

Gender change in sport through the lens of law

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Abstract. This report aims to analyse gender change and legal cases related to participation in sports, sports ethics, sports legal relations, regulation and others. In order to solve the main tasks, achieve the goal and prove the hypothesis, a complex methodology is applied: a legal method oriented to the practice of law enforcement, a sociological - axiological method, a comparative analysis between methodological concepts, the judicial practice in Bulgaria and the EU. The analysis interprets decisions of the courts in Bulgaria, the EU and the IOC, as well as psychological and normative aspects related to gender change. European gender reassignment practice, as well as the conditions for legal gender reassignment, are also reviewed. Conclusion: legal gender change does not disturb the balance between personal and public relations, including civil law turnover, but this possibility introduces ambiguity, unpredictability and instability in sports legal relations.

1 Introduction

The state has an obligation to legislate the matter, but not to interfere in the personal choice of the individual. The law, including in sports, is obliged to regulate social phenomena. The EU supports cooperation between policy makers and dialogue with sports organizations in order to promote the positive values associated with sport and address the challenges [1].

What are the consequences of gender redefinition and what will happen legally in sports? Legally, there is no gender discrimination, so the state cannot treat you differently anyway. Medical aspects related to gender are related to: civil registration - Art. 8.1 Basic data for the civil registration of the persons are there: 1. Name; 2. Date - day, month, year, and place of birth; 3. Gender; 4. Citizenship [2].

There is no blanket ban on gender reassignment for transgender people. The conditions for legal gender reassignment are derived from case law, which has ruled positively on transgender claims.

Hypothesis: I assume that in the process of the research, various problems and variations related to the regulations of gender change in sport and its peculiarities on a national and European scale will be revealed. The purpose of the scientific research is to analyse gender change and legal cases related to participation in sports, sports ethics, sports legal relations and regulation. The following main tasks arise from this goal: to reveal and analyse

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interpretations, variations and leading interrelationships of regulations and legal gender change in sports in Bulgaria and the European Union; to analyse normative documents, including recommendations and reports from various commissions dealing with gender reassignment in a broad and narrow context; to draw conclusions and recommendations for the legal change of gender on a regional, national and European scale.

2 Methods

The subject of the research are problems related to gender change in sports and its influence on the sports system in Bulgaria and the EU. The object of the conducted research are normative documents, court practices in relation to the discussed issues at the level of Bulgaria and the European Union, recommendations, reports from various commissions, etc. In order to solve the main tasks, achieve the goal and prove the hypothesis, a complex methodology is applied: a legal method oriented to the practice of law enforcement, a sociological - axiological method, a comparative analysis between methodological concepts, the judicial practice in Bulgaria and the EU. The analysis interprets decisions of the courts in Bulgaria, the EU and the IOC, as well as psychological and normative aspects related to gender change. The scientific research was conducted in the period from January 2021 to May 2023.

3 Results

According to the spokesperson of the IOC - Mark Adans: "The situation is very complex and controversial. Dealing with it must go through maintaining balance and fairness. What we are sure of is that each sport must decide for itself how to proceed. However, in each different sport, athletes receive a different advantage, and sometimes none at all [3]. In their existence, people enter into relationships with each other on the occasion of, in connection with, and during the realization of a sports activity. They are internationally accepted and defined as educational, health, social, cultural and restorative functions. The current legal order is normatively established by the Constitution [4], the ratified international acts and the laws adopted by the National Assembly. A normal society is one in which people live according to socially valid and established norms [5]. Differences in gender change in sports should be interpreted at the level of amateur and professional sports, there is not and should not be a limitation of playing sports for hobby and health, but the issue is different in professional sports in which there are large prize funds and profits respectively.

The functions of sport are regulated both domestically and internationally. As a substantive part of sports, in our country they are regulated at the primary level already in chapter 1 of the Sports Law, in its article 4 [6].

The international and domestic regulation of sports completely overlap. In its article 4, the Sports Federation enumerates the following functions of sport: educational, health, social, cultural and restorative function. In order to allow gender reassignment, it is necessary to establish the status of transsexuality according to the International Classification of Diseases [7] in court proceedings. In the proceedings, it should be established that there is a discrepancy between the person's physical and mental sex. Expertise is required in which experts with special knowledge in the field will answer the question. The Penal Code forbids doctors from this type of "intervention", since the very injection of hormones leads to childbearing incapacity, which is considered grievous bodily harm according to our Criminal Code [8].

One of the negative consequences of gender redefinition appears in the form of "transgender women" emerging among female athletes and dominating weightlifting,

running, wrestling, American football, fitness, basketball, mixed martial arts... [9]. Some of the world's most popular sports have indicated that they are beginning to review their rules regarding the participation of transgender athletes in some competitions. The decision by the International Swimming Federation (FINA) is to limit the inclusion of transgender athletes in women's competitions. The World Athletics Federation has confirmed it will ban transgender athletes from competing in women's events. The ban applies to transgender people who were male at puberty but then changed their gender [10].

In our country, if the petitioner's request for a gender change is accepted, the information is sent *ex officio* to the GRAO, the municipality and the Judiciary Bureau. If the court unreasonably refuses to change the gender of the applicant, there is a possibility of a planned appeal in connection with the recognition of gender identity, in connection with a violation of the right of transgender people to respect for private life, which is derived from Art. 8 of the European Convention on Human Rights. Right to respect for private and family life. 1. Everyone has the right to the inviolability of his private and family life, of his home and of the secrecy of his correspondence [11].

Transgender men (male-identifying women) are percentage-wise more active and assertive in seeking their legal rights to erase their feminine past. The issue of gender reassignment in sport is not about a type of doping, it is much more. Because if only one gender wins, then the other will be the victim. According to a number of psychiatrists, there should be legislation to regulate the case of transsexuals who want to change their civil sex. It is logical to first change the identity through a court, and subsequent surgical interventions, it's just that the first is reversible, and the second is not. Inquiries were sent to 30 courts in Bulgaria about similar cases by the end of 2012. Answers were received from 23. Out of the 13 decisions, in only two cases did the court not allow a change of civil gender of the transgender person [12].

This phenomenon is far from new for the 21st century, already in 1977. Renee Richardson wins the US Women's Open, but was born a man. As soon as this fact came to light, she was stripped of her title and her access to women's championships ended [13]. In the opinion of Prof. Ganev in a case aimed at answering the question: "How should the concept of "gender" used in the Constitution be understood, and does it have a meaning other than biological sex?", which was put before the constitutional judges of the Civil panel of the Supreme Court of Cassation Ganev points out - "there is a biologically determined inequality in the sporting achievements of both sexes, with men surpassing women by an average of 10%, which since 1968 has required mandatory gender testing within the International Olympic Committee "due to concerns that male athletes will pose as women to gain an athletic advantage" [14].

The problem of gender reassignment in sports is not only legal and psychological, but also medical and healthy. Women who have more than the permissible amount of testosterone in their blood, regardless of whether they were born female, will not be able to compete. Athletics has enough examples in this direction. Caster Semenya, who, if she wants to compete, will have to take medication to reduce the male hormones in her blood, regardless of the fact that they are not the result of doping, but are "the specificity of her body" [15]. One should also take into account the change of gender due to a medical necessity, for example, and one aimed at satisfying his wishes, such as earlier retirement if he is a woman, for example the case from Switzerland [16].

The Court of Justice of the EU has delegated the legal settlement of civil status and marriage to be decided within the autonomy of the Member States of the Union. However, taking into account the specifics of each individual case. There are particularities in individual countries when it comes to allowing gender reassignment, dual citizenship, marriage, etc. (see in this sense Decision of October 2, 2003, Garcia Avello, C-148/02, item 25, [17] Decision of April 1, 2008, Maruko, C-267/06, item 56, Decision of 14 October 2008 [18].

Olympic champion and reality star in the USA Bruce Jenner has admitted that he has completely thinned out as a woman. The former decathlete is also the ex-stepfather of reality star and model Kim Kardashian. Bruce Jenner won his Olympic gold medal at the 1976 Games in Montreal [19]. The IOC is liberal on the subject, there is a precedent during the Tokyo Games, New Zealand's Laurel Hubbard became the first transgender athlete at such a level. Bulgaria was condemned by the European Court of Human Rights (ECHR) due to unmotivated refusals to change gender, and without presenting sufficient and justified reasons and without seeking a balance between the public interest and the applicant's right to private life [19].

The case of the transsexual woman named in the decision with the initials P.H. in 2018, she applied under the Civil Registration Act to have her three names and social security number changed to female. After an appeal, the matter goes to the Supreme Court. The supreme judges did not allow the case to go to cassation and the district court's refusal to change the names of P.H. from male to female. Bulgarian jurisprudence on gender reassignment is summarized in the case of Y.T. v. Bulgaria (No. 41701/16, §§ 24-30, July 9, 2020) [20].

The Supreme Court of Justice has also issued other decisions in which it has accepted that domestic law allows for the recognition of legal gender change (decision No. 142/18 of 2:8.06.2019 of the Supreme Court of Justice under City Decree No. 3826/2018, IV year o. [21], decision No. 285/18 of 07/05/2019 of the Supreme Court under city d. No. 1417/2018, IV year o. [22] and decision No. 245/18 of 8.11 .2019 of the Supreme Court of Appeal under City Decree No. 4454/2018, IV year o.) [23]. The Supreme Court issued an interpretative decision on the issue of legal gender change. With Interpretive Decision No. 2/2020 of 20.02.2023 on Interpretive Case No. 2/2020, the General Assembly of the Civil Collegium (OSGK) of the Supreme Court of Cassation (SCC) decided: "The objective substantive law operating on the territory of the Republic of Bulgaria , does not provide for the possibility for the court to allow, in the proceedings under Chapter III, Section VIII of the Law on Civil Registration, a change of the data regarding the sex, name and single civil number in the acts of civil status of an applicant who claims to be transgender" [24]. This decision aims to unify the controversial judicial practice in Bulgaria, which in one case allows transgender persons to change the data on the registered gender in the civil status acts, and in other cases - refuses. Accordingly, the decision also gives binding instructions to the courts to reject all pending or future applications for gender reassignment. Currently, there are dozens of pending applications and all of them will probably be rejected.

At EU level, the European Parliament has repeatedly called for stronger action to extend the scope of equal pay provisions at European level, adopting several resolutions to that effect in 2008 and 2012 [25].

The law of the European Union takes precedence through the Constitution in matters relating to the exclusive competence of the EU institutions, as well as in shared competence, but has no bearing on matters which are vested in the exclusive competence of the Member States, which is exactly what the question is about gender change. The non-governmental organization "we are coming" with its letter dated 13.03.2023, wants the EC to sanction Bulgaria because of the interpretive decision of the Supreme Court of Appeals on gender reassignment. According to them, "the present case directly affects two of the main principles of the EU - the rule of law and human rights. The lack of reaction to such a practice would create a dangerous precedent, threatening the legal order both in our country and in the EU, because inequality in one-member state is inequality in the entire Union" [26].

The Supreme Court does not rule out the possibility of changing the gender legally - but only under "detailed legislation, which is currently lacking". The decision is among the most disputed at the court so far - 28 supreme judges have supported it, 21 have signed it with a dissenting opinion [27].

Jessica Pegula, one of the world's highest-paid tennis players, is a reminder of the pay gap between women and men in professional sports. The IOC is working towards gender equality in sports pay, how far it will go is another question.

In German football, a decision was made that removed the gender marker and now trans footballers will be able to choose for themselves whether to play in men's or women's teams [28]. The court decision of the Supreme Court in our country leads to an absolute ban on legal gender change, unless special legislation is adopted in this direction. The different pay in sports, which is a fact at the moment, and in order to equalize it can only be done administratively, there is no way that the interest in rhythmic gymnastics performed by women and correspondingly performed by men should be the same and, accordingly, the income from the sale of tickets, TV rights, etc.

Some of the legal wobbles of the EU are based on pseudo-scientific and unfounded concepts, such as the existence of a third and fifty-third gender for example, and it cannot be expected that the legislator would show more understanding in the regulation of the matter of legal gender change. In sports, this would lead to separate championships for all types of sports, another question is where the funds for such type of sporting events will come from and who will license them, and last but not least, what would be the interest and social significance of such events.

4 Conclusion

The globalization of sport increasingly shifts the legal framework of the international sports system to international sports bodies such as the International Olympic Committee (IOC), the World Anti-Doping Agency (WADA) and international sports federations (IF). A significant effect of this shift has been the erosion of the ability of domestic legal systems to intervene, particularly when the rules of international sporting bodies conflict with domestic norms and values. The debate related to the legal cases of gender reassignment in sports has not stopped in recent decades, the legislation does not aim to criminalize discussions related to building support when someone is struggling with their sexuality, the purpose of the law is to have an opportunity for balance in sports between personal and public interest.

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