

ABSTRACT

Dissertation on Legal Aspects of Gender Reassignment. Characteristics of the topic, definition of the aim of the thesis and methods. The statement that "Man is born free and is everywhere in chains" is not merely a well known sentence with which the Enlightenment philosopher Jean Jacques Rousseau opened his treatise *On the Social Contract*, for it reverberates the idea of universal human freedom. Therefore, this quotation can also be applied to the very sensitive issue that is the subject of this work.

It has been argued in the literature that the issue of gender reassignment is a reminder that the social categories (male, female) that we encounter in everyday life are not a definitive description of the diversity of society, but a reflection of individual imagination. One cannot but agree with this, although there are other views.

The first references to sexual mismatch can be seen in antiquity. Literature suggests that men at this time were characterised by femininity in their behaviour and character. Among the well-known medieval figures, Joan of Arc, who removed her breasts, cut her hair and dressed up as a man, can be mentioned. In these times, no distinction was made between transvestitism and transsexuality. It was not until 1897 that Doctor Howard published a case of a man who fit today's description of a transsexual.

Human identity is determined by a legal category. The legal system does not only work with the categories of man or woman, but also creates a certain boundary between them. Even if people who do not fall into traditional categories are not excluded from society, they are marginalised precisely because of their uniqueness. They are the border between what is accepted and what is not. In Western philosophy, identity "plays" a very important role because it determines the essence of our being in the world. It represents a combination of personal stories, which ensures the expression of human personality in society. However, an interesting point is the discovery that identities that are considered natural did not arise by themselves, but are the result of a power (symbolic) structure. As an example, there are various historical situations in which identities were created that were not the result of self-determination, but the result of the actions of other groups.

However, the very existence of the individual in society is not possible without the surrounding connections and difference of others, or the ability to become aware of the individuality of the self by looking at it from an outsider's perspective.

Social reality is an open space in which interactions occur that both create and disrupt individual identities. It is an ongoing, continuous, open-ended process that can be termed freedom. It is recognised, however, that freedom can only work in cooperation with others, for individual freedom begins where the freedom of others begins.

It is this indicated approach to trans people, who are often labelled by society as anomalous or mentally ill, and also because of the paradigm shift, that has resulted in a worldwide effort to depathologise people who do not identify with the gender assigned at birth. This is closely related to the topicality of the issue of gender reassignment, since the update of the International Classification of Diseases, effective from 1 January 2022, has replaced the previously used 'gender identity disorder' with 'gender incongruence'.

The new designation is described as a significant and long-standing discrepancy between authentically experienced gender and assigned sex and is included in the chapter on sexual health. Thus, the diagnosis associated with trans identity is now excluded from the mental disorders section. While trans people are no more likely to suffer from mental illness than the general population, they may experience mental health problems or disorders as a result of, for example, long-term stress, bullying or discrimination.

It is often heard that the topic of gender reassignment and related aspects is marginal. The argument for this statement is often based on the small number of cases that are affected by the issue. There are also

not many works that deal with it, which is most likely the reason why trans people are considered mentally ill by the public.

Therefore, the aim of this thesis is mainly a more comprehensive treatment of the issue in relation to selected foreign legislation and a search for arguments why the current and effective Czech private legal regulation of gender reassignment is insufficient and incorrect.

Although the issue of gender reassignment largely concerns sociological and health disciplines, the topic will be treated through the lens of law with an emphasis on the private law sphere, as gender reassignment is part of the civil status of a person. The medical or sociological link will be given only marginal attention. However, the topic would certainly benefit from a future publication in which the different aspects (not only the legal ones) would be intertwined.

Thus, the first situation is the impossibility of unambiguously determining the sex after the birth of the child. This is the issue of so-called intersex children. If it is not possible to determine the sex unambiguously, it is necessary to examine the newborn in various specialised departments and, on the basis of the predominant sex characteristics of the child, to determine whether it is a boy or a girl. According to experts, approximately one in 5 000 babies is born with an undefined sex. In about four-fifths of these cases, one of the external sex organs dominates. Medical solutions to such situations are different. However, surgical interventions and medical procedures leading to gender 'normalisation' are not necessary in most cases, as they can leave lifelong consequences, whether in the form of psychological trauma or physical disability. Czech neonatologists reject the gender normalisation approach and state that after birth, newborns are only operated on for organ function, e.g. urethral lengthening. "In fact, 'normalising' gender after birth can cause serious problems in the future, as the person begins to identify with the gender that was denied after birth.

However, a situation can also arise in life in which a person is born into a male or female body, or the determination of sex after birth is made without difficulty, but the individual begins to "identify" with a person of the opposite sex, or does not feel a sense of belonging to either of the binary concepts of gender. A person who does not identify with their sex assigned at birth is called transgender. Given that this is a foreign term, the term trans person will be used throughout this thesis.

The two situations outlined are indicative of the fact that it is not always possible to determine the gender male or female. Alternatively, this process can take place throughout a person's life. The law should respond accordingly to such situations, ensuring respect for the uniqueness and autonomy of the human will.

For the purpose of this thesis, the concept of gender binary will be established, consisting of its strict distinction between men and women only. It is therefore necessary to distinguish the following.

Currently, a person's gender is determined at several levels. Genetic sex is determined by the sex chromosomes on which the genes are located, which decide at an early stage of embryonic development on the formation of the gonads (testes in men and ovaries in women). The activity of the gonads (or the hormones they produce) causes the formation of the external and internal sex organs. The appearance of the external genitalia thus determines the biological sex of the child after birth, or the matrilineal sex - the officially assigned sex. Following this, the person is assigned a birth number, part of which is an indication of sex.

In addition to genetic and biological sex, social sex is also distinguished. This is based on the social role in which the person is situated in society (gender). The concept of gender was introduced into the Anglo-Saxon system in the 1950s. The reason for its creation was the birth of a child with an undefined gender. Subsequently, it was awaited to see how it would develop further, or to describe a set of behaviours and self-identification for possible surgical intervention. However, the concept of gender, as a sociological

concept, has changed considerably since the 1950s. The original instrument used to justify surgical intervention has turned into a deeply rooted legal concept.

Within the social concept of gender, then, we speak of the traditional roles of woman and man, while the very education of the individual directs him or her into an order in which there is a dichotomy of roles, male and female. Identity formed in this way, in addition to its inclusion in society, becomes a means of communication with the outside world and with oneself.

The next category is psychological gender. This refers to whether an individual feels like a man or a woman. The term gender is used here as well, but the psychological perception of one's gender identity may differ greatly from the socially constructed one. The psychological perception of gender is therefore based on the individual himself, who, despite the pressure exerted by society on his behaviour (determined by biological characteristics), does not identify with the 'assigned' role. Most trans people cannot be categorised in the world of identities, as they create a separate type that is distinct from the dichotomy of male or female.

It is possible to state that gender identity thus expresses a subjectively perceived sense of belonging or, on the contrary, contradiction with one's own body, with its primary and secondary sex characteristics, and with the social role attributed to a given sex. Its reflection can be found in the thinking, feeling and behaviour of the individual, including his/her profession, interests, social relations. In Czech we speak of gender identity, but English uses the terms gender and sex. The term transgenderism is also sometimes used for some not entirely clear gender incongruities or for their aggregate. It is understood as a feeling of subjectively perceived discomfort related to a mismatch between one's gender identity on the one hand and one's gender role and biological sex on the other. Its most pronounced form is transsexuality.

The term transgender (trans person) is a label for a group of people who do not identify with their body. There is a contradiction between their biological and psychological sex. These persons perceive or express their gender identity as something other than the identity assigned to them at birth based on their physical features. The University of California, San Francisco analysed data from 2006-2016 and concluded that about 0.39% of the population in the US identifies as trans. There are approximately fifteen hundred trans people in the Czech Republic (i.e. about 0.00015% of the population). This is due to different terminology, which leads to inaccurate statistics. Originally (first half of the 20th century) the term transsexualism was used as a medical category for people who have undergone some phase of medical gender reassignment. Since 1980, the medical category changed to a psychiatric diagnosis, and in 1994 to the label gender identity disorder, gender dysphoria (2013), until 2022, when, with the aim of depathologizing, gender nonconformity was removed from the mental disorders chapter. Thus, currently, the label trans person includes people who have undergone gender reassignment, but also those who have not undergone medical adjustments.

For the sake of interest, it may be added that not all trans people need to perceive their gender as the opposite sex to the one they were assigned at birth. The term fluid gender identity is used for this phenomenon. This means that a person does not consistently fix their gender identity to one gender, but sometimes feels themselves to be a woman, sometimes a man, or even perceives their gender identity as a mixture of the two, or creates their own definition of gender identity.

Trans people meet their needs differently. For some, it is enough to be the person of the "dream" gender only for a while, without the need to change gender. Others, on the other hand, require everything, a new ID card and a surgical change.

One other type of gender non-conformity is undoubtedly dual role transvestitism. It is typical of heterosexual men who live in the role of the opposite sex for the psychological satisfaction of the possibility of a temporary change, not for the sexual excitement. There is no clear desire for gender reassignment, although for some it represents a transitional phase of transsexualism.

In the Czech Republic, gender non-conformity is resolved by sex reassignment surgery, which is covered by public health insurance. There are philosophical, ethical and medical questions associated with this solution, such as whether it is ethically correct to change otherwise functioning and healthy bodies at all, since anorexia is also not treated by liposuction, or why to solve gender non-conformity by plastic surgery. However, there are also undoubtedly legal issues surrounding this topic.

Many trans people live in happy heterosexual couples or marriages. Over time, however, their identification with people of the opposite sex escalates, until eventually they begin to live in the opposite role. The literature suggests that when a person chooses to live in an opposite-sex role, a wide range of issues are involved. In addition to the various administrative tasks involved in changing one's name and registry, it also involves communicating one's new civil status to one's surroundings, employer or the authorities, which is not always received kindly. In these situations, trans people are often victims of discrimination. The issue of trans people is linked to the difficulties of everyday life, whether it is using women's or men's public toilets or trying to buy hormonal products abroad, as they are only available in the Czech Republic on prescription.

It is the distinction between genetic, biological, social and psychological sex, as defined above, that is essential to understanding trans people.

As noted earlier, in 2019 (effective January 1, 2022), the WHO will no longer classify gender identity disorder (GID) as a psychiatric disorder. Its expectation was that member countries would build on this change by removing the diagnosis from their practices. What did the Czech Republic say? We do not know yet. The view that trans people were born into the wrong body or are trapped in it continues to be held in our environment. This approach was abandoned long ago. Trans people often state that they were not born into the wrong body, but into a trans body. There is no universal category, but as mentioned above, everyone goes through a different phase or sees the satisfaction of their desire differently.

Although gender is biologically determined from birth in a binary sense (male or female), people are allowed to legally change it.

It has been suggested in the literature that the original only possible solution to transsexuality was invasive surgery as a condition for changing status issues or changing the gender information on identity documents. Today, however, medical confirmation is sufficient for legal recognition of a preferred gender in many countries. The development of ECtHR case law has contributed to this concept, but so has the widespread social debate. In some European countries, an even more liberal approach is in place. This is based on self-identification. Gender reassignment is possible through a personal declaration by the person concerned to the registry office.

The NGO Transgender Europe has reported that, based on recent research, most European countries require medical confirmation of gender identity disorder for legal recognition of a preferred gender, while a minority (including the Czech Republic and Slovakia) make invasive surgery for sterility conditional.

Considering that the beginning of 2022 has set a completely new direction in the field of sex reassignment (by updating the International Classification of Diseases), I decided that the focal point of my research would be the European approach to sex reassignment in relation to the Czech private law.

I will examine the presented issue from several perspectives, both from the human rights dimension, the concept of foreign legislation of selected countries, the case law of the European Court of Human Rights and the Czech legislation.

Taking into account the above, one of my main goals is to develop a more comprehensive treatment of the issue of legal regulation of gender reassignment, and I would like to find answers to the following research questions.

"What is the current European standard on the issue of legal regulation of gender reassignment"?

"Is domestic private law regulation of gender reassignment in line with the European standard"?

If the European concepts on gender reassignment are to be presented in the thesis, I have chosen several sub-areas of research for this purpose.

Nowadays, the gradual convergence of civil (family) law regulations in European legal systems cannot be overlooked. The jurisprudence of the European Court of Human Rights ("ECtHR") is a significant contributor to such harmonization of legal rules. This is despite the fact that its jurisprudence often clashes with the consensus that is absent among the Contracting States to the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") on various legal issues. Despite this, it has a key function in the protection of human rights for the States Parties to the Convention, including the Czech Republic. Last but not least, it contributes to the unification of interpretation; therefore, in relation to the European scale of the issue under examination, attention should also be paid to the decision-making practice of the ECtHR.

In the light of the above, the thesis is divided into five chapters.

Trans persons represent a particularly vulnerable group of people. Human rights are closely linked to this, therefore the first part of the thesis will be carried out in the light of human rights standards at national, EU and international level. This chapter aims to analyse the compatibility of the conditions for legal recognition of gender reassignment with the protection of human rights. Considering that trans persons struggle most with the discrimination they face in different areas of their lives, the issue of discrimination against trans persons was chosen for the subchapter of this thematic focus. An extensive part of this thematic block has already been published in the journal *Právník*.

The chapter on human rights law will be followed by an excursion, using the comparative method, into selected European countries where there are different approaches to the treatment of trans people. The criteria for dividing these countries into three models will be the concepts of legal recognition of gender reassignment. The first model, which is based on strong medicalization, will be represented by the Slovak Republic, the Republic of Poland and the Republic of Turkey.

The second model will include countries whose approach to gender reassignment is more lenient in medicalization. Here, European countries include the Federal Republic of Germany, the Republic of Austria, the Kingdom of Belgium, the Italian Republic, the Kingdom of Spain and England. Another approach in relation to gender reassignment will be demonstrated in the legislation of the Kingdom of Sweden and the Kingdom of Denmark. Beyond Europe, and of interest, attention will be given to the Republic of Argentina. This is a country that is considered to be the most 'progressive' in the world in the field of gender reassignment.

I do not pretend to make a detailed comparison of the various legal provisions, but my aim is to focus primarily on selected aspects of gender reassignment. I consider these to be, for example, age, the conditions for legal recognition of the preferred gender or the nature of the proceedings. With this chapter, I will follow up on my article entitled *Foreign Inspiration in Relation to Gender Reassignment Legislation*, published in the journal *Právní rozhledy*.

In the following chapter I will analyse the case law of the ECtHR, also in the context of selected aspects relating to the issue of gender reassignment. In its jurisprudence on the issue under review, the ECtHR has focused on the issues of changing the registration of sex information in the civil registry, the absence of marriage or registered partnership and surgical intervention as conditions for the legal recognition of preferred sex. The aim of this part of the paper is not merely to describe the legal conclusions of the ECtHR case law; on the contrary, the intention is to analyse the case law and draw individual sub-conclusions from the general one. This part will be based primarily on an article published in the journal *Právník* and also on the paper *Marriage for Transpeople*, presented at the Days of Law 2018 conference.

The following chapter will shift the focus to the Czech Republic. This will initially focus on the development of legal regulation of gender reassignment on its territory. However, the main focus will be on the development of the relevant health legislation, as well as the concerned legislation in the field of civil registry and population registration. The methods used will be mainly analysis and abstraction, and the historical method will also be partly applied. This part of the thesis follows the article Gender reassignment in the Czech legal system, published in *Právni rozhledy*, and the paper Civil status of transgender in the Czech legal system presented at the COFOLA 2018 conference.

The follow-up to the previous ones will be the Czech *de lege lata* legislation. This part aims at a critical analysis of the domestic legislation. A more detailed analysis will be made of the key private law regulation contained in the provisions of Section 29 of Act No. 89/2012 Coll., the Civil Code (hereinafter referred to as the "CC"), which introduced the issue of civil aspects of gender reassignment into the Czech legal system with effect from 1 January 2014. However, the subject of examination will be no less the norms that control the issue of gender reassignment in the Czech legal system in the sphere of health law and registration. These are Act No. 373/2011 Coll., on Specific Health Services (hereinafter referred to as "SpecZdrSI"), which deals with the issue of gender reassignment in transsexual patients, Act No. 301/2000 Coll., No. 133/2000 Coll., on Population Registration and Birth Numbers and on Amendments to Certain Acts (the Population Registration Act); hereinafter referred to as "ZEO", concerning the change of birth number after undergoing gender reassignment. In relation to procedural law, this chapter will conclude with a discussion of the effect of a change of sex on the commencement or course of civil court proceedings, and beyond that, it will discuss the proceedings that may arise in relation to a change of name and surname following a sex change. This part of the thesis will also follow up on the article Change of gender in the Czech legal system, published in *Právni rozhledy*.

Since the Czech courts have also dealt with the area of gender reassignment, their decision-making practice will be discussed in the next chapter. On these pages, it is also necessary to deal with the activities of the Public Defender of Rights, who actively assesses whether the persons concerned have been treated less favourably because of their different gender identification, in the context of methodological assistance to victims of discrimination, which will be addressed under the human rights dimension.

The chapters presented above will conclude with a *de lege ferenda* reflection on the forthcoming amendment to the Civil Code and the relevant provisions of the Act on Civil Registration, Names and Surnames. The latter represents a response to the developments already defined in this dissertation and to the current selected (not only) European concepts in the field of gender reassignment.

It should be added that the individual chapters conclude with partial conclusions, through which the issue under study is evaluated together with *de lege ferenda* considerations, using the method of synthesis. In the very end of the thesis, I will summarize its main ideas and results in relation to the research questions.

At the end of the dissertation, the research questions have been answered.

In the first of these, I asked the question "What is the current European standard on gender reassignment legislation"?

From the analysis carried out, especially of selected foreign legislation and also from the case law of the ECtHR, it can be observed that there is no consistency in European countries on the issue of legal regulation of gender reassignment. However, in view of the fact that in the European legal area there is a gradual convergence of the civil (family law) legislation of individual states, with the ECtHR making a significant contribution to this through its decision-making practice, it is possible to observe a shift towards humanism in most foreign legislation on the issue of gender reassignment, in relation to the shared values of the protection of human rights, including the protection of private family life, together with a uniform approach of the Contracting States to the Convention to ensure their protection.

In the light of the above, it is therefore possible to answer the research question posed by arguing that the European standard on the issue of gender reassignment legislation represents commonly shared values based on the protection of human rights. This is reflected in the issue of gender reassignment, or in setting the conditions for its legal recognition, in most countries in the concept of official gender reassignment (based on a personal declaration to the registry office) without surgical procedures, sterilization and dissolution of marriage.

As a second research question I set out to address at the beginning of this thesis, the question was "Is domestic private legal regulation of gender reassignment in line with the European standard"?

On the basis of the findings concerning the concept of the legal regulation of gender reassignment introduced into the Czech legal system through the Civil Code effective from 1 January 2014, which, according to the Explanatory Report to the Civil Code, was supposed to be inspired by the Quebec legislation, it can be stated that the "stumbling block" lies in the fact that the Czech legislator omitted the amendment to the Quebec Civil Code, which was already in preparation at that time. The latter rejected surgery as a condition for legal recognition of preferred sex. At the same time, there was a split in terminology, since the Quebec Civil Code regulated the term change of designation of sex, i.e. "change of designation of sex", not the terminology chosen by the Czech legislator, i.e. "change of sex", as in the provisions of Section 29 of the Civil Code.

Thus, although the Czech legislator, in the framework of the recodification of the Civil Code as the basic source of private law, remembered the trans person in the regulation of the civil status of a person, several serious problems accompany the effective regulation of gender identity. In addition to the more general ones, such as the absence of relevant research and extensive debate, involuntary divorce or dissolution of registered partnerships, involuntary surgery and sterilization, mention can be made of the assignment of a new birth number to trans persons. This is allegedly a "relic" of the communist past, where there were no insurance numbers, as health care was provided free of charge by the state.

It has been suggested by experts that a new birth number can pose a real problem for trans people, as the change of gender has no legal continuity and the person is forced to disclose to the public his or her 'old birth number' and therefore 'previous gender'.

As already mentioned, the current Czech private law regulation of gender reassignment is not considered optimal. However, the question remains what it should be. As indicated, foreign legislation varies, the standard remains a question, but it tends towards legal recognition of preferred sex without invasive surgical procedures, with emphasis on the autonomy of the person's will, its determination, respect for privacy, life, sex (civil status), i.e. no scalpels and torture.

If we assess the relevant legislation in neighbouring countries, it is safe to say that, in contrast to the Slovak Republic and the Republic of Poland, we have gender reassignment legislation, which also includes debates on amendments. Although, on the contrary, Austrian and German legislation has already adopted a humanistic approach to the issue of gender reassignment, it should be appreciated that after the fall of the Iron Curtain, Czech legislators began to address the issue of trans persons not only when amending or adopting health regulations (in 1991 and 2011), but also when adopting the Civil Code (2012).

The idea that the Civil Code should be conceptually changed after a long preparatory phase and wide discussion is disturbing to many stakeholders. Civil codes, as pillars of private law, should not be changed frequently on conceptual issues. On the other hand, if one agrees with the view that the legislation enshrined in the Civil Code does not reflect developments in European legal systems and the case law of the ECtHR, then it is undoubtedly appropriate to seek to make changes in the field of trans persons.

Although there has been a widening of the social debate in the Czech Republic concerning the issue at hand, as well as an effort to find a more appropriate concept of legal recognition of gender reassignment in civil law, it is currently not possible to have an effective legal regulation of gender reassignment contained in the provisions of Section 29 of the Civil Code, which makes the legal recognition of gender reassignment by surgery conditional on the simultaneous disabling of reproductive function and the consequences of gender reassignment in the form of the dissolution of marriage, can be considered to be in line with the European standard of protection of human rights, or a concept which does not make the legal recognition of the preferred gender conditional on surgery leaving permanent consequences.

For persons who are born with an undefined biological sex, the Czech legislation does not create any space. This leads to situations in which intersex people are forced to live in a role characteristic of the sex they were "authoritatively" assigned at birth, without being given the space to express their feelings or being allowed to live in a role that is not typical only of men or women. The neighbouring country of Germany, for example, is inspiring in this respect, with its 'X' gender category. The introduction of the 'X' gender category provides the possibility of having a child born with an undefined gender entered on the birth certificate, and it will be up to the individual to decide in future whether to change the entry to male or female or to keep the current gender.

In considering the possibility of a third gender, the question must be asked: why is it necessary to determine gender after the birth of a child? Is it not really only because of the established social norms that have prevailed since ancient times, according to which society is made up only of men and women?

Thus, the answer to the second research question is: "No, the domestic private legal regulation of gender reassignment is not in line with the European standard if we consider it to be respect for the human person, humanity and not a scalpel!"

In the very conclusion of this dissertation I would like to summarize that although currently the Czech private legal framework of gender reassignment is based on an outdated concept, and this is due to the public's ignorance of the topic, it is a legal issue that is undergoing dynamic development not only in law, but also in the medical or sociological field. Therefore, in my opinion, it is necessary to proceed further in the analysis of the legal development of the concepts of gender reassignment not only at the European level, to subject the obtained knowledge to discussion by the professional public and then to take everything into account in the framework of the amendment of the basic source of Czech private law regulating the civil status of man.

However, I believe that the first step in opening up society to trans people will be to create a discourse within which we will be able to rethink the symbolic organization of our society. The current attitude towards trans people is a clear statement of our inability to imagine an alternative world order. One can agree with the view that we prefer stubborn preservation to the openness that is a fundamental condition for the functioning of a modern democratic society.