## 平衡變性者和生理男女的權益

身體性別和性別認同一致的人是主流,有少數人患上性別焦躁的精神疾病,精神 長期承受困迫,有些人是渴望以手術改變身體性徵,以及在法律上登記為另一性 別。政府為到社會上極少眾提出措施改變承認性別的方式,我表示欣賞。

我希望香港政府在保障性別焦症患者的權益時,同時注意性別在目前社會制度裡 所發揮的功能。我認為要爭取平權——平衡權利,我提議立法者採取「患者最大 方便」的原則,而前設是「最低度干擾性別制度」。

或者我需要先解釋以生理性別作為區分的性別制度,其實是遍佈日常社會,我嘗試作出一些歸納。

警察尋找失蹤人士列明性別,要搜尋對象範圍初步可以收窄一半,性別有辨別身份的社會功能。醫療部門掌握男女人口分佈以及男女各自常見的疾病,則可以按生理性別預測用藥及醫療設施的服務需要,發揮政策預測的功能。3歲女兒已經要學習保護自己的性私密保位,不在異性前裸露身體;承受家暴而特別需要庇護的婦女,該處所亦不能有男性出入,以生理性別區分保障脆弱的兒童和婦女的隱私和安全。再者,刑事法裡的強姦或猥褻侵犯罪等,對男女規範與相應罰都有所差異。在學校運動會,以生理區分男女組別是更公平的較量,因為老師本身就會男女學童的身心發展需要,而衡量教材和學制,以生理區分性別的制度本身就具有教化功能,在文化裡塑造男女身份的基礎和莊重。

如果政府為到一些性別不安症患者登記新性別,使到他們內心得到抒解,要到沙田租單車、去戲院睇 X-men 勞根、找物業經紀租住房屋等得到最大的承認和便利,我認為實在是一件好事。同時,政府亦會關心社會上其他人的權益不會受到損害,到底如何做,才不會造成削弱性別制度功能的後果,包括剛才提到的辨別身份、政策預測、隱私和安全、公平和教化等呢?

我認為性別承認的措施,若能採取嚴謹的、完成整套變性手術的性承認,以行政方式保留公私營社會承認的彈性,提高市民對於性別焦躁症患者的接納和認識,是較為平權的做法。

## 不同意手術前設是酷刑

對於在無須做手術的前設下,可向政府申請新性別,否則是違反《禁止酷刑公約》,我暫且稱為「手術前設酷刑論」,我並不同意。

過往主理變性手術的醫生袁維昌曾說,以手術來治療不安及焦慮,對一些變性者來說是解脫,不能說成酷刑。若手術前設為酷刑,而香港既然簽署了國際公約,又有相應的《刑事罪行(酷刑)條例》在本地實施,執行公職的公營醫生有機會成為非法施刑者,而政府動用公帑全數資助的手術則有機會被當成酷刑,政府也沒有理由再資助此等醫療費用。本人不忍見到「手術前設酷刑論」最終令到真正以手術為出路的性別焦躁症患者,在進行手術風險和承擔痛楚的同時,還要付出高昂的手術費。

另外,支持「手術前設酷刑論」的人採用的權威,是聯合國對簽署公約的締約國發出呼籲,然而呼籲的理據基礎是薄弱。

首先,聯合國審議小組所發出的建議在本地並不具有法律約束力(non-legally binding)。立法者在參考審議結論時,要檢視權威的理據。

本人嘗試追查聯合國的權威文件,包括了:

- 1 2016 年的「A/HRC/31/57」, 聯合國酷刑問題特別報告員門德斯(Juan E. Méndez) 提到「更改性別前要求強迫或不自願的變性手術、絕育等是酷刑」
  - 1.1 「A/HRC/31/57」引用了 2015 年的「A/HRC/29/23」,是聯合國高專辦向人權理事會提交報告,提到「譴責強迫和非自願的絕育」<sup>II</sup>
  - 1.2 「A/HRC/29/23」引用了 2013 年的「A/HRC/22/53」,聯合國酷刑問題特別報告員門德斯採用三個國家法院的判案 "歸納出手術前設是酷刑。該三國案例包括:
    - 1.2.1 瑞典 2012 年的案例 Mål nr 1968-12, kammarrätten i stockholm, Avdelning 03 提到強迫絕育不能算作自主
    - 1.2.2 德國 2011 年的案例 Federal Constitutional Court, 1 BvR 3295/07 提到 手術前設違反身體完整和自主
    - **1.2.3** 奧地利 **2009** 年的 Administrative High Court, No. 2008/12/0054 案例 提到改變法律性別的手術前設違法

而當門德斯提到其他手術前設合法的地區時,態度閃避 iv:

1.2.4 2011 年的「Discrimination on grounds of sexual orentation and gender identity in Europe」,歐洲理事會人權委員會報告提到 29 個歐洲國家保留變性手術要求 V;歐洲人權法院至今仍未有一宗關於手術前

設違法的判案。<sup>vi</sup>而 2008 年的學者文獻「Documenting gender」提到「美國 20 個州份保留變性手術的要求」<sup>vii</sup>

- 1.3 而「A/HRC/29/23」又引用了 2014 年的「消除強迫、脅迫和其他非自願絕育:機構間聲明」裡,聯合國高專辦、世衛及其他世界組織發出取消手術前設的呼籲,引用的權威卻是上述的「A/HRC/22/53」及上述三國判案 viii
- 2 此外,上述的「A/HRC/31/57」又引用了 2015 年的「A/HRC/29/23」中聯合 國人權理事會收到報告提到「性別再造治療在某些情況下是強迫的」 ix
  - 2.1 「A/HRC/29/23」所引用的個案是來自 2014年的「A/HRC/25/61, Annex II」, 其中聯合國酷刑問題特別報告員報告伊朗情況,提到庫爾德族人和伊 朗同志分別匯報,變性手術在當地被用作治療同性戀者(注意:並非 跨性別人士)。\*

眾多國際組織文件交互引用,追源溯本後「手術前設酷刑論」的權威來自門德斯 對於三個歐洲國家法院的裁決的詮釋,且其裁決很大程度上建基於《歐洲人權公 約》中的「身體完整權」。

本人認為,歐洲國家的法院具法律約束的裁決性質只適用於該國家,香港政府沒有義務跟隨德國、奧地利和瑞典的法院裁決行事。其次,就算歐盟組織要求締約國按照《歐洲人權公約》的新詮釋行事,也只限歐洲締約國,香港政府並不適合訴諸《歐洲人權公約》的權威制訂政策。第三,香港並沒有簽署《歐洲人權公約》,聯合國酷刑問題特別報告員以歐洲區域(或中東伊朗)的社會處境,強加於香港獨有的文化和制度之上,是有違常理,又有意無意地侵擾了香港政府高度自治的主權,更何況報告被掩蔽的資料本身已提到,歐美根本未有為手術前設的做法劃下共識。

以「手術前設酷刑論」反對手術前設的規定,在情(令到真正需要者權益受損)在理(所謂國際共識)都說不通。本人認為香港政府須要審慎檢視該建議,對此保留。香港政府是有合理理由質疑前任特別報告員門德斯的個人詮釋,向市民澄清政府沒理由隨之而行。

市民 招雋寧

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<sup>&</sup>lt;sup>1</sup> In States that permit the modification of gender markers on identity documents

abusive requirements can be imposed, such as forced or otherwise involuntary gender reassignment surgery, sterilization or other coercive medical procedures...These practices are rooted in discrimination on the basis of sexual orientation and gender identity, violate the rights to physical integrity and self-determination of individuals and amount to ill-treatment of torture.(p.14)

- <sup>ii</sup> The medical practices condemned by United Nations mechanisms in this context included...forced and otherwise involuntary sterilization and medically unnecessary surgery...(p.6)
- "A/HRC/22/53, footnote no.111-113. There are "Mål nr 1968-12, kammarrätten i stockholm, Avdelning 03", "Federal Constitutional Court, 1 BvR 3295/07" and "Administrative High Court, No. 2008/12/0054" separately.
- iv In many countries transgender persons are required to undergo often unwanted sterilization surgeries as a prerequisite to enjoy legal recognition of their preferred gender. In Europe, 29 States require sterilization procedures to recognize the legal gender of transgender persons. In 11 States where there is no legislation regulating legal recognition of gender, enforced sterilization is still practised. As at 2008, in the United States of America, 20 states required a transgender person to undergo "gender-confirming surgery" or "gender reassignment surgery" before being able to change their legal sex. In Canada, only the province of Ontario does not enforce "transsexual surgery" in order to rectify the recorded sex on birth certificates. Some domestic courts have found that not only does enforced surgery result in permanent sterility and irreversible changes to the body, and interfere in family and reproductive life, it also amounts to a severe and irreversible intrusion into a person's physical integrity. In 2012, the Swedish Administrative Court of Appeals ruled that a forced sterilization requirement to intrude into someone's physical integrity could not be seen as voluntary. In 2011, the Constitutional Court in Germany ruled that the requirement of gender reassignment surgery violated the right to physical integrity and self-determination. In 2009, the Austrian Administrative High Court also held that mandatory gender reassignment, as a condition for legal recognition of gender identity, was unlawful. In 2009, the former Commissioner for Human Rights of the Council of Europe observed that "[the involuntary sterilization] requirements clearly run counter to the respect for the physical integrity of the person". (para78-79) A/HRC/22/53, footnote no.108.
- vi To date, no cases have been judged by the European Court of Human Rights over requirements such as mandatory sterilization and surgery leading to infertility. The Recommendation of the Committee of Ministers, however, states that "requirements, including changes of a physical nature, for legal recognition of a gender reassignment, should be regularly reviewed in order to remove abusive requirements".(p.85) vii A/HRC/22/53, footnote no.109.
- "Eliminating forced, coercive and otherwise involuntary sterilization: An interagency statement.", endnote no.15,16, 140-146.
- The medical practices condemned by United Nations mechanisms in this context include so-called "conversion" therapy, forced genital and anal examinations, forced and otherwise involuntary sterilization and medically unnecessary surgery and treatment performed on intersex children.(para14)
- <sup>x</sup> Kaveh Kermanshahi...Gender-reassignment surgeries occur because the Islamic

Republic views homosexuality as a sickness. Social and family norms do not help, as families often cooperate with the discourse by condemning their own.(p.89); Mr.Mahnaz...She points out that Iran is a hetero-normative society, so it tolerates gender-reassignment surgery; individuals who really should not be reassigned are often pushed to undergo the procedure, sometimes very hastily and without proper prior psychological counseling or necessary medical preparation.(p.83)