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An Action for Determination Within the Meaning of Art. 189 C.C.P, and the Development of Polish Case-Law Concerning the Legal Aspects of Gender Reassignment)

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***Abstract*—The issue of gender reassignment remains a controversial topic both morally and customly, philosophically and medically intricate. However, without going into these issues, which of course should not be underestimated and in fact should take the lead, it is worth looking at the legal aspect of gender reassignment, above all through the prism of the development of Polish case law in this area. The emphasis on the evolution of the jurisprudence in this matter remains all the more important because the Polish law has not seen a direct regulation of the indicated matter in the provisions of substantive law, and only the auxiliary use of the institution specified in Article 189 of the Code of Civil Procedure allows, in the current state of the law, the use of an action for determination as a procedural institution that allows for the legal determination of gender, in accordance with gender identity.**

Keywords— Civil proceedings, action for cessation, gender reassignment, transsexualism, litigation

I. Origins of Polish jurisprudence on gender reassignment. Non-procedural mode

Initially, in the jurisprudence - under the decree of 8 June 1955 - Law on civil status records (Journal of Laws No 25, item 151) - it was admitted that the content of a civil status record could be changed through court proceedings as a result of a change of sex by means of a rectification of a birth record with ex nunc effect pursuant to Article 26 of the decree (Pazdan 2020,). The first Supreme Court decision on the issue of gender reassignment dates back to the 1950s. At that time, the Supreme Court ruled that if a person had a predominance of masculine features and therefore had to be classified as male, as a result of which his sex specified in the birth certificate was not determined in a manner corresponding to the actual state, the birth certificate would be rectified to that extent in non-contentious proceedings (Supreme Court ruling of 14 November 1958, 2 CR 798/58, OSN 1959, item 101). Other rulings made at this time and touching on this delicate matter until the end of the 1970s were of a similar tone. The Provincial Court for the capital city of Warsaw, in its ruling of 24 September 1964, noticed a loophole in the law regarding the lack of regulations on gender reassignment and allowed for the application, by analogy, of the provisions of the law on civil status records providing for the possibility to rectify, by way of court proceedings, a civil status record in the case of an erroneous or inaccurate redaction thereof (Ruling of the Provincial Court for the capital city of Warsaw of 24 September 1964). (Ruling of the Provincial Court for the Capital City of Warsaw of 24 September 1964, 2 Cr 515/64, PiP 1965, No 10, p. 600 et seq.). Also the Supreme Court, in a resolution of 25 February 1978, allowed for the rectification of a birth certificate in the case of transsexualism (Supreme Court Resolution of 25 February 1978, III CZP 100/77, OSP 1983/10/217). In its deliberations, the Supreme Court has noted the lack of standardisation in Polish law of the problem of gender reassignment, indicating at the same time that civil status records should state the truth and for this reason alone, in the Supreme Court's opinion, it may be concluded that the adjustment of the gender record contained in the birth certificate to the actual state is permissible. With regard to the protection of personal rights, the Supreme Court expressed that every individual should be able to appear in society with such personal characteristics as he or she actually possesses. It would be contrary to this principle to force a person to appear in life as a man if the characteristics of his body indicate that he is a woman (or vice versa). For a society that was quite conservative in terms of morals for that period, this thesis seems very progressive. One might even say that the Supreme Court has

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shown a modern face in this ruling. However, it did not specify what characteristics would determine whether an individual should belong to the female or male sex - whether it is a question of external characteristics or an internal sense of belonging to a particular sex or whether it is a question of a combined combination of external and internal characteristics.

Above all, if one were to draw the conclusions of the above-mentioned rulings to a common denominator, the view initially prevailed in the jurisprudence that the appropriate mode of procedure for gender reassignment cases was the non-trial mode, and that the cases were therefore non-contentious in nature. The possibility of the procedural mode was even negated, in particular due to the lack of a second party who could be a defendant in the case. This situation was to change fundamentally, even drastically, in the following decade.

II. Breakthrough in jurisprudence. Negating the admissibility of the non-procedural mode

The hitherto undisturbed, admittedly not very abundant line of jurisprudence allowing for the rectification of the status act in the case of gender reassignment was completely negated by the Supreme Court in a resolution of 7 judges of 22 June 1989 (Resolution of the Supreme Court of 7 judges - legal principle of 22 June 1989 III CZP 37/89, OSNC 1989/12/188). In addition, by entering this resolution in the book of legal principles, it prejudged, as it were, the procedural procedure for the future. The Supreme Court categorically negated the admissibility of correcting an entry specifying gender in the birth certificate in the case of the presence of transsexualism. This resolution has become the subject of interest of many authors. In his approving gloss to the aforementioned resolution (Glosa do uchwały SN z dnia 22 czerwca 1989 r., III CZP 37/89, PiP 1990/10/116-118), M. Filar first of all pointed out that the determination of sex falls under the notion of the so-called civil status of a person. Such a state is, inter alia, the result of a biological fact - it arises at birth and is indivisible (i.e. a person may have only one civil status, so there is no partial or limited civil status. Above all, the author stressed that civil status records are declarative and not constitutive. Such conclusions can also be drawn directly from the resolution under review and, above all, one can only rectify something that was defined incorrectly from the beginning and not what became incorrect as a result of later changes that occurred in the external world. The ruling also explicitly articulates that gender is a personal good of a human being.

In principle, it appears that the conclusion explicitly expressed in this resolution that it is inadmissible to rectify a birth certificate is correct in principle, since the very institution of rectification of a civil status certificate is intended to serve the actual rectification of errors or obvious clerical mistakes, and not in fact to create a new legal state of affairs through an auxiliary rectification.

III. Action for determination. Procedural mode.

The beginnings of the formation of an action in the field of gender reassignment as an action for determination are connected with the decision of the Supreme Court of 22 March 1991 (Supreme Court decision of 22 March 1991, III CRN 28/91, LEX No. 519375). In this ruling, it was pointed out first and foremost that not only marital status, not only sex understood objectively, but also the sense of belonging to a given sex may be considered a personal good (Article 23 of the Civil Code) and as such is also subject to protection by means of an action for determination under Article 189 of the Civil Procedure Code. The Supreme Court, perfectly understanding that the admissibility of an action for determination depends on the fulfilment of a number of conditions, anticipating critical voices, made an attempt to prove what the legal interest would manifest itself in, which is an obligatory element supporting acceptance of such an action. Indeed, the absence of a legal interest in establishing, in accordance with the well-established views expressed on this issue in the doctrine and judicature, speaks in favour of the inadmissibility of the action. Thus, according to the Supreme Court, the basis for such an action would be "the legal interest of a transsexual in obtaining objective protection in the face of uncertainty of the legal state or law. The legal interest is expressed in the contradiction between the actual state of affairs and that resulting from the birth certificate". First of all, however, it should be noted that establishment within the meaning of Article 189 of the Code of Civil Procedure is only possible if the legal relationship actually exists, and the legal interest is to relate to the legal relationship in which the plaintiff finds himself.

As this issue has not received its own standardisation in Polish law, taking into account the general prerequisites for an action under Article 189 of the Code of Civil Procedure, such an action would be admissible.

On the other hand, if an action for determination is already granted, i.e. if it is established in a judgment that a change of a person's sex has occurred, such a judgment is effective ex nunc and constitutes the basis for disclosing the circumstances of the change of sex in the civil status records in the form of an additional entry pursuant to Article 21 of the 1986 Act. - Law on Civil Status Records.

Marek Safjan was critical of this ruling. He alleged, first of all, the vagueness of the relationship between the scope and conception of the protection of the personal good, which is the sense of belonging to a given sex (belonging to the broader sphere of privacy of life), and the protection of the sex constituting a component of civil status, and noted the dangers arising from the unlimited authorisation of the determination of civil status on the basis of Article 189 of the Civil Procedure Code. In order to justify the interest of a transsexual in establishing his or her gender, it is sufficient, in his or her view, to realise that he or she is aiming at the correct establishment of personal status, and not necessarily to rely on the provision of Article 23 of the Civil Code. (M. Safjan, Glosa do postanowienia z 22.03.1991 r., III CRN 28/91, PS 1993, No 2, pp. 85-88).

Marek Safjan rightly pointed out that two opposing legal

interests may be drawn, i.e. the determination of sex in accordance with the plaintiff's will, as well as the legal interest as certainty of the sex specified in the civil status records.

Nevertheless, the Supreme Court, in defining what constitutes a legal interest in the context of an action to establish gender, came out on top, or at least to the extent that, after more than two decades, the problem has not been regulated by statute law (which, of course, should be viewed critically) and the judicature is full of quotations from this ruling. The line of jurisprudence established at the turn of the 1980s and 1990s remains valid. In its resolution of 8 May 1992 (III CZP 40/92, LEX No. 162225), the Supreme Court once again expressed its support for the inapplicability of rectifying the entry specifying gender in the birth certificate and stated that the principle of objective truth may be fully realised by means of the institution of an additional reference in Article 21 of the a.s.c. Act. Indeed, if the sex is established in a trial, differently than it results from the birth certificate, such establishment will be effective ex nunc. According to the Supreme Court, the institution of the additional note provided for in Article 21 of the Civil Status Act serves to ensure the compliance of the civil status record with the actual state of affairs when, as a result of events occurring after the drawing up of the record and having impact on its content, it needs to be appropriately supplemented. In the context of the factual situation which resulted in the issuance of the said resolution, it is necessary to apply the institution of an additional note in order to, first of all, reflect the actual factual and legal situation. Above all, it is relevant that initially the sex was determined correctly and the birth certificate was drawn up on this basis, and then, due to some later circumstance, this state of affairs ceased to correspond to reality. Consequently, this change cannot be made ex tunc, but only ex nunc, and it should be made clear that the change occurred at a later stage with the date of birth.

In the context of the institution of an additional entry, an interesting legal problem arose on the grounds of the facts underlying the judgment of the Supreme Administrative Court in Warsaw of 16 July 2008 (Judgment of the Supreme Administrative Court in Warsaw of 16 July 2008,II OSK 845/07 LEX No 483689). In short, the applicant requested that his previous name, clearly indicating female gender, be deleted on the grounds that the entry violated his personal rights by allowing speculation as to his atypical sexual orientation. The Supreme Administrative Court did not break from the previous line of rulings of the Supreme Court, confirming that sex is a personal good which, pursuant to Article 40(1)(1) pr. a.s.c., is subject to entry in the birth certificate. It also remains clear that civil status records constitute the sole evidence of the events stated therein (Article 4 of the a.s.c.). However, if after the preparation of a civil status record some events occur which affect its content or validity, the changes resulting from these events are entered into the record in the form of an additional entry (Article 21, paragraph 1 of the Civil Status Code). The basis for entering the note referred to in paragraph 1 are final court decisions, final decisions, extracts from civil status records and other documents affecting the content or validity of the record (Article 21, paragraph 2 of the Act). Additional mentions, as soon as they are entered, become an integral part of the civil status record. According to the Supreme Administrative Court, the insertion of an ancillary note in a civil status record, from which a change of sex is apparent, does not constitute an infringement of the law in terms of Article 18 a.s.c or a violation of personal rights, on the grounds that the action taken to change sex is legal, ethical, rational and justified in the light of current medical knowledge. The mere fact of gender reassignment is not a reprehensible fact and such facts a priori cannot violate a person's personal rights. In this context, it is also important to bear in mind the declaratory nature of the civil status act. The very fact of the applicant's uncomfortable well-being and the possible harassment he may face from society remains another issue, but this problem remains outside the legal sphere.

It is difficult to give an unequivocal answer to the question of whether the right way to legally sanction the change of sex is still through an action for determination under Article 189 of the Code of Civil Procedure. Currently, this way, as it was initiated in 1989 (Supreme Court resolution of 7 judges - legal principle of 22 June 1989, III CZP 37/89, OSNC 1989/12/188) of the procedure for rectification of birth certificates, seems to be the only one. Especially as the courts remain bound by this resolution as a legal principle. However, it is important to realise that an action for determination is not so much about a change of sex as it is about the legal determination of sex. If it were a question of gender reassignment, the use of an action under Article 189 of the Civil Procedure Code would not be the most appropriate course of action. Thus, determination should be understood on the basis of both case-law and doctrinal views as the legal determination of gender in accordance with one's own identity (Judgment of the Court of Appeal in Katowice of 30 April 2004, I ACa 276/04, OSA 2004/10/31).

Although marital status is not mentioned as a personal good in the provision of Article 23 of the Civil Code, the doctrine and judicature treat marital status as a personal good, subject to the protection provided for in civil law for the protection of personal goods. A person's sex is also considered to be a personal good (Judgment of the Court of Appeal in Katowice of 30 April 2004, I ACa 276/04, OSA 2004/10/31), as well as the sense of belonging to a given sex (Decision of the Supreme Court of 22 March 1991, III CRN 28/91, LEX No 519375). It is also argued in the literature that the qualification of the "sense of belonging to a certain sex" as a personal good has been used as a theoretical justification for the application of an action to establish sex in order to change the content of civil status records (Sadomski 2021).

The procedural mode has also been criticised (Ignatowicz, Glosa do uchwały Sądu Najwyższego z dnia 22 września 1995 r., III CZP 118/95, OSP 1996, nr 4, p. 194), in particular for the reason that it is an artificial procedure and basically a fiction to look for a defendant in such a trial.

IV. Active and passive legitimacy.

The formation of the legal aspects of gender reassignment as an action for determination has a number of legally relevant

consequences. First of all, there can be no non-litigation procedure when applying the provision of Article 189 of the Code of Civil Procedure. Therefore, such a determination must be made by way of a trial. The consequences of this are that a trial is characterised by a dispute and two parties - the plaintiff and the defendant - are involved in the dispute. It is obvious and unquestionable that the plaintiff will be the person who has a legal interest in establishing the sex other than that stated on the birth certificate. The legal interest will have its source in the factual state, which will be the feeling of belonging to a different sex, and the legal interest will be the elimination of the difference between the factual and legal state, or as the Supreme Court put it, the legal interest of a transsexual will manifest itself in obtaining objective protection against the uncertainty of the legal state or law (Supreme Court decision of 22 March 1991, III CRN 28/91, LEX No 519375). The identification of the plaintiff as a party to the lawsuit will therefore not present difficulties. However, much greater difficulties may arise in determining who is to be the defendant in this lawsuit. The first decision to address the issue of passive standing was the Supreme Court resolution of 22 September 1995 (Resolution of the Supreme Court of 22 September 1995, III CZP 118/95, OSNC 1996/1/7), which, after analysing the option of suing the head of the registry office, unequivocally determined that the plaintiff's parents should be the defendants in the case. In justifying this position, the Supreme Court referred to the analogy arising from the conduct of trials in family matters, noting at the same time that the parties are always, or almost always, persons bound by the relevant legal and family relations. Consequently, if the plaintiff's parents were deceased, the Supreme Court assumes that the action should be brought against the court-appointed guardian. This position seems reasonable insofar as, indeed, a guardian is appointed in family relationships where the defendant has died. Examples of such situations were mentioned by the Supreme Court in the decision.

In the doctrine there has also been a view that the defendant could be anyone who contests the plaintiff's right (Osajda, 2005, pp. 159 &160). This view seems controversial insofar as it leads to an unlimited number of potential defendants who could be completely random persons.

The issue of standing was also addressed by the Supreme Court in a decision dealing with the issue at hand, namely in its judgment of 6 December 2013 (Supreme Court judgment of 6 December 2013, I CSK 146/13, LEX No. 1415181). This ruling has an extremely interesting structure. This is because the Supreme Court is not afraid to express its far-reaching doubts in it. First and foremost, in this ruling, the Supreme Court does not lose sight of the issue of standing, i.e. the plaintiff's legitimacy to bring an action for determination. Once again, the Supreme Court pulls out the legal interest in front of the parenthesis, which seems obvious, as this is a necessary prerequisite for an action for determination. While it is true that the Supreme Court, in its legal reasoning, did not repeat the arguments of the Court of Appeal with regard to legal interest, it is very apt to quote the statements of the Court of Appeal in the historical part of its reasoning that it is the plaintiff seeking legal protection under Article 189 of the Code of Civil Procedure who bears the burden of proving facts justifying a legal interest in obtaining a particular decision, which is the premise for the application of this provision. Moreover, and importantly, it has been emphasised that the legal interest must be in accordance with the law and the principles of social co-existence and the purposes served by Article 189 of the Civil Procedure Code. Obviously, the issue of raising principles of social comity is relevant in the context of the facts of the case on which the judgment of 6 December 2013 was based, in which the plaintiff had concealed that he was married. However, according to the wording of Article 18 of the Constitution of the Republic of Poland, marriage as a union between a man and a woman, family, maternity and parenthood are under the protection and guardianship of the Republic of Poland. Therefore, firstly, as it already follows from the Basic Law, marriage in the Polish legal order is a legally sanctioned union of a man and a woman, therefore, in view of the above, it does not seem appropriate to accept an action for the establishment of a person in a valid marriage and thus, as it were, sanctioning a same-sex marriage. The Supreme Court, in the aforementioned decision, opted for the assumption that the plaintiff's parents are the entities with passive legal standing if the plaintiff is a childless, unmarried person. However, as gender also determines certain social roles - the plaintiff's spouse and children are also passively entitled. The Supreme Court even went a step further, stating that "the essence of the legal ties between the transsexual applying for gender determination and his or her spouse and children determines not only the necessary nature of co-participation between these persons (Article 72 § 2 of the Code of Civil Procedure), but also its qualified, uniform form (Article 73 of the Code of Civil Procedure)." From the above, as well as from the Constitution, one can conclude that a person in a valid marriage cannot demand the determination of sex, so that a homosexual marriage would result. On the other hand, an interesting problem touched upon in the ruling is that the premise of divorce is the permanent and complete breakdown of the marriage, and not the mere fact of transsexualism. Also Radwański took the view that only the cessation of marriage may lead to the so-called judicial change of sex, in order to prevent the appearance of same-sex marriages (Glosa do uchwały składu siedmiu sędziów Sądu Najwyższego Izba cywilna i Administracyjna z dnia 22 czerwca 1989 r., III CZP 37/89, OSP 1991, nr 2, poz. 35, p. 66). The question of the passive legitimacy of the plaintiff's child(ren), on the other hand, was justified by the fact that, first and foremost, gender determines the status of the mother and father in their relationship with the child. On the other hand, the determination of the belonging of either the father or the mother of the child to a different gender than that indicated by the role fulfilled by that person in the process of conception and birth is therefore relevant for the child, as it concerns the person from whom he or she is ascribed descent. In making such a judgment, it is not only the transsexual's desire to reconcile his or her assigned metric sex with his or her psychological sense of gender that has to be taken into account, but also the circumstances on the

child's side, namely his or her willingness, in the broadest sense, to be placed in such a situation that he or she is to see in his or her parent a person of a different sex than the role fulfilled by that person in the child's conception and birth process, and perhaps also in the child's upbringing, at some stages of his or her life. This is an ethically very difficult subject, which is still socially a kind of taboo.

The Supreme Court also looked at the consequences of establishing the sex of the child's parent, first of all pointing out that the establishment of a gender other than that determined by social role can only have effects for the future, as otherwise, i.e. with an ex tunc determination, it would be possible to attribute the child's descent from two persons of the same sex. Thus, the effectiveness of an ex nunc determination judgment was once again confirmed.

The above-mentioned ruling also addressed the issue of the prosecutor's legitimacy, which derives from the provision of Article 7 of the Code of Civil Procedure. This provision constitutes the prosecutor's authority to request the initiation of proceedings in any case, as well as to participate in any proceedings already pending. The public prosecutor is guaranteed an independent procedural position in the proceedings, for the reason that he does not have to act on behalf of a particular party, and his action should be determined by the pursuit of the rule of law.

On the other hand, as far as the effectiveness of judgements on the establishment of gender is concerned, they should enjoy the so-called extended effectiveness, i.e. erga omnes, for the reason that it is difficult to imagine that the person to whom the judgement pertains is simultaneously a man and a woman, and moreover, it would not be justified to bring another action to establish gender (Glosa do uchwały SN z dnia 22 czerwca 1989 r., III CZP 37/89, PiP 1991/6/112-116).

A different position with regard to the determination of passive standing in an action for determination was expressed by the Supreme Court in its judgment of 10 January 2019. (Judgment of the Supreme Court - Civil Chamber of 10 January 2019, II CSK 371/18), where the view was expressed that in an action to establish gender reassignment (Article 189 of the CCP), only the plaintiff's parents have passive standing to sue, and if they are deceased - the court-appointed guardian, while the essence of the legal ties between the person who seeks the establishment of gender reassignment and his or her children not only cannot be the source of their necessary passive co-participation in a suit for such establishment, but is not even the source of their passive standing to sue in this suit. This is because the Supreme Court points out that the issuance of a judgment on the determination of sex does not, therefore, affect the legal relations between the parent and the child - for there are no changes in the birth records of the children of the person who has determined sex on the basis of Article 189 of the CPC. Thus, on the part of the plaintiff's children, there is no legal interest in obtaining a specific decision. However, the Supreme Court goes on to point out that there may be a factual interest on their side, which, however, cannot constitute a basis for granting them passive standing in the proceedings. On the other hand, in an action for determination, only persons who have a legal interest in the court's decision may be defendants. Thus, there is no uniform view on passive standing under Polish case law.

V. Conclusion

Due to an existing gap in the law, the courts have, as it were, taken on the burden of legal regulation of transsexualism, which, however, in a system of statute law, should belong to the legislator. As the law should keep up with both medicine and social changes, the conclusion that the matter of gender reassignment should await explicit legal regulation comes to the fore. Nevertheless, it would seem that this should be a non-procedural, i.e. non-contentious, route, contrary to the line of jurisprudence to date, since in a healthy legal system, the procedural route should be the last resort and, above all, should be used when there is a genuine dispute. In the case of gender reassignment, there is in fact no dispute or second party, and suing the parents (possibly the children or the spouse) seems to be an artificial creation, adopted only to sanction the use of the litigation procedure. Of course, the question of whether Polish society is mature enough for such legal changes is a different matter, as this issue remains only in the sphere of customs.

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