

PENAL AND LEGAL ASPECTS OF GENDER CONFIRMATION SURGERY. CONSIDERATIONS IN THE CONTEXT OF POLISH CRIMINAL LAW

TRESTNÉ A PRÁVNE ASPEKTY OPERÁCIE NA POTVRDENIE POHLAVIA. ÚVAHY V KONTEXTE POĽSKÉHO TRESTNÉHO PRÁVA

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ABSTRACT

Gender confirmation surgery may be perceived as a strictly medical matter. However, the issue of such surgeries also affects legal matters, mainly civil law and criminal law. The subject of this article is the criminal law aspects of gender confirmation surgery and their analysis from the perspective of the Polish criminal law. The findings presented in the study were reached by 1) analyzing the normative material relating to the subject of this study, mainly by analyzing the Act of 6 June 1997 of the Polish Criminal Code (Dziennik Ustaw [Journal of Laws] of 2019, item 1950, as amended, hereinafter referred to as 'the Polish Criminal Code'), and 2) by analyzing the views presented in the legal literature and the judicial practice. Taking into account the considerations contained in this article, it is necessary to postulate that gender confirmation surgery procedures should be treated as medical activities (this is a concept already presented in the criminal law science) or as activities not covered by the scope of the normalization of the penal and legal sanctioned norm as expressed in the Article 156 section 1 item 1 of the Polish Criminal Code in connection with the Article 31 section 3 of the Polish Constitution.

ABSTRAKT

Operáciu na potvrdenie pohlavia možno vnímať ako striktno medicínsku záležitosť. Problematika takýchto operácií sa však dotýka aj právnych aspektov, najmä občianskeho práva a trestného práva. Predmetom tohto článku sú trestnoprávne aspekty operácie na potvrdenie pohlavia a ich analýza z pohľadu poľského trestného práva. Zistenia prezentované v štúdiu boli dosiahnuté 1) analýzou normatívneho materiálu týkajúceho sa predmetu tejto štúdie, najmä analýzou zákona zo 6. júna 1997 poľského trestného zákonníka (Dziennik Ustaw [Zbierka zákonov] z roku 2019, položka 1950, v znení neskorších predpisov, ďalej len „Poľský trestný zákon“) a 2) analýzou názorov prezentovaných v právnej literatúre a súdnej praxi. Zohľadňujúc úvahy obsiahnuté v tomto článku, je potrebné postulovať, že chirurgické zákroky na potvrdenie pohlavia by sa mali považovať za lekárske úkony (toto je pojem už prezentovaný v trestnoprávnej vede) alebo ako činnosti, na ktoré sa nevzťahuje rozsah úpravy trestnej a

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právnjej sankčnej normy vyjadrenej v článku 156 ods. 1 bod 1 poľského trestného zákona v spojení s článkom 31 ods. 3 poľskej ústavy.

1. INTRODUCTION

Gender confirmation surgery may be perceived as a strictly medical matter. However, the issue of such surgeries also affects legal matters, mainly civil law and criminal law. The subject of this article is the criminal law aspects of gender confirmation surgery and their analysis from the perspective of the Polish criminal law. Considering the problematic aspects of gender confirmation surgery on the basis of the criminal law may seem quite surprising. It should be noted, however, that while gender confirmation surgeries are being performed in Poland, there is or may be a doubt regarding their complete legality in accordance with the current legal status and whether they could be a basis for bearing criminal liability by medical doctors performing said surgeries in the future, e.g. in the event of a negative attitude of the state authorities towards the LGBTQ+ persons. As it happens, in Poland there is a regulation of the Article 156 section 1 of the Polish Criminal Code, according to which: "Anyone who causes grievous bodily harm in a form that: 1) deprives a person of their sight, hearing, speech or the ability to procreate, or 2) inflicts on another person a serious crippling injury, an incurable or prolonged illness, a potentially fatal illness, a permanent mental illness, a permanent total or significant incapacity to perform a profession, or a permanent serious bodily disfigurement or deformation, is liable to imprisonment for at least 3 years". At the same time, there is no regulation that excludes from the scope of said regulation persons confirming their gender surgically.

The situation of LGBTQ+ people in Poland is not great. Suffice to point out that in some Polish cities, there were introduced the so-called anti-LGBT resolutions, i.e. resolutions of individual local governments on counteracting the "LGBT ideology". An example of such a resolution may be the Declaration No. 1/19 of the regional parliament of Małopolska of April 29, 2019 on opposition to the introduction of the "LGBT" ideology to local government communities³, in which you can read that "The regional parliament of Małopolska expresses its strong opposition to the emerging public activities aimed at promoting the ideology of LGBT movements, the goals of which violate the fundamental rights and freedoms guaranteed by acts of international law, question the values protected in the Polish constitution, and interfere with the social order. Actions taken recently by some representatives of the local government and the national political scene are focused on causing fundamental changes in social life. These activities are aimed at the annihilation of values shaped by the centuries-old Christian heritage, which are especially important to the inhabitants of Małopolska. As councilors of the Małopolska region, we declare support for families based on traditional values and defense of the education system against LGBT propaganda that threatens the proper development of the young generation. We declare that in the performance of its public tasks the regional parliament of Małopolska will be faithful to the national and state tradition, remembering the thousand-year tradition of Christianity in Poland and the centuries-old attachment of Poles to freedom".

In the public space, there are even statements of the highest state authorities referring to LGBTQ+ people in a not very positive way, to say the least. For example, in the opinion of President Andrzej Duda, "we are being persuaded that the LGBT is people. And that's simply an ideology."⁴ Adding to that the "Stop LGBT" bill that was submitted to the Polish Parliament, which includes: 1) prohibition of organizing the so-called Equality Parades; 2) prohibition of questioning marriage as a relationship between a woman and a man; 3) prohibition of promoting the extension of marriage to persons of the same sex; 4) prohibition of promoting same-sex

³ <https://bip.malopolska.pl/umwm,a,1594074,deklaracja-nr-119-sejmiku-wojewodztwa-malopolskiego-z-dnia-29-kwietnia-2019-r-w-sprawie-sprzeciwu-wo.html> (visited 17 February 2022).

⁴ More: <https://wiadomosci.radiozet.pl/Polska/Polityka/Andrzej-Duda-i-homofobiczne-slowa-o-LGBT.-Swiatowe-media-cytuja-prezydent?gclid=EAIaIQobChMlrP7.08B68gIVkOJ3Ch3Ch3OIQ17EA0> (visited 17 February 2022).

unions or unions consisting of more than two people; 5) prohibition of promoting the treatment of same-sex unions or unions consisting of more than two people in a privileged manner; 6) prohibition of promoting legal solutions aimed at privileging same-sex relationships; 7) prohibition of promoting sexual orientations other than heterosexuality; 8) prohibition of promoting gender as an entity independent of biological conditions, it will turn out that the situation of LGBTQ+ people in Poland is, in fact, not great, and may even worsen.⁵

The noticeable in Poland trend of smuggling populist and emotional narratives striking the LGBTQ+ community, including transgender people, is not a purely Polish domain. We are currently dealing with a similar situation in the USA, where in 2020, in 2020, legislators in several states introduced bills that would prohibited and frequently criminalized providing gender-affirming healthcare services to minors and in January 2021, at least nine states were considering gender-affirming care bans⁶. One can also mention the so-called Bathroom bills which banned trans people from using public bathrooms and changing facilities consistent with their identified genders⁷. These bills never came into effect. However, the very idea contained in them is significant for the problem described in this article.

Considering the political context of the legal problem of transgenderism observed in Poland, the USA and, as shown below, also in Hungary, it can be concluded that the question of adequate legal regulation of gender confirmation surgery is, to some extent, international.

In the context of gender confirmation procedures, as above-mentioned, it should be stated that they are performed in Poland without any problems. Transgender men and women, however, sometimes face problems not of a formal nature but "human" one. As Sonia Milch, who has gone through the transition, points out: "Oppression and misunderstanding happen to transgender people on practically every step. Institutions and doctors are no exception here. (...) most doctors in Poland, even sexologists, do not know about transgenderism and are not interested in this topic, it is common to think that it is a whim or a mental disorder. Those who take up the topic at all often have a lot of misconceptions and are very limited. (...) The biggest shock for me, however, was that my identification was questioned during a forensic examination by a well-known sexologist (...). He stated that my history of severe depression and suicide attempts made him questionable because such things don't happen to transgender people. Official WHO reports show the opposite, transgender people are particularly vulnerable to depression and suicide. The formal and legal path that must be followed in order to change documents and obtain the indisputability of a medical diagnosis is extremely difficult and overwhelmingly long. And it does not end all the problems anyway. For example, my psychiatrist, whom I used to visit for several years after the transition process, when asked if he would give me a certificate of no psychiatric contraindications for surgery, replied that he, as a doctor, could not be absolutely sure about my diagnosis of transgenderism because he was not a sexologist. It was a shock for me, I realized that all this time, yes, he tolerated my functioning in the female role, but he was not able to fully accept that I was just a "real" woman. Like any other patient of his."⁸

Now imagine that the above-mentioned "Stop LGBT" bill comes into force. It would be a simple way to turn on the green light for entities negatively oriented towards LGBTQ+ people to use discriminatory practices against them, including threatening doctors, who would perform

⁵ <https://www.rp.pl/Bezpieczenstwo/308099964-Fundacja-Kai-Godek-zlozyla-w-Sejmie-projekt-Stop-LGBT.html> (visited 17 February 2022).

⁶ See *Outlawing trans youth: state legislatures and the battle over gender-affirming healthcare for minors*. *Harvard Law Review*, Vol. 134, No 6. Online: <https://harvardlawreview.org/2021/04/outlawing-trans-youth-state-legislatures-and-the-battle-over-gender-affirming-healthcare-for-minors/> (visited 17 February 2022).

⁷ See KRALIK, J. Bathroom Bill. Legislative Tracking, Nat'l conf. of state legislatures (Oct. 24, 2019). Online: <https://www.ncsl.org/research/education/-bathroom-billlegislative-tracking635951130.aspx> (visited 17 February 2022).

⁸ <https://noizz.pl/lgbt/sonia-milch-opowiada-o-korekcje-plci-i-codziennosci-osob-transplciowych/nfpg12c> (visited 17 February 2022).

such a gender confirmation surgery, with initiating criminal proceedings against them for such a health service on the basis of the above-mentioned Article 156 of the Polish Criminal Code. Such a practice would paralyze the provision of assistance to transgender persons and simply violate their right to health protection. The literal wording of Article 156 of the Polish Criminal Code theoretically allows for its application, i.e. the enforcement of criminal liability if a surgeon performs a sex change operation of a transgender patient, with their consent and with all indications for the existence of benefits for mental and physical health. This is why the authors try to find theoretical arguments that could be in favor the legality of performing gender confirmation surgeries in Poland, simultaneously proposing a change in the current legal regulations.

It is worth noting that the solutions proposed by the authors in the context of the Polish Criminal Code can be easily translated into solutions proposed in other legal orders. For example – for solutions provided for in Hungary, where the Article 164 of the Hungarian Criminal Code provides that: “(1) Any person who causes bodily harm to or injures the health of another person is guilty of battery. (6) The penalty shall be imprisonment between one to five years, if the aggravated battery is committed: (...) d) causing permanent disability or serious health impairment”. The media, in the meantime, reports: “Transgender people in Hungary have lost legal recognition, as the country makes it impossible for people to legally change gender. (...) Until this new law passed, identity documents could be changed in Hungary by law. But the Article 33’s approval today, will only confirm the fear created by a suspension on changing gender in that way, in place for two years already. All references of <<sex>> will now instead refer to "sex assigned at birth" in the national registry and on identity documents. This amendment effectively ends any opportunity for legal gender recognition in Hungary, because identity documents will now reference the immutable characteristic of <<sex assigned at birth>>”⁹. Therefore, perhaps, in Hungary (and in other countries), the arguments in favor of legally permitting gender confirmation operations, and arguments against punishing for performing such operations, will also prove useful.

2. RESEARCH METHOD

In the work, the authors analyze the Polish law and the way it is applied to transgender people. The study focuses on how a specific law can be used against doctors who treat transgender patients. The findings presented in the study were achieved through the analysis of the Polish Criminal Code and through the analysis of views presented in the doctrine and judicial practice.

The above-mentioned analysis was carried out on the basis of a derivative concept of legal interpretation. The indicated concept of legal interpretation fully and precisely describes the course of the interpretation of a legal text and is a concept integrated with other concepts of the interpretation, which also constituted a major argument for using it¹⁰.

⁹ <https://www.forbes.com/sites/jamiewareham/2020/05/19/hungary-makes-it-impossible-for-transgender-people-to-legally-change-gender/?sh=d9f61c6698e9> (visited 17 February 2022).

¹⁰ On the derivative concept of legal interpretation, see more in: CHODUŃ, A. Maciej Zieliński’s (derivative) concept of legal interpretation. *Studia Prawa Publicznego*, Vol. 2, 2015, pp. 111-125; BOGUCKI, O. The Derivational Theory of Legal Interpretation in Polish Legal Theory. 33 *International Journal for the Semiotics of Law - Revue internationale de Sémiotique juridique*, 2020. DOI:10.1007/s11196-019-09628-1, pp. 617–636. For more on the statutory interpretation, see CROSS, F. *The Theory and Practice of Statutory Interpretation*. Stanford, Calif: Stanford University Press, 2009. DOI: 10.1515/9780804769815; CROSS, R., BELL, J., ENGLE, G. *Cross: Statutory Interpretation*. London: LexisNexis, 1995; WALTON, D., MACAGNO, F., SARTOR, G. *Statutory Interpretation: Pragmatics and Argumentation*. Cambridge: Cambridge University Press, 2020. DOI:10.1017/9781108554572; YULE, K. *Statutory Interpretation: General Principles and Recent Trends*. New York: Nova Science Publishers, 2009.

It is also worth pointing out that the authors decided to use the non-exclusive terminology proposed in The NLGJA: The Association of LGBTQ Journalists Stylebook on Lesbian, Gay, Bisexual, Transgender and Queer Terminology¹¹.

3. BASIC INFORMATION ON GENDER CONFIRMATION SURGERY

Before criminal law considerations, it is necessary to outline the issue of gender confirmation in a more general and non-legal context. Certain reasons why some people decide to confirm their gender may be crucial for the argumentation for specific legal solutions¹².

Gender confirmation surgery, also referred to as gender-affirming surgery, concerns transgender persons. The term transgenderism should be understood in this work as a discrepancy between biological sex (determined primarily by the sex organs), gender registered at birth (determined by information contained in the birth certificate) and psychological gender (determined by the sense of belonging to a given gender)¹³. According to the International Classification of Diseases ICD-10, transsexualism¹⁴ has three fundamental criteria: 1) the person wants to live and be accepted as representing the opposite gender; 2) a person is not satisfied with their sex characteristics; 3) wants to undergo hormonal or surgical treatment. This condition must last at least 2 years as the disorder itself cannot be a symptom of another mental, genetic disorder, intersex¹⁵, or chromosomal disorder¹⁶. There are two types of transsexualism – type F-M (a transsexual person considers themselves as a female trapped in a male body) and type M-F (a transsexual person consider themselves as a male trapped in a female body).

The indicated discrepancy between both biological sex and gender registered at birth, and psychological gender results in the tendency of transgender persons to submit to the so-called gender-affirming surgeries. These are surgical procedures aimed at achieving consistency between the perceived psychological gender and biological sexual characteristics. These procedures include mastectomy, removal of the uterus and ovaries with subsequent neophalloplasty, that is, the formation of a scrotum and penis (in the case of the F-M type) or removal of the testicles and penis combined with the formation of the vagina (in the case of the M-F type). These surgeries are supplemented with hormone therapy influencing changes in the tertiary sexual characteristics (including hair, tone of voice, musculature). What is particularly significant, the formation of genital organs in line with the preferred psychological gender does not enable the reproductive ability which a transgender person irreversibly loses as a result of the gender-affirming surgery.

Performing a gender-affirming surgery, apart from the obvious physical changes a transgender person undergoes, also brings visible changes in their mental state. On the one hand, such persons mostly declare a sense of fulfillment in their social life, a feeling of relief resulting from getting rid of 'foreign' sexual organs, improving relations in family life and satisfying their needs in sexual life. On the other hand, transgender persons who have not undergone a gender confirmation surgery, due to the perceived incompatibility in terms of

¹¹ <https://www.nlgja.org/stylebook/> (visited 17 February 2022).

¹² In general, on the legal situation of transgender people in Poland, see in: MAZURCZAK, A., MROWICKI, M., ADAMCZEWSKA-STACHURA, M. Sytuacja prawna osób nieheteroseksualnych i transpłciowych w Polsce. Międzynarodowy standard ochrony praw człowieka osób LGBT i stan jego przestrzegania z perspektywy Rzecznika Praw Obywatelskich, *BIULETYN RZECZNIKA PRAW OBYWATELSKICH*, Vol. 6, 2019, p. 128.

¹³ See IMIELIŃSKI, K. *Zarys seksuologii i seksiatrii*. Warszawa: PZWL, 1982, p. 253.

¹⁴ When referring to the ICD-10 classification, we use the term "transsexualism" and not "transgenderism", because this is exactly the term included in this classification.

¹⁵ One should distinguish from transsexualism intersexuality (hermaphroditism), which consists in having both male and female sexual organs - see MICHALIK, J. Kiedy ciało jest więzieniem a państwo strażnikiem. Analiza procedury zmiany płci metrykalnej w Polsce ze szczególnym uwzględnieniem kryterium ustalenia płci. *Internetowy Przegląd Prawniczy TBSP UJ*, Vol. 2, 2012, p. 63.

¹⁶ OLESIAK, G. Transseksualizm – dylematy diagnostyczne. *Psychologia w praktyce*, Vol. 11, 2018. Online: <https://psychologiawpraktyce.pl/artykul/transseksualizm-dylematy-diagnostyczne> (visited 17 February 2022).

biological sex and psychological gender, often exhibit numerous psychological problems, sometimes resulting in depression and suicide attempts¹⁷. At the same time, it should be pointed out that taking actions in the opposite direction, that is, trying to adjust the psychological gender to the biological sex and gender registered at birth of a transgender person, usually ends in failure. The effects of psychotherapy trials are oftentimes unsatisfactory¹⁸.

The lack of legal regulations on gender confirmation in the Polish legal system results in serious difficulties in the legal field, where civil, administrative and criminal issues overlap. Transgender persons, apart from carrying out appropriate gender-affirming surgeries, also want to legally confirm their gender by applying for an appropriate change of their birth certificate pursuant to the Article 189 of the Polish Code of Civil Procedure¹⁹ to determine the gender and to change the birth certificate accordingly. Sometimes, the courts, examining such claims, make their recognition as justified, basing on prior gender confirmation surgery. Often, it is the judicial determination of gender and the change of the birth certificate that are the first conditions posed by doctors who are to undertake gender confirmation surgery²⁰. Thus, a vicious cycle forms, where surgery is required for a judicial determination of gender, and judicial determination of gender is required for a judicial determination²¹. It should also be noted that due to the lack of provisions regulating the matter of gender confirmation in the Polish legal system, the burden of determining the procedure in this regard has fallen on the courts by successive judgments in cases for determining the gender. This judicial practice, apart from its discrepancy, cannot and should not replace the statutory regulation of gender confirmation in Polish law²².

In the context of the above findings, it is worth adding that sex change operations are not a novelty in Poland and have been performed for a long time. First gender change operation took place in Poland in 1963 at the Szpital Kolejowy hospital in Międzyzylesie. At the same time, however, since the beginning of the 1980s, there has been a discussion about the need to introduce such legal solutions to the Polish legal order that would regulate the legal situation of

¹⁷ See FERENZ, J.M. Operacje korekty płci: czyn bezprawny czy legalny? *Family Forum*, Vol. 6, 2016, pp. 139-140. For the sake of completeness of the considerations, it should be noted that there have also been cases of mental disorders as a result of the gender confirmation.

¹⁸ See. KUBIAK, R. Karnoprawna dopuszczalność zabiegów adaptacyjnych – stan obecny i proponowane regulacje. *Acta Universitatis Lodzianis. Folia Iuridica*, Vol. 74, 2015. DOI: 11089/10423, p. 85 and MICHALIK, J. Kiedy..., p. 63

¹⁹ Act of November 17, 1964, Code of Civil Procedure (Journal of Laws of 2019, item 1460, as amended). According to the Article 189 of the Code of Civil Procedure: 'The claimant may request the court to establish the existence or non-existence of a legal relationship or right, if it has a legal interest in doing so'.

²⁰ Without prejudging the legitimacy of such a requirement, it should be noted that the judicial determination of the gender and the change in the birth certificate may be the first, preliminary verification of the stability of a person's aspirations in the change of gender. Moreover, the so-called forensic gender confirmation is not medical, invasive and, above all, irreversible. Perhaps, for these reasons, it should be a step preceding gender confirmation coaching or even hormone therapy - cf. FERENZ, J.M. Operacje..., p. 149.

²¹ Zob. URBANOWICZ, K., BĘTKOWSKA, M., Prawne aspekty zmiany płci – uwagi na gruncie prawa polskiego oraz wybranych krajów europejskich. *Medyczna Wokanda*, Vol. 10, 2018. DOI: 10.32055/mw.2018.10.9, p. 100.

²² The first judicature concerning the issue of gender confirmation was the judgment of the Provincial Court for the Capital City of Warsaw in 1964, in which the court, considering the application for a change of the birth certificate, sanctioned the M-F type change procedure already performed by the applicant, indicating that it was no longer a man and should be considered a woman – the decision of the Provincial Court of the Provincial Court of the Capital City of Warsaw of September 24, 1964, II CR 515/64, LEX N° 1726970. The resolution of the Supreme Court of 1978, indicating that that: 'In an exceptional case, the court may correct the birth certificate by changing the gender designation also before performing corrective surgery of the external genitalia, if the characteristics of the newly developing sex are predominant and this condition is irreversible', and that: 'The procedure is - yes as with any treatment aimed at improving the health of the patient with his consent (the Article 17 (1) of the Act of October 28, 1950 on the medical profession, Journal of Laws N° 50, item 458) – admissible' – resolution of the Supreme Court of February 25, 1978, III CZP 100/77, LEX N° 1104539. The Supreme Court expressed a different position in its judgment of 1989, indicating that the presence of transgenderism does not give grounds for rectification on the birth certificate of the gender entry. However, the Supreme Court also drew attention to the possibility of issuing a separate legal act regulating the legal issue of gender confirmation, including the admissibility of gender confirmation procedures - Resolution of the Supreme Court of 22 June 1989, III CZP 37/89, LEX n° 3502, see resolution of the Supreme Court of May 8, 1992, III CZP 40/92, LEX n° 162225. As already indicated, there is, unfortunately, no such legal act.

transgender persons in a possibly unambiguous manner²³. As K. Urbanowicz and M. Bętkowska rightly point out: "An important step aimed at ensuring protection for transgenders was the enactment of the act on gender reconciliation of September 10, 2015. However, their situation has not changed as a result of the presidential veto, which means that it is still necessary to use the numerous, yet heterogeneous, achievements of the Supreme Court's jurisprudence"²⁴. In order to demonstrate the heterogeneity of the jurisprudence of the most important Polish court (the Supreme Court), mentioned by the authors, let us indicate some examples of judgments made on the matter of interest to us. And thus, in 1978 the Supreme Court ruled that in extraordinary circumstances it is possible to correct a birth certificate even before the corrective surgery of the external genitalia is performed, if the characteristics of the newly developing sex are predominant and the condition is irreversible²⁵. In 1989, the Supreme Court already decided that the presence of transgenderism does not constitute the basis for correcting the gender entry in the birth certificate, regardless of previous therapy or even surgery, due to the fact that "The marital status record is only of the nature of declaratory – its content only states the legal status that arose by virtue of specific legal events, but the order of these events does not include transgenderism, the occurrence of which consists in a change in the mental state, and not in the legal status of a person"²⁶. As indicated by K. Urbanowicz and M. Bętkowska: "The above resolution was given the force of a legal principle. As a result of the situation, the doctors, fearing the legal consequences, stopped performing the procedures without a prior court decision. In result, there were concerns about illegal gender confirmation surgery."²⁷ In 1991, the Supreme Court indicated that: "it is difficult to expect in the near future the statutory, comprehensive regulation of the issue of transgenderism, being proposed for several years, not only due to the complex physical, mental and moral aspects of this phenomenon, but also the length of the legislative process in view of the need to use legal instruments in the first place to achieve political and economic transformations. For these reasons, the judicature should strive to use all possible interpretations and such an interpretation of the applicable legal provisions that would already allow to take into account the aspirations of people who feel painfully contradictory between the desired gender and the biological sex entered in the birth certificate. The doctrine is already dominated by the view that human gender (sexual integrity) is an element of the human right to state, which belongs to the category of human personal rights, protected by the provisions of the Polish Civil Code (Articles 23 and 24). The sense of belonging to a given gender may be considered a personal interest (the Article 23 of the Polish Civil Code) and as such is also protected by an action for determination under the Article 189 of the Polish Code of Civil Procedure"²⁸.

Considering such a large discrepancy in the jurisprudence of the Supreme Court and the current situation of LGBTQ+ people in Poland, including in particular the aforementioned "Stop LGBT" bill which provides, inter alia, the prohibition of promoting sexual orientations other than heterosexuality and the prohibition of promoting gender as an entity independent of biological conditions, it is feared that subsequent judicatures may be less favorable to transgender people. In this light, further considerations contained in this work, aimed at an adequate interpretation of the Article 156 of the Polish Criminal Code must appear highly desirable.

²³ See URBANOWICZ, K., BĘTKOWSKA, M. *Prawne...*, p. 99.

²⁴ URBANOWICZ, K., BĘTKOWSKA, M. *Prawne...*, p. 99.

²⁵ Resolution of the Supreme Court of February 25, 1978, III CZP 100/77, OSP 1983, No. 10, item 217, LEX no.1104539.

²⁶ Resolution of the Supreme Court of June 22, 1989, III CZP 37/89, OSNC 1989, No. 188, LEX No. 3502.

²⁷ URBANOWICZ, K., BĘTKOWSKA, M. *Prawne...*, p. 104.

²⁸ Decision of the Supreme Court of March 22, 1991, III CRN 28/91, LEX No. 519375. more in: URBANOWICZ, K., BĘTKOWSKA, M. *Prawne...*, pp. 103-106.

4. PENAL AND LEGAL ASPECTS OF GENDER CONFIRMATION SURGERY

4.1. Literature Review

Penal and legal aspects of gender confirmation surgery focus on the above-mentioned irreversible loss of reproductive capacity²⁹ due to the gender-affirming surgery. And as was mentioned, these surgeries, that is, surgical procedures aimed at achieving consistency between the perceived psychological gender and biological sexual characteristics, include mastectomy, removal of the uterus and ovaries with subsequent neophalloplasty, that is, the formation of the scrotum and penis (in the case of type F-M) or removal of testicles and penis connected with the formation of the vagina (in the case of the M-K type). Therefore, as a result of gender-affirming surgeries, there is an irreversible loss of human fertility. Meanwhile – in accordance with the Article 156 section 1 item 1 of the Polish Criminal Code, anyone who causes grievous bodily harm in a form that deprives a person of their, inter alia, the ability to procreate, is liable to imprisonment for at least three years. Understanding the provision literally, it could be concluded that, while the person undergoing gender confirmation surgery themselves will not be criminally liable for causing serious damage to health³⁰, the gender confirmation procedure performed by a third party (also, and maybe especially – by a doctor) will already fulfill the features of an act punishable under the law described as perpetration that results in serious damage to health (the Article 156 section 1 item 1 of the Polish Criminal Code) and constitute the basis for the perpetrator to be held criminally liable³¹. After all, the sanctioned norm expressed in the Article 156 section 1 item 1 of the Polish Criminal Code, with this (literal) way of understanding, should be considered as: 1) addressed to every human being (and therefore – including a doctor); 2) prohibiting the deliberate (and with oblique intent) depriving another human of the ability to procreate (it is impossible to conclude that a doctor performing a gender confirmation surgery could refuse to deprive another human of the ability to procreate by this procedure); 3) prohibiting depriving another human of the ability to procreate in any way (and thus also through a gender-affirming surgery); 4) prohibiting the above-mentioned at any time, in any place, in any situation; 5) prohibiting the above regardless of the consent or lack thereof of the person who would be deprived of the ability to procreate (therefore, the possible consent of the transgender person could not be considered as preventing the violation of the sanctioned criminal law)³².

²⁹ The question of the loss of fertility is also related to the problem of the procedure of "contraceptive" nature, which is sterilization. In women, this procedure involves the ligation of the ovaries, and in men - the cutting and ligation of the vas deferens. Such treatments are carried out in Poland, although - and it should be emphasized - some authors claim that they are formally prohibited under penalty of punishment. For example, in the opinion of J. Warylewski: "From the formal point of view, the sterilization procedure fulfills the features of the Article 156 § 1 point 1 of the Polish Criminal Code. The admissibility of sterilization for therapeutic purposes is undisputed. However, eugenic (genetic) and contraceptive considerations do not fall within the scope of medical procedures or even therapeutic procedures for third parties (e.g. sterilization of a man to save health, and even life of a woman who would be at risk in the next pregnancy)" (WARYLEWSKI, J. *Prawo karne. Część ogólna*. Warszawa: LexisNexis, 2009, p. 283). However, taking into account the position of the majority of Polish doctrine, which supports the legalization of voluntary sterilization to the full extent, and at the same time in view of the already mentioned practice of performing such procedures in Poland, the author finally proposes that sterilization should be considered a circumstance excluding the criminal behavior of the doctor performing the discussed procedure (see WARYLEWSKI, J. *Prawo...*, p. 283). However, this issue is not – as can be seen – resolved unequivocally in Polish law.

³⁰ Although at first glance it cannot be ruled out that such a person may be held criminally responsible for inciting (the Article 18 section 2 of the Polish Criminal Code in conjunction with the Article 156 section 1 item 1 of the Polish Criminal Code) or aiding (the Article 18 section 3 of the Polish Criminal Code in conjunction with the Article 156 section 1 item 1 of the Polish Criminal Code) to cause serious damage to health.

³¹ Under the previous Polish Criminal Codes (the Polish Criminal Code of 1932 and the Polish Criminal Code of 1969), similar regulations were in force, also mentioning the prohibition of depriving a person of the ability to reproduce. As mentioned in the "Introductory Remarks" section, the doubts raised under the previous legislation as to the feasibility and legality of gender confirmation procedures were related to the question whether the presence of transgenderism could constitute a basis for correcting a gender entry in the birth certificate.

³² In any case – as it is pointed out in the literature – 'Giving consent to the violation of an organ of the body or health disorders for a period exceeding 7 days (...) will be ineffective, because it usually entails negative social effects (even the

At the same time, as has already been pointed out, the Polish legal system lacks any provisions regulating the issue of gender confirmation in any way. Therefore, the doubts raised in Polish criminal law science as to whether and how to justify the legality of gender confirmation surgery are not surprising³³.

A potential and the most obvious justification for doctors to perform a gender confirmation surgery could be – of course – the reference to the question of consent of the "aggrieved party", i.e. the consent of the person on whom the procedure in question is being carried out for violation of its legally protected interest (in this case – interest in form of health and fertility). This idea, however, if raised in theory or in practice, would be immediately countered by the argument that not all legal interests are interests that can be disposed of at one's own discretion. While we can freely dispose interests such as property, bodily inviolability or honor (personal dignity), they certainly do not include human life or health, which represent not only individual (for the aggrieved part), but also social value (for society and the state). As such, these interests may not be infringed by their disposer in such a way and to the extent that they please. In this respect, it is necessary to follow the rules of precaution developed by the society, and these in the context of gender confirmation surgery procedures are not unambiguous enough in Poland to exclude the criminal liability of a physician on this basis³⁴.

Let us point out that in the literature not everyone agrees on the necessity or even the possibility of justifying the analyzed medical procedures. Among the doctrine positions presented in the literature, the following can be distinguished in this respect: 1) the position according to which the performance of a gender confirmation surgery constitutes the fulfillment of the features of the type of prohibited act specified in the Article 156 section 1 item 1 of the Polish Criminal Code, but it may be justified on the basis of the current legal status, e.g. using the justification of the protective force; 2) the position according to which the performance of a gender confirmation surgery does not constitute the fulfillment of the type of prohibited act specified in the Article 156 section 1 item 1 of the Polish Criminal Code; and 3) the position according to which performing a gender confirmation surgery constitutes the fulfillment of the features of the type of prohibited act specified in the Article 156 section 1 item 1 of the Polish Criminal Code and cannot be in any way justified on the basis of the current legal status.

The last position on this subject, that is, the most radical one, as it considers the performance of a gender confirmation surgery as a procedure that deprives the possibility of procreation, fulfills the features of a prohibited act consisting in causing serious damage to health and, in principle, is an unlawful act, was expressed by G. Rejman. The author pointed out that: 'Gender confirmation when it comes to adults, leading to serious bodily harm, even with the consent and on a request, violates the provisions of criminal law. Since such a correction is not able to

necessity of treatment), despite the fact that in if the aggrieved person is the closest person, the prosecution of such an act in an unintentional form depends on his / her request (the Article 157 section 5 of the Polish Criminal Code). As a rule, it is not legally effective to consent to a serious damage to health (the Article 156 section 1 of the Polish Criminal Code). However, there is no consensus in the science of criminal law as to whether the consent to sterilization or gender confirmation surgery is legally effective and waives the criminal liability of the perpetrator' (SPK). The possible reliance on the consent of a transgender person would therefore be a highly embarrassing solution.

³³ What is surprising, however, is the fact that this issue is omitted from the basic sources of information on Polish criminal law, and more specifically - in the commentaries to the Polish Criminal Code.

³⁴ It is worth pointing out that, as Ł. Pohl rightly points out: "For its criminal law validity, consent must meet the following conditions: 1) it must be the result of the sovereign decision of the disposer of a legally protected interest; it is worth noting that the sovereignty of this decision has nothing to do with whether the consent to infringement or exposing this interest to the risk of its infringement will be an acceptance resulting from good or bad will (hence these statements in the doctrine of criminal law should be considered not fully convincing)., which the consent condition discussed in this point is referred to as the condition of its voluntary nature), 2) it must be a decision of an entity authorized to express legally effective consent to infringement or to jeopardize legal interest; hence the right to consent in criminal studies is denied to people who do not recognize its social significance, which will most often be insane persons and children, 3) it must exist at the time of violation or exposure of the legal right to the risk of violating it; for this reason, it is not consent that the disposer of the interest is accepted after destroying the good or exposing it to a real risk of its infringement" (POHL, Ł. *Prawo karne. Wykład części ogólnej*. Warszawa: LexisNexis, 2012, pp. 283-284).

restore the biological functions of the organs determining human gender, being only a simulacrum of these functions, then such a procedure does not fall within the concept of therapeutic activity and as such is punishable under the provisions on bodily injury.³⁵

M. Filar took a similar position, also stating that gender-affirming surgeries do not achieve the therapeutic goal. He pointed out that if transgenderism is treated as a disease, therapeutic activities should cure it or at least alleviate symptoms. Therefore, to cure a transgender person would mean obtaining the correct gender identification, which is impossible if such a person undergoes a gender confirmation surgery which is contrary to the therapeutic goal. However, M. Filar postulated the introduction of an appropriate regulation that would regulate the conditions and procedure of gender confirmation and the related surgical procedures³⁶.

Agreeing that it is necessary to introduce legal regulations for the issue of gender confirmation surgeries, authors of the work think that we should also try to find a basis for declaring their legality (primary or secondary) on the basis of the current legal status.

There are several positions on how to justify the secondary legality of gender confirmation surgeries. Unfortunately, they cannot be effectively used in practice. And thus: 1) P. Daniluk proposes excluding the unlawfulness of gender confirmation surgery by means of the justification of the protective force, that is, a situation in which the perpetrator (in our case, a doctor who performs a gender confirmation surgery) acts to remove the immediate threat to any interest protected by law if the danger cannot be avoided otherwise, and the consecrated interest has a value lower than the interest of the rescued person (see the Article 26 section 1 of the Polish Criminal Code). Unfortunately, this institution can only be used in specific cases of transgender persons, and the assessment of whether we are dealing with legal/illegal behavior will depend on the law enforcement agencies and courts³⁷, and consequently – the legal situation of doctors performing gender confirmation surgery will be highly ambiguous in this respect; 2) J. Warylewski admits the existence of a non-statutory justification, the so-called the justification for transgenderism. The author also points to the possibility of excluding doctors from criminal liability due to the negligible degree of social harmfulness of their actions³⁸. It should be noted, however, that the issue of the degree of social harmfulness of an act should always be considered in concreto on the basis of a given act and on the basis of all the elements indicated in the Article 115 section 2 of the Polish Criminal Code, i.e. based on the type and nature of the infringed interest, the extent of the damage done or threatened, the manner and circumstances of the act, the importance of the obligations violated by the perpetrator, as well as the form of the intention, the perpetrator's motivation, the type of the breached precautionary rules and the degree of their breach. For that reason, it is impossible to exclude criminal liability in each case of a gender confirmation surgery. The proposal to treat gender confirmation measures in the category of a justification exposes itself to the objection of inadmissibility of non-statutory justifications related to the encroachment of the judiciary into the powers of the legislative authority, which would be contrary to the principle of legality (the Article 7 of the Polish Constitution), and a potential excessive restriction of freedoms and rights of other persons (the Article 31 item 3 of the Polish Constitution) and a potential strain on the principle of equality before the law (the Article 32 of the Polish Constitution).

³⁵ REJMAN, G. Glosa do uchwały SN z dnia 22 czerwca 1989 r., III CZP 37/89. *Orzecznictwo Sądów Polskich*, Vol. 2, 1991. LEX.

³⁶ See FILAR, M. *Prawne i społeczne aspekty transseksualizmu*. in: M. Filar (ed.), *Prawo a medycyna u progu XXI wieku*. Toruń: TNT, 1987, p. 96 and FILAR, M. Glosa do uchwały składu 7 sędziów z 22 czerwca 1989, I CZ 37/89. *Państwo i Prawo*, Vol. 10, 1990, p. 118.

³⁷ See DANILUK, P. Stan wyższej konieczności jako okoliczność wyłączająca bezprawność chirurgicznej zmiany płci. *Państwo i Prawo*, Vol. 1, 2008, pp. 106-107.

³⁸ See WARYLEWSKI, J. O duszy uwięzionej w obcym ciele – dopuszczalność chirurgicznej zmiany płci w świetle prawa karnego. Online: <http://www.warylewski.com.pl/karne/karne/TRANS.htm> (visited 17 February 2022).

Table 1. Views on the possibility of justifying gender confirmation surgery

Views on the possibility of justifying gender confirmation surgery		
View no. 1 Performing a gender confirmation surgery may be justified on the basis of the current legal status (but it constitute the fulfillment of the type of prohibited act specified in the Article 156 section 1 item 1 of the Polish Criminal Code)	View no. 2 Performing a gender confirmation surgery does not constitute the fulfillment of the type of prohibited act specified in the Article 156 section 1 item 1 of the Polish Criminal Code	View no. 3 Performing a gender confirmation surgery cannot be in any way justified on the basis of the current legal status
<p>Arguments for:</p> <p>1/ we can use justification of the protective force;</p> <p>2/ we can use the institution of a non-statutory justification, the so-called the justification for transgenderism;</p> <p>3/ we can use the possibility of excluding doctors from criminal liability due to the negligible degree of social harmfulness of their actions.</p> <p>Arguments against:</p> <p>1/ the institution of the protective force can only be used in specific cases of transgender persons;</p> <p>2/ the proposal to treat gender confirmation measures in the category of a justification would be contrary to the principle of legality (the Article 7 of the Polish Constitution), and a potential excessive restriction of freedoms and rights of other persons (the Article 31 item 3 of the Polish Constitution) and a potential strain on the principle of equality before the law (the Article 32 of the Polish Constitution);</p> <p>3/ the assessment of whether we are dealing with legal/illegal behavior will depend on the law enforcement agencies and courts;</p> <p>4/ the legal situation of doctors performing gender confirmation surgery will be highly ambiguous.</p>	This will be discussed in the next part of the work.	<p>Arguments for:</p> <p>1/ gender confirmation, leading to serious bodily harm, violates the provisions of criminal law;</p> <p>2/ such a correction is not able to restore the biological functions of the organs determining human gender, then such a procedure does not fall within the concept of therapeutic activity.</p>

4.2. Analysis

In light of the above, it is worth considering those positions that try to demonstrate the primary legality for gender confirmation surgeries³⁹. First of all, because demonstrating the primary legality of such procedures would avoid any doubts as to the lack of criminal liability of doctors for the performance of the gender confirmation procedure and failure to institute criminal proceedings in this respect⁴⁰.

The possibility of demonstrating the primary legality of gender confirmation surgery entails their recognition as a therapeutic activity. In the Polish criminal law science, the prevailing view is that medical activities are not a justification that would only legalize the activities performed by a physician that could formally correspond to acts typifying health detriment. Medicinal activities are legal acts that were originally undertaken for therapeutic purposes and in accordance with the rules of medical knowledge and practice⁴¹. As already mentioned above, M. Filar refused to perform gender confirmation surgery for a therapeutic purpose. It is, therefore, appropriate to consider at this point how to understand the concept of a therapeutic goal, the therapeutic activity itself, and whether the gender confirmation procedure is a therapeutic activity. Adopting the definition of therapeutic activities proposed by M. Filar, it should be pointed out that these are physician's actions towards the patient, undertaken in order to save their life, health or reduce physical and mental suffering⁴². From the definition of therapeutic activity, the concept of a therapeutic goal can be derived. Following P. Daniluk, it can be understood as an objective orientation of given activities to the disease and aiming at its prevention, diagnosis, therapy or rehabilitation of the person affected by its effects. The therapeutic goal is associated with both causal and symptomatic treatment, consisting in removing and reducing the symptoms of the disease, which may take the form of alleviating physical and mental suffering associated with it⁴³. Assuming the understanding of therapeutic activities outlined in this way, it must be stated that gender confirmation meet the criteria set by them. Research conducted among transgender persons shows that their mental health usually improves significantly after gender confirmation surgery⁴⁴. As already indicated, they signal a

³⁹ By the primary legality of a given act, we mean that not only is it not unlawful, but also does not bring about a threat to a given legal interest or does not violate the rules of dealing with this interest. In such a situation, we do not evaluate the act at all in terms of its unlawfulness. It is legal 'from the beginning'. On the other hand, a given act is secondary legality if it causes a threat to a given legal interest and violates the rules of dealing with that interest, but there is some circumstance justifying the threat to the interest and violating the rules of conduct, which 'legally' legalizes this act.

⁴⁰ While accepting the secondary legality of gender adaptation procedures, e.g. due to the justification of the protective force or the non-statutory justification, we also recognize that the doctor performing such an operation commits an offense under the Article 156 section 1 item 1 of the Polish Criminal Code It is only due to a justification (an institution as understandable to doctors as to a lawyer, e.g. subsequent stages of heart transplantation) that this act is not unlawful, and the criminal liability of the doctor is excluded.

⁴¹ See POHL, Ł. *Prawo karne. Wykład części ogólnej*. Warszawa: Wolters Kluwer, 2019, pp. 318-319.

⁴² See FILAR, M. *Lekarskie prawa karne*. Kraków: Zakamycze, 2000, p. 90.

⁴³ DANILUK, P. *Zbieg kontratypów. Prokuratura i Prawo*, Vol. 2, 2007, p. 146.

⁴⁴ As D. Cysarz et al. points out: "In clinics specializing in the surgical treatment of gender identity disorders, very broad criteria have been adopted to assess the effectiveness of the therapy: << The person considers the effects of surgical treatment to be sufficient and does not regret having undergone it >>. According to this criterion, the method of surgical treatment is successful in 97% of people changing gender from female to male and in 87% from male to female. The results of cross-sectional German studies of 40 transgender people indicate that 85% -95% of respondents are <<satisfied>> or <<very satisfied>> with the results of surgical procedures, however, these people are statistically significantly less <<satisfied with life>> compared to with the general population. Two years after surgery, none of the 19 people who underwent surgery in Brazil regretted the decision. 83.3% of the respondents declared more pleasure from sexual contacts, and 64.7% more often than before the procedures, moreover, 26.3% noticed an improvement in family relations (73.7% did not feel any changes in them) "(CYSARZ, D., et al., *Zmiany w zadowoleniu z obrazu własnego ciała, poczuciu koherencji i satysfakcji z życia w trakcie leczenia kobiet transseksualnych. Badanie pilotażowe. Psychiatria Polska*, Vol. 11, 2008, p. 116). As far as the pilot Polish research in this area is concerned, they suggest that as a result of gender confirmation surgery: "- satisfaction with one's own body increases, although there is still a desire to change numerous parts of it, - the quality of life, sense of comprehensibility and steerability, but the sense of meaning in life grows "(ibid.,

sense of fulfillment in sexual life, their family relations, partnerships and general mental well-being improve. No other effective method of helping transgender persons has been developed to improve their mental state related to biological sex and psychological gender incompatibility. Gender confirmation does not cure them either but it can be perceived as a symptomatic treatment aimed at reducing the patient's mental suffering⁴⁵.

Another argument could be the fact that these surgeries are, in fact, performed. Officially, the first of such surgeries took place in Poland in 1963 at the Szpital Kolejowy hospital in Międzylesie. It is also a fact that the main goal of the physicians performing them (gender confirmation surgeries) is not to cause damage to the patient's body but to help those suffering from gender incompatibility. It is hardly possible to imagine that doctors who have been performing gender confirmation surgeries for almost 70 years could be held criminally responsible for the act of causing serious damage to health, which is classified as a crime in the Polish Criminal Code and for which a minimum penalty of imprisonment is at least three years.

It should be emphasized that perceiving gender confirmation as therapeutic activities is justified if transgenderism is viewed as a disease or disorder that is to be treated. It seems that in the light of current knowledge about transgenderism and its classification in ICD-10, it can be viewed as a subject of therapeutic activities. In the ICD-10 classification, it was included in the 'F' category 'Mental and behavioral disorders', in the F64 'Gender identification disorders' subcategory. It should be noted, however, that in 2018 WHO published a new version of the disease classification – ICD-11, which is to become the version applicable in 2022. In ICD-11, the term "transgenderism", still being used in ICD-10, is replaced with "gender incongruence" and has been defined as a condition which is characterized by a marked and persistent incongruence between an individual's experienced gender and the assigned sex. What is most important from the point of the considerations here, in ICD-11 is that "gender incongruence" is no longer classified as mental disorders, but as 'conditions related to sexual health'. These classification changes will therefore be able to constitute an argument in the legal discourse regarding the recognition of gender confirmation as a therapeutic activity.

Another way to demonstrate the primary legality of gender confirmation surgeries could be to state that the regulation of the Article 156 section 1 item 1 of the Polish Criminal Code, to the extent that it would prohibit gender confirmation surgeries, would be inconsistent with the Article 31 section 3 of the Polish Constitution, according to which restrictions on the exercise of constitutional rights and freedoms may be established only by statute and only if they are necessary in a democratic state for its safety or public order, or for the protection of the environment, health and public morality, or the freedoms and rights of others. It should be emphasized that the said regulation implies that: 1) any restriction of human freedom (in this case – restriction of the possibility of a doctor performing a gender confirmation surgery) should be established in a legal act equivalent to an act of the legislature; 2) any restriction of human freedom should be necessary in a democratic state, that is, fit to achieve a given goal (in this case to protect the health of a transgender person), necessary to achieve a given goal and proportional to restrictions imposed on a citizen (in this case on a person performing the gender confirmation surgery); 3) any restriction of human freedom should serve the protection of strictly defined interest, more specifically – the protection of public safety or order, protection of the environment, protection of public health and morality, protection of the freedoms and rights of other people (in this case it would be – as it was mentioned above – protection of the health of a transgender person). However, while the prohibition of gender confirmation surgery, provided for *prima facie* in the Article 156 section 1 item 1 of the Polish Criminal Code, was

p. 121), cf. eg, COSTA, R., et al. Psychological Support, Puberty Suppression, and Psychosocial Functioning in Adolescents with Gender Dysphoria. *Sexual Med.*, Vol. 12, 2015. DOI: 10.1111/jsm.13034.

⁴⁵ Compare KNYZIAK, I. Legalność zabiegu adaptacyjnego (zagadnienia prawnokarne i cywilnoprawne). *Państwo i Prawo*, Vol. 9, 2016, pp. 56-57 and FERENZ, J.M. Operacje..., pp. 150-151.

established in the Polish Criminal Code, that is, in the act (which is of key importance for Polish criminal law), it would be difficult to consider the above-mentioned prohibition effective for the protection of the health of a transgender person. On the contrary, a prohibition of this type could be considered counter-effective in the analyzed scope, as it would result in a potential 'surgical tourism' or the transfer of gender confirmation surgery practice to the so-called gray market, and thus limiting social and state control over such procedures, and, consequently, also a potential increase in the risk to the health of transgender persons (e.g. due to the performance of gender confirmation surgery in inappropriate conditions or by unqualified people). Finally, it would be difficult to recognize the prohibition of gender confirmation surgery as unequivocally and truly serving the protection of interest, indicated in the Article 31 section 3 of the Polish Constitution. In addition to what was mentioned above, it should finally be emphasized that the prohibition of gender confirmation surgery would serve to protect human health⁴⁶ only to a narrow extent (in terms of protecting human ability to reproduce and health against possible serious complications related to the procedure), and moreover – in the field in which the aggrieved party would consent to the violation of this right but it would not serve to protect human health and life in a wider scope, that is, to the extent to protect their mental health and to the extent to protect their health and life against self-harm or suicide attempts and suicides. As it is indicated in the literature: 'the transgender community before the gender confirmation surgery procedure is characterized by a high percentage of people showing a tendency to self-harm and suicide. Many transgender persons attempt attacks on their own lives and health. This leads to the conclusion that in such cases, 'gender confirmation surgery' may be a measure to avert the danger to the life and health of transgender persons at risk of suicide or self-harm to the body.'⁴⁷

It should also be mentioned that the absolute protection of health in terms of the ability to procreate even against the rational will of a transgender person could suggest treating the ability to procreate not as an individual, but a social or state interest, and this could mean treating a transgender person (as an entity obliged to reproduce and maintaining the sustainability of society and the state) and thus violating the dignity of that person⁴⁸; dignity – it has to be emphasized – which in the Polish legal order is the source of human and civil freedom and rights, is inviolable, and its respect and protection is the duty of public authorities (the Article 30 of the Polish Constitution).

The above could suggest the necessity to interpret the Article 156 section 1 item 1 of the Polish Criminal Code in a somewhat restrictive manner, that is, in a way that would prevent the

⁴⁶ It should be emphasized that the Article 156 section 1 item 1 the Polish Criminal Code cannot be regarded as a provision protecting other interests, e.g. family life. The above results from the content of the said provision itself and from the title of the chapter of the Polish Criminal Code, in which this provision is included (Chapter XIX. Offenses Against Life and Health). In any case, as J. Ferenz points out: 'In the case of transsexualism, it is not the fact of the operation itself that is of key importance for the stability of the family, but a phenomenon that also manifests itself in a number of other behaviors, the penalization of which cannot be excluded. For the stability of a given family, the most important thing will be whether it is possible to accept the transsexuality of a given person in a much wider aspect than purely physical' (FERENZ, J.M. *Operacje...*, p. 144).

⁴⁷ See DANILUK, P. *Stan...*, p. 99.

⁴⁸ As J. Mariański points out: 'The contemporary philosophical understanding of dignity was significantly influenced by Immanuel Kant, who recognized dignity as an absolute value, as the goal of all actions (dignity is not a relative value). According to him, „man and, in general, every rational being exists as an end in itself, not only as a means which this or that will may use as it pleases, but must also be regarded as an end always, in all his deeds so related to it. to himself as well as to other rational beings” (...). (...) Dignity is an absolute value, and as a practical imperative it is „Proceed so that you use humanity both in yourself and in the person of everyone else. always at the same time as an end, never only as a means” (...). Every man is entitled to dignity by virtue of his humanity, and as an absolute value it does not allow man to be used as a means to an end, treated as equal to things' (MARIANŃSKI, J. *Godność ludzka jako wartość społeczno-moralna: mit czy rzeczywistość? Studium interdyscyplinarne*. Toruń: Warszawskie Wydawnictwo Socjologiczne, 2016, pp. 59–60). Treating a man (and a man who does not identify with his biological sex) as an individual obliged to reproduce and maintain the sustainability of society and the state would certainly be to treat him as a means, and not as an end in itself, and, consequently, would be contrary to mentioned, with human dignity understood in this way.

scope of normalization from being sanctioned by the said provision of those cases of performing gender confirmation surgery that would be performed in accordance with the rational will of a transgender person and in a manner consistent with the precautionary rules (according to principles of medical knowledge and practice). Of course, in accordance with the Polish (the Article 188), it is the Constitutional Tribunal that adjudicates the compliance of laws and international agreements with the Constitution. It should be emphasized, however, that there is nothing to prevent courts adjudicating in given cases (in cases of deprivation of the ability to procreate by gender confirmation surgery) of the so-called pro-constitutional interpretation.⁴⁹

As indicated in the literature, the judicial application of the constitution may take three forms: 1) it may consist in the use of a constitutional norm as a stand-alone basis for adjudication (when the constitutional norm is formulated in a way that allows its spontaneous application and ordinary legislation does not regulate a given issue or regulates it only partially); 2) it may consist in the co-application of a constitutional norm and statutory provisions regulating a given issue in detail and adopting, in a situation where it is possible to adopt several different interpretations of the act, the interpretation which corresponds most fully with the content expressed by the constitutional norm; 3) it may consist in finding a conflict between a constitutional norm and specific provisions of a statute, which should be removed by way of interpretation, and if that is not possible – by taking steps to remove an unconstitutional provision of the act from the legal system⁵⁰. The use of the second and third forms in principio would not contradict the guiding principle of modern criminal law, that is, the principle of *nullum crimen sine lege stricta* (this principle prohibits only an extending/narrowing interpretation to the detriment of the perpetrator), and at the same time would be in line with the principle in *dubio pro libertate* (this principle prescribes that in case of doubt, a case should be in favor of the perpetrator).

Consequently – the provision of the Article 156 section 1 item 1 of the Polish Criminal Code could be interpreted in such a way that the sanctioned norm included in it would not cover the gender confirmation surgery (which does not mean that each such procedure would have to be allowed; however, it would require a separate regulation in an appropriate act). It should be emphasized that in this way, it would make the situation of doctors who perform gender confirmation surgery (and indirectly – also transgender persons) dependent on the will of the court and the court's interpretation of the provision under analysis, which would certainly be a highly uncomfortable situation. K. Urbanowicz and M. Bętkowska put it very suggestively: ‘So far, the problem of gender confirmation proceedings has been tried by the Supreme Court by adopting several key resolutions on the basis of which a certain model of proceedings in this area has been developed. However, this solution is insufficient as in many cases it creates the risk of a vicious circle. The lack of legal procedures results in doctors' fear of being charged with the crime of serious bodily harm in the form of deprivation of the ability to procreate (the Article 156 section 1 item 1 in fine of the Polish Criminal Code). The courts, on the other hand, demand convincing evidence of belonging to the opposite gender, including physical characteristics impossible to obtain otherwise than through surgery. As a consequence, it may happen that a person interested in gender confirmation will be sent by a doctor to the court, and

⁴⁹ It is not only a question of interpretation consistent with the Constitution, but also in line with the juricial practice of the European Court of Human Rights. As P. Rusak-Romanowska points out: ‘The European Court of Human Rights (ECtHR) referred to the European Convention on Human Rights in the matter of significant judgments and considered that Member States should allow transgender persons to undergo gender confirmation surgeries leading to full gender confirmation and ensure the reimbursement of these procedures, as medically necessary. The Tribunal also ruled that the confirmation of gender should be reflected in identity documents’ (RUSAK-ROMANOWSKA, P. *Sytuacja prawna osób dotkniętych transeksualizmem i interseksualizmem – wybrane zagadnienia prawne. Metryka. Studia z zakresu prawa osobowego i rejestracji stanu cywilnego*, Vol. 1, 2014, p. 97).

⁵⁰ GARLICKI, L. *Polskie prawo konstytucyjne. Zarys wykładu*. Warszawa: LIBER, 2008, pp. 43-44. Similar: BANASZAK, B. *Konstytucja Rzeczypospolitej Polskiej. Komentarz*. Warszawa: C.H. Beck, 2012. Legalis, commentary on article 8, theses 6-10.

from the court to a doctor.’⁵¹. It seems that this is yet another factor supporting the fact that gender confirmation surgery should be comprehensively regulated in Polish law.

An attempt at such regulation was the Act on Gender Reconciliation passed by the Polish Parliament in 2015. However, it was vetoed by the President of Poland. In its assumption, this act was primarily intended to regulate proceedings in civil cases for gender reconciliation and the administrative consequences of judicial gender confirmation, mainly related to the change in marital status records and other documents of a transgender person. This act, however, completely ignored the criminal law issues related to the issue of gender confirmation surgery procedures. This omission was intentional. As the authors of the bill in its justification pointed out: ‘It should be emphasized that the bill intentionally regulates only procedural, not medical issues, responding to the existing social need. The interested persons mainly raise allegations about the current state of legal uncertainty as regards access to court in order to determine gender, as well as the effects of issued judgments and the need to constantly disclose to third parties (e.g. employers) their previous identity (name, surname, gender), and hence the reasons for its change.’⁵². It seems, however, that the legal regulation of gender confirmation surgery procedure is not only in the interest of transgender persons, but also, and perhaps most of all, in the interest of doctors to whom these people report to perform a procedure. Therefore, comprehensive legal regulation of gender confirmation should cover not only civil and administrative matters but also medical ones, thus removing doubts as to the legality of performing gender confirmation procedures. It is necessary to postulate that work on the act regulating gender reconciliation should be restarted. The act vetoed in 2015 has unfortunately remained in a legislative vacuum for seven years.

It should be added that the proposed comprehensive legal regulation also covering medical issues should not introduce any changes to the Polish Criminal Code, or at least – it should not introduce changes similar to the one provided for in the original draft of the act on gender reconciliation. It should be recalled that this draft proposed adding the Article 156¹ with the following wording: ‘Anyone who performs irreversible medical intervention concerning external or internal sexual characteristics to a person that is (...) over 13 years of age with their consent, does not commit an offense specified in the Article 156 section 1.’ A change of this kind should be considered unnecessary, constituting a statutory surplus and proving – by force of necessity – of the legislator's irrationality, manifested in the redundancy of normative information, consisting in coding by the legislator of identically sounding standards in various provisions (excess of standards is – as we know – an obvious flaw) praxeological aspect of the legal system, which should be avoided each time by skillfully carrying out the process of interpreting a legal text)⁵³. The mere regulation of medical issues related to gender reconciliation in a separate act and the indication of acceptable gender confirmation procedures would be sufficient in this regard; after all, what is forbidden cannot be allowed at the same time, and what is allowed cannot be forbidden at the same time.

The above-mentioned potential amendment to the Polish Criminal Code should also be considered unjustified due to the use of the phrase ‘does not commit an offense’. Such a

⁵¹ URBANOWICZ, K., BĘTKOWSKA, M. Prawne, p. 100.

⁵² The parliamentary draft of the act on gender reconciliation of January 3, 2013, print n° 1469, p. 28, <http://orka.sejm.gov.pl/Druki7ka.nsf/0/AA0CB1BCA4CE5088C1257B8F00361E90/%24File/1469.pdf> (visited 17 February 2022), however, it should be noted that the draft in question provided for in the Article 13 also the amendment to the Criminal Code by adding the Article 156¹ with the wording ‘Does not commit an offense specified in the Article 156 section 1, who performs irreversible medical interventions concerning external or internal sexual characteristics to a person specified in the Article 7 of the Act on gender reconciliation after she turns 13 with her consent.’. The Article 7 of the draft act, however, is about intersex people. The provision of the Article 13 of the draft act was deleted during the parliamentary work on the act and was not included in the text of the act passed and presented to the president.

⁵³ See POHL, Ł. *Prawo...*, p. 251.

formulation would not allow for an unequivocal determination whether the gender confirmation surgery is a circumstance legalizing the indicated procedure primarily or secondarily.

The only acceptable amendment to the Polish Criminal Code that could be introduced by the discussed act would be the amendment to the Article 119 section 1 of the Polish Criminal Code, according to which anyone who uses violence or makes an unlawful threat towards a person or a group of people on national, ethnic, political or religious grounds, or because of a lack of religious belief, is liable to imprisonment for between three months and five years. It would be worth considering supplementing this regulation with the prohibition of the use of violence or unlawful threats against a group of people or a particular person due to their sexual orientation or gender (without specifying whether it is biological sex, gender registered at birth or psychological gender).

Table 2. Summary of arguments in favor of primary legality of gender confirmation surgery

How the primary legality of gender confirmation surgery is justified		
View no. 1 Gender confirmation surgery as a therapeutic activity		View no. 2 Justification in the Polish Constitution (Article 31 (3))
Arguments for: 1 / there is a therapeutic goal (improvement of mental health); 2 / Gender confirmation surgery is the most effective method of medical help for transgender people.	Argument against: 1 / the need to perceive transgenderism as a disease (ICD-11 excludes this).	Argument for: 1 / restrictions on the exercise of constitutional freedoms and rights may be established only by statute and only if they are necessary in a democratic state for its safety or public order, or for the protection of the environment, health and public morals, or the freedoms and rights of other persons .

4.3. Regulation Adjustment Example

The introduction of the proposed comprehensive legal regulation of the surgery to confirm the psychological sex in Poland (covering not only civil and administrative issues, but also medical ones, and also removing doubts as to the legality of performing adaptive procedures) would be very desirable, but at the same time extremely complicated. Regulation of such a sensitive issue would also require great caution and cooperation of lawyers with doctors, psychologists, sociologists, philosophers and ethics. At this point, it is difficult to say what the law would sound like. It is certain, however, that it should take into account the latest achievements of science in the field of transgenderism and be precise enough to provide sufficient protection for all individuals involved in the process of gender confirmation surgery.

The introduction of the proper regulations, preferably in the form of a comprehensive act, regarding gender confirmation surgery in Poland seems unlikely, given the current political situation. Thus, as a minimum, it should be suggested to introduce a change to the regulation of the Article 156 of the Polish Criminal Code analyzed in this work by adding an appropriate section that excludes from the scope of the legal normalization of the sanctioned norm specified in this provision the act of gender confirmation surgery. The mentioned section could read as

follows: "§ 1a. The act of gender confirmation surgery of a human being will not constitute an offence".

Simultaneously, it should be propounded that the comprehensive legal regulation does not exclude the possibility of performing gender confirmation surgery by imposing excessive requirements on transgender persons. This kind of situation (the situation of imposing excessive requirements) occurs, for example, in Russia. In Russia, the procedure of the surgery to confirm the psychological sex has been regulated (in a very restrictive manner) in the context of making changes to the civil status records in the order of the Ministry of Health of Russia of 23rd October 2017 on the approval of the form and procedure for issuing a certificate on gender confirmation by a medical organization. In accordance to this order, to establish 'sexual reorientation' in a medical organization, is formed the medical commission, which includes a psychiatrist, a sexologist and a medical psychologist. A referral for the establishment of sexual reorientation is issued by a psychiatrist based on the results of medical supervision of a citizen in the event that he is diagnosed with transgenderism. The medical commission of a medical organization, on the basis of a study of an extract from medical documentation, anamnesis data and examination results, assesses sexual reorientation and decides whether to issue a certificate. This certificate is the basis for hormonal treatment and is crucial to change gender marker in official documentation.

6. CONCLUSIONS

As shown, the situation of LGBTQ+ persons in Poland is not easy. The behaviour and statements of representatives of different political parties indicate their aversion to this group of people. Considering the political context of the legal problem of transgenderism observed in Poland (but also in the USA and Hungary) it can be concluded that the question of adequate legal regulation of gender confirmation surgery is very important.

In the context of gender confirmation procedures it should be stated that they are performed in Poland without any problems. Unfortunately, the literal wording of Article 156 of the Polish Criminal Code theoretically allows for its application, i.e. the enforcement of criminal liability if a surgeon performs a sex change operation of a transgender patient, with their consent and with all indications for the existence of benefits for mental and physical health. This is why the authors tried to find theoretical arguments that could be in favor of the legality of performing gender confirmation surgeries in Poland, simultaneously proposing a change in the current legal regulations.

Taking into account the considerations contained in this article, it is necessary to postulate that gender confirmation surgery procedures should be treated as medical activities (this is a concept already presented in the criminal law science⁵⁴) or as activities not covered by the scope of the normalization of the penal and legal sanctioned norm as expressed in the Article 156 section 1 item 1 of the Polish Criminal Code in connection with the Article 31 section 3 of the Polish Constitution. However, the above should be treated only as a temporary solution⁵⁵, a kind of provisional legal solution, functioning only until comprehensive regulation of gender confirmation in Polish law. Such a provisional arrangement is, on the one hand, difficult to maintain at the moment of definitively formal exclusion of transgenderism from the category of disease states, and on the other hand, it is difficult to accept due to the uncertainty as to the legal situation of doctors performing gender confirmation procedures (and indirectly – as to the legal situation of transgender persons).

The legal problems highlighted in the article, which transgender people have to face, are the best indicator that the precise legal regulation in this area is needed. The difficulties encountered

⁵⁴ See i.a. KNYZIAK, I. Legalność zabiegu adaptacyjnego (zagadnienia prawnokarne i cywilnoprawne). *Państwo i Prawo*, Vol. 9, 2016, p. 56-57 and FERENZ, J.M. Operacje..., pp. 150-151 and the literature cited therein.

⁵⁵ Por. KUBIAK, R. Karnoprawna..., p. 98.

in connection with the gender confirmation in birth certificate or surgical procedure, often leading to the phenomenon of the so-called vicious circle, should have no place in a democratic state under the rule of law. Also definitely unacceptable is the aforementioned lack of certainty among doctors as to whether they are not exposing themselves to criminal liability by performing a gender confirmation surgery. Justifying the lack of this liability by the construction of medical activities or based on constitutional provisions may be understandable to lawyers, but not necessarily to doctors and their patients. The need for legal certainty, particularly in criminal law, which must always be the ultima ratio, should provide sufficient impetus to resume legislative work on a law comprehensively regulating issues related to gender confirmation surgery⁵⁶.

KEY WORDS

Criminal law, criminal liability, transgenderism, gender confirmation surgery, Article 156 section 1 item 1 of the Polish Criminal Code

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trestné právo, trestno-právna zodpovednosť, transgenderizmus, chirurgický zákrok na potvrdenie pohlavia, článok 156 ods. 1 bod 1 poľského Trestného zákona

BIBLIOGRAPHY

1. BANASZAK, B. *Konstytucja Rzeczypospolitej Polskiej. Komentarz*. Warszawa: C.H. Beck, 2012. Legalis.
2. BOGUCKI, O. The Derivational Theory of Legal Interpretation in Polish Legal Theory. 33 *International Journal for the Semiotics of Law - Revue internationale de Sémiotique juridique*, 2020. DOI:10.1007/s11196-019-09628-1.
3. BOHLANDER, M. Criminalising LGBT persons under national criminal law and article 7(1)(h) and (3) of the ICC statute. *Global Policy*, Vol. 5, 2014. DOI: 10.1111/1758-5899.12136.
4. CHODUŃ, A. Maciej Zieliński's (derivative) concept of legal interpretation. *Studia Prawa Publicznego*, Vol. 2, 2015.
5. COSTA, R., et al. Psychological Support, Puberty Suppression, and Psychosocial Functioning in Adolescents with Gender Dysphoria. *Sexual Med.*, Vol. 12, 2015. DOI: 10.1111/jsm.13034.
6. CROSS, F. *The Theory and Practice of Statutory Interpretation*. Stanford, Calif: Stanford University Press, 2009. DOI: 10.1515/9780804769815.
7. CROSS, R., BELL, J., ENGLE, G. *Cross: Statutory Interpretation*. London: LexisNexis, 1995.
8. CYSARZ, D., et al. Zmiany w zadowoleniu z obrazu własnego ciała, poczuciu koherencji i satysfakcji z życia w trakcie leczenia kobiet transseksualnych. Badanie pilotażowe. *Psychiatria Polska*, Vol. 11, 2008.
9. DANILUK, P. Stan wyższej konieczności jako okoliczność wyłączająca bezprawność chirurgicznej zmiany płci. *Państwo i Prawo*, Vol. 1, 2008.

⁵⁶ On other legal issues in need of change in the context of LGBTQ+ persons see BOHLANDER, M. Criminalising LGBT persons under national criminal law and article 7(1)(h) and (3) of the ICC statute. *Global Policy*, Vol. 5, 2014. DOI: 10.1111/1758-5899.12136; DURIC, N., VIDLICKA, S.R., BOGUSH, G. Legal protection of sexual minorities in international criminal law. *Russian Law Journal*, Vol. 6, n.d. DOI: 10.17589/2309-8678-2018-6-1-28-57; MOORE, C.B. Embracing ambiguity and adopting propriety: Using comparative law to explore avenues for protecting the LGBT population under article 7 of the Rome statute of the international criminal court. *Minnesota Law Review*, Vol. 101, 2017; PETERSON, D., PANFIL, V.R. *Introduction: Reducing the invisibility of sexual and gender identities in criminology and criminal justice*. New York: Springer, 2014. DOI: 10.1007/978-1-4614-9188-0_1.

10. DANILUK, P. Zbieg kontratypów. *Prokuratura i Prawo*, Vol. 2, 2007.
11. DURIĆ, N., VIDLIČKA, S.R., BOGUSH, G. Legal protection of sexual minorities in international criminal law. *Russian Law Journal*, Vol. 6, n.d. DOI: 10.17589/2309-8678-2018-6-1-28-57.
12. FERENZ, J.M. Operacje korekty płci: czyn bezprawny czy legalny? *Family Forum*, Vol. 6, 2016.
13. FILAR, M. Głosa do uchwały składu 7 sędziów z 22 czerwca 1989, ICZ 37/89. *Państwo i Prawo*, Vol. 10, 1990.
14. FILAR, M. *Lekarskie prawa karne*. Kraków: Zakamycze, 2000.
15. FILAR, M. *Prawne i społeczne aspekty transseksualizmu*. in: M. Filar (ed.), *Prawo a medycyna u progu XXI wieku*. Toruń: TNT, 1987.
16. GARLICKI, L. *Polskie prawo konstytucyjne. Zarys wykładu*. Warszawa: LIBER, 2008.
17. IMIELIŃSKI, K. *Zarys seksuologii i seksiatrii*. Warszawa: PZWL, 1982.
18. KNYZIAK, I. Legalność zabiegu adaptacyjnego (zagadnienia prawnokarne i cywilnoprawne). *Państwo i Prawo*, Vol. 9, 2016.
19. KRALIK, J. Bathroom Bill. Legislative Tracking, Nat'l conf. of state legislatures (Oct. 24, 2019). Online: <https://www.ncsl.org/research/education/-bathroom-billlegislative-tracking635951130.aspx> (visited 17 February 2022).
20. KUBIAK, R. Karnoprawna dopuszczalność zabiegów adaptacyjnych – stan obecny i proponowane regulacje. *Acta Universitatis Lodzianis. Folia Iuridica*, Vol. 74, 2015. DOI: 11089/10423.
21. MARIAŃSKI, J. *Godność ludzka jako wartość społeczno-moralna: mit czy rzeczywistość? Studium interdyscyplinarne*. Toruń: Warszawskie Wydawnictwo Socjologiczne, 2016.
22. MAZURCZAK, A., MROWICKI, M., ADAMCZEWSKA-STACHURA, M. Sytuacja prawna osób nieheteroseksualnych i transpłciowych w Polsce. Międzynarodowy standard ochrony praw człowieka osób LGBT i stan jego przestrzegania z perspektywy Rzecznika Praw Obywatelskich, *BIULETYN RZECZNIKA PRAW OBYWATELSKICH*, Vol. 6, 2019.
23. MICHALIK, J. Kiedy ciało jest więzieniem a państwo strażnikiem. Analiza procedury zmiany płci metrykalnej w Polsce ze szczególnym uwzględnieniem kryterium ustalenia płci. *Internetowy Przegląd Prawniczy TBSP UJ*, Vol. 2, 2012.
24. MOORE, C.B. Embracing ambiguity and adopting propriety: Using comparative law to explore avenues for protecting the LGBT population under article 7 of the Rome statute of the international criminal court. *Minnesota Law Review*, Vol. 101, 2017.
25. OLESIAK, G. Transseksualizm – dylematy diagnostyczne. *Psychologia w praktyce*, Vol. 11, 2018.
26. Outlawing trans youth: state legislatures and the battle over gender-affirming healthcare for minors. *Harvard Law Review*, Vol. 134, No 6. Online: <https://harvardlawreview.org/2021/04/outlawing-trans-youth-state-legislatures-and-the-battle-over-gender-affirming-healthcare-for-minors/> (visited 17 February 2022).
27. PETERSON, D., PANFIL, V.R. *Introduction: Reducing the invisibility of sexual and gender identities in criminology and criminal justice*. New York: Springer, 2014. DOI: 10.1007/978-1-4614-9188-0_1.
28. POHL, Ł. *Prawo karne. Wykład części ogólnej*. Warszawa: LexisNexis, 2012.
29. POHL, Ł. *Prawo karne. Wykład części ogólnej*. Warszawa: Wolters Kluwer, 2019.
30. REJMAN, G. Głosa do uchwały SN z dnia 22 czerwca 1989 r., III CZP 37/89. *Orzecznictwo Sądów Polskich*, Vol. 2, 1991.

31. RUSAK-ROMANOWSKA, P. Sytuacja prawna osób dotkniętych transseksualizmem i interseksualizmem – wybrane zagadnienia prawne. *Metryka. Studia z zakresu prawa osobowego i rejestracji stanu cywilnego*, Vol. 1, 2014.
32. URBANOWICZ, K., BĘTKOWSKA, M. Prawne aspekty zmiany płci – uwagi na gruncie prawa polskiego oraz wybranych krajów europejskich. *Medyczna Wokanda*, Vol. 10, 2018. DOI: 10.32055/mw.2018.10.9.
33. WALTON, D., MACAGNO, F., SARTOR, G. *Statutory Interpretation: Pragmatics and Argumentation*. Cambridge: Cambridge University Press, 2020. DOI:10.1017/9781108554572.
34. WARYLEWSKI, J. O duszy uwięzionej w obcym ciele – dopuszczalność chirurgicznej zmiany płci w świetle prawa karnego. Online: <http://www.warylewski.com.pl/karne/karne/TRANS.htm> (visited 17 February 2022).
35. WARYLEWSKI, J. *Prawo karne. Część ogólna*. Warszawa: LexisNexis, 2009.
36. YULE, K. *Statutory Interpretation: General Principles and Recent Trends*. New York: Nova Science Publishers, 2009.
37. Decision of the Supreme Court of March 22, 1991, III CRN 28/91, LEX no. 519375.
38. Resolution of the Supreme Court of February 25, 1978, III CZP 100/77, OSP 1983, no. 10, item 217, LEX no. 1104539.
39. Resolution of the Supreme Court of June 22, 1989, III CZP 37/89, OSNC 1989, no. 12, item 188, LEX no. 3502.
40. <https://www.forbes.com/sites/jamiewareham/2020/05/19/hungary-makes-it-impossible-for-transgender-people-to-legally-change-gender/?sh=d9f61c6698e9> (visited 17 February 2022).
41. <https://www.nlgja.org/stylebook/> (visited 17 February 2022).
42. <https://noizz.pl/lgbt/sonia-milch-opowiada-o-korekcje-plci-i-codziennosci-osob-transplciowych/nfpg12c> (visited 17 February 2022).
43. <https://www.rp.pl/Bezpieczenstwo/308099964-Fundacja-Kai-Godek-zlozyla-w-Sejmie-projekt-Stop-LGBT.html> (visited 17 February 2022).
44. https://wiadomosci.radiozet.pl/Polska/Polityka/Andrzej-Duda-i-homofobiczne-slowa-o-LGBT.-Swiatowe-media-cytuja-prezydenta?gclid=EAIaIQobChMirP7emKS68gIVkOJ3Ch3OIQ17EAAYASAAEgK0tvD_BwE (visited 17 February 2022).

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