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GENDER IDENTITY AS A LEGAL CATEGORY

Abstract

This paper explores evolving gender identity definitions in both social and legal contexts. Traditionally, gender was defined based on visible anatomical features. However, contemporary perceptions acknowledge the significance of gender identity, which may not align with sex assigned at birth. Many legal systems, including the Polish one, still rely on binary gender classifications based on anatomy, while the legal concept of gender identity remains underdefined. The ambiguity regarding legal gender identity calls for a solution that draws from extensive non-legal literature on the topic, to offer a more informed legal understanding. The redefined legal concept of gender should fulfil three key criteria: it should be clear, align with current scientific knowledge, and advance trans rights as well as gender equality. In the paper, three non-legal approaches to defining gender identity – materialist, externalist, and internalist – will be examined; and their potential application in the legal context based on the above-mentioned criteria will be assessed.

KEYWORDS

legal gender, gender identity, trans rights, gender equality, gender recognition

SŁOWA KLUCZOWE

prawne pojęcie płci, tożsamość płciowa, prawa osób trans, równość płci, uzgodnienie płci

1. INTRODUCTION

Gender is a concept that has gained a polysemic meaning in the recent decades, even though it was once considered to be uncontroversial and clear. The traditional approach to defining it was based on visible anatomical features, i.e., ‘what the midwife sees’,¹ and allowed for categorization of individuals into males and females. With Simone de Beauvoir’s ‘one is not born, but rather becomes a woman’,² gender gained a second meaning. It became understood in virtue of social norms and roles associated with femininity and masculinity. Thirdly, gender may be understood as an identity, i.e., being a certain gender is defined through a subjective perception of oneself as a member of a certain gender category. These three major understandings of gender, or three levels of description of gender, may be in line for a certain individual; for instance, a person who possesses female anatomical features has norms of femininity applied to her, and she identifies as a woman. We would call her a cis woman (as defined below). However, there may be a mismatch between the three understandings of gender when applied to a person. Consider two examples: first, a female-bodied person that identifies as a woman, who disagrees with the norms of femininity applied to her and regards them as oppressive. Even if this person is gender non-conforming, she is considered a cis woman because her gender identity matches her gendered body. On the other hand, a male-bodied person who identifies as a woman will be considered a trans woman, regardless of her attitude towards the gender norms. It is the mismatch between the gender of the body (also referred to as ‘biological sex’) and gender identity that defines trans individuals.

Next to the three non-legal understandings of gender there is also the legal gender. In most jurisdictions, citizens belong to one of two legal gender categories: one either counts as a man, or as a woman, in the context of the law. This categorisation is also employed in the Polish legal system.³ A question arises, what is the relation of a person’s gender in the three enlisted non-legal understandings,

¹ Stephen Whittle, Lewis Turner, *Queer Europe: New Normative Values for Global LGBT Law in Transgender and Intersex: Theoretical, Practical, and Artistic Perspectives*, Stefan Horlacher (ed), New York 2016, 4.

² Simone de Beauvoir, *The Second Sex*, London 1997.

³ Resolution of a formation of seven judges of the Supreme Court of Poland: Civil and Administrative Chamber; Legal principle of 22 June 1989 III CZP 37/89.

in particular gender identity, and their gender in the context of the law. As a rule, the anatomical features are the basis of legal gender ascription. When a mismatch between this legal (anatomy-based) gender ascription and gender identity occurs, the need of legal gender recognition, i.e., amendment of the legal gender to be in line with gender identity, arises. However, gender identity is a contested concept, both in the non-legal discourse and in the law. In the legal contexts, it is employed in a highly ambiguous manner, particularly in the Polish legal system.⁴ Because the importance of gender identity in institutional contexts is increasing, it is crucial for the law to have a clear understanding of what exactly constitutes its content. The aim of this paper is to analyse the non-legal discourse on defining gender identity, with particular focus on its possible legal applications.

The paper analyses gender identity as a basis for legal gender categorisation. In the first part, focusing on the Polish legal system as a case study, I will introduce two existing approaches to ascribing a person to be of a certain gender in the legal context: 1) gender ascribed at birth based on anatomical features; 2) legal gender recognition based on gender identity. The latter approach will be a subject of the following parts of the paper. In the second part, I will analyse the Polish judicial standard of legal gender recognition, focusing on the notion of ‘gender identity’ as a category employed in law. I will argue that as a category in the Polish legal system, gender identity is not developed adequately and highly vague. This leads not only to multiple challenges in the interpretation and application of the law but also to unjust outcomes for trans citizens. This ambiguity of gender identity in law calls for resolving, and this may be achieved by resorting to a rich non-legal literature on the subject which can enrich the legal understanding of this notion. The revisited legal category of legal gender should meet three criteria, it should be: 1) clear, 2) coherent with the up-to-date state of science, and 3) allow for advancing trans rights. In the third part of the paper, three non-legal approaches to defining gender identity will be analysed: material, externalist and internalist. The possibility of their employment in the legal context will be evaluated based on the three aforementioned criteria.

Lastly, a few conceptual remarks will be presented. I will call the anatomical, social, legal gender and gender identity as levels of gender description (legal gender, even though it is a subtype of the social gender, is outlined as a separate level because it is of specific concern for the discussion presented in this paper, but also because it differs from generally understood social gender in a significant way). I will use the term ‘gender binary’ to describe approaches to defining gender that only allow for the existence of two, mutually exclusive gender categories: men and women. I will define cis people as individuals whose gender identity is matched with both their legal gender ascribed at birth, and their anatomy; correspondingly,

⁴ Milena Adamczewska-Stachura, Paulina Pilch, *Postępowania w sprawach o ustalenie płci – przewodnik dla sędziów i pełnomocników*, Zasada Równego Traktowania. Prawo i Praktyka 2020, No 28, 24–32.

trans will be a term used for people whose gender identity is mismatched to their gender on one or both levels. I will use ‘non-binary’ as an umbrella term for all the individuals who do not identify as a man or a woman, including agender, gender-fluid etc. I will differentiate between trans-binary individuals (trans people who identify as men or women), and trans-non-binary (individuals, whose non-binary gender identity is misaligned with the male or female features of their bodies). Finally, gender expression will be understood as a social behaviour that indicates membership to a given gender category, due to the choice of clothing, gestures, speech, etc., culturally associated with this category.

2. GENDER IN THE CONTEXT OF THE LAW: CATEGORIES AND MEMBERSHIP CONDITIONS

To be of a certain legal gender is to be assigned a legal status of being a woman or a man in the context of the law. This status is disclosed in documents and is further a basis for certain legal enablements and restraints related to gender, such as a maternity leave, retirement age, etc. In the Polish legal system, legal gender is established as binary, i.e., one can be either a man or a woman in the legal context. As a rule, the ascription to a legal gender category is effected by means of an entry in a birth certificate,⁵ in majority of cases based on observable anatomical features of a newborn. This practice has been criticised as defective, due to a disregard of the existence of intersex individuals, who are forced into either male or female legal category,⁶ and the binarity of the legal gender is often described as inadequate in the literature.⁷ However, gender ascription at birth is not a subject of this paper, so the highlighted controversies will not be elaborated further. Regardless of the accuracy of the gender ascription, it is obligatory for every person in the Polish legal system,⁸ which means that everybody must be defined as either a man or a woman in the context of law, and nobody can be defined as both.

Gender ascribed at birth does not necessary correspond with the gender one identifies with. In such cases, legal gender recognition applies. Although in the Polish legal system there is no legal act that would provide a proper procedure, gender recognition can be obtained through the courts under Article 189

⁵ Act of 28 November 2014 – Law on civil status records, Journal of Laws 2014, item 1741, Article 57.

⁶ Renata Ziemińska, *Niebinarne i wielowarstwowe pojęcie płci*, PWN 2018, 61–74.

⁷ Laurie Shrage, *Does the Government Need to Know Your Sex?*, Journal of Political Philosophy 2012, Vol 20, No 2, 20–22.

⁸ Konrad Osajda, Maciej Domański, Jerzy Słyk, *Komentarz do art.52-60 in Prawo o aktach stanu cywilnego. Komentarz*, Krótkie Komentarze Becka series, Warsaw 2023.

of the Code of Civil Procedure,⁹ by means of an action to establish the fact. In the absence of the legal act, the Polish courts have developed a judiciary standard, which followed the resolution III CZP 37/89 of the Polish Supreme Court regarding legal gender recognition. Further, by the decision of the Supreme Court of Poland III CRN 28/91,¹⁰ gender identity has been ruled as a personal good, protected under Article 23 of the Polish Civil Code.¹¹ In the procedure, recognition of the gender the plaintiff identifies with (either male or female) is possible, and it is enforced through an addition of a supplementary note to the birth certificate, attribution of a new Personal ID Number and change of name,¹² by the decision of the court. Even though gender identity is not sufficient to obtain the ruling, and additional conditions must be met by the plaintiff, gender identity mismatched with the legal gender is as a rule the reason for the initiation of the procedure of gender recognition.

3. GENDER IDENTITY AND THE JUDICIARY STANDARD AFTER III CZP 37/89

The judiciary standard on legal gender recognition that has been enacted with the resolution III CZP 37/89 has been a subject of criticism, especially from the trans rights activists. The resolution itself may be regarded as not corresponding to the contemporary knowledge on gender dysphoria. The Court refers to transsexualism as one ‘among the various gender deviations – [...] discrepancy between the mental sense of gender and the morphological-biological physique of the body’ and indicates that a misaligned gender identity is somewhat faulty: ‘according to the current state of medical knowledge – no method of therapy allows the “reversal” of a malformed identification’.¹³ The language used by the Court with respect to trans identities is highly value-laden and may be regarded as stigmatising, due to introducing it as a deviation that would profit from being reversed. Such approach does not correspond to the contemporary knowledge about gender dysphoria. In the context of the international law, a definition of gender identity included in Yogyakarta Principles is regarded to be a state-of-the-art standard, even though it is without binding force, and only regarded as a good

⁹ Act of 17 November 1964 – Code of Civil Procedure, Journal of Laws 1964, No 43, item 296, Article 189.

¹⁰ Order of the Supreme Court of 22 March 1991, III CRN 28/91.

¹¹ Act of 23 April 1964 – Civil Code, Journal of Laws 1964, No 16, item 93.

¹² Milena Adamczewska-Stachura, Paulina Pilch, *Postępowania w sprawach o ustalenie płci – przewodnik dla sędziów i pełnomocników*, Zasada Równego Traktowania. Prawo i Praktyka 2020, No 28, 24–25.

¹³ III CZP 37/89, (my translation, KH).