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Commentary on the Resolution of the Full Bench of the Civil Chamber of the Polish Supreme Court of 4 March 2025 (III CZP 6/24): Approbative Gloss

Abstract: This article discusses the resolution of the Polish Supreme Court of 4 March 2025, III CZP 6/24, which constitutes a breakthrough in Polish jurisprudence concerning the procedural framework in cases relating to the legal determination of the gender of transgender persons. The resolution departs from the previously established rule that the occurrence of transgender does not provide grounds for rectifying the entry specifying gender in a birth certificate (resolution of the Supreme Court of 22 June 1989), opening the possibility of changing the gender designation in a birth certificate at the request of the person concerned, with effect *ex nunc* – that is, from the date on which the judgment becomes final and binding, not retroactively. The legal basis for this approach is Article 36 of the Law on Civil Status Records, applied *per analogiam*. In this manner, the previously developed judicial model based on adversarial proceedings (Article 189 of the Code of Civil Procedure) has been replaced by a non-contentious judicial model, in which the interested person files an application, without the necessity of bringing an action against his or her own parents.

Keywords: gender recognition, legal issues of transgender people, procedural and non-contentious court proceedings, birth certificate rectification

Introduction

In the resolution under commentary here, the Supreme Court, sitting in full¹, pursuant to Articles 83(1) and (2), 86(2), and 88(1) of the Act on the Supreme Court (Sejm of the Republic of Poland, 2017), departed from the legal principle that had been adopted by a panel of seven judges of the Supreme Court in its ruling of 22 June 1989, according to which the occurrence of transgender does not constitute grounds for the rectification of the entry specifying sex in a birth certificate. To understand the groundbreaking significance of this resolution, it is necessary to revisit the underlying reasoning of the 1989 ruling. Under the civil status legislation then in force, the phenomenon of gender incongruence did not fit within the accepted doctrinal assumptions governing the rectification of civil status records². As the Supreme Court explained in the reasoning of its 1989 resolution, errors may be corrected or rectified only with retroactive effect (*ex tunc* – as of the date of birth), whereas subsequent changes to particular elements of civil status may be recorded in the form of additional annotations (as in the case of a judgment granting a divorce or annulling a marriage, which are constitutive in nature). An exceptional situation was the drawing up of a new birth certificate for an adopted child. This rigid position, which failed to take into account the medical nature of transgender as an exception to the principle of the immutability of gender over time, indicated that a civil status record could be rectified only where it had been drafted erroneously or inaccurately³. Since physical sex (at birth) had been correctly determined (on the basis of secondary sexual characteristics), the practical consequence of the 1989 resolution was to block the procedural avenue previously developed for applications by transgender persons⁴. In the face of a legislative lacuna, doctrinal criticism, and the necessity of adopting any workable *modus operandi*, the Supreme Court, in its decision of 22 March 1991, recognised that the sense of belonging to a given sex may be regarded as a personal right within the meaning of Article 23 of the Civil Code (Sejm of the Republic of Poland, 1964b) and as such is subject to protection by way of an action for a declaratory judgment pursuant to Article 189 of the Code of Civil Procedure (Sejm of the Re-

1 The Supreme Court, composed of seven judges, taking into account the social importance of the problem and the growing number of cases concerning gender recognition, decided to submit the issue for resolution to the entire Civil Chamber.

2 The ruling was issued based on the content of Article 31 of the Act of 29 September 1986 (Sejm of the Republic of Poland, 1986), which is no longer applicable.

3 This position was shared by the Supreme Court in its resolution of 8 May 1992. The concept of gender indivisibility is derived from the indivisibility of marital status; gender is a part of it. According to this concept, a person can only have one gender throughout their life.

4 Historic rulings adopted the path of the rectification of civil status records. Compare the ruling of the Voivodeship Court for the Capital City of Warsaw, 1964, p. 600, and the judgment of the Supreme Court, 1978. For a broader commentary and review of case law with reference to this subject, see Drozdowska & Wnukiewicz-Kozłowska (2018, pp. 686–699).

public of Poland, 1964c)⁵. The issuance of a judgment under Article 189 of the Code of Civil Procedure upholding the claim of a transgender person could subsequently result in an amendment of the birth certificate by way of an additional annotation (thereby producing an effect *ex nunc* – for the future). In its resolution of 22 September 1995, the Supreme Court confirmed the admissibility of bringing an action on the basis of Article 189 of the Code of Civil Procedure and further clarified its position, designating the claimant's parents and, in the event of their death, a court-appointed guardian, as the defendants⁶.

It may therefore be argued that as a result of the resolution adopted by the Supreme Court in 2025, judicial practice in cases concerning legal gender recognition has come full circle⁷. After more than 35 years, a request seeking to amend the designation of gender in a birth certificate will once again be subject to the procedure set out in the Act – Law on Civil Status Records (Sejm of the Republic of Poland, 2014). At present, Article 36 of this law has been recognised as the legal basis (*per analogiam*), providing for the rectification of a civil status record by a court. Consequently, in view of the transition from adversarial to non-contentious proceedings, the Supreme Court held that an amendment of the gender designation in a birth certificate may be effected exclusively upon an application by the person to whom the record relates, and that apart from the applicant, the only permissible participant in the proceedings may be his or her spouse (Article 510 of the Code of Civil Procedure). In the final part of the resolution, the Supreme Court determined that the court's order produces legal effects from the moment it becomes final and binding (i.e. with *ex nunc* effect).

All the arguments expressed in the resolution are of significant importance from the point of view of matters related to gender correction, but in our opinion, the last argument is groundbreaking. The Supreme Court not only determined the admissibility of rectifying a civil status record with prospective effect, but in doing so also departed from the concept of the indivisibility of gender over time (mentioned in footnote 3 above), according to which a person cannot be male until a given date and female thereafter (and vice versa). With regard to the concept of transgender, that concept was premised on the assumption that once psychological gender is

5 Regarding legislative lacunae, attempts to pass a law dedicated to the legal problems of transgender people have failed; see Boratyńska (2015, pp. 53–83). On doctrinal criticism, see the review of legal doctrine positions in Drozdowska & Wnukiewicz-Kozłowska (2018, pp. 684, 689–691).

6 The judicial model of gender change based on Article 189 of the Code of Civil Procedure was examined and described by Holewińska-Łapińska (2010, *passim*) on the basis of court files. Also see Śledzińska-Simon (2013, p. 152).

7 Various terms are used: 'gender recognition', 'gender change', and 'gender reassignment'. Because adaptive procedures do not result in a biological sex change but rather in the adjustment of a person's secondary sexual characteristics to their perceived gender, the more correct term is 'gender reassignment'. However, the terms described in this article are used interchangeably. Due to changes in the legal framework, it is also proposed to use the expression 'change of gender designation', as in Ślaski (2025, p. 165).

formed (at approximately the age of five), it is immutable and persists throughout life (Pietrzykowski, 2025). Conversely, Safjan has explained that, insofar as medical knowledge assumes that gender dysphoria may be the consequence of a defect in the genetic code or of a certain biological or physiological abnormality, it may be argued that an error already occurred at the time the civil status record was drawn up. Accordingly, an analogy with the former Article 31 of the Law on Civil Status Records would be justified, with *ex tunc* effect (Safjan, 1993, pp. 80–81; similarly Pietrzykowski, 2012, p. 133). At the same time, with regard to the possibility of adopting an alternative solution, if one accepts the view that, in cases of transgender people, the issue concerns not the definitive formation or determination of gender but its actual change, then that fact would constitute an event subsequent to the state of affairs existing at the time the birth certificate was drafted (Safjan, 1993, p. 84).

The manner of interpreting the institution of the rectification of a civil status record presented above was closely linked to the assumptions adopted in the medical sciences concerning the aetiology of transgender⁸. The law, however, should respond flexibly to developments in scientific knowledge where the application of specific legal institutions is dependent upon such knowledge. This is expressly acknowledged by the Supreme Court in the reasoning of the resolution under commentary here, where it observed that, since the adoption of the 1989 resolution, there have been changes in the social perception of transgender identity, in the responses of Member States of the European Union and in the jurisprudence of international courts. Definitions have likewise evolved in the Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition (DSM-5), as well as in the International Statistical Classification of Diseases and Related Health Problems (ICD-11)⁹. Therefore there is a need to take a different look at the institution of rectifying a civil status record and consequently to recognise the concept of gender divisibility over time as an exception to the rule.

Therefore, in this commentary, after presenting the factual and legal context of the resolution under review, we analyse the reasons for the decision contained in the justification of the resolution. This is done from a substantive (from the perspective of civil status records and family law) and a procedural perspective. The international

8 The aetiology of transsexuality is not fully understood. Research confirms that gender incongruence is mostly congenital, but symptoms peak during adolescence. From a legal perspective, gender reassignment, which requires registration in civil status records, should be considered a post-birth event, as the diagnosis of transsexuality is based on a sense of belonging to a different gender (being trapped in a foreign body). Therefore the institution of rectifying a civil status record with *ex tunc* (retroactive) effect cannot be applied, also due to the interests of other individuals, such as a spouse or children (if any). This would create a problem with the content of other civil status records and the rights of those individuals arising from them.

9 The DSM-5 eliminated the term 'gender identity disorder' from the DSM-4 and replaced it with the term 'gender dysphoria'. In the ICD-11, the term 'transsexualism' (present in the ICD-10) was removed and replaced with the term 'gender incongruence'.

context, which – as evidenced by the justification – had a significant impact on the final form of the decision, is also addressed.

1. The factual and legal context

The proceedings were initiated by an application of the Prosecutor General, who sought the resolution of a significant legal issue concerning the proper designation of the defendant in actions for the determination of gender brought by transgender persons who are married or have children. The Prosecutor General pointed to inconsistencies in the jurisprudence of the Supreme Court. In its judgment of 6 December 2013, the Supreme Court held that the legal ties binding a transgender person to his or her non-divorced spouse and children justified their participation in the proceedings as uniform co-participants on the defendant's side. By contrast, in its judgment of 10 January 2019, the Supreme Court ruled that a standing to be sued (*passive standing*) in proceedings for the determination of a change of sex is vested exclusively in the claimant's parents and, in the event of their death, in a court-appointed guardian. The former ruling was received critically in legal scholarship (Boratyńska, 2015, pp. 67–72; Szeroczyńska, 2014) on account of its departure from the previously developed procedural model and was perceived as excessive judicial interference in the family law relationships of a transgender person. However, in the view of the Prosecutor General, the position adopted in the 2019 judgment gave rise to doubts as to the correct interpretation of the provisions governing the procedural joinder of parties. In his assessment, limiting the circle of defendants exclusively to the parents lacked justification, particularly given that the legal consequences of a change in gender designation may affect the legal situation of the spouse and children more directly than that of the parents. Criticism was also directed at the practice of appointing a guardian for a deceased parent, since the content of a child's birth certificate produces no legal effects within the sphere of the rights and obligations of a deceased person. In conclusion, the Prosecutor General advocated the view that in cases for the determination of gender where the claimant remains married or has minor children, the defendants – alongside any living parents – should also include the spouse and children, and that their participation should take the form of uniform co-participation. He further indicated the need to notify the public prosecutor of pending proceedings, pursuant to Article 59 of the Code of Civil Procedure. In the subsequent course of the proceedings, the Prosecutor General withdrew the application for the adoption of a resolution¹⁰. The full Civil Chamber of the Supreme Court,

10 The Prosecutor General also requested the recuse of 20 Supreme Court judges from adjudicating due to their improper appointment. However, the Supreme Court found that the resolution aimed at ensuring compliance with the law and ensuring uniformity of case law was abstract in nature. Therefore the issue of the judge's impartiality did not arise at all (Reasoning, p. 5).

however, held the withdrawal to be inadmissible; in the Supreme Court's assessment, the Prosecutor General's competence to request the resolution of divergences in case law was of a public-law character. This entails that once the proceedings for the adoption of a resolution have been effectively initiated, the initiating authority may not freely dispose of them, including by withdrawing the application.

The positions adopted by other entities participating in the debate preceding the resolution were decidedly more balanced. The Ombudsman for Human Rights and the Ombudsman for Children's Rights applied for a refusal to adopt a resolution. In their assessment, no genuine divergence existed in the jurisprudence of the common courts, and the 2019 judgment had definitively resolved the issue of passive standing by exclusively designating the claimant's parents as the defendants. According to both Ombudsmen, that position had been consistently respected in judicial practice. At the same time, it was noted that transgender people who remain married in practice elect to obtain a divorce prior to bringing an action for the determination of gender, being aware that otherwise their claim may be dismissed. A similar position was taken by organisations supporting transgender persons, which advocated for a procedural model that would be as unburdensome as possible for the transgender individual. Accordingly, they petitioned the Supreme Court to refuse to adopt the resolution. The Supreme Court nevertheless held that the significance of the divergence concerning the participation of specific entities on the defendant's side was sufficiently substantial to warrant the removal of doubts. Consequently, it adopted a solution that none of the participants in the debate had anticipated and which, it would appear, is decidedly the most favourable for transgender persons.

The current model of court proceedings in gender determination cases has been controversial from the outset, and not only because the problem of identifying the defendant was inappropriate to the nature of the case. Above all, it has been emphasised that a case concerning a change of gender is not a matter relating to rights of status in the sense of family law relationships. Gender constitutes an element of civil status and defines someone's personal status, yet it does not exhibit the reciprocity characteristic of family law relations (Ignatowicz, 1996, p. 194). Basing the claim on Article 189 of the Code of Civil Procedure (declaratory relief as to a right or legal relationship) requires the demonstration of a legal interest, understood as an objective need for legal protection in the face of uncertainty as to a legal status or right. In such proceedings, it is difficult to discern any genuine adversarial dispute, and the parents (as defendants) likewise lack any legal interest in relation to the exercise by their child of the right to the correct designation of gender¹¹. A judgment rendered pursuant to Article 189 of the Code of Civil Procedure is effective only *inter partes*, but it nevertheless became the basis for making an additional annotation in the birth certificate. Judicial practice thus accorded

11 Reasoning of the judgment, pp. 9, 11. Similarly in the literature on the subject, see more broadly Pietrzykowski (2012, p. 133).

it the attribute of extended effectiveness – *erga omnes*. For these reasons, the Supreme Court rightly concluded that the legal basis hitherto applied should be reconsidered, and that the issue of procedural standing is secondary to the determination of the appropriate procedural framework for this category of cases. Consequently, it directed its attention to the Act – Law on Civil Status Records of 2014.

2. Commentary in the context of the Law on Civil Status Records and the Family and Guardianship Code

Pursuant to Article 36 of the Law on Civil Status Records, the rectification of a civil status record is effected by a court in non-contentious proceedings, upon an application by an interested person, the public prosecutor, or the head of the civil registry office, in the cases specified therein¹². The broad circle of entities vested with standing to apply is linked to the public law character of civil status records, which serve to ensure the security and reliability of legal transactions. Civil status registers, by virtue of the evidentiary value attributed to them (Article 3 of the Law on Civil Status Records), must be complete and consistent with the current factual state of affairs. Thus, in the interest of legal order, it is important to remove discrepancies between the designation of gender on the birth certificate and the gender whose characteristics a given person actually represents (Rosental, 1991, p. 65).

In the legal literature, it is argued that Article 36 of the Law on Civil Status Records is formulated in an ambiguous manner (Pietrzykowski, 2025), since its interpretation requires reference to Article 35 of that Act, which provides for the administrative procedure for rectification of a civil status record by the head of a civil registry office. The judicial procedure described in Article 36 of the Act was thus conceived as a kind of substitute for rectification by the head of a civil registry office. Therefore, in order for the way to be opened for legal proceedings, a case that excludes the possibility of correcting the civil status record by the head of a civil registry office must materialise (Decision of the Supreme Court, 2023). In other words, the admissibility of rectification by the court is contingent upon the occurrence of circumstances excluding the possibility of administrative rectification. This procedural model, which at first glance seems intricate, has resulted in the paradox that the judicial mode has become more flexible and better suited to atypical situations which cannot be resolved on the basis of the documents enumerated in Article 36(1) of the Law on Civil Status Records.

12 Article 36 of the Law on Civil Status Records: when the correction of a civil status record is impossible on the basis of collective civil status registration files or other civil status records, provided that they record an earlier event and concern the same person or their ancestors or foreign civil status records referred to in Art. 35 sec. 2 p.a.s.c. (1), or the correction of a civil status record by the head of the civil status office is not possible solely on the basis of the documents listed above (2).

In the reasoning of the resolution, the Supreme Court emphasised that the institution of rectification was originally designed to remove errors existing at the moment the record was drawn up; accordingly, it accepted the possibility of applying Article 36 of the Law on Civil Status Records only *per analogiam*. It seems that the application of Article 36 is not possible without it being *per analogiam*.

In the 2014 Act, the legislature departed from a narrow understanding of the institution of rectification of civil status records as being confined exclusively to clerical errors or inaccuracies¹³. If a court is empowered to rectify a record where rectification by the head of a civil registry office is precluded in the situations specified in Article 35 of the Act, it must be assumed that there is no closed catalogue of grounds in substantive law that the court may not update, for example a birth certificate. Such a conclusion is supported by both a literal and a purposive interpretation. Rectification of a record need not be predicated solely upon the existence of an error, and the necessity of ensuring conformity between the content of civil status records and the actual state of affairs should be accorded priority in light of the principle of legal certainty and the security of legal transactions.

Turning to issues of family law, it should be noted that according to the Supreme Court, being married constitutes an insurmountable obstacle to the demands of transgender persons, primarily due to the content of Article 18 of the Constitution of the Republic of Poland, which requires the protection of marriage understood as a union of persons of opposite sexes. Under the previously applied procedural model, courts required a prior divorce, and actions brought by married transgender persons were dismissed. The Supreme Court intends to uphold that practice; accordingly, it not only provides that the spouse should participate in the proceedings, but explicitly indicates that the continued existence of a marriage involving a transgender person precludes the granting of an application for a change of gender (Reasoning, p. 20). While we concur with this aspect of the Supreme Court's reasoning, we do not share the view that a similar approach – entailing the possibility of dismissing the application – should be adopted where the child of a transgender person objects to the parent's transition. If, as the Supreme Court rightly observes, the child does not fall within the category of interested persons (and is therefore not a participant in the proceedings within the meaning of Article 510 of the Code of Civil Procedure), then the child's attitude towards the parent's change of sex should remain legally indifferent from the standpoint of the ultimate determination. As Boratyńska correctly notes, it is in the best interests of the child to have caring and loving parents in the social roles to which he or she has been accustomed from an early age and which fall within his or her capacity of understanding. Such an approach, undoubtedly consistent with

13 Under the old law, there were two forms of rectification: minor (when the act contained an obvious clerical error) and major (when the act was incorrectly or imprecisely drafted). The former was reserved for the head of the Civil Registry Office, the latter for the court.

the welfare of the child, nevertheless imposes in this instance a disproportionate sacrifice on the parent: the renunciation of the regulation of his or her personal status in accordance with his or her gender identity (Boratyńska, 2015, p. 65). It is therefore proposed by the author that any consideration of the interests of a minor child should take place within the sphere of family and guardianship law, with the involvement of a guardianship court. An order concerning the manner of maintaining contact with the child may be issued by the court pursuant to Article 109 of the Family and Guardianship Code (Sejm of the Republic of Poland, 1964a), and its execution supervised; the court may, for example, direct the parent to continue performing their existing social role in relation to the child and to refrain from manifesting a different gender identity (Boratyńska, 2015, p. 72). This proposal seeks to reconcile the interests of the transgender parent and of the child. It would not, however, be feasible where advanced medical procedures aimed at altering external characteristics manifesting a given gender have been undertaken. The guardianship court could not prohibit such procedures, as this would amount to a substantial interference with the autonomy of the transgender person. In such circumstances, a prohibition or restriction of contact with the child on account of the parent's transition would constitute the price that the transgender parent would have to pay for 'being oneself'.

3. Commentary in the context of civil procedural law

The Polish Code of Civil Procedure recognises non-contentious proceedings as one of the principal forms of judicial proceedings in civil matters. Both procedural regimes, adversarial and non-contentious, serve the adjudication of civil cases; however, they differ in certain respects, reflecting the need to adapt procedural mechanisms to the nature of the matters examined therein (Misztal-Konecka, 2026). The diversity of non-contentious proceedings stems from the structure of the provisions of substantive law, thereby enabling compliance with the constitutional requirement of appropriately shaping judicial procedure (Walasik, 2022). The Supreme Court has likewise drawn attention to this need, namely to shape judicial proceedings in a manner ensuring the effective realisation of the constitutional right to a court (Article 45 of the Constitution of the Republic of Poland; Reasoning, p. 9). The procedural regime must therefore be properly adapted to the character of the case under consideration. Accordingly, the Supreme Court held that both the structure and the mechanisms of non-contentious proceedings more adequately accommodate the specific circumstances associated with cases concerning a change of gender. This procedural model also minimises doubts relating to the issue of procedural standing¹⁴.

14 Pietrzykowski has criticised the appearance of both a Civil Registry Office Manager (as a representative of state) and the parents of a transgender person as defendants and has noted that

As already noted, the adversarial model required the preservation of bipartite proceedings, whereas in cases concerning legal gender recognition, only the person asserting the claim has a vital and direct interest. The matter concerns an element of civil status (gender) devoid of the attribute of reciprocity. In addition, it has been pointed out that Article 189 of the Code of Civil Procedure is an inappropriate legal basis because this provision concerns the establishment of a right or legal relationship and not the determination of a fact, such as a person's gender (Pietrzykowski, 2012, p. 133).

Non-contentious proceedings are founded upon a flexible determination of the circle of participants. All interested persons may participate in the proceedings; their interests may be convergent or conflicting, and they may be affected to an equal or varying degree. This flexibility enabled the Supreme Court to conclude that the public prosecutor and the head of a civil registry office should be excluded from the circle of participants. The personal nature of the claim advanced by a transgender person precludes the admissibility of those authorities initiating such proceedings, contrary to the original suggestion of the Prosecutor General. Consequently, the Supreme Court held that exclusive standing to initiate the proceedings is vested solely in the interested person. The parents are no longer participants in the proceedings; the only participant, in the case of a transgender person who remains married, is the spouse.

The problem with the Supreme Court's reasoning is that the referral of gender reassignment cases to non-contentious proceedings is made through the prism of the Law on Civil Status Records¹⁵. This decision, however, should have been an expression of the legislature's will. Therefore, given that in cases of doubt a contentious procedure is adopted (Misztal-Konecka, 2026), the legislature should regulate matters concerning gender reassignment, for example by amending Article 36 of the Law on Civil Status Records. Qualification for such a procedure should stem from an explicit statutory provision rather than from the interpretation of an ambiguous legislative wording.

4. Commentary in the context of international law

The Supreme Court's reference to international law in the justification of its adopted resolution, while interesting and important, requires further comment. In our opinion, a mere reference to that legal framework, without providing specific and concrete elaboration, leaves a sense of insufficiency. The court's mere indication of international law serves as a reference to the constitutional necessity to comply with obligations assumed under it (Article 9 of the Polish Constitution). On the other hand, drawing attention to the evolution of the scope of protection of individual rights and the means of their implementation should be assessed as a positive aspect of the judicial

this construction was completely artificial'. (Pietrzykowski, 2012, p. 133). Equally strong criticism concerned the participation of the children of a transgender people (Szeroczyńska, 2014).

15 All proceedings under this Act are conducted in a non-contentious procedure.

panel's legal awareness and social sensitivity. Which legal acts, instruments, and judicial decisions are being referred to should nevertheless be emphasised more specifically.

International hard law does not have any legal regulations directly addressing the rights of transgender persons, including gender recognition and assignment. However, this does not mean that the rights of transgender people cannot be protected. On the contrary, at the international level, there are international treaties (e.g. the International Covenant on Civil and Political Rights and the European Convention on Human Rights) that are binding on states that have acceded to them. These treaties enshrine fundamental human rights that, due to developments in various areas of life, primarily science (including biology, biotechnology, medicine, biochemistry, biophysics, and bioethics) and technology, should be interpreted in accordance with the spirit of the times (the so-called 'living instrument' doctrine), as is consistently emphasised in the case law of the European Court of Human Rights¹⁶.

At the soft law level, the most relevant document covering transgender rights is the 2015 Yogyakarta Principles. This document was developed in collaboration with the International Commission of Jurists and was prepared by a group of experts¹⁷. It contains 29 principles and is supplemented with additional recommendations. The most significant and detailed body of standards has been developed within the framework of the Council of Europe. The rights of transgender persons are generally guaranteed by the provisions of the European Convention on Human Rights and are further articulated in the form of guidelines contained in soft law instruments adopted within that organisation. The European Convention on Human Rights, like acts of general international law in the field of human rights, protects everyone's right to privacy (Article 8) and prohibits discrimination (Article 14). More detailed guidelines concerning the treatment of transgender persons are set out in Recommendation CM/Rec(2010)5 of the Committee of Ministers of the Council of Europe on measures to combat discrimination on grounds of sexual orientation or gender identity; in Resolution 1728 (2010) of the Parliamentary Assembly of the Council of Europe on discrimination on the basis of sexual orientation and gender identity; and in Recommendation 1117 (1989) of the same body on the condition

16 See for example Judgment of the ECtHR (1978, § 31): 'The Convention is a living instrument which must be interpreted in the light of present-day conditions'; Judgment of the ECtHR (2002, § 74): 'The Court must take into account the changing situation both within the respondent country and throughout the area of application of the Convention'; Judgment of the ECtHR (2009, para. 60): '[W]hat may have been a justified restriction eighteen years ago does not necessarily retain such justification today.'

17 The International Commission of Jurists (ICJ) is an institution established in 1952 that brings together over 60 highly qualified and morally sound lawyers (including retired judges, attorneys, and academics) from dozens of countries, in accordance with the principle of geographical equity and representation of diverse legal systems. Their activities include promoting civil rights and freedoms through education, consultative activities, and initiating work on human rights conventions. For more information, see <https://www.icj.org/>.

of transgender people¹⁸. With regard to legal gender recognition, the above-mentioned recommended standards indicate not only that ‘prior requirements, including changes of a physical nature, for legal recognition of gender reassignment should be regularly reviewed in order to remove abusive requirements’ (Recommendation CM/Rec(2010)5, annex, point IV.20; 1), a principle encompassed within the right to respect for private and family life, but also that domestic legal systems should ‘revoke legislative provisions which are not in conformity with the case law of the European Court of Human Rights’ (Resolution 1728 (2010), para. 16.6; Council of Europe, 2011). For this reason, the reference in the resolution of the Supreme Court to international law, one of whose subsidiary sources is judicial case law, is of particular importance. Moreover, Member States of the Council of Europe should, both ‘in legislation and in practice’, ensure to transgender persons the right to obtain ‘official documents that reflect [...] their] preferred gender identity, without any prior obligation to undergo sterilisation or other medical procedures such as sex reassignment surgery and hormonal therapy’ (Resolution 1728 (2010), para. 16.11.2;), and should also ensure ‘access to gender reassignment treatment and equal treatment in health-care areas’ (para. 16.11.3). Already in Recommendation 1117 (1989)), the Parliamentary Assembly of the Council of Europe requested the Committee of Ministers to encourage Member States to introduce legal regulation enabling, in cases of irreversible transgender, the new factual situation (the new gender) to be reflected in the birth certificate and identity documents of the person concerned. Recommendation CM/Rec(2010)5 was supplemented by an explanatory memorandum stating that ‘[s]tates should also ensure that procedures for legally changing a person’s gender and name are prompt, transparent, accessible, and respectful of the person’s physical integrity and private life’ (paras. 20–21).

The latest study on human rights and gender identity by the Council of Europe’s Commissioner for Human Rights clearly defines legal gender recognition as ‘the legal recognition of a person’s gender identity, which allows them to change their sex/gender designation and other gender-related information, and may also be reflected in names, social security numbers/identification numbers, titles, etc., in public registers, documentation, identity documents, and other similar documents (such as school certificates)’ (2024, p. 37). Thus reference is made not only to the gender recognition procedure itself, but also to its reflection in the applicant’s documents, including civil status records.

The above-mentioned international legal documents and the ECtHR’s case law therefore impose an obligation on states to incorporate the rights of transgender people into their national laws and ensure their observance. This includes both a clear and non-discriminatory gender recognition procedure and the reflection of this fact

18 The cited documents, along with other achievements of the Council of Europe in the field of transgender protection, are available in Council of Europe (2011).

in national documents. It is worthwhile noting that in one of its most recent judgments (Judgment of the ECtHR, 2025), the Court, while recalling its consistent position that in ethically and morally sensitive cases, the margin of appreciation afforded to states in fulfilling their positive obligations under Article 8 (the right to privacy) will usually be wide, simultaneously stated that 'the respondent State has overstepped its margin of appreciation and has failed to comply with its positive obligation to ensure that the applicants had a specific legal framework providing for the recognition and protection of their same-sex unions. This amounts to a breach of the applicants' right to respect for their private and family life' (para. 23). Ultimately, the Court concluded that: 'that by failing to ensure that the applicants have a specific legal framework providing for recognition and protection, the Polish authorities have left them in a legal vacuum and have not provided for the core needs of recognition and protection of same-sex couples in a stable and committed relationship (para. 21)

This conclusion imposes on states parties to the ECHR (including Poland) a positive obligation to implement each person's right to their identity, with strict regard to the guidelines developed in the case law of the Strasbourg Court.

The Polish Supreme Court also referred indirectly to EU law. Although it does not have significant impact on the gender recognition procedure, does address the issue of transgender individuals to a certain extent. The issue of transgenderism in EU law is highlighted primarily in the context of the general prohibition on discrimination and on discrimination within the European single market. Judgments of the Court of Justice of the European Union address the issue of gender discrimination in employment and the acquisition of pension rights (e.g. Judgments of the CJEU, 1996, 2006). To sum up, the sense of the Supreme Court resolution discussed above should be assessed positively, as it aims to facilitate the interested person to carry out the gender recognition procedure.

Conclusions

It should be noted that the content and significance of the Supreme Court resolution of 2025 deserve full approval; it represents significant progress for the legal situation of transgender people in Poland, as it ensures individual autonomy in terms of their gender identity while minimising formal procedural obstacles. However, there is a need to supplement the statutory procedure concerning the designation of a new sex in the birth certificate to avoid interpretational uncertainties, for example under Article 36 of the Law on Civil Status Records. This would be the proverbial 'dotting the i', expressing the admissibility of rectifying the designation of a person's sex in their birth certificate with *ex nunc* effect. The Supreme Court, departing in its resolution from the position expressed in 1989, acknowledged that there are exceptions to the principle of the indivisibility of gender over time, since the effect of a positive

court ruling issued in non-contentious proceedings would be the introduction of an additional annotation in the birth certificate pursuant to Article 42(1) and (2)(1) of the Law on Civil Status Records.

In conclusion, however, one cannot ignore a significant reservation related to the fear of formal doubts regarding the composition of the adjudicating panel related to irregularities in the procedure for appointing so-called neo-judges. In its judgment in *Advance Pharma v. Poland*, the ECtHR explicitly found that the composition of the Civil Chamber of the Supreme Court that heard the applicant company's case was not a tribunal established by law, and therefore there had been a violation of Article 6(1) of the Convention – the right to a fair trial (Judgment of the ECtHR, 2022).

Despite the above-mentioned formal reservation, the essence of the commented judgment lies in its tangible facilitation of the legal gender recognition procedure. The ruling reflects a shift from excessive procedural formalism toward a more rights-oriented approach, strengthening the effective protection of personal dignity, private life, and individual autonomy. In this respect, the judgment remains consistent with contemporary standards developed under international human rights law, in particular the jurisprudence concerning the protection of gender identity and the requirement to ensure accessible, effective, and non-discriminatory legal mechanisms for gender recognition. Consequently, the decision should be primarily assessed in light of its practical contribution to enhancing the legal and social situation of transgender persons.

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