Teka Komisji Prawniczej PAN Oddział w Lublinie, vol. XVI, 2023, no. 1, pp. 155-168
https://doi.org/10.32084/tkp.5463

THE EUROPEAN STANDARD OF LEGAL GENDER RECOGNITION

Dr. Paweł Kwiatkowski

University of Gdańsk, Poland
e-mail: p.kwiatkowski@ug.edu.pl; https://orcid.org/0000-0003-2567-6819

Abstract. The author in his analysis focuses on two subjects. The first one is the history of legal gender recognition as a European standard followed by the analysis of the connections between legal gender recognition and the right to have medical treatment reimbursed by insurance, right to marriage, right to have children and protection against discrimination. The second one is related to the analysis of the margin of appreciation that States-Parties to the Convention enjoy in regulating conditions for the admissibility to request the recognition of one's gender identity. Presented analysis lead to a conclusion that European standard of legal gender recognition is defined in negative way by limiting the margin of appreciation that States-Parties to the Convention enjoy in regulating conditions for the admissibility to request the recognition of one's gender identity.

Keywords: human rights law; case-law of the European Court of Human Rights; legal gender recognition procedure

INTRODUCTION

The notion of gender identity or its legal recognition is not a subject of direct reference in the Convention for the Protection of Human Rights and Fundamental Freedoms [Cannoot 2019, 14-35; Dunne 2014, 506-10; Idem 2015, 530-39; Holzer 2022, 165-82; Osajda 2010; Theilen 2016, 530-39]. The European standard of legal gender recognition, as a positive obligation of a State-Party to provide a procedural framework allowing gender identity to be reconciled with a legal gender record comes from the Strasbourg case-law and was formed in 2002. The Court places this obligation in the context of the right to respect for private and family life, and emphasizes its importance for the life of an individual by pointing out that the legal gender is also related to other rights and freedoms of an individual, such as the right to marriage, to have medical treatment reimbursed by insurance, parental rights, or protection against discrimination. Taking into consideration the listed assumptions, the scope of this article is to reconstruct the European standard of legal gender recognition in terms of a standard that defines the applicable level of a guarantee of a specific legal status

ISSN 1899-7694
e-ISSN 2719-7379

shaped in the case-law of the European Court of Human Rights, by focusing on two subjects. The first one is the history of legal gender recognition as a European standard followed by the analysis of the connections between legal gender recognition and the right to have medical treatment reimbursed by insurance, right to marriage, right to have children and protection against discrimination. The second one is related to the analysis of the margin of appreciation that States-Parties to the Convention enjoy in regulating conditions for the admissibility to request the recognition of one's gender identity

1. FROM REES TO GOODWIN. TOWARDS LEGAL GENDER RECOGNITION AS A EUROPEAN STANDARD

The history of the European case-law on the rights of transgender persons[1] is marked by the distinction between two periods, which differ in terms of the Court's approach to legal gender recognition [Osajda 2010; Theilen 2016, 530-39]. In its judgments delivered from 1986 to 1998 the Court gave State-Parties to the Convention a margin of appreciation in regulating the procedure for amending the legal gender record of a transgender person. The basis for this approach comes from the judgment delivered in the Rees case,[2] where the applicant alleged a violation of Articles 8 and 12 of the Convention due to the refusal to register the change of legal gender from female to male in his birth certificate, despite the fact the applicant had undergone hormone therapy and surgical body correction. In its judgment, the Court did not find a violation of the Convention and stated that the admission of the medical gender reassignment procedure does not oblige state authorities to amend the birth certificate, which was justified by the lack of European consensus, as revealed on the basis of a comparative analysis of State-Parties' legal orders. The Court subsequently relied on this view in its judgment from 27 September 1990, in Cossey v. The United Kingdom, holding that the refusal to change legal gender in the birth certificate of the applicant, which made it impossible to marry, did not violate the applicant's right to respect for her private and family life or the right of to marry.

The judgments in the Rees and Cossey cases, however, were not reached unanimously, and the additional dissenting opinions foreshadowed

[1] The first case on gender identity recorded in the case-law of the bodies of the human rights law of the Convention for the Protection of Human Rights and Fundamental Freedoms is case X v. Germany ended with a settlement, concluded before the European Commission of Human Rights, on the basis of which the applicant's name and legal gender on her birth certificate were changed. X v Germany App no. 6699/74, 15 December 1977.

[2] *Rees v United Kingdom* App no. 9532/81 ECtHR, 17 October 1986.

changes that were to take place in 2002 in the landmark case of Goodwin v. The United Kingdom. Judges Bindschedler-Robert, Russo and Gersing dissented on the point expressed by the majority in the Rees Case by pointing out in a dissenting opinion that the refusal to change the legal gender in the birth certificate "has resulted – and may again result – in the applicant's having to face distressing situations which amount to an interference with his private life and thus to a breach of Article 8"[3] which could have been avoided by an annotation in the birth register that there had been a change of his sexual identity. In turn, the judgment in the Cossey case was supplemented by four dissenting opinion of eight judges, who drew attention to a change in the approach to the rights of transgender people. Judges Bindschedler-Robert and Russo recalled the dissenting opinion in the Rees case. Judges Macdolan and Spielman noted changes in the domestic legal system of the Council of Europe Member States since 1986. Palm, Foighel and Pekkanen saw a violation of Art. 8 and 12, while Judge Martens presented a critical view on the adopted line in the case-law of the Court.

As to the admissibility of legal gender reassignment as an internal matter of State-Parties to the Convention, the Court also made a statement in the judgments in the cases of B v. France,[4] X, Y, Z v. The United Kingdom,[5] and Sheffield and Horsham v. The United Kingdom.[6] In the judgment of 25 March 1992, in B v. France, the Court revealed the differences between the British and French civil registration records systems in order to conclude that "Article 8 ECHR created a positive obligation on France to allow the applicant to change her legal gender on at least some official documents" [Holzer 2022, 173]. The Court's opinion expressed in the Rees case was reflected in the assessment of the situation of the applicant, who was denied his right to paternity registration despite gender reassignment surgery changing his body features from female to male, in X, Y, Z v. The United Kingdom. Despite permission for treatment with a view to artificial insemination by an anonymous donor from which Z was born, an obstacle to establishing the relationship between X and Z was the X legal gender annotation as a female, as registered in his birth certificate.

The Court contends that the domestic authorities of the Contracting States enjoy a wide margin of appreciation in applying the provisions of the European Convention in relation to the rights of transgender persons, as is evident from the judgment of 30 July 1999, in Sheffield and Horsham v. The United Kingdom. While assessing the situation of the applicants

---

[3] *Rees v United Kingdom* App no. 9532/81 ECtHR, 17 October 1986.

[4] *B v France* App no. 13343/87 ECtHR, 25 March 1992.

[5] *X, Y, Z v France* App no. 21830/93 ECtHR, 22 April 1997.

[6] *Sheffield and Horsham v United Kingdom and* App no. 22985/93, 23390/94 ECtHR, 30 June 1999.

in the joined cases of Sheffield and Horsham, the Court once again emphasized a lack of consensus among the States of the Council of Europe in recognizing the request for a change of legal gender and pointed out that the scientific progress made in this area did not allow it to break the line adopted in the case-law. The Court also found it impossible to indicate that there had been a clear trend in the member States of the Council of Europe towards giving full legal recognition to gender reassignment. Bearing in mind these considerations, it therefore adjudicated that there had been no violation of the applicants' rights guaranteed by Article 8, 12 and 14 of the Convention, but its decision was made by a minimum majority of 11 to 9 votes, with five dissenting opinions emphasizing the need to take into consideration the changing approach to the rights of transgender people.

A breakthrough in the approach to gender identity came with the judgment of 11 July 2002, in Goodwin v. The United Kingdom,[7] in which the Court emphasized that it appeared illogical to refuse to recognise the legal implications of the result of the applicant's gender reassignment surgery that had been carried out by the National Health Service. The lack of appropriate procedures left the applicant with significant effects on her life where gender was of legal relevance. The applicant was unable to avail herself of the legal remedies for women when she experienced sexual harassment in the workplace. Her application for a new NI social security number was rejected and she was denied the ability to benefit from retirement rights under the rules for women, and due to the fear of the social consequences of revealing the fact that she had undergone gender reassignment surgery to a new employer, she was forced to pay her own pension contributions for five years. She was also prevented from marrying a man with whom she was in a relationship. These experiences, resulting from the failure to register the legal gender change to female, became the basis for the allegations of violation of Article 8, 12, 13 and 14 of the Convention which the applicant referred to the Court. The Court found that "the state had not struck a fair balance between the applicant's right to private life and the public interest of avoiding any major bureaucratic changes to the birth registration system that could affect «access to records, family law, affiliation, inheritance, criminal justice, employment, social security and insurance»"[8] [Holzer 2022, 173] which constituted a violation of the right to respect for private life and the right to marry. Its judgment allowed the European standard of protection to be recognized for transgender persons, giving legal significance to the gender reassignment procedure in all areas of private life of the person concerned, by taking actions such as changing the legal gender

[7] *Christine Goodwin v United Kingdom* App no. 28957/95 ECtHR, 11 July 2002 [Bratza 2014, 245-50; Dunne 2015, 530-39; Theilen 2016, 530-39].

[8] *Christine Goodwin v United Kingdom* App no. 28957/95 ECtHR, 11 July 2002.

given on a birth certificate. This positive obligation of the States Parties to the Convention constitute the last stage on the way "to achieving as one of its principal purposes as close an assimilation as possible to the gender in which the transsexual perceives that he or she properly belongs."[9]

The unanimous judgment of the Court delivered in the Goodwin case was justified by the international trend towards legal gender reassignment recognition, which allowed the Court to change the approach it had presented since Sheffield and Horsham v. The United Kingdom.[10] This statement was confirmed on the same day in the judgment delivered in the case I v. The United Kingdom.[11] Three years later, both judgments were recalled in the judgment of 23 August 2006 Grant v. The United Kingdom, in which the Court decided on the temporal consequences of the landmark Goodwin case in relation to the constitution of a new obligation for States parties to the Convention. At the same time, it emphasized that domestic legal regulations, which prevents the change of legal gender, amounted to a violation of the applicants' rights under Article 8 of the Convention. In Grant's case it resulted in her being denied a retirement pension under the rules for women despite the fact the applicant had undergone gender reassignment surgery. Finding this to be a violation of the Article 8 of the Convention, the Court rejected the argumentation of the United Kingdom that it takes time to change legal regulations so that they correspond to the interpretation of the right to respect for private life adopted in the Goodwin case.

The lack of legal regulation regarding the status of transgender persons is pointed out by the Court in the judgment of 11 September 2007, in L. v. Lithuania. In its statement in the L case the Court considered that a fair balance between the public interest and the rights of the applicant had not been struck, leading to a violation of Article 8 of the Convention. The violation of the applicant's right to respect for private life due to his continuing inability to complete gender reassignment surgery left him with a permanent feeling of personal inadequacy. This suspended the process aimed at full assimilation with society in accordance with the sense of belonging to the male gender. The lack of subsidiary legislation to implement the right to gender reassignment surgery envisaged by the Lithuanian Civil Code affected the applicant. Due to the prolonged work on regulations required by Lithuanian law, the applicant was allowed to undergo hormone therapy with a mastectomy, to change his name to a gender neutral form and to correct his legal gender status in some of his documents, but his numerical code that indicates gender, remained unchanged.

---

[9] *Christine Goodwin v United Kingdom* App no. 28957/95 ECtHR, 11 July 2002.

[10] *Sheffield and Horsham v United Kingdom and* App no. 22985/93, 23390/94 ECtHR, 30 June 1999.

[11] *I v United Kingdom* App no. 25680/94, ECtHR, 11 July 2002.

The Court not only confirmed positive obligation to provide procedural framework allowing gender identity to be reconciled as the European standard but also emphasized that legal gender is related to other rights and freedoms of an individual. While protection against discrimination was a subject of Goodwin case, in Van Kück v. Germany; Hämäläinen v. Finland and A.M. and others v. Russia the Court focuses on the relation between gender recognition procedure and the right to have medical treatment reimbursed by insurance, right to marriage and parental rights. The issue of whether gender reassignment surgery with accompanying hormone therapy should be reimbursed by a health insurance company as an "essential medical procedure" for transgender persons was the subject of the judgment of 12 September 2003 in the Van Kück v. Germany case.[12] Analyzing the arbitrary approach of the German courts to the interpretation of the concept of "necessary medical treatment" in Van Kück case, the Court emphasized that in determining whether the positive obligation to ensure respect for private or family life exists, a fair balance must be struck between the public interest and the rights of the applicant, and found the German authorities had exceeded their margin of appreciation, leading to a violation of Articles 6 and 8 of the Convention.

The relationship between gender recognition and the marital relationship of a transgender person is defined by the Court in its judgment of 16 July 2014 in Hämäläinen v. Finland.[13] In its judgment the court states that the possibility of automatically converting the marriage of a transgender person who seek to obtain legal recognition of his/her preferred gender into a registered partnership does not interfere his/her right to respect for private and family life. Approval for this condition comes from the previous case-law of the Court on the national regulations on civil status records. State Parties to the Convention enjoy a wide margin of appreciation in regulating the right to marriage or legal partnership by persons of the same sex. According to this view, the Finnish legal order allows correction of the legal gender record, with the precondition that the marital status of the person concerned has to be converted, in order to avoid a same-sex marriage. Thus legal gender recognition of a married transgender person is possible, but only with the consent of his/her spouse, which results in their marriage being converted into a registered partnership. In the event of lack of consent to convert the marriage into a registered partnership, transgender persons are left with divorce as way of regularizing their marital status before the relevant entry in the civil record is made. The applicant did not receive such consent. Neither did she decide to divorce. In consequence her sex change was not formally recognized and a new gender identification number was

[12] *Van Kück v Germany* App no. 35968/97 ECtHR, 12 June 2003.

[13] *Hämäläinen v Finland* App no. 37359/09 ECtHR, 16 July 2014 [Dunne 2014, 506-10].

not assigned. In the opinion of the Court this fact was not sufficient to rule that there had been a violation of Article 8 of the Convention. Finnish law ensures a level of protection for transsexuals in line with the European Convention and the applicant could have used the available forms to regulate their marital status, including converting marriage into a partnership, which would not have affected parental and property rights.

In its judgment of 6 July 2021 in A.M. and others v. Russia,[14] the Court ruled that the restriction of parental rights in connection with denying a transgender person the right to contact with her children, due to the reassignment of biological sex constitutes, a violation of the right to respect for family life and discrimination. As the Court indicated that: "restricting the applicant's parental rights and contact with her children without doing a proper evaluation of the possible harm to the applicant's children, the domestic courts relied on her gender transition, singled her out on the ground of her status as transgender person and made a distinction which was not warranted in the light of the existing Convention standards."[15]

2. LIMITS OF THE MARGIN OF APPRECIATION IN LEGAL GENDER RECOGNITION PROCEDURES IN EUROPE

While the positive obligation of a State-Party to provide a procedural framework allowing gender identity to be reconciled with an ID certificate is a European standard, domestic regulation on the prerequisites for the admissibility of legal gender recognition is subject to the margin of appreciation [Basetti 2020, 291-325; Cannoot 2019, 14-35; Holzer 2022, 165-82]. The scope of this margin is clarified by the judgments delivered in the cases of Schlumpf v. Switzerland,[16] Y.Y. v. Turkey,[17] A.P., Garçon and Nicot v. France,[18] S.V. v. Italy,[19] Y.T. v. Bulgaria,[20] Rana v. Hungary[21] and Y. v. Romania.[22]

---

[14] *A.M. v Russia* App no. 47220/19 ECtHR, 6 July 2021.
[15] Ibid.
[16] *Schlumpf v Switzerland* App no. 29002/06 ECtHR, 8 January 2009.
[17] *Y.Y. v Turkey* App no. 14793/08, ECtHR, 10 March 2015.
[18] *A.P., Garçon, Nicot v France* App no. 79885/12, 52471/13, 52596/13 ECtHR, 6 April 2017.
[19] *S.V. v Italy* App no. 55216/08 ECtHR 11 October 2018.
[20] *Y.T. v Bulgaria* App no. 41701/16 ECtHR, 9 July 2020.
[21] *Rana v Hungary* App no. 40888/17, ECtHR, 9 July 2020.
[22] Ibid.

2.1. Transitional preconditions of legal gender recognition procedure

In Schlumpf v. Switzerland, the Court found that a two-year "transitional period" as a condition for the admissibility of a claim for the reimbursement of sex reassignment surgery is incompatible with the Convention.[23] The reasoning behind this requirement, as defined by the Swiss Federal Insurance Court, was that it served as a test of whether a person suffers from sexual dystrophy. Motivated by age, health, family situation and a medical opinion confirming sexual dystrophy, which had manifested in childhood, the applicant decided to undergo this surgery with no transitional period, despite a negative decision regarding reimbursement. Both the Insurance Court of the Canton of Aargau and the Federal Insurance Court of Switzerland agreed with the insurance company, which refused to finance the procedure. The European Court of Human Rights, however, upheld the applicant's position in the part concerning the violation of Art. 6. 1 and art. 8 of the Convention, stating that the arbitrary approach of the domestic authorities to the admissibility of the claim for reimbursement of the sex reassignment surgery meant that a fair balance had not been struck between the interests of the insurance company and the rights of the applicant.

2.2. Legal gender recognition procedure and gender reassignment surgery

In the judgment of 10 March 2015, in Y.Y. v. Turkey,[24] the Court stated that permanent inability to have children as a condition of admissibility of legal gender recognition constitutes an unjustified interference in the sphere of private life. In the Court's opinion this condition constituted a conflict between the protection of gender identity and the protection of physical integrity, which led to a dissonance between the perceived belonging to the male sex and having female physical characteristics in the applicant's case. In 2005 the applicant asked the court for permission to undergo sex reassignment surgery. Despite a positive psychiatric opinion on his sexual dysphoria, the decision was negative, which was later upheld on appeal. In the justification of its statement the Turkish court referred to the lack of permanent incapacity to procreate. The applicant then appealed to the European Court of Human Rights, claiming there had been a violation of Article 8 of the Convention, and then re-submitted a request for consent to undergo sex reassignment surgery, which he finally received, after eight years of efforts, on May 21, 2013. In the Court's opinion, the actions taken by the Turkish judicial authorities resulted in a state

[23] The applicant decided to undergone gender reassignment procedure after her children had grown up and her wife had died of cancer.

[24] *Y.Y. v Turkey* App no. 14793/08, ECtHR, 10 March 2015.

of suspension, which lasted despite the fact that the applicant had already been diagnosed as a transgender person, lived in society as a man and benefited from psychological counseling. Thus the Court found that the permanent inability to have offspring is not justified as the condition for permitting sex reassignment surgery.

In its judgment of 6 April 2017 delivered in the cases of A.P., Garçon and Nicot v. France,[25] the Court found the condition requiring that a transgender person prove that he or she has undergone an irreversible sex reassignment surgery related to the loss of the ability to have children in order to be able to initiate a legal gender reassignment procedure constitutes a violation of Article 8 of the Convention. The applicants A.P., Garçon and Nicot requested to change their legal gender status and names on their birth certificates in line with their perceived belonging to the female gender. In the course of the proceedings before the French courts, the first applicant submitted medical documentation to prove that he was suffering from sexual dystrophy and had already undergone the required surgery in Thailand. The second, in turn, referred to ongoing hormone therapy and genital surgery. The third one did not provide any medical documentation. However according to the statement of the French court, they did not prove irreversible gender reassignment and did not confirm sexual dysphoria with the required medical documentation. In its judgment, the European Court of Human Rights held that there had been a violation of Article 8 of the Convention in respect of the second and third applicants on account of the requirement to demonstrate an irreversible change in appearance; held that there had been no violation of Article 8 of the Convention in respect of the second applicant on account of the requirement to demonstrate the existence of a gender identity disorder; and held that there had been no violation of Article 8 of the Convention in respect of the first applicant on account of the requirement to undergo a medical examination. In its justification, the Court indicated there was a lack of a fair balance between the rights of the individual and the interests of the society: "French positive law as it stood at the material time presented transgender persons not wishing to undergo full gender reassignment with an impossible dilemma. Either they underwent sterilisation surgery or treatment – or surgery or treatment very likely to result in sterilisation – against their wishes, thereby relinquishing full exercise of their right to respect for their physical integrity, which forms part of the right to respect for private life under Article 8 of the Convention; or they waived recognition of their gender identity and hence full exercise of that same right. In the Court's view, this amounted to disrupting

[25] *A.P., Garçon, Nicot v France* App no. 79885/12, 52471/13, 52596/13 ECtHR, 6 April 2017.

the fair balance which the Contracting Parties are required to maintain between the general interest and the interests of the persons concerned."[26]

In its judgment of 19 January 2021, in X and Y v. Romania,[27] the Court held that the requirement to have genital sex reassignment surgery performed in order to have the civil-status records amended constitutes a violation of Art. 8 of the Convention. The applicants lodged requests to have the details on the documents concerning their gender identity corrected. Their request was supported by medical documentation confirming sexual dysphoria, that hormone therapy had been carried out, and that they had both undergone the mastectomy procedure. However, their requests were refused, because they both failed to meet the requirement of having had genital sex reassignment surgery performed. In the opinion of the Court, the decision of the national authorities in the case of X and Y was not consistent with Article 8 of the Convention "due to the lack of a clear and predictable procedure of legal gender recognition procedure allowing for the change of biological sex, and thus the name and number or code of a personal record, in official documents, in a quick, clear and accessible manner"[28] and "the refusal of the national authorities to recognize the male identity of the applicants in the absence of sex reassignment surgery led in this case to a breach of the fair balance which the State is required to maintain between the general interest and the interests of the applicants."[29]

2.3. Legal gender recognition procedure and request to change one's name

In its judgment of 11 October 2018, in S.V. v. Italy,[30] the Court found a violation of Article 8 of the Convention due to the refusal to change the applicant's name from male to female before successful completion of the gender recognition procedure. On the 10th of May 2001 the applicant obtained consent for sex reassignment surgery modification, after which she applied to the administrative authorities with a request to change her name. However, she was refused for formal reasons. Consequently, the applicant was left in a waiting period until the end of the court proceedings, until 10 October 2003, when the Rome District Court ordered Savona's authorities to change the legal gender status from male to female, and to change the name of L. to S. In the Court's view, this situation resulted in a violation of the applicant's right to respect for her private life. Although "safeguarding

---

[26] Ibid.
[27] *X and Y v Romania* App no. 2145/16, 20607/16, ECtHR 19 April 2021.
[28] Ibid.
[29] Ibid.
[30] *S.V. v Italy* App no. 55216/08 ECtHR 11 October 2018.

the principle of the inalienability of civil status, the consistency and reliability of civil-status records and, more broadly, the need for legal certainty are in the general interest and justify putting in place stringent procedures aimed, in particular, at verifying the underlying motivation for requests for a change of legal identity"[31] in the circumstances of the present case "the Court fails to see what reasons in the public interest could have justified a delay of over two and a half years in amending the forename on the applicant's official documents in order to match the reality of her social situation, which had been recognised by the Rome District Court in its judgment of 10 May 2001. In that connection it reaffirms the principle according to which the Convention protects rights that are not theoretical or illusory, but practical and effective."[32]

2.4. Examination of the application to have one's gender identity to be reconciled

In its judgment of 9 July 9 2020, in Y.T. v. Bulgaria,[33] the Court found that the refusal to allow a transgender person to have his change of sex recorded in the civil-status register, on the basis of a public interest that was not precisely defined, was not justified and constituted a violation of the right to respect for private life. The applicant Y.T. underwent gender reassignment process changing his physical appearance from feminine to masculine and functioned in society as a man, but was refused authorisation by the Bulgarian courts to have the indication of legal gender in the civil-status registers amended, and thus was unable to obtain legal recognition of his identity as a male, which the Court judged to be based on a public interest that was not precisely defined. This justification became the basis for judgments delivered in the first and second instance against domestic case-law recognizing the right of transgender persons to have their gender identity recognized. As emphasized by the Court, the Bulgarian judiciary "have in no way elaborated their reasoning as to the exact nature of this general interest and have not carried out, in compliance with the margin of appreciation granted, an exercise in balancing this interest with the applicant's right to recognition of his sexual identity."[34]

---

31 Ibid.

32 Ibid.

33 *Y.T. v Bulgaria* App no. 41701/16 ECtHR, 9 July 2020.

34 Ibid.

2.5. Legal gender recognition procedure and rights of foreign nationals legally settled on the territory of the States-Parties to the Convention

In its judgment of 16 July 2020, in Rana v. Hungary,[35] the Court held that "denying a refugee who could not change his legal gender in his country of origin, the right to access the Hungarian gender recognition procedure" [Holzer 2022, 176] constituted a violation of Article 8 of the Convention. The applicant applied for a gender and name change at the Hungarian Immigration and Citizenship Office. In its decision the Immigration and Citizenship Office Office issued a "formal rejection decision without examining the application on the merits, holding that it did not have jurisdiction to take any further action, Because the applicant's birth had not been registered in Hungary, the application could not be forwarded to the relevant registrar."[36] The conclusion of the Office on the lack of jurisdiction of the Hungarian administrative authorities was upheld by the Courts in the first and second instance and by the Constitutional Court, which called upon Parliament to regulate the gender recognition procedure for petitioners without Hungarian birth certificates. However, this obligation has not been fulfilled. As emphasized by the European Court of Human Rights: "The complete lack of regulations excluded lawfully settled non-Hungarian citizens from the name-changing procedure, including those whose country of origin did not allow for such a procedure. The Constitutional Court considered that the legislative omission identified was disproportionately restrictive and unconstitutional. In its view, the legislator was under the obligation to find a different solution for petitioners without Hungarian birth certificates, for example by entering the change of name in other documents received from the Hungarian authorities."[37]

CONCLUSIONS

The positive obligation of a State-Party to provide a procedural framework allowing gender identity to be reconciled is a European standard that serves the right to self-determination. Its realization requires the preservation of a fair balance between the interests of the society and the individual's right to respect for his/her private life. Behind the right of a State-Party to set its conditions for the admissibility to request the recognition of one's gender identity is the necessity of "safeguarding the principle of the inalienability of civil status, the consistency and reliability of civil-status records

[35] *Rana v Hungary* App no. 40888/17, ECtHR, 9 July 2020.
[36] Ibid.
[37] Ibid.

and, more broadly, the need for legal certainty are in the general interest and justify putting in place stringent procedures aimed, in particular, at verifying the underlying motivation for requests for a change of legal identity."[38] However, the States-Parties to the Convention enjoy a limited margin of appreciation in regulating conditions for the admissibility to request the recognition of one's gender identity, which is specified in the case-law of the Court. The Court considers as inconsistent with the Convention:

1) arbitrary regulation on the "transitional period" as a precondition of gender reassignment procedure, or as a precondition for the admissibility for reimbursement of the sex reassignment surgery;[39]
2) permanent inability to have children as a precondition for the admissibility of sex reassignment surgery;[40]
3) sex reassignment surgery connected with the permanent inability to have children as a precondition for gender recognition procedure;[41]
4) positive conclusion of the legal gender recognition procedure as a precondition to change one's name;[42]
5) formal rejection of the request to recognise one's gender identity without examining the application on the merits;[43]
6) denying the right to access gender recognition procedure to legally settled foreign nationals, who could not change their legal gender in their country of origin;[44]
7) genital sex reassignment surgery as a precondition to correct legal gender record.[45]

REFERENCES

Basetti, Matteo. 2020. "Human rights bodies' adjudication of trans people's rights: shifting the narrative from the right to private life to cruel and inhuman or degrading treatment." *European Journal of Legal Studies* 12, no. 2:291-325.

Bratza, Nicolas. 2014. "The Christine Goodwin Case. The Long Road to Transsexual Rights in the United Kingdom." *Human Rights Law Journal*, vol. 34, 245-50.

[38] *S.V. v Italy* App no. 55216/08 ECtHR 11 October 2018.
[39] *Schlumpf v Switzerland* App no. 29002/06 ECtHR, 8 January 2009.
[40] *Y.Y. v Turkey* App no. 14793/08, ECtHR, 10 March 2015.
[41] *A.P., Garçon, Nicot v France* App no. 79885/12, 52471/13, 52596/13 ECtHR, 6 April 2017.
[42] *S.V. v Italy* App no. 55216/08 ECtHR, 11 October 2018.
[43] *Y.T. v Bulgaria* App no. 41701/16 ECtHR, 9 July 2020.
[44] *Rana v Hungary* App no. 40888/17, ECtHR, 9 July 2020.
[45] X and Y v Romania App no. 2145/16, 20607/16, ECtHR, Wyrok ECtHR 19 April 2021.

Cannoot, Pieter. 2019. "The pathologisation of trans* persons in the ECtHR's case law on legal gender recognition." *Netherlands Quarterly of Human Rights* 37, no. 1:14-35.

Dunne, Peter. 2014. "Marriage Dissolution as a Pre-Requisite for Legal Gender Recognition." *The Cambridge Law Journal* 73, no. 3:506-10.

Dunne, Peter. 2015. "Ten years of gender recognition in the United Kingdom: Still a model for reform?" *Public Law* 4:530-39.

Holzer, Lena. 2022. "Legal gender recognition in times of change at the European Court of Human Rights." *ERA Forum*, 165-82.

Osajda, Konrad. 2010. "Orzecznictwo Europejskiego Trybunału Praw Człowieka dotyczące transseksualizmu." In *Prawa osób transseksualnych. Rozwiązania modelowe a sytuacja w Polsce*, edited by Anna Śledzińska-Simon, 99-119. Warszawa: Wolters Kluwer.

Theilen, Jens. 2016. "The Long Road to Recognition: Transgender Rights and Transgender Reality in Europe." In T*ranssexualität in Theologie und Neurowissenschaften. Ergebnisse, Kontroversen, Perspektiven*, edited by Gerhard Schreiber, 530-39. Berlin–Boston: De Gruyter.