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Philosophy and Canon Law 2, 235-251

2016

Artykuł został opracowany do udostępnienia w internecie przez Muzeum Historii Polski w ramach prac podejmowanych na rzecz zapewnienia otwartego, powszechnego i trwałego dostępu do polskiego dorobku naukowego i kulturalnego. Artykuł jest umieszczony w kolekcji cyfrowej bazhum.muzhp.pl, gromadzącej zawartość polskich czasopism humanistycznych i społecznych.

Tekst jest udostępniony do wykorzystania w ramach dozwolonego użytku.

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Femininity and Masculinity as a Legal Issue

Abstract: The Pastoral Constitution on the Church in the Modern World *Gaudium et Spes* emphasizes that dignity refers to the human person in all his/her complexity including everything that constitutes sex and human sexuality.

The determination of sex is not always as natural and obvious as it might seem. There are cases of people who do not accept their femininity or masculinity, which takes place, for example, in the case of transsexualism. In brief—this disorder consists in the desire to belong to the opposite sex, which is usually accompanied by discomfort associated with the biological sex, a sense of inadequacy, and—consequently—desire to undergo a surgical or hormonal treatment in order to adjust the body to the preferred sex.

The appearance of a formal possibility to change the sex registered at birth raises the question of whether such a possibility actually serves the human person. Do transsexual people actually do it with respect for the rights and inherent dignity of the human person?

The present article constitutes an attempt to answer these questions by analysing the existing solutions in the Polish law, including the position on the matter of both the European and Polish jurisprudence.

Keywords: sex, transsexualism, sex change, birth certificate, marriage

Introduction

The Pastoral Constitution on the Church in the Modern World *Gaudium et Spes*¹ in the opening of the chapter entitled “The Dignity of the Human Person” states:

¹ The constitution promulgated by Pope Paul VI on December 7, 1965. Text: *Sobór Watykański II, Konstytucje. Deklaracje. Dekrety*, Polish translation, Pallotinum (1968), 537–620.

“According to the almost unanimous opinion of believers and unbelievers alike, all things on earth should be related to man as their centre and crown.”² The dignity of all persons is equal.³ The dignity of man and equality in the theological perspective has its source in the creation of all people in the image of God. The constitution *Gaudium et Spes* quotes the formula from Genesis: “Thus God created mankind in his own image; in his own image God created them; he created them male and female.”⁴ The constitution emphasizes that dignity refers to man in all his complexity, including everything that constitutes sex and human sexuality.

However, determination of sex is not always as natural and obvious as it may seem. There may occur cases of persons⁵ who do not accept their femininity or masculinity, which happens, for instance, in the case of transsexualism.⁶

According to International Classification of Diseases of 2010 (the so-called ICD-10), prepared by the World Health Organization (WHO), transsexualism is classified among mental and behavioral disorders,⁷ in the subcategory of disorders of adult personality and behavior,⁸ of the gender identity disorder type.⁹ According to the definition adopted in this classification, transsexualism consists in the desire to be accepted as a member of the opposite sex, which is typically accompanied by a discomfort related to the biological sex, the feeling of its inappropriateness and, in consequence, the wish to undergo surgery or hormonal treatment to make one’s body as congruent as possible with one’s preferred sex.¹⁰ The diagnostic criteria for transsexualism provided by ICD-10 include a persistent, lasting for at least two years transsexual identity, which

[English text derived from http://www.vatican.va/archive/hist_councils/ii_vatican_council/documents/vat-ii_const_19651207_gaudium-et-spes_en.html, accessed September 17, 2016].

² Ibid., No. 12.

³ Ibid., No. 29.

⁴ Gen. 1:27, quotation according to Biblia Tysiąclecia, Pallotinum, Poznań 2003 [English text after International Standard Version].

⁵ According to statistics, this disorder in the global scale concerns 1 per 30,000 persons of anatomically masculine sex and 1 per 100,000 persons of anatomically female sex. Polish statistics provide that transsexualism occurs much more frequently in anatomical women than in anatomical man. It is estimated that 1 per 17,000 Polish women and 1 per 57,000 Polish men can be affected by transsexualism (see Joanna Ostojka, “Sądowa zmiana płci.” Praca doktorska przygotowana pod kierunkiem Prof. dr. hab. Krzysztofa Pietrzykowskiego w Instytucie Prawa Cywilnego Wydziału Prawa i Administracji Uniwersytetu Warszawskiego, accessed July 25, 2015, https://depotuw.ceon.pl/bitstream/handle/item/1014/S%C4%85dowa%20zmiana%20p%C5%82ci_Joanna%20Ostojka.pdf?sequence=1, footnote 47).

⁶ Due to limitations resulting from the nature of this publication, other forms of sex identification disorders, such as intersexualism, have been omitted in the article.

⁷ ICD-10: F.00–F.99.

⁸ ICD-10: F.64–F.69.

⁹ ICD-10: F.64.

¹⁰ ICD-10: F.64.0.

does not result from other mental disorders, intersexual or genetic irregularities, or chromosomal aberrations.¹¹

Just like ICD-10, also the literature on the subject defines transsexualism as a discrepancy between the mental experience of one's own gender and the morphological and biological structure of the body and the sex assigned at birth, which are perceived as alien and belonging to the opposite sex.¹² A transsexual does not identify himself or herself with their own anatomical sex, feels disgust at his or her own sex organs and usually wants to get rid of them, and aims at obtaining a legal decision establishing that he or she is a member of the sex opposite to the one recorded in his or her birth certificate.

Transsexualism and related attempts to "change sex" recorded at birth are a tragedy for persons suffering from this disorder and for their families. This phenomenon is also a social problem, towards which the law does not remain indifferent.

European legislations do not provide a uniform solution concerning the problem of changing sex assigned at birth. Legal regulations of this type apply, for example, in Sweden, Germany, Italy, the Netherlands, United Kingdom, and Italy. In other countries, for instance in France and Switzerland, matters related to sex reassignment are left to be decided by way of court decisions.

The emergence of the formal possibility of changing sex assignment recorded in the birth certificate raises the question of whether such possibilities are really good for the human being? Do they actually serve the human being with respect to his or her rights and inherent dignity of the human person? This article, by presenting an analysis of solutions existing in the Polish law, including the standpoints of the European and Polish judiciary, attempts to answer these questions.

The Issue of Transsexualism and Sex Change in Judicial Practice

In judicial decisions of the European Court of Human Rights,¹³ the right to change legal sex by transsexual persons is derived from Art. 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms,

¹¹ International Classification of Diseases (ICD-10): F.64.0 – transsexualism <http://apps.who.int/classifications/icd10/browse/2010/en#/F60-F69>; accessed September 9, 2015.

¹² Kazimierz Imieliński, *Seksjatria. Patologia seksualna* (Warszawa: Państwowy Zakład Wydawnictw Lekarskich, 1990), 285.

¹³ Hereinafter the ECHR.

which in section 1 states that everyone has the right to respect one's private and family life, one's home and one's correspondence.¹⁴ However, it should be noted that until 2002, the Court, referring to the doctrine of the so-called margin of appreciation, regarded the possibility of sex change as an internal matter of individual Contracting States.¹⁵

The first case in which the ECHR expressed a substantial opinion on the situation of transsexual persons was the case of *Rees v. the United Kingdom*.¹⁶ In this case, the ECHR did not find any violation of Art. 8 or Art. 12 of the ECPHR. In justification of its decision, the Court stated that the issue of the possibility of changing sex in some jurisdictions had been regulated only in some national legislations, and that those regulations were not uniform. It stated further on that due to the specific nature of the topic under discussion, the United Kingdom was entitled to regulate this issue at its discretion within the so-called margin of appreciation. On this basis, ECHR indicated that it was not competent to force the United Kingdom to change the existing regulations and to issue a legal act making it possible to legally change sex.

The ECHR also referred to the doctrine of the margin of appreciation in the case of *Cossey v. the United Kingdom*, decided on 27 September 1990.¹⁷

The first sign of tuning down the standpoint expressed in case *Rees v. United Kingdom* was brought by the case of *B. v. France*, in the judgement of 25 March 1992.¹⁸ In its decision, the ECHR pointed out that, unlike the British legal system, French law did not assume registration of only historical facts, but provided for the possibility of introducing changes to the birth certificate. On this basis, the ECHR decided that France violated Art. 8 of the ECPHR since it had implemented such solutions and made it impossible for the M-to-F transsexual to change sex assignment on the birth certificate.

As it could be clearly seen in subsequent decisions concerning change of legal sex, the ECHR maintained its previous interpretations of the ECPHR

¹⁴ The European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950, Dz. U. of 1993, No. 61, item 284; hereinafter ECPHR.

¹⁵ Wojciech Burek, „Interpretacja ewolucyjna Europejskiej Konwencji Praw Człowieka na przykładzie orzecznictwa w sprawach sytuacji prawnej transseksualistów pooperacyjnych,” *Prawo i Medycyna* 1 (2007): 114; Konrad Osajda, „Orzecznictwo Europejskiego Trybunału Praw Człowieka dotyczące transseksualizmu,” *Europejski Przegląd Sądowy* 5 (2009): 35. The discussions concerning the decisions presented are based on Ostojka, „Sądowa zmiana płci,” 65–85 and 93–138.

¹⁶ Application No. 9532/81; decision of ECHR of 17 October 1986, accessed September 12, 2015, <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57564>.

¹⁷ Application No. 10843/84; decision of the ECHR of 27 September 1990, accessed September 12, 2015, <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57641>.

¹⁸ Application No. 13343/87; decision of the ECHR of 25 March 1992, accessed September 9, 2015, <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57770>.

regulations, including case X., Y. and Z. v. the United Kingdom of 1997¹⁹ and the case of Sheffield and Horsham v. United Kingdom of 1998.²⁰

A breakthrough in judicial decisions of the ECHR as regards the legal effects of transsexualism was brought by in the judgment issued in the case of Goodwin v. the United Kingdom on 11 July 2002.²¹ This decision rejected the thesis of leaving the issue of legal sex assignment of transsexual persons within the margin of appreciation of Contracting States. In its assessment, the ECHR based its position on the view that the ECPHR creates a basic system for the protection of human rights, and cannot be perceived only as theoretical or illusory. Although due to the principle of law certainty, the ECHR should not depart from the interpretation presented in its previous decisions, it must present an evolutive approach, open to progress in science and changes occurring in society. The ECHR pointed out the incoherence in the legal system of the United Kingdom which, on one hand, provided for financing by the state of the sex change surgical procedure and, on the other, did not introduce regulations which would make it possible to change sex assignment on the birth certificate. The ECHR also emphasized that the fact that European legislations did not apply uniform solutions to the problem of changing the legal sex of transsexual persons only served to highlight the need to solve this issue at the European level. Consequently, the ECHR concluded that the United Kingdom could not refer to the margin of appreciation, but should create appropriate regulations to make it possible to exercise rights guaranteed in the ECPHR. The Court also established a violation of Art. 12 of the ECPHR in this case. In substantiation of its opinion, the ECHR considered that sex as a premise for entering into marriage cannot be determined only on the basis of the chromosomal scheme, type of gonads or type of external genitalia. At the same time, the ECHR established that an obligation of Contracting States in relation to creating legal regulations enabling transsexual persons to change sex recorded at birth resulted in the right of those persons to form a marital union within their “new” sex.

The decision in the case of Goodwin v. the United Kingdom entirely changed the approach of the ECHR to reassignment of legal sex by transsexual persons. The interpretation presented in this judgement was repeated in a decision issued on the same date in the case of I. v. the United Kingdom,²² and four years

¹⁹ Application No. 21830/93; decision of the ECHR of 22 April 1997, accessed September 9, 2015, <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58032>.

²⁰ Application No. 31-32/1997/815-816/1018-1019; decision of the ECHR of 30 July 1998, accessed September 9, 2015, <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58212>.

²¹ Application No. 28957/95; decision of ECHR of 11 July 2002, accessed September 9, 2015, <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-60596>.

²² Application No. 25680/94; decision of ECHR of 11 July 2002, accessed September 9, 2015, <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-60595>.

later, in the decision concerning the case of *Grant v. the United Kingdom*.²³ In the latter case, the ECHR established that from the time of the judgement in the case of *Goodwin v. the United Kingdom*, legal regulations of Contracting States which violated the right of transsexual persons after surgery to be given recognition to their sex remained incompatible with the ECPHR.

In judicial decisions of Polish courts, the first commonly referred to adjudication concerning the subject matter discussed in this article is the decision of the Provincial Court for the Capital City of Warsaw of 24 September 1964,²⁴ which admitted the possibility of changing sex assignment on the basis of applied *per analogiam* provisions of the Act on Registry Office Records concerning corrections of the registry office records in case of erroneous or imprecise wording. Such a manner of proceeding was also approved by the Supreme Court in its resolution of 25 February 1978.²⁵ In this resolution, adopted in response to the legal issue presented by the Provincial Court in Gdańsk, regarding whether the birth certificate of a person with an intersexual body build and identification with the female sex could be changed by reassignment of sex from male to female before a required corrective surgery of external sex organs, the Supreme Court decided that in an exceptional case, the court can correct the birth certificate by changing sex assignment also before the corrective surgery of external sex organs if the characteristics of the newly-developing sex were prevailing and this state was irreversible. The Court assumed that a change of legal sex assignment can take place even without previously undergoing a surgical procedure, since—as the Court asserted—forcing a person who identifies with the sex that is opposite in relation to the sex of his or her external genitalia to undergo a surgery for changing these organs is unjustified, since this issue is of strictly personal nature and should be left to be decided by the person concerned.

On the other hand, in its resolution of 22 June 1989,²⁶ taken in relation to the legal question of the Attorney General asking whether the court can correct the birth certificate on the basis of regulations of the Act on Registry Office Records by changing sex assignment from male to female or vice versa in the case of transsexualism, but before a relevant surgical procedure to external sex organs, the Supreme Court asserted that the occurrence of transsexualism did not provide any grounds to correct the birth certificate as regards sex assignment. In justification of this resolution (which was given the force of a rule

²³ Application No. 32570/03; decision of ECHR of 23 August 2006, accessed September 12, 2015, <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-75454>.

²⁴ Decision of the Provincial Court for the Capital City of Warsaw of 24 September 1964, file ref. No. 2 Cr 515/64, *Państwo i Prawo* 10 (1965).

²⁵ Resolution of the Supreme Court of 25 February 1978, file ref. No. III CZP 100/77, *Orzecznictwo Sądów Polskich i Komisji Arbitrażowych* 10 (1983), item 217.

²⁶ Resolution of the Supreme Court of 22 June 1989, file ref. No. III CZP 37/89, *Orzecznictwo Sądów Polskich i Komisji Arbitrażowych* 2 (1991), item 35.

of law), the Supreme Court emphasizes that sex, as a personal trait, determines the civil status of a person. This status is based on the principle of indivisibility, which results in that every person can have only one civil status and, therefore, only one sex. At the same time, the Court shared the view of the Attorney General, according to which the existing practice of correcting birth certificates of transsexual persons as regards sex assignment, established by the resolution of the Supreme Court of 25 February 1978, constituted a threat to the legal order. In the light of the assessment of the Supreme Court, the registry office record determines the legal status of a person, which was issued based on legal events. Transsexualism, in which the change of the mental status and, not the legal status of the person is concerned, is not a legal event. In the opinion of the Court, provisions of the Act on Registry Office Records do not permit any corrections in the birth certificate of a transsexual person as regards sex assignment, as the birth certificate can be corrected only when it is erroneous or imprecise from the very beginning, which does not apply in the case of transsexualism. Also, in the opinion of the Court, it is not possible to admit the possibility of applying provisions on correction *per analogiam*, since they concern facts that are entirely different and dissimilar in legal terms.

However, in its judgement of 22 March 1991,²⁷ the Supreme Court decided that the sense of being a member of a given sex can be considered a personal interest (Art. 23 of the Civil Code) and, as such, is subject to protection by way of an action for a declaratory judgement pursuant to Art. 189 of the Code of Civil Procedure. Such an opinion was also maintained by the Supreme Court in its resolution of 22 September 1995.²⁸

On the other hand, the Court of Appeal in Katowice, in its decision of 30 April 2004,²⁹ ruled that sex reassignment through a court decision cannot be based only on the feeling of a given person of being a member of a specific sex, since the legal evaluation of human sex is based on medical criteria. A similar position was also taken by the Supreme Court in its judgement of 6 December 2013.³⁰ In this decision, the Supreme Court also observed that reassignment of the sex of a father or a mother of a child, resulting in the difference between the new sex and the sex indicated by the role fulfilled by this person in the process of conception and birth, was important for the child, since it concerned the person to whom his or her origin would be assigned. Consequently, the

²⁷ Resolution of the Supreme Court of 22 March 1991, file ref. No. III CRN 28/91, *Przełąd Sądowy* 5–6 (1991), item 118.

²⁸ Resolution of the Supreme Court of 22 September 1995, file ref. No. III CZP 118/95, *Orzecznictwo Sądu Najwyższego–Izba Cywilna* 1 (1996), item 7.

²⁹ Decision of the Court of Appeal in Katowice of 30 April 2004, file ref. No. I ACa 276/04, *Orzecznictwo Sądu Administracyjnego* 10 (2004), item 31.

³⁰ Decision of the Supreme Court of 6 December 2013, file ref. No. I CSK 146/13, LEX 1415181.

Supreme Court justifiably emphasized that in the decision on sex reassignment “consideration should be given not only to the desire of a transsexual to adjust the sex assigned to him or her at birth with the mental feeling of his or her gender, but also to the circumstances affecting the child, namely the child’s broadly understood readiness to find himself or herself in a situation in which the child is to see the person of his or her parent as a person of another sex [...]”

Sex and Sexual Identity as Normative Criteria

Experts specializing in transsexualism studies and treatment distinguish ten elements determining sex, which include³¹: (1) chromosomal sex (genotype),³² (2) gonadal sex,³³ (3) sex of internal genitals (gonadophoric),³⁴ (4) sex of external genitals,³⁵ (5) phenotypic sex (somatotypical, biotypical),³⁶ (6) hormonal sex,³⁷ (7) metabolic sex,³⁸ (8) social sex (registered at birth, legal),³⁹ (9) brain sex⁴⁰ and (10) psychological sex.⁴¹

Pursuant to solutions applicable in Polish law, the initial sex identification takes place in the birth certificate, which is prepared on the basis of a written notification of a birth of a child, a document issued by a physician, a midwife or a health care facility. Identification of the child’s sex is made on the basis of the appearance of external sex organs, which in great majority of cases are convergent with internal characteristics. However, the law does not regulate a situation when such a convergence does not exist, that is, when among the ten

³¹ Stanisław Dulko, Kazimierz Imieliński, and Marian Filar, *Transpozycje płci. Transseksualizm i inne zaburzenia identyfikacji płciowej* (Warszawa: Polska Akademia Medyczna, 1997): 3–5.

³² It is determined at fertilization. It is determined by two sex chromosomes: XY in men and XX in women.

³³ It is determined by sex glands: testicles in men and ovaries in women.

³⁴ It is determined by diversification of reproductive tracts developed from the gonadal ducts.

³⁵ It is determined by the presence of a penis in men and a vulva in women.

³⁶ It is determined by secondary or tertiary sexual characteristics.

³⁷ It is determined by internal secretory activity of testicles and ovaries.

³⁸ It is determined by the type of enzymatic apparatus of some metabolic systems.

³⁹ In the opinion of authors, it is established immediately after birth, on the basis of the appearance of external genitals and determines fulfilment of a male or female role.

⁴⁰ It consists in typically sexual differentiation of brain.

⁴¹ It is determined by the feeling of adherence to a given sex, therefore through identification of an individual with male or female sex.

above-mentioned sex determinants at least one belongs to the opposite sex.⁴² The applicable regulations do not explicitly settle the issues of admissibility or the scope and manner of changing human sex assignment, and the problem of a so-called sex change is the subject of vivid discussions in the judiciary and the doctrine. However, the view prevailing in legal sciences is that although not every sex transposition can justify the right to change sex, and the choice and self-determination of sex is unacceptable, yet a sex change in case of a transsexual person should be legally admissible.

This is the interpretative direction that predominates over the judicial practice. Changes of sex assignment in birth certificates were initially made by applying *per analogiam* regulations on birth certificate correction, while the current practice provides for sex assignment pursuant to Art. 189 of the Code of Civil Procedure.⁴³ Sex is currently reassigned by way of adversarial litigation: the petitioner in this procedure is a transsexual person who wishes to be assigned a sex that is different from the one recorded in his or her birth certificate and the passive subjects of the legal action are his or her parents. The court decision reassigning sex pursuant to Art. 189 of the Code of Civil Procedure results in *ex nunc* effects, which means that a transsexual person belongs to the sex determined by the court decision as of the date it becomes valid. The procedure of issuing a sex reassignment decision does not require the transsexual person to undergo any previous or subsequent medical procedure in order to adjust his or her anatomical appearance to features of the sex established in the decision.⁴⁴ It does not require the transsexual person to be unmarried and it does not condition the possibility of obtaining a required decision on his or her childlessness.

The Act of Gender Reassignment, approved on 10 September 2015,⁴⁵ which is a first attempt⁴⁶ to explicitly regulate the conditions and mode of the legal reassignment of a person to a given sex, provides for significant changes in the existing model. This Act assumes, among others, that sex reassignment must be made by the Regional Court in Łódź in non-litigious proceedings, while the petition for sex assignment can be filled only by persons who are not married (Art. 5.1), and a party interested in this case is only the petitioner (Art. 4.1). A court decision on sex reassignment does not require the petitioner to be previously subject to any medical intervention, in particular, hormonal treatment or surgical procedures aiming at correction of external or internal sex charac-

⁴² Stanisław Dulko, „ABC płci,” *Kosmos—Problemy Nauk Biologicznych* 1 (2003): 7.

⁴³ The Code of Civil Procedure Act of 17 November 1964, Dz. U of 1964, No. 43, item 296 as amended; hereinafter CCP.

⁴⁴ The surgical procedure of sex change is also not required in such countries as for example: United Kingdom, Austria, Germany, Sweden, and Spain.

⁴⁵ Sejm paper No. 1469.

⁴⁶ The President of the Republic of Poland applied on 2 October 2015 for re-examination of this act by the Sejm.

teristics, or at introducing changes into body structure or sex-related functions. A valid decision considering the petition for sex reassignment provides a basis for preparing a new birth certificate, a change in the personal identification number (PESEL) and issuance of an ID card, and it can be used as a basis for changing the surname (Art. 10.1). At the moment when the decision considering the petition for sex reassignment comes into force, all rights and obligations contingent upon belonging to a given sex result from the sex established in this decision (Art. 11).

A fundamental change brought about by the act under discussion is that it clearly rejects the basic role of biological characteristics for human sex identification, considering gender identity as the basis for sex assignment. Pursuant to the definition provided by this act (Art. 2.1), the notion of gender identity is understood as “established, intensively felt experience and sense of one’s own sexuality, which corresponds or does not correspond to the sex registered at birth.”

None of the solutions currently applicable or the solutions that are proposed deserve approval. Both models discussed here are based on assumptions that clearly undermine the existing paradigms related to sex and family law relations, destabilizing the existing normative order. This can be proved in a compelling way by the fact that the sex reassignment decision (in the form of a ruling or judgment) is a decision resulting in effects *ex nunc*, that is, for the future.

The nature of such a decision obviously undermines the fundamental thesis that human sex is a fact (which occurs at the moment of birth) and that this fact is indivisible over time. In the light of the sex reassignment decision, a human being at a certain period of his or her life belongs to one sex, and starting from a certain other moment (when the court decision becomes valid), he or she is already of the opposite sex. The above effect, in view of the absence of prohibition to reassign sex in case of persons with children, results at the same time in the “divisibility” of parental relations. For instance, a transsexual person with reassigned (recognized) sex, until a certain moment in time, is the mother of her children born in the “previous” sex, and suddenly becomes their father. Such a state of affairs, as rightly observed by the Court of Appeal in Łódź in its decision of 15 July 2010,⁴⁷ undermines the relationship between the child and the parent and violates the child’s personal interests in the form of a right to protect family life.

Unquestionably, the *ex nunc* effect of the sex reassignment ruling also results in upsetting other intrafamily relations. A person who used to be a daughter, a grand-daughter, a sister, a niece, etc. ceases to function in those roles when the decision becomes valid. Such a situation causes a change not only in the personal life of a transsexual person, but also in the life of members of his

⁴⁷ Case I ACa 437/2010, *Orzecznictwo Sądu Apelacji Łódzkiej* 3 (2010), item 23.

or her family, violating their personal interests. Following the decision of the Constitutional Tribunal of 12 November 2002,⁴⁸ it should be emphasized that the data making up the personal and civil status of one person can affect the enforceability of rights of other persons, and the civil status, in the meaning of belonging to a specific family and relevant family bonds, is a particular personal interest of every person. At the same time, it is obvious that specific family bonds result in a series of rights and obligations, such as those related to inheritance or maintenance obligations.

Admissibility of gender reassignment also has a significant effect on the aspect of marriage, impairing the meaning of marriage as a relationship between a woman and a man (Art. 18 of Constitution of the Republic of Poland⁴⁹ and Art. 1 of the Family and Guardianship Code⁵⁰). Under the current legal status, there are no regulations which would prevent persons remaining in a marital union from obtaining a sex reassignment decision. This means that in the light of applicable legal solutions there can be (and are) marital unions of persons who formally (according to their birth records) are of the same sex. On the other hand, the permission granted to a transsexual person who has already obtained a decision reassigning his or her sex, to enter into marriage with a person who is of the opposite sex in the light of documents, *de facto* means the possibility of entering into marriage by persons who biologically are of the same sex.

Although the Gender Reassignment Act of 2015 excludes the possibility of applying for a sex reassignment decision by married persons, marital unions of persons who biologically are of the same sex will also be admissible in the light of this act. Moreover, in view of the fact that none of the analyzed procedures condition the issuance of the gender reassignment (recognition) decision upon any previous or consecutive surgery or hormonal corrections, both solutions legitimize marriages of persons who, even in external appearance perceived *prima facie*, form a relationship of persons of the same sex.

The absence of the requirement of adjustment of sex organs or even only of external phenotypic traits, with a simultaneous change of sex assignment registered at birth, also upsets social rules related to functioning within a given sex. Being a man or a woman determines the possibility of, for example, participating in specific categories of sport events, determines the choice of toilet or dressing room to be used, as well as has an effect on the type of a penal institution in case of imprisonment. In the light of regulations under discussion, the person who is a biological man and looks like a man but who has documents

⁴⁸ Case SK 40/01, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* 6 (2002), item 81.

⁴⁹ The Constitution of the Republic of Poland of 2 April 1997, Dz. U. 1997, No. 78, item 483.

⁵⁰ The Family and Guardianship Code Act of 25 February 1964, Dz. U. 1964, No. 9, item 59 as amended; hereinafter FGC.

proving that he is a woman will be able to access toilets, dressing rooms, etc. intended for women. It is difficult to consider it proper in the context of applicable social and cultural norms. At the same time, it is hard not to notice that a change in sex assignment registered at birth, along with the existing possibility of preserving the previous sex characteristics, also bears the risk that the person who formally belongs to a given sex will be able to beget a child of the opposite sex. For instance, an F-to-M transsexual, with regard to whom it has been adjudicated that he is of a male sex, will be able—having ovaries and uterus—to give birth to a child. Therefore, in the light of law, he will be a man (with a masculine form of name and surname), who will give birth to a child.

Regardless of the above, fundamental reservations are brought by the fact that the analyzed Gender Reassignment Act of 2015 deconstructs the notion of “sex,” rejecting the basic role of biological characteristics for identification of human sexuality. Although the previously applicable law did not define what gender is, and applied this term in its fundamental meaning as commonly used in the Polish language, it undoubtedly is based on dichotomous division of people into men and women and this division has biological references.⁵¹

In the light of the Gender Reassignment Act of 2015, the legal understanding of sex is to be determined by the so-called gender identity (therefore, as indicated above—“a persistent intensively felt experience and sense of one’s own sexuality, which corresponds or does not correspond to the sex registered at birth”), which means that determination of sex registered in registry office records is to be made on the basis of internal feelings of a human being. From such a perspective, sex will cease to be an objective state based on biological foundations, but it will depend on the subjective self-perception of a human being.⁵² Therefore, the fact of belonging to a specific sex will be determined on the basis of psychological sex and this is to determine the legal gender.

The proposed solutions have their ardent supporters, but also fierce critics.⁵³ The opponents have justly observed that transposition of sexual characteristics does not determine by itself, even in medical terms, the belonging to the opposite sex, but only proves sexual disorders of a given person. Therefore, since not every fact of incompatibility of one or more sexual characteristics determines belonging to the opposite sex, and not every transposition of sexual characteristics can justify a motion for gender assignment, then the motives making it acceptable to change sex assignment in case of discrepancies concerning psychological sex raise serious doubts. Even more doubts emerge if we consider that under the existing legal system it is the relation between physiological (and not

⁵¹ For more, see: Maciej Domański, „Rozdzielność płci nupturientów jako przesłanka istnienia małżeństwa (art. 1 k.r.o),” *Kwartalnik Prawa Prywatnego* 4 (2013): 821–55.

⁵² Jan Lipski, „Uwagi dotyczące poselskiego projektu ustawy o uzgadnianiu płci na tle orzecznictwa i poglądów doktryny,” *Zeszyty prawnicze* 3 (2014): 36.

⁵³ Lipski, “Uwagi,” along with the literature referred to therein.

psychical) features and sex that provide a basis for a series of regulations, for instance, related to the protection of working pregnant women, etc.⁵⁴

The opponents of the act emphasize, not without reason, that, above all, this is questionable whether the solutions proposed in this act can actually reach the aim which the act is to serve. A highly disputable issue is whether any legal change of sex assignment and even a surgical correction can actually correct errors of nature and solve the problems of a transsexual person. It is an undeniable fact that a change in documents or correction in the form of surgical adjustment procedures will not result in the total belonging of a transsexual person to the desired sex, the meaningful evidence of which there is a lack of reproductive abilities in the “new” sex. This, in turn, means that the thesis claiming that the above changes could really change the perception of a transsexual person by the community, ensure “normal functioning in society”⁵⁵ for such a person and eliminate the discomfort related to functioning in the “unwanted” sex is controversial.

Conclusion

According to the *Gaudium et Spes* constitution, the human person is to be the subject and aim of all actions of the state, human community, and all social institutions, since he or she stands above “all things and his [or her] rights and duties are universal and inviolable.”⁵⁶ The constitution also emphasizes that all things on earth should be referred to man as the center and crown of all existence, while among the most important issues that the Church faces in contemporary world, *Gaudium et Spes* mentions care for marriage and the family above all. Marriage is perceived as a mutual gift of two persons, and the marital union as a noble and dignified way of mutual giving. It is unquestionable that in the meaning of *Gaudium et Spes*, it is a woman and a man who constitute a marital union, the woman is the mother and the man is the father.

Those truths, although quite obvious at the time when the referred constitution was created, over the next 50 years have been subject to significant redefining attempts, with transsexualism and sex reassignment becoming a part of those changes.

The issue of gender reassignment in the case of transsexual persons is a complex issue, raising interpretive doubts both in the case-law of the ECHR

⁵⁴ Lipski, „Uwagi,” 41.

⁵⁵ Juliusz Leszczyński, „Glosa do uchwały Sądu Najwyższego z dnia 22 czerwca 1989 roku, sygn. akt III CZP 37/89,” *Palestra* 3–4 (1992): 97.

⁵⁶ No. 41.

and in the judicial decision of Polish courts and doctrine. What is noteworthy is that the relation to the issue of sex change has undergone clear evolution, while the direction of those changes—quite clearly specified in the Gender Reassignment Act of September 2015 referred to in this article—has become a cause for concern. These changes can lead to destabilization of social norms related to functioning in a given sex, in the understanding of marriage, motherhood and fatherhood, and finally—to rejection of a division of people into women and men.

The fact that such a risk is not illusory is proven by a significant example of Sweden and Germany. In Sweden, in response to postulates of supporters of abandoning the notion of sex and considering it as a neutral term, the National Encyclopaedia of Sweden has introduced the personal pronoun “hen.” This pronoun has been defined as a gender-neutral personal pronoun used instead of “he” and “she.” Also, an *Egalia* pre-school was opened in Stockholm, in which gender does not exist. The notions of “boy” or “girl” are not used there, children are called “friends” and they are referred to by the above-mentioned pronoun “hen.”⁵⁷ However, in Germany, an amendment to the German Act on Rights of Status entered into force on November 1, 2013, providing that if a child cannot be unambiguously assigned physical male or female physical characteristics, no sex assignment is recorded in the birth certificate.⁵⁸

Persons affected by the tragedy of transsexualism unquestionably deserve understanding, care, and professional help. Those persons, just like any others struggling with incurable disease and suffering, have a right to respect and to life in society free from any manifestation of discrimination. They should also not be denied the right to improve the comfort of their life.

However, it cannot be considered that the existing (and postulated) normative solutions as regards gender reassignment would actually serve man with respect to the rights and inherent dignity of the human person.

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⁵⁷ Ewa Łosińska and Anna Nowacka-Isaksson, „Bezplciowe przedszkole,” *Rzeczpospolita* (8.02.2011): A–002.

⁵⁸ Ostojka, “Sądowa zmiana,” 14.

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Féminité et masculinité en tant que question juridique

Résumé

La Constitution pastorale sur l'Église dans le monde de ce temps *Gaudium et Spes* souligne que la dignité se réfère à l'homme dans toute sa complexité, en englobant aussi tout ce qui concerne le sexe et la sexualité humaine.

Toutefois, la détermination du sexe n'est pas toujours si naturelle et évidente que cela puisse paraître. Il arrive qu'il y ait des personnes qui n'acceptent pas leur féminité ou masculinité, ce qui est visible entre autres dans le cas du transsexualisme. Tout court, cette déviance consiste dans le désir d'appartenir au sexe opposé qui est d'habitude accompagné d'un inconfort lié au sexe biologique, de la conviction de son incongruité et, par conséquent, d'un désir de subir un traitement chirurgical ou hormonal visant à adapter le corps au sexe préféré.

L'apparition de la possibilité formelle permettant de changer le sexe dans les actes de l'état civil incite à poser la question si ces possibilités sont vraiment salutaires pour l'homme. Le font-elles avec le respect de ses droits et de la dignité innée de l'homme ?

Le présent article constitue la tentative de répondre à ces questions en analysant les solutions existant dans le droit polonais, y inclus les positions de la judicature européenne et polonaise.

Mots clés: sexe, transsexualisme, changement de sexe, acte de naissance, mariage

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La femminilità e la mascolinità come problema legale

Sommario

La Costituzione pastorale sulla Chiesa nel mondo contemporaneo *Gaudium et spes* sottolinea che la dignità si riferisce all'uomo in tutta la sua complessità, includendo anche tutto ciò di cui fanno parte il sesso e la sessualità umana.

La definizione del sesso tuttavia non sempre è così naturale e palese come possa sembrare. Occorrono casi di persone che non accettano la propria femminilità o mascolinità, cosa che

avviene tra l'altro nel caso del transessualismo. Tale disturbo—considerando la cosa per sommi capi—consiste nel desiderio di appartenenza al sesso contrario che è solitamente accompagnato da un disagio legato al sesso biologico, da un senso della sua inadeguatezza e di conseguenza dal desiderio di sottoporsi ad un intervento chirurgico o ad una cura ormonale allo scopo di adattare il corpo al sesso preferito.

L'apparire della possibilità formale di cambiare l'indicazione del sesso registrato alla nascita induce alla domanda: possibilità di tal genere giovano realmente all'uomo? Lo fanno effettivamente rispettando i suoi diritti e la dignità innata della persona?

L'articolo, attraverso l'analisi delle soluzioni che esistono nel diritto polacco, tra cui le posizioni della giurisprudenza europea e nazionale, costituisce un tentativo di risposta a tali quesiti.

Parole chiave: sesso, transessualismo, cambiamento di sesso, atto di nascita, matrimonio