

Warsaw, 28 February 2020

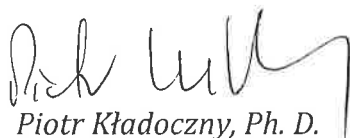
346/2020/PSP/JJ

**Ms Ksenija Turković**  
**President of the Chamber**  
**European Court of Human Rights**  
Section I  
Council of Europe  
F-67075 Strasbourg-Cedex  
France

***Ref. Y. v. Poland***  
**Application no. 74131/14**

Pursuant to the letters from Mr Abel Campos, the Section Registrar of the First Section of the European Court of Human Rights (hereinafter also referred to as "ECtHR", "Court") dated 3 February 2020, granting leave to make written submission to the High Court by the 28 February 2020, the Helsinki Foundation for Human Rights with its seat in Warsaw, Poland, hereby respectfully presents its written comments on the cases of Y. against Poland (application no. 74131/14).

On behalf of the Helsinki Foundation for Human Rights,

  
*Piotr Kładoczny, Ph. D.*

Secretary of the Board

Helsinki Foundation for Human Rights

  
*Danuta Przywara*

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Helsinki Foundation for Human Rights

Warsaw, 28 February 2020

*Y. v. Poland*  
Application no. 74131/14

WRITTEN COMMENTS  
BY  
THE HELSINKI FOUNDATION FOR HUMAN RIGHTS

**EXECUTIVE SUMMARY:**

- The case *Y. v. Poland* provides the ECtHR with the opportunity to develop standards for the upholding of transgender persons' right to the protection of their private life and respect for their gender identity.
- Currently, there is no statutory regulation of the gender recognition procedure in Poland and the currently available procedural avenue developed in judicial practice has been criticised by, among others, transgender persons, academics, NGOs and the Ombudsman.
- There is a clear trend among European and non-European countries towards the adoption of measures enabling and facilitating the full respect of the gender identity of transgender persons.
- The full respect of the gender identity of transgender persons should also entail establishing the maximum possible restrictions on the display of their particulars related to the period preceding the relevant gender recognition procedures in their official documents. The non-disclosure of being subjected to a gender recognition procedure may be essential to the respect of a transgender person's dignity and right to privacy.

**I. INTRODUCTION**

1. The Helsinki Foundation for Human Rights ("HFHR" or "the Foundation") is a non-governmental organisation working in the field of human rights protection, whose statutory activities include, *inter alia*, dealing with issues related to the respect of the rights and freedoms of LGBT+ persons, including transgender persons. The Foundation was involved in a range of different activities including legislative work aimed at introducing a special gender recognition procedure into the Polish legal system, which would comprehensively address the legal situation of individuals who feel the difference between the gender assigned at birth and the mental (real) gender.

2. Ultimately, the aforementioned legislative work has ended in failure, which means that the measures adopted in the jurisprudential practice remain in use. Studies show that between January 1991 and March 2013, a total of 409 gender recognition cases were

examined<sup>1</sup>. However, in the Foundation's opinion, the small number of such cases cannot serve as a basis for downplaying the problems and difficulties experienced by transgender persons.

3. In *Y. v. Poland*, the applicant complains under Article 8 of the European Convention on Human Rights ("ECHR") that the Polish authorities have failed to fulfil their obligation to guarantee full recognition of his gender identity, since a full copy of his birth certificate contains particulars revealing his previous identity and gender as originally indicated on his birth certificate, so that those particulars may be disclosed in certain situations. The applicant also complains under Article 14 ECHR read in conjunction with Article 8 ECHR as he considers that he has been discriminated against due to the absence of the possibility of issuing a new birth certificate.

4. In view of the scope of the leave granted by the ECtHR, the opinion does not directly address the factual situation of the above-mentioned case but presents the wider context of the situation. In particular, the Foundation respectfully draws the Court's attention to the current design of the legal procedure that transgender persons in Poland must use in order to ensure that the perceived gender is properly recognised in civil status documents, as well as to the manner in which the jurisprudential practice in these cases has developed. Furthermore, the Foundation would like to emphasize foreign regulations adopted to promote respect for the right to privacy of transgender persons by preventing third party access to information about the use of gender recognition procedures.

## II. THE LEGAL SITUATION OF TRANSGENDER PERSONS IN POLAND

5. There are no statutory regulations in Poland that would explicitly provide for a gender recognition procedure for a transgender person. The possibility of correcting designation of a person's gender has been acknowledged solely as an effect of a jurisprudential interpretation of otherwise ambiguous legal provisions. The courts have ultimately accepted that a person's gender may be recognised in civil proceedings, through a declaratory action under Article 189 of the Code of Civil Procedure ("CCP"). A crucial impact in this context is that of the decision of the Supreme Court of 22 March 1991, issued in case no. III CRN 28/91, which reads that "the feeling of belonging to a given gender may be considered a personal right under Article 23 of the Civil Code. As such, it may also be protected by means of the declaratory action under Article 189 CCP based on a transsexual person's legal interest in obtaining objective protection against the uncertainty of legal status or the uncertainty of the law. On the other hand, in the event of gender reassignment, the person's legal interest is expressed in the contradiction between the actual state of affairs and the state resulting from the birth certificate." This

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<sup>1</sup> D. Pudzianowska, J. Jagura (Eds.), *Równe traktowanie uczestników postępowań. Przewodnik dla sędziów i prokuratorów*, Warszawa 2016, p. 141; E. Holewińska-Łapińska, "Sądowa zmiana płci. Analiza orzecznictwa z lat 1991–2008" in K. Ślebza (Ed.), *Studia i Analizy Sądu Najwyższego*, Warszawa 2010; R. Grzejszczak, "Transpłciowość w świetle badań" in W. Dynarski, K. Śmiszek (Eds.), *Sytuacja prawna osób transpłciowych w Polsce. Raport z badań i propozycje zmian*, Warszawa 2013, p. 14.

approach was consolidated in the resolution of the Supreme Court of 22 September 1995 (case no. III CZP 118/95), according to declaratory action should be brought against the parents or, if they are deceased, against a guardian appointed by the court.

6. The current state of protection of the rights of transgender persons is criticised not only by the persons concerned but also by legal scholars, the Ombudsman<sup>2</sup> and human rights NGOs. Concerns are raised in particular about the absence of a comprehensive procedural framework that could be used by transgender persons to ensure that their actual gender is properly recognised in the civil status documents and records. The Supreme Court took note of this problem also in the judgment of 22 March 1991 (case no. III CRN 28/91), holding that in the absence of a comprehensive statutory regulation of transsexualism “the courts should seek to make use of all possible interpretations and construe the existing laws in such a way as to take into account the wishes of people who feel a painful contradiction between the irresistibly desired gender and their biological gender recorded in their birth certificate.”

7. It is emphasised that the current design of the judicially developed procedure does not correspond to the true nature of these cases. A transgender person seeking recognition of their gender should bring the declaratory action against their parents or, if they are deceased, a guardian who must be appointed for that purpose by the court. This solution is criticised as causing additional problems for transgender persons<sup>3</sup>, possibly exacerbating family conflicts<sup>4</sup>, stigmatising and humiliating<sup>5</sup> and negatively affecting the psychological condition of the participants in the proceedings (both the transgender person and the “sued” parents)<sup>6</sup>. Notably, in the course of proceedings, the court examines the most intimate details of one's private life. It may be embarrassing for an adult child to reveal such details in the presence of their parents. As complaints received by the Ombudsman indicate, if parents do not approve the recognition of the child's actual gender, the proceedings may be unreasonably protracted, and a similar situation may occur if the claimant does not maintain contact with the parents whose whereabouts are unknown.<sup>7</sup> At the same time, in the Ombudsman's opinion, “the frequently protracted proceedings in gender recognition cases violate the dignity and right to a private life of transgender persons who are forced to live in an administrative and legal reality with a non-perceived gender”.<sup>8</sup> It is worth noting the recent developments of the jurisprudence

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<sup>2</sup> “Sytuacja prawna osób nieheteroseksualnych i transpłciowych w Polsce. Międzynarodowy standard ochrony praw człowieka osób LGBT i stan jego przestrzeganie z perspektywy Rzecznika Praw Obywatelskich”, Biuletyn Rzecznika Praw Obywatelskich (6) 2019, p. 60, <https://www.rpo.gov.pl/sites/default/files/Raport%20RPO%20Sytuacja%20prawna%20os%C3%B3b%20LGBT%20w%20Polsce.pdf>.

<sup>3</sup> D. Pudzianowska, “Uwagi o sytuacji prawnej osób transseksualnych w Polsce” in A. Śledzińska-Simon (Ed.), *Prawa osób transseksualnych. Rozwiązania modelowe a sytuacja w Polsce*, Warszawa 2010, p. 41.

<sup>4</sup> A. Śledzińska-Simon, “Sytuacja prawna osób transseksualnych w Polsce” in Dynarski, Śmiszek, *Sytuacja prawna...*, p. 164.

<sup>5</sup> *Ibid.*, p. 163.

<sup>6</sup> Grzejszczak, “Transpłciowość...”, p. 32.

<sup>7</sup> “Sytuacja prawna osób nieheteroseksualnych...”, p. 60.

<sup>8</sup> *Ibid.*

concerning the identification of respondents in gender recognition cases. In a judgment of 6 December 2013 entered in case no. I CSK 146/13, the Supreme Court held that such an action should be brought against the spouse if the transgender person was married at the time of bringing the action, as well as against the children. The Supreme Court retracted this view in respect of the children in its judgment of 10 January 2019 entered in case no. II CSK 371/18.

8. Furthermore, in the absence of a uniform and dedicated gender recognition procedure, the course of judicial proceedings in a given case may differ from court to court.<sup>9</sup> The courts approach differently to the questions such as the necessity of appointing expert witnesses to testify in the case<sup>10</sup>, adjudication based solely on documents submitted by the claimant<sup>11</sup> or the designation of the new claimant's view in the ruling<sup>12</sup>. It is assumed that in order to be able to bring the gender recognition action, a transgender person must obtain a diagnosis from a specialist, start a hormone therapy and, in the case of female to male gender reassignment procedures, perform a mastectomy, although according to information from NGOs, the last requirement is not uniformly applied by all courts.<sup>13</sup> According to the prevailing jurisprudential view, after the court has recognised a gender consistent with the psychological gender, it is possible for the person concerned to undergo a gender reassignment surgery.

9. However, the aforementioned judicial procedure is not the only legal procedure that a transgender person needs to use. In a decision of 22 March 1991 issued in case no. III CRN 28/91, the Supreme Court emphasised that a ruling admitting a gender recognition action brought by a transgender person would have an *ex nunc* (future) effect and would be the basis for an additional entry in the civil status records under Article 21 of the Act of 29 November 1986 on Civil Status Records ("the 1986 Act", a uniform text published in the JL of 36, item 180 as amended). Questions relating to entries in civil status records will also be discussed below. If the court ruling did not determine the new name and surname (or adjust the form of the surname to the gender recognised in the ruling), the person concerned must apply for a change of the name and/or surname pursuant to the Act of 17 October 2008 on the change of the name and surname<sup>14</sup>. Next, the transgender person should apply for the change of their national identification number (PESEL).<sup>15</sup> The next step is having one's new official documents, including the personal identity document (*dowód osobisty*).

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<sup>9</sup> Pudzianowska, "Uwagi...", p. 39.

<sup>10</sup> Holewińska-Łapińska, "Sądowa zmiana płci...". Expert witness testimony was admitted in 174 out of 245 surveyed cases (71%).

<sup>11</sup> Grzejszczak, "Transpłciowość...", p. 25.

<sup>12</sup> A. Śledzińska-Simon, "Sytuacja prawna osób transseksualnych w Polsce" in Dynarski, Śmiszek (Eds.), *Sytuacja prawna...*, p. 170.

<sup>13</sup> Śledzińska-Simon, "Sytuacja prawna...", p. 164.

<sup>14</sup> Uniform text published in the Journal of Laws ("JL") of 2016, item 10 as amended.

<sup>15</sup> Article 19 (1) (2) of the Act of 24 September 2010 on the population records (Uniform text published in the JL of 2019, item 1397).

10. As indicated above, a successful action for the recognition of a person's psychological gender in their civil status records constitutes a basis for annotation in these records. In effect, although an abridged copy (*odpis skrócony*) of the person's birth certificate displays only the particulars reflecting the correction of the gender assigned at birth, a full copy (*odpis zupełny*) of the same birth certificate additionally displays the pre-correction particulars as well as a note of the annotation<sup>16</sup>. This means that information about the gender recognition procedure completed by a transgender person is disclosed whenever this person is required to present a full copy of the birth certificate. It is argued that such a situation causes discomfort to transgender persons who, despite having undergone the necessary procedures, still have to disclose the gender originally assigned to them in their civil status records and that transgender persons are exposed to the stress of having to disclose that fact<sup>17</sup>. Notably, according to the findings of a study carried out by the European Union Agency for Fundamental Rights (Fundamental Rights Agency, "FRA"), one-third of the trans persons surveyed said they felt discriminated against in the 12 months preceding the survey because they had to present an ID or other official document that identified their sex.<sup>18</sup>

11. In this context, as well as in view of the complaints raised by the applicant in the case at hand, it is worth pointing out that Polish courts initially applied a different legal framework in cases of transgender persons. Crucially, the application of that framework did not pose the problem of making an additional annotation in civil status records. It is believed that the first cases concerning the alignment of the gender recorded on the birth certificate with the psychological gender were already considered by Polish courts in the 1960s.<sup>19</sup> Before the courts assumed that the proper procedure to change the gender assigned in civil status records is the declaratory action under Article 189 CCP, the issue in question had been addressed within the framework of the procedure for the correction of the birth certificate. This practice is reflected in the resolution of the Supreme Court of 25 February 1978 (case no. III CZP 100/77), in which the Court held that the provisions governing corrections of errors in civil status records should be applied by analogy in matters relating to gender designation. The possibility to make a correction in the event where a civil status document was "incorrectly or inaccurately drafted" was at the time provided for by Article 26 (3) of the Decree of 8 June 1955 June – the Law on civil status records (a similar provision was also laid down in the 1986 Act). This ruling consolidated the practice of courts, which corrected or even amended birth certificates of transgender persons, changing the assigned gender and names of their holders.<sup>20</sup> This practice was abolished by the resolution of the Supreme Court of 22 June 1989 (case no. III CZP 27/89)

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<sup>16</sup> Article 44 (2) of the Act of 28 November 2014 on Civil Status Records (Uniform text published in the JL of 2018, item 2224 as amended).

<sup>17</sup> A. Szczerba, "Zmiana danych w akcie stanu cywilnego osób transseksualnych, Komentarz do wyroku Naczelnego Sądu Administracyjnego z 16.07.2008 r.," II OSK 845/07 as cited in Śledzińska-Simon, "Sytuacja prawna...", p. 170.

<sup>18</sup> FRA, *Being Trans in the EU Comparative analysis of the EU LGBT survey data. Summary*, 2014, [https://fra.europa.eu/sites/default/files/fra-2014-being-trans-eu-comparative-0\\_en.pdf](https://fra.europa.eu/sites/default/files/fra-2014-being-trans-eu-comparative-0_en.pdf), pp. 81-82.

<sup>19</sup> HOLEWIŃSKA-ŁAPIŃSKA, "Sądowa zmiana płci..."

<sup>20</sup> Śledzińska-Simon, "Sytuacja prawna...", p. 169.

which considered that it was not permissible to correct the birth certificate of a transgender person under the correction procedure. The Supreme Court held that it was not possible to correct an entry relating to gender that had been correct at the time a document was drafted. The Supreme Court thus took the view that the fact of feeling one's gender identity was a new occurrence.<sup>21</sup> The approach presented in the 1989 resolution has been disputed in the literature, e.g. in the context of new studies that show that gender identity is an inborn trait.<sup>22</sup>

### III. ATTEMPTS TO INTRODUCE A STATUTORY FRAMEWORK FOR GENDER RECOGNITION

12. In 2013, a bill was proposed in an attempt to address the need for statutory regulation of gender recognition, first acknowledged in the early 1980s<sup>23</sup>. Two years later, the Sejm adopted the Gender Recognition Act<sup>24</sup>, which was later vetoed by the President. Due to the end of the parliamentary term, the Sejm, bound by the principle of discontinuation of legislative work, could not override the veto; ultimately, the Act has never entered into force. Nevertheless, it is worthwhile to briefly discuss the key concepts of the Act.

13. The purpose of the Act was to introduce a separate procedure for dealing with gender recognition cases. Pursuant to the Act, gender recognition cases were to be considered in non-litigious proceedings. As a rule, only a transgender person could be a participant in these proceedings. In a decision granting the gender recognition request, the court was to designate the name(s) of the participant and, if a need arose and the participant so requested – also the surname. The Act also laid down comprehensive rules on the effects of gender recognition.

14. At the same time, the Act assumed that the court's ruling was the basis for drawing up a new birth certificate for the person concerned. The Act also provided for appropriate modification of the provisions on civil status records. According to the Act, once a new birth certificate was drawn up, the relevant annotation was to be attached to the old certificate, which would not be subject to disclosure. The Act provided that a full copy of the “old” birth certificate was to be issued only at the request of a court, the person concerned, their biological or adopted children before the decision granting the gender recognition request became final, if this would be necessary to confirm their family origins. The same parties would be entitled to obtain documents pertaining to the old birth certificate from the collective files of the register of civil status documents. In addition, the Act indicated that persons who had successfully completed the gender recognition procedure prior to the entry into force of the Act could also apply for a new birth certificate.

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<sup>21</sup> *Ibid.*

<sup>22</sup> *Ibid.*

E. Holewińska-Łapińska, “Sądowa zmiana płci...”.

<sup>24</sup> Act of 10 September 2015, Sejm paper no. 1469,

<http://www.sejm.gov.pl/sejm7.nsf/PrzebiegProc.xsp?id=85B75FD599203E5DC1257B8F0034A240>.

15. According to information obtained by the HFHR, neither the Ministry of Justice<sup>25</sup> nor the Ministry of Health<sup>26</sup> is currently working on a piece of legislation that would introduce legal measures related to the gender recognition procedure.

#### IV. INTERNATIONAL STANDARDS AND REGULATIONS IN OTHER COUNTRIES

16. The research carried out by FRA shows that, as of 2014, 35 countries in Europe had legal regulations allowing for the alignment of gender identity of a transgender person with gender recorded in civil status documents, whereas 14 countries did not provide for such an option<sup>27</sup>. At the same time, there is no established common EU standard regulating these issues, though one may observe a trend towards introducing legal measures on gender recognition, which take different forms in different countries<sup>28</sup>. A report prepared for the European Commission is also a testimony of a varied situation of transgender persons in EU member states<sup>29</sup>. It should be stressed that Belgium, Denmark, Ireland, Luxembourg, Malta, Norway and Portugal were indicated in the mentioned report as a states with the most progressive approach to the legal recognition of gender, based on the self-determination model.

17. Taking this situation into account, FRA has developed recommendations for UE member states. "EU Member States should ensure the full legal recognition of a person's preferred gender, including the change of the first name, social security number and other gender indicators on identity documents. Gender recognition procedures should be accessible, transparent and efficient, ensuring respect for human dignity and freedom. In particular, divorce and medical interventions, such as sterilisation, should not be required in legal gender recognition processes. EU Member States should fully recognise documents and decisions issued by other EU Member States in the area of legal gender recognition, to facilitate the enjoyment of trans persons' right to freedom of movement in the EU"<sup>30</sup>.

18. FRA recommendations are in line with the Recommendations of the Council of Europe's Committee of Ministers (CoM) CM/Rec(2010)5<sup>31</sup>, which provide that: "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; member states should also ensure, where appropriate, the corresponding recognition and changes by non-state actors with respect to key documents, such as

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<sup>25</sup> Letter of 14 January 2020 (incorrectly stating 2012 as the year of issue), ref. DLPC-IV.082.1.2020.

<sup>26</sup> Letter of 9 January 2020, ref. ZPN.0164.1.2020.

<sup>27</sup> FRA, *Being Trans in the EU Comparative analysis of the EU LGBT survey data. Summary*, 2015, [https://fra.europa.eu/sites/default/files/fra-2015-being-trans-eu-comparative-summary\\_en.pdf](https://fra.europa.eu/sites/default/files/fra-2015-being-trans-eu-comparative-summary_en.pdf), p. 11.

<sup>28</sup> FRA, *Being Trans...* (2014), p. 79.

<sup>29</sup> M. van den Brink, P. Dunne, *Trans and intersex equality rights in Europe – a comparative analysis*, European Commission, [https://ec.europa.eu/info/sites/info/files/trans\\_and\\_intersex\\_equality\\_rights.pdf](https://ec.europa.eu/info/sites/info/files/trans_and_intersex_equality_rights.pdf).

<sup>30</sup> FRA, *Being Trans...* (2015), p. 13.

<sup>31</sup> Council of Europe, *Recommendations of the Council of Europe's Committee of Ministers (CoM) CM/Rec(2010)5*, [https://search.coe.int/cm/Pages/result\\_details.aspx?ObjectID=09000016805cf40a](https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805cf40a).



educational or work certificates” (para. 21). Furthermore, the CoM recommends that “[p]rior requirements, including changes of a physical nature, for legal recognition of gender reassignment, should be regularly reviewed in order to remove abusive requirements” (para. 20). In 2018 similar recommendation prepared the Independent Expert on Protection against Violence and Discrimination based on Sexual Orientation and Gender Identity (SOGI) appointed by the UN Human Rights Council. The Independent Expert has called states to “enact gender recognition laws concerning the rights of trans persons to change their name and gender markers on identification documents.”<sup>32</sup>

19. Also it is worthy to recall the views adopted by the UN Human Rights Committee under article 5 (4) of the Optional Protocol, concerning communication No. 2172/2012 (G. v. Australia) in which the Committee found that requiring transgender persons to divorce prior to obtaining full legal gender recognition is contrary to the International Covenant on Civil and Political Rights<sup>33</sup>. The Committee noted also that “the author’s [author of the communication] argument that the invasion of privacy stems from the fact that her sex is different from that recorded on the birth certificate; that her birth certificate thus reveals private information about the fact that she is transgender, as well as her medical history”.<sup>34</sup> Finally the Committee stressed: “following her [author’s of the communication] gender reassignment, she was lawfully issued with passports designating her as female, and changed her name on, inter alia, her birth certificate, passport, driver’s licence and Medicare card. It is also uncontested that as a result of her gender reassignment, the author has lived on a day-to-day basis in a loving, married relationship with a female spouse, which the State party has recognized in all respects as valid. There is no apparent reason for refusing to conform the author’s birth certificate to this lawful reality”<sup>35</sup>. As a consequence the Committee found a violation by Australia of articles 17 (freedom from arbitrary or unlawful interference with privacy, family) and 26 (prohibition of discrimination) of the Covenant. Mentioned case shows that respect of the right to privacy of transgender persons is an important value from the perspective of UN human rights treaty bodies. Given the above, it is worth noting some legal measures for gender recognition adopted in other jurisdictions, in particular in the context of disclosure of gender recognition in official documents.

20. Malta was one of the first EU members that adopted modern gender recognition measures. In 2015, the country enacted the Gender Identity, Gender Expression and Sex Characteristics Act<sup>36</sup>, which introduces a fast and approachable gender recognition procedure enabling a transgender person to specify the gender with which they identify.

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<sup>32</sup> Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity, issued on 11 May 2018, ref. A/HRC/38/43, § 98, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G18/132/12/PDF/G1813212.pdf?OpenElement>.

<sup>33</sup> Communication No. 2172/2012, ref. CCPR/C/119/D/2172/2012, [https://tbinternet.ohchr.org/\\_layouts/15/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2f119%2fd%2f2172%2f012&lang=en](https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2f119%2fd%2f2172%2f012&lang=en)

<sup>34</sup> *Ibid.* § 7.2.

<sup>35</sup> *Ibid.* § 7.9.

<sup>36</sup> The Gender Identity, Gender Expression and Sex Characteristics Act, No. XI of 2015, [https://tgeu.org/wp-content/uploads/2015/04/Malta\\_GIGESC\\_trans\\_law\\_2015.pdf](https://tgeu.org/wp-content/uploads/2015/04/Malta_GIGESC_trans_law_2015.pdf).

The procedure allows for amending a birth certificate of the person concerned. The Act stipulates that a person requesting a change of the gender recorded in documents and a change of name and surname is entitled to demand that a full certificate of the act of birth showing the particulars resulting from the annotations be issued to them so however that there shall be indicated on such certificates the annotations that have been made upon it by virtue of a decree of a court or in terms of the procedure established under this Act without the details of the said annotations being specified (Section 4.6). As a result, the Director of Public Registry should not give any information contained in the register indicating the original act of birth except insofar as expressly provided in the provisions of this Act (Section 4.6.c). Section 4.7. of the Act states that: "The said information or copy of the original act of birth may be given with the consent of the person to whom the certificate refers; or ... upon an order of the Court", which may also be issued in specific situations and "after taking into consideration all relevant circumstances" and in recognition of the right to privacy of the person to whom the documents refer. Furthermore, the Act stipulates that "Accessibility to the full act of birth shall be limited solely and exclusively to the person who has attained the age of eighteen years and to whom that act of birth relates or by a court order" (Section 8.1).

21. The question of non-disclosable information about gender recognition procedures has also been acknowledged in the New Zealand legislation. According to the Births, Deaths, Marriages and Relationships Registration Act 1995, if the gender recognition procedure has been successful, copies of a birth certificate should contain the information on the "nominated sex" (and the appropriate names and surnames that accord with the nominated sex) that results from a court's decision ("declaration"). These documents are issued in such a manner as if the amended data had been recorded upon a person's birth and no information on the court's declaration is included therein. As a rule, the information on the procedure is confidential and their disclosure is only allowed after the passage of 120 years unless the person concerned approves disclosure or disclosure is required by the court or a civil registry office.<sup>37</sup>

22. Similar solutions operate in Argentina, pursuant to the Gender Identity Law ("GIL") adopted in 2012<sup>38</sup>. The GIL was one of the first most progressive legal acts related to gender recognition. Under the GIL, a person can request an amendment of their gender and name recorded in civil status registers, such a request leads to the issuance of the new birth certificate with the amended entries. The GIL provides that the amended birth certificate and new personal identity documents may not include any references to the fact that they have been issued in connection with a gender recognition procedure (Article 6). Furthermore, the GIL stipulates that the fact of a change of sex designation in civil status registers and a change of name may not be disclosed, unless with the consent of the person concerned. The above restrictions apply also to access to the initial version of the

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<sup>37</sup> M. Szeroczyńska, "Sytuacja prawna osób transpłciowych w Polsce. Raport z badań i propozycje zmian" in Dynarski, Śmiszek (Eds.), *Sytuacja prawna...*, p. 139.

<sup>38</sup> English Translation of Argentina's Gender Identity Law as approved by the Senate of Argentina on 8 May 2012, <https://tgeu.org/argentina-gender-identity-law/>.

birth certificate, which may be obtained only by persons authorised by the person concerned or based on a written and reasoned judicial decision (Article 9).

23. Also the British legislation pays the attention to the issue of protection of transgender persons' privacy. The Gender Recognition Act 2004 ("GRA")<sup>39</sup> stipulates that it is an offence for a person who has acquired information connected with the gender recognition procedure in an official capacity to disclose the information to any other person (Section 22.1.). The GRA lists specific situations when disclosure of information is permitted (Section 22.4.). In general, information about person's application for legal recognition of their acquired gender can be revealed for the purpose of court proceedings, preventing or investigating crime. In Equal Treatment Bench Book stressed: "The policy intention behind section 22 appears to have been that disclosure would only be permissible if made for the purpose of court proceedings; that is to say not as a generality within proceedings, but as relevant to the fundamental purpose of the proceedings themselves. There are obvious instances when disclosure will be made for this purpose, eg for the recovery of a debt incurred in the previous name/gender. (...). However, judges should be aware of the sensitivities, and exercise extreme caution about 'outing' someone where their gender is not relevant to the specific issue(s) in the case".<sup>40</sup>

## V. CONCLUSIONS

24. In view of the arguments presented above, we would like to draw the following conclusions:

- Although there is no single common model of gender recognition procedure, there is a clear trend, also among European countries, towards the adoption of measures designed to enable and facilitate the full respect of the gender identity of transgender persons.
- National regulations adopted to address the need for respecting the right to privacy of transgender persons, *inter alia* by preventing situations where their previous identity or originally assigned gender would be revealed.
- The absence of the necessity to disclose previously used particulars of transgender persons (also in official documents) may be considered as a manifestation of full respect for their gender identity, dignity and right to privacy.
- The outcome of *Y. v. Poland* will be significant not only for the applicant but also for other transgender persons in Poland, whose situation is similar to that of the applicant.

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<sup>39</sup> <http://www.legislation.gov.uk/ukpga/2004/7>.

<sup>40</sup> Judicial College, Equal Treatment Bench Book, 2018, p. 249, <https://www.judiciary.uk/wp-content/uploads/2018/02/ETBB-February-2018-edition-September-2019-revision.pdf>.