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Current Legal and Administrative Situation of Transgender Persons in Poland. Selected Issues

Aktualna sytuacja prawnoadministracyjna osób transpłciowych w Polsce. Wybrane problemy

This article analyses the current legal and administrative situation of transgender persons in Poland. Three particularly relevant acts of substantive administrative law in this context are analysed: the Civil Status Records Law, the Population Register Act, and the Identity Cards Act. The following research questions were posed: What is the impact of the provisions of the aforementioned acts on the status of natural persons covered by this law? Whether and when citizens are treated equally in this matter? And whether the protection of transgender persons in Poland is sufficient, in particular concerning civil status, which is a fundamental personal right. In addressing this issue, the dominant research theory is the legal-dogmatic approach. In addition, the authors employed the analysis of judicial decisions, expert literature, legal doctrine, and observation methods as auxiliary approaches.

Keywords: administrative law, legal transformation, legal and administrative situation of transgender persons

Niniejszy artykuł analizuje aktualną sytuację prawnoadministracyjną osób transpłciowych w Polsce. Analizie poddane zostały trzy akty materialnego prawa administracyjnego o szczególnie znaczeniu w kontekście badanego przedmiotu: Prawo o aktach stanu cywilnego, Ustawa o ewidencji ludności i Ustawa o dowodach osobistych. Postawiono następujące pytania badawcze: jaki jest wpływ przepisów ww. ustaw na status osób fizycznych objętych tym prawem, czy i kiedy obywatele są równo traktowani w tej kwestii oraz czy ochrona osób transpłciowych w Polsce jest wystarczająca, w szczególności w zakresie stanu cywilnego,

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który jest podstawowym prawem osobistym. Zagadnienie to autorzy podjęli z perspektywy prawnodogmatycznej, ponadto wykorzystali analizę orzecznictwa sądowego, literatury przedmiotu, doktryny prawa oraz metody obserwacyjne jako podejścia pomocnicze.

Słowa kluczowe: prawo administracyjne, transformacja prawna, sytuacja prawnoadministracyjna osób transpłciowych

I. Introduction

The concept of human sex can be observed in a multitude of contexts, rendering it an inherently ambiguous term. The definition of sex, in turn, presents several difficulties, not only within the realm of biological sciences. Sex is typically a sophisticated phenomenon, comprising a set of visible, distinctive, and universal features that serve as the foundation for the formation of various stereotypes. Despite decades of research demonstrating the absence of significant psychological differences between sexes, the lives of women and men, as well as related social roles, continue to be constrained by deeply entrenched stereotypes that prescribe specific, often narrow, ways of life. According to the *Encyclopedia of Women and Gender*, ‘sex’ is “structural and physiological characteristics that distinguish females and males as a result of chromosomes, hormones, and morphological development”, while ‘gender’ is “attributes that a culture ascribes separately to human females and males that prescribe appropriate ways of feeling and behaving”.¹ As the term ‘gender’ has become established in social sciences, including political and administrative sciences, it has become possible to include it in the research-oriented perspective. Since then, research on sex has been conducted to determine the actual impact of congenital and acquired factors on specific differences between sexes.²

The focus of this article is to explore the concept of gender reassignment, which can be defined as the adjustment of various aspects of a person’s life according to their gender identity. Adopting this perspective allows us to identify and differentiate between the multiple elements of this process, which may occur in different sequences and to varying degrees in individual cases. In this process, three components can be identified: medical transition, which involves the implementation of changes to the physiognomy and body; social transition, which focuses on the modification of private and family life and the surrounding environment, resulting in a transgender person adopting a social role that aligns with their sex identity; and legal transition, which not only rectifies the sex assigned at birth but also leads to the reassignment of

¹ B. Lott, D. Maluso, ‘Gender Development: Social Learning’, in J. Worell (ed.), *Encyclopedia of Women and Gender: Sex Similarities and Differences and the Impact of Society on Gender*, vol. 1 (Academic Press, San Diego, CA, 2002), pp. 537–49 (at p. 537).

² J. Podgórska-Rykała, *Polityka równości płci na szczeblu samorządowym* [Policy on equality of sexes on the level of self-government] (Oficyna Wydawnicza Humanitas, Sosnowiec, 2016), pp. 78–83.

sex and personal data in all registers and documents, thus enabling a person to live in accordance with their sex identity in both social and legal contexts. In addition, there is the legal transition, which not only results in the correction of the sex assigned at birth but also leads to the reassignment of sex and personal data in all registers and documents. This allows the individual to live following their perceived natural sex in both social and legal contexts.³ The processes of medical, social, and legal transitions are independent though intersecting.⁴ This study will focus on the legal transition, narrowing its scope to selected legal and administrative aspects.

Thus, this paper aims to provide a detailed characterisation of the current legal and administrative situation of transgender persons⁵ in Poland. To this end, three acts of substantive administrative law relevant to the issue under discussion have been selected for analysis: the Vital Records Act, the Population Register Act, and the Identity Cards Act. To gain insight into the impact of these provisions on the status of individuals covered by this legislation, the authors have posed a series of questions. Firstly, the question was asked, what is the influence of provisions of the aforesaid acts on the status of natural persons covered by this law? Whether and when citizens are treated equally in this matter is also addressed. The main question of this study, however, is whether the protection of transgender people in Poland is sufficient, in particular concerning civil status, which is a fundamental personal right. Concerning this issue, the dominant research theory is the legal-dogmatic approach. In addition, the authors employed the analysis of judicial decisions, expert literature, legal doctrine, and observation as auxiliary methods.

It is evident that when analysing the concept of equality, one can consider it in two distinct contexts: the legal and the actual. While the former may be perceived as synonymous with the latter, this is arguably an insufficient interpretation. Instead, it is more fruitful to recognise the existing differences and to reject the classical and currently insufficient expectations regarding equality. This rejection will result in the extension of the category being discussed, for example, to include equality of treatment or equality of opportunities.⁶ Consequently, when establishing a legal framework for the principles of equality and non-discrimination, it is necessary to select between relative equality and absolute equality. The former entails the obligation to treat each individual identically, which is frequently associated with classifying specific individuals in a manner that is profoundly incompatible with the concept of equality. Law is the set of orders and

³ *Postępowania w sprawach o ustalenie płci. Przewodnik dla sędziów i pełnomocników* [Proceedings regarding sex reassignment. Guidelines for judges and proxies], *Newsletter of the Commissioner for Human Rights*, no. 2, *Equal Treatment Rule. Law and Practice*, no. 28 (Rzecznik Praw Obywatelskich, Warszawa 2020), p. 8.

⁴ It is unacceptable to make legal recognition of sex reassignment depend on any surgeries infringing physical integrity.

⁵ Medical term for transgenderism is *gender dysphoria*.

⁶ I. Boruta, *Równość kobiet i mężczyzn w pracy w świetle prawa Wspólnoty Europejskiej* [Equality of women and men at workplace as defined in the legal order of the European Economic Community] (Uniwersytet Łódzki, Łódź, 1996), p. 15.

prohibitions that shape human interactions.⁷ Paraphrasing the words of Roger Scruton, the law can be compared to a cloak that covers the entire common territory, protecting society from daily disputes and supporting the settlement of conflicts that arise within it.⁸

In formalised societies such as states, the Sovereign (the people) is permitted to create and enforce codes of conduct and to punish unacceptable behaviour. This is done indirectly via political authorities selected by the Sovereign. The relationship between law and politics is intricate and interdependent. The content of the law is created by politicians who also influence its subsequent implementation. The functioning of contemporary states is considerably more sophisticated than it was a few centuries ago. As a result, a crucial role is assigned to administrative law (defined by negation to everything that is not civil or criminal law) in democratic states. In addition, substantive administrative law delineates the criteria for determining citizenship status under this legislation, specifies the types of public documents that may be utilised, and delineates the procedures for confirming an individual's identity. To fulfil its obligations efficiently, the administration required the ability to manage specific data on the population it controlled. This necessitated the development of a system capable of processing information from the first state forms.⁹ The scope of these data has been consistently expanded, and the acquisition and processing of personal data for public and legal purposes has been evolving for years. In the modern approach, public administration is an organisation appointed by the power of law to execute public tasks that constitute its essence. To enable effective performance of these tasks, the administration must possess some information on natural persons on behalf of whom these tasks are performed.

II. The third wave of feminism, queer, and the rule of equality

In the context of political philosophy social functioning of transgender persons is included in the term ‘queer’,¹⁰ introduced by the so-called ‘third wave’ of feminism. It is a collective, historical term for various phenomena related to the feminist movement from the 1980s until now. Feminism is the name of a significant cultural, political, social, and intellectual movement. Its various branches, orientations, and theories are connected with the common idea that women were and have still been discriminated against. Despite multiple examples of parting ways and conflicts within the movement

⁷ D. North, *Institutions, Institutional Change and Economic Performance* (Cambridge University Press, Cambridge, 1990), p. 3.

⁸ R. Scruton, *The West and the Rest: Globalization and the Terrorist Threat* (ISI Books, Wilmington, DE, 2002).

⁹ M. Kępa, J. Podgórska-Rykała in M. Kępa, G. Krawiec, A. Nodzak, J. Podgórska-Rykała, *Ustawa o ewidencji ludności. Komentarz* [Population Register Act. Commentary] (Wydawnictwo C.H.Beck, Warszawa, 2020), p. 5.

¹⁰ The term that has been used to describe the LGBTQIA+ community and its members since the 1990s.

itself, this “huge fight within the family – or maybe no longer a family – should not [...] be seen as very important. It occurred in the feminist community and was primarily reflected in the feminist literature”.¹¹ The third-wave feminist movement represents a response to the limitations of the second-wave or long-term strategies of the equal rights movement. It is a consequence of the growing awareness of the importance of ethnicity, religious beliefs, or economic differences in the context of equal rights for women and men. Agnieszka Graff posits that this phenomenon exacerbates the problem of exclusions, which are racial, class, and ethnic in nature.¹² In contemporary political discourse, there is a growing recognition of the role of language in shaping social reality. There is also a growing awareness of the underrepresentation of women in decision-making bodies and the need to address gender-oriented issues.

In discussing the third wave of feminism, it is imperative to acknowledge the contributions of Judith Butler, a prominent US feminist philosopher, whose seminal work, *Gender Trouble. Feminism and the Subversion of Identity*, published in 1990, was a significant contribution to the discourse on the collective object of feminism. The author of this work challenged the category of ‘we women’ as a limiting construct in identity formation, and it is now regarded as a foundational text in the field of queer theory. By challenging the conventional definitions of fundamental terms, including the term ‘sex’, she demanded that the subject of feminism be subjected to rigorous scrutiny. Her assertion that the distinction between gender and sex is arbitrary and that gender is not a reflection or expression of sex prompted considerable debate. She argued that gender is not constrained to the two categories of male and female and that sex is not a determining factor in gender identity. Furthermore, she asserted that gender is not an inevitable consequence of biological sex. In other words, the concept of ‘woman’ does not need to be defined by a specific female body, and the concept of ‘man’ does not need to be limited to biologically male bodies. She stated that the concept of gender does not need to be constrained to the two categories that are currently understood.¹³ Butler then proceeded with her argument, which can be summarised as follows: gender could develop beyond binary limitations imposed by the apparent binary character of sex: “gender itself need not be restricted to the usual two. If sex does not limit gender, then perhaps there are genders, ways of culturally interpreting the sexed body, that are in no way restricted by the apparent duality of sex”.¹⁴ Citing Monique Wittig, Butler defined the third category of lesbians as those who do not conform to the traditional gender binary. Wittig assumed that ‘man’ and ‘woman’ were not natural categories but political constructs. Butler’s famous sentence,

¹¹ K. Ślęczka, *Feminizm. Ideologie i koncepcje społeczne współczesnego feminizmu* [Feminism. Social ideologies and concepts of contemporary feminism] (Książnica, Katowice, 1999), p. 223.

¹² A. Gajewska, *Hasło: feminizm* [Password: Feminism] (Wydawnictwo Poznańskie, Poznań, 2008), p. 109.

¹³ J. Butler, *Gender Trouble. Feminism and the Subversion of Identity* (Routledge, New York–London, 1999), pp. 142–43.

¹⁴ *Ibid.*, p. 143.

that sex is a gendered category, challenges the separation of gender from sex, suggesting that there is no such thing as a pure, untouched body: “the category of ‘sex’ is itself a gendered category, fully politically invested, naturalized but not natural”.¹⁵ Her reasoning was based on challenging the omnipotent terror of heterosexuality and phallogocentric.¹⁶ For Butler, biological sex was a construct,¹⁷ and her theses, which were highly controversial and perceived as radical, were not accepted by the majority of contemporary feminists. Nevertheless, they have significantly impacted the development of third-wave feminist discourse.

As a *living entity*, society is subject to continuous civilisational transformations, which act as a driving force for its development. However, these transformations also become an inevitable catalyst for various conflicts that were previously unknown to such an extent. These transformations are followed not only by new challenges for equality movements but also by a significant increase in the geographical range of impact produced by their demands. Furthermore, it is crucial to be aware of their specific character. In contrast to political parties, branch-specific social organisations, and trade unions, they do not represent specific factual approaches and ideological opinions. Instead, they defend a group distinguished based on particular criteria, such as sex or sexual orientation. The organisation defends the group as a whole, addressing all issues relevant to its members. Women and men do not constitute homogeneous groups, as they differ in various aspects. These include class, race, skin colour, ethnic origin, religion, age, sexual orientation, and political opinions. In essence, neither women nor men constitute a collective political subject. However, they may share certain commonalities, such as biological sex and its associated consequences. The concept of political subjectivity is not ascribed to individuals and groups in a fixed and absolute manner.¹⁸

To resolve the impasse resulting from the comparison of the situation of LGBTQIA+¹⁹ persons to that of heterosexual persons (never *vice versa*), it is necessary to consider the various options regarding relative equality. These include absolute equality (which refers to a given absolute value), distribution equality (which relates to the rules of distribution of goods and values among members of a given society), and functional equality (which refers to formulas used to achieve the goals of a society as

¹⁵ *Ibid.*

¹⁶ K. Gębarowska, “‘Kobiety’ jako zbiorowy podmiot ruchu feministycznego w Polsce. Polemika z Partią Kobiet i Kongresem Kobiet Polskich” [“Women” as a collective subject of the feminist movement in Poland. Polemics with the Women’s Party and The Polish Women’s Congress], in F. Pierzchalski, K. Smoczyńska, M.E. Szatlach, K. Gębarowska, *Feminizm po polsku* [Feminism in Poland] (Dom Wydawniczy Elipsa, Warszawa, 2011), pp. 194–95.

¹⁷ P. Dybel, *Zagadka “drugiej płci”. Spory wokół różnicy seksualnej w psychoanalizie i w feminizmie* [Second sex riddle. Discussions on sexual difference in psychoanalysis and feminism] (Towarzystwo Autorów i Wydawców Prac Naukowych Universitas, Kraków, 2007), p. 446.

¹⁸ A. Pacześniak, *Kobiety w Parlamencie Europejskim. Przelamywanie stereotypu płci w polityce* [Women in the European Parliament. Challenging sex-related stereotypes in politics] (Wydawnictwo Alta 2, Wrocław, 2006), p. 95.

¹⁹ Rights of lesbians, gays and bisexual, transgender and intersex persons.

a whole and its certain members).²⁰ These are merely some approaches to this rule presented in the literature.²¹ However, among them, two basic dichotomies can be distinguished: equality before the law and equal rights and equality in the formal and substantive meanings. It would be beneficial to devote more attention to these pairs of terms.

The principle of equality is manifested in two interrelated dimensions: equality before the law and equal rights.²² The Polish Constitutional Court affirmed this in a ruling: “Regarding equality before the law, we should consider two meanings of this term: equality of law application, which the doctrine defines as *sensu stricto* equality before the law and equal rights”.²³ As Wojciech Sadurski claims, the judges ruled that “equal protection of rights of each person – as justifiably referred to in the doctrine – is not equivalent to the protection of the same rights of each person”.²⁴ The concept of equality, expressed in this dualistic form, constitutes one of the fundamental pillars of the legal orders of democratic states. The first of these foundations is characterised by equality in the application of law and equal treatment of subjects of law by public authorities. The second aspect of equality in lawmaking concerns the obligation to consider the principle of equality when defining the content of legal norms that are to be binding.²⁵ Nevertheless, Jerzy Oniszczyk observed that while a law may be equal for all if it is to be just, it must be accompanied by specific legal qualifications that distinguish citizens based on particular criteria.²⁶

III. The status of an individual as defined in the Polish substantive administrative law

The following three acts have the most significant impact on the status of an individual as defined in Polish substantive administrative law: The Identity Cards Act of 6 August 2010 (Journal of Laws of 2022, item 671, and of 2023, item 1234, 1941); the

²⁰ I. Boruta, *op. cit.*, pp. 35–36.

²¹ K. Wandowicz, ‘Ewolucja zasady równości w prawie wspólnotowym’ [Development of the rule of equality in the European Union law], in W. Bokajło, A. Paczeński (eds), *Równość w Unii Europejskiej. Teoria i praktyka* [Equality in the European Union: Theory and Practice] (Wydawnictwo Alta 2, Wrocław, 2008), p. 109.

²² L. Garlicki, *Polskie prawo konstytucyjne. Zarys wykładu* [Polish constitutional law. An outline of the basic issues] (Liber, Warszawa, 2008), p. 94.

²³ The ruling of the Constitutional Court of 24 October 1989, case no. K 6/89.

²⁴ W. Sadurski, *Teoria sprawiedliwości. Podstawowe zagadnienia* [Theory of justice. Basic issues] (Państwowe Wydawnictwo Naukowe, Warszawa, 1988), p. 94.

²⁵ A. Łabno, ‘Zasada równości i zakaz dyskryminacji’ [The rule of equality and the prohibition of discrimination], in L. Wiśniewski (ed.), *Wolności i prawa jednostki oraz ich gwarancje w praktyce* [Freedoms and rights of an individual and their practical guarantees] (Wydawnictwo Sejmowe: Kancelaria Sejmu, Warszawa, 2006), p. 35.

²⁶ J. Oniszczyk, *Równość: najpierwsza z zasad i orzecznictwo Trybunału Konstytucyjnego* [Equality: the primary rule and judicial decisions of the Polish Constitutional Court] (Wydawnictwo Wyższej Szkoły Przedsiębiorczości i Zarządzania im. Leona Koźmińskiego, Warszawa, 2004), p. 35.

Population Register Act of 24 September 2010 (Journal of Laws of 2024, item 736) and the Vital Records Act of 28 November 2014 (Journal of Laws of 2023, item 1378, 1615). The substantive law norms included therein determine their addressees' rights and obligations (behaviour).²⁷ The content of the aforementioned legal acts is focused on issues related to the registration of facts about natural persons. It constitutes the area to be regulated in the administrative and legal context.

In general, Polish substantive administrative law defines humans regarding their biological sex. It does not address the issue of gender development in the context of social and cultural interactions. This is in contrast to the increasing trend observed in many other countries. The following countries have enacted legislation that permits administrative and legal procedures for sex reassignment: In 2003, Japan became the first country to adopt legislation allowing for sex reassignment. This was followed by the United Kingdom in 2004, Spain in 2007, Uruguay in 2009, Argentina in 2012, Denmark in 2014, Malta in 2015, Ireland in 2015, Norway in 2016, France in 2016, Canada in 2017 and Pakistan in 2018. In addition, the legal protection of transgender individuals is enhanced in numerous countries. For instance, in France, Belgium, and Greece, the requirement to undergo sterilisation for administrative and legal sex reassignment has been abolished. Another issue is the administrative and legal recognition of intersex and non-binary persons. The most prominent example is the Federal Republic of Germany, where in late 2018, the legislature permitted not only the designation of the 'third sex' (divers) but also the omission of sex identification in identity verification documents.²⁸

In Poland, individuals are unable to indicate their third sex on vital records, identity card registers (or ID cards themselves), population registers, or PESEL registers. Consequently, they are unable to claim non-binary status during proceedings before a public institution. Another issue is the administrative and legal difficulties that arise in the context of sex reassignment. Given the absence of a clear legal basis, the fact that sex has been changed is only noted in public documents after sex reassignment, and this occurs with great infrequency. Nevertheless, these modifications are only carried out under certain acts and to a limited extent.

The legislation pertaining to vital records, population registers, and identity card registers applies to all Polish citizens without exception. The Vital Records Act delineates the regulations and methodologies of the civil status registry. In the context of Polish substantive administrative law, civil status is defined as the legal situation of an individual, expressed by features that distinguish a person from others. These features may be determined by natural events, legal actions, or court rulings or decisions of institutions, and they are recorded in a civil registry.

²⁷ Z. Leoński, *Materialne prawo administracyjne* [Substantive administrative law] (Wydawnictwo C.H.Beck, Warszawa, 2006), pp. 6–7.

²⁸ J.M. Łukasiewicz, *Prawne aspekty zmiany płci w wybranych państwach europejskich* [Legal aspects of gender reassignment in selected European countries] (Instytut Wymiaru Sprawiedliwości, Warszawa, 2021).

The status of an individual is recorded in the form of certificates of personal status. These certificates are birth, marriage, or death certificates registered in a civil registry and subsequent entries that impact the act's content or validity. Certificates of personal status are prepared when an entry is made in a civil registry regarding a birth, marriage, or death. Activities regarding civil status registration are performed as administrative decisions or material technical activities. Certificates of personal status constitute the sole evidence of the events described therein. Their falseness can be proven only in the form of judicial proceedings.

The Vital Records Act should be accorded a pivotal role in the organisation of the legal and administrative framework pertaining to the status of an individual (as defined by law). In addition to the aforementioned act, the Polish legal order also encompasses the Population Register Act and the Identity Cards Act (which, until recently, were merged into a single legal act). The Population Register Act defines the rules and methods of registering the population in the Republic of Poland, the scope and methods of registration of data gathered in the PESEL database and population registers, the rules and procedures of PESEL number issuance, the rules and methods of observing the resident registration obligation by Polish citizens and foreigners, and the rules of making PESEL data accessible. The population is registered through the registration of essential data, the verification of identity, and the administrative and legal status of natural persons, as specified in the Population Register Act.

The Identity Cards Act delineates the individuals authorised or obliged to possess identity cards, the scope of data included in identity cards, the rules governing the operation of identity cards' electronic layer, the restrictions on identity card issuance, the rules governing replacement and annulment of identity cards, the scope of data gathered in the Identity Card Register and the regulations governing the conduct of this register, the rules governing the handling of documentation related to identity cards, and the rules governing the making of data in the Identity Card Register available. An identity card is a document that verifies an individual's identity and Polish citizenship within the territory of the Republic of Poland and other member states of the European Union, as well as states of the European Economic Area that do not belong to the European Union and states that are not parties to the agreement on the European Economic Area. These states permit their citizens to utilise the free movement of persons based on agreements concluded by these states with the European Union and its member states and on unilateral decisions of other states recognising this document as sufficient to cross their borders. The right to possess an identity card is guaranteed to each citizen of the Republic of Poland. Furthermore, each adult citizen of the Republic of Poland who is domiciled within its territory must possess an identity card. As an identity card serves to confirm identity and Polish citizenship as defined in the substantive administrative law, it occupies a privileged position compared to other types of identity documents specified by Polish law. The following categories of identity documents can be distinguished: (1) Identity documents in the strict sense (e.g., identity cards, passports); (2) Identity documents in the broad sense

(e.g., seaman's book, military service book); (3) Documents that serve as surrogates for identity documents (e.g., student card, PhD student card).²⁹

The commonality of the legal acts under analysis in the context of the issue discussed in this paper is the processing of a set of data on natural persons (data distinguishing individuals in the legal context) following the specifications outlined in these acts and the creation of registers in which these data are collected, stored, and processed (these registries are maintained in the form of IT systems). The starting point is a set of specific data to ensure that the information collected on a given person corresponds to a factual state to the greatest extent possible. The act of birth is the defining factor in determining a person's sex. However, it is important to note that this matter is inherently ambiguous. In Poland, for instance, the information on sex resulting from this fact is not subject to change in a birth certificate. This is because the lawmakers assume that certificates on civil status confirm specific legal events. Nevertheless, instances of sex reassignment during the lifetime of a natural person should be acknowledged in public registries, such as in the case of transgenderism.

IV. Legal protection of transgender persons

No international treaties directly define the legal protection of transgender persons. “However, both human rights instruments of the United Nations and European systems of the Council of Europe and the European Union guarantee the rights included therein to everyone, while prohibiting discrimination based on any reason, including gender identity”.³⁰ It is particularly important to consider the role of instruments of what is known as soft law, including recommendations, which can be an effective tool for interpreting existing regulations in the context of protecting human rights. Such instruments permit the differentiation of transgender individuals as a distinct and specific category. However, in practice, their rights are frequently discussed in conjunction with those of non-heterosexual individuals (as rights of LGBTQIA+ persons). Nevertheless, this assumption is unjustified, as numerous legal issues and problems, including those on sex reassignment, are not inherently connected to sexual orientation.³¹

In 1986, the European Court of Human Rights (ECHR) addressed the issue of legal recognition of the gender identity of a transgender person and the issue of enabling them to reassign sex in a birth certificate and identity documents for the first time (*Rees vs the United Kingdom*³²). However, in 1992, in the case *B. vs France*, the ECHR ruled on violating Article 8 of the Convention. Eight of the Convention's

²⁹ M. Kępa, J. Podgórska-Rykała, in M. Kępa, G. Krawiec, A. Nodzak, J. Podgórska-Rykała, *Ustawa o dowodach osobistych. Komentarz* [Identity Cards Act. Commentary] (Wydawnictwo C.H.Beck, Warszawa, 2021), p. 10.

³⁰ *Postępowania w sprawach o ustalenie płci – przewodnik dla sędziów i pełnomocników*, p. 10.

³¹ *Ibid.*

³² The ruling of ECHR of 17 October 1986, complaint no. 9532/81.

articles were invoked in a case involving a transgender individual. A breakthrough occurred in 2002 when, in the case of *Christine Goodwin vs the United Kingdom*,³³ the Grand Chamber decided that based on Article 8 of the European Convention on Human Rights, its parties (states) had a positive obligation to recognise sex reassignment by a transsexual person legally. It was indicated that ‘in the 21st century rights of transsexual persons to personal development and physical and moral safety cannot be treated as subject to any discussion. The situation in which post-operative transsexual persons are legally stuck between two sexes cannot last any longer.’ It can be stated that the jurisprudence of the Court in this matter is already well-established.

Despite the introduction of legislative amendments and the active involvement of social organisations, the Polish law does not include regulations on sex reassignment. The most significant attempt to implement such regulations in Poland was the Act on Sex Reassignment, passed by the Parliament on 10 September 2015. However, it was not incorporated into the legal order, as President Andrzej Duda vetoed it.

The Act was designed to establish a simplified procedure for sex reassignment through a designated regional court. This procedure would be conducted as non-contentious proceedings based on the expert opinions of two independent experts in psychiatry, sexology, or psychology. The motion for sex reassignment was to be recognised by the relevant court within a period of three months from the date of filing. It is noteworthy that among the 25 countries³⁴ that had implemented sex reassignment procedures in the form of legal acts until the end of 2019, Poland was the only one where lawmakers withdrew from the implementation of the results of the already conducted legislative process. The current legal ambiguity in this matter presents a significant challenge for many citizens, complicating their lives and influencing the outcome of judicial rulings.

It is important to note that the first systematic attempt to address this issue was made as early as 1978 when the Polish Supreme Court³⁵ ruled that changing one’s sex designation was permissible without the necessity of undergoing surgery. In the same ruling, the court determined that it was permissible to amend a birth certificate. Between 1982 and 1987, district courts amended birth certificates regarding sex, resulting in changes to names and surnames. However, in 1989, the Polish Supreme Court³⁶ issued a resolution, which was subsequently made a principle of law, stating that the occurrence of transsexualism did not provide a basis for amending the sex designation on a birth certificate. The Supreme Court’s primary rationale was the binding nature of the regulations governing vital records at the time. The aforementioned resolution has served as the standard for judicial rulings until today. Another significant ruling that impacted Polish jurisprudence was the decision of the Supreme Court of 22 March

³³ The ruling of ECHR of 11 July 2002, complaint no. 28957/95.

³⁴ J.M. Łukasiewicz, *op. cit.*

³⁵ The resolution of the Supreme Court of 25 February 1978, case no. III CZP 100/77.

³⁶ The resolution of the Supreme Court of 22 June 1989, case no. III CZP 37/89.

1991,³⁷ in which it was determined that the feeling of belonging to a given sex is a personal right as defined in Article 18 of the Constitution. This is following Article 23 of the Code of Civil Procedure, which affords protection during court proceedings. As the procedure of sex reassignment is not determined on the level of specific legislation, Polish courts have developed a court procedure for sex determination based on Article 189 of the Code of Civil Procedure (a general provision).

In practice, following the issuance of a court decision on sex designation, a transsexual individual submits a motion to a registrar of Vital Statistics, who issues a new PESEL number, makes an additional entry on sex designation change based on a court ruling, and then issues a decision regarding the change of name – and in some cases, the surname – of a transsexual individual. It should be noted that the amendment of the current practice would require the amendment of some regulations of the Vital Records Act.

By the stipulations of Polish administrative law, the sex of a human being is determined at the moment of birth based on the external genital organs. The phenomenon of transgenderism is a secondary consideration in this context. The reassignment of sex, a fundamental aspect of a person's civil status and the primary legal and administrative criterion that distinguishes a natural person from others, is, from a legal and administrative perspective, a form of interruption of the civil status determined at birth. In this matter, the substantive administrative law is discriminatory because it does not appear to recognise the problem of transgenderism/transsexualism, namely the discrepancy between sex and gender, which is usually identified during adolescence. Unfortunately, Polish law does not define the clear legal (administrative and civil) proceedings path for a transgender person to require a change of sex at birth and to have it adjusted to their gender, thus resulting in a change of name and surname.

Many individuals are unable to navigate the intricate legal landscape on their own. NGOs play a crucial role in providing information and assistance to the LGBTQIA+ community, ensuring they are aware of their rights and can manoeuvre their way through complex legal and administrative processes. As the Ombudsman notes, between 2014 and 2019, 647 individuals filed gender determination lawsuits, with only four cases being dismissed. These figures highlight the significant challenges faced by this community.³⁸

V. Conclusion

The employment of legal norms, given the nature of the subject matter, allows for the creation of specific legal qualifications. This type of action can, via specific norms, result in delineating distinctions that pertain solely to particular segments of the citizenry. In this context, it is pertinent to consider the matter of equality and non-discrimination. The realisation of these rules is contingent upon assessing a given

³⁷ The resolution of the Supreme Court of 22 March 1991, case no. III CRN 28/91.

³⁸ *Postępowania w sprawach o ustalenie płci – przewodnik dla sędziów i pełnomocników*, p. 47.

criterion as just and reasonable.³⁹ The law can be seen to have the potential to exclude and integrate certain social groups,⁴⁰ depending on lawmakers' assumptions. A detailed analysis of multiple processes and historical events indicates the authenticity of these words. It can be demonstrated that valid regulations have played and continue to play a significant role in developing social, economic, and political conditions for certain groups of people.

Furthermore, the current legislation, which is generally impartial or *blind* to, for instance, sex, has a significantly detrimental impact on individuals who do not align with the traditional system of references, including transgender individuals. This is because decision-makers are still insufficiently diverse to reflect the interests of all communities they represent. The issue is not the development of discriminatory regulations but rather the abandonment of the traditional system in favour of a more inclusive approach that could overcome existing inequalities. This is why adequate human rights protection necessitates providing reliable guarantees of equality and protecting individuals against discrimination.

As previously stated by the authors, the rationale for modifying sex determination in certain public documents can be derived from Article 189 of the Code of Civil Procedure: A plaintiff may request a court to determine the existence or non-existence of a legal relation or act when they have a legal interest in a given matter. This regulation was enacted in the 1990s. It is important to acknowledge that the civil procedure can be traumatic for a transgender person, as the plaintiff⁴¹ is forced to sue their parents.

As elucidated in the Supreme Court's ruling of 10 January 2019,⁴² initiating legal proceedings against parents on behalf of their child does not stem from the parents' legal interest in the child's right to gender reassignment. Instead, it is merely a procedural requirement for the presence of two parties in a judicial trial. Consequently, the mere fact that parents are present during a trial as defendants does not imply that without their participation, it would be impossible to resolve a case. Instead, their presence merely facilitates the resolution of a case in the form of a trial. Nevertheless, it appears that legislative intervention may be necessary to permit lawsuits against municipalities in sex reassignment trials rather than parents to mitigate the already challenging psychological aspects of such proceedings.

In 1989, the Supreme Court determined that the occurrence of transsexualism was not a sufficient basis for amending an entry on sex in a birth certificate.⁴³ Furthermore,

³⁹ J. Falski, 'Ewolucja wykładni zasady równości w orzecznictwie Trybunału Konstytucyjnego' [Evolution of interpretation of the equality rule in judicial rulings of the Polish Constitutional Court], *Państwo i Prawo*, no. 1 (2000), pp. 49–59 (at p. 56).

⁴⁰ E. Zielińska, 'Prawo wobec kobiet. Refleksja w dwudziestą rocznicę kontraktu Okrągłego Stołu' [Law towards women. Reflections on the twentieth anniversary of the Polish Round Table Agreement], in K. Slany, J. Struzik, K. Wojnicka (eds), *Gender w społeczeństwie polskim* [Gender in the Polish society] (Zakład Wydawniczy Nomos, Kraków, 2011), p. 104.

⁴¹ Procedural civil law is characterised by dichotomy of trial subjects: plaintiff – defendant.

⁴² The ruling of the Supreme Court of 10 January 2019, case no. II CSK 371/18.

⁴³ The resolution of the Supreme Court of 22 June 1989, case no. III CZP 37/89.

there are no existing regulations that would enable sex reassignment through judicial proceedings. The 1990s saw some successes in this area, but these were not the result of the passing of specific regulations. Instead, they were based on rulings of the Supreme Court that had an impact on particular jurisprudence regarding the reassignment of sex at birth. Nevertheless, numerous practical discrepancies and inconsistencies remain, which is why *de lege ferenda* demands, submitted since the 1980s, are still on the agenda.⁴⁴ This indicates the necessity for a direct and precise definition of the phenomenon of transsexualism in generally applicable law.

In light of the aforementioned circumstances, it can be argued that the protection of transgender individuals in Poland is inadequate, particularly in relation to civil status, which is a fundamental personal right and subject to the civil status rights enshrined in civil law, which can be enforced through specific claims, such as declaratory action and action for the formation.⁴⁵ Furthermore, it is of paramount importance to emphasise the pivotal role of sexual and civic education, with the objective of challenging stereotypes and prejudice against other individuals. It is important to note that despite popular belief, sexual orientation can be utterly distinct from gender identity. Consequently, it is irrelevant in terms of sex determination proceedings.⁴⁶

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⁴⁴ M. Filar, ‘Transseksualizm jako problem prawny’ [Transsexualism as a legal issue], *Przegląd Sądowy*, no. 1 (1996), pp. 73–84 (at p. 83); *id.*, ‘Prawne i społeczne aspekty transseksualizmu’ [Legal and social aspects of transsexualism], *Państwo i Prawo*, no. 7 (1987), pp. 67–77 (at p. 67); *id.*, ‘Prawne i społeczne aspekty transseksualizmu’ [Legal and social aspects of transsexualism], in *id.* (ed.), *Prawo a medycyna u progu XXI wieku. Sympozjum, Toruń 18–19 maja 1987 r.* [Law vs medicine at the beginning of the 21st century. Symposium, Toruń 18–19 May 1987] (Towarzystwo Naukowe w Toruniu, Toruń, 1987), p. 83; *id.*, ‘Glosa do uchwały SN z dnia 22 czerwca 1989 r., III CZP 37/89’ [Gloss to the resolution of the Supreme Court of 22 June 1989], *Państwo i Prawo*, no. 10 (1990), pp. 116–18; Z. Radwański, ‘Glosa do uchwały SN z dnia 22 czerwca 1989 r.’ [Gloss to the resolution of the Supreme Court of 22 June 1989], *Orzecznictwo Sądów Polskich*, no. 2 (1991), item 35; J. Pisuliński, ‘Glosa do uchwały SN z dnia 22 czerwca 1989 r., III CZP 37/89’ [Gloss to the resolution of the Supreme Court of 22 June 1989], *Państwo i Prawo*, no. 6 (1991), pp. 112–16; J. Ignatowicz, ‘Glosa do uchwały Sądu Najwyższego z dnia 22 września 1995 r., III CZP 118/95’ [Gloss to the resolution of the Supreme Court of 22 September 1995], *Orzecznictwo Sądów Polskich*, no. 4 (1996), item 78.

⁴⁵ T. Smyczyński, M. Andrzejewski, *Prawo rodzinne i opiekuńcze* [Family and custody law] (Wydawnictwo C.H.Beck, Warszawa, 2020), p. 15.

⁴⁶ B. Grabski, D. Rachoń, W. Czerniewicz *et al.*, ‘Recommendations of the Polish Sexological Society on medical care in transgender adults – position statement of the expert panel’, *Psychiatria Polska*, vol. 55, no. 3 (2021), <<https://www.psychiatriapolska.pl/pdf-125785-81746?filename=Zalecenia%20Polskiego.pdf>>, accessed 20 December 2024.

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