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Split Genders: Medical versus Legal Understanding of Gender Identity (De Lege Lata and De Lege Ferenda)¹

Abstract: For centuries, the law accepted the legal gender of an individual that was indicated at birth by the appearance of their genitalia and stated on their birth certificate. Nowadays, however, we have plenty of scientific, medical and psychological evidence (and thus reasons) to revise the adopted way of thinking about legal gender to associate it more with gender identity. Most people do not perceive a potential conflict between genital sex and gender identity, because their genital sex is consistent with their gender identity. Trans- and intersex community needs recognition of their gender identity independent of their genital sex as a condition for a life of self-determination, personal freedom, respect and dignity; these are, after all, values that are extremely important for the law. The purpose of this analysis is to determine whether the concept of gender identity is perceived generally in the Polish

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language and the Polish legal system in a way that takes into account current medical knowledge and the legitimate needs of the individual. If not, then what *de lege ferenda* recommendations can be made to change this situation?

Keywords: ascribed gender, experienced gender, gender identity, legal gender

Introduction

For centuries, it has been accepted in law that the legal gender of an individual is the gender documented on the birth certificate, determined shortly after birth based on the appearance of the newborn's genitals. Legal gender is thus, in principle, the same as genital sex. Nowadays, however, we have plenty of medical and psychological evidence (and thus reasons) to revise the accepted way of thinking and link legal gender more strongly to gender identity than to genital sex. Most people overlook this issue, because their genital sex and gender identity are consistent. None of us, however, would want to be considered a man while feeling like a woman (or vice versa), but most of us are not threatened with this, because at birth we were recognized as the persons we truly are. A minority of people whose physicality does not comply with their self-identification needs recognition of their gender identity independent of their genital sex as a condition for living a life of self-determination, personal freedom, respect and dignity. All these values are extremely important for the law.

This text will focus on the Polish legal system for three reasons. First, Polish law does not explicitly provide for regulations addressing the protection of gender identity or the reconciliation of legal gender based on it. Second, Polish society is strongly polarized on the issue of recognizing the right of transgender people to live according to their gender identity (PTPA, 2013, p. 230). Third, Poland is generally doing a poor job of protecting transgender minorities (ILGA Europe, 2023, pp. 114–116). The comparative analyses will show that Poland is among the countries whose citizens face a number of serious life impediments in the area analysed here. In doing so, the Polish legal system is an example of an interesting bifurcation. At the regulatory level, it strongly embodies the traditional, 'objective' (genital) approach to human gender, but this view becomes more liberal at the level of the application of the law. This makes the Polish legal system particularly conducive to considerations of whether the law needs the category of gender identity and what the consequences of its absence are. However, in order to conduct such deliberations, it is necessary to first understand what gender identity is, especially given the persistence of stereotypes about this component of mental life. Therefore legal considerations of this aspect must be carried out, taking into account knowledge provided by medicine and psychology.

We have set two goals: to determine whether and how the Polish legal system recognizes an individual's gender identity and to make *de lege ferenda* recommenda-

tions based on the medical and psychological understanding of gender identity and the results of comparative findings. This study is part of the paradigm of the external integration of legal sciences (Opałek, 1968, p. 9; Pietrzykowski, 2012, p. 9). The medical and psychological understanding of gender identity has been presented by specialists in these fields based on a review of the latest literature on the subject. The following methods are used to present the legal understanding of gender identity:

- 1) formal and dogmatic analysis of legislation and jurisprudence;
- 2) dictionary analysis (for determining ordinary meanings); and
- 3) comparative analysis, in order to set Polish regulations against the background of solutions adopted in other countries, for a better understanding of the characteristic features of the Polish approach and to determine the possible directions of its transformation in the future.

1. Gender identity in the light of current medical knowledge²

From a medical perspective, human gender is a multifactorial phenomenon, consisting of chromosomal sex, genetic sex, gonadal sex, the sex of internal and external genitalia (genital sex), psychological gender or gender identity, and assigned sex (legal gender) (Bielska-Brodziak & Gawlik, 2016, pp. 9–15). Gender identity (psychological gender, perceived gender or gender identification) is a sense of being a person of a certain gender or multiple genders, or a sense of reluctance or lack of need to define one's identity in terms of gender categories; this is how it is defined in key Polish and international standards of medical care (including Coleman et al., 2022; Gawlik-Starzyk et al., 2024; Grabski et al., 2021).

The latest Polish recommendations for adolescent care introduce a group of substantive and axiological assumptions based on current scientific research:

1. Once formed, gender identity is not subject to volitional change; similarly, the developing gender identity cannot be formed arbitrarily;
2. A person's perceived gender (gender identity) that is incompatible with their genital sex cannot be viewed as a mental disorder per se;
3. Affirmation of gender identity and living in accordance with it are an inalienable right of every individual;
4. Attempts to forcibly influence the development of someone's gender identity are not only ineffective, but have negative consequences for the person's health (Gawlik-Starzyk et al., 2024, p. 3).

2 Under medical knowledge, I also include the observations and conclusions made by psychologists.

The above observations are of particular importance in the case of people whose gender identity is incompatible with their genital sex, and consequently, most often, their legal gender. In this context, the term 'transgender' is used, which is now a collective name for all forms of such non-conformity. Transgender people include those who have developed unambiguously male or female gender identities (trans men and trans women), as well as non-binary people (Grabski et al., 2020, p. 267). The evolution of thinking about transgenderism that has taken place in medical science over the past few decades is telling. It is made apparent by analysing the records of the international medical classifications, the International Statistical Classification of Diseases and Health Problems of the World Health Organization (ICD) and the Diagnostic and Statistical Manual of Mental Disorders of the American Psychiatric Association (DSM). The ICD-9 of 1977 placed 'transsexualism' (the term used originally) among sexual disorders and deviations, while in the DSM-3 classification, which dates back to 1980, it was included in the category of gender identity disorders. The subsequent 1980 version of the ICD (ICD-10, p. 180) similarly shifted this term to gender identity disorders. Originally, then, transgenderism (or 'transsexualism') was understood as a disorder, a psychopathology. The first significant changes included the abandonment of the category of 'gender identity disorder' in favour of 'gender dysphoria' (DSM-5, 2013). A fundamental change came with the new 2018 version of the ICD (ICD-11), which discarded the terms 'transsexualism' and 'gender identity disorder', replacing them with the concept of gender incongruence. The latter was excluded from mental disorders and placed in a new group of conditions related to sexual health. Gender incongruence is defined in the ICD-11 as 'a marked and persistent incongruence between an individual's experienced gender and the assigned sex'.

This brief overview reveals some rather surprising facts. Although the phenomenon of transgenderism has been known for centuries, it has only appeared in both scientific research and official medical classifications relatively recently.³ Since then, however, we can observe an overt, verifiable and rapid evolution of scientific thinking about it, in particular its depsychiatrization and the transfer from the area of disorders to the area of norms (Grabski et al., 2020, p. 36). This shift in thinking is not driven by ideological or political considerations but is the result of a scientific consensus, developed on the basis of evidence-based medicine, recognizing gender diversity beyond traditional perceptions of gender.

3 The first diagnostic units, before the ICD and DSM classifications, were described in the 19th century (Jakubowski, 2015, p. 119).

1.1. The etiology of gender identity: The biological background of gender incongruence

The most current scientific evidence points to a biological rather than volitional origin for gender identity. These views have evolved over the years: in the mid-20th century, the prevailing concept was that gender identity was mainly determined by psychosocial factors, including upbringing. The fallacy of this assumption is demonstrated by numerous unsuccessful attempts to manipulate gender identity, including of intersex people, i.e. those born with atypical external genitalia (Knudson et al., 2020, p. 4; Korpaisarn & Safer, 2019, p. 325). In the past, intersex individuals underwent surgical ‘normalization procedures’ in early childhood to give their genitalia a more typical appearance. As a rule, a procedure with a lower risk of failure was chosen, i.e. feminizing plastic surgery. Although these children were subsequently raised most often in a female gender role, a significant number of them demonstrated a male gender identity upon reaching maturity or reported symptoms of gender dysphoria. Thus nowadays, a belief in the dominant role of psychosocial factors in the development of gender identity is rejected. In turn, the key role is attributed to several interacting factors: genetic factors, exposure to androgens as a foetus and neuroanatomy (brain structure).

1.1.1. Genetic factors

The involvement of genetic factors in the development of gender identity is indicated by twin studies (Burri et al., 2011, p. e21982; Sasaki et al., 2016, p. 1681). It has been demonstrated that monozygotic twins (having the same genetic material) were congruent in their transgender identity in up to 40% of cases. Such a relationship was not found for dizygotic twins, whose genetic similarity is the same as that of regular siblings (Heylens et al., 2012, p. 752). The data available now suggests there is no single gene that determines gender identity; multiple genes are likely involved in its development (Polderman et al., 2018, p. 97).

1.1.2. Exposure to androgens as a foetus

Another factor shaping gender identity may be the different exposure of the structures of the central nervous system to androgens, i.e. testosterone and hormones with similar activity (commonly known as male hormones), during early foetal development. Excessive androgen production in individuals with the XX karyotype (female chromosomal sex) may predispose the development of a male-like gender identity. In contrast, lack of or insensitivity to androgens in foetuses with the XY karyotype (male chromosomal sex) may result in development of a female gender identity. This mechanism is probably responsible for the incongruent gender identity of some intersex people with underlying hormonal disorders (Babu & Shah, 2021, p. 39). Also, exposure in early foetal development to androgen-lowering drugs

(e.g. certain drugs used to treat epilepsy) has been linked to an increased incidence of gender incongruence (Dessens et al., 1999, p. 31).

1.1.3. Neuroanatomy (structure of the brain)

Studies also indicate a link between brain anatomy and gender identity (Boucher & Chinnah, 2020, p. 91; Kurth et al., 2022, p. 1582; Xerxa et al., 2023, p. e2313139). For example, it was found that the size of the bed nucleus of the stria terminalis, a structure that exhibits gender differences in structure (known as sexual dimorphism), approximates the size characteristic of the sex experienced rather than assigned at birth. These differences occur early in brain development and are probably not a consequence of later hormonal interventions (Kruijver et al., 2000, p. 2034; Zhou et al., 1995, p. 68). Another sex-dependent brain structure whose volume in transgender people is similar to that observed in the experienced gender is the sexually dimorphic nucleus of the hypothalamus (Garcia-Falgueras & Swaab, 2008, p. 3132; Joel et al., 2020, p. 156). There is also data indicating differences in brain structure specific to transgender people, not attributable to one end of the 'female brain–male brain' spectrum (Mueller et al., 2021, p. 1122).

1.2. The significance of gender identity affirmation for human well-being

From a psychological perspective, gender identity is one of the basic components of human identity (Steensma et al., 2013, p. 289), through which an individual perceives themselves and functions in society. Being seen in terms of the gender assigned at birth can have a variety of consequences: it can involve a degree of favouritism or, conversely, stigmatization and exclusion. The experiences of transgender people highlight the need for legal protection of gender identity by adapting the legal system to the needs of transgender minorities. The model of minority stress experienced by gender-minority individuals (Testa et al., 2015, p. 67) explains how prejudice-based discrimination and the resulting internalized stigma associated with minority membership translate into negative mental health consequences. The factors described in the model explain the significant disparity in the incidence of mood and anxiety disorders, among others, between trans – and cisgender people, to the disadvantage of the former (Lee et al., 2020, p. 103). Living in a gender role assigned at birth, rather than in accordance with the gender experienced, causes significant suffering (Cole et al., 2000, p. 151) and carries negative mental health consequences (Rotondi et al., 2012, p. 135).

Functioning in accordance with the gender experienced but in disagreement with one's legal gender forces transgender people to disclose their minority status (indicating that they have a diagnosis included in the mental disorders chapter of the ICD-10 classification). It therefore potentially exposes them to discrimination (and violence) based on their membership in gender minorities as well as in a group of

people with mental disorders (Taylor, 2007, p. 834). Discrimination and violence motivated by prejudice against transgender people can manifest not only at an interpersonal level, but also at an organizational and systemic level; it can result in the loss of jobs, impeded access to education and medical care, and lack of equal treatment by the justice system (Delgado & Castro, 2014, p. 193; Jakubowski, 2017, p. 210).

Using documents that include the gender assigned at birth increases the risk of experiencing deadnaming and misgendering, which adversely affects the mental health of transgender people (Russell et al., 2018, p. 503). Having documents with unadjusted data is associated with higher levels of psychological distress and suicidality (Scheim et al., 2020, p. e196). Adjusted data, in turn, can promote higher earnings, engaging in health-seeking behaviours and less discrimination from the family, among other things (Hill et al., 2018, p. 25), which is conducive to improving the mental state of trans people (Drescher et al., 2019, p. 52). The legal adjustment of gender designation in Poland can, in its current form, negatively affect the well-being of transgender people in many ways (Grabski et al., 2020, p. 73). Having to sue parents in court can contribute to a deterioration in family relationships, although family support is a key factor affecting the well-being of transgender people (Simons et al., 2013, p. 791).

1.3. Recapitulation before reflections on language and law

To summarize, it is important to highlight some basic conclusions. First, there is now a preponderance of evidence for the predominant biological etiology of gender incongruence (including transgenderism) and thus the biological basis of gender identity itself. Despite this, there is no imaging or genetic or laboratory test that can be used to 'confirm' gender identity. In most cases, it is also not possible to assess the hormonal environment in which the sex (including gender identity) of the foetus is formed. Hence a person with gender incongruence may not present any of the identified biological markers of transsexuality (Knudson et al., 2020, p. 3). Second, gender identity, as biologically determined, is not a matter of choice, much less a matter of whim, caprice, etc. There is no justification for dividing sex determinants into those that are biological (the appearance of genitals), 'objective', certain and given once and for all, and those that are 'non-biological' (gender identity), which are 'subjective', uncertain and subject to arbitrary changes. Gender identity is also a biological determinant and is not subject to arbitrary change. Third, gender identity is one of the basic categories of human identity, which organizes the way an individual sees themselves, the way they navigate social reality and the way they are perceived by others. Studies have shown that extending legal protection to it promotes improved psychological well-being (Du Bois et al., 2018, p. 220), and the inability to affirm one's gender identity can be a source of suffering. In such a context of current medical knowledge,

I will look at the perception of gender identity in the Polish language generally and in the Polish legal system.

2. Gender identity in the general Polish language

Before analysing the relevant legislation and jurisprudence, it should be pointed out that gender identity does not have a legal definition in Poland. This leads to the conclusion that a lawyer can understand it either in the specialized way outlined above or must resort to general language. In turn, a representative source of knowledge about the general language is dictionaries (Bielska-Brodziak & Tobor, 2007; Tobor et al., 2008). Therefore, using a selection of 25 dictionaries from 1983 to 2023, I will determine how ‘gender identity’ and closely associated expressions, i.e. ‘identity’, ‘sex’ and ‘gender’, are understood in modern Polish.

2.1. Tożsamość płciowa

None of the modern dictionaries of the Polish language includes either the term *tożsamość płciowa* (gender identity) or *identyfikacja płciowa* (gender identification). Moreover, although dictionaries note the broader categories of *tożsamość* (identity) and *identyfikacja* (identification), none of the descriptions of these categories refer to gender identity or identification. These are terms that are still too rarely present in actual utterances, and thus also in the consciousness of language users, to be included in dictionaries. Dictionaries of European languages such as English, French and Spanish present a different picture; they include the expression for *tożsamość płciowa* – *gender identity* (*Cambridge dictionary* (Cambridge University Press, n.d.)), *identité de genre* (*Dictionnaire de français* (Larousse, n.d.)), *identidad de género* (*El Diccionario de la lengua española* (Real Academia Española, n.d.)) – and define it in a way that is close to its medical-psychological understanding.

2.2. Tożsamość

Tożsamość (identity) in Polish dictionaries refers both to an individual and a group. On an individual level, it is understood as an awareness of oneself, one’s qualities and one’s distinctiveness, or as the totality of characteristics that identify a person (Bralczyk, 2005, p. 853; Drabik et al., 2008, p. 1048; Dubisz, 2003, p. 96; Polański, 2008, p. 836; Żmigrodzki et al., 2023). The first meaning has appeared in dictionaries only since the beginning of the 21st century, emphasizing the internal perspective of the subject. The second, much older, one, on the other hand, assumes an external perspective, focusing on what allows others to identify the person. In the case of people experiencing a conflict between genital sex and gender identity, the choice of either of the above-mentioned understandings of *tożsamość* will clearly lead to completely different intuitions about the determinants of gender – whether it is the sense of experienced gender (awareness of oneself, one’s characteristics and one’s dis-

tinctiveness) or the appearance of external genitalia (the totality of features that allow the identification of a person).

2.3. Płeć

Płeć (sex) is defined in dictionaries as ‘the totality of characteristics that make it possible to distinguish women from men’ or as ‘a set of properties that characterize the organisms of male and female individuals and oppose them to each other’ (Żmigrodzki et al., 2023). Therefore both of these understandings emphasize the external perspective: the observer should be able to distinguish between a woman and a man based on their distinctive external characteristics. There is no room for an internal perspective, experiencing oneself as a particular person. It should be noted that in Polish, there is only the term *płeć*; in contrast, in languages such as English, French and Spanish, there are pairs: *sex-gender*, *sexe-genre*, *sexo-genero*. Therefore already at the level of general language, the phenomenon of *płeć* does not distinguish the nuances between the external and internal dimensions, thus reducing it to what is external.

2.4. Gender

Polish dictionaries have recently noted the term ‘gender’, which can be understood in two ways. First, it is understood as ‘a current in contemporary humanistic reflection based on the belief that human gender identity is a phenomenon shaped socially and culturally’ (Żmigrodzki et al., 2023). Second, gender is ‘a person’s gender identity understood as a phenomenon shaped socially and culturally’ (Żmigrodzki et al., 2023); the notion that gender identity is something learned, acquired from the outside, is clearly visible here.

Two important insights can be seen here: in general Polish, ‘gender identity’ has been merged with ‘gender’, and the word has become a symbol of a hostile ideology that threatens the foundations of the social order.⁴ Thus ‘gender identity’ inherits the burdens of ‘gender’, with much less association with the achievements of medicine and psychology. Let us note again that gender identity, according to current medical knowledge, is not shaped culturally and socially; it is a human property with a biological basis. This fundamentally changes the situation, because it brings the etiology of gender identity closer to uncontrollable human traits, rather than to preferences that are subject to fairly free changes.

4 In 2020 (in the 9th term of the Sejm), a citizens’ bill was submitted entitled ‘Tak dla rodziny, nie dla gender’ (Yes to family, no to gender). It concerned consent to denunciation of the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence, drawn up in Istanbul on 11 May 2011. ‘Gender’ appears in the bill’s explanatory memorandum: ‘The key reason why the [...] convention has been met with [...] opposition is its introduction into Polish law of the gender category of “socio-cultural gender”, assuming the contractual nature of differences between genders’ (Sejm Rzeczypospolitej Polskiej, 2020).

3. Gender identity in Polish legislation and judicature

3.1. Gender identity in applicable legislation

Gender identity appears expressly in Polish legislation only once, in Article 47 of the Act of 13 June 2003 on Granting Protection to Foreigners on the Territory of the Republic of Poland. This provision establishes a special procedure in international protection cases if the applicant is persecuted on the basis of gender, sexual orientation, gender identity or age.⁵ It is more common to find the term *tożsamość* in Polish legislation, with other words complementing it, such as the identity of the Polish nation, religious identity, cultural identity or national identity. These are different types of collective identities, the first three of which are already mentioned in the Constitution (Articles 6(1) and 35(2) of the Constitution of the Republic of Poland, 1997), while national identity is mentioned in the preamble to the Pole's Card Act of 7 September 2007. Interestingly, despite the fact that these are collective identities, this is where the legislatures use the concept of identity to emphasize the internal perspective of the subject: national, religious or cultural identity are phenomena experienced internally by the individual. The expression *tożsamość* in relation to an individual is also used in several laws.⁶ In principle, it is consistent with the dictionary definition of identity cited above – but the 'external' one, understood as the totality of characteristics that make it possible to identify a person.

3.2. Gender identity in judicial decisions: Gender reconciliation procedures

Jurisprudence seeks to 'patch up' the legal system's deficiencies by introducing the category of gender identity, as an important factor in the identity of the subject, into the justifications of judgments. First, jurisprudence defines it for the purposes of legal language and has also 'created' the Polish procedure for reconciling the gender entered on the birth certificate with gender identity – in a way in place of the legislature.

Regarding the former, courts accept that gender identity is 'the deeply felt internal and individual experience of social gender, which does not have to correspond to the gender determined at birth, including personal feelings of one's own corporeality and other expressions of one's gender' (Judgment of the Regional Court in Warsaw, 2020; also see: judgment of the Supreme Court of Poland 2022). The jurisprudence emphasizes the subjectivity in feeling a certain identity: it is a matter of the individual 'feeling' of a person (Judgment of the Province Administrative Court in Łódź, 2017). It is a well-established view that gender identity constitutes an individual's per-

5 In addition, the term *tożsamość płciowa* is used in the annex to the regulation on the core curriculum of the subject 'Family, Life, Education' (Regulation on the Core Curriculum of Pre-School Education and General Education in the Respective Types of Schools 2012)

6 See, for example, Article 4(1) of the Act on Identity Cards 2010, Article 3(19) of the Act on Safety of Mass Events 2009, or Article 12(3) of the Act on the Family Capital 2021.

sonal interest as a special area of intimate life and the human psyche (Judgment of the Court of Appeal in Rzeszów, 2009; Judgment of the District Court in Warsaw, 2017; Order of the Supreme Court, 1991).

The judicature has also developed a procedure for changing the sex in a birth certificate, and it is in these judgments that the term 'gender identity' is present most frequently. The term *uzgodnienie płci* (gender reconciliation) has been criticized for pointing to the possibility of changing a person's sex, while the purpose of the procedure is to reconcile the flawed legal condition with the factual condition of a person's gender identity. The procedure currently in use in Poland is not designed for this type of case; its basis is Article 189 of the Code of Civil Procedure (1964), on a very general action for determination. Courts use it by analogy for gender reconciliation processes, because the procedure that would clearly address that important issue has never been specified or regulated in Poland in any legislation. Proceedings are held in a litigation procedure, which requires the identification of the defendant (in practice – the parents of the person whose gender is being affirmed). What is difficult to accept is that someone is forced to claim such a personal right through conflict; the problem becomes even more serious when a transgender person is not accepted by their parents. When parents accept the claim, it facilitates the proceedings to a great extent. However, there are situations in which parents request that the action be dismissed, e.g. because 'they cannot allow this request due to emotional feelings relating to the fact that a son and not a daughter was born' and they believe that the action is a manifestation of a 'whim [or] fancy' (Judgment of the Court of Appeal in Białystok, 2016; also see: judgment of the Regional Court in Słupsk, 2017).

While the Polish legislation is silent, the courts have introduced in their rulings explicit references to medical knowledge: gender reconciliation requires special knowledge and cannot be based solely on the testimonies and statements of the parties (Judgment of the Court of Appeal in Białystok, 2016; Judgment of the Court of Appeal in Rzeszów, 2009). The courts, in lieu of the legislature, formulate the necessary conditions for the gender reconciliation procedure: contact of the person with specialist physicians, diagnosis, start of hormone therapy, a lawsuit with experts and change in the birth certificate, possibly further medical affirmative treatments (Judgment of the Court of Appeal in Białystok, 2016). Only after a diagnosis has been made and hormone therapy has started is it possible to bring a lawsuit, and the basic evidence in the case is the opinion (diagnosis) of the physician-sexologist and the testimony of the plaintiff.

In gender reconciliation processes, gender identity is a visible category, as it is the basis for reconciliation. However, it appears only in contrast to genital sex, and in the Polish normative system it does not constitute a value in itself. Courts make gender identity the criterion determining legal gender, only taking precedence in cases of conflict with genital sex. This is also supported by the fact that gender reconciliation lawsuits do not require a transgender person to undergo either prior or subsequent

surgical intervention that would alter the external perspective, i.e. the appearance of the genitals. However, gender identity is anyway evaluated in a way that seeks to strongly and externally ‘objectify’ this criterion, which is related to the law’s general caution towards declarations made by an individual interested in undergoing gender reconciliation. This distrust in itself can be a traumatizing experience for a transgender person (cf. Bielska-Brodziak & Boratyńska, 2019, pp. 542–559). By recognizing the serious shortcomings of the current solution, courts indicate the need for legislative activity: ‘it is the legislature’s responsibility to consider whether the current state of the law corresponds to the contemporary level of knowledge about gender identity and international standards for recognizing gender identity as the official basis for gender determination. It is also up to the legislature to exhaustively define the legal consequences of a court decision on gender reconciliation’ (Order of the Supreme Court, 2014).

3.3. Gender identity in the vetoed Gender Recognition Act

In 2015, the Polish parliament passed the Gender Recognition Act (Sejm Rzeczypospolitej Polskiej, 2015), which was then effectively vetoed by the president. This piece of legislation was the result of years of work by the activist, legal and medical communities; their representatives took an active part in the legislative process. Importantly, the act introduced a legal definition of gender identity, clearly embedded within the medical context: ‘Whenever the act refers to gender identity, it should be understood as the established, intensely felt experience of one’s gender, which corresponds, or does not correspond, to the sex entered on the birth certificate’ (Article 2(1)). The definition stressed the importance of a person’s internal experience of gender identity, rather than the identification of a person from the outside.

The 2015 Act stipulated that gender reconciliation would take place in a non-contentious procedure before a court specializing in such cases. An unmarried person who finds they have a gender identity different from the gender entered on their birth certificate can apply for gender reconciliation (the application had to be accompanied by two medical certificates confirming this). The request for gender reconciliation was subject to quick review (three months from the date of filing), and the court could limit the proceedings to evidence in the form of documents attached to the application and hearing the testimony of the applicant. The Act thus provided for a significant reduction in formality and for empowerment of the applicant. The participation of the ‘other party’ (parents) was not required. Perhaps, more than nine years after this bill was adopted by the Polish parliament and vetoed by the president, this solution could be revised in light of contemporary legislative directions in Europe, which will be discussed next.

4. Gender identity in international law and other legal systems

Gender identity is a category present in acts of international law, where the need to protect it and to combat transphobia is emphasized.⁷ The Yogyakarta Principles (2006) (soft law) define gender identity very broadly, as the deeply felt internal and individual experience of social gender, which may or may not correspond to the gender determined at birth, including personal feelings of one's own corporeality (which may lead to modification of external appearance or biological functions by medical, surgical or other methods) and other expressions of one's sexuality through clothing, speech or behaviour.

The interpretation of Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms plays an important role in shaping the international understanding of 'gender identity'. This provision states that '[e]veryone has the right to respect for his private and family life, his home and his correspondence'. The European Court of Human Rights has repeatedly indicated in its decisions that the expression 'private life' includes an individual's gender identity, first name, sexual orientation and sex life (judgments of the ECHR, 2001, 2016 and 2017). In 2002, a landmark judgment was made to protect an individual's gender identity in the case of *Goodwin v. the United Kingdom*; in finding a violation of Article 8, the Court pointed out:

It must also be recognised that serious interference with private life can arise where the state of domestic law conflicts with an important aspect of personal identity. The stress and alienation arising from a discordance between the position in society assumed by a post-operative transsexual and the status imposed by law which refuses to recognise the change of gender cannot be regarded as a minor inconvenience arising from a formality. A conflict between social reality and law arises which places the transsexual in an anomalous position, in which he or she may experience feelings of vulnerability, humiliation and anxiety. (Judgment of the ECHR, 2002)

Thirteen years later, in its decision in *Y.Y. v. Turkey*, the Court emphasized that 'the right of transgender persons to personal development and to physical and moral security in the full sense enjoyed by others in society cannot be regarded as a matter

7 For example, Article 4(3) of the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (2011); Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 Establishing Minimum Standards on the Rights, Support and Protection of Victims of Crime and Replacing Council Framework Decision 2001/220/; Regulation (EU) 2021/692 of the European Parliament and of the Council of 28 April 2021 Establishing the Citizens, Equality, Rights and Values Programme and Repealing Regulation (EU) No. 1381/2013 of the European Parliament and of the Council and Council Regulation (EU) no. 390/2014.

of controversy requiring the lapse of time to cast clearer light on the issues involved (Judgment of the ECHR, 2015). In this decision, the Court also highlighted the limitations on the freedom of states to regulate gender reconciliation, because ‘where a particularly important facet of an individual’s existence or identity is at stake, the margin allowed to the State will be restricted’ (Judgment of the ECHR, 2015; similarly Judgment of the ECHR, 2018).

Also relevant to this discussion are the solutions to legal gender reconciliation adopted by other European countries. A duality of approach can be noted here: progressive countries that have implemented the standards of international law quoted above (such as Spain, Germany and Malta) and countries with legal systems as mal-adjusted as in Poland (such as Hungary and the Czech Republic). In May 2020, the Hungarian parliament amended the existing civil records law with a two-thirds’ majority: the previous ‘sex’ column on birth certificates was replaced with a ‘sex at birth’ column. While previously the law allowed people to apply for a change in the sex indicated on their birth certificate based on an administrative procedure set forth in a ministerial decree, currently there is no such possibility. Reconciliation of birth-certificate sex with gender identity is not possible even if the transgender person has undergone surgical sex correction (Łukasiewicz, 2021, pp. 91–92). This solution appears to be one of the most radical in Europe.

In the Czech Republic, legal gender reconciliation is very difficult. The application is examined by an expert commission at the Ministry of Health, which consists of a sexologist, a psychiatrist, a medical expert hired by the ministry, a clinical psychologist, an endocrinologist, a gynaecologist and a lawyer specializing in medical law. Before an application is filed, a transgender person must function in the opposite gender for a period of one year, and appropriate hormone therapy is given to them for another year. As a result, after two years, it becomes possible to submit an application; if it is accepted, the commission will issue an opinion qualifying the transgender person for surgical sex correction. Only after this has been performed, and after sterilization, is it possible to introduce a change in the birth certificate. In May 2024, the Czech Constitutional Court ruled that surgery cannot be a condition of formal sex change (Judgment of the Constitutional Court, 2024). This decision is seen as a landmark, and indications are that new regulations could be in place by 2025.

However, in many European countries, legal solutions have been developed to provide high-level protection to transgender people (including in France, Denmark, the Netherlands, Germany, Spain and Malta). We will discuss the latter three countries, which are also interesting because of the legislative evolution they have made towards liberalizing the gender reconciliation procedure, moving away from the need for medical ‘verification’ to give more agency to the will of the individual.

In Spain, the issue of legal gender reassignment was regulated in the 2007 Act on Gender Rectification in the Register (the so-called *Ley trans* (Gobierno de España, 2007)). An adult could apply for a legal gender reconciliation, including changing

their full name to match the new gender entered in their birth certificate. As the law stood in 2007, it was necessary to present a medical certificate stating gender dysphoria and undergo at least two years of hormone therapy. It was not necessary to dissolve an existing marriage (same-sex marriage is possible in Spain) or to undergo surgical procedures to adjust a person's appearance to the experienced sex (such as hormone therapy or surgical sex correction), including sterilization. On 2 March 2023, the Ley para la igualdad real y efectiva de las personas trans y para la garantía de los derechos de las personas LGTBI (Gobierno de España, 2023) went into effect, an act liberalizing the status quo. Gender identity (*identidad sexual*) is henceforth framed as 'the internal and individual experience of gender as each person feels and defines it, possibly, but not necessarily, corresponding to the sex assigned at birth' (Article 3(1)). Legal definitions of the terms 'gender expression' (the way each person expresses their gender identity) and 'transgender person' were also introduced.

Under the new solutions, any person who wishes to change their legal gender may apply for a correction of the entry in the registry (Article 43(1)); all they have to do is make a statement, and there is no longer a need to present medical documents. The age limit has also changed: a change in the sex entered in the birth certificate can be made by a person who is 16 years of age or older, while those between 14 and 16 years of age must submit the consent of their legal guardians. Under the age of 14, court approval is required for the change.

In Malta, the first gender reassignment procedures were regulated through an amendment to the Civil Code in 2004. These provisions were repealed in 2015 and replaced by the Gender Identity, Gender Expression and Sex Characteristics Act (Leġislazzjoni Malta, 2015). The Act includes legal definitions of several key terms related to gender (Article 2), namely gender identity, gender expression, gender marker, lived gender and sex characteristics. For all Maltese citizens, the act affirmed the right to recognition of gender identity, the free development of the individual in accordance with their gender identity, the right to be identified in a manner consistent with one's identity in documents and the protection of bodily integrity and physical autonomy (Article 3). A person 16 years of age or older can make a statement to a notary public, which is then entered in a public registry. On this basis, the head of the registry approves changes to the birth certificate, which then paves the way for amending other documents.

The Spanish and Maltese procedures are interesting examples, and not only because of the way they deformatize the process. These laws determine the widespread implementation of specialized (medical) terminology into legal language, thus expanding the linguistic picture of the world and influencing the presence of this terminology with the desired defined meaning, in legal language, the language of the law and, as a result, in general language as well.

In Germany, the issue of gender reconciliation was regulated by the 1980 Act on Name Change and Gender Determination in Legitimate Cases (*Transsexuellengesetz*)

(Bundesministerium der Justiz, 1980). The Act distinguished two procedural modes: a mode for the 'small' procedure of gender reconciliation (*kleine Lösung*), consisting of a change of first name on the birth certificate; and a mode of the 'large' procedure of gender reconciliation (*große Lösung*) that allows a transgender person to make a full change of sex, entered in the birth certificate. Both modes were present before courts, with the necessary element for the second mode being the submission of opinions of two court-appointed physicians specializing in transgenderism, acting independently of each other. The prerequisites for the 'large' procedure were feeling a lack of belonging to the sex entered in the birth certificate, at least three years of the desire to assume the experienced gender and a high probability that the feeling of belonging to another gender will not change in the future. Initially, the requirement for the 'large' procedure also included a permanent inability to procreate and undergoing a surgical procedure that altered external sexual characteristics, clearly approximating their appearance to the experienced gender (§ 8(3) and (4)). This provision was declared unconstitutional (2011) and has not been applied since. Earlier, the Federal Constitutional Court (2008) had ruled that the requirement for divorce is in conflict with the right to protection of personal life and the right to protection of a previously contracted marriage.

In April 2024, the German Bundestag passed the Self-Determination Act (*Selbstbestimmungsgesetz*), which has not yet come into force.⁸ The very name of the Act emphasizes the change in favour of expanding the autonomy and subjectivity of trans people so that they can exercise their rights in accordance with their identity and without hindrance. It will be possible to change the sex entered in the birth certificate by making a declaration at a registry office, and it will no longer be necessary to have proceedings before a court or to submit two medical reports. The new proposed Act also does not include regulations for medical gender adjustment. The German example is important for showing the direction of evolution that has explicitly linked gender reconciliation to the concept of self-determination, a direction that affirms the fundamental influence of gender identity in determining a person's sex and shifts the emphasis from appearance of the body to a person's self-identification.

Conclusions

The objectives of this study were (1) to determine whether and how the Polish legal system recognizes an individual's gender identity, and (2) to make *de lege ferenda* recommendations based on the medical and psychological understanding of gender identity and the results of comparative findings. Below, We will summarize the anal-

⁸ The Act will come into force in two stages: as of 1 August 2024, it will be possible to apply for a declaration of gender and first-name change, while on 1 November 2024, the Self-Determination Act will finally replace the Transsexuals Act of 1980.

yses on the understanding of gender identity and at the same time present *de lege ferenda* conclusions.

First, gender identity is a category present in research discourse and seen as an important component of human life. The prevailing position in medical sciences is that gender identity is biologically determined, although it cannot be easily determined by the tests currently available. Gender identity is as much a 'biological', 'objective' and not easily changed determinant of a person's gender as the appearance of the external genitalia. However, it has a much greater impact on the overall life of the individual, so the need to renounce it in society and the lack of recognition of the right to live in accordance with one's gender identity have a destructive effect on the psychological well-being of the individual. Legal gender is, in turn, a formal category; its understanding in law can and should change with changes in the understanding of the world and reliable knowledge about it. It is precisely for these reasons that the semantic content of *pleć prawna* should turn towards gender identity.

Second, the law splits gender from gender identity. Gender in law and gender in medicine and psychology are also split categories. As a result, legal gender in Poland is identified with a person's physical appearance rather than their self-identification. Gender identity is not seen as the most important criterion determining gender, as current medical and psychological knowledge shows.

Third, the Polish legal system does not explicitly recognize gender identity at all; the concept is absent from current legislation. The term *tożsamość płciowa* (gender identity) has not yet spread in general Polish language, while it is present in other European languages (such as English, French or Spanish). This situation shows well that gender identity is a term that is not very present in social consciousness, which is reflected in and co-created by language (cf. Bartmiński, 2012). The dictionary entry that is relatively close to gender identity is 'gender', most often used in Poland as an expression for a hostile ideology that threatens the traditional order. This is expressed, for example, in the title of the citizens' bill: 'Yes to family, no to gender'.

A dictionary analysis of the word *pleć*, on the other hand, shows that it is understood in general Polish language mainly from the perspective of criteria that are external and thus considered objective. A better-embedded concept, however, is *tożsamość* (identity), one of the meanings of which focuses on what is internal to a person. This lays the groundwork for the construction of a universally understood concept of *tożsamość płciowa*, corresponding to the medical and psychological knowledge about it (on these perspectives, see Walkiewicz, 2022, pp. 86–87).

Polish legislation also does not use the term *tożsamość płciowa*. The law explicitly addresses various types of identity, mostly collective ones, but does not explicitly address gender identity. Thus the average addressee of the law is not aware that gender identity is an important legal criterion; it is hidden as irrelevant and subjective. A way to free the legal system from the inadequacy of general language over specialized knowledge could be to follow in the footsteps of other legislations – such as the

Maltese or Spanish – and establish legal definitions as binding understandings of the words in question.

Fourth, it is of course impossible to dispute the fact that the practice of sex assignment based on the appearance of external genitalia is the cheapest, simplest method and, moreover, usually leads to a correct result. However, the problem is deeper, because genital sex is not only used to establish *prima facie* gender. In practice, this is the basis of a very strong presumption, which in Poland can only be refuted in court. However, judicial gender reconciliation has not been established directly by the legislature; it is a solution resulting from jurisprudence and based on a legal basis that is unsuited to the specifics of this type of case. When the conflict is real, when parents do not accept their child's needs, the process can have a traumatizing effect on the transgender person.

Fifth, although gender identity is a present and relevant category in Polish jurisprudence (as the basis for gender reconciliation), it must be said that it is not viewed in accordance with current medical knowledge. An individual's experience of themselves is usually seen as a subjective state, not an objective one; the internal experience requires objectification from the outside. For recognition of gender identity, at this stage of legal reflection strong medical evidence (medical opinions) is needed, provided during the gender reconciliation process. A person's gender identity is not a category that the law trusts; the law requires strong proof. The above-cited Spanish and Maltese solutions are characterized by trust of the individual, which undoubtedly enhances the well-being of transgender people. In the countries that recognize the authority of medical science and psychology on the issue of gender identity, there is a clear trend towards making the burden of proving gender identity smaller, as evidenced by the rejection of the former requirement for surgical intervention, or the evolution of German law towards placing the decision in the hands of the citizen to decide for themselves.

As Małgorzata Bienkowska writes, the experience of transgender people is marked by 'a kind of discontinuity' (2012, p. 81). The Polish legal system exacerbates the uncertainty of their situation. In view of the conflict and divisions around the concepts of gender and gender identity, Polish law is incapable of producing its own categories and meanings but focuses on eclecticism. On the one hand, it does not seem to take gender identity into account in any way, and on the other hand it does not destroy the peculiar 'prosthesis' in the form of the current procedure for reconciling legal gender with gender identity which has been developed in jurisprudence. This eclecticism, compared to the Hungarian or Czech solutions, is, of course, a certain 'blessing in disguise' for transgender people, but it still encumbers them with a burden of anxiety, in that their gender identity is exposed to public judgement and has to be proven.

One's identity makes one think about the definition of oneself (who am I?); this simple question about self-definition is always difficult. Transgender people expe-

rience dual difficulties: 'If these people navigate the binary gender system, they are forced, at least in part, to define themselves according to how their environment perceives them. On the other hand, they have a constant sense of the inadequacy of such a definition of themselves' (Bieńkowska, 2012, pp. 81–82). This perspective – searching, waiting, confirming – is well reflected in the words of Urszula Werkowska's letter to MPs in connection with the submission of the 2015 gender reconciliation bill:

[T]he current legal system has taken me away from the very important work of rationally building my desired cohesive female personality. It was a time to focus on pondering: Will the court believe me? Do I meet the appropriate standards of femininity as defined by the legal institution? What does the court understand by the term woman? [...] As a result of this disturbed atmosphere for several years, full of pressure, after obtaining a judgment that was positive for me, I needed another several years to achieve the femininity that was balanced and natural for my own ego. The court battle for my happiness, dragging on (from the filing of the lawsuit to the final judgment) for as long as two years, made it much more difficult for me to build my natural female identity in the social sphere [...] The next several years were spent distancing myself from the artificially fuelled, overexaggerated female identity, forever proving my femininity for the court. (Quoted in Dębińska, 2020, p. 207)

Even if the law ultimately recognizes the experience that is most deeply accessible to the individual, it starts from a position of distrust towards it and at the same time challenges and interferes with what the individual has discovered in themselves: the knowledge and feeling that change everything. The law does not trust gender identity, but also emphatically reveals transgenderism, exposing this piece of an individual's identity to a public test, or one might even say a so-called 'real-life test' (Dębińska, 2020, p. 205).

Sixth, *de lege ferenda*, the law should treat gender identity with more trust, justified precisely by the grounds provided by current medical and psychological knowledge. In particular, a statutory regulation is needed that should lead to the abandonment of court proceedings, either in favour of non-contentious proceedings or an administrative procedure. In this regard, the Polish legislature has the opportunity to draw, for example, from the models cited in this text.

Seventh, statutory provisions should specify a legal definition of gender identity, which will help embed the concept more firmly in legal discourse but will also affect general Polish language. Thus a legal definition can indirectly have a positive effect on public perceptions of the right to live in accordance with one's gender identity. The relationship between legal language and general language is admittedly asymmetrical (legal language draws more from general language than vice versa) but not one-sided. Law can also affect everyday Polish language and thus the awareness of its users.

The introduction of a legal definition of gender identity will allow genital sex to cease to be the sole determinant of legal gender. Two clear criteria for determining a person's legal gender will appear in the system, and in the event of a conflict

between them, resulting from gender mismatch (rather than, for example, mental illness), the identity criterion will obviously take priority. This will promote the protection of self-determination and the freedom of an individual.

We will not suggesting here a withdrawal from the traditional method of determining legal gender based on the appearance of the external genitalia, because in the vast majority of cases there is no conflict between genital sex and gender identity. However, since these situations of conflict do occur, then in respecting human dignity and the right to life, the system must also recognize an individual's right to live according to their gender identity. The presumption of conformity of gender aspects must therefore be able to be rebutted in a way that values the individual's identity to the greatest extent possible and protects them from experiencing harm due to a flawed presumption based on the genital sex.

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