



Short Version in English:

# Gender diversity in law: the status quo and the deve- lopment of regulatory models for recognizing and protecting gender diversity

Englische Kurzfassung (nicht amtliche Übersetzung zum Gutachten):

## Geschlechtervielfalt im Recht

Status quo und Entwicklung von Regelungsmodellen zur  
Anerkennung und zum Schutz von Geschlechtervielfalt  
(Begleitmaterial Band 8 zur Interministeriellen Arbeitsgruppe)

„Gender diversity in law: the status quo and the development of regulatory models for recognizing and protecting gender diversity“  
(English summary)

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The right to legal recognition of sex and gender identity is recognised as a fundamental and human right, as is protection against discrimination and violence based on gender identity and gender diversity in the context of the principle of non-discrimination. Against this background, the German Institute for Human Rights was commissioned by the Federal Ministry for Family Affairs, Senior Citizens, Women and Youth (BMFSFJ)<sup>1</sup> to prepare a report on gender diversity in law, which has been available since February 2017.<sup>2</sup>

The report entitled “Gender Diversity in Law – Status Quo and Development of Regulatory Models for the Recognition and Protection of Gender Diversity” examines how the legal recognition and protection of the diversity of physical sex development, gender identities and gender expression in Germany against the background of fundamental and human rights can and must be improved. The authors conclude that the current regulations, in particular with regard to the situation of intersex persons<sup>3</sup> and trans/transsexual<sup>4</sup> persons, are inadequate. The expertise is based on legal analyses of the applicable law and a legal comparison<sup>5</sup> as well as a socio-scientific assessment of the civil status regulation for the blank gender entry of intersex newborns (§ 22 para. 3 Civil Status Act – Personenstandsgesetz – PStG), and various types of regulatory models for the recognition and protection of sex and gender identities have been developed (Part 1 and Annex of the report). The report recommends the drafting of a comprehensive umbrella law on the recognition and protection of gender diversity (part 2 of the report).

The development of regulatory alternatives was carried out in consultation with intersex and trans/transsexual persons, their parents, associations, counsellors and academics, and the initial draft of the bill was the subject of written comments by an extended circle of independent organisations with a perspective on inter and trans/transsexuality as well as by scientists and practitioners.

\* This article was originally written in German and has been translated into English by the Federal Ministry for Family Affairs, Senior Citizens, Women and Youth (BMFSFJ).

- 1 The report was prepared on behalf of the BMFSFJ to advise the work of the Interministerial Working Group on Inter- and Transsexuality in the 18th legislature. The Federal Government has used it to illuminate questions and problems by exchanges with experts and interests, to discuss proposals for possible legislative solutions and to submit a final paper.
- 2 N ALTHOFF, G SCHABRAM, P FOLLMAR-OTTO, *Gender Diversity in Law: Status Quo and Development of Regulatory Models for Recognition and Protection of Gender Diversity*, ed. BMFSFJ, Berlin 2017, available in German at the following link <<https://www.bmfsfj.de/blob/114066/e06661c7334f58078eccfc8332db95cc/geschlechtvielfalt-im-recht--band-8-data.pdf>> downloaded on 18.04.2017.
- 3 The term “intersex” refers to persons (inter\*, intersexual, intersex persons) whose physical-biological gender and sex characteristics do not fit into the medical and social norms of male and female bodies. This may be due to the appearance of the chromosomes, the germinal glands or the anatomical development of primary or secondary sexual characteristics. The term thus refers to congenital variations of the sexual characteristics.
- 4 The term „trans/transsexuality“ refers to persons (trans\*, transgendered, transsexual, transient persons) who do not identify themselves (only) with the gender assigned to them at birth or who belong to another gender. The term thus refers to the multitude of sexualities and gender identities.
- 5 Comparative examination was made between selected recent regulatory models for the recognition and protection of gender identity: Malta, Argentina, Denmark, Ireland and Australia. In addition to the legal materials, available experience reports and assessments were also evaluated. The results were prepared in tabular form in a comparative short overview as well as in detailed country overviews, cf. N ALTHOFF, G SCHABRAM, P FOLLMAR-OTTO, footnote 2, Annex 2 <Synoptic legal comparison>.

# 1.

## SOCIAL-SCIENTIFIC ASSESSMENT OF § 22 PARA. 3 OF THE CIVIL STATUS ACT

The focus of the social-scientific assessment was the amendment of the Civil Status Act (PStG), which came into effect on 1 November 2013 and according to which children who “cannot be attributed to the female or the male gender” (...) are to be entered without a gender specification in the register of births (§ 22 para. 3 PStG).<sup>6</sup> This regulation had been adopted by the legislature to address the previous proposals by the German Ethics Council on intersexuality.<sup>7,8</sup>

The number of applications of §§ 22 para. 3 and 27 para. 3 no. 4 of the PStG was recorded in the period from November 2013 to November 2015 by means of a survey among the states by the State Ministries of the Interior. The application practice was assessed by qualitative and quantitative surveys. For this purpose, semi-structured guideline interviews were conducted with relevant professional groups (from the civil registry office, obstetrics units and counselling centres) as well as those affected and their parents. In addition, the professional groups were also involved through quantitative online surveys.

The assessment shows that § 22 para. 3 PStG has so far hardly been applied in practice at all. Based on information provided by the Ministries of the Interior, it is estimated that only about 4 % of intersex children born by medical assessment after its entry into force have been registered with blank gender.<sup>9</sup> The causes include, in addition to a lack of knowledge of the new regulations for medical professional groups and a lack of implementation in forms and IT systems (birth announcements), also application uncertainties as to when the medical conditions for a release respectively a blank gender entry are met. Last but not least, there is the tendency for medical personnel, parents and registrars to assign a supposedly predominant binary gender. Intersex persons and parents of intersex children criticise the risk of stigmatisation of children affected by leaving the registration blank in a still discriminating society, the continuing dominance of differentiation from a medical perspective and the lack of equality of registration under an independent gender category alongside male and female.<sup>10</sup>

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6 Law on the Amendment of the Civil Status Act of 7 May 2013, Federal Law Gazette 2013 Volume I, 1122.

7 GERMAN ETHICS COUNCIL, Opinion of the German Ethics Council Intersexuality, 14 February 2012, German Parliament Printed Matter: Bundestags-Drucksache 17/9088.

8 COMMITTEE ON THE INTERNAL AFFAIRS OF THE GERMAN PARLIAMENT, Recommendation and Report by the Committee on the Internal Affairs of the German Parliament on the Draft Law of the Federal Government – Printed Matter: Bundestags-Drucksache 17/10489 – Draft Law for the Amendment of Provisions of the Civil Status Act (Law on the Amendment of the Civil Status Act – PStRÄndG), German Parliament Printed Matter: Bundestags-Drucksache 17/12192.

9 See N ALTHOFF, G SCHABRAM, P FOLLMAR-OTTO, footnote 2, chapter 4.1.

10 N ALTHOFF, G SCHABRAM, P FOLLMAR-OTTO, footnote 2, chapter 4.1.3.

## 2. LEGAL STOCKTAKING AND REGULATORY PROPOSALS

Within the scope of legal stocktaking, the federal law was searched by means of a full-text search in legal databases for statutory provisions conceptually linked directly or indirectly to sex/gender.<sup>11</sup> The inventory shows that the applicable legal system uses gender as a classification category. Accordingly, there are numerous provisions in a wide range of legal areas, which directly or indirectly differentiate according to gender, or according to which gender-related data are registered or transmitted. The law is predominantly based on a binary gender rule. This excludes persons who do not correspond to the typical binary understanding of gender. This applies particularly to intersex and trans/transsexual persons. If a person does not meet a gender-specific characteristic of a regulation, they are excluded from the regulation. The gender-differentiating rules, which presuppose a specific gender, are not – at least not directly – applicable to persons without a gender entry according to § 22 para 3 PStG. Although applicability can to some extent be established by means of analogy because of the existence of an unintended regulatory gap, legal uncertainties remain, and, as will be shown, application questions cannot always be resolved by means of analogies or be considered appropriate in the light of the fundamental and human rights of intersex and trans/transsexual persons.

In some cases, however, the rules also use binary language, without linking a differentiating legal treatment to the gender. As a rule, this is done with the aim of linguistic equality between women and men. There is no immediate need for change in this case group. These regulations can be interpreted according to fundamental and human rights law in such a way that they encompass all persons irrespective of their gender – and thus, for example, persons with a blank gender entry according to § 22 para 3 PStG. In the long term, they should be progressively improved in favour of gender-inclusive language.

From the other regulations, which actually differentiate according to gender or according to which gender-related data are registered or processed, case groups have been formed for which exemplary proposals for solutions have been developed within the context of the draft law. In what follows, selected results and proposals for the civil status rules governing the registration on gender, the rules on parenthood in family law and the rules on the protection of the physical integrity of intersex infants and young children will be presented.

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11 All the regulations identified in the inventory were transferred into two Excel tables, which are available on the Institute's website (in German): <<http://www.institut-fuer-menschenrechte.de/themen/diskriminierungsschutz/sexuelle-selbstbestimmung-und-geschlechtsidentitaet/geschlechtervielfalt-im-recht/>>.

## 2.1 The Gender Marker in Civil Status Rules

First steps towards the recognition of the rights of intersex and trans/transsexual persons were made by the transsexual law (Transsexuellengesetz – TSG) introduced in 1980 and subsequently amended, as well as the supplement to § 22 para. 3 PStG introduced in 2013 on leaving blank the gender entry for intersex children. More extensive reform requirements have been established by the Federal Constitutional Court with regard to transsexual persons and by the German Ethics Council and the Federal Council with regard to intersex persons.<sup>12</sup> Representatives of the interests of intersex and trans/transsexual persons, state anti-discrimination agencies, science and practice also indicate continuing threats and discrimination.<sup>13</sup>

### 2.1.1 Functions of the Civil Status Register and Importance for the Right to Legal Recognition of Gender

The collection of civil status data is intended to assist with the identification of the individual as well as the assignment of specific rights and obligations. Certification or registration in the civil status is not constitutive, but has the presumption effect according to § 54 PStG (presumption of correctness).<sup>14</sup> The entries have a special evidential function. The civil status resulting from the substantive law (§ 1 para. 1 PStG) must be clearly indicated. In this way, the state interests in the permanence and uniqueness of the civil status and the principle of determining the reality of the civil status, according to which an entry not only corresponds to the truth but also does not lead to misconceptions about the actual legal situation, are combined. This protects trust in the correctness and completeness of the entry.<sup>15</sup> The task of the civil status register is, therefore, to provide clear information about identity and personal status, such as affiliations and partnerships between persons. After an entry or change of a gender registration, the civil status registers have certain notification duties, as also, in particular, to the reporting authorities, which are governed by various laws and regulations.<sup>16</sup>

The regulations on gender entry in the civil status register are a central element of the legal recognition of sex and gender identity, which is required by fundamental and human rights. It is true that the formal, “operational” function of registration law is emphasised, while substantive legal decisions are merely represented.<sup>17</sup> However, by virtue of the documents based on the

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12 Decisions of the FEDERAL CONSTITUTIONAL COURT (BVerfGE) 60, 123; 88, 87; 115, 1; 116, 243; 121, 175; 128, 109; GERMAN ETHICS COUNCIL, footnote 7; FEDERAL COUNCIL, Decision of 14 March 2014, Federal Council Printed Matter: Bundesrats-Drucksache 29/14, pp. 12 ff.

13 In summary, BMFSFJ, Situation of trans- and intersexual Persons. Assessment Information, Berlin, 2016, p. 9ff; FEDERAL ANTI-DISCRIMINATION AGENCY – ADS, Equal Rights – against Discrimination on Grounds of Sex. Report of the Independent Experts’ Committee of ADS, Berlin 2015; K PLETT, Discrimination Potentials against trans- and intersex Persons in German Law, ed. Berlin State Office for Equal Treatment and Against Discrimination, Berlin 2015; D C GHATTAS, Human Rights between the Sexes, ed. Heinrich Böll Foundation, Rheinheim 2013; W FUCHS, D C GHATTAS, D REINERT, C WIDMANN, Study on the Life Situation of Transsexuals in North Rhine-Westphalia, ed. Lesbian and Gay Association in Germany, Cologne 2012.

14 A DUTTA, Allocation to a Gender according to German Law, in: Family and Civil Status. A Handbook on German and International Private Law, ed. Hepting/Dutta, Verlag für Standesamt, Frankfurt am Main 2015, 2nd ed., para. I–10.

15 S L GÖSSL, Substantive-legal Approximation of the Registration of Persons with Impediments, in: Practice of International Private and Procedural Law (IPRax) 2015, p. 273, 276.

16 See § 68 PStG, § 57 para. 4 PStV, et al. § 34 of the Federal Law on Registration (Bundesmeldegesetz).

17 GERMAN FEDERAL SUPREME COURT, decision of 22 June 2016, XII ZB 52, 15, para. 15; T HELMS, Do We need a Third Sex?, De Gruyter, Berlin, 2015, p. 26.

register entry, such as birth certificates and passports, the registered gender is externally presented, as has also been recognised in the case-law of the Federal Constitutional Court and the European Court of Human Rights on the right to self-determination of gender identity and protection of the intimate sphere.<sup>18</sup>

The courts emphasise two different components of the right to the recognition of gender identity in terms of the universal personality right and the right to private life: on the one hand, the right to self-determination of individual identity and its external representation (protection of identity) and thereby protection against a wrongly perceived misattribution of gender, on the other hand the protection of the intimate sphere (protection of integrity) from unintentional disclosure and thus also against a need for justification with respect to society and the authorities.<sup>19</sup>

Recognition must be non-discriminatory; the diversity of the sexes/gender in terms of physical development, identity and expression is one of the bases for the prohibition of discrimination. The principle of non-discrimination based on gender in article 3 para. 3 of the Basic Law (Grundgesetz – GG) is increasingly considered to include intersex and trans/transsexual persons.<sup>20</sup> This is already enshrined in the European Union’s prohibition of gender discrimination.<sup>21</sup>

### 2.1.2 Gender Registration in the Civil Status Register

Against this backdrop, the current civil status regulations on the gender marker must be considered critical:

The allocation of a person to a gender takes place at the time of birth by registration of the gender in the register of births (§ 21 para. 1 no. 3 PStG). There are no statutory regulations on the registration of gender, but practice, case-law, literature and administrative provisions specify “male” and “female”.<sup>22</sup> In addition, § 22 para. 3 PStG states that since 2013 the gender specification in the birth entry remains open when a “child cannot be attributed to either the female or the male gender”.<sup>23</sup> According to the wording of § 22 para. 3 of the PStG, the blank gender entry for intersex children is compulsory and is limited in its application to physically

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18 See N ALTHOFF, G SCHABRAM, P FOLLMAR-OTTO, footnote 2, Chapter 3.1.

19 See EUROPEAN COURT OF HUMAN RIGHTS, *Y.Y./Turkey*, 10 March 2015, application No. 295/07, para. 56ff.; FEDERAL CONSTITUTIONAL COURT, decision of 11 January 2011, 1 BvR 3295/07, para. 51.

20 See C LANGENFELD, Commentary on article 3 of the Basic Law (GG), in: GG Comment, eds Maunz-Dürig, 78. supplementary delivery, 2016, para. 42, with further references; L ADAMIETZ, *Sex as Expectation*, Nomos, Baden-Baden 2011.

21 See, e.g. COURT OF JUSTICE OF THE EUROPEAN UNION, *P. v S.*, judgement of 30 April 1996, Case C-13/94 [1996] ECR I-2143 (on transsexual persons); in detail S AGIUS, C TOBLER, *Transsexual and Intersexual Persons*, European Communities, Luxembourg 2011; F WELTI, commentary § 1 AGG, in: *General Equality Law. A Comment from a European Perspective*, ed, D Schiek, Sellier, Munich 2007, para. 27, 32; EUROPEAN COMMISSION, Report on the Application of Directive 2014/113/EC, COM (2015) 190final, p. 5.

22 No 21.4.3 General Administrative Provision to the Civil Status Act (PStG-VwV); B GAAZ, commentary § 21 PStG, in: *Civil Status Act, manual commentary*, ed. Gaaz/Bornhofen, Verlag für Standesamt, Frankfurt am Main 2014 (3rd edition), para. 30; A DUTTA, footnote 14, para. IV-224.

23 Introduction with Reference to the Recommendations of the GERMAN ETHICS COUNCIL (fn. 7) with the Law on the Amendment of the Civil Status Act of 07 May 2013, printed matter 17/10489.



intersex persons.<sup>24</sup> The gender entry can be left open indefinitely, and a male or female gender entry after birth can also be erased retrospectively in the case of intersex persons.<sup>25</sup> According to the case-law, however, there is no legal recognition of another gender alongside male and female in the regulation; most recently, the Supreme Court ruled that the registration of “inter/other” was not possible.<sup>26</sup>

### Registration Options

Taking into account fundamental and human rights, in particular with regard to the right to recognition of sex and gender identity in connection with the principle of non-discrimination,<sup>27</sup> it seems unacceptable to leave in place the regulation on blank entry without making possible the registration of further gender categories beyond the binary system.<sup>28</sup> In Australian law such non-binary categories have been envisaged, and in other countries this has been recognised by Supreme Court rulings.<sup>29</sup> The medical assessment of intersexuality has also changed: intersex is no longer viewed as a disorder or disease, but as a recognisable variation of gender.<sup>30</sup> This right must not be denied. Moreover, in interviews of trans persons in Germany, a large portion (one quarter to one third) indicate a non-binary identification.<sup>31</sup>

Equal recognition of their sex and gender with regard to body and identity is denied to intersex persons by simply leaving the gender entry blank. For the blank entry does not meet a positive recognition of a gender, but merely negates an assignment to the binary categories male and female. The fact that the existing legal regime is largely characterised by a binary gender system is, in descriptive terms, correct, but has no significance for the protection of the fundamental right to recognition of sexuality for persons who are outside the binary gender categories. From a legal point of view this is not a question of the creation of gender by the legislature, but of the equitable legal recognition of sex and gender on the basis of individual psychological

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24 A DUTTA, footnote 14, para. IV-224; L LETTRARI, M WILLER, Current Aspects of the Legal Situation for Intersex Persons, in: *Inter\* and Trans\* Identities*, Psychosocial Publishing House, Gießen 2016, p. 260f.; D C GHATTAS, footnote 13, pp. 36ff.; K PLETT, *Trans\* and Inter\* in Law: Old and new Contradictions*, in: *Inter\* and Trans\* Identities*, Ethical, Social and Legal Aspects, Psychosocial Publishers, Giessen 2016, pp. 215, 224f.; R BOCK-STETTE, the Civil Code of Civil Procedure, in: StAZ The Registry Office Number 6/2013, p. 169, 172; as well as T HELMS, footnote 17, p. 10 with regard to the limitation of § 22 para. 3 PStG to intersex persons, but not with regard to a compulsion, rather there was a right to vote (T HELMS, p. 11).

25 FEDERAL SUPREME COURT, decision of 22 June 2016, XII ZB 52/15; See also HIGHER REGIONAL COURT Celle, decision of 21 January 2015, 17 W 28/14.

26 FEDERAL SUPREME COURT, decision of 22 June 2016, XII ZB 52/15, 12; Constitutional Complaint [www.dritte-option.de](http://www.dritte-option.de); for a different view S L GÖSSL, *Intersexual Persons and their Personal Identification*, in: *New Journal of Family Law* 2016, p. 1122ff.; Already S L GÖSSL, *The Entry in the Birth Register as „inter“ or „divers“*, in: StAZ The Registry Office Number 6/2015, p. 171ff.; Critical to the Decision of the Federal Supreme Court: J THEILEN, *Intersexuality Remains Invisible: The Decision of the Supreme Court on Intersexuality in Civil Law*, in: *Young Science in Public Law*, 09 August 2016, <[juwiss.de](http://juwiss.de)>.

27 See above under 3.1.1. <Functions of the Civil Status and Importance for the Right to Legal Recognition of Sexuality>; in detail N ALTHOFF, G SCHABRAM, P FOLLMAR-OTTO, footnote 2, chapter 3.1.

28 However, T HELMS, footnote 17, p. 26.

29 See for Australia: N ALTHOFF, G SCHABRAM, P FOLLMAR-OTTO, footnote 2, Annex 2; Example of Nepal: Supreme Court of Nepal, Sunil Babu Pant and Others, Nepal Government and Others, decision of 21 December 2007 („Third Gender“); India: Supreme Court of India, WRIT PETITION (CIVIL) NO.400 OF 2012, decision of 15 April 2014 („Third Gender“); Pakistan: Supreme Court of Pakistan, Khaki by Rawalpindi, decision of 12 December 2009 („Hirja“).

30 GERMAN MEDICAL ASSOCIATION, *Opinion on the Care of Children, Adolescents and Adults with Variants/ Disorders of Sexual Development*, 30 January 2015; WORKING GROUP SCIENTIFIC MEDICAL SPECIALISTS e.V., *S2k - Guideline Variants of the Sex Development*, 07.2016.

31 A BORA, *On the situation of Intersex Persons. Report on the Online Survey of the German Ethics Council*, German Ethics Council, Berlin 2012, p. 32; L ADAMIETZ, K BAGGER, *Need for Regulation and Reform for Transsexual Persons*, ed. BMFSFJ, Berlin 2017.

and physical constitution.<sup>32</sup> It is also problematic that, given the sex characteristics of intersexuality, the provision stipulates leaving the gender entry blank and is reserved for physically intersex persons. And it is not regulated whether and how physically intersex persons with a male or female gender identity can achieve a corresponding gender entry.<sup>33</sup>

### **Registration Time**

Irrespective of whether the gender entry is left blank for intersex children as in the applicable law or a positive third category is registered, it always affects the area of protection of the general personality right, namely the protection of gender intimacy from unintentional disclosure. In the assessment of § 22 para. 3 PStG, the resulting forced “outing” of the minority of intersex children was stressed as a problem. Even if the legal gender entry is only one element of the binary order, not a few respondents considered that a legal gender assignment for all children instead of a special arrangement for intersex children would represent a sensible reduction in the pressure on parents and medical personnel.

In addition, the Federal Constitutional Court bases its case-law on the Transsexual Law (TSG) on the scientific finding that “the affiliation of a person to a gender cannot be determined solely by external sex characteristics at the time of his/her birth, but also essentially depends on his/her psychological constitution and self-perceived gender.”<sup>34</sup> If, therefore, gender affiliation only becomes apparent in every person, the question arises of the necessity and meaningfulness of an entry under the law of a person immediately after birth, which must always be externally determined and heteronomous. For children and adolescents who develop or have a trans/transsexual identity, legal attribution to a gender at birth as a result of the sex characteristics becomes a burden and is an interference with their right to the recognition of their sex and gender identity and the protection of their intimate sphere.

Postponement of a gender entry at birth is also not precluded by overarching state interests, such as the function of gender assignment for legal obligations and rights and family allocation. Indeed, the right of affiliation and partnership is irrelevant at least for childhood before puberty.<sup>35</sup> Moreover, the need for a family law amendment already transpires from the applicable law.<sup>36</sup> Furthermore, with regard to military and civil service obligations, there is also a conflict only after the age of 18. Regarding freedom of travel, renunciation would be unproblematic, since the gender could be registered in travel documents for all persons with the marker “X”.<sup>37</sup>

A complete renunciation of gender entry in the civil status register does not appear to be an alternative at present given that officially documented affiliation to a gender, precisely in a

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32 Contrary to the statements in Supreme Court decision of 22 June 2016, Az. XII ZB 52/15; In detail, N ALTHOFF, G SCHABRAM, P FOLLMAR-OTTO, footnote 2, chapter 6.

33 S. N ALTHOFF, G SCHABRAM, P FOLLMAR-OTTO, footnote 2, chapter 5.3.1.2.

34 Decisions of the Federal Constitutional Court (BVerfGE) 115, 1, 15; Federal Constitutional Court, decision of 11 January 2011, para. 51.

35 B TÖNSMEYER, *The Limits of Parental Care in Intersexually Born Children*, Nomos, Baden-Baden 2012, p. 68.

36 See below 2.2. <Affiliation Regulations>; in detail, N ALTHOFF, G SCHABRAM, P FOLLMAR-OTTO, footnote 2, chapter 5.2.

37 Regulation (EC) 2252/2004 in conjunction with. Document No. 9303 of the International Civil Aviation Organization – ICAO.

society characterised by the binary gender system with a multitude of areas which are structured by gender, can be important for the implementation of the right to the recognition of gender identity. This is particularly true for persons who differ in their appearance from the gender categories assigned by society.<sup>38</sup> With a completely renunciation of the gender entry, family and inheritance law constellations with foreign nationals might also be problematic, since without a binary gender entry a person may not be able to marry abroad, be recognised as a parent of a child or for inheritance.<sup>39</sup>

### **The Legislative Proposal Developed**

Against this background, the draft law provides for the possibility to choose a third gender entry or to renounce a gender entry indefinitely. The Gender Diversity Law (Gesetz zur Anerkennung und zum Schutz der Geschlechtervielfalt – Geschlechtervielfaltsgesetz – GVielfG-E) provides for four entry options: the categories “male”, “female”, “other gender options” and “not specified” (§ 2 para 2 GVielfG-E). From the legal point of view, there is a legitimate interest in the fact that the number and designation of possible gender categories is fixed. Therefore, a meaningful collective concept was chosen for the third category. In the interests of the right to self-determination, the possibility has been introduced of adding a separate gender designation in the registry entry, which can also be indicated in the birth certificate on request. The “not specified” category is independent of the physical development of the gender of each person and is intended to be an explicit entry instead of a non-entry, in view of the practical implementation difficulties which have become apparent in the assessment of leaving the entry blank.

In addition, a gender entry is postponed for all children after birth, and instead the entry “not specified” (§ 21 para. 1 p. 1 PStG-E) is initially made. At the same time, the intrinsic right to determine the gender entry for the register of births is introduced (§ 2 para. 1 GVielfG-E).

### **2.1.3 Procedures for Changing the Gender Marker**

There is no statutory regulation in the law in force according to which the gender of a child is determined or according to which the assignment has to take place. However, in practice, the classification of a person at the time of birth is usually determined according to the external physical condition, in particular according to the external sex characteristics.<sup>40</sup> Any change of gender entry is also based on medical knowledge. Although the blank entry can be replaced by an entry as male or female, by virtue of § 27 para. 3 no. 4 PStG, the secondary regulations still provide for a change of the blank gender entry only in the event that the affiliation to one of the binary sexes is medically proven.<sup>41</sup> Similarly, proof of intersexuality is required for the subsequent deletion of a gender entry.<sup>42</sup>

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38 Detailed information on the TSG: L ADMIETZ, K BAGER, footnote 31.

39 T HELMS, footnote 17, p. 23, with reference to the „internationality of personal status questions“; Cf. also S L GÖSSL, From the Question of the Question of Law to the Question of Private International Law: the Question whether a Person is Male, Female, or ... ?, in: *Journal of Private International Law* No. 2, 2016, pp. 261-260.

40 J ELLENBERGER, Commentary §§ 1-6 BGB, in: *German Civil Code: BGB*, ed. Palandt, Beck, Munich 2017 (76th edition), para. 10; At the time of birth admissible as confirmed lastly by the Federal Constitutional Court, decision of 11 January 2011, 1 BvR 3295/07.

41 No. 27.8 of the General Administrative Procedure on the Civil Status Act.

42 By way of a judicial correction under §§ 48 para. 1, 47 para. 2 no. 1 in conjunction with. § 22 para. 3 PStG, T HELMS, footnote 17, p. 12, 13 with further proofs.

The Federal Constitutional Court deviates from the purely external differentiation of gender, which is determined solely by physical criteria and attaches increasing importance to the “psychic constitution and self-perceived gender”.<sup>43</sup> The TSG provides for the amendment of the gender entry on request for persons who do not regard themselves as belonging to the “gender specified in their birth entry, but to the other gender”.<sup>44</sup> This perpetuates the binary gender regime and disregards intersex persons. In addition, the prescriptive and cost-intensive court procedure requests, in particular, a double assessment obligation, according to which a feeling of belonging to the other gender, which has existed for at least three years and is highly probable, has to be determined.<sup>45</sup>

The psychiatric diagnosis procedures according to the TSG, which are far-reaching limitations of the principle of self-determination, constitute a considerable temporal and psychological hurdle and are perceived as a heavy burden by trans/transsexual persons. Moreover, the results very rarely deviate from the self-definition.<sup>46</sup> With respect to intersex persons, the assessment carried out within the context of the expertise also highlighted problems when change procedures were made dependent on medical records and assessments.<sup>47</sup> Malta, Argentina, Denmark and Ireland,<sup>48</sup> in the context of their statutory amendments, only require self-declaration and not medical proof. The resolution of the Parliamentary Assembly of the Council of Europe of 2015 also calls on states to develop rapid, transparent and accessible procedures for changing name and gender in personal documents based on the principle of self-determination.<sup>49</sup> And the Yogyakarta Principles hold that the procedures must be efficient, fair and non-discriminatory and respect the right to privacy.<sup>50</sup>

### **The Legislative Proposal Developed**

Accordingly, the procedure for later registration of the gender is easily accessible and low in effort: The draft law provides for a standard procedure for the determination of the gender entry, which is based on the self-declaration of the person (§ 2 para 1 GVielfG-E). Any further verification and official inspection obligations are waived. In addition, the possibility of changing the gender entry is also facilitated (§ 3 GVielfG-E).

In this context, even multiple changes cannot be excluded, since gender identity is to be understood as a continuum on which the gradual location can also change several times in life. A period of 12 months, which has elapsed since the date of the last change, is intended to prevent

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43 FEDERAL CONSTITUTIONAL COURT, decision of 11 January 2011, 1 BvR 3295/07, 51; As well as the FEDERAL CONSTITUTIONAL COURT, decision of 6 December 2005, 1 BvL 3/03, para. 50.

44 § 1 para. 1 no. 1 TSG; on the TSG in detail, see A DUTTA, Germany, in: *The Legal Status of Transsexual and Transgender Persons*, ed. SCHERPE, intersentia, Cambridge 2015, p. 207ff.

45 In detail, L ADAMIETZ, K BAGER, footnote 31, with further evidence.

46 The assessment of 670 opinions from the years 2005 to 2014 showed that in less than 1 % of the cases the court’s rejection of the application is recommended, see B MEYENBURG, K RENTER-SCHMIDT, G SCHMIDT, *Assessment of the Transsexual Law. Evaluation of Expert Opinions of three Experts 2005/2014*, in: *Journal of Sexual Research* 2015/28, p. 107 to 120.

47 S. N ALTHOFF, G SCHABRAM, P FOLLMAR-OTTO, footnote 2, chapter 4.2.2.

48 Only for adults, for 16–18 year olds, a medical certificate of maturity and transition is required.

49 Parliamentary Assembly Resolution 2048, *Discrimination against Transgender Persons in Europe*, 2015.

50 Yogyakarta Principles. Principles on the application of international human rights law in relation to sexual orientation and gender identity.

abusive multiple changes.<sup>51</sup> In contrast to Denmark, which provides for a six-month “reflection period” after the application, after which the application must be reasserted, the fundamental accessibility and speed of the procedure is not restricted. The Danish legislation takes insufficient account of the fact that the decision to change a gender entry is often based on a specific reason (such as an imminent journey or a change of employment, which necessitates changes in personnel documents in order to prevent discrimination or to protect the intimate sphere). However, it is different in cases where a person is seeking a change of the gender entry in a case-related manner in order to take advantage of this change and subsequently return to the initial gender. These abusive changes should be blocked by a reasonable waiting period between any two changes.

Applications by children who lack legal capacity or have not yet reached 14 years of age are subject to the approval of their legal representatives. Children over 14 years of age who are limited in their legal capacity can act without their parents’ participation, see § 2 para. 3 GVielG-E. This is in accordance with the regulations on religious self-determination (§ 5 Act on Religious Child Education). Even if the age of 14 has not yet been reached, gender identity should be recognised and a corresponding determination of the gender entry should be allowed, especially since it is not irrevocable but can be changed again. In the event that the statutory representative refuses consent, the Family Court may replace it in accordance with sentence 4. This is a determined decision that specifies the child’s best interest and can only be refused if the welfare of the child is likely to be adversely affected on an overall assessment.

Non-German nationals who are habitually resident in Germany can also rely on the Gender Diversity Law (GVielG-E), and, under certain conditions, guardians may choose the application of the Civil Status Act and thus the deferment of a gender entry at birth; cf. proposal for an added article 13a of the Introductory Act to the Civil Code (Einführungsgesetz zum Bürgerlichen Gesetzbuch – EGBGB-E) and §§ 2 para. 4, 3 para. 1 no. 2 GVielG-E.

## 2.2 Rules on Parenthood in Family Law

For the legal recognition of gender diversity, adjustments are necessary not only in civil status law, but also and in particular in family law. For example, there are various legal uncertainties in particular in relation to the right to affiliation, which involves gender-specific conditions and designations; such as in the core regulation on maternity in § 1591 Civil Code (Bürgerliches Gesetzbuch – BGB), according to which the mother of a child is the woman who gave birth. § 1592 no. 1 BGB allocates paternity to the father who is married to the mother (§1592 no. 1 BGB), recognises with the consent of the mother (§§ 1592 no. 2, 1595 BGB) or if his paternity is established through the court (§ 1592 no. 3 BGB).

Parenthood of persons who are outside the binary system are not recognised as equally entitled by designation (mother and father, man and woman). Gender-related links also lead to legal uncertainties, particularly as regards the question of whether or not persons with a blank

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51 Even if fears of repeated bills of exchange or misuse have proved to be unfounded as studies and experience show in other countries that have already opened their respective laws.

gender entry within the meaning of § 22 para. 3 PStG can establish parenthood at all. Although it is to be assumed that there is an unlawful regulatory gap, an analogous application is, however, only unproblematic under § 1591 BGB. The possibility of legal paternity under § 1592 BGB, however, appears questionable.<sup>52</sup> Although in effect analogous application will also be confirmed in this case, it is limited in the literature only to the judicial paternity test based on genetic origin under no. 3.<sup>53</sup> The legal uncertainties thus indicated can have the result that, in individual cases, the establishment of a parenthood must first be enforced by a court.

Trans/transsexual persons are also not adequately covered. This also applies to persons with a change in personal status according to the TSG, who, following the constitutional lifting of the sterilisation requirement,<sup>54</sup> can now give birth to or procreate a child. They are denied the recognition of parenthood according to their gender identity or their registered gender. Legal protection is only granted according to the biological gender. In practice, for example, § 1591 BGB is applied to a transsexual male giving birth, with the effect that he is registered as a mother and is treated on that basis in civil status terms.<sup>55</sup> Thus the protection of the intimate sphere from inadvertent revelation is inadequately preserved, since the persons are designated as mothers or fathers in the birth certificate. It is only in isolated cases that the prohibition of revelation is extended to the certificate of birth, because, as in Malta or Australia, a gender-neutral designation of the parents is given on the children's birth certificate.<sup>56</sup>

The basic right of the child to knowledge of his/her origin, including his/her genetic origin under article 2 para. 1 in conjunction with article 1 para. 1 of the Basic Law (GG),<sup>57</sup> cannot justify the retention of gender-specific names and conditions. It is true that the legislators would be intervening in the personality rights of affected children if the possibilities for clarifying genetic origin were limited by family law.<sup>58</sup> But reproductive-related rather than gender-specific preconditions of parenthood would also make this possible. This would lead to the right of the person who gave birth to the child and the genetic affiliation still to be identified. If the personal status right of the child is plausibly extended beyond the genetic lineage to the knowledge of which of the parents has actually given birth, this could also be done, for example, by means of references to the "bearer" and the "other" parent in the civil status register, without gender-specific assignment or disclosure in the birth certificate.

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52 W SIEBERICHS, *The Undefined Gender*, in: *Journal of Family Law* 2013, pp. 1180, 1181f; T HELMS, footnote 17, p. 19ff.; L LETTRARI, M WILLER, footnote 24, p. 257, 269ff.

53 T HELMS, footnote 17; see also W SIEBERICHS, footnote 52; Affirmative L LETTRARI, M WILLER, footnote 24, p. 270; K PLETT, footnote 13, p. 56.

54 FEDERAL CONSTITUTIONAL COURT, decision of 11 January 2011, 1 BvR 3295/07.

55 See CHAMBER COURT BERLIN, decision of 30 October 2014, Az. 1 W 48/14, pending before the Federal Supreme Court. In detail J THEILE, *Transsexuality in Family Law*, Regensburg 2013, S. Roderer Verlag, p. 267 ff.; See also J REMUS, *Rights of Trans- and Intersexed Parents*, in: *New Legal Weekly Journal Issue 3/2014*, p. 14.

56 Thus, for example, referring to the prohibition of disclosure by the District Court of Münster, decision of 4 January 2016, 22 III 12/15, p. 7.

57 See also article 7 para 1 of the UN Convention on the Rights of the Child, which lays down the right of the child to know his or her parents.

58 U DI FABIO, *Commentary art. 2 para. 1 Basic Law*, in: *GG Comment*, ED. Maunz/Dürig, Munich 2016 (78th supplementary delivery), para. 212.

### The Legislative Proposal Developed

In the proposed umbrella law the core regulations on affiliation have been changed. The goal is legal protection of the parent, which waives gender-specific conditions and names.<sup>59</sup> Instead, parenthood is linked to reproductive function and partnership, and gender-neutral terms are used.<sup>60</sup> According to the new regulation in § 1591 BGB-E, with the title “Parenthood”, parental status is independent of the respective gender entry for the childbearing person as well as for the person who is either already married or marries at the time of birth with the childbearing parent who has legally recognised parenthood or for whom it is judicially determined. § 1592 BGB on paternity is repealed.

The basic rules on affiliation law will thus be adapted to be gender-inclusive and the many possibilities for parenthood and new family forms, as well as gender diversity, will be legally recognised. Thus § 1591 of BGB-E is constitutive.<sup>61</sup>

## 2.3 Protection of Physical Integrity: Medical Interventions in Intersex Infants and Children

Intersex infants and children are still undergoing operations and medical treatments that are not medically necessary in Germany with the aim of reconciling their physical appearance and function in line with the binary gender stereotypes.<sup>62</sup> These procedures are usually irreversible and can cause severe long-term physical and mental suffering.<sup>63</sup> Human rights bodies have repeatedly pointed out that medically unnecessary interventions in intersex infants and children without explicit and informed consent constitute inhumane treatment and harmful practices that must be terminated. The state is required to ensure the principle of informed consent to medical and surgical interventions in intersex persons as well as effective investigations and compensation in the event of violations of this principle.<sup>64</sup>

In German law, consent is prohibited without mandatory medical necessity by statutory representatives as under §§ 1626, 1629 Civil Code (BGB), as these are highly personal decisions which are not accessible to substitution. Thus, interventions which are nevertheless carried out could be prosecuted as bodily harm. But neither this possibility of prosecution nor the gradual revi-

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59 Also T HELMS, footnote 17, p. 22 and J REMUS, footnote 55, p. 14.

60 This is already the case, for example, in the Australian Capitol Territory with the names „birth parent“ and „other parent“; In addition, parents can freely choose how they would be designated on the birth certificate, see the legal comparison in Annex 2 of the report N ALTHOFF, G SCHABRAM, P FOLLMAR-OTTO, footnote 2.

61 Numerous other regulations are to be rectified as a result, as well as to legal follow-up questions. Extensive reform discussions on the law of descent take place among the experts of a workgroup, organised by the Federal Ministry of Justice and Consumer Protection.

62 A KRÄMER, K SABISCH, J WOWERIES, Variations of Gender Development, in: Child and Adolescent Doctor 2016, pp. 2248 ff.; U KLÖPPEL, To the Topicality of Cosmetic Operations of „ambiguous“ Genitalia in Childhood, Centre for Transdisciplinary Gender Studies at the Humboldt-Universität zu Berlin, Berlin 2016.

63 GERMAN ETHICS COUNCIL, footnote 7, p. 2 f.

64 Last addressed to Germany: UN WOMEN'S RIGHTS COMMITTEE, Concluding Remarks Germany 2017, para. 24d f. (CEDAW/C/DEU/CO/7-8); See also UN CHILDREN'S RIGHTS COMMITTEE, Concluding Remarks Ireland, para. 39 f. (CRC/IRL/CO/3-4); Concluding Remarks Switzerland, para. 42 f (CRC/C/CHE/CO/2-4); Concluding Remarks France, para. 47 f (CRC/C/FRA/CO/5); UN ANTI-TORTURE COMMITTEE, Concluding Remarks Switzerland 2015, para. 20 (CAT/C/CHE/CO/7); Final remarks Germany, para. 20 (CAT/C/DEU/CO/5); UN DISABILITY COMMITTEE, Final Remarks Germany, para. 37 f (CRPD/C/DEU/CO/1).

sion of medical treatment guidelines since 2005<sup>65</sup> has so far resulted in a reduction in the number of interventions carried out. This has been most recently confirmed in a study of December 2016, which found that the relative frequency of interventions between 2004 and 2014 remained essentially unchanged.<sup>66</sup> The medical recommendations are non-binding and therefore not suitable in individual cases to provide adequate protection. The state is therefore required under human rights law to take further, effective measures to prevent unauthorised interventions, and accordingly various options are discussed.<sup>67</sup>

In view of the constant relative frequency of the interventions, a clarification of the law is necessary. This could be done in the criminal law (according to the example of § 226a of the criminal code) or in the law of parental custody (based on § 1631c Civil Code – BGB). An advantage of the parental custody solution is that it can be combined to secure the prohibition with a family court authorisation procedure for those cases where medical intervention is absolutely necessary to avoid risk to life or the danger of serious health impairment.<sup>68</sup>

### **The Legislative Proposal Developed**

Accordingly, for the protection of self-determination and the physical integrity of intersex children in the law of parental custody the draft law adds a clarifying prohibition on the consent of persons entitled to custody in a gender-altering or adjusting medical intervention on the genitalia or gonad glands of a child not capable of understanding and judgement (§ 1631e para. 1 BGB-E with the title “Medical Interventions on the Genitals or Gonads”). It introduces a family court authorisation procedure for medically necessary interventions to prevent risk to life or serious health impairment, in order to strengthen the enforcement of the prohibition and ensure adequate protection in individual cases (§ 1631e para. 2 BGB-E).

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65 GERMAN MEDICAL ASSOCIATION, footnote 30; WORKING GROUP SCIENTIFIC MEDICAL SPECIALISTS e.V., footnote 30.

66 U KLOEPEL, footnote 62.

67 GERMAN ETHICS COUNCIL, footnote 7, p. 55 ff; See also B TÖNSMEYER, footnote 35; Cf. also B SCHMIDT AM BUSCH, *Intersexuality and State Protection Obligations in Sex-assigning Operations*, in: *Archives of Public Law*, Vol. 137/2012, pp. 441, 454ff.; J WOWERIES, *Intersexuality. Medical Interventions and Participation of Children in Medical Decisions*, in: *Early Childhood* 17, 2014, pp. 40, 45f.; A KOLBE, *Intersexuality, between Sexes and Constitutional Law*, Nomos, Frankfurt 2009, in particular pp. 200ff.

Of the countries studied, only Malta has introduced an explicit ban on any postponable operation of intersexual minors before they can effectively consent. In exceptional cases, which may not be based on social factors, an intervention can take place if representatives of the authorities and a specially established interdisciplinary team agree on it. S. N ALTHOFF, G SCHABRAM, P FOLLMAR-OTTO, footnote 2, Annex 2.

68 See in this respect B TÖNSMEYER, footnote 35.



# 3.

## SUMMARY

In summary, it can be stated that:

- the rule on leaving open the gender entry for intersex children (§ 22 para. 3 PStG), introduced in 2013, is hardly applied in practise;
- the introduction of a non-binary gender category is necessary in respect of fundamental and human rights;
- a gender entry in the birth register right after childbirth is dispensable for all children;
- procedures to allocate and change the gender entry must take into account the right to self-determination;
- special norms such as the TSG and § 22 para. 3 PStG must be abolished or revised accordingly;
- the state has a duty under the protection of human rights to prevent medically unnecessary interventions on intersex children;
- a comprehensive legislative approach to the recognition and protection of gender diversity is to be recommended and feasible.

Against this background, the umbrella law has been developed in consultation with intersex and trans/transsexual persons, their parents, associations and counselling centres as well as the science and practice community. Under it, gender entry immediately after birth is dropped, and at the same time the right to determine the gender entry in the register of births is defined. The procedure for this certification of the gender entry is easily accessible – based on a self-declaration, without further evidence, to the registry office – and is explicitly made available to children. In addition, the opportunity is given to choose a third, non-binary gender option or dispense with a gender entry indefinitely. The law also facilitates the possibility of changing the gender entry with respect to the registry, in the same way as the possibility of changing the first name, and provides extended possibilities for the gendering of the passport.

At the centre of the umbrella law is a new law on the recognition and protection of gender (Gender Diversity Law – Geschlechtervielfaltsgesetz – GVielfG). In this context, changes in the law of civil status (PStG and personal status regulation), the Introductory Act to the Civil Code (EGBGB), the amendment of the right to change names (NamÄndG) and the passport law (PaßG) are proposed and in particular counselling requirements on the law of gender diversity for parents and children have been added in the Eighth Book of the Social Code – Children and Youth Welfare (SGB VIII). These rules apply to everyone irrespective of gender. This means that the special rules for transsexual persons in the TSG as well as the special rules for intersex persons in § 22 para. 3 PStG can be dispensed with.

In addition, core provisions for a gender-inclusive legal system have been amended in other legal areas. These include, in particular, the provisions laid down in family law on affiliation as well as on legally protected relationships. There, gender-specific preconditions and terms within the context of legal parenthood are dispensed with and same-gender marriage as well as different gender partnerships are introduced (BGB and LPartG). Clarifications and additions are also made in the General Equal Treatment Act (AGG) and the Federal Equalisation Act (BGleig). A clarification of the range of beneficiaries is given in the Maternity Protection Act (MuSchG). Rules on search and accommodation under the Prison Law (StVollzG) and the Federal Police Act (BPolG) are further developed to take account of the special situation and needs of intersex and trans/transsexual persons. The allocation of personal identification numbers in accordance with the Sixth Book of the Social Code – Statutory Pension Insurance – (SGB VI) and the corresponding implementing regulation is amended in such a way that there is no longer any reference to gender. In the context of child and youth welfare, apart from the supplementation of the consultation requirement for parents, children and adolescents by questions concerning the law on gender diversity, the interests to be taken into account as a matter of principle under the Eighth Book of the Social Code are supplemented by the different positions in life of all children, including intersex and trans/transsexual children (SGB VIII).

As a central rule for the protection of intersex and trans/transsexual persons, the draft contains the presented proposals for protection of physical integrity and against discrimination. The draft also provides for further necessary consequential changes in other laws and, for the purpose of rectification of the law, the repeal of the superseded provisions.

The report summarises the results of the stocktaking, evaluation and assessment in Part 1 and contains in Part 2 the draft law with general and special explanation. Further working results can be found in the extensive annexes to the expert report as well as in materials available on the website of the German Institute for Human Rights.<sup>69</sup>

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