

# CHANGE OF SEX BY THE ADOPTIVE PARENT AND ITS IMPACT ON THE CIVIL STATUS OF THE ADOPTED CHILD IN VIEW OF THE FUNDAMENTAL PRINCIPLES OF THE POLISH LAW

Janusz Gajda<sup>1</sup>

## ABSTRACT

*This paper outlines issues connected with gender reassignment in the context of child adoption by a transgender person. In particular, it focuses on the questions of the civil status (and its registration) of the child adopted by such a person. What is striking in Polish law is the lack of a law that comprehensively regulates this issue. This situation is unfavourable as it results in the emergence of various theoretical doubts and inconsistent practice by the judiciary. This applies especially to the basic principle of Polish law, according to which only a woman can be the mother, while only a man can be the father. The said principle applies to both biological and adoptive parents. Therefore, the paper proposes that the Polish legislature pass a law on gender reassignment to normalise, as fully as possible, these issues. It should include provisions concerning, among other things, the permissibility of gender reassignment of a married person and adoption by such a person, as well as the possibility of adoption of a child by a single person who has changed sex. The law should also regulate issues relating to the gender change of the adopter and its impact on the civil status of the adopted child.*

## KEYWORDS

*adoption  
change of sex  
polish law*

## 1. Introductory remarks

This study was undertaken as part of a grant awarded by the National Science Centre in Poland entitled ‘Minors vs. Parents and the State: Contemporary Polish legal conditions of the principle of child welfare and participation.’<sup>2</sup> Under this grant, the legal relationship between parents (adoptive and biological) and adopted children was examined.<sup>3</sup>

1 | Professor, Institute of Legal Sciences, Jan Kochanowski University of Kielce, Poland; janusz.gajda@ujk.edu.pl; ORCID: 0000-0003-4865-6829.

2 | Agreement with the National Science Centre No. UMO-2015/19/B/HS5/03014.

3 | See Gajda, 2020b.



Therefore, this study focuses only on one of the problems with gender reassignment: its impact on the civil status of the adopted child.<sup>4</sup> Several other issues related to the effects of this change have been omitted, such as the marriage of a transsexual person, the change in sex by one of the spouses during their relationship, and the establishment of the origin of the child from a person who has changed his or her legal sex status.<sup>5</sup>

The purpose of this study is to analyse Polish norms related to the issues mentioned in the title. The specificity of the Polish legal system in this regard, as compared to other European countries is discussed. First, there is no law in Poland which comprehensively regulates issues related to gender reassignment.<sup>6</sup> The Polish parliament passed such a law in 2015, but it was not signed by the President of the Republic of Poland.<sup>7</sup> No new laws have been passed to replace it. However, there is no provision prohibiting such changes. Carrying out gender reassignment is therefore possible in practice.<sup>8</sup> The lack of such regulations raises doubts about the procedure under which the change of sex can be carried out, as well as its prerequisites and consequences, including the registration of the civil status of the person changing sex and, for example, of their relatives. The non-existence of explicit regulations relevant to this issue indicates that the judiciary's practices are of particular importance.<sup>9</sup> When analysing the rulings of Polish courts on this matter, one assumes that a legal change in sex is permissible, despite the lack of provisions directly permitting it. Second, the proper procedure is for a transsexual person to obtain a judgment granting a claim for gender determination based on Article 189 of the Code of Civil

4 | According to Art. 2(1) of the Law of November 28, 2014 – Law on Civil Status Records (consolidated text Official Gazette of 2022, item 1681), civil status is the legal situation of a person expressed by the characteristics that individualise him or her, shaped by natural events, legal actions, court rulings or decisions of authorities, and stated in a civil status record. The elements that make up civil status include, for example, the situation of a person in the family, including kinship. (See Kasprzyk, 2018, p. 97.) The kinship linking a child with his parents has also been recognised as one of the typical elements of civil status. See Wojewoda, 2014, p. 29.

5 | I have referred to these issues in other studies. See for example, Gajda, 2017a; Gajda, 2017b. See also Łączkowska-Porawska, 2019, pp. 132–139 and 163–194; Łukasiewicz, 2021, p. 7.

6 | As noted by the European Court of Human Rights, Art. 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms of November 4, 1950, Official Gazette of 1993, No. 61, item 284, imposes an obligation on states to ensure the right of their citizens to genuine respect for their physical and mental integrity. States are obliged to recognize gender reassignment in transgender people who have undergone surgery, among others, by changing the data regarding their civil status. Nevertheless, it is up to the state to decide whether to introduce legislation for legal recognition of the new gender of such persons. See *Hämäläinen v. Finland* (Application No. 37359/09), Judgment, 16 July 2014.

7 | Gender Recognition Act of September 10, 2015 [Online]. Available at: [http://orka.sejm.gov.pl/proc7.nsf/ustawy/1469\\_u.htm](http://orka.sejm.gov.pl/proc7.nsf/ustawy/1469_u.htm) (Accessed: 15 September 2022).

8 | Unlike, for example, in Hungary, where, as a result of a 2009 amendment to the law on civil status registration, a legal change of gender became impossible. (See Łukasiewicz, 2021, pp. 91–92 and the Hungarian legislation cited there.) Meanwhile, according to the European Court of Human Rights, the refusal to recognize a gender reassignment without providing compelling reasons constitutes an unjustified interference with the right to respect for private life. The Court also considered the denial of legal recognition of gender correction without surgery to be such interference. See *Y. T. v. Bulgaria* (ECHR Application No. 41701/16), Judgment, 9 July 2020; *X and Y v. Romania* (ECHR Application No. 2145/16), Judgment, 19 January 2021.

9 | An analysis of the evolution of the views of Polish judiciary in this regard is presented, for example, in Łukasiewicz, 2021, pp. 9–12.

Procedure.<sup>10</sup> This judgment is the basis for altering the person's birth certificate by adding a supplementary note to the certificate.<sup>11</sup> This statement is the starting point for further discussions.

In the absence of a regulation on gender reassignment, it has not been legally resolved whether this should have consequences *ex tunc* or *ex nunc*, that is, from the moment the relevant judgment becomes final. However, as is generally accepted, a judgment establishing gender should produce effects only in the future and not retroactively, that is, from the moment of the person's birth.<sup>12</sup> Therefore, it is unclear how this change affects the adopted child's civil status and registration. Reviewing the relevant legal acts of countries where gender reassignment has been normalised, one can see that, as a rule, the change in the parent's legal sex does not affect the pre-existing status (maternal or paternal) of the transgender person in relation to the child.<sup>13</sup> This person, who is listed on the child's birth certificate, for example, as a mother, continues to be so in the eyes of the law. This is because the child's birth certificate is not amended after this event. A pertinent example can be found in British regulations. According to Article 9(2) of the Gender Recognition Act of 2004,<sup>14</sup> the effectiveness of a gender certificate is excluded for events occurring before its issuance. In addition, according to Article 12, a legal change in gender does not affect a parent's previous status with respect to the child. Moreover, in the absence of an obligation to undergo hormone therapy and corrective surgery, there may be situations in which a person who is legally male but biologically female gives birth to a child. Such a situation, of course, results in doubts as to whether such a

10 | Law of November 17, 1964 – Code of Civil Procedure, consolidated text Journal of Laws of 2021, item 1805, as amended. Regarding the possibility of claiming the determination of sex on the basis of the aforementioned provision, see, for example, the judgment of the Court of Appeals in Wrocław dated 12 February 2021, I ACa 1233/20 with commentary by Krakowiak and Slaski, 2021, pp. 263 et seq. In turn, according to Art. 3(1) of the 2015 Gender Recognition Act, the change was to be made by the court in non-trial proceedings at the request of the person concerned (Art. 4(1) and (2) of the Act). Also in German law, for example, it is possible for a court to declare a gender other than that entered on the birth certificate. See para. 8 Gesetz über die Änderung der Vornamen und die Feststellung der Geschlechtszugehörigkeit in besonderen Fällen vom 10.9.1980 [Online]. Available at: <https://www.gesetze-im-internet.de/tsg/BJNR016540980.html> (Accessed: 21 September 2022). However, it is to be replaced by the Self-Determination Law (Selbstnennungsgesetz), under which it will be possible to change the entry specifying gender in the registry book by filing an application with the registry office. See Bundesministeriums für Familie, Senioren, Frauen und Jugend, 2022.

11 | See Art. 24(1) and (2) of the law on civil records. See, e.g., Łukasiewicz, 2021, p. 12; *Y v. Poland* (ECHR Application No. 74131/14), Judgment, 17 February 2022, states that it does not constitute a violation of the right to the protection of private life if the information about the change of sex is included in the full copy of the birth certificate in the form of an additional note, while the abbreviated copy of this certificate indicates the new name and sex after the change. See also the resolution of the Supreme Court of May 8, 1992, III CZP 40/92, LEX 162225, in which it was mentioned that a partial change in the sexual characteristics of a transsexual as a result of hormone therapy and a surgical procedure performed does not create grounds for correcting the entry specifying gender in the birth certificate. The issue of changing the sex of a transsexual person in the rulings of Polish courts is discussed in greater detail, e.g. by Ostojka, 2015, pp. 93 et seq.

12 | Cf. Łukasiewicz, 2021, p. 11.

13 | Such countries include, for example, the UK, Germany, France, Italy, the Netherlands, and Denmark.

14 | Gender Recognition Act 2004 [Online]. Available at: <https://www.legislation.gov.uk/ukpga/2004/7/contents> (Accessed: 16 September 2022).

person should be entitled to the status of mother or father. This issue was resolved by establishing that being either the mother or father of a child does not need to be linked to the current legal sex of that person. What is more relevant to being a mother is that this person went through the process of becoming pregnant, carrying the pregnancy, and giving birth.<sup>15</sup>

In the context of these observations, it can be recalled that also Article 10(2) of the Polish Gender Recognition Law of 2015 stipulated that the establishment of a new birth certificate based on a final court decision granting a request for gender recognition was not to affect the legal relationship between the person changing sex and third parties. In particular, this rule affected that person's parents and children adopted by him or her before the said ruling became final. This was also to apply to the relationship between that person and his or her biological children.

## 2. Basic principles of adoption in Poland

Another issue that warrants mentioning is the principles of adoption developed by Polish lawmakers. The key legal acts normalising this institution are the Family and Guardianship Code passed on 25 February 1964<sup>16</sup> and the Act of 9 June 2011 with respect to family support and the system of foster care.<sup>17</sup> From the perspective of this study, the regulations set forth in the first of these two laws are by far more important. In particular, they define the prerequisites for adoption and the consequences of various types.

Analysing the provisions of the Family and Guardianship Code there seems to be a reasonable conclusion, in the absence of an unambiguous position of the legislature in this matter, that there are three basic (distinguished according to the consequences) types of adoption, that is, full, complete and incomplete.<sup>18</sup> In each of these types, nevertheless, adoption results in the emergence of a legal relationship between the adoptive parent and child.<sup>19</sup> However, there are differences with regard to, for example, the registration of the adopted child's civil status. In cases of full adoption, a new birth certificate is always drawn up with the adoptive parents listed as parents.<sup>20</sup> However, in the event of a complete adoption, a supplementary note about the adoption is attached to the child's birth certificate.<sup>21</sup> Even then the guardianship

15 | These issues are signalled by Łukasiewicz, 2021, pp. 37–38. See also the British literature and case law cited in this study.

16 | Law of February 25, 1964 – Family and Guardianship code, consolidated text Official Gazette of 2020, item 1359.

17 | Law of June 9, 2011 with respect to family support and foster care system, consolidated text Official Gazette of 2022, item 447 as amended.

18 | This issue may be considered debatable, but since it is not of major importance from the point of view of the problems of this study, it will not be discussed further. The position expressed in this study was supported by, e.g., Ignatowicz and Nazar, 2016, p. 801; Panowicz-Lipska, 1997, pp. 209 et seq.; Smyczyński and Andrzejewski, 2020, p. 319; Sokołowski, 2008, p. 154; Zegadło, 2014, p. 783.

19 | Arts. 121(1) and 124(1) of the Family and Guardianship Code.

20 | Art. 71 of the Law on Civil Status Records.

21 | Art. 72(1) of the Civil Records Law.

court ruling on adoption may decide whether to issue a new birth certificate.<sup>22</sup> The situation is different for incomplete adoptions. In such cases, there is no possibility of a new birth certificate; only a supplementary note on the adoption is attached to the existing birth certificate.<sup>23</sup> In this note, the adopters are named as the parents. This solution corresponds to the assumption that in a full and complete adoption, the situation of the adopted child should be similar to that of a biological child. Following the ruling on this type of adoption, the legal ties binding the adopted child to his or her biological family are therefore severed. Through adoption, the child acquires rights and obligations with respect to the adoptive parent and his or her relatives, similar to a biological child.

However, the situation differs in the case of an incomplete adoption. This is because the effects consist only of the creation of a relationship between the adoptive parent and adopted child (and his or her descendants). However, the child does not become a relative of the persons related to the adoptive parent. Nor does the adoption sever the ties with the adopted child's biological family.

Regardless of the adoption type, the fundamental consideration is always the welfare of the child.<sup>24</sup> In Poland, only the adoption of a minor is permitted.<sup>25</sup> For this reason it is particularly important that the adoption centre selects the most suitable candidate in the best interest of the child's welfare. In the eyes of the law, this person will become a parent who should create a family environment that is optimal for the child's development. Despite this, it does not seem possible or expedient to create mechanisms for permanent, ongoing supervision of the adoptive family. This is because the Polish legislature tries not to interfere with the family-legal relations. This occurs only in the case of a threat to or violation of the welfare of the child.

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### 3. The concept of parents

If, following a court decision on adoption, a relationship is created between the persons who adopt and the child who is adopted, such as between biological parents and their child, it becomes necessary to discuss the concept of parents under Polish law.

The Family and Guardianship Code, which is fundamental to the parent-child relationship, does not explicitly define this concept. Instead, the notion of parents can be interpreted based on applicable regulations. Thus, to determine who may be parents in Polish law, reference is most often made to the regulations set forth in the Constitution

22 | According to Art. 73(3) of the Civil Records Law, at the request of the adoptee, upon reaching the age of majority, the adoptee may obtain a complete copy of the existing birth certificate.

23 | Art. 71(1) of the Civil Records Law.

24 | Art. 114(1) of the Family and Guardianship Code. Further prerequisites are set forth in the section of the Family and Guardianship Code devoted to adoption.

25 | So, also in this respect, Polish law differs from those legislations that regulate the adoption of an adult. Only by way of example can we mention German and French law. See Arts. 1767–1772 of the German Civil Code (Bürgerliches Gesetzbuch vom 18 August 1896) [Online]. Available at: <https://www.gesetze-im-internet.de/bgb/BJNR001950896.html> (Accessed: 21 September 2022) and Arts. 344–345 and Arts. 360–370 – 2 of the French Civil Code (Code Civil des Français 1804) [Online]. Available at: [www.legifrance.gouv.fr/affichCode.do](http://www.legifrance.gouv.fr/affichCode.do) (Accessed: 17 September 2022).

of the Republic of Poland of 2 April 1997 (especially Article 18)<sup>26</sup> and the provisions of the Family and Guardianship Code governing the origin of the child.<sup>27</sup>

Article 18 of the Constitution does not contain a definition of the term parents. However, it does define marriage as the union of a man and woman. As pointed out in Polish literature, this provision conveys the traditional understanding of the concepts used therein while protecting maternity and parenthood,<sup>28</sup> which are values of particular importance to society.<sup>29</sup>

The provisions contained in the Family and Guardianship Code align with constitutional regulations. As previously mentioned, this law lacks a definition of the concept of parents despite the fact that the concept repeatedly appears in this legal act.<sup>30</sup> It is clear from the code provisions that, according to Polish law parents are the mother<sup>31</sup> and father.<sup>32</sup> Maternity is a prerequisite for establishing paternity. The purpose of the current legislation is to confirm the relationships that occur in nature. It is unacceptable to adopt normative measures that would allow for the creation of constructs that do not correspond to the premise of the legislature. It is not possible to include any person who wants to be defined by the concept of parents.<sup>33</sup> Therefore, under Polish law, the parents cannot be of the same sex. As previously mentioned, the term parents refer only to the mother (female) and father (male). The other parent cannot be of the same sex.<sup>34</sup> It would also be unacceptable for one person to have, for example, a female gender and another a third gender (not female or male).<sup>35</sup> It is also not possible to enter more than two parents into a child's birth certificate. Moreover, the existing rule that the mother is a woman and the father is a man has been recognised as a fundamental principle of the Polish legal

26 | Constitution of the Republic of Poland of April 2, 1997, Official Gazette of 1997, No. 78, item 483, as amended.

27 | Arts. 61–86 of the Family and Guardianship Code.

28 | Banaszak and Zieliński, 2014, p. 353.

29 | See, for example, the judgment of the Constitutional Court of July 16, 2007, SK 61/06, OTK - A 2007, No. 7, item 77.

30 | In particular, the IA section on maternity and paternity.

31 | A woman who has given birth to a child – Art. 619 of the Family and Guardianship Code.

32 | A man whose paternity has been established in one of the available ways. The Polish legislature includes: 1. presumption of descent of the child from the mother's husband (Art. 62 of the Family and Guardianship Code); 2. acknowledgment of paternity (Art. 73 of the Family and Guardianship Code), 3. judicial determination of paternity (Arts. 84–85 of the Family and Guardianship Code).

33 | See Mostowik, 2015, pp. 312–314.

34 | This issue is variously normalised by individual legislatures. See, for example, the regulations of the Austrian Civil Code (Allgemeines bürgerliches Gesetzbuch vom 1 June 1811) [Online]. Available at: <https://www.jusline.at/gesetz/abgb> (Accessed: 16 January 2022), in which the lawmakers uses such concepts as mother, father, and parent. Vide para. 143 and para. 144 of this code. In contrast, for example, the British legislature, in addition to the terms mother and father, also uses the terms parent and also second female parent. The latter refers to a situation in which the parents are not married or are civil partners. See Birth and Deaths Registration Act 1953, e.g., Sec. 10 [Online]. Available at: <https://www.legislation.gov.uk/ukpga/Eliz2/1-2/20>, (Accessed: 2 December 2021).

35 | In Polish legislation, unlike in other legal systems (e.g. German or Austrian), the concept of a third (different) gender is not known. Only female and male sexes function. Therefore, it is permissible to enter only one of these genders in the birth certificate. Nor is it possible, not to enter any gender, as stipulated by para. 22(3) Personenstandsgesetz vom 19 February 2007 (BGBl I S 122) [Online]. Available at: <https://www.gesetze-im-internet.de/pstg/BjNR012210007.html> (Accessed: 17 July 2022). See also, for example, para. 45b of that law.

order, which justifies the prohibitive application of the public policy clause.<sup>36</sup> Therefore, in Poland, issuing a child's birth certificate in which the data of two persons of the same sex are entered as parents is not permissible. The head of the civil registry office was also precluded from registering a foreign birth certificate with two parents of the same sex.<sup>37</sup> Such registration would be contrary to the fundamental principle of the Polish legal order and would therefore constitute a violation of Article 107, point 3 of the Law on Civil Status Records.

The existing rules in Polish law that define the concept of parents are reflected in adoption cases. For if, as previously mentioned, as a result of adoption, the persons adopting become the parents of the child, these persons must be of the opposite sex. Thus, it is not permissible for same-sex couples to engage in a joint adoption. At the same time, it should be added that the Polish legislature does not provide for the institution of a homosexual partnership (or marriage). Joint adoption can only be carried out by spouses, who are a man and a woman. This provision is based on the unambiguous provision of Article 115(1) of the Family and Guardianship Code.<sup>38</sup> This is not considered a sign of discrimination against same-sex couples in Poland. It should be recalled that joint adoption cannot be carried out not only by same-sex partners, but also by different-sex cohabitants or fiancées. In addition, Polish law does not prohibit adoption by a person with a homosexual orientation. Therefore, a person who is not in any relationship can adopt, although adoption by a single person (homosexual or heterosexual) is treated as an exception and is granted based on the special needs of the child. It considers the welfare of the adopted child, which constitutes the fundamental and conclusive basis for adoption.<sup>39</sup>

36 | This position has been reflected in both the literature and the judicature. See, for example, the judgment of the Supreme Court of December 6, 2013, I CSK 146/13; the judgment of the Regional Administrative Court in Lodz of February 14, 2013, III SA/Łd 1100/12; the judgment of the Supreme Administrative Court of December 17, 2014, II OSK 1298/13, LEX 1772336. Cf. also the justification of the judgment of the Supreme Administrative Court of May 6, 2015, II OSK 2419/13, LEX 1780557, and the judgment of the Supreme Administrative Court of May 6, 2016, II OSK 2372/13, LEX 1780419. Crucial in this regard, however, was the resolution of the Supreme Administrative Court of 7 judges of December 2, 2019, II OPS 1/19. See also statements in the literature accepting this position, such as Mostowik, 2019; Mostowik, 2021. However, the issue is controversial, as evidenced both by statements in the literature accepting the permissibility of registration of a foreign birth certificate containing the data of two persons of the same sex as parents. There have also been court rulings accepting just such a position. By way of example, see the judgment of the Supreme Administrative Court of 10 October 2018, II OSK 2552/16; the judgment of the Supreme Administrative Court of 30 October 2018, II OSK 1869/16. Identically also in the judgment of 30 October 2018, II OSK 1870/16; Pawliczak, 2020, p. 51; Zachariasiewicz, 2018, p. 392; Tadla, 2019, p. 154.

37 | This situation is different in Germany. For example, the Federal Constitutional Court, in one of its rulings, stated that parents can be same-sex couples. See Bundesverfassungsgericht, Urteil vom 19 February 2013, 1 BvL 1/11.

38 | The situation is different, for example, in Germany, where, although according to Sec. 1741(2) of the German Civil Code, spouses can jointly adopt a child, but marriage can be entered into by persons of different or same sex (Sec. 1351(1) of the German Civil Code). For examples of other solutions see Arts. 264a–264c of the Swiss Civil Code (Schweizerisches Zivilgesetzbuch vom 10 December 1907) or Art. 346(1) of the French Civil Code. Also, the revised European Convention on the Adoption of Children of 27 November 2008. Allows adoption also by married homosexual couples and registered same-sex partnerships (Art. 7(2)), although the principle of adoption by a couple consisting of a man and a woman is maintained.

39 | Art. 114(1) of the Family and Guardianship Code.

The above remarks are essential for clarifying the issue of the permissibility of adoption by a transsexual person who has undergone a sex reassignment (only legal or biological). It is easy to see that there are two basic possibilities. The first is when the person in question underwent a sex change before the adoption of the child, and the second is when this occurred after the adoption was granted by the court. These issues are discussed later in this paper.

#### 4. Change of sex by the adoptive parent before the adjudication of the adoption

In examining this issue, two cases are considered separately. The first is a joint adoption by spouses. The second is the adoption by a single person.

In a joint adoption, if the spouses are persons of the opposite sex, (both legal and biological), and all the necessary prerequisites, especially the welfare of the child, are met, there is no obstacle to adoption, even if one of the spouses is a transgender person. If one parent has undergone a sex change even before marriage and adoption, it is difficult to present this change as an obstacle to prevent the adoption. Following the adoption judgment, a new birth certificate will be drawn up for the child, which will identify the adopting parents as two persons of different sexes, both legal and biological, in accordance with the basic principle of the Polish legal order relating to the concept of parents.

However, the situation will be different when one of the spouses changes their legal sex after the couple marries. In such cases, spouses have the same legal, albeit different, biological sex. It seems that the court would not rule for joint adoption. This is because the adopted child's new birth certificate would have to include the data of two people of the same legal sex as the parents, which violates the aforementioned fundamental principles of Polish law. The situation becomes difficult if the adoption is granted by the court. The head of the registry office is obliged to refuse to register any event that is contrary to the fundamental principles of the Polish legal order,<sup>40</sup> but he or she is bound by the final court ruling.<sup>41</sup> A copy of such a ruling is sent by the court to the relevant civil registry office.<sup>42</sup> Given this unclear situation, the question arises whether the head of the civil registry office has the authority to refuse to register the civil status in such a case. This is not, after all, a decision of an administrative court issued in connection with the supervision of public administration,<sup>43</sup> which the head is indisputably bound to comply.<sup>44</sup>

40 | Art. 103 of the Law on Civil Status Records.

41 | Art. 365(1) of the Code of Civil Procedure.

42 | Art. 4 of the Civil Records Law.

43 | See Arts. 1 and 3 of the Law of 30 August 2002 – Law on Proceedings before Administrative Courts, consolidated text Official Gazette of 2022, item 329 as amended.

44 | According to Art. 170 of the Law – Law on Administrative Court Proceedings, according to which a final decision of such a court is binding not only on the parties and the court that issued it, but also on other courts and state bodies. In turn, according to Art. 153 of that law, the legal assessment and the court's indication as to further proceedings expressed in its ruling are binding on the authorities whose action was the subject of the appeal.



Otherwise, the concept of supervision is undermined altogether. However, a possible argument in favour of the admissibility of such a refusal could be that the head of the civil registry office is not making a substantive assessment of the legitimacy and accuracy of the court's decision but that the registration of the event (based on the court's decision) would be contrary to the basic principles of the Polish legal order. Accepting such a solution, one would have to assume that the head of the registry office would not assess the court ruling itself (which he or she is obviously not entitled to do) but the effects of the registration of the event is an issue of compliance with the fundamental principles of the Polish legal order.

By accepting such a solution, the head of the civil registry office avoids a situation in which, by concluding a civil status registration based on a general court ruling,<sup>45</sup> he or she would be violating Article 103 of the Law on Civil Status Records. Notwithstanding, this solution is not entirely accurate because the head of a civil registry office cannot have the authority to refuse the final decisions of courts, not only the administrative courts that oversee their activities but also the common courts. Otherwise, the head would be given the function of a super-arbitrator who could challenge court rulings.<sup>46</sup>

Alternatively, other solutions should be contemplated whereby the head of the registry office would make an appropriate entry into the register pursuant to a court ruling without exposing himself or herself to the charge of violating the elementary principles of the Polish legal order. For example, he or she could leave the fields for mother and father blank in the adopted child's birth certificate while providing the data of two persons of the same sex as the parents in the annotation accompanying the certificate based on Article 23 of the Civil Status Records Law. Finally, one might consider filling in only one box (mother or father), depending on the spouse with the legal sex consistent with the biological sex.<sup>47</sup>

However, these solutions are not flawless. Doubts have arisen as to whether the head of the civil registry office may leave sections relating to one or both parents blank when drawing up a new birth certificate for a child of adoption. The Polish law on civil records does not expressly provide for omission of a box for one of the parents.<sup>48</sup> Consequently, it seems that under the current law, it is difficult to recommend a solution that would not raise reasonable doubts regarding compliance with applicable regulations. In this regard, a gap in Polish law is apparent. It is very difficult to address the gap through the interpretation of current regulations, the need for the intervention of lawmakers seems to be the most justified.

With regards to adoption by a single transsexual person, it is necessary to consider the situation in which they have changed not only their legal but also their biological sex and when there has been a change only in legal sex without surgical correction.

In the first case, there does not seem to be any obstacle to granting adoption (provided, of course, that the other prerequisites required by the legislature are met). A person adopting a child will be entered on the birth certificate of the adopted child as either the mother or father. Personal information corresponds to both legal and

45 | And thus respecting Art. 365(1) of the Code of Civil Procedure.

46 | For a more extensive discussion of these problems, see for example, Gajda, 2020a, pp. 18–20.

47 | Cf. in this regard the considerations of M. Wojewoda on same-sex parenthood in the context of registration of events in Poland: Wojewoda, 2020, pp. 36–37.

48 | These issues are more extensively analysed, for example, by Łukasiewicz, 2020, pp. 60 et seq.

biological sex. The same applies to the additional mention of adoption. The first name of the other parent is then entered on the birth certificate according to the parent's indication, and in the absence of such an indication, the first name is chosen by the head of the civil registry office. Subsequently, the surname of the other parent will be entered as the surname of the adoptive parent.<sup>49</sup> Thus, the birth certificate of the adopted child will include data of persons of the opposite sex as parents. In fact, it should be assumed that if a person adopting the child wanted to provide the name of a person of the same sex as the other parent, the head of the registry office would refuse to include it in the child's birth certificate.

The situation becomes complicated again if the person who adopts a child undergoes a change in legal gender only. First, the adjudicating court may raise doubts about whether such an adoption will be compatible with the welfare of the minor child and refuse to decree it.<sup>50</sup> On the other hand, in the event of an order granting the request of the person who intends to adopt the child, a copy of the final order will be sent to the registry office. In such a case, the head is obliged to issue a new birth certificate for the adopted child (and attach a supplementary note to it) in accordance with the order. Depending on the legal sex of the adoptive parent, he or she will include their data in the mother's or father's column.

However, a situation will then arise in which technically everything will be in keeping with the law, but due to the biological sex of the adoptive parent, which is different from their legal sex, there will be a violation of the basic principle of Polish law where only a woman can be the mother, and only a man can be the father. In this case the violation is the fact that the person who is entered as the mother is a biological male with the legal sex of a woman. In this situation, the problem reappears, is the head of the civil registry office bound by the final court decision and take the appropriate action (draw up a new birth certificate or attach an additional note about adoption to the existing one) or, by virtue of the applicable regulation<sup>51</sup> he or she is obliged to refuse to take such action.

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## 5. Change of adoptive parent's sex after the adoption

This section focuses on the situation in which an adoption judgment was made before the adoptive parent's sex changed. This may involve only a change in legal sex, as well as a change in legal sex combined with surgical sex correction. First, whether such a case, especially for joint adoption by spouses, is possible under Polish law should be considered. It can be argued that the court should not grant a transgender person's request to determine his or her gender other than their legal sex if such a person is married and has jointly adopted a child with their spouse. However, as previously

49 | Arts. 71(3) and 72(3) of the Civil Records Law.

50 | This issue may raise analogous questions to the permissibility of adoption by an unmarried homosexual person. On this matter, see for example, the decision of the ECHR (Application No. 43546/02, Judgment, 22 January 2008) in the case of *E.B. v. France*, from which it follows that sexual orientation should not stand in the way of granting adoption permission to a homosexual person if national law allows adoption by a single person.

51 | Art. 103 of the Civil Records Law.

mentioned, the basis for this claim is Article 189 of the Code of Civil Procedure. According to this provision, the plaintiff may demand that the court determine the existence (non-existence) of a right or legal relationship if he or she has a legal interest in it.<sup>52</sup> Thus, such a demand is contingent on the existence of a legal interest<sup>53</sup> on the part of the plaintiff in establishing that he or she is a person of a different sex from that specified in his or her birth certificate. Thus, in this case, there is no basis for the court to consider at all the question of whether the plaintiff remains married or whether they and their spouse have adopted a child. The existence of said interest is a *conditio sine qua non* for the admissibility of an action under Article 189 of the Code of Civil Procedure. In this regard, it is not necessary to meet other additional conditions, such as not being married. In view of this situation, it should be stated that according to current Polish regulations, it is possible for a situation to arise in which one of the spouses, after the court has ruled on joint adoption, can carry out a change in sex (only legal or biological). In the event of adoption a new birth certificate will be drawn up for the child, or an additional note of adoption will be attached. This certificate will include the data of the adopting spouses before one of them changed sex; therefore, it will include the data of the opposite sex. A change in sex by one adoptive parent would not affect the child's civil status registration. Its consequences would not be retroactive but only *ex nunc*. Thus, the adoptee's birth certificate should continue to include data of persons of the opposite sex as parents. The most relevant consideration in this matter seems to be the determination of the adoptive parent's gender at the time of adoption. This is consistent with Article 10(2) of the 2015 Law on Gender Recognition. This also corresponds to the norms of most countries that have decided to regulate issues related to gender reassignment. One example is the German legislation. According to paragraph 11 of the *Gesetz über die Änderung der Vornamen und die Feststellung der Geschlechtszugehörigkeit in besonderen Fällen*, a change in the adoptive parent's sex does not affect the relationship between adopted children and the parent, if the adoption took place before the final ruling on the change of the adoptive parent's sex.

As one may suppose, also in the case of a change of sex by a single person who previously adopted a child, the adopted child's civil status will not be affected. The adoptive parent's data from the time of the court's decision on adoption will remain in his or her birth certificate if a new one has been drawn up. These data will also be disclosed in copies of certificates issued by the head of the civil registry office.<sup>54</sup> If, on the other hand, an additional note is attached, the data of the adoptive parent at the time when the adoption ruling became final will also be included.

52 | Regarding this concept, see for example, Zieliński, 2011, pp. 341–344.

53 | I also expressed this view in another study. See Gajda, 2019, p. 180.

54 | For the concept of complete and abbreviated copies of a civil status record, see Art. 44(2) and (3) of the law on civil status records. In turn, according to Art. 48(1) of the Law on Civil Status Records, an abbreviated copy of a birth certificate contains: 1) the surname, first name(s) and gender of the child, 2) the country, date and place of birth, and 3) the family names and first names of the parents.

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## 6. Conclusion

This article confirms the need for Polish lawmakers to enact a law on gender reassignment which regulates this important issue in a comprehensive and detailed manner. The law should specify the prerequisites for the change in question, the procedure to be followed with special attention to the consequences of gender correction. It should include a provision regarding whether a change in legal sex has to be accompanied by a surgical procedure. The introduction of such an obligation is undoubtedly debatable (if only in terms of human rights and freedoms), although, on the other hand, in the event of an obligation to carry out surgical sex correction, a number of current problems would cease to exist. For example, we can mention the case of the birth of a child by a person who is legally male but biologically female, or the judicial determination of paternity of a legally female person who is biologically male. In addition, in the event of adoption, there is no doubt about the sex of the person who adopts the child. Consequently, there would be no difficulties related to issuing a birth certificate for the child (attaching a supplementary note) after the court's decision. Nevertheless, a solution involving no obligation to perform surgical correction of the reproductive organs is also possible.

It is necessary for lawmakers to consider the introduction of a ban on gender reassignment by married persons. This solution would avoid violations of Article 18 of the Constitution of the Republic of Poland which presupposes a different sex of spouses not only at the time of entering marriage but also throughout its duration. In such cases, the joint adoption of a child by spouses after a change in sex by one of them would also be excluded, since the prerequisite for this change would be that the spouses were not married. Should there be a ban on gender reassignment by married persons, joint adoption prior to such a change would be possible; however, gender reassignment would no longer be relevant as long as the transgender person remains married. If this person had applied to the court for a divorce and the court granted the divorce,<sup>55</sup> it would have to be assumed that the change in sex after the divorce (and earlier adoption) would not affect the origin of the child, as recorded on his or her birth certificate. Spouses would continue to be listed as parents of different sexes.<sup>56</sup>

The issue of adoption by a single person who has changed sex should also be resolved. Such an adoption would have to be considered permissible as long as the rules of maternity and paternity were observed; that is, if the adoptive parent had changed their gender, the adopted child's birth certificate would include data from parents of different sexes.

Going slightly beyond the issue of adoption, one could advocate a solution where a transgender woman with a legally male gender gives birth to a child, then the woman's data as the mother should be entered on the child's birth certificate in accordance with Article 61(9) of the Family and Guardianship Code. Similarly, if a legally female biological male becomes the father, then the data of the male biological father should be entered into

55 | A divorce decree would, of course, be possible only if there is a complete and permanent breakdown of the marriage and in the absence of the so-called negative grounds for divorce. See Art. 56 of the Family and Guardianship Code.

56 | On the other hand, if the option is adopted in which the marriage would terminate by operation of law as a result of a change in the sex of one of the spouses, joint adoption would be possible only before such a change.

the child's birth certificate.<sup>57</sup> Indeed, one must agree with the previously cited view that the legal sex of a given parent should not be decisive, but rather his or her biological sex at the time of birth or even conception of the child (in the case of the father).

The proposed solutions could arguably be considered debatable only because of the principle of equality before the law and the prohibition of discrimination for any reason contained in Article 32 of the Polish Constitution. However, as it seems, they correspond to the basic principles of the Polish legal order, according to which the mother is a woman and the father is a man. In addition, they would allow the rights of transgender people to be respected primarily by creating legal rules that define the prerequisites for the permissibility of gender reassignment and normalising its effects.

57 | One could also consider a solution whereby in the event of 'fulfilment' in the role of a parent consistent with biological sex, but contrary to legal sex, there would be a 'return' by law to the legal sex corresponding to biological sex.

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