UNIWERSYTET ZIELONOGÓRSKI

DYSKURS PRAWNICZY I ADMINISTRACYJNY 4/2024 ISSN 2657-926X

Martyna Łaszewska-Hellriegel
University of Zielona Góra
ORCID: 0000-0002-2212-371X
mail: m.laszewska-hellriegel@wpa.uz.zgora.pl

Gender Reassignment – the Right to Self-Determination – New Regulation in Germany

Keywords: German law, personal rights, right to self-determination

Summary. As of 1st November 2024, German residents can register their name and gender entry at the registry office with much greater ease than was previously possible. While the law has broad public support, criticism can also be heard. The purpose of this article is to present the main points of the new regulation as well as to show the criticisms, in particular regarding its impact on family law and the problem of its compatibility with the German Constitution.

Zmiana płci – prawo do samostanowienia – nowe regulacje w Niemczech

Słowa kluczowe: prawo niemieckie, prawa osobiste, prawo do samostanowienia

Streszczenie. Od 1 listopada 2024 r. obywatele Niemiec mogą zarejestrować swoje nazwisko i płeć w urzędzie stanu cywilnego znacznie łatwiej niż dotychczas. Chociaż ustawa cieszy się szerokim poparciem społecznym, pojawiają się również głosy krytyki. Celem niniejszego artykułu jest przedstawienie głównych założeń nowej regulacji, a także wskazanie krytyki, w szczególności dotyczącej jej wpływu na prawo rodzinne i problemu jej zgodności z niemiecką konstytucją.

1. Introduction – Background – Status Quo of Existing Regulations

On the first of November 2024 by virtue of the Law on Self-Determination on Gender Entry (Gesetz über die Selbstbestimmungin Bezug auf den Geschlechtseintrag von 19. Juni 2024[1] –SBGG), German residents can register their name and gender entry at the civil registry office. While the law has broad public support, criticism can also be heard. The current debate focuses on the rights of transgender[2], intergender[3] and non-binary people[4].

[1] Act from 19 of June 2024. BGBl. 2024I no. 206, see under: https://www.gesetze-im-internet.de/sbgg/SBGG.pdf [Accessed on: 22.11.2024].

[2] A person whose sex marked at birth is incompatible with gender identity.

[3] A person born with differential development of sexual characteristics.

[4] A person who does not feel only female or only male.

Until Nov. 1, 2024, the Transsexuality Act (Transsexuellgesetz[5] TSG) was in effect in Germany. When the Transsexuality Act went into effect in 1981, transgender people in West Germany were able for the first time to obtain documents that corresponded to the reality of their lives (in the GDR, this possibility had already existed)[6]. The law was therefore an important step. However, the law had one fundamental mistake – it was, in the opinion of many constitutionalists, unconstitutional – and in several respects. The German Federal Constitutional Court (*Bundesverfassungsgericht* – BVerfG), in several proceedings, found the requirements for official sex reassignment to be invalid[7]. These included, for example, the minimum age limit or the condition for gender reassignment surgery, which remained in effect until 2011[8]. With each decision of the BVerfG, it became clearer that TSG's restrictive standpoint was not in line with the German Constitution. In one of its most recent rulings, the BVerfG stated regarding the so-called third sex:

> general personal rights also protect [...] gender identity [...], which is an essential constitutive aspect of one's personality. Gender assignment is of paramount importance for individual identity under the given conditions; it usually occupies a key position in both self-image and how a person is perceived by others[9].

According to § 4 (3) of the TSG, there was an obligation to provide two medical opinions obtained at the applicant's expense, on the basis of which the judge made a decision on the applicant's official sex[10]. Experts now rely primarily on the self-description of a person's sex, which should be accepted by the state authority[11]. This also applies to children and adolescents[12]. The paradigm of pathologization,

---

[5] Transsexuality Act (Transsexuellengesetz) from 10. September 1980 BGBl. I, p. 1654.

[6] Decree of the Minister of Health (Verfügung zur Geschlechtsumwandlung von Transsexualisten) 27.02.1976, see: U. Klöppel, *Verfügung zur Geschlechtsumwandlung von Transsexualisten*, *im Spiegel der Sexualpolitik der DDR*. https://lernen-aus-der-geschichte.de/Lernen-und-Lehren/content/11667 [Accessed on: 18.12.2024].

[7] Judgements BVerfG NJW 1982, 2061 and NJW 1993, 1517 (age limit of 25); BVerfG NJW 2007, 900 (application of TSG to foreigners); BVerfG NJW 2008, 3117 (marriage as a prerequisite for gender reassignment of married transsexuals); BVerfG NJW 2011, 909 (surgical gender reassignment as a prerequisite for entering into a partnership of homosexual couples).

[8] Judgements BVerfG NJW 1982, 2061 and NJW 1993, 1517 (age limit of 25), BVerfG NJW 2011, 909 (surgical sex change as a prerequisite for entering into a partnership of homosexual couples).

[9] Judgements BVerfG NJW 2017, 3643 (3644); t is cited in the explanatory memorandum to the SBGG cf. BT-Drs. 20/9049, p. 19. § 4(3) TSG available at: https://dgti.org/2021/11/06/das-transsexuellengesetz/ [Accessed on: 18.12.2024].

[10] § 4 (3) TSG available at: https://dgti.org/2021/11/06/das-transsexuellengesetz/ [Accessed on: 18.12.2024].

[11] World Medical Association (WMA), 2015: WMA Statement on Transgender People, see under: https://www.wma.net/policies-post/wma-statement-on-transgender-people/ [Accessed on: 18.12.2024].

[12] E. Coleman, A. E. Radix, W. P. Bouman, G. R. Brown, A. L. C. de Vries, M. B. Deutsch at all, *Standards of Care for the Health of Transgender and Gender Diverse Peopl*e, "International Journal of Transgender Health", no. 8 sup1, 2022, p. 259.

in which transgender people were considered to have a personality disorder, is outdated. The World Association for Transgender Health (WPATH) believes that instead of psychiatric diagnosis, the personal state of the person concerned should be the central point on the basis of which the decision on gender entry is made[13]. This made the mandatory medical opinion provided for in the TSG extremely questionable. Intersex people also demanded the introduction of the institution of self-determination, they also have a painful history of pathologization. As recently as 2016, more than 2,000 surgeries were performed on children under the age of 10 to adjust their genitalia to social norms[14]. International organizations have condemned the practice for decades as a violation of human rights. In 2021, they were successful and their demand to ban surgery on children became law. However, according to intersex organizations, the law still contains many loopholes, and intersex people in particular in the care system continue to be pathologized. According to Council of Europe Human Rights Commissioner, Dunja Mijatović, this often occurs when medical professionals are given the right to decide the gender of others[15].

2. Key Points of the Law on Self-Determination

The purpose of the new law is to "standardize laws on gender and name changes in the event of discrepancies between gender registration and gender identity, and to regulate self-determination in order to preserve and protect constitutionally protected gender identity"[16]. The new self-determination law aimed to create standardized regulations for all trans, inter and non-binary people. As early as June 2022, Federal Family Affairs Minister *Lisa Paus* and Federal Justice Minister Dr *Marco Buschmann* presented the first key points, and they were[17]:

– It should be possible to change names and gender at the registry office. A certificate or expert opinion will no longer be required;

[13] See under: https://wpath.org/publications/soc8/ [Accessed on: 18.12.2024].

[14] J. Hoenes, E. Januschke, U. Klöppel, *Häufigkeit normangleichender Operationen „uneindeutiger" Genitalien im Kindesalter. Follow Up-Studie*, Bulletin Texte 44, Zentrum für transdisziplinäre Geschlechterstudien/Humboldt-Universität zu Berlin, Berlin, 2019, pp. 43-44.

[15] Commissioner for Human Affairs Dunja Mijatović, 2019: Statement: ICD11 is a stride toward depathologisation of trans people, but more is needed. Strasbourg, 27.05.2019, https://www.coe.int/en/web/commissioner/-/icd11-is-a-stride-toward-depathologisation-oftrans-people-but-more-is-needed [Accessed on:18.12.2024].

[16] See Explanatory Memorandum to Law BT-Drs. 20/9049, p. 2.

[17] See under. https://www.bmfsfj.de/bmfsfj/aktuelles/alle-meldungen/eckpunkte-fuer-das-selbstbestimmungsgesetz-vorgestellt-199378 [Accessed on: 19.12.2024].

– Young people under the age of 18 will continue to depend on the consent of their legal guardians to make a declaration. For those under 14, legal guardians will make the declaration on behalf of the child;
– If young people want their data to be changed, but their parents refuse consent, they can appeal to the family court. The court will then decide whether the consent of one or both parents to change the data can be overturned in court proceedings in accordance with the principle of the best interests of the child;
– The modification is followed by a one-year lockout period, during which no further modification is possible.

Despite the many advantages of the Law on Self-Determination, it also causes some problems and uncertainty, especially in the relationship between parent and child in family law. This is because it is not entirely clear who will be the mother and who will be the father of the child if it is born after the parents have changed their gender declaration. Another contentious point is the compatibility of the new law with the German Constitution.

3. Family Law Problems

3.1. Kinship

With regard to parental authority § 11(1) of the SBGG[18] stipulates that the gender entry in the civil registry regarding an existing or future relationship between a person and his children in accordance with § 1591 and §1 592 No. 3 of the BGB[19] is irrelevant. In other words: with regard to maternity and paternity by virtue of a judicial determination, biological sex remains decisive. However, this does not limit the circle of potential parents. Since a male-to-female transsexual cannot give birth to a child for factual reasons, so that maternity would be excluded anyway under § 1591 of the BGB. And a male-to-female transsexual would not be able to be recognized as a father according to § 1592 No. 3 BGB because he cannot be recognized as a genetic father[20].

[18] Act from 19 June 2024. BGBl. 2024, I, no. 206, available under: https://www.gesetze-im-internet.de/sbgg/SBGG.pdf [Accessed on: 22.11.2024].

[19] BGB – (Bürgerliches Gesetzbuch BGBl. I S. 42, 2909; 2003 I S. 738), German Civil Code text under: https://www.gesetze-im-internet.de/bgb/BJNR001950896.html [Accessed on: 19.12.2024]. Translation § 1591 BGB: The mother of a child is the woman who gave birth to it, § 1592 BGB The father of a child is a man

1. who is married to the child's mother at the time of the child's birth;
2. who has acknowledged paternity or;
3. whose paternity has been established by a court in accordance with § 1600d or § 182 (1) of the Family and Non-Conflict Proceedings Act.

[20] Ch. Schmidt, *Selbstbestimmungsgesetz und Abstammungsrecht,* „Neue Zeitschrift für Familienrecht", 2024, p. 49.

In terms of its content, § 11 (1) SBGG corresponds to the previous § 11 (1) TSG, which, however, additionally applied to paternity by marriage in accordance with § 1592 No. 1 BGB as well to paternity by acknowledgment in accordance with § 1592 No. 2 BGB. With regard to § 1592 No. 1, 2 BGB, according to § 11 (1) SBGG, the entry of the sex of the parent at the time of the child's birth will be decisive. On the one hand, this leads to a situation in which biological men who change the gender entry will only be able to become the legal parents of the child through a judicial determination of paternity in accordance with § 1592 No. 3 even if they are married to the child's mother at the time of the child's birth or are the child's biological parents and this is undisputed. A pregnant woman's husband can therefore unilaterally prevent the woman from becoming the child's father in accordance with § 1592 No. 1 BGB by making a declaration in accordance with § 2 (1) SBGG. Contradicting other provisions, it is clear that even if a divorce petition is pending, the non-application of § 1592 No. 1 BGB in the context of a so-called tripartite declaration pursuant to § 1599 (2) BGB requires the consent of the mother (or pregnant woman).

Also, prenatal acknowledgment of paternity will become non-binding on the man because it will not be effective if he changes his gender before the birth of the child. While the mother is bound by her consent required under § 1595(1) of the BGB[21]. In this regard, it is not true that § 11 (1) sentence 2 of the SBGG, as stated in the law's explanatory statement: "prevents an unjustifiably better position in comparison with women who have not changed their sex registration"[22]. Rather, this provision puts married women at a disadvantage, as they can no longer rely on their husband's *eo ipso* paternity. The same applies to unmarried women in the case of prenatal acknowledgment of paternity[23].

Another, no less problematic change is that biological women, in addition to motherhood, can perform the parental role previously reserved for biological men by changing their gender entry to "male" (which they can change again after the one-year lockout period of § 5(1) of the SBGG). Same-sex female couples can therefore take advantage of the possibilities offered by the SBGG and achieve shared parenthood by circumventing the adoption law. This not only contradicts previous case law of the Federal Supreme Court (*Bundesgerichtschof* – BGH), according to which the provisions of §§ 1591 and next of the BGB are based on biological sex, not gender under the law of civil status, so that a male-to-female

[21] See commentary *MüKoBGB/Wellenhofer* § 1595 no. 15.

[22] BT-Drs. 20/9049, p. 53.

[23] Preferential treatment of male-to-female transsexuals compared to so-called "cis-women" does not exist because the latter cannot be the father, but according to §1591 of the BGB, can be the mother of the child.

transsexual can only be the father of a child, a female-to-male transsexual can only be the mother[24]. This also means that paternity proceedings initiated by the actual "creator of the child" may be rendered pointless. This is of practical importance, in particular, if the denial of "paternity" is inadmissible under § 1600 (2) BGB.

In conclusion, § 11(1) SBGG puts biological women in a better position, since regardless of their sex entry under the civil status law, they can be the mother under § 11(1) SBGG or the father under § 1592 No. 1 or No. 2 BGB. For biological men, on the other hand, a change of sex under the law of civil status results in the fact that they can only become parents through a judicial determination of paternity, and, furthermore, until the birth of the child, they are not bound by any contract, either marriage or recognition of the child, in relation to their rights under kinship. In this context, one can speculate as to how long the legislature will use the terms "mother" and "father" at all. At least in birth certificates, they are to be replaced in the future by the term "parent" in accordance with § 48 (1a) PStV[25]. § 11 (1) SBGG also refers to "the legal relationship between a person and his/her children"[26]. Such a change is again disadvantageous to children. The BGH emphasized in connection with the registration of a male-to-female transsexual in the birth registry "the child's interest in the specific reproductive participation of the parent"[27].

3.2. Adoption

According to § 11(2) of the SBGG, the legal relationship between a person and the children previously adopted by that person should be independent of the change in gender registration. This provision corresponds to the previous § 11 of the TSG, but seems to be redundant[28]. For the relationship between the adopter and the child adopted by him, it is not relevant. In particular, § 1754 (1) and (2) BGB stipulates that the adoptee by adoption acquires the legal status of the adopter's child (in the case of joint adoption by spouses or adoption of a stepchild: a joint child). The terms "mother" and "father" are used in the BGB different from the rationale for the SBGG, but this does not apply to adoption law[29]. This makes sense insofar as,

[24] BGH NJW 2017, 3379 (3379 ff.); BGH NJW 2018, 471 (471 f.).

[25] Personenstandsverordnung (Civil Status Ordinance) of November 22nd, 2008, (BGBl. I p. 2263 as amended).

[26] See Final Report of the Working Group on Parental Law at the Federal Ministry of Justice, p. 19. (Abschlussbericht des Arbeitskreises Abstammungsrecht im BMJV).

[27] Judgement BGH NJW 2018, s. 471 (472).

[28] Comentry *TSG Nomos-BR/Augstein* TSG § 11 no. 1.

[29] Commenary *BGB BeckOK BGB/Pöcker* § 1755 no. 12.

regardless of adoption, there are still provisions that are related to the parenting of the child[30].

3.3. Parental Rights

Parental rights have been developed several times since the BGB came into force. While originally a distinction was made between legitimate and illegitimate children, as only the former were considered related to the father according to § 1589 (2) of the BGB. Children born out of wedlock were no longer referred to as "related" in terms of terminology.

Since the KindRG came into force in 1998[31] there has been a unified parental law for legitimate and illegitimate children. This is intended to legally trace the biological-genetic origin of the child. This is clearly evident with regard to maternity under § 1591 BGB and judicial determination of paternity § 1592 No. 3 BGB. This will not be discussed below, as the essential elements remain unaffected by Section § 11 (1) SBGG. However, paternity by virtue of marriage (§ 1592 No. 1 BGB) and paternity by acknowledgment (§ 1592 No. 2 BGB) are not intended to favour spouses or the legal parent-child relationship as an alternative to adoption, but rather their purpose is, by means of presumptions, to simplify the process compared to judicial determination of paternity.

With regard to § 1592 No. 1 of the BGB, this purpose is already apparent from the fact that § 1353(1) of the BGB is generally considered to imply an obligation of marital fidelity[32]. In this respect, the system of matrimonial and parental law is consistent. The BVerfG also refers to the fact that the "natural" parental right of Article 6 (2) of the German Constitution (Grundgesetz- GG)[33] explicitly states that the legislator is obliged to "ensure, assign paternal rights depending on the child's origin"[34]. However, this does not result in an obligation to genetically establish paternity from a paternity determination under § 1592 No. 3 BGB in each individual case. Rather, "it is sufficient to infer paternity from certain factual circumstances and social situations in order to draw conclusions about the origin of the child and, on the basis of this presumption, assign legal parental status, if

[30] Commentry *MüKoBGB/Roth* § 1353 No. 40; *BeckOK BGB/Hahn* § 1353 no. 10; *HK-BGB/Kemper* §1353 No. 9, BT-Drs. 7/4361, p. 7.

[31] Act on the Reform of Parent and Child Law (Gesetz zur Reform des Kindschaftsrechts) from 1 December 16, 1997, BGBl. I 2942, p. 946.

[32] Commentry *MüKoBGB/Roth* § 1353 No. 40*; BeckOK BGB/Hahn* § 1353 no. 10; *HK-BGB/Kemper* § 1353 No. 9; *Jauernig/Budzikiewicz BGB* § 1353 No. 4; *BeckOGK/Erbarth BGB* § 1353 nrb. 572; BT-Drs. 7/4361, p. 7.

[33] German Constitution (Grundgesetz für die Bundesrepublik Deutschland), BGBl. I p. 2478.

[34] Judgment BVerfG NJW 2003, pp. 2151-2152.

this essentially leads to a coincidence of biological and legal parenthood[35]". In this regard, the paternity of the husband "has always been assumed not only in our legal culture" the same applies to paternity acknowledged with the consent of the mother[36]. The BVerfG, applying the principles, stresses that it is a legitimate concern "to legally assign children to their biological parents in such a way that their descent is not attributed to two legal mothers or fathers against their biological mothers or fathers[37]". This does not mean that biological parenthood is impossible outside of the mentioned constellation, but it highlights its fundamental importance. The Federal Supreme Court also follows this line when it emphasizes that according to § 1592 Nos. 1 and 2 of the BGB, a father is a person "where, based on the social relationship with the mother, it can be assumed from a standardized perspective [...] that he is the genetic father of the child"[38].

§ 11 I 2 of the SBGG thus contradicts these constitutional requirements, prescribing the application of paternity by marriage and paternity by acknowledgment to persons for whom the presumption of biological-genetic paternity is not only improbable from the outset but is absolutely impossible.

4. Problems of Constitutional Law

4.1. Protection of Family, Social Relations and Privacy – the Trinciple of Equality

Whether it would be constitutionally permissible to discontinue the presumption of paternity under § 1592 No. 1 or 2 of the BGB, and instead refer parents and child, in each case, to establish paternity, has not yet been resolved by the BVerfG. However, on the question of the admissibility of the rules of presumption, referred BVerfG to the protection of family and social relations under Article 6 (1) of the GG, and to the protection of privacy under Article 2 (1) of the GG[39]. This will be supplemented by the fundamental right to informational self-determination under Article 2 (1) in conjunction with Article 1 (1) GG. This is relevant insofar as the flip side of the (from the outset erroneous) presumption of paternity in the case of female-to-male transsexuals is that male-to-female transsexuals cannot be recognized as fathers under Section 11 (1) 2 SBGG in conjunction with Section 1592 No. 1, 2 BGB. Even in the case of an existing marriage or in constellations where

[35] Judgment BVerfG NJW 2003, 2151 (2152); similar: BVerfG NJW 1989, 891 (891).
[36] Judgment BVerfG NJW 2003, 2151 (2152).
[37] Judgment BVerfG NJW 2011, 909 (913); Here also the rationale for SBGG BT-Drs. 20/9049, s. 51.
[38] Judgment BGH NJW 2017, 3379 (3381).
[39] Judgment BVerfG NJW 2003, 2151 (2152).

paternity has already been prenatally recognized prior to the transition, mothers and fathers should therefore be referred to a judicial paternity determination procedure. This may constitute an unnecessary interference with the aforementioned fundamental rights.

The fact that a husband or a man who has recognized paternity prenatally can unilaterally remove the basis for the presumption of paternity by means of a statement pursuant to Section 2(1) of the SBGG so that the mother is left alone at the time of childbirth is also questionable with regard to Article 3(2) of the SBGG, as it puts mothers at a disadvantage compared to fathers without there being a compelling reason to do so. This is even more apparent because, according to Article 6(4) of the GG, every mother has a fundamental right to protection and care. In the case of legitimate children, there is also the fact that the *eo ipso* awareness of the existing responsibility from the birth of the child can be a decisive factor in the decision to start a family, with regard to the custody of legitimate children after the declaration of the biological father according to Section 2 I SBGG until paternity is established, Section 1626a (3) BGB should apply by analogy[40].

4.2 Discussions on the Introduction of Joint Maternity

Immediately after the introduction of same-sex marriage in 2017 (which is still not without controversy from a constitutional point of view)[41], there were the first voices in favour of application of § 1592 No. 1 BGB by analogy to the wife of the child's mother[42]. However, the court failed to see that § 1592 No. 1 BGB is a presumption and that therefore both comparable interests and also an unintended regulatory gap are required for the application of interpretation by analogy[43]. The decisions of the appellate courts have therefore rejected joint maternity by analogy[44].

In addition to the discussion in the doctrine, there have also been policy initiatives that also sought to introduce joint maternity. Of particular note here

---

[40] (Indirect) consequences for care result from z § 11 I 2 SBGG. Non-application of § 1592 Nr. 1 BGB is not apparent from the justification for the law.

[41] For not complying with the Constitution see Comment *Dürig/Herzog/Scholz/Badura GG* art. 6 nb. 43; *BeckOK GG/Uhle* art. 6 no. 4.; J. Ipsen, *Ehe für alle – verfassungswidrig?* "NVwZ" 2017, P. 1096 ii.; C. Schmidt *„Ehe für alle" – Ende der Diskriminierung oder Verfassungsbruch?* „Neue Juristische Wochenschrift" 2017, p. 2225 ii; A. Erbarth, *Öffnung der Ehe für alle?* „Neue Zeitschrift für Familienrecht" 2016, p. 536; T. Blome, *Die Geschlechterverschiedenheit der Ehegatten – Kerngehalt der Ehe nach Art. 6 I GG?* „Neue Zeitschrift für Verwaltungsrecht" 2017, p. 1658.

[42] See S. Binder, A. Kiehnle, *„Ehe für alle" – und Frauen als Väter*, „Neue Zeitschrift für Familienrecht" 2017, pp. 742-3; M. Löhnig, *Ehe für alle - Abstammung für alle?* „Neue Zeitschrift für Familienrecht" 2017, p. 643; further in favor of an analogous conclusion: H. Engelhardt, *Die „Ehe für alle" und ihre Kinder*, „Neue Zeitschrift für Familienrecht " 2017, pp. 1042-1047.

[43] C. Schmidt *„Ehe für alle"*…, pp. 832-833; *Commentry MüKoBGB/Wellenhofer BGB* § 1592 no. 14.

[44] Judgment BGH, NJW 2019, pp. 153-154 et seq.; Judgment OLG Dresden „Neue Zeitschrift für Familienrecht" 2018, p. 759.

is the final report presented in 2017 by the Working Group on Kinship Law at the BMJV[45] , the partial discussion draft presented by the BMJV in 2019[46], and the proposal by the Bündnis 90/Die Grünen parliamentary group from the 19th parliamentary term[47]. All of these proposals were unsuccessful. They all positioned the law of origin merely as an appendix to marriage law, *i.e.,*. making the child an object, and did not distinguish between the level of the couple's relationship on the one hand and the parent-child relationship on the other[48]. This is because, against the backdrop of a constitutionally defined purpose, the existing regulations do not violate Article 3 (1) of the GG[49]. Rather, shared parenthood between two biological women would degenerate the "natural" parental rights of Article 6 (2) GG into a meaningless wrapper[50]. As well as it would violate Article 3(GG), since same-sex female couples would be in a more favourable position than same-sex male couples[51]. In other words: all previous de *lege lata* and de *lege ferenda* approaches to introduce shared motherhood for biological same-sex couples through the law of consanguinity have failed. Therefore, it is all the more worrisome that the SBGG aims to introduce an appropriate regulation "through the back door", which, moreover, opens the door to abuse beyond its actual scope of application[52].

5. Conclusions

Key points of the self-determination law were met with almost universal applause[53]. Lesbian and gay, trans and inter gay organizations welcomed the responsible ministries' proposal. Sven Lehmann, a Bundestag member from Cologne and spokesman for queer policy in the federal government, hailed the key points as "a milestone for human rights"[54]. The SPD queer working group agreed: The upcoming regulation is long overdue and means dignity and recognition[55]. Many other organizations

[45] See: https://www.bmj.de/SharedDocs/Downloads/DE/Gesetzgebung/DiskE/DiskE_Reform_Abst ammungsrecht.pdf?__blob=publicationFile&v=3. [Accessed on: 7.01.2025].

[46] BT-Drs. 19/2665.

[47] Ch. Schmidt, *Einführung einer Co-Mutterschaft im Abstammungsrecht – Rechtspolitisch sinnvoll, verfassungsrechtlich geboten?* „Neue Zeitschrift für Familienrecht " 2022, pp. 909-910.

[48] See judgments: KG NJOZ 2021, 840 (845 ff.); OLG Celle NJOZ 2021, 1123 (1130 ii.).

[49] Art. 3 (1) GG "All people are equal before the law".

[50] Art. 6 (2) GG "The care and upbringing of children is a natural right of parents and their primary duty. Their actions are supervised by the state community".

[51] C. Schmidt, *Einführung einer Co-Mutterschaft*…p. 912.

[52] See. Schmidt, *Einführung einer Co-Mutterschaft*…p. 911.

[53] *Ibidem*.

[54] See: https://www.bmfsfj.de/bmfsfj/aktuelles/alle-meldungen/sven-lehmann-riesiger-fortschritt-fuer-die-geschlechtliche-selbstbestimmung-229748 [Accessed on: 7.01.2025].

[55] See: https://spdqueer.spd.de/aktuelles/aktuelles/news/beschluss-selbstbestimmungsgesetz/12/04/2024 [Accessed on: 7.01.2025].

were also convinced of the traffic light coalition. The German Women's Council and the Association for the Protection of Children expressed their support for the self-determination law[56] as did the German Conference of Psychotherapists[57] and the professional associations for child and adolescent psychiatry. The Social Democratic Women's Working Group (ASF) has already taken initiatives for a "comprehensive regulation on gender self-determination" in 2020; the Paritätische Wohlfahrtsverband (Parity Welfare Association) produced a detailed document on the subject the following year.

However, some critical points remain. As a result, it can be summarized that § 11(1) of the SBGG is a provision that not only restricts the rights of biological men and biological women: the former because, after a change in civil registration, they can only become parents of a child by virtue of a court decision, and the latter because they cannot rely on their husband (or partner who has acknowledged paternity) not to withdraw this declaration before the birth. In addition, §11(1) of the SBGG does not fit with the existing system of kinship and adoption law. This is because the main difference between the two areas of law to date is that kinship law legally tracks biological-genetic parentage, while adoption law establishes a legal parent-child relationship separate from biological parentage[58]. In contrast, the new regulation for the first time allows legal and biological parentage will be distinct from each other, without this being an intended consequence of the statutory presumptions[59]. In this regard, § 11(1) of the SBGG should be consistent with the BVerfG's requirements for kinship law. For a kinship law that does not base its primary attribution on the biological function of procreation withdraws the basis of the "natural" parental right from Article 6 (2) of the GG. At the same time, the SBGG draft is good for changes in parental law: after all, who can have anything against strengthening the rights of a marginalized minority?

References

Binder S., Kiehnle A., *„Ehe für alle" – und Frauen als Väter*, „Neue Zeitschrift für Familienrecht" 2017.
Blome T., *Die Geschlechterverschiedenheit der Ehegatten – Kerngehalt der Ehe nach Art. 6 I GG?* „Neue Zeitschrift für Verwaltungsrecht" 2017.

[56] See: https://www.frauenrat.de/stellungnahme-zum-gesetzentwurf-der-bundesregierung-ueber-ein-selbstbestimmungsgesetz/; https://kinderschutzbund.de/stellungnahme-zum-entwurf-eines-gesetzes-ueber-die-selbstbestimmung-in-bezug-auf-den-geschlechtseintrag-und-zur-aenderung-weiterer-vorschriften/ [Accessed on: 7.01.2025].

[57] See: https://www.bptk.de/pressemitteilungen/selbstbestimmte-aenderung-des-namens-und-personenstands-fuer-trans-personen-endlich-moeglich/ [Accessed on: 7.01.2025].

[58] C. Schmidt *Einführung einer Co-Mutterschaft*…p. 911.

[59] Another issue is the fact that § 1600 ust. 2 BGB protects the socio-family relationship at the secondary level, see. C. Schmidt *Einführung einer Co-Mutterschaft*…p. 911.

Coleman E., Radix A.E., Bouman W.P., Brown G.R., de Vries A. L. C., Deutsch M.B. et.al, *Standards of Care for the Health of Transgender and Gender Diverse People*, "International Journal of Transgender Health", no 23/2022.
Engelhardt H., *Die „Ehe für alle" und ihre Kinder*, „Neue Zeitschrift für Familienrecht" 2017.
Engelmann-Gith H., *Geschlechtliche Selbstbestimmung soll Gesetz werden*, „Weiterdenken" 6/2022.
Erbarth A., *Eroffnung der Ehe fr alle?*, „Neue Zeitschrift für Familienrecht" 2016.
Hoenes J., Januschke E., U. Klöppel, *Häufigkeit normangleichender Operationen „uneindeutiger" Genitalien im Kindesalter. Follow Up-Studie*, Bulletin Texte 44, Zentrum für transdisziplinäre Geschlechterstudien / Humboldt-Universität zu Berlin, Berlin 2019.
Ipsen J., Ehe für alle – verfassungswidrig? „Neue Zeitschrift für Verwaltungsrecht" 2017.
Löhnig M., *Ehe für alle - Abstammung für alle?* „Neue Zeitschrift für Familienrecht" 2017.
Schmidt C., *Selbstbestimmungsgesetz und Abstammungsrecht,* „Neue Zeitschrift für Familienrecht" 2024, pp. 49-61.
Schmidt C., *„Ehe für alle" – Ende der Diskriminierung oder Verfassungsbruch?* „Neue Juristische Wochenschrift", 2017, p. 2225.
Schmidt C., *Einführung einer Co-Mutterschaft im Abstammungsrecht – Rechtspolitisch sinnvoll, verfassungsrechtlich geboten*? „Neue Zeitschrift für Familienrecht" 2022, pp. 909-910.