

Gender and Law

Abstract

Currently, the terms sex and gender are the subject of much debate. Recently, the Czech courts have had the opportunity to comment on these terms in the case of a non-binary person who was assigned male sex at birth and whose application to change their birth number to neutral or female was denied because they did not meet the condition for undergoing a sex change under the current legislation – they did not undergo a surgical procedure that rendered her unproductive. In other words, she has not undergone the castration required by law. In their decisions, the Supreme Administrative Court and the Constitutional Court provide an interpretation of gender, its conception, characteristics and its role in the Czech legal system. The opinions of these highest courts in the Czech Republic not only reflect the social understanding of the issue of gender reassignment, but also shape the social understanding through their authoritative interpretation of these concepts in the context of the legal order. Therefore, it is relevant and necessary to critically analyse these decisions, which is the aim of this paper.

In the first part, critical tools and ideas are introduced, which in the second part serve as ideological resources for the critique of judicial decisions. First, Critical Legal Studies and its understanding of law in relation to politics is introduced, followed by feminist legal theory, which brings the concept of gender into legal theory, and last, the work of Judith Butler is presented, which brings, among other things, a performative understanding of gender and the concept of heterosexual hegemony.

The second part critically analyses the court decisions and the related legislation on gender reassignment. The first area of criticism of the decisions is the attempt, in particular by the Constitutional Court, to depoliticize the case at hand. The paper starts from the Critical Legal Studies assumption of the inherent politicisation of the law and puts forward arguments why the decision in the case under discussion could not have been non-political. The second area of critique is the essentialist conception of sex (gender) put forward by the courts, which is analysed through the work and theory of gender by Judith Butler. A third area of criticism of the courts' decisions is their reasoning in defence of forced sterilisation as a condition for gender reassignment. The fourth area of critique is the assumption of gender binary that the court decisions operate with.

The thesis concludes that the courts rely on a partially modified biological essentialism in interpreting the concept of gender. It presents arguments that such a conception of sex and

gender leads to a harmful normalization of the identities, sexualities and bodies of all people, with the greatest impact on trans* and non-binary people.

This thesis deliberately avoids specific prescriptive proposals for solutions to the issues at hand, given that the author is cis man, and therefore is intended to serve more as a contribution to the broader debate about gender and its manifestations in the legal order, as the voices of trans* and non-binary people whose lives are most affected by the outcome of that debate should be heard in this ongoing public debate.

Keywords: gender, trans*, feminism