Ignorance and Evil

The Hungarian Constitutional Court on Legal Gender Recognition for Trans People

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21.02.2023 doi: 10.17176/20230221-233144-0

On 2 February 2023, the Hungarian Constitutional Court (CC) published its long-awaited decision on legal gender recognition. Upon a petition submitted by a judge in a case pending before her, the CC for the first time reviewed the provisions introduced into the Act on Registry Procedure (RPA) in late May 2020 requiring the registration of the sex at birth (instead of sex) and banning any modification to that registry entry. The CC held that since the concept of sex at birth is contained in the Fundamental Law, its mandatory and unalterable registration does not constitute a violation of human dignity and the right to respect for private life. With this decision, the CC chose to remain concordant with the perceived political expectations, blatantly served the interest of the government majority, and echoed their fixation of biologically determined sex.

Legal gender recognition for trans and intersex people in Hungary

Legal gender recognition for trans and intersex people in Hungary has never been properly regulated. Despite this, between the early 2000s and 2018, trans and intersex people could change the gender marker and their name in official documents. Since 2014, certain procedural details were regulated in the ministerial decree on civil status registries, but the legislation did not provide answers to such basic questions as who and under what conditions could apply for legal gender recognition, what medical expert opinions are needed, and who decides on their acceptability.

To settle the dispute among public bodies involved in the procedure, and as the first step of a series of anti-LGBTQI legislative measures, the government submitted an omnibus bill to Parliament on 31 March 2020. Section 33 of the bill banned legal gender recognition: it amended the RPA, and mandated recording of "sex at birth" instead of "sex" in the birth registry. Sex at birth is defined as "the biological sex based on primary sex characteristics and chromosomes". Additionally, a paragraph was included explicitly declaring that once recorded, "sex at birth" cannot be amended, and that given names have to correspond to "sex at birth". Hungarian given names are gendered and ought to be chosen from authorized lists for male and female names.

In March 2021, the CC declared that the new rules cannot be applied retroactively, however, it tackled the overall constitutionality of Section 33 only in the case discussed below. While the CC had a constitutional deadline of 90 days to decide the case, it took the Court 585 days to deliver its decision.

The petition - as it should look

The petition submitted by a judge in an individual case concerning the rejection of legal gender recognition based on Section 33 presented a rights-based argumentation: while the legislature declared that the biologically determined sex at birth is a relevant personal identifier, the petitioner reminded the CC that both its own case-law and that of the European Court of Human Rights acknowledged the right of transgender persons to be recognized by the state based on their gender identity and not their biological sex. Prior to Section 33, the CC has not directly addressed the issue of legal gender recognition as such, but it did mention the right of transgender people to change their name as fundamental in a broader decision on spousal names, and it found that trans people legally residing in Hungary should also be able to change their names. The petitioner judge based the constitutional challenge on two pillars: Article II

and Article VI (1) of the Fundamental Law (human dignity and right to respect for private life, respectively). The plaintiff in the underlying case – a client of Háttér Society – does not identify with his sex registered at birth, his request for legal gender recognition was supported by the opinion of a psychologist and a psychiatrist. However, as a result of Section 33, he was unable to change his gender marker in the birth registry (and consequently his name) to his social reality.

The petition recalled that the CC had already recognized the right of transgender people to change their name and gender marker as a fundamental right; the CC understood it as an aspect of human dignity. The petition further claimed that both Article VI (1) of the Fundamental Law and Article 8 of the European Convention on Human Rights are relevant when examining the plaintiff's right to have his gender marker changed. The petition importantly underlined: the European Court of Human Rights (ECtHR) had consistently held that states have a positive obligation to create and maintain an effective and accessible procedure with clearly identified criteria that allow for the legal gender recognition of trans people. As the question affects the most intimate aspect for private life, states enjoy a limited margin of appreciation and cannot – for instance – condition legal gender recognition on having undergone gender affirming medical interventions.

The decision - how to avoid a rights-based approach?

Despite being served the arguments on a silver platter, the CC chose a strikingly different line of reasoning. First, it limited the admissibility of the case to the issues raised with respect to recording sex at birth in the registry (not addressing the question of name change, since the judge did not specifically invoke those provisions of RPA). Second, the CC reviewed "the legal environment" of the challenged provisions. It endorsed without any critical reflection the explanatory memorandum attached to Section 33: that sex at birth recorded in the registry only declares a fact established by a medical doctor. The decision creates a weak, unsubstantiated, and self-contradicting rationale for the need to introduce a new identifier into the system: "The registry proves the registered facts, rights until the opposite is proven, thus it does not create rights. However, based on the sex declared in the registry, rights and duties may emerge, thus it is necessary to define sex at birth." (24) The CC recognizes that there are people whose gender identity is different from their sex at birth (even though the CC seems to conflate gender identity with having undergone gender affirming medical interventions (e.g., 50)), and that the registration at birth might limit their right to self-determination. However, it arrives at the conclusion that while there are compelling reasons to record sex at birth, there is no similar compelling reason to record one's gender identity. This – it claims – means that "the state does not take sides when it comes to its citizens' gender identity" (24).

The CC considers the compatibility of the impugned provisions – in line with the petition – with human dignity, the right to self-determination and the right to private life. While the CC addresses these provisions one-by-one, the arguments put forward follow a similar logic, and are excruciatingly repetitive. The CC claims that since sex at birth is a factual datum based on medical expert opinion, its registration cannot contradict human dignity. As to why that is the case – the CC provides no explanation. Following this argumentation, the state registration of any factual data that can be established by a medical professional (genetic data, hereditary diseases etc.) cannot be challenged with reference to human dignity.

The CC then proposes to answer two questions: (1) what data the state can register, and (2) whether the right to self-determination encompasses the right to have gender identity registered by the state, and if so under what conditions (33, repeated in 46). Regarding the first, the decision recalls the Ninth Amendment to the Fundamental Law and the amended text of Article XVI (1) which explicitly mentions children's right to self-identity in line with their sex at birth. The CC argues that since the concept of the sex at birth is contained in the Fundamental Law, its registration directly relates to the Fundamental Law, thus its registration cannot be in violation of the Fundamental Law.

The CC appears to argue that the mere fact that the Fundamental Law mentions sex at birth, justifies the state to record it. It adds that medical, penological, sport or labor law considerations also make its registration necessary and proportionate, although the proportionality is merely stated rather than demonstrated.

The decision acknowledges that the state cannot record any data in the birth registry: among other things, such data "need to relate to registry events", "be capable of identifying a given individual", and "be unique and if possible, unamendable" (35). While recording the parent or the date of birth is in fact related to the registry event, i.e. the birth, the CC does not clarify how and why a person's sex at birth is of relevance to the birth event. Furthermore, sex at birth is not a unique identifier, since around half of the population belongs to the same group. At the same time, race or skin color, for example, meet these criteria to the same extent as sex at birth does, and are also included in the text of the Fundamental Law. We can only hope that the CC has not given a green light to record such data in the birth registry.

Regarding question (2) the CC simply states that "in the current procedure it only assessed whether the registration of sex at birth as an unamendable datum is in compliance with the Fundamental Law" (47). The CC summarizes its finding by stating that "(t)he fact that the state registers the individual's sex at birth instead of or in addition to the individual's self-identified gender corresponding to their identity (…) can be justified for several reasons" (50).

Despite the fact that the petition contained an overview of the ECtHR case law and the CC could have benefited from the thorough amicus briefs submitted by the National Authority for Data Protection and Freedom of Information on data protection considerations, and the Hungarian Psychological Association on the negative mental health consequences of the lack of legal gender recognition, it failed to include even a summary of the ECtHR case law or these submissions, let alone address their arguments.

The questions put forward by the CC indicate that they had in fact understood the human rights questions implied by the petition, however, they either avoided answering those questions, provided formalistic, technical and circular responses, or claimed that answering the question would be beyond the scope of the case. The CC opted for only a cursory assessment of the justifications and failed to advance reasons why the balance tilts in favor of those – unsubstantiated – state interests (e.g., labor law or penological grounds) over human dignity. A more comprehensive inquiry would have allowed the CC to recognize that even if registering sex at birth is acceptable under the Fundamental Law (a contrary reasoning could have been advanced without much effort), this finding does not exclude legal gender recognition for trans people. The CC, for example, could have argued that a gender marker separate from sex at birth should be added to the birth registry and other public registers, and legal gender recognition could entail amending this marker in the registry and official documents. The CC did not foreclose such a solution (they emphasize that the registration of sex at birth is justified "instead of *or in addition*" to gender identity). This would have offered a practical solution for trans people (even if not a fully satisfactory one). The CC of course cannot legislate the introduction of such a new gender marker, but they could have found that the lack thereof constitutes a legislative omission in violation of the Fundamental Law. The lack of such finding is particularly alarming, since no one has standing to initiate a proceeding for declaring a legislative omission, the CC needs to act *ex officio*.

Conclusion

The CC made a cowardly decision: it chose to remain concordant with the perceived political expectations, blatantly served the interest of the government majority, and echoed their fixation of biologically determined sex. To reach this shortsighted conclusion, it not only defied its own jurisprudence but ignored the ECHR jurisprudence, too. Although the CC claims that "the state does not take sides when it comes to its citizens' gender identity", it unequivocally does: it only acknowledges identities it deems worthy of protection, i.e. the ones matching the sex at birth.

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SUGGESTED CITATION

Polgári, Eszter; Dombos, Tamás: Ignorance and Evil: The Hungarian Constitutional Court on Legal Gender Recognition for Trans People, Verfassungsblog, 21.02.2023, doi: 10.17176/20230221-233144-0.

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Langzeitarchiviert bei IntRechtDok unter: doi.org/10.17176/20230221-233144-0.