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Body, sex, gender. Current Polish interpretive moment*

Keywords: legal sex assignment, gender recognition, interpretation of law

Summary. The paper aims to present Poland's regulations concerning legal sex assignment and gender recognition in light of Poland's social and political situation, which often leads to harmful and pathological decisions in the application of the law. To illustrate this, we will discuss the Polish legal situation regarding legal sex assignment and gender recognition. The authors will use the theoretical-legal concept of the interpretive moment to describe the evolution of the legal situation of individuals undergoing gender recognition procedures, despite the "letter of the law" remaining unchanged during the analyzed period. A change in the "letter" of Polish law is currently impossible due to the political factors. However, the activity of the fourth-wave feminism offers potential for a change in the interpretation of the existing regulations.

Ciało, płeć, płeć społeczna. Aktualny stan wykładni prawa w Polsce

Słowa kluczowe: legalizacja płci, uznanie płci, interpretacja i wykładnia prawa

Streszczenie. Celem artykułu jest przedstawienie regulacji prawnych dotyczących korekty płci prawnej w kontekście polityczno-społecznym. Ten kontekst w ocenie Autorów prowadzi do szkodliwych i patologicznych decyzji w procesie stosowania prawa. Autorzy użyją teoretyczno-prawnej koncepcji momentu interpretacyjnego, aby opisać ewolucję sytuacji prawnej osób przechodzących procedurę zmiany płci, mimo że „litera prawa” pozostała niezmienną w okresie objętym analizą. Zmiana „litery” polskiego prawa jest obecnie niemożliwa ze względu na czynniki polityczne. Jednak aktywność feminizmu czwartej fali oferuje potencjał dla zmiany interpretacji istniejących przepisów.

1. Preliminary issues: interpretive moment

This article presents an interesting fragment of the Polish normative reality: The Polish law's attitude to the human body (in particular its sexuality) and the scope

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of autonomy that the Polish legislator awards to individuals as regards the possibility to transform and self-create one's own body. It should be stressed that the article primarily focuses on issues related to the legal regulation of sex/gender and the consequences thereof. Other, extralegal contexts of human sexuality (philosophical, social) are not the focal point of the analysis and merely serve to provide a background for the legal status quo.

Before we proceed, a terminological comment is necessary to understand the Polish context better. Neither the Polish natural language nor the language of the Polish law differentiates between sex and gender. In everyday language, one Polish word "płeć" – the equivalent of the English word "sex" – is traditionally used for both these concepts. "Płeć" concerns biological sexual characteristics, and in particular only those features that: "make it possible to distinguish a woman from a man, and – among animals – females from males". Sex is understood as a something that divides the world into two separate categories – women and men – in a way that can be objectively verified¹.

In this text "sex" shall mean biological sex, "legal sex" shall mean sex assigned at birth, whereas "gender" or "gender identity" shall mean a sense of belonging to a given sex or to any sex. "Sex reassignment" (transition) will be understood as a process encompassing a variety of elements such as hormonal therapy and/or surgical procedures intended to achieve body characteristics which correspond with one's perceived gender. Sex reassignment is to be distinguished from "gender recognition" which is the legal procedure aimed at changing the designation of gender in official documents. "Gender recognition" will be used alternatively with "legal sex change". Whenever – due to the specificity of Polish language – it is difficult to define which category in English should be used, we will use a double terminology "sex/gender".

The main thread of the text is an analysis of the relations between the legal sex, biological sex, and gender, with a special focus on establishing what model of sex/gender is given preference and protection in the Polish law and is treated as a basis for determination of a person's sex assigned at birth (legal sex)². The choice of

¹ *Wielki słownik języka polskiego* [the Great Dictionary of Polish Language], Available from: https://wsjp.pl/index.php?id_hasla=3360&id_znaczenia=3942447&cl=21&ind=0 [access: 25.03.2022].

² Knowledge which provides medical background for this paper is a result of cooperation with team of physicians working at the Department of Paediatrics and Paediatric Endocrinology of the Medical University of Silesia in Katowice with Professor Aneta Gawlik MD – specialist in paediatrics and endocrinology, as a team leader. In 2008, Poland's first clinical Sub-department for Disorders of Sex Development was created to diagnose and treat underage patients with DSD. The

a model of biological sex creates quite strong presumptions and results in assigning a person a life role whose change is difficult and often a traumatizing experience. This way, the legislator significantly constrains a person's possibility for living in accordance with their identity. In the light of these considerations, we will discuss access to possibilities for having control over one's body in other, unrelated to sex/gender, cases.

The text is intended to present Poland's regulations concerning legal sex assignment and gender recognition against the background of Poland's social and political situation, which causes pathological and harmful decisions to be made in the process of application of the law. To illustrate this, we will discuss the Polish legal situation as regards legal sex assignment and gender recognition.

We will employ the theoretical-legal concept of the interpretive moment to describe the evolution of the legal situation of persons undergoing a gender recognition procedure, although the "letter of the law" has remained unchanged in the period of time covered by the analysis. A change of the "letter" of the Polish law is also impossible in the current political situation due to the conservative Law and Justice party remaining in power. However, the activity of the fourth-wave feminism offers some potential for a change in the interpretation of the regulations in force. In fact, it can be a tool in the transformation of the application of these regulations and become a real alternative to a legislative change. Taking into account the hitherto-unprecedented dimension of the fourth-wave feminism, we presume that further growth of the movement can translate into liberalization of how law is construed and, using Ehrlich's words, turn into a rapid river that gives a new life to still regulations that are like a water in which water stands³.

We will use methodology based on the notion of interpretive moment, which I understand as a point in time in which one interprets and applies the law. The interpretive moment helps to identify situations that demonstrate that the literal layer of provisions is not the only factor that determines their content; even if "the letter of the law" is clear and unambiguous. "The letter of the law" may inde-

sub-department is currently expanding the scope of its activity to treat underage transgender patients. Given the seriousness and complexity of the issue, as well as the risk that caring for underage patients with incongruent biological sex features carries in Poland, a multi-specialist team was appointed in 2018. In addition to physicians (endocrinologists, surgeons, gynaecologists, urologists), its members are psychologists, psychotherapists and lawyers (including the author of this article). The team creates a unique formula of cooperation – based on the specific cases, it strives to elaborate and implement national medical procedures ensuring standards of safe and uniform medical care in this area (there are not such standards in Poland).

³ E. Ehrlich, N. Isaacs, *The Sociology of Law*, "Harvard Law Review" 1922, vol 36, no. 2, p. 122.

ed change its normative content as a result of the passage of time. Hence, a point on the timeline selected as the interpretive moment becomes one of the crucial determinants for both the outcome of interpretation and – in consequence – for the scope of rights, liberties and restrictions that the addressees of the norms of law are subject to. What matters, from the perspective of the addressee of the law, is therefore not just the literal wording of a provision, but how the provision in question is interpreted by law enforcement authorities (courts, administrative bodies), whose decisions have a fundamental impact on the life of an individual.

Putting together different interpretive moments confirms an important feature of how the law operates: despite an unchanged letter of the law, the way the law is interpreted may change (affecting individual liberties in positively or adversely) and thus the line between what is actually admissible and inadmissible may shift. The most vivid example of this situation in Poland is the current interpretation of abortion regulations. Although the legal status quo has not changed (attempts at both sharpening and loosening the right to abortion have failed), the scope of actual possibilities for performing an abortion has decreased dramatically.

The same applies to Polish regulations governing the legal sex assignment and legal sex change. In case of the latter, too, while the letter of the law has remained unchanged, its application – depending on the changing social climate – becomes more or less troublesome and problematic for individuals whose gender and legal sex are in conflict.

The interpretive moment appears where we consider the intention of the historical and current legislator⁴. In case-law countries, the interpretive moment can be reconstructed in two categories: historical and current. Both play a crucial role in the dispute between the grand doctrines of originalism and living constitutionalism, and – to some extent – between textualism and intentionalism⁵. Both pairs of notions express similar intuitions: interpretation can recreate a meaning attributed to provisions after they were enacted or a meaning provisions gain at

⁴ Ch. Perelman, *Logika prawnicza. Nowa retoryka*, Warszawa 1984, pp. 199-200.

⁵ See: J.M. Balkin, *Framework Originalism and the Living Constitution*, "Northwestern University Law Review" 2009, vol. 103, pp. 549-614; L.B. Solum, *We Are All Originalists Now*, [in:] *Constitutional Originalism. A Debate*, ed. L.B. Solum, R.B. Bennett, Ithaca-London 2011; L.B. Solum, *Originalism versus Living Constitutionalism: The Conceptual Structure of the Great Debate*, "Northwestern University Law Review" 2019, vol. 113, No. 62019, pp. 1243-1296; D.A. Strauss, *The Living Constitution*, Oxford 2010; W. Baude, *Is Originalism Our Law?*, "Columbia Law Review" 2015, vol. 115, pp. 2349-2408; I.P. Farrell, *Enlightened Originalism*, "Houston Law Review" 2017, vol. 54, pp. 569-638; A. Bielska-Brodziak, *Śladami prawodawcy faktycznego. Materiały legislacyjne jako narzędzie wykładni prawa*, Warszawa 2017.

different moments in time since their enactment, after they have been in force for some time. This concerns those situations where the “letter of the law” has remained unchanged, but the scope of actual situations decided based on it changes or the manner of deciding in such situations changes (to more or less restrictive or troublesome for the citizen).

The interpretive moment furthermore helps to gain an understanding of the entire context of understanding of the law: normative, political, and socio-cultural, and realise how this context affects how the “letter” of the law is understood at a specific point in time. The use of the interpretive moment is particularly useful when one is analysing socially controversial problems. In Poland, these include issues related to human sexuality, abortion, single-sex relationships, acceptable ways of management of human corpses, or animal rights.

An intrinsic change in the meaning of provisions of law is intuitively associated with two situations. First of all, it is strongly visible in the periods of systemic transformation, when the axiology of a state undergoes major changes in a more or less abrupt way (current changes in the understanding of provisions of the Constitution or provisions governing access to abortion in Poland). The second case concerns situations when regulations, literally unchanged, have been in force for many years in the ever-changing socio-economic realities. The latter is strictly linked with the issue of sex and the thesis that the activity of social movements in the fourth-wave feminism many change how the provisions that regulate sexuality are interpreted. We assume in this regard that while a legislative change of provisions governing the assigning and legal sex change is currently not possible in Poland (as the parliamentary majority is radically conservative⁶), it is possible to raise elementary social awareness in this area. We believe that effective provision of evidence-based medical knowledge on human sexuality is fundamental for the change of social preconceptions and, as a result, the reinterpretation of the legal procedures currently in force. This is something that the activity of social movements, in particular the fourth-wave feminism, can bring about. This is all the more important since the debate that accompanied legislative works on the law on gen-

⁶ The ruling party, in its vote on the Law on Gender Recognition in 2015 persistently voted against the law (in the final vote, after the III reading, of 129 persons voting, as many as 128 voted against and 1 person abstained). Unless there is a transfer of power, chances of the draft turning into a binding legislation are slim to none – the current ruling party together with its coalition have as many as 235 votes in the Sejm.

der recognition showed how unscientific and harmful are opinions voiced by both Polish MPs⁷ and Polish president⁸.

2. A few reflections on autonomy and care in the context of intersex and transgender people

“It would be a great misunderstanding of this doctrine [autonomy] to suppose that it is one of selfish indifference, which pretends that human beings have no business with each other’s conduct in life, and they should not concern themselves about the well-doing or well-being of one another, unless their own interest is involved. Instead of any diminution, there is a need for a great increase of disinterested exertion to promote the good of others. But disinterested benevolence can

⁷ Examples of opinions expressed in the course of legislative works on the draft law on gender recognition: E. Rafalska: “The law radically, drastically changes the definition of sex and introduces a new concept of gender identity. As a result, gender will mean a preserved, intense perception and experiencing of one’s sexuality. This calls into question the principle of biological determination of sex and proposes a quick, fast-track medical-judicial path that allows individuals to determine what their sex is and instantly receive new ID documents free of charge. A court will issue its decision without evidentiary proceedings – it will merely recognize the sex. [...] This allows a situation where a person whose physical features indicate a certain sex will be legally considered a representative of the opposite sex. The draft law therefore created a third sex – applicable to individuals whose physical features belong to one sex, and whose legal status belongs to the other sex” (Session of the Sejm np. 55 of 3 December 2013 (first day of deliberations), I reading of the draft law); T. Latos: “I fear that some decisions that are taken by the WHO and that were taken in the past, were, according to my best knowledge, Mr. minister, taken in the form of a vote. I will not refer to another anomaly that was once treated as a disease and, through a vote none the less, Mr. minister, believe me, the smile on your face is unfounded, the vote in question led to a decision that starting from a certain point in time in the past it was no longer to be treated as a disease” (Session of 9 July 2015, Sub-committees: Committee on Justice and Human Rights /no. 264/; Health Committee /no. 214/). Undersecretary of state at the Chancellery of the President, A. Surówka-Pasek: “[The law] will tempt to circumvent the provisions that stipulate that only opposite-sex marriages can exist, and will violate the principle of a dichotomous division of the society into two sexes, by creating a sort of third sex. And the creation of this third sex will, in fact, lead to stigmatization of individuals who have to deal with the problem of transsexuality on a daily basis” (Session of 9 October 2015; Committee on Justice and Human Rights /no. 280/; Health Committee /no. 234/; after presidential veto).

⁸ Motion by President of the Republic of Poland Andrzej Duda to reject the law on gender recognition: “Consent to legally correct sex without performing relevant anatomical corrections on the applicant will lead to social and legal functioning of persons whose legal (assigned) sex will be different than their biological sex. Allowing for such situations to take place will encourage attempts at circumventing the provisions that stipulate that only opposite-sex marriages can exist and will violate the principle of a dichotomous division of the society into two sexes, by creating a sort of third sex, applicable to persons whose physical features are representative of one sex, and their legal status – the opposite sex. The basis for an individual’s functioning is their gender identity, i.e. their self-recognition as a woman or man. Belonging to a specific sex entails legal consequences in the personal, family, and social sphere (p. 7). [...] I hereby call on the High Chamber to not introduce to the legal system a law that envisages systemic changes that can effectively destabilize social norms through denying the existence of a dichotomous division of people into women and men. (p. 8)”.

find other instruments to persuade people to their good than whips and scourges, either of the literal of the metaphorical sort”⁹. Autonomy is treated as a value so great, that it is not even being contested by potential damages incurred as a result of making use of it¹⁰. Adopting a perspective offered by the ethics of care may prevent us from this way of thinking. Humans, as subjects of legal regulations, are not some impersonal beings on whom legal “operations and investments” are performed. Vulnerability and the relational context of life are two essential factors that, if taken into account by the legislature, may prevent the legislature from making decisions exposing individuals to unnecessary suffering. The fundamental task of each state is therefore to ensure that basic needs of its citizens are met – in order to the legislature to do its job properly, it must be attuned to their voices. As Jonathan Herring has pointed out, „Care is often invisible in public policy and ethic, when it should be at the heart of it. [...] We all have needs and caring for others in meeting these needs and having our needs met by the care of others is a universal experience”¹¹. The perspective of care shows individuals’ “soft spots” and their diversity. With this perspective, the legislature can improve, at low cost, these elements of life that it has an impact on. More specifically, not only can it select these delicate elements that expose an individual to suffering, but also effectively listen to these needs and respond to them. In the current situation, the Polish legislature regulates the relations between an individual and his or her body in a non-uniform way: while in some areas (e.g. transforming the body through aesthetic surgery), it promotes an individual’s almost complete autonomy, in other aspects (including the legal sex assignment and gender recognition), the legislature chooses an extremely paternalistic approach. This is in no way motivated by care for citizens; instead, it is indicative of a selective treatment of and attitude to different aspects of human life.

Current social situation in Poland is making clear the necessity of a deep reflection and the need to work out some new answers to a number of fundamental questions in the space of “subject – its body” relation. Among them, especially interesting are the questions relating to “processing” of the human body, particularly with reference to sex and sex organs. Is the body – in a legally relevant sense – just the external entity, or is it also “the inside”? What if the body is not really coherent: the brain “dictating” one thing, and the rest of the body the other? Should the law draft any borders limiting subject’s authority and influence over its body

⁹ J.S. Mill, *O wolności. O zasadzie użyteczności*, Warszawa 2003, p. 113, cited for: M. Boratyńska, *Wolny wybór. Gwarancje i granice prawa pacjenta do samodecydowania*, Warszawa 2012.

¹⁰ D. Cowart, R. Burt, *Confronting Death: Who Chooses, Who Controls?*, “The Hastings Center Report” 1998, vol. 28, No 1, pp. 14-24.

¹¹ J. Herring, *Law and the Relational Self*, Cambridge University Press 2020, pp. 58-59.

and if so, to what extent? Should the body (e.g. some particular view of its sexuality) be granted the protection reaching even beyond the will of the subject itself?

3. Assigning and changing of legal sex (gender recognition) in the Polish legal system

One of the authors of this article have broadly discussed the issue of legal sex assignment and correction of wrongly assigned legal sex in several articles and encourage all interested readers to read those materials¹². Here, we shall only briefly outline the problem.

3.1. How the conflict between biological sex and legal sex is possible?

Legal sex being different from biological sex and gender identity: an individual experiences incongruence between personal gender identification and the assigned legal sex (at the moment of birth, legal sex will be assigned that will later appear to be inconsistent with the individual's gender identity, which will only be revealed in later stages of the individual's development). The medical reasons for this are diverse. A special category of cases dealing with a conflict between legal and biological sex is Disorders of Sex Development (DSD)¹³. These cases deal with individuals with improperly developed external and/or internal sex organs, or that frequently exhibit both male and female physical features. The specificity of this medical category is of utmost significance for legal reflection, since many cases shortly after birth raise medical doubts regarding what gender the child/adult will identify with in the future. Such doubts should result in undertaking whatever measures necessary to dissolve the doubts in a reliable way before medical assessments become the basis for determining the legal *status quo*.

However, current procedures for legal sex assignment in Poland (finalised, with no exception, immediately after birth) do not leave time for performing the comprehensive medical procedures available, thus carrying the risk of error; the cur-

¹² A. Bielska-Brodziak, A. Gawlik, *Dzieci bez płci: jak polski prawodawca rozwiązuje problemy osób interseksualnych. Część 1*, „Prawo i Medycyna” 2016, No 2, pp. 5-28; A. Bielska-Brodziak, A. Gawlik, *Dzieci bez płci: jak polski prawodawca rozwiązuje problemy osób interseksualnych. Część 2*, „Prawo i Medycyna” 2016, No 3, pp. 6-30; A. Bielska-Brodziak, A. Gawlik, *Is sex essential for personhood?: being «halfway between female and male» from the perspective of polish law*, [in:] *Legal personhood: animals, artificial intelligence and the unborn*, Springer International 2017, pp. 141-158; A. Bielska-Brodziak, A. Gawlik, S. Brodziak, *Oswajanie nieoswojonego, czyli o metodzie przypisywania płci prawnej w świetle wiedzy medycznej*, „Societas Communitas” 2018, No 1-2, pp. 19-42; A. Bielska-Brodziak, M. Boratyńska, *Zaburzenia różnicowania płci i transseksualizm*, [in:] *System Prawa Medycznego. Regulacja prawna czynności medycznych*, t. II, part 2, eds. M. Boratyńska, P. Konieczniak, Warszawa 2019, pp. 517-570.

¹³ This has been referred to earlier as intersexuality.

rently acceptable procedures applied to correct such errors burden the individual with unnecessary and acute consequences.

Second, very significant and more familiar category (of conflict between biological and legal sex) is gender incongruence (previously named: transsexualism). In International Statistical Classification of Diseases and Related Health Problems (ICD-11), which came into force by 1 th January 2022 r. there is new diagnostic category: **gender incongruence**, which is assigned to a new category of health problems: “Conditions related to sexual health”¹⁴. Gender incongruence is defines as marked and persistent incongruence between an **individual’s experienced gender** and the **assigned sex**. Gender variant behaviour and preferences alone are not a basis for assigning the diagnoses in this group”¹⁵.

Due to the specific nature of cases involving gender incongruence, i.e. the fact that it’s manifests itself quite late in life, contemporary medicine cannot identify individuals predisposed to this incongruence at the moment of birth (or shortly after). In view of the above, postponing the registration of sex on birth certificates in order to diagnose gender incongruence is not rational. Consequently, the only solution available is resorting to the procedure of legal sex change.

Referring to previous studies¹⁶, we outline only the key determinants of biological and legal sex. Biological sex is a complex set of features, allowing classification of organisms as either male or female¹⁷. The most extensive presentation of these criteria, based on sexology, distinguishes chromosomal sex (genotype sex), gonadal sex, internal sex, external sex, phenotypic sex, hormonal sex, metabolic sex, social

¹⁴ As Robles at al. points out: “the proposal for WHO’s ICD-11 is to remove categories related to transgender identity from the Mental and Behavioural Disorders chapter and place them in a new ICD-11 chapter called Conditions Related to Sexual Health,18 which is conceptualised as a more medically oriented chapter. The ICD-11 proposal names the category gender incongruence and emphasises the individual’s subjective experience of incongruence between the individual’s experienced gender and the assigned sex.3 The proposed diagnostic guidelines note that gender incongruence can be associated with clinically significant distress or impairment in social, occupational, or other important areas of functioning, particularly in disapproving social environments, but neither distress nor functional impairment is a diagnostic requirement”. R. Robles, A. Fresan *et al.*, *Removing transgender identity from the classification of mental disorders: a Mexican field study for ICD-11*, “The Lancet” 2016, p. 3.

¹⁵ Międzynarodowa Klasyfikacja Chorób ICD-11 (ICD-11), <https://icd.who.int/browse11/l-m/en#http%3a%2f%2fid.who.int%2fcd%2fent%2f411470068> [access: 18.03.2022].

¹⁶ See references in note 13.

¹⁷ J. Strzałko, *Słownik terminów biologicznych*, Poznań 2006, p. 495; K. Imieliński, S. Dulko, *Przekleństwo Androgyne. Transseksualizm: mity i rzeczywistość*, Warszawa 1988, pp. 13-14; J. Vetulani, *Mózg męski i mózg żeński*, [in:] *Psychiatria na obcasach*, ed. D. Dudek, J. Rymaszewska, Warszawa 2014, pp. 15-17; A.T. Midro, *Genetyczne i epigenetyczne uwarunkowania płci człowieka*, [in:] *Gender – spojrzenie z różnych perspektyw*, ed. W. Wierzchorek, Warszawa 2015, p. 86; R. Ziemińska, *Płynność płci biologicznej i performatywności płci kulturowej*, “Kultura i Edukacja” 2015, vol. 32015, pp. 247-252.

sex (sex assigned at birth), brain sex, and psychic sex¹⁸. From the perspective of the evaluation of the quality of current legal solutions, it is important to highlight the following components of biological sex as the main ones: genetic sex (based on the presence of sex chromosomes – the X and Y chromosome), gonadal sex (based on the structure and function of gonads – testicles and ovaries), somatic (genital) sex, and last but not least, psychic sex. Gender identity is considered to be one of the aspects of psychic sex¹⁹. Sexual differentiation, or the “decision” about whether a child will be born a boy or a girl, occurs in the foetal period of development. Current developments in the biological sciences indicate that it is the hormonal component (presence and activity of sex hormones), which is derived from genetic and gonadal sex, that plays the largest role in determining an individual’s sex²⁰. The formation of genetic and hormonal interdependencies during pregnancy will lead to the occurrence of a specific biological sex in a newborn, including the occurrence of one of its most significant aspects – the psychic sex, which will manifest itself through gender identity, or a sense of belonging that one feels for either the female or male sex²¹.

In Poland, legal sex is, as a general rule, determined by one of the components of biological sex, namely genital sex, which in turn is determined the moment a child is born. In the Polish culture, genital sex is intuitively associated with the notion of sex as a whole – it is simply the way external sex organs look that classically categorise an individual as either male or female. At the moment of birth, genital sex is the most important „proof” or indicator of whether the newborn is a boy or a girl; the visible and (seemingly) easy to classify external sex organs are the key determinant of legal sex.

It can be said that “*who I am*, in the sense of individual identity, is determined by the whole of biological sex, the most important component, from the perspective of an individual, being psychic sex (gender identity). *Who I am*, in the individual sense, is determined by psychic sex; if taken literally, the statement can be made that *I am* the only person who can specify what my identity is. On the other hand, *who I should be*, in the social sense, is determined by the legal sex that was assigned to an individual without any personal participation.

The current perspective of medical science seems to be quite convinced that „Psychic sex cannot be reduced to subjective feeling dependent on human volition

¹⁸ S. Dulko, *ABC... płci*, “Kosmos. Problemy Nauk Biologicznych” 2003, vol. 52, no 1 (258), pp. 5-6.

¹⁹ *Ibidem*, p. 7.

²⁰ A.T. Midro, *op. cit.*, pp. 83-102; J. Ostojcka, *Sądowa zmiana płci*, doctoral dissertation written at the Faculty of Law and Administration, University of Warsaw 2014, pp. 15-18.

²¹ S. Dulko, *ABC... płci*, pp. 7-8.

as in ‘I want to be a woman’ or ‘I want to be a man’²². A sense of belonging to either gender is determined as early as in the foetal life and does not change at later stages of life²³. Until the sixth week of embryonic life, the gonads are bipotential, and further differentiation into female or male structures depends on the presence and correct functioning of a cascade of genes. Therefore, a child is not psychosexually neutral at birth, as the process of building gender identity commences the moment a human embryo is created²⁴ - „Infants are not blank slates, on whom we scrawl instructions for sexually-appropriate behaviour”²⁵.

The scientific advances in the past decades have changed the way of answer the question of where sex/gender “resides” in the human body. While the answer is still far from definite and unambiguous, it shows that using the prima facie evidence (evidence obtained by examination of a person’s external sex organs) to label people as representing one or the other sex is incorrect and should be approached by the law more cautiously. Regrettably, this knowledge has failed to trigger any significant changes in the Polish legal regulation.

3.2. Polish law and the conflict between biological and legal sex

Several years of our exploration of the discussed issues allows identifying specific legal problems resulting from the inability to unambiguously determine legal sex. Two situations should be distinguished here. The first one is when physicians notice symptoms indicating DSD after a child is born and the legal problems that could arise from a hasty issuance of the child’s birth certificate. The second situation is related to eliminating the consequences of wrongly assigning the legal sex, which usually takes the form of a legal sex change (gender recognition).

3.2.1. Assigning a legal sex

The key regulations governing the assignment of legal sex (sex registered at birth) have been set forth in the Civil Registry Records Act²⁶. A prerequisite for legal „existence” of a child and, therefore, for execution of its rights, is the issuance of an official document – a birth certificate, which is the final outcome of this pro-

²² J. Ostojka, *op. cit.*, p. 19; J. Vetulani, *op. cit.*, pp. 15-17.

²³ See: S. Dulko, *Transseksualizm. Wybrane aspekty kliniczne*, paper delivered at the scientific conference at University of Gdansk: “Legal, Medical and Psychosocial Aspects of Transsexualism”, Gdańsk, 28 November 2012.

²⁴ K. Imieliński, S. Dulko, M. Filar, *Transpozycje płci. Transseksualizm i inne zaburzenia identyfikacji płciowej*, Kraków 2001, p. 41.

²⁵ A. Moir, D. Jessel, *Płeć mózgu. O prawdziwej różnicy między mężczyzną a kobietą*, Warszawa 2015, p. 33.

²⁶ Act of 28 November 2014 on Civil Registry Records, Journal of Laws of 2014, *item* 1741, further CRRA.

cedure. The birth certificate is a document which, alongside the forenames and surname of the child, the date and place of its birth, and the parents' forenames²⁷, and contains an **obligatory entry regarding the child's sex**²⁸. The birth certificate is drafted on the basis of two documents: (1) a medical certificate indicating the child's sex, known as the statement of live birth, issued mandatorily by a health care facility (in most cases the hospital in which the child was born), and (2) the birth notification form, filled out by the parents.

The entity performing medical activities has no deadline specified in the provisions on civil status records to draw up a birth card or a stillbirth card. The status of the card is unclear, and its determination depends on whether it is determined or there is a time limit for its preparation, despite the fact that it is not specified in the Act on civil status records. The first of the proposals treats the birth card and the stillbirth card as a certificate within the meaning of Section VIII of the Code of Administrative Procedure²⁹. The certificate should be issued without undue delay, but not later than within seven days³⁰. However, the doctrine also recognizes that not always can be considered a certificate confirming documents that provide authorities and institutions with data that cannot be derived without appropriate medical knowledge³¹. The second of the proposals therefore treats birth and stillbirth cards as other supporting documents, which are not certificates. Consequently, it recognizes that there is no strict time limit for the preparation of these documents³². However, the entity performing medical activities is obliged to provide it within 3 days (birth card) or 1 day (still birth card) after preparing this document³³.

Regardless of the performance of the obligation by the medical entity, the child's mother or father is also required to report the birth of a child³⁴. They must fulfill this obligation within 21 days from the date of drawing up the birth card or 3 days from the date of drawing up the still birth card³⁵.

²⁷ What is important, it is necessary to specify the "father" and "mother" in the Polish birth certificate. It is not possible to write "parent 1" and "parent 2", which is one of the normative manifestations of the lack of acceptance for understanding parenthood other than as a couple of a woman and a man.

²⁸ Art. 60 of the CRRA.

²⁹ Ustawa z dnia 14.06.1960 r. – Kodeks postępowania administracyjnego (t.j. Dz.U. z 2021 r. poz. 735 ze zm.).

³⁰ Art. 217 § 3 ustawy z dnia 14.06.1960 r. – Kodeks postępowania administracyjnego (t.j. Dz.U. z 2021 r. poz. 735 ze zm.).

³¹ Z.R. Kmiecik, *Instytucja zaświadczenia w prawie administracyjnym*, Lublin 2002, p. 168 *et seq.*

³² Zob. A. Gawlik, A. Bielska-Brodziak, G. Krawiec, *Dzieci bez płci. Jak polski prawodawca rozwiązuje problemy osób interseksualnych. Część druga. Zasady przypisywania płci prawnej*, "Prawo i Medycyna" 2016, nr 2, pp. 11-16.

³³ Art. 54 ust. 1 i ust. 3 zdanie drugie ustawy z dnia 28.11. 2014 r. – Prawo o aktach stanu cywilnego (t.j. Dz.U. z 2021 r. poz. 709 ze zm.).

³⁴ *Ibidem*, Art. 57 ust. 1.

³⁵ *Ibidem*, Art. 55 ust. 1.

The regulations do not include cases where the gender of a child cannot be determined. It is clearly assumed that gender is always ascertainable - with the exception of early pregnancy miscarriages. It is possible that the legislator's silence about the impossibility of sex determination is based on the assumption that a child must be assigned any gender, even if it is not certain. As already indicated, the earliest possible stabilization of the marital status is extremely important for the legislator, even more important than determining the truthful data.

In cases when physicians see symptoms indicating DSD after the birth of a child, there are two possible scenarios: they may attempt to delay the issuance of a birth certificate, or determine the child's legal sex regardless of any doubts they might have. In the latter case, the only way to reverse the consequences of making a hasty and missed decision will be through the procedure of a gender recognition (more on that in the section devoted to legal sex change). Let's analyse the first scenario in more detail. It is possible that physicians and a child's parents are ready to undertake measures to postpone the issuance of the birth certificate. Two types of measures are possible here: the physicians delay sending the statement of live birth, and/or the parents attempt to get registrars at the Public Registry Office to consent to extending the deadline for issuance of the birth certificate.

In these cases, the people affected by the most severe negative consequences are obviously the parents and the child itself. One of the non-legal, though extremely severe, results of delaying the issuance of a birth certificate is the potential societal reaction. The absence of a birth certificate requires a lot of courage and determination from the parents, who need to face possible reactions (coming both from various officials and the community they live in) to revealing the fact that their child is „sexless” as a result of not having a birth certificate. As a general rule, the Polish society is not tolerant or open towards any sexual distinctness, and any gender identity issues are socially stigmatised³⁶. In cases where a child's legal sex cannot be determined, some authors explicitly postulate that the issuance of the birth certificate should be postponed until physicians can unambiguously assign it³⁷; this is not in fact often practised and the period between the birth of a child and the issuance of a birth certificate is not long. The longest prolongation period

³⁶ One example could include an opinion expressed by Patryk Jaki on “LGBT/gender ideology” on Facebook, available from: <https://www.facebook.com/PatrykJaki/posts/2734762389961154> [access: 18.03.2022]: “Let's dissect the issue. The term «LGBT ideology» derives from «Gender ideology». If, as the mainstream claims, there is no such ideology, then what do gender departments all over the world teach? They teach that gender is «culturally determined». This, obviously, is nonsense since sex does not depend on culture but on biology. The division of roles of men and women is a consequence of natural biological differences. A man cannot get pregnant, cannot breastfeed a child. (2)”

³⁷ A. Czajkowska, E. Pachniewska, *Prawo o aktach stanu cywilnego. Komentarz. Orzecznictwo. Wzory dokumentów i pism*, Warszawa 2011, p. 106.

We aware of was approximately three months. As a rule, birth certificates are issued within the time limits stipulated by the law. The reasons for this are not only common practice for physicians and officials, but also due to pressure from a significant proportion of parents who – perhaps lacking psychological support – want this delicate and socially stigmatising matter to be over as soon as possible. Having a birth certificate becomes a priority for them, even at the risk of premature legal sex assignment of their child (a risk that they probably subconsciously repress).

As far as the strictly legal consequences are concerned, the absence of a birth certificate is a major obstacle to exercising the majority of the child's rights, or the parents' rights related to the birth of the child. As the birth certificate is a primary document (attesting that a new subject of the law was born), it is non-substitutable. The legal importance of the birth certificate is best proven by the scope of legal procedures that cannot be initiated and carried out without it. These encompass procedures in the field of civil law, family law, inheritance law, insurance law, administrative law, and labour law. In order to be initiated, each of the procedures requires the provision of a birth certificate. The range of procedures that require the birth certificate is really extensive.

Whereas the need for prompt issuance of the birth certificate is unquestionable due to its legal importance, the reasons why a person's sex is a requisite element for the issuance thereof are not clear. The reasons why the Polish legislator has decided to adopt this type of an exceptionless solution are not known and have not been specified in the relevant legislative process materials. After all, the law on civil registry of records that is currently in force is a new act, developed when medical knowledge on DSD cases was already well established.

3.2.2. Polish procedure of gender recognition (legal sex correction)

What happens at this stage is in fact reconciliation of the legal sex specified in official document, with the actual gender, i.e. gender perceived by an individual. Nothing else. In particular, there is no mention of „changing the sex” since, as we have written above, we have no authority to change our own sex, determined in foetal life. What can be done is the reconciliation, correction, rectification of official documents in order to correct an error originally made in the process of drafting of these documents.

However, it should be noted that Polish legal culture discusses just „sex change” in general terms. This creates a damaging popular belief that a person can influence what gender they want, freely choose between the genders, and subsequently change any decision made regarding this choice; this gives the impression that

“changing sex” may be an ill-considered whim and the state should oppose it³⁸. Paternalistically – like a good father who knows better.

Also popular is a counterfactual fear that a person’s environment may successfully trigger that person’s need to change their legal sex (where in fact the opposite is the case – pressure from the environment more often leads to not making the decision to rectify misassigned legal sex even though the person’s legal sex is incongruent with gender identity). In Poland, it was not until the year 2013 that the first draft law regulating these issues was submitted³⁹, introducing the notion of gender recognition, understood as a procedure for rectification of legal sex wrongly assigned at birth and incongruent with a person’s gender identity. The draft was supposed to highlight the fact that while human biological sex, “coded” during the foetal life, is permanent, it is not always congruent with a person’s external body. Hence the “change” of legal sex should in fact be a rectification of the state’s original and missed decision, and should reconcile a person’s legal sex with their actual biological sex (gender identity). What the proposal did was shed light on the existence of a claim that the state should assign legal sex correctly and, in the event of misassignment, rectify it in a way to protect the individual concerned. Although the law did not enter into force, it constituted a major step towards raising social awareness⁴⁰ of the issue of gender and the state’s obligations of assigning legal sex to its citizens.

³⁸ It should be stressed that the transition, i.e. everything that happens between the moment an individual defines himself or herself as transgender until the moment the process of sex correction is completed (the process from transitioning from “the incorrect” to “the correct”) cannot be treated as a whim, which is how Poland’s rightist circles try to present it. It is a lengthy process of “returning to oneself”, both in the medical and socio-cultural sense. It is by no means an easy process, one that an individual decides to start on a whim. As Małgorzata Bieńkowska has rightly observed, “transsexualism is the revealing and uncovering of who one really is; it is the naming and understanding of one’s own distinctness; it is the determination of one’s identity. The next, natural step is the decision as to what one is supposed to do with himself or herself. This decision is neither simple, nor easy”. M. Bieńkowska, *Transseksualizm w Polsce*, Białystok 2012, pp. 150-151.

³⁹ Art. 1 of the draft law on gender recognition, parliamentary print no. 1469 of the Sejm of the 7th term, available from <http://www.sejm.gov.pl/sejm7.nsf/PrzebiegProc.xsp?nr=1469> [access: 18.03.2022].

⁴⁰ This area of activity is the exclusive domain of dynamically operating non-governmental organizations that undertake many educational actions. For example, Organizacja Kampania Przeciwko Homofobii (Organization Campaign Against Homophobia) information campaigns on intersexuality (online) available from: <https://kph.org.pl/interplciowosc-dowiedz-sie-czym-jest/> [access: 18.03.2022], social campaign “Rainbow Friday” as an expression of solidarity for LGBT school youth. In turn, the Trans-Fuzja Foundation publishes several reports and publications, including textbooks for teachers *How to help transgender youth?*, reports on the situation of transgender families in Poland (Raport: *Rodzina przede wszystkim – trans rodzicielstwo w Polsce*, eds. I. Jąderek, W. Dynarski, A.M. Kłonkowska, Warszawa 2019, https://tranzycja.pl/media/docs/rodzina/raport_rodzina.pdf [access: 18.03.2022]).

What will happen if physicians, acting hastily, make a wrong decision? The Polish legal system does not have a quick and simple procedure for the rectification of legal sex. The procedure for “changing” (recognition) sex assigned at birth is uniform, irrespective of why such a change is necessary; it is also traumatizing⁴¹. Legal sex change is the exact opposite of legal sex assignment. Whereas birth certificates are issued hastily because of the provisions of the law (although, up to a certain age, the legal sex is not as legally important as it is in the adult life)⁴², “changing” a misassigned legal sex involves a lengthy procedure, often carried out long after the mistake was revealed. Paradoxically, in order to initiate reversing the effects of decisions that were legally required to be made within approximately 30 days after birth, several years must pass until the child becomes an adult, and then even more years are required for the court procedure to be formally completed. However, it is not only the time that is a burden to the person affected. The Polish legal system *expressis verbis* does not provide for misassignment of legal sex, and therefore does not provide explicitly for any procedures for the correction of such an error. Legal sex change is performed using an institution referred to in Art. 189 of the Polish Civil Procedure Code, namely „action for a declaratory judgement”. Whereas the provision was not originally developed for such purposes, it is nevertheless used in such cases due to the nonexistence of specific and adequate legal tools. This raises justifiable objections as such a delicate and private matter ought to be regulated in a way that guarantees respect and dignity to the person affected.

Detailed presentation of the gender recognition procedure goes beyond the framework of this paper⁴³. Nevertheless, it is worth pointing out these elements of the procedure which show the scope of personal costs incurred by a person undergoing legal sex change in Poland. First of all, the procedure is usually initiated by the interested party after they have reached adulthood, even though the incongruence between sex assigned at birth and biological sex is often revealed much earlier (in both - trans people and people with DSD). There is not only a legal requirement,

⁴¹ See: W. Dynarski, K. Śmiszek, *Sytuacja prawna osób transpłciowych w Polsce: raport z badań i propozycje zmian*, Fundacja Trans-Fuzja, Polskie Towarzystwo Prawa Antydyskryminacyjnego, Warszawa 2013, p. 46: “one example is how the court refers to petitioners – in fact, the very word petitioner is problematic in Polish for it is marked for gender; As one of the respondents said, “The very fact that the judge made it clear from the very beginning that she was going to refer to me in the female form indicated to me that she wasn’t even trying to understand the case. Despite my look, clothes and a clear character of the case, she continued to refer to me in the female form, used my old name and corrected herself whenever she used masculine word forms for, as she herself said, she had to stick to what was in my documents and case file”.

⁴² The importance concerns areas such as marriage or motherhood/fatherhood.

⁴³ Also, it has been widely discussed in literature. See: A. Czechowska, *Wybrane zagadnienia chirurgicznej zmiany płci u osób dotkniętych transeksualizmem w Polsce*, “Prawo i Medycyna” 2012, no 2, pp. 91-104; M. Boratyńska, *Wolny wybór. Gwarancje i granice prawa pacjenta do samodecydowania*, Warszawa 2012, pp. 538-558.

but also by the trauma related to the closest relatives (parents) having to disclose socially stigmatising knowledge which they have attempted to keep secret for as long as possible, often with the hope that time and adolescence would eliminate the dissonance. What is more, the procedure of gender recognition is carried out as a dispute, and thus makes it necessary to take action against the closest relatives (parents), as the existence of the other disputing party, against whom action will be taken, is required⁴⁴. This appears to be less painful if the relatives of the person intending to correct their sex assigned at birth accept the decision. If this is not the case, the action unquestionably causes that person to suffer, forcing them to be in open conflict with their closest relatives in a court of law.

As we have pointed out⁴⁵, Polish law does not sufficiently protect human identity and autonomy at the stage of legal sex assignment and neither does it support human identity and autonomy at the stage of gender recognition. A question is, therefore, what does it protect by resolving cases involving human sexuality through the use of paternalistic regulations? Regulations wherein the deciding role in determining the official status of an individual is not played by the will of the individual in question but by how their genitals look⁴⁶.

4. Several remarks on the current Polish interpretive moment and the reasons for an absence of changes⁴⁷

Current developments in science and technological advances offer an almost unrestricted access to information. Unfortunately, the issue of a conflict between biological and legal sex clearly shows that the law fails to make use of these access opportunities and remains passive and indifferent to the knowledge elaborated by

⁴⁴ See: W. Dynarski, K. Śmiszek, *op. cit.*, p. 48: Reports by the Trans-Fuzja Foundation could be used as an example here. The Foundation interviewed transgender people, who critically reviewed this manner of proceedings, and argued the procedure needed to be simplified: "Determining everything through an administrative procedure would likely allow to save time. Administrative procedure alone would make it much easier for individuals in need who could then simply go to an office and say – I want to function as a woman, please change the name in my ID and my assigned sex"; "I believe the agency of the court is completely unnecessary, the procedure should in fact be carried out the way it is in most countries that are far ahead of us in this regard. More specifically, it should be enough to submit a relevant medical certificate issued by a specialist."

⁴⁵ See references in note 13.

⁴⁶ If a specific person undergoes the transition process and obtains new documents, his/her situation is still "unfinished," suspended in his/her previous life. – see: A.M. Klonkowska, *Making Transgender Count in Poland Disciplined Individuals and Circumscribed Populations*, "Transgender Studies Quarterly" 2015, no 2(1), pp. 127-128.

⁴⁷ Interesting in this respect is the similarity of observations under Spanish law, despite the different legal situation (more generally, legal culture) – see: M.V. Carrera, M. Lameiras, R. DePalma, R.R. Casas, *Pathologizing gender identity: An analysis of Spanish law and the regulation of gender recognition*, "Journal of Gender Studies" 2013, no 22(2), pp. 206-220.

researchers representing other disciplines. There are many reasons for this, and one of them is connected with how law is made. The legislative body (the parliament) has limited opportunities for creating laws that are an answer to real needs of contemporary diverse societies, as a result of which authorities in power select those areas which are crucial for their vision of the state and which satisfy the ambitions of the electorate that gave them power. On the other hand, the law in the first place regulates problems of the majority. As a result, the cases that deviate from the general standard are discarded, and an argument (highly dubious from the moral perspective) is often made that an insignificant proportion of individuals affected by a certain condition is not a problem of the state and does not require separate, specific regulations. This is the case with transgender and intersex persons.

There are also cases when certain medically justified measures and procedures are not legalized due to objections of an ethical nature. As I have already mentioned, what appears morally acceptable has greater chances of being acknowledged by the legislator. Social factors and political relations therefore have an unquestionable impact on the shape of decisions made in the parliament, and often cause a political deadlock as regards issues that, while controversial for the society, are scientifically recognized and examined. Social factors largely determine the shape of Poland's current regulations governing the assignment of legal sex (the regulations fail to factor in certain evidently required exceptions) and for the legal sex change (there are in fact no such regulations). Polish discussion on the legal framework for the assignment and change of wrongly assigned legal sex is spread between two strong and conflicted worldviews. The issue of determination and change of human sex has become, at the highest level of generality (which prevails in the public debate), weapons used by conservative circles, typically linked with the Catholic Church, in their fight against liberals, who are identified with the selectively and ideologically perceived gender movement.

The view promoted and radicalized in Poland by the conservative circles, which are currently very strong and prominent, is strongly embedded in the deeply rooted Catholic tradition and adherence to the permanence of human sex, which is determined at the moment of birth and remains unchanged throughout a person's entire life. This viewpoint requires that sex and gender be treated as an innate, God-granted gift that no person should negate by deciding that it was not "given" to them and that, instead, they have the right to choose one⁴⁸. The problem is, however, that this view identifies sexuality with genital sex (mere external physicality, the way the genitals look, and physical procreation abilities) and does not allow any "manipulation" of such selectively understood nature. The proponents of this way of thinking not only take no heed of the fact that the "external proof" may be

⁴⁸ Benedict XVI, *Kto broni Boga, ten broni człowieka*, [in:] *Dyktatura gender*, Kraków 2014, p. 76.

totally incongruent with how an individual identifies themselves, but also fail to acknowledge that current medical advances make it possible to examine the human body and prove and explain the reasons for such incongruity. In fact, the view in question precludes an individual's sovereign power to decide on their own identity – a person, having been “gifted” a body with a specific set of biological attributes (sexual organs), is supposed to accept a “destiny” that was imposed on them top-down even if other, now thoroughly identified, biological determinants indisputably refute it. A person's identity is chosen outside of them, is detached from them and based on what the community believes to be the proof (and source) of identity. Conservatives refuse to acknowledge the fact that the assumptions of the Christian doctrine should be viewed from the perspective of the current knowledge on the biological determinants of identity, and while some representatives of the conservative circles agree that „sex is determined at the genome level and as such cannot be chosen”⁴⁹, at the same time the ultimate proof that determines a person's gender is the way their external genital organs look – the same factor that is the grounds for the assignment of legal sex. Any interference with an individual's sex/gender is a „radical invasion into the act of creation and essence of humanity” and an “usurpation intended to parody God”⁵⁰. It is indeed difficult to accept this situation, and even more difficult to explain it, as there is no coherence and consensus among the Catholic circles as to the ever-changing possibilities of medicine. The Church no longer questions the admissibility of extending a person's life or improving its quality (through the use of modern therapies, transplantations, artificial limbs), and yet any interference with sexuality associated with bodily physicality and reproductive functions is hard to accept. Gender treated selectively as the *physis* rejects contemporary medical *status quo*, which makes it far more dependent on genes and hormones than on what we can see on the outside. Modern times make it necessary to thoroughly modify the methods for the assessment of legal sex and to review the hierarchy of “proofs” based on such an assessment is made, shifting the stress to an individual's will as the decision-maker. The only individuals that fit in the conservative thinking are those who, since the “conferral” of sex upon them, remain who this sex makes them their entire lives.

The conservative movements see any activity intended to bring change (change of procedures for the assignment of sex at birth or correction of wrongly assigned sex) in the light of the concept of gender, which they treat as a pseudoscientific ideology and an enemy of tradition and nature⁵¹. Gender is, according to Marguerite

⁴⁹ W. Chrostowski, *Płeć jest darem Boga. Ideologia gender w świetle Pisma Świętego*, [in:] *Dyktatura gender*, p. 13.

⁵⁰ *Ibidem*.

⁵¹ L. Woroniecki, *Gender – próba spojrzenia na aktualny stan dyskusji*, [in:] *Gender – spojrzenie z różnych perspektyw*, ed. W. Wiczorek, Warszawa 2015, pp. 57-82.

A. Peeters, a radically critical author promoted by conservative publishers, artificial charlatanry, imposed top-down, “a giant on feet of clay”, “a house built on sand”, and “a tip of the iceberg of anthropological deconstruction”⁵², which builds an „avatar of substitution: a citizen – individual «liberated» from what he is by nature and by free gift, asexual, radically undifferentiated holder of the right to »choose« which goes **as far as** his «sexual orientation» and «gender identity»⁵³. The use of the phrase „as far as” is crucial in this regard – it shows that a person has a marginal level of agency in the identification and evaluation of their own identity. Yet, given the medical *status quo*, who if not an individual him/herself should have the right to inspect his/her own identity? Why should someone else’s evaluation be more valued and respected in the legal system than self-evaluation made by the individual concerned?

Consent to „manipulate” in the sphere of human sexuality is believed to have a destructive impact on the natural order of the world, and is seen as causing destabilization of values preserved for centuries, as well as a “[...] social revolution that shakes the foundations of human existence [...] denial of everything that, for every human, is visible, possible to be experienced and has been obvious just as the lapse of day and night”⁵⁴, even if thanks to developments in science it no longer is obvious. All attempts at explaining the reasons for not meeting the masculinity or femininity standards (evaluated from the perspective of the externality of the human body) are highly criticized; the same applies to attempts at working out acceptance to sexual distinctness⁵⁵. The opponents of liberalization of procedures for the assignment and correction of wrongly assigned legal sex argue that anatomy and gender identity are irrevocably bound, as the boys have got “this” and the girls have got “that”, without going to the core of the problems and its complex forms.

The “coin” of the right to manage one’s own body in Poland also has a reverse side. On the other side of the extremely autonomy-restricting rules governing the relation body – gender is an area of unfettered freedom, which covers in particular increasingly popular and more and more accessible broadly-understood aesthetic medicine procedures. As a rule, these are procedures intended to make a per-

⁵² M.A. Peeters, *Gender – światowa norma polityczna i kulturowa. Narzędzie rozeznania*, Warszawa 2013, pp. 47, 135.

⁵³ *Ibidem*, p. 29.

⁵⁴ G. Kuby, *Rewolucja genderowa. Nowa ideologia seksualności*, Kraków 2009, p. 58.

⁵⁵ For example, Magdalena Środa’s book has met this kind of criticism, see: M. Środa, *O gender i innych potworach*, Warszawa 2014. It was a book addressed to children, the critical review available from <http://wpolityce.pl/spoleczenstwo/200324-o-gender-i-innych-potworach-bajkopisarka-magdalena-sroda-kontratakuje> [access: 18.03.2022]. The author of the critical review opposes even the claim that “each of us is first and foremost a human, and only then a woman or a man. Furthermore, we all have the same rights,” which clearly shows how radically opposite to gender conservative currents are.

son beautiful in a specific, socially preferred way, and to make them similar to a selected ideal model and thus socially acceptable. Here, access to bodily transformations is strikingly different than in the case of sex reassignment. In today's Poland not only are there no legal obstacles preventing individuals from undergoing such procedures and treatments, but in fact measures helping to achieve model beauty are increasingly promoted. They are promoted in a manner similar to the way in which new needs are created and promoted to support the market. Readily available and easily accessible treatments go beyond „cosmetic” enhancements such as cheek surgery, otoplasty, blepharoplasty, lip augmentation or wrinkle removal. More invasive procedures are becoming more and more popular and acceptable. These include breast augmentation, buttock enhancement, rib resection for a smaller waist, or liposuction. All of these are free from any interference on the part of the state, as the law does not hinder or control access to such services. The moment these types of procedures became technologically possible to perform, they instantly earned legions of ardent fans and a tacit approval from the remaining part of the society. The rate at which the market for these services is growing is spectacular, astonishing, and at times terrifying. In the name of autonomy, elective invasive surgeries are performed merely to satisfy the ever-sophisticated wishes of patients – clients⁵⁶. This triggers the question as to why this area of activity continues to enjoy such extensive autonomy, especially given how the Polish law approaches sex modification. It is indeed hard to ignore an apparent reference to Michel Foucault's concept of biopolitics⁵⁷, a set of measures, methods and ways in which the authorities, state and politics approach human life as a biological species, a set of specific, made at state level choices that become ways to organize the life of the population as a whole. Poland's current governing strategy reveals a seemingly reverse axiology, where the value of trusting in oneself (one's own identity) is sacrificed for trusting in externally developed standards and models. This way of shaping the life of the society, also one as morally conservative as the Polish society, manifestly increases its productivity to meet the needs of the growing capitalist society⁵⁸. Perfecting social productivity, economic extraction of

⁵⁶ Human replica of Barbie or cat woman are flagship products of the autonomy in search for beauty. See e.g. material available from: <https://www.youtube.com/watch?v=Vbc17hd8zA> [access: 18.03.2022].

⁵⁷ See: M. Foucault, *Bezpieczeństwo, terytorium, populacja*, transl. M. Herer, Warszawa 2010; M. Foucault, *Narodziny biopolityki*, transl. M. Herer, Warszawa 2011.

⁵⁸ In *The History of Sexuality*, Foucault directly says: “Bio-power was [...] an indispensable element in the development of capitalism; the latter would not have been possible without the controlled insertion of bodies into the machinery of production and the adjustment of the phenomena of population to economic processes”. M. Foucault, *Historia seksualności*, t. 1, *Wola wiedzy*, transl. B. Banasiak, K. Matuszewski, Warszawa 2000, p. 123.

powers, increasing usefulness and obedience through the „taming of the bodies”⁵⁹, which consists in production of a man’s self, subjectivity, and soul through making him subject to a disciplinary regime⁶⁰. Obviously, a part of the taming of the bodies is the taming of sexuality.

5. Conclusions

Problems of individuals experiencing incongruence between gender identity and legal sex assigned at birth prove that the law’s most important task is to accept what currently is a rather explicit medical thesis on the status of psychic sex. In order to make progress in cases involving people with gender incongruence and people with DSD, the society should make use of the latest medical findings, which state that gender identity is the single most important factor as a biological determinant of sex⁶¹.

As the analyses of the archaic Polish regulations in force, carried out in the light of the current medical knowledge, show, new regulations are urgently needed for both the legal sex assignment process and gender recognition.

The former requires in particular introduction of the possibility of postponing entering a child’s sex in the birth certificate and removing once-entered sex when serious doubts emerge as to the correctness of the original entry⁶². Meanwhile, correction of wrongly assigned legal sex requires that a separate legal procedure be passed to replace the current provisional and highly unfair solution based on provisions of Art. 189 of the Code of Civil Procedure.

Postulates for a change of the law – although definitely legitimate from the perspective of medical knowledge – appear to be impossible to implement in to-

⁵⁹ Taming – wordplay demonstrating the fact that human ego is secondary to the systems of power that create it through the taming of the bodies – “me” comes from taming.

⁶⁰ “The process of body’s degradation made silently and unconsciously was a necessary technique to colonize the subject in an unnoticeable way. Homo economicus, as the result of this long process of silencing the body is a good example of how the contemporary ‘body care’ has nothing to do with fulfilling body’s real needs, but on the contrary, follows the ‘free market’s unlimited consumption. The policy of contemporary ‘body care’ is nothing but another disciplinary discourse aimed at creating a perfect body of a precisely defined shape, color, weight or smell”. L. Rodak, P. Kowalewski, *Body test or some Foucauldian analysis of “The Washing Machine Tragedy” by Stanislaw Lem*, in press. See more broadly: R. Shusterman, *Body Consciousness. A Philosophy of Mindfulness and Somaesthetics*, Cambridge University Press 2008.

⁶¹ D.M. Levasseur, *Gender Identity Defines Sex: Updating the Law to Reflect Modern Medical Science Is Key to Transgender Rights, Recognizing Injustice: From Social Movements to Legal Reform*, Vermont Law Review 14th Annual Symposium Vermont Law School-October 3, 2014; Vermont Law Review, vol. 39, p. 947.

⁶² Obviously, such legislative changes would have to be followed by reflection on administrative regulations such as dividing school-age children into girls and boys, dividing toilets into those for women and those for men, etc.

day's Poland. The rhetoric of the conservative majority that is currently in power in Poland does not allow for taking one step back without incurring heavy political costs. The electorate of the ruling party is fed anti-gender demagoguery fuelled by strong and based on fear of being condemned voice of Polish church. Hence, it is rather unlikely to return to work on the draft law on gender recognition⁶³.

Fortunately, the constructions that are currently employed to solve problems related to legal sex (and in particular gender recognition), being provisional as they are, are also easy to mould through interpretation. The current "letter of the law" can therefore relatively easily change its normative content as a result of the change of the interpretive context. This has been corroborated by an analysis of interpretations of the law in force, conducted by Polish courts for in their judgments for the purpose of previously decided cases. These interpretations show, for instance, that until a certain point in time the courts presumed that the non-contentious (not based on a legal dispute) procedure was the one that should be employed for cases involving a change of legal sex. Back then a person wishing to change their legal sex did not need to sue their parents as the second party to the dispute, and the entire case was rather of an "official" nature than litigious one. Since this line of judicial decision-making practice did exist in the past (based on the same regulations), perhaps "softening" the social attitude (through effective provision of reliable information) can make the courts re-discover the possibility of replacing the procedural mode with one that is more individual-friendly. Likewise, it is easy to imagine that with changed interpretation, at least some of the ongoing cases will be decided not through the procedure for a „change" of sex (under Art. 189 of the Code of Civil Procedure) but through the procedure of birth certificate rectification. This solution could be employed in a large number of DSD cases. However, a vast majority of cases today are decided using action for declaratory judgment (Art. 189 of the Code of Civil Procedure).

Reinterpretation of regulations concerning sex and gender could – without a change of „the letter of the law" – affect other spheres of the law, too. It could increase and homogenise standards for the appointment of experts (how many experts, what specialisations, what experience), and introduce uniform standards for their work. As regards physicians, it could facilitate action for introducing uniform standards of treatment. Additionally, it could potentially reduce physicians'

⁶³ The draft law on gender recognition, presented by transgender MP Anna Grodzka, was Poland's first attempt at regulating legal sex correction (recognition) and remained under parliamentary debates for almost three years. The work to make it law was accompanied by an atmosphere of criticism and opposition from conservative circles. It was eventually passed by the parliament in 2015, only to be vetoed by the Polish President. As parliamentary elections were held in the meantime, the act could not be resubmitted to the Sejm. This means that any future legislative initiatives must proceed from scratch.

fear of being held accountable for medical error due to the employment of specific therapeutic procedures to support the treatment of their patients (e.g. hormone therapy of minors).

Last but not least, a change of the social interpretive context could translate into a greater courage of individuals in making the decision to rectify mis-assigned legal sex in cases where the rectification procedure is possible. Meanwhile, a change of the context could improve parents' acceptance of their children's problems. After all, the majority of the legal solutions will not have the desired effect if, at family level, instead of understanding and acceptance there is shunning and exclusion.

Therefore, we presume that since the change of provisions governing the assignment of legal sex and gender recognition is not possible in Poland in this particular interpretive moment, it becomes crucial that elementary social awareness in this area be raised. Provision of evidence-based medical knowledge on human sexuality is, in my opinion, fundamental for the change of social preconceptions. This is something that the activity of social movements, in particular the fourth-wave feminism, can bring about.

Modern-day feminism, in its causative power, strength, and ability to bring millions of women at the same time to the streets, is an outcome of two phenomena: the emergence of radical right wing, and the development of social media and Internet communications. The fact that the development of virtual communications continues to bring new possibilities and opportunities is illustrated by unprecedented internet mobilisations of women: hashtags of the Internet-based MeToo action, or the Internet union of women, which closed Women's March in January 2017. In Poland, the recent movement connected with "#czarnyprotest" (the Black Protest), brought together hundreds of thousands of women fighting for a common cause (the symbol of the fight was black dress), with tens of thousands taking to the streets as part of the Polish Women's Strike⁶⁴. The potential of the fourth wave is seen in the communication possibilities also by its commentators: "the Internet itself has enabled a shift from 'third-wave' to fourth-wave feminism. What is certain is that the Internet has created a *call-out* culture, in which sexism or misogyny can be *called out* and challenged"⁶⁵. The Internet operated as both a discussion form and a road to the development of activism. What is happening now

⁶⁴ E. Korolczuk, *Explaining mass protests against abortion ban in Poland: the power of connective action*, "Zoon Politikon" 2016, nr 7, https://www.civitas.edu.pl/wp-content/uploads/2015/03/Zoon_Politikon_07_2016_091_113.pdf [access: 19.03.2022].

⁶⁵ E. Munro, *Feminism: A Fourth Wave?*, <https://www.psa.ac.uk/psa/news/feminism-fourth-wave> [access: 18.03.2022].

is defined by technology: the tools that allow women to build a strong, popular, and responsive movement online⁶⁶.

As B. Hall has rightly observed, “What distinguishes the new generation of activists is not necessarily competing political claims but rather changing sensibilities, and in particular new forms of action and organization committed to informal grassroots engagements, horizontality and inclusivity”⁶⁷. It should be stressed that the fact that the fourth-wave feminism relies heavily on new technologies and is inclusive in nature (which has its source in extensive focus on intersectionality)⁶⁸, offers some potential for consolidating the voice of LGBTQ individuals. K. Cochrane, who described this phenomenon, featured in her work interviews with transgender women who pointed out that their situation improved and became more understandable for others largely thanks to Internet, where they can share their experiences⁶⁹. Furthermore, social media allowed messages from transgender activists⁷⁰ to reach wide audiences all over the world. Although these examples predominantly come from western countries, where the fourth-wave has already been thoroughly analyzed and its existence is more visible and established, it does appear that there is some hope for change in Poland as well. The Internet allows for the voice of transgender people to reach numerous people and for transgender communities to be formed in this part of Europe.

These are phenomena thanks to which one can significantly transform social beliefs and quickly mobilise the society, without having to invest major financial

⁶⁶ What’s happening now feels like something new again. It’s defined by technology: tools that are allowing women to build a strong, popular, reactive movement online (K. Cochrane, *The fourth wave of feminism: meet the rebel women*, available from: <https://www.theguardian.com/world/2013/dec/10/fourth-wave-feminism-rebel-women> [access: 18.03.2022]).

⁶⁷ B. Hall, *Gendering Resistance to Right-Wing Populism: Black Protest and a New Wave of Feminist Activism in Poland?*, “American Behavioral Scientist” 2019, p. 5.

⁶⁸ K. Cochrane, *All the Rebel Women: The Rise of the Fourth Wave of Feminism*, Guardian Books 2013.

⁶⁹ It should be stressed that the transition from male to female (M/F) entails deeper social exclusion than the transition from female to male. As A.M. Kłonkowska has rightly pointed out, in addition to exclusion related to transgenderism, “females by choice” are not treated seriously as regards their femininity, experience misogyny and ridicule (are targets of opinions such as “You’ll never be a true woman anyways”, “What are you doing to yourself”). This sort of situation further strengthens the need for solidarity among women, including trans-women. A.M. Kłonkowska, „Kobiety z wyboru”. *O społecznym wykluczeniu trans-kobiecości*, [in:] *Spolecznie wykluczeni. Niewygodni, nienormalny, nieprzystosowani, nieadekwatni*, eds. A.M. Kłonkowska, M. Szulc, Gdańsk 2013, pp. 137-138.

⁷⁰ See P. Chamberlain, *The Feminist Fourth Wave*, London 2017. The author mentions activists such as Laverne Cox – actress in a Netflix show “Orange is the New Black”, first trans woman to have appeared on the cover of TIME magazine, advocate of trans rights; Caitlyn Jenner – known from the reality TV show „Keeping up with the Kardashians”. In 2015, Jenner came out as a trans woman, appeared on the cover of Vanity Fair; Paris Lees – she established a trans campaign “All About Trans”, and in 2015 was top of the Independent’s Pink List.

resources. In this regard, great hopes are placed on the fourth-wave feminism as to broadening social awareness of the violence that is generated to maintain the binary *status quo*. Where law cannot be changed, what one can do is change awareness by reaching for the opportunities brought by grassroots social communication, and provide knowledge to change how the law is understood and, as a result, how it is applied. “The beauty of the fourth wave is that there is a place in it for all –together. The academic and theoretical apparatus is extensive and well-honed in the academy, ready to support a new broad-based activism in the home, in the workplace, and in the streets”⁷¹.

We presume that perspective based on virtual activism, predominantly on the part of young people, means that the current interpretive moment differs considerably from the one from before the year 2016. The fourth-wave feminism goes beyond specific actions and protests. It also entails a change in how we think about human sexuality. A change in collective thinking can affect and translate into how law is made and interpreted. The fourth-wave in Poland opened a debate on human sexuality, threatened on many different levels (reproductive rights, sexual orientation, and gender identity). Feminism gained a new dimension and became a significant voice in the public debate. The fourth-wave feminism is predominantly the voice of the younger part of the society, willing to show their ever-growing frustration over the treatment of sexuality as a taboo topic. We are witnessing an increase in activity, both of feminist movements and the LGBTQ community, in the field of education and social activism. They are calling for mobilization and readiness to act in the face of a heated public debate triggered by the populist ruling party. This has led to the development of an Internet space where transgender and intersexual individuals can freely open up and share their experiences with one another and the society. Given the Internet hate, this space is not entirely safe, however joint mobilization encourages transgender individuals to openly speak for themselves. Nevertheless, it should be added that feminist movements do not always adopt a coherent stance on transgenderism, in particular the TERFS movement⁷². However, even despite these discrepancies, the potential of the fourth-wave feminism to free itself from prejudice and rely on the idea of social justice, is obvious.

⁷¹ M. Rampton, *Four Waves of Feminism*, <https://www.pacificu.edu/about/media/four-waves-feminism> [access: 17.03.2022].

⁷² After Sally Hines, we indicate that the foundations for this movement were the book by Janice Raymond, *The Transsexual Empire* (1979), in which he assumes that gender is an expression of biological sex, which is shaped by the chromosome system; therefore, the chromosomal sex cannot be changed. Consequently, gender and gender are inextricably linked in a biological sense from birth. Raymond points out that the male-to-female transition is in fact a male practice based on a patriarchal medical system designed to produce more female subordinates (maids). Raymond assumes that trans women will never stand up and are not women. S. Hines, *The feminist frontier: on trans and feminism*, “Journal of Gender Studies” 2017, vol. 28 (2), p. 3.

The actual cost of a conservative approach to sex and gender is the life of many people whose legal status is highly unclear. Now, in 2022 Polish legal system is in a „hard” interpretative moment - Poland is currently ranked 43 out of 49 countries in the annual review of the legal protection provided to LGBT people in European countries prepared by the ILGA Europe organization. It is the last place among all European Union countries. As we wrote - the level of legal protections for trans people in Poland is deficient. Maybe, the potential of fourth-wave feminism will change that – we hope that we can examine that in the future with more optimistic conclusions

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