

Lack of Appropriate Legislation in Poland: Having to sue one's parents to qualify for gender reassignment

Aleksander Świątek (University of Warsaw)

I recently saw the movie “Call Me Marianna”¹ by Polish director, Karolina Bielawska. In brief, it discusses the problem of gender reassignment in Poland. But as Poland's right-wing government now controls public television this film is blocked because it focuses attention on a topic the government considers to be taboo. Thus, the only possibility to see this film is to obtain it directly from the director which is what the Law Faculty of the University of Warsaw did. Indeed, thanks to this movie I started to look for information about gender reassignment as it is problematic to obtain approval for it from the Polish courts.

Firstly, I would like to introduce some of the legal documents in which we can find information concerning transgendered people. In Polish law, only the Regulation of the Minister of National Defence² covers the subject and it does so only with regard to eligibility for active military service. Transsexualism and intersexualism are mentioned in a “List of diseases and disabilities in assessing the physical and mental ability for active military service and the fulfilling of this duty abroad”³. In Poland transsexualism and intersexualism are defined as diseases by the state. As intersexual and transexual people are automatically put into category E, they are barred from military service. Already here I can conclude that there is no appropriate legislation in Poland just by looking at these restrictions. Suffice to say that this document is inconsistent with the World Health Organisation's (WHO) global manual of diagnoses⁴ because transgender health issues are no longer classified as mental and behavioural disorders.

Today, people who experience gender dysphoria, in other words, people who feel distress due to a mismatch between their gender identity and their sex assigned at birth, can reassign their gender according to their gender identity through various kinds of medical treatments including surgical procedures. As a result, transsexual people can achieve their desired physical identity. However, in Poland today having change of gender recognized in official documents is not so easy. In the past, thanks to a Supreme Court resolution issued on 25 February 1978⁵, it was possible to amend one's birth certificate to reflect a change in gender without having to undergo sex reassignment surgery. It was sufficient to go to a notary and present a request for

¹ K. Bielawska, *Call Me Marianna* (2015; Warsaw: Polish Film Institute/ Studio Filmowe Kalejdoskop/ Telewizja Polska), DVD.

² Regulation of the Minister of National Defence regarding the pronouncement of fitness to perform military service and also the attributes and proceedings of military medical commissions in such cases (January 24, 2018), Dziennik Ustaw [Law of Journals] 2018, item 258, <http://prawo.sejm.gov.pl/isap.nsf/download.xsp/WDU20180000258/O/D20180258.pdf>.

³ *Ibid*, 10.

⁴ *International Classification of Disease, Eleventh Revision (ICD-11)*, World Health Organisation (June 18, 2018), <https://icd.who.int/browse11/l-m/en>.

⁵ Resolution of 25 February 1978 of the Supreme Court (III CZP 100/77).

gender reassignment. Normally, notaries would agree to such requests. It should be noted that already three years ago the European Court of Human Rights ruled that requiring sterilisation as a condition for legal gender recognition amounted to a violation of human rights⁶. In France, prior to October 2016, individuals wishing to have their gender identity legally recognised needed to prove infertility, undergo genital surgery, and submit to lengthy and humiliating examinations. From April 2017⁷, the European states can no longer demand that a person seeking legal gender recognition undergo any kind of medical treatment or procedure.

But in Poland, in addition to the above problem, we have a requirement that has a strong impact on the families of transgendered persons. While from 1978 it was possible to change one's birth certificate to reflect correctly one's preferred gender identity by submitting a single notarized document, in 1989 the Supreme Court eliminated gender change through non-contentious proceedings⁸. Currently, one must file a lawsuit against one's parents in order to obtain the right to reassign one's gender. Such trials are long, often lasting up to four years.

Why should it be necessary to sue one's parents? The logic behind this requirement would seem to be that parents are involved in the process because they brought a child into the world and they indicated the child's gender on the birth certificate. Therefore, it ought to be up to them to make appropriate changes on behalf of their son or daughter. It is just a formal procedure because the documents of the parents also need to be amended due to the change in their child's gender. Nonetheless, claimants must sue their parents in order to obtain the right to change gender. In case the parents have already died, or the parentage is unclear or the parents' whereabouts are unknown, the claimant is obliged to sue a parole officer chosen by the court.

The legal basis for the plaintiff, in this case, is a loophole permitting initiation of legal proceedings when no legal document exists giving any possibility to proceed in a desirable direction. This is covered in article 189 of the Code of Civil Procedure⁹: *The plaintiff may request a determination by the Court of the existence or non-existence of a legal relationship or right, where he has a legal interest.* The Supreme Court rules on cases related to gender reassignment by means of a broad interpretation of this article. The grounds for a lawsuit should include some information indicating the fact that the claimant was seeking to change his or her life in the context of subjective gender, referring to the period of time in which the claimant was functioning full-time in his or her preferred gender role. In addition, a claim needs to be based on the so-called Real Life Test or RLT. It is a document in which claimants describe their social lives, personal relationships, and choice of clothes appropriate to their subjective gender. Moreover, medical certificates regarding the use of hormone therapy may be considered as crucial. Witness statements can be either helpful or have a negative impact during

⁶ *Human Rights Victory! European Court of Human Rights ends Forced Sterilisation* (April 6, 2017), TGEU, https://tgeu.org/echr_end-sterilisation/.

⁷ European Court of Human Rights, A.P., *Garçon and Nicot v. France*, n. 79885/12, 52471/13 and 52596/13 (April 6, 2017), <http://hudoc.echr.coe.int/eng?i=001-172556>.

⁸ Judgement of 22 June 1989 of the Supreme Court (III CZP 37/89), <https://sip.lex.pl/orzeczenia-i-pisma-urzedowe/orzeczenia-sadow/iii-czp-37-89-uchwala-sadu-najwyzszego-520097198>.

⁹ Act Of 17 November 1964, The Code of Civil Procedure, Article 189. <https://www.global-regulation.com/translation/poland/7049655/act-of-17-november-1964%252c-the-code-of-civil-procedure.html>.

the trial. Friends and family can make statements about the difficulties of leading a transsexual life which may or may not work to the advantage of the plaintiff. Neither the plaintiff nor the defendants act as witnesses, but the judge listens to them during the trial. During such trials, claimants cannot always count on the support of their parents. Gender change is a sensitive issue, often accompanied by doubts.

Furthermore, a married transsexual person may not succeed in the courtroom since the Polish Constitution defines marriage as a union of a man and a woman¹⁰. Moreover, should a person change gender prior to obtaining an official divorce, a course of action illegal in Poland, an insurmountable problem will arise.

As there is no appropriate legislation, in order to overcome this problem, lawyers can choose to pursue two different paths making reference to two different legal acts. One of them provides that State interference is not possible since there is no legal basis to justify annulment of marriage. Grounds for annulment of marriage are contained in the Polish Family and Guardianship Code¹¹ however, the Code does not include gender change among valid grounds. Hence, in the case of gender change prior to divorce, marriage annulment would not be possible. As a result, a marriage that is illegal under the Polish Constitution will remain valid under the Family and Guardianship code.

The other solution cites the definition of the institution of marriage in the Polish Constitution and in Article 1 of the Family and Guardianship Code¹² in order to make a marriage invalid. In this case, the marriage would not be valid because it is clearly written in the Constitution that marriage is a union of a man and a woman.

Even though we have these two approaches, the Constitution is more important in the Polish hierarchy of legal acts. Accordingly, in neither of the above approaches, would such a marriage be valid. At the same time, the indisputable fact remains that due to the increasing number of transgendered persons wishing to obtain legally recognized gender reassignment, there is an urgent need for parliament to enact appropriate legislation. Moreover, the State must take action to remove the inconsistency between the Constitution and the Family and Guardianship Code.

On the other hand, there is nothing to prevent one from getting married to a transgendered person who has already legally obtained gender reassignment. Some problems can arise in case of a church wedding conducted by a religious representative. However, such problems are not legal but stem from the attitudes towards transsexuality on the part of particular religions.

It should be clear by now that there is a lack of appropriate legislation pertaining to the needs of transsexual people. The complicated trial and the absence of a bill aimed at introducing quick and transparent measures to guarantee full legal recognition of a person's gender reassignment are incompatible with the recommendations of the Council of Europe on

¹⁰ The Constitution of the Republic of Poland (April 2, 1997), Dziennik Ustaw No. 78, item 483, <https://www.sejm.gov.pl/prawo/konst/angielski/kon1.htm>.

¹¹ Act of 25 February 1964 to promulgate the Family and Guardianship Code (Text No. 59), Dziennik Ustaw, 1964-03-05, vol. 9, pp. 77-85, ISSN: 0867-3411, <https://www.global-regulation.com/translation/poland/3353737/the-act-of-25-february-1964-family-code-and-caring.html>.

¹² *Ibid.*

measures to combat discrimination on grounds of sexual orientation or gender identity¹³. One of the points of the recommendation states: “Member states should take appropriate measures to guarantee the full legal recognition of a person’s gender reassignment in all areas of life, in particular by making possible the change of name and gender in official documents in a quick, transparent and accessible way”. The Polish legislation does not make the gender change possible either in a quick or in a transparent way¹⁴. Moreover, the Polish mechanism is an infringement, a violation of Article 8 of the European Convention on Human Rights¹⁵:

“Article 8 – Right to respect for private and family life:

1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”

The public authority, summoning before the court the plaintiff’s children, spouse and even neighbors as witnesses, interferes with the plaintiff’s private life. Transsexual individuals are as well forced to divorce before the trial because of the lack of legislation recognising gender reassignment as grounds for annulment of marriage.

I would like to suggest some possible solutions to this complex problem. Instead of a trial, an appropriate and simple solution would be an application before a notary with some essential documents, such as the Real Life Test but not necessarily with proof of already commenced hormone therapy. Such applications would not violate privacy because there would be no need for statements from witnesses so the parents would not have to appear in court. Their documents could be updated automatically and sent to them by the public authorities. There would be no infringement of privacy and the duration of this mechanism would not be so long as it is now.

Furthermore, the addition of “gender reassignment” to the Family and Guardianship Code as an automatic condition for the annulment of marriage would facilitate divorce and accelerate the whole process. Finally, there would be no legal inconsistency between the Constitution and the Family and Guardianship Code. If the State adds “gender reassignment” as an automatic condition for the annulment of marriage, potential legal problems regarding same-sex marriage can be avoided.

¹³ Recommendation CM/Rec(2010)5 of the Committee of Ministers to member states on measures to combat discrimination on grounds of sexual orientation or gender identity (31 March 2010), Council of Europe, https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805cf40a

¹⁴ Adam Bodnar, Ombudsman’s reply to the Regional Attorney’s cassations appeal (XI.501.6.2016.AM),

<https://www.rpo.gov.pl/sites/default/files/Odpowied%C5%BA%20RPO%20na%20skarg%C4%99%20kasacyjn%C4%85%20Prokuratora%20Regionalnego%20ws.%20ustalenia%20p%C5%82ci.pdf>.

¹⁵ European Convention on Human Rights. European Court of Human Rights (September 3, 1953), https://www.echr.coe.int/Documents/Convention_ENG.pdf.

To conclude, gender reassignment presents major difficulties, mainly because it touches on the most intimate aspects of a person's life involving relationships with family members. Moreover, in spite of recent social changes in this regard, a transsexual person still cannot count on being fully accepted by society. Although the absence of appropriate legislation in Poland presents serious problems, solutions must be found because everyone has the right to be free in their own skin.

Bibliography

- A.P., Garçon and Nicot v. France, n. 79885/12, 52471/13 and 52596/13. European Court of Human Rights. April 6, 2017. <http://hudoc.echr.coe.int/eng?i=001-172556>.
- Act Of 17 November 1964, The Code of Civil Procedure, Article 189. <https://www.global-regulation.com/translation/poland/7049655/act-of-17-november-1964%252c-the-code-of-civil-procedure.html>.
- Act of 25 February 1964 to promulgate the Family and Guardianship Code (Text No. 59), Dziennik Ustaw, 1964-03-05, vol. 9, pp. 77-85, ISSN: 0867-3411. <https://www.global-regulation.com/translation/poland/3353737/the-act-of-25-february-1964-family-code-and-caring.html>.
- Bielawska, Karolina. *Call Me Marianna*. 2015; Warsaw: Polish Film Institute/ Studio Filmowe Kalejdoskop/Telewizja Polska. DVD.
- Bodnar, Adam. Ombudsman's reply to the Regional Attorney's cassations appeal. XI.501.6.2016.AM. <https://www.rpo.gov.pl/sites/default/files/Odpowied%C5%BA%20RPO%20na%20skarg%C4%99%20kasacyjn%C4%85%20Prokuratora%20Regionalnego%20ws.%20ustalenia%20p%C5%82ci.pdf>
- European Convention on Human Rights. European Court of Human Rights. September 3, 1953. https://www.echr.coe.int/Documents/Convention_ENG.pdf.
- “Human Rights Victory! European Court of Human Rights ends Forced Sterilisation”, TGEU. April 6, 2017, https://tgeu.org/echr_end-sterilisation/.
- “International Classification of Disease, Eleventh Revision, ICD-11”, World Health Organisation. June 18, 2018. <https://icd.who.int/browse11/l-m/en>.
- Judgement of 22 June 1989 of the Supreme Court (III CZP 37/89). <https://sip.lex.pl/orzeczenia-i-pisma-urzedowe/orzeczenia-sadow/iii-czp-37-89-uchwala-sadu-najwyzszego-520097198>.
- Recommendation CM/Rec(2010)5 of the Committee of Ministers to member states on measures to combat discrimination on grounds of sexual orientation or gender identity. Council of Europe. March 31, 2010. https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805cf40a.
- Regulation of the Minister of National Defence regarding the pronouncement of fitness to perform military service and also the attributes and proceedings of military medical commissions in such cases. January 24, 2018. Dziennik Ustaw [Law of Journals] 2018, item 258. <http://prawo.sejm.gov.pl/isap.nsf/download.xsp/WDU20180000258/O/D20180258.pdf>.
- Resolution of 25 February 1978 of the Supreme Court (III CZP 100/77).
- The Constitution of the Republic of Poland. April 2, 1997. Dziennik Ustaw No. 78, item 483. <https://www.sejm.gov.pl/prawo/konst/angielski/kon1.htm>.