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## GENDER IDENTITY AS A LEGAL CATEGORY

### Abstract

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

### KEYWORDS

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

## SŁOWA KLUCZOWE

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

## 1. INTRODUCTION

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

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

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

<sup>2</sup> Simone de Beauvoir, *The Second Sex*, London 1997.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

practice. The definition states that ‘gender identity is understood to refer to each person’s deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical or other means) and other expressions of gender, including dress, speech and mannerisms’.<sup>14</sup> Nowadays, legal gender recognition is deemed to be a positive obligation of many States, as it is formulated, e.g., in the judiciary of the ECHR.<sup>15</sup> In the European context, a fast and effective procedure of legal gender recognition stems from Article 8 (the right to privacy) of the ECHR,<sup>16</sup> and life in accordance with one’s gender identity, which is a component of personal identity, is regarded as one of the most basic personal rights.

There are two major issues with the Polish standard on gender recognition procedure that are discussed both by scholars and trans-rights activists: lack of clear, unified criteria<sup>17</sup> and inadequate protection of the rights of trans people.<sup>18</sup> The first problem is manifested by a differentiated approach of courts to the cases of legal gender recognition; the courts may demand taking different measures from the plaintiffs, such as enclosing a psychological opinion, ongoing hormonal therapy, etc., to obtain the desired ruling. The second problem is connected to the first, as trans people who apply for a ruling face the ambiguous procedure. This often forces the plaintiffs to resort to the employment of the so-called ‘correct trans narrative’,<sup>19</sup> which involves presenting a narrative for the court that is not corresponding to the real experience of trans people but enhances the chances of obtaining the ruling by presenting a stereotypical account of being trans. This may involve the plaintiff feeling forced to claim that they are living in accordance with the gender norms culturally associated with the gender they identify with, involving heterosexuality, gender presentation, etc., regardless of their actual situation or views. In result, being trans in the context of the law is conflated with stereotypical beliefs about gender held by officials and does not correspond to

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<sup>14</sup> The Yogyakarta Principles address a broad range of international human rights standards and their application to SOGI issues. On 10 November 2017, a panel of experts published additional principles expanding on the original document reflecting developments in international human rights law and practice since the 2006 Principles, The Yogyakarta Principles plus 10. The new document also contains 111 ‘additional state obligations’, related to areas such as torture, asylum, privacy, health and the protection of human rights defenders. The full text of the Yogyakarta Principles and the Yogyakarta Principles plus 10 are available at <[www.yogyakartaprinciples.org](http://www.yogyakartaprinciples.org)> accessed 10 October 2023.

<sup>15</sup> Milena Adamczewska-Stachura, Paulina Pilch, *Postępowania w sprawach o ustalenie płci – przewodnik dla sędziów i pełnomocników*, 11–18.

<sup>16</sup> European Court of Human Rights, *Guide on Article 8 of the ECHR*, <[https://www.echr.coe.int/documents/d/echr/guide\\_art\\_8\\_eng](https://www.echr.coe.int/documents/d/echr/guide_art_8_eng)> accessed 08 October 2023.

<sup>17</sup> Renata Ziemińska, *Niebinarne i wielowarstwowe pojęcie płci*, 75–79.

<sup>18</sup> Trans-Fuzja Foundation, *Uzgodnienie płci w Polsce*, <<https://www.transfuzja.org/edukacja/proces-tranzycji#h.jzmep5bgxqrw>> accessed 08 October 2023.

<sup>19</sup> Renata Ziemińska, *Niebinarne i wielowarstwowe pojęcie płci*, 80–81.

actual lived experience of trans people. Both problems: the ununified procedure and the challenges that the trans plaintiffs face share the same root, which is the lack of a proper legal understanding of gender identity.

The legal understanding of gender identity needs to be revisited. Learning from the shortcomings of the current Polish standard, it is possible to formulate three desiderata for this concept that could be employed by the law. First, it should consider the contemporary state of science regarding gender dysphoria to avoid folk understandings that are often both prejudicial and stereotypical. Secondly, the concept needs to be clarified to avoid the current ambiguity and the practical problems that it results in. Identity, understood as a subjective feeling of belonging to a gender category (as it is employed in both international and Polish law) is especially challenging for the law because it is difficult or impossible to prove something that is a mental state. Effects of this may be observed in the current judicial standard and the differentiation of the approaches of the Polish courts. And thirdly, since the procedure of legal gender recognition is a way of protection of the rights of trans people, it should be focused on advancing their wellbeing and securing their dignity. Hence, the postulates of trans rights advocates need to be included, as they may provide for a superior epistemic standpoint regarding the issues in question.

#### **4. GENDER IDENTITY OUTSIDE OF THE LAW**

Disambiguation of the concept of gender identity is a necessary step for a foundation of its legal application. And even though the legal discourse on the definition of gender identity is scarce and often vague, the concept had been developed rather exhaustively in the non-legal literature, specifically in psychology, political and feminist philosophy, as well as in the field of gender studies. For this reason, a resort to this specialist discourse may prove to be essential in achieving this goal. It is not to say that outside of the law the concept of gender identity is not regarded as controversial. Quite the contrary, there are numerous approaches to defining it, through resorting to different features. The approaches, however diverse, may be categorised into three main groups: 1) defining gender identity through physical features (i.e., material approaches); 2) focusing on social gender roles and norms (i.e., externalist approaches); and 3) regarding subjective feelings and mental states (i.e., internalist approaches). In the following parts of the paper, each of the three approaches will be reconstructed from the general discussion, with particular focus on assessing to what degree each of them could serve as a basis for a proper definition of the legal concepts of gender identity. Subsequently, the approaches will be evaluated based on the three criteria for the reconsidered legal concept of gender identity, as specified in paragraph 3.



#### 4.1. GENDER IDENTITY AS A BIOLOGICAL FEATURE OF THE BODY

The first approach to defining gender identity is based on the findings of contemporary neurobiology and genetics but is also part of a long-standing tradition of distinguishing gender based on biological characteristics.<sup>20</sup> In this line of reasoning, gender identity is considered a biological feature of the body. It is both innate and immutable. Due to these features, it is a candidate for a basis of the legal concept of gender identity.

To grasp the idea of gender identity as a biological feature, one must place it in the broader picture of the contemporary understanding of biological notion of gender, also called the biological sex. In general, the biological sex is conceived as a bundle of multiple features or layers, such as hormones, chromosomes, gonads, internal and external sexual organs,<sup>21</sup> brain differences,<sup>22</sup> and the reproductive function.<sup>23</sup> Each of the features has a female and male variant (e.g., XX chromosomes for women, XY for men), but there also exist intermediate stages (such as XXY or X karyotype). Due to the existence of the intermediate stages, organisms can be divided into three groups: female (i.e., organisms that possess all the female features), male, and intersex (i.e., organisms that possess one or more features that are neither male or female, or organisms that possess mixed features, e.g., male karyotype and female anatomical features, characteristic for androgen insensitivity syndrome<sup>24</sup>). For these reasons, some scholars believe that the biological sex is not binary,<sup>25</sup> but rather a spectrum.<sup>26</sup> Gender identity may be described as another of these gendered features of the body.

Evidence for the biological basis of gender identity may be found in genetics and in brain anatomy. It should be underlined that the contemporary biological knowledge does not allow to conclude that gender identity is determined by these physical features,<sup>27</sup> but the existing correlations make it possible to deem it at least probable. Studies on persons subjected to the so-called 'normalising surgery' point to the influence of genetic factors to the formation of gender identity.<sup>28</sup>

<sup>20</sup> Joshua D Safer, *A Current Model of Sex Including All Biological Components of Sexual Reproduction*, Law and Contemporary Problems 2022, Vol 85, No 1.

<sup>21</sup> John HJ Bancroft, *Human Sexuality and its Problems*, 3rd Edition, Edinburgh 2009.

<sup>22</sup> Renata Ziemińska, *Niebinarne i wielowarstwowe pojęcie płci*, 20–22.

<sup>23</sup> Joshua D Safer, *A Current Model of Sex Including All Biological Components of Sexual Reproduction*, 47.

<sup>24</sup> Renata Ziemińska, *Niebinarne i wielowarstwowe pojęcie płci*, 23.

<sup>25</sup> *ibid.*

<sup>26</sup> Anne Fausto-Sterling, *The Five Sexes*, The Sciences 1993, Vol 33, No 2; R. Ziemińska, *Niebinarne i wielowarstwowe pojęcie płci*.

<sup>27</sup> James W Kalat, *Biologiczne podstawy psychologii*, Wydawnictwo Naukowe PWN 2006, 323–353.

<sup>28</sup> Renata Ziemińska, *The Epistemic Injustice Expressed in 'Normalizing' Surgery on Children with Intersex Traits*, *Diametros* 2020, No 66.



This medical procedure, however controversial and widely held as unethical,<sup>29</sup> is often applied to intersex newborns, and it involves a surgical adaptation of the ambiguous genital organs of intersex children to the ones that adhere to the binary norm – usually to female organs, which are easier to recreate surgically.<sup>30</sup> The permissibility of this practice has been justified in the past by doctors' belief (accepted by them as true at the time) that gender identity depends only on socialisation and that a child raised as a girl will grow up to be a woman and behave like one. However, there are numerous examples of children who are genetically male (XY karyotype) but intersex at the level of other layers or who, subjected to this practice, developed a male gender identity in adulthood.<sup>31</sup> The percentage of trans individuals among the group that has been subjected to the 'normalising surgery' is much higher than in general population (8.5–20% and 0.5–2%, respectively, where the latter percentage covers both trans people who decided to transition, and those who did not<sup>32</sup>), which indicates the existence of an influence of genes on gender identity but not an influence that is exclusive – some respondents identified with the gender they were raised to be. This points to the simultaneous role of socio-cultural factors in the development of gender identity.

When it comes to the neurological correlates of gender identity, it must be highlighted that there are some differences between typical male and female brains. They can be found primarily in the area called the hypothalamus.<sup>33</sup> However, the brains of transgender individuals are not identical to the brains of the 'typical' sex with which they identify, nor are they typical of the opposite sex.<sup>34</sup> Moreover, the observed differences in the brains relate to areas whose role and function are not yet known, so one can only speak of correlation with gender identity, not causation. J. Safer,<sup>35</sup> pointing to the same data, concludes that although the biological correlates of gender identity remain vastly unexplored, the knowledge that we already possess allows to state with certainty that gender identity is part of human biology. He postulates that gender identity should be considered a biological category by reducing it to the characteristics of the human brain and that those elements of gender identity that are externalised through social behaviour should be referred to as gender expression.

The possibility of employment of the material approach to defining gender identity in law faces significant challenges. First, it fails to meet the condition of clearness on two bases: it is underdeveloped in the science it derives from,

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<sup>29</sup> *ibid.*

<sup>30</sup> *ibid.*

<sup>31</sup> Renata Ziemińska, *Niebinarne i wielowarstwowe pojęcie płci*, 39.

<sup>32</sup> *ibid.*, 40–77.

<sup>33</sup> *ibid.*, 96.

<sup>34</sup> *ibid.*, 102–103.

<sup>35</sup> Joshua D Safer, *A Current Model of Sex Including All Biological Components of Sexual Reproduction*, 54.

namely biology. And because of that, it also is unfit to explain gender identities outside of the binary ones. The first weakness of this account practically defeats its potential application into the law; even if the biological understanding of gender identity were the basis for its legal definition, contemporary biology does not provide a method of examination of, e.g., the brain structure to determine whether a person is, without a doubt, of a particular gender. The existing brain differences are only correlational and the functions of many areas of the hypothalamus are yet to be discovered. Additionally, even if certain regularities have been found for the brains of trans men and women, it is extremely difficult, if not impossible, to determine whether non-binary identities in their variety also have each such material correlates. Even though there is evidence for biological correlates of gender identity, it is too scarce and vague to be a base for a clearly defined legal concept of gender identity.

The second condition stipulated for the reconsidered legal concept of gender identity seems to be met; this approach is definitely in line with the contemporary scientific findings regarding the biological bases for gender identity. However, it is not free of shortcomings. Firstly, as I have already mentioned, the issue of gender identity as a biological feature is not yet fully researched, but it is in the early stages of the work. There is no conclusive answer to what is understood materially as a gender identity and what are its physical bases. Secondly, this approach does not include achievements of other sciences, such as psychology, regarding important aspects of gender identity, such as distress and other psychological phenomena that relate to gender dysphoria, exhaustively described in the subject literature.

Finally, regarding the condition of trans rights advancement, the material approach faces the most serious challenges. Perception of gender identity as innate and immutable is problematic for two main reasons: first, it seems to be susceptible to stigmatising narratives that situate trans people as somewhat inferior, but without their fault, due to a feature they were born with. Focus on the innateness of gender identity may be regarded as a justifying factor for the deviation of the norm. The unspoken intuition behind this argument is that this cis-heterosexual norm is morally good because it is natural, while any deviation from it should be well justified in order to be accepted – this justification is supposed to be the innateness and impossibility of changing one's gender identity (i.e., also because these characteristics are natural).<sup>36</sup> In the context of trans people, being cis constitutes such a norm. This of course adds up to a naturalistic fallacy of a sort – gender identity, whether innate or not, is morally neutral and not good or bad. It is similar to the features of being left-handed or a redhead – those properties are not regarded to be value-laden and we generally treat them as innate. But

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<sup>36</sup> Anne Goldstein, *Organizing and Arguing Sex and Gender*, Law and Contemporary Problems 2022, Vol 85, No 1.

imagine a right handed woman who trains herself to use her left hand to write, or a blonde man dying his hair red. Similarly, these features of writing with a left hand or having red hair remain morally neutral, regardless of the lack of their feature of being innate. However, the emphasis on the innateness and immutability of trans people's gender identity shifts the focus of the discussion on trans rights away from trans people's significant problems, such as discrimination, violence, fetishization and others, in favour of examining whether they resemble the 'norm' and whether their existence and functioning as trans people in the society can be justified. The second problem regards recognising gender identity specifically as immutable. The existence of gender identities that themselves presuppose mutability – for example, 'genderfluid' identification, which is the experience of one's own gender as changeable over time, makes them impossible to be included in this framework.

The material account of gender identity fails to meet condition one and three (clarity and advancement of trans rights). It partly meets the second criterion of being up-to date with the contemporary state of science. Hence, it is not a proper candidate for the account that could successfully be employed in law.

## 4.2 EXTERNALIST ACCOUNTS OF GENDER IDENTITY

Some of the philosophical accounts of gender identity define it in virtue of social norms of femininity and masculinity that prevail in the society. In this vein, as S. Stryker puts it, being trans is a 'movement across a socially imposed boundary away from an unchosen starting place'.<sup>37</sup> It is typical for these accounts to position gender identity in relation to the social norms of behaviour and in reference to the other members of the society, who also are subject to the set of gender norms. Identity, as formed in response to such norms has been theorized by S. Haslanger, who points out to the role of a social group in sustaining the norms.<sup>38</sup> K. Jenkins, in her norm-relevancy account, defines gender identity as referential to a mental map of gender norms one deems applicable to oneself,<sup>39</sup> and Ásta, whose account focuses on a map of categories together with context-dependent social enablements and restraints specific to the categories that allow for the formation of gender identity in relation to them.<sup>40</sup>

Externalist accounts of gender identity share a common point of departure, the existing gender norms. The sets of norms that are typical for femininity and

<sup>37</sup> Susan Stryker, *Transgender History*, Berkeley 2017, 1.

<sup>38</sup> Sally Haslanger, *Resisting Reality: Social Construction and Social Critique*, New York, US: Oxford University Press 2012, 164–168.

<sup>39</sup> Katharine Jenkins, *Toward an Account of Gender Identity*, *Ergo*, an Open Access Journal of Philosophy 2018, Vol 5, No 1214.

<sup>40</sup> Ásta, *Categories We Live By: The Construction of Sex, Gender, Race, and Other Social Categories*, Oxford University Press 2018, 121–123.

masculinity group certain behaviours (such as caring for others), attitudes (such as passivity and domesticity), modes of expression (such as wearing dresses and make-up), or occupations (e.g., a nurse), as well as certain appropriate features that indicate preferred behaviours (e.g., as being nurturing and modest), as typical for one of the gender categories, in this case: women. These social norms govern the social behaviours and allow for gender identity formation in relation to them. It is not to say that a person who identifies as a woman evaluates these norms as good, that she acts accordingly to them, or that she does not object to them. Gender norms are hierarchical, harmful and discriminatory, and all the externalist accounts of gender identity agree on this point. However, living in the social world and interacting with other members of the society forces one to position themselves in relation to these norms. Social interactions involve gender norms, other members of the society expect us to act accordingly to them, and social sanctions may be imposed on individuals who do not comply. In this vein, being of a certain gender identity can be best described as deeming oneself as a subject of a given set of gender norms.<sup>41</sup> For instance, a person who identifies as a woman will deem feminine gender norms as applying to her (regardless of the fact whether she opposes or conforms to them), a person who identifies as a man will regard masculine gender norms as relevant to him, and a non-binary person will not regard feminine or masculine gender norms as proper for them. Gender identity is thus understood as a social position that has its boundaries set within a particular set of gender norms a person deems relevant to herself.

Externalist accounts of gender identity partly meet the condition of clarity. It allows to escape the circularity problem specific to many gender identity definitions that explain identity as a subjective feeling, internal identification, etc.<sup>42</sup> by emphasising the more objective and verifiable aspect of adhering to a particular set of gender norms. However, it faces difficulties with recognising gender identity of trans individuals who deem a certain set of gender norms as proper for them, but do not express it. For instance, a closeted trans woman, who regards feminine gender norms as appropriate for her, but maintains a male gender expression because of living in a highly transphobic society, will still be considered a woman in this account, but her identity will not be socially recognized and acknowledged.<sup>43</sup> Another problematic issue in this account is the experience of non-binary individuals who may, opposite to K. Jenkins' claims, adopt some of the feminine or masculine norms because they are compelled to do so in order to function within the society but without upholding a binary gender identity.<sup>44</sup> In

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<sup>41</sup> Katharine Jenkins, *Toward an Account of Gender Identity*.

<sup>42</sup> *ibid.*

<sup>43</sup> *ibid.*

<sup>44</sup> Robin Dembroff, *Beyond Binary: Genderqueer as Critical Gender Kind*, Philosophers' Imprint 2020, Vol 20, No 9.

consequence, adopting the externalist account makes it easy to confuse gender identity with gender expression.

When it comes to the second condition, externalist accounts do emphasise the contemporary knowledge regarding medical and psychological aspects of being trans; K. Jenkins specifically points out to the state-of-the-art findings regarding the relation of psychological distress or depression connected with disregard for gender identity,<sup>45</sup> or proper healthcare, including transition related healthcare that some trans people require.<sup>46</sup> Externalist accounts focus on the social norms regarding gender, but are not limited to it, and incorporation of scientific knowledge about the (often adverse) effects that social norms have on individuals, together with claims on how to mitigate them, is not contradictory to these positions but rather complementary.

The third condition, advancement of trans rights, has been specifically stated as an aim of the norm-relevancy account presented by K. Jenkins.<sup>47</sup> However, all the externalist accounts also face difficulties in meeting this condition. The first problem is the attachment to the binary system of gender norms that is presupposed by this line of understanding of gender identity. Reinforcing the binary understanding of gender is often perceived in the subject literature as undesirable for two reasons. Firstly, gender binary is inherently unjust and hierarchical and for this reason should be resisted rather than maintained.<sup>48</sup> Secondly, the conceptual framework of binary genders compels to perceive and interpret people and their behaviour through the lens of masculinity and femininity. This has adverse effects on non-binary individuals, who are coerced into making sense of their own identities in the terms that do not apply to them.<sup>49</sup> The binary model makes it difficult for non-binary people to communicate their identity and to make it intelligible.

### 4.3 INTERNALIST ACCOUNTS OF GENDER IDENTITY

The last approach to defining gender identity is based on the internal, subjective sense of belonging to a given gender category. This approach admits the existence of social norms regarding gender that may dictate dominant understandings of social categories of gender, as well as their membership conditions, but does not conflate gender identity with them.<sup>50</sup> Quite contrary, they underlie the possible mismatch between how the dominant gender norms and categories

<sup>45</sup> Katharine Jenkins, *Toward an Account of Gender Identity*, 718.

<sup>46</sup> *ibid.*, 721.

<sup>47</sup> *ibid.*

<sup>48</sup> Robin Dembroff, *Beyond Binary: Genderqueer as Critical Gender Kind*, 16.

<sup>49</sup> *ibid.*

<sup>50</sup> Robin Dembroff, *Real Talk on the Metaphysics of Gender*, *Philosophical Topics* 2018, Vol 46, No 2.

are imposed on a person and her own subjective identification, with prioritising the latter. In this line of reasoning, the self-identification serves both as a basis for membership in each category, but it also outlines the membership conditions for the individual in question.<sup>51</sup> The internalist accounts emphasise the standpoint of the individual, or what T. Bettcher calls the First Person Authority (FPA).<sup>52</sup> In this line of reasoning, the person who speaks about their own gender identity should be treated as the best and final indicator of their membership in gender categories, either because of the moral duty of respecting their autonomy, and privacy (ethical FPA), or because of their privileged epistemic access to their own identification (epistemic FPA).<sup>53</sup> In consequence, according to the internalist approaches, gender identity involves the personal experience of gender that may be very different for each person; thus, two individuals who identify as women may do so based on different criteria, depending on their background and the social context, but nevertheless both will be valid. These accounts also allow for the inclusion of multiplicity of non-binary gender identities.

However, when it comes to the possible application of internalist accounts, some problems arise. Firstly, as K. Jenkins point, such definitions do not escape circularity and are not very informational<sup>54</sup> because they translate the notion of identity into terms of subjective feelings and mental states. The subjectivity of these accounts is also not compatible with the second condition: coherency with the contemporary scientific knowledge because they prioritise the first-person gender experience over the possibility of objectifying it for, e.g., legal purposes. This of course is rooted in the main purpose of these accounts, i.e., the shift of epistemic and ethical standpoint, in order to return the agency to the marginalised members of the society – trans people; and to allow them to articulate their experience from the first-person perspective, rather than according to the dominant gender categories that are often employed to deny autonomy and authenticity of trans people.<sup>55</sup> On the other hand, approaches with exclusive focus on self-determination are problematic since they do not cover all cases.<sup>56</sup> Some of the people with severe cognitive impairments may not possess a subjective sense of being of a certain gender, yet it is desirable that we are able to refer to them as, e.g., men or women, girls, etc.<sup>57</sup>

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<sup>51</sup> Talia M Bettcher, *Trans Identities and First-Person Authority in You've Changed: Sex Reassignment and Personal Identity*, Laurie Shrage (ed), Oxford University Press 2009, 109.

<sup>52</sup> *ibid.*

<sup>53</sup> *ibid.*

<sup>54</sup> Katharine Jenkins, *Toward an Account of Gender Identity*.

<sup>55</sup> Talia M Bettcher, *Trans Identities and First-Person Authority*, 108; and Renata Ziemińska, *Toward a Nonbinary Model of Gender/Sex Traits*, *Hypatia* 2022, Vol 2, No 37, 402–421 (413–414), doi:10.1017/hyp.2022.10.

<sup>56</sup> Elizabeth Barnes, *Gender without Gender Identity: The Case of Cognitive Disability*, *Mind* 2022, Vol 131, No 523.

<sup>57</sup> *ibid.*

The internalist accounts meet the third criterion to the greatest degree. They are based on the trans postulates for autonomy over self-identification without the necessity of presenting any ‘proof’, such as a psychological diagnosis or complying with stereotypical and oppressive gender norms. They come forward against the social, legal and medical practices that often disregard trans people’s identity and experience, or infantilise them, by treating trans individuals as confused or mistaken about their gender. Hence, these accounts restrain the ‘basic denial of authenticity’,<sup>58</sup> i.e., the misgendering practices and the coercion to adhere to gender norms related to the genital-based sex that trans people face. The internalist approaches to defining gender identity are sensitive towards the injustice and marginalisation; they prioritize the autonomy of trans people over the conformity with dominant conceptions of gender and imposed membership conditions.

## 5. CONCLUSIONS

The importance of the concept of gender identity increases with the ongoing debate on gender justice and trans rights; many of the issues are of great importance to the law. Nevertheless, the concept of gender identity is ambiguous not only in the legal context but outside of it, as the three competing definitional approaches: material, externalist and internalist, show. The approaches have been evaluated in the paper based on the three criteria that aimed at the adaptation of gender identity for legal purposes: 1) clarity, 2) coherency with the up-to-date state of science, and 3) advancement of trans rights and gender justice. However, neither of the accounts have met all the criteria and thus neither can be deemed as appropriate for the law. The materialist approach exceeded in meeting the second condition; externalist definitions appear to be the clearest, and the internalist ones prevail from the perspective of trans rights advancement. Perhaps the reconsidered legal concept of gender identity would improve from drawing from the three different approaches and combining their strengths, while avoiding the shortcomings that are characteristic of each of them.

**This inquiry was supported by the National Science Centre, Poland, Grant No [2020/37/B/HS5/00272].**

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<sup>58</sup> Talia M Bettcher, *Trans Identities and First-Person Authority*.



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