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INTERSEX NEWBORNS AND PEOPLE WITH NONBINARY GENDER IDENTITY: THE BEGINNING OF LEGAL RECOGNITION¹

Abstract

Intersex newborns cannot be qualified as male or female at the level of their biological traits. People with nonbinary gender identity are those who do not identify as a man or a woman (at the level of gender identity). In most countries both groups, intersex people and nonbinary people, are in legal limbo. The existence of *congenital eunuchs/hermaphrodites* is confirmed in the Bible. Recently, a process has begun to introduce third sex/gender options in documents. I discuss the legal recognition in Germany, where since 2019 there have been used three sex/gender categories: male, female, and diverse (*divers*). Finally, I present a nonbinary and multilayered conceptualization of sex/gender that goes beyond the system of male/female categorization. It includes a third category in addition to male/female and allows us to describe the clash of layers.

KEYWORDS

intersex newborns, nonbinary gender identity, nonbinary sex characteristics, third gender category

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SŁOWA KLUCZOWE

nowonarodki interpłciowe, niebinarna tożsamość płciowa, niebinarne cechy płciowe, trzecia kategoria płciowa

1. CONGENITAL EUNUCHS AND HERMAPHRODITES IN THE CHRISTIAN TRADITION

I begin with the Bible because our Western culture is under its influence. In the Bible, there are traces of both binary and nonbinary understandings of human sex characteristics and gender identity. The binary understanding is in the Book of Genesis: “So God created man in his own image, in the image of God created he him; male and female created he them”². Dormor improves the patriarchal translation, replacing *man* with *humankind* and *him* with *them*: “So God created *humankind* in his image, in the image of God he created *them*; male and female he created them”³. This sentence is interpreted as the thesis that one is exclusively either a male or a female on both the biological and psychological level and *tertium non datur* (there is no third option). Pope John Paul II is listed as one of proponents of such an essential difference between men and women⁴.

There is also a nonbinary tendency. One example is the Epistle to the Galatians, containing the message that “there is neither male nor female”⁵. However, the most important nonbinary passage is in the Gospel of Matthew, which mentions the congenital eunuchs: “For there are some eunuchs, which were so born from their mother’s womb: and there are some eunuchs, which were made eunuchs of men: and there be eunuchs, which have made themselves eunuchs for the kingdom of heaven’s sake”⁶.

The category of eunuch refers primarily to the castrated male⁷, but here, there is a distinction among three kinds of eunuchs: 1) the congenital eunuch, 2) the castrated male, and 3) the eunuch who decided to be castrated for the sake of the kingdom. According to Dormor, this passage shows that Jesus recognized

² Genesis 1:27, quoted from *The Holy Bible. Old and New Testaments*, King James Version, Ramboro, London 1994. All subsequent biblical quotations were drawn from this edition if not stated otherwise.

³ Genesis 1:27, quoted after D. Dormor, *Intersex in the Christian tradition: Personhood and embodiment*, (in:) J. Scherpe, A. Dutta, T. Helms (eds.), *The legal status of intersex persons*, Cambridge, UK 2018, p. 118.

⁴ D. Dormor, *op. cit.*, p. 133.

⁵ Galatians 3:28.

⁶ Matthew 19:12.

⁷ D. Dormor, *op. cit.*, p. 124.

eunuchs more readily than such persons are recognized today⁸. Such recognition is confirmed by the story of the Ethiopian eunuch who was baptized⁹.

The passage about eunuchs can be explained by ancient cultural awareness of the existence of such persons. Dormor reveals that in the Jewish tradition there was a distinction between a congenital eunuch and a eunuch made by man. The latter was excluded from the worshipping community, while the former was accepted¹⁰. According to Isaiah¹¹, the eunuch who keeps the Sabbath will have a place in God's house.

The congenital eunuch is especially interesting to me because it is an equivalent of an intersex person. In ancient times, a congenital eunuch was also called a *hermaphrodite*, referring to a Greek myth. Hermes and Aphrodite had a son together, the nymph Salmacis fell in love with him and asked the gods to be united with him forever. The result was *Hermaphroditus*, a person with both male and female sex characteristics, described as a beautiful boy with developed breasts¹².

A friendly attitude towards hermaphrodites is found in Augustine of Hippo's *City of God*: "As for Androgynes, also called Hermaphrodites, they are certainly very rare, and yet it is difficult to find periods when there are no examples of human beings possessing the characteristics of both sexes, in such a way that it is a matter of doubt how they should be classified"¹³.

Augustine describes the hermaphrodite (alternatively called *Androgyne* from ἀνδρός/ andrós 'male' and γυνή/gyné 'female') not as a castrated male but as a person exhibiting the traits of both sexes. The Roman tradition presented hermaphrodite newborns as a sign of divine anger or a disturbance of the social order. Hermaphrodites are mentioned in Roman legal texts, but they do not have a separate status as a third sex, and there is a tradition of categorizing them as male or female according to the principle of the prevailing sex traits¹⁴. Augustine, in opposition to the Romans, claims that hermaphrodites are not monstrosities but rather marvelous variations within the human fold. "For God is the creator of all, and he himself knows where and when any creature should be created"¹⁵. These words can serve as an example of how Christians can accept intersex people and allow them to live as they were born.

⁸ *Ibidem*, p. 134.

⁹ Acts 8:26–40.

¹⁰ D. Dormor, *op. cit.* p. 126.

¹¹ Isaiah 56:3c-5.

¹² Ovid, *Metamorphoses*, Book IV, 4.285.

¹³ Saint Augustine, *Concerning the City of God against the Pagans*, H. Bettenson (transl.), London 1972, p. 663, quoted after D. Dormor, *op. cit.*, p. 130, Pol. ed. *Państwo Boże*, W. Kubicki (transl.), Kęty 1998, p. 604, Book 16, chapter 8.

¹⁴ A. Wijffels, *Intersex: Some (legal-)historical background*, (in:) J. Scherpe, A. Dutta, T. Helms (eds.), *The legal status of intersex persons*, Cambridge, UK 2018, p. 189.

¹⁵ Saint Augustine, *op. cit.*, p. 662, quoted after Dormor, *op. cit.*, p. 129.

Under the influence of Augustine, medieval canon lawyers understood hermaphrodites as a third natural sex¹⁶. However, modern law brought a change. The term *hermaphrodite* was used in difficult legal cases of inheritance or marriage, but when registers of births, marriages and deaths were established, they only provided either the male or female sex as options. Legal uncertainty about sex was left to medical experts. Modern medicine, when trying to explain sex differentiation, found continuous scales of sex traits, but practical, moral and political needs to segregate people triumphed over scientific accuracy¹⁷. Modern law was the return to the Book of Genesis.

2. BEYOND MEN AND WOMEN – RECENT EMPIRICAL DATA

Despite knowledge of the exceptions, we are socialized to believe that people can be divided into two exclusive groups: men and women. However, there is medical and social evidence on intersex newborns and people with nonbinary gender identity that brings a binary understanding of sex and gender into question. What is common to both groups is that they are outside of the public conceptual systems, and, in most countries, outside of the legal systems.

The term *intersex* was invented in 1917 by biologist Richard Goldschmidt¹⁸ for organisms that are not clearly male or female. In 1993, the term was adopted as an identity by the social movement of people diagnosed in medical terms with hermaphroditism (Intersex Society of North America)¹⁹. In recent medical language, their conditions are called DSDs (disorders of sex development). Intersex persons have bodies that are neither male nor female. They are born with nonbinary genitals (for instance, both a vagina and a micropenis) or genitals “inconsistent” with internal anatomy (for instance, a vagina and testes) or “mixed” gonads (ovotestes with both ovarian and testicular tissue). Genital “ambiguity” occurs in 1 in 4500 births²⁰. Other cases appear in puberty, and “when all congenital genital anomalies are considered (...) the rate may be as high as 1:200 to 1:300”²¹.

¹⁶ D. Dormor, *op. cit.*, p. 131.

¹⁷ A. Wijffels, *op. cit.*, p. 197–198.

¹⁸ E. Reis, *Bodies in doubt: An American history of intersex*, Baltimore 2009, p.154.

¹⁹ Ch. Chase, *Affronting reason*, (in:) J. Nestle, C. Howell, R. Wilchins (eds.), *GenderQueer: Voices from beyond the sexual binary*, Los Angeles, New York 2002, p. 205.

²⁰ I. Hughes, Ch. Houk, S. Ahmed, P. Lee, *Consensus statement on management of intersex disorders*, “Archives of Disease in Childhood” 2006, Vol. 91, p. 554.

²¹ P.A. Lee *et al.*, *Global disorders of sex development. Update since 2006: Perceptions, approach and care*, “Hormone Research in Paediatrics” 2016, Vol. 85, p. 159.

Intersex newborns and children suffer from the cruel practice of “normalizing” surgery intended to conform their bodies to legal and social norms. The side effect is often chronic pain, eliminating sexual pleasure, and the risk of an incorrect sex assignment, with the irreversible loss of genitals and fertility. Nevertheless, these surgeries continue to occur without medical justification and without informed consent of the body owner²². In Poland, the existence of intersex people is confirmed by medical papers²³.

Nonbinary people are another group. They do not identify as men or women (on the level of gender identity). “Some people have a gender that is neither male nor female and may identify as both male and female at one time, as different genders at different times, or as no gender at all”²⁴. There are at least three variations of nonbinary identity: fixed identity (neither or both, beyond or between), fluid identity or no gender identity.

Most people with nonbinary gender identity belong to the transgender community of people whose gender identity does not fully correspond with the sex they were assigned at birth²⁵. A study among 889 transgender people in the UK revealed the spectrum of their identities:

I have a constant and clear gender identity as a woman – 39.9% (317),
 I have a constant and clear gender identity as a man – 24.8% (197),
 I have a constant and clear non-binary gender identity – 7.9% (63),
 I have a variable or fluid non-binary gender identity – 15.4% (122),
 I have no gender identity – 2.6% (21),
 I am unsure of my gender identity – 6.2% (49)²⁶.

The last four identities leave 32,1% of trans people outside of or uncertain about the binary male/female division. When we remove the uncertain group, nonbinary identities (3–5) account for 25,9% of trans people. In Poland, the transgender

²² S. Monroe, D. Crocetti, T. Yeadon-Lee, *Intersex, variations of sex characteristics, and DSD: The need for change*. Report, University of Huddersfield 2017; J. Greenberg, *Intersexuality and the law: Why sex matters*, New York, London 2012; A. Tamar-Mattis, *Exceptions to the rule: Curing the law's failure to protect intersex infants*, “Berkeley Journal of Gender, Law and Justice” 2006.

²³ M. Szarras-Czapnik, Z. Lew-Starowicz, K. Zucker, *A psychosexual follow-up study of patients with mixed or partial gonadal dysgenesis*, “Journal of Pediatric and Adolescent Gynecology” 2007, Vol. 20; Z. Kolesinska *et al.*, *Changes over time in sex assignment for disorders of sex development*, “Pediatrics” 2014, Vol. 134, No. 3; M. Pisarska-Krawczyk *et al.*, *Nietypowo ukształtowane narządy płciowe lub zaburzenia rozwoju płci. Aspekty medyczne i etyczne* [Ambiguous genitalia or disorders of sex development. Medical and ethical aspects], “Curr. Gynecol. Oncol.” 2014, Vol., 12, No. 4, pp. 259–270.

²⁴ Ch. Richards *et al.*, *Non-binary or genderqueer genders*, “International Review of Psychiatry” 2016, Vol. 48, No. 1, p. 95.

²⁵ V. Valentine, *Non-binary people's experiences in the UK*. Report, Scottish Trans Alliance 2016, p. 92.

²⁶ S. Ellis, J. McNeil, L. Bailey, *Gender, stage of transition and situational avoidance: A UK study of trans people's experiences*, “Sexual and Relationship Therapy” 2014, Vol. 29, No. 3, p. 355.

group accounts for at least 29,7% of nonbinary people²⁷, confirming the existence of persons in Poland who identify beyond the male/female divide.

As most transgender people have binary gender identity (67,9%), they are sometimes opposed to nonbinary gender identity as a legal category, they are frightened that it will be attributed to them, against their wishes. A similar situation exists among intersex communities.

A study among intersex people revealed that 24% of them reported a mixed two-gender identity, 3% reported neither a female nor a male gender identity, and 26% were highly uncertain about belonging to a specific gender²⁸. Thus, 27% of intersex people have nonbinary gender identity. The others, accounting for 73%, are intersex men or intersex women. Therefore, the intersex social movement as a whole is not very interested in third gender options.

The Organization Intersex International focuses on the campaigning against “normalizing” surgery and discrimination on the grounds of sex characteristics. As these abuses result directly from the notion that intersex bodies are disordered, they call for “depathologising variations in sex characteristics in medical guidelines, protocols and classifications”²⁹. They accept a particular version of a third gender option in documents: “options other than ‘male’ and ‘female’ should be available for all individuals regardless whether they are intersex or not”³⁰. However, they emphasize that most intersex people have binary male or female gender identity and are at risk of being misgendered when someone presupposes that being intersex equals being nonbinary³¹.

The relation among intersex people (A), transgender people (B), and nonbinary people (C) can be visualized by three crossing circles as in Figure 1.

²⁷ M. Świder, M. Winiewski, *Sytuacja społeczna osób LGBTa w Polsce. Raport za lata 2015–2016* [The social status of LGBTa people in Poland. Report 2015–2016], KPH, Warszawa, 2017, p. 19.

²⁸ K. Schweizer, F. Brunner, Ch. Handford, H. Richter-Appelt, *Gender experience and satisfaction with gender allocation in adults with diverse intersex conditions (divergences of sex development, DSD)*, “Psychology and Sexuality” 2014, Vol. 5, No. 1, p. 56.

²⁹ D.C. Ghattas, *Standing up for the human rights of intersex people – how can you help?* ILGA Europe, OII Europe, Brussels 2015, p. 13.

³⁰ *Ibidem*, p. 22.

³¹ M. Carpenter, *The ‘normalisation’ of intersex bodies and ‘othering’ of intersex identities*, (in:) J. Scherpe, A. Dutta, T. Helms (eds.), *The legal status of intersex persons*, Cambridge, UK 2018, p. 504.

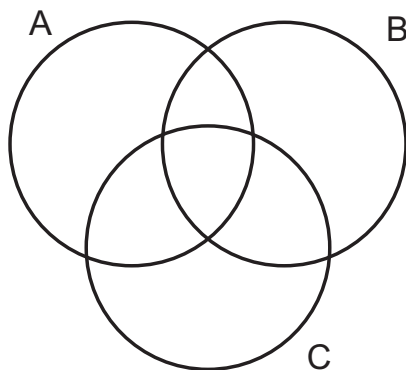


Fig. 1. The relation among intersex people (A), transgender people (B), and nonbinary people (C)

Some intersex people are also trans (8–20%)³², some are also nonbinary (27%)³³. Some transgender people are intersex, and some have nonbinary identity (25,9%)³⁴. Some nonbinary identities are also inter, and nearly all are trans, as their birth certificates do not conform to their gender identity. There is also a common group among these three groups: people who are inter, trans and nonbinary. For example, intersex activist Hida Viloría, who was born intersex, later received a corrected birth certificate, and she identifies as a nonbinary person (but prefers the pronoun *she*)³⁵. However, most intersex people are not trans and not nonbinary (they are men and women with some intersex biological traits). And most transgender people have a binary gender identity. All these data are important to construct adequate regulations that respond to the needs of these groups.

The simplest need is expressed by the adult people with nonbinary gender identity. Nonbinary activism campaigns first of all “for the rights of nonbinary people to self-determine their gender and to have their gender accurately recorded in documentation which displays gender (...), or to have gender markers removed entirely from such documentation”³⁶.

Vic Valentine has published a report about the experience of nonbinary people in the UK. Most of them, 64% of respondents, “would like to be able to have their legal gender/sex recorded as something other than ‘male’ or ‘female’ on documents”³⁷. According to them, this option would validate their identity. Most

³² P.S. Furtado *et al.*, *Gender dysphoria associated with disorders of sex development*, “Nature Reviews Urology” 2012, Vol. 9, p. 620.

³³ K. Schweizer *et al.*, *op. cit.*, p. 56.

³⁴ S. Ellis *et al.*, *op. cit.*, p. 355.

³⁵ H. Viloría, *Born both: An intersex life*, New York 2017.

³⁶ S. Bear Bergman, M.-J. Barker, *Non-binary activism*, (in:) Ch. Richards, W. Bouman, M.-J. Barker (eds.), *Genderqueer and non-binary genders: Critical and applied approaches in sexuality, gender and identity*, London 2017, p. 34.

³⁷ V. Valentine, *op. cit.*, p. 68.

of them (72.5%) preferred a third gender category. Others were frightened about their safety if documents outed them as nonbinary³⁸.

However, their wish to be legally recognized as a third gender is treated with suspicion by the society, and what the adult nonbinary people want for themselves, society is ready to give not to them but to the intersex newborns, even against the protest from the adult intersex community. I will try to dismantle this issue in the next section.

3. THIRD GENDER OPTION IN DOCUMENTS IN GERMANY AND OTHER COUNTRIES

“For lawyers, and those tasked with creating or supervising the law, the question is how to accommodate individuals outside male-female categories”³⁹. The Council of Europe in 2017 issued the resolution “Promoting the human rights of and eliminating discrimination against intersex people”. This resolution calls on member states to “ensure, wherever gender classifications are in use by public authorities, that a range of options are available for all people, including those intersex people who do not identify as either male or female”⁴⁰. The resolution from 2015, “Discrimination against transgender people in Europe”, urges the inclusion of “a third gender option in identity documents for those who seek it”⁴¹ and promotes legal gender recognition “based on self-determination”⁴².

In Germany, the process of legal recognition of nonbinary persons started when the German Ethics Council (Deutscher Ethikrat) in 2012 published a statement about intersex citizens – and especially intersex newborns – as objects of irreversible medical sex assignments because of a lack of a sex category for their born bodies. According to the Council, a third sex category (“ein drittes Geschlecht”⁴³) is needed to defer sex assignment and give newborns a future that remains open to their own decisions.

³⁸ *Ibidem*, p. 71.

³⁹ P. Dunne, *Towards trans and intersex equality: Conflict or complementarity?*, (in:) J. Scherpe, A. Dutta, T. Helms (eds.), *The legal status of intersex persons*, Cambridge, UK 2018, p. 235.

⁴⁰ Promoting the human rights of and eliminating discrimination against intersex people, Resolution 2191 (2017), 7.3.3., <http://assembly.coe.int/nw/xml/XRef/Xref-DocDetails-EN.asp?FileID=24232&lang=EN> (accessed 4.11.2017).

⁴¹ Discrimination against transgender people in Europe, Resolution 2048 (2015), 6.2.4., <https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-EN.asp?fileid=21736> (accessed 4.11.2017).

⁴² *Ibidem*, 6.2.1.

⁴³ Statement by the German Ethics Council regarding intersex [Stellungnahme des Deutschen Ethikrates zum Thema Intersexualität], Bundestagsdrucksache (BT-Drucks) 17/9088 of 14.2.2012, p. 41.

As a result, since 2013, according to the German Civil Status Act – Personenstandsgesetz (PStG) §22(3), gender can be left blank on birth certificates: “Where the child cannot be assigned to either the female or the male sex, its civil status is to be recorded in the register of births without such declaration”⁴⁴.

Intersex organizations opposed this regulation⁴⁵, as it seems that leaving gender blank is mandatory for all intersex newborns (children who cannot be designated male or female) when most of them, as we know, will have a binary gender identity. In practice, it was not mandatory, as during the initial two years, only 12 newborns were left without sex assignment out of 150–340 intersex births per year in Germany⁴⁶. However, there was a risk of mandatory interpretation⁴⁷. The regulation was not satisfactory for the adult intersex and nonbinary people.

In 2014, an adult intersex person named Vanja, who identifies as neither a woman nor a man (nonbinary identity), applied to the registry office to correct their⁴⁸ birth certificate. They wanted to delete the *female* sex entry and replace it with *inter/diverse*. The option to leave the gender entry blank was not acceptable to them. “The registry office’s rejection of their application was confirmed by the Federal Supreme Court (Bundesgerichtshof – BGH) on 22 June 2016. The applicant challenged this decision before the Federal Constitutional Court (Bundesverfassungsgericht – BVerfG)”⁴⁹.

In 2017, the Federal Constitutional Court answered the challenge and stated that the option of leaving the gender entry blank was not sufficient, as people who are beyond the male/female binary are not genderless: “the complainant [Vanja] does not see herself as a genderless person, but rather perceives themselves as having a gender beyond male and female”⁵⁰. The Press Release reported: “The provisions of civil status law are incompatible with the Basic Law’s requirements to the extent that §22(3) of the Civil Status Act (Personenstandsgesetz – PStG) does not provide for a third option – besides the entry ‘female’ or ‘male’, allowing for a positive gender entry. (...) the Basic Law, Grundgesetz – GG also protects

⁴⁴ Gesetz zur Änderung personenstandsrechtlicher Vorschriften of 7.5.2013 (Bundesgesetzblatt [BGBl.], Teil I, p. 1122).

⁴⁵ D.C. Ghattas, *op. cit.*, p. 22.

⁴⁶ T. Helms, *The 2013 German law: Analysis and criticism*, (in:) J. Scherpe, A. Dutta, T. Helms (eds.), *The legal status of intersex persons*, Cambridge, UK 2018, pp. 373–374.

⁴⁷ N. Althoff, *Gender diversity in law: The German perspective*, (in:) J. Scherpe, A. Dutta, T. Helms (eds.), *The legal status of intersex persons*, Cambridge, UK 2018, p. 399.

⁴⁸ I use singular pronouns *they/their/them/themselves* as it is accepted in formal English for persons who are beyond male/female identity. “A writer (or speaker) may also use *they* to refer to a specific, known person who does not identify with a gender-specific pronoun, such as *he* or *she*”. Chicago Manual, 3 April 2017, <http://cmosshoptalk.com/2017/04/03/chicago-style-for-the-singular-they/> (accessed 2.11.2017).

⁴⁹ T. Helms, *op. cit.*, p. 377.

⁵⁰ Bundesverfassungsgericht, Civil status law must allow a third gender option. Press Release No. 95/2017 of 08 November 2017, <http://www.bundesverfassungsgericht.de/SharedDocs/Pressemittelungen/EN/2017/bvg17-095.html> (accessed 9.11.2017).

the gender identity of those who cannot be assigned either the gender ‘male’ or ‘female’ permanently”⁵¹. According to the decision, Civil Status law must allow a third gender (*Geschlecht*)⁵² option in all official records, but the third option is to be voluntary, based on self-determination and not mandatory for any group.

In December 2018, a new version of §22(3) of the Civil Status Act was accepted: “Where the child cannot be assigned to either the female or the male sex, its civil status is to be recorded in the register of births without such declaration *or with declaration ‘divers’*”⁵³. Therefore, in Germany today, there are four legal gender categories: männlich ‘male’, weiblich ‘female’, divers ‘diverse’, and unspecified/empty box. Adult persons can apply to correct their birth certificate if they “cannot be assigned to either the female or the male sex” and have medical certification of being intersex. Therefore, self-determination is available only within a medically defined group of people. Again, both intersex and nonbinary transgender people are not satisfied.

The 2018 regulation suits adult intersex people who identify as nonbinary in gender. For most intersex people, this is a mistaken regulation. 1) Adult intersex people with binary identity are at risk of misgendering because being intersex was linked to having nonbinary gender identity. 2) Intersex newborns, at whom the regulation was directed, are at risk of being stigmatized by third gender options in birth certificates before they can state their gender identity. 3) Most transgender noninter people are excluded from the third gender option even if they identify as neither male nor female.

This regulation seems to mistakenly presuppose that having some sort of sex characteristics is connected with having a nonbinary gender identity. However, I think that the source of inadequacy may be a kind of precaution: this regulation limits the extent of people eligible for *divers* gender identity to people who can additionally confirm their identity by sex characteristics. This regulation is as minimal as it can be.

There is a simple way to correct the mistake, namely, to allow all people to self-determine their gender identity. Sex assignment at birth is always provisional because gender identity is something personal and established on the grounds of self-determination. However, even if legislators have knowledge about all these details, they are thinking about their voters – who are not so well informed – and they are not ready to change the binary tradition. In such a case, biological

⁵¹ *Ibidem*.

⁵² The German term *Geschlecht* is the equivalent to both *sex* and *gender*, like the Polish term *pleć*.

⁵³ “Kann das Kind weder dem weiblichen noch dem männlichen Geschlecht zugeordnet werden, so kann der Personenstandsfall auch ohne eine solche Angabe *oder mit der Angabe ‘divers’* in das Geburtenregistereingetragen werden” (PStG) 22(3), <https://www.gesetze-im-internet.de/pstg/PStG.pdf> (accessed 19.04.2022).

descriptions and medical procedures are more acceptable to society than is self-determination.

Generally, change is progressive, there has been a small step in the right direction and this is of great significance for social education. In Poland, there are voices demanding such legislation⁵⁴. There is hope that parents of intersex newborns, seeing people living openly as the third sex/gender, seeing that there is a place in society for such persons, can stop asking for “normalizing” surgery for their children. It seems that Germany needs one gender law for both intersex and transgender people⁵⁵ and a third option available on the grounds of declaration, as it is adopted in California.

In California, the Gender Recognition Act was approved by the Governor in 2017. It allows people to self-select the nonbinary gender marker on birth certificates, IDs, and drivers’ licenses. No medical treatment or court order is needed for adults, just an affidavit. Under this law, intersex, transgender, and nonbinary people can self-determine their identity as female, male, or nonbinary. In the case of intersex children, “physicians assign a provisional gender designation with the knowledge that the child may later identify differently. An option of a non-binary gender designation on state-issued identification documents would allow intersex people, like transgender and nonbinary people, to be able to use state-issued identification documents that accurately recognize their gender identification as female, male, or nonbinary”⁵⁶.

However, passports are issued by federal institutions, and nonbinary gender markers in passports are not available in the entire US. In 2016, Jamie Shupe from Oregon received a court order recognizing their sex as nonbinary, they have non-binary birth certificates, IDs, and driver’s licenses, but the US State Department refused to issue a passport with a nonbinary identity⁵⁷. Dana Zzyym, an intersex and nonbinary person, sued the State Department and continues to fight for a non-binary passport⁵⁸.

Alex MacFarlane was the first person in Australia to receive a passport with the sign X in the sex box in 2003⁵⁹. Australia recognizes that a citizen might be

⁵⁴ A. Gawlik, A. Bielska-Brodziak, *Dzieci bez płci. Jak polski prawodawca rozwiązuje problemy osób interseksualnych*. Część I [Sexless children. How Polish legislators resolve the problem of intersex children. Part I], “Prawo i Medycyna” 2016, Vol. 63, No. 18, p. 26.

⁵⁵ N. Althoff, *op.cit.*, p. 411.

⁵⁶ Senat Bill No. 179, p. 3, http://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201720180SB179 (accessed 10.10.2019).

⁵⁷ J. Greenberg, *The legal status of intersex persons in the United States*, (in:) J. Scherpe, A. Dutta, T. Helms (eds.), *The legal status of intersex persons*, Cambridge, UK 2018, p. 341.

⁵⁸ *Ibidem*.

⁵⁹ C. Fenton-Glynn, *The legal status of intersex persons in Australia*, (in:) J. Scherpe, A. Dutta, T. Helms (eds.), *The legal status of intersex persons*, Cambridge, UK 2018, p. 251.

neither male nor female⁶⁰. Since 2011, citizens have had a third sex category as an option in passports. Since 2013, all adult people have had three options from which to choose in their passports: M (male), F (female), and X (Indeterminate/Intersex/Unspecified). For an X identification, the medical practitioner/psychologist's confirmation of being an intersex person or person with a nonbinary identity is required. Both transgender and intersex people are eligible. There is "no need for the birth certificate to be amended"⁶¹. The law for passports is the same for intersex and transgender adults. In Australia, passports are issued on the federal level, but birth certificates are under the jurisdiction of states and territories. In 2014, the X marker was introduced on birth certificates in the Australian Capital Territory, ACT. Intersex activists protested. According to them, X markers should not be applied when births are registered, they should only be used when people are able to consent⁶². Indeed, the third gender marker in documents is socially perceived as a kind of stigma, and the better option seems to be the entry "not specified" and waiting for the child's choice⁶³.

Therefore, even if intersex newborns led to the third gender option in documents, the option is better applicable to adults or nonbinary people who are able to consent, as well as to intersex and transgender people if they identify as nonbinary. The sex assignment at birth is provisional because gender identity can be inconsistent with sex characteristics. Gender identity is the self-declaration of a particular person, and third gender identity is no exception. In Malta, Argentina, Denmark and Ireland, transgender recognition is based on "self-declaration and no form of medical proof"⁶⁴. The legal status of third gender identity and a third option in identity documents based on the principle of self-determination is in the common interest of trans and intersex communities⁶⁵.

4. A NONBINARY CONCEPT OF SEX CHARACTERISTICS AND GENDER IDENTITY

Intersex persons undermined "the myth of a rigid biological binary"⁶⁶ and nonbinary gender identities that are complementary to this challenge. The binary

⁶⁰ T. Bennett, *No man's land: Non-binary sex identification in Australian law and policy*, "UNSW Law Journal" 2014, Vol. 37, No. 3, p. 855.

⁶¹ C. Fenton-Glynn, *op. cit.*, p. 251.

⁶² *Darlington Statement: Joint Consensus Statement from the Intersex Community Retreat in Darlington, March 2017*, (in:) J. Scherpe, A. Dutta, T. Helms (eds.), *The legal status of intersex persons*, Cambridge, UK 2018, p. 13.

⁶³ N. Althoff, *op. cit.*, p. 403.

⁶⁴ *Ibidem*, p. 404.

⁶⁵ P. Dunne, *op. cit.*, p. 240.

⁶⁶ *Ibidem*, p. 236.

male/female divide is too simple to reflect the empirical data. We need a more detailed concept of sex and gender characteristics to integrate existing information. Trying to organize the data, sex characteristics and gender characteristics can be divided into at least seven important layers: sex chromosomes, gonads, internal sex organs, external genitals, secondary sex characteristics, gender identity, and legal sex/gender. The first five are biological, and the last two are psychological and social. Of course, more layers can be added: hormones, language or gender expression.

The next step is to describe each of the layers as a continuum of characteristics. There are people with nonbinary chromosomes (XXY), people with nonbinary gonads (ovotestes), people with hemi-uterus and one seminal vesicle, people with both a vagina and micropenis, people with both developed breasts and facial hair, and people who identify as neither a man nor a woman⁶⁷.

On every layer, the continuum can be divided into three spectra: femaleness, nonbinary, and maleness. Nonbinary means being outside male/female division. Nonbinary also exists because of the clash of layers (for instance, a person has “male” XY chromosomes and a vagina).

The sex/gender of a particular person is the cluster of characteristics from the various layers. Each layer can be inconsistent with other layers, and each layer can have a nonbinary form. Under this model, being intersex is not a disorder, and having nonbinary gender identity is not a phantasy. The groups are no longer anomalies, but they are incorporated into this nonbinary model of sex/gender characteristics.

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⁶⁷ R. Ziemińska, *Niebinarne i wielowarstwowe pojęcie płci* [A nonbinary and multi-layered conceptualization of sex/gender], Warszawa 2018, p. 137.

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