

Trans parents and the gendered law: Critical reflections on the Swedish regulation

Daniela Alaattinoğlu* and Alice Margaria**

Sweden has attracted international attention for its 2018 legislative provisions which recognize trans parenthood in line with legal gender. This legislation provides that a trans man who gives birth is registered as his child's father in Sweden, unlike in most countries of the world. This article offers an original engagement with the genesis, peculiarities, and future of the revised Swedish Children and Parents Code, and the criticism it attracts, as an illustrative example of the inherent challenges present in regulating trans parenthood in a gendered, cis- and hetero-normative legal system. The critical analysis of the Swedish provisions investigates two alternative legal models for regulating trans parenthood from a comparative perspective: degendering legal parenthood and misalignment of legal gender and parental status. Looking towards the future, the article normatively embraces a substantive conceptualization of degendering legal parenthood, rather than merely a nominal one, highlighting the need to rethink and redistribute childcare.

1. Introduction

As explored from various angles in this Symposium, trans people often find themselves at the mercy of law's gendering functions: traditionally, along binary lines, dividing the world into male and female. When trans people become biological parents—be it through sexual intercourse, at-home insemination, or assisted reproduction—such

* Assistant Professor, Faculty of Law, University of Turku, Turku, Finland. Email: daniela.alaattinoglu@utu.fi.

** Assistant Professor, Faculty of Law, University of Zurich, Zurich, Switzerland; Research Partner, Department of Law and Anthropology; Research Partner, Max Planck Institute for Social Anthropology, Halle/Saale, Germany. Email: alice.margaria@rwi.uzh.ch.

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gendering functions come to the fore, generally restricting legal parenthood to mother- or fatherhood. Many European countries are currently abolishing rights-violating preconditions for legal gender recognition, such as sterilization or castration, removing earlier obstacles to prevent trans people from becoming biological parents.¹ Instances of trans biological parents have indeed become more frequent or, at least, more visible in many countries, increasingly triggering disputes concerning the determination of trans legal parenthood.² Despite a trend towards more effective protection of trans people's personal and bodily integrity and gender self-identification,³ there is nevertheless a state reluctance to legally recognize trans people as parents in line with their legally registered gender and/or gender identity. This reluctance is perhaps most evidently embodied in the persistence of public authorities to legally register trans men who give birth as “mothers,” rather than “fathers” or “parents,” on their children's birth certificate and/or in population registries.⁴ From formerly embracing a similar approach, Sweden as the first European country moved towards regulating trans people's parenthood in line with their legally registered gender in 2018.⁵ In spite of being innovative and prima facie trans-friendly, the Swedish approach continues to show limitations as it remains trapped in a mesh of hetero- and cis-normativity.

- ¹ The European Court of Human Rights has also stated that sterilization as a precondition to legal gender recognition violates the right to respect for private and family life (Article 8 of the European Convention on Human Rights). On the broader requirements of sterilization and gender confirmation surgery, see, especially, *A.P., Garçon & Nicot v. France*, App. Nos. 79885/12, 52471/13, 52596/13 (Apr. 6, 2017), <https://hudoc.echr.coe.int/eng?i=001-172913>; *X. & Y. v. Romania*, App. Nos. 2145/16 & 20607/16 (Jan. 19, 2021), <https://hudoc.echr.coe.int/eng?i=001-207364>. See also *Y.Y. v. Turkey*, App. No. 14793/08, (Mar. 10, 2015), <https://hudoc.echr.coe.int/eng?i=001-153134>. According to Transgender Europe (TGEU), eight Council of Europe member states required sterilization for legal gender recognition in 2022, while most member states did not enforce such requirements. *Sterilisation*, TGEU, <https://transrightsmap.tgeu.org/home/legal-gender-recognition/sterilisation> (last visited Apr. 13, 2023). See also Peter Dunne, *Transgender Sterilisation Requirements in Europe*, 25 *MEDICAL L. REV.* 554 (2017).
- ² The question of recognition of trans parents has also reached the European Court of Human Rights (ECtHR). See *O.H. & G.H. v. Germany*, App. Nos. 53568/18, 54741/18 (Apr. 4, 2023), <https://hudoc.echr.coe.int/eng?i=001-223924>; *A.H. & Ors. v. Germany*, App. No. 7246/20 (Apr. 4, 2023), <https://hudoc.echr.coe.int/eng?i=001-223932>. See Alice Margaria, *Trans Men Giving Birth and Reflections on Fatherhood: What to Expect?*, 34 *INT'L J. L. POL'Y FAMILY* 225 (2020). In this article, trans people's varying experiences of parenthood are generally referred to as “trans parenthood.” When referring to the legal recognition of trans people's parenthood, the term “trans legal parenthood” is used.
- ³ This trend can nevertheless be considered to be limited, since a majority of Council of Europe member states still require mental-health diagnosis for legal gender recognition. *Mental Health Diagnosis*, TGEU, <https://transrightsmap.tgeu.org/home/legal-gender-recognition/mental-health-diagnosis> (last visited Apr. 13, 2023).
- ⁴ That said, the wishes of trans parents are individual: not everyone wishes to be recognized as “mother” or “father”; some would, for example, prefer a gender-neutral recognition such as “parent.”
- ⁵ *LAG OM ÄNDRING I FÖRÄLDRABALKEN [ACT ON AMENDMENT OF THE CHILDREN AND PARENTS CODE]* (Svensk författningssamling [SFS] 2018:1279) (Swed.). Since 2018, other countries, such as Iceland and Denmark, have also introduced similar legislation which provides for registering trans parents according to their legal gender identity. See *Lög 49/2021 um breytingu á barnalögum (kynrænt sjálfræði)* [Act 49/2021 Amending the Children's Act (gender autonomy)] (Iceland); *Loi nr 227 af 15.2.2022 om ændring af børneloven, navneloven og forskellige andre love [Act no. 227 of Feb. 15, 2022 on Amendment of the Children's Act, the Name Act and Several Other Acts]* (Den.).

The aim of this article is twofold. First, it presents an analytical investigation of the globally original Swedish 2018 legislative amendment, and its background and implications as an illustrative example of the challenges inherent in regulating trans parenthood in a gendered legal system.⁶ Second, by means of exploring alternative legal approaches, it offers a broader reflection on the connections between the regulation of legal parenthood and ways in which “care” is understood and organized.⁷ The analysis emphasizes the need to distinguish between “degendering legal parenthood,” on the one hand, and “degendering care/parenting,” on the other. The argument is made that the former, if not supported by the latter, is at risk of playing out as a mere semantic strategy with limited impact on traditional, deeply seated, cultural and structural notions and arrangements of care.

The article is structured as follows. Section 2 explores the interests and rights at stake when determining trans legal parenthood and identifies some of the human rights questions raised by the topic, particularly referring to the weak international legal recognition of the issue. Section 3 offers a descriptive analysis of the 2018 Swedish legal amendment to the Children and Parents Code to legally recognize trans parents in line with their legally registered gender, together with central points of criticism against the Swedish model.⁸ Albeit unique, the new Swedish provisions do not represent the only approach to regulating trans legal parenthood. Section 4 looks beyond Sweden to explore existing alternative solutions. For example, Ontario, Canada, and Israel have opted to degender legal parenthood, namely to replace “mother” and “father” with the gender-neutral term “parent” when assigning legal parenthood. In other jurisdictions, such as Norway, Germany, and England and Wales, the prevailing approach involves disconnecting parental status from legal gender in the absence of specific provisions or on the basis of ambiguous provisions so interpreted by courts. Viewing the Swedish example in this comparative context, Section 5 identifies some of the persistent challenges inherent in the existing approaches, and reflects on the importance of degendering care/parenting as a first, crucial step towards disestablishing the traditional gender order to the benefit of all families and society at large. As a potential way forward, the article makes the concrete proposal to rethink legal fatherhood, structuring it around care, and thus seizing the transformative potential of cases involving trans birthing men. Some concluding remarks that summarize the findings bring the analysis to a close.

⁶ A brief overview of parental legislation regarding trans people in Sweden is included in Laura Carlson, *The Paradox of Trans Law in Sweden*, in *TRANS RIGHTS AND WRONGS: A COMPARATIVE STUDY OF LEGAL REFORM CONCERNING TRANS PERSONS* 541, 551–3 (Isabel C. Jaramillo & Laura Carlson eds., 2021).

⁷ The regulation of trans legal parenthood is a scholarly topic which has attracted increasing attention during recent years. See Margaria, *supra* note 2; Anniken Sørli, *Governing (Trans)parenthood: The Tenacious Hold of Biological Connection and Heterosexuality*, in *QUEERING INTERNATIONAL LAW: POSSIBILITIES, ALLIANCES, COMPLICITIES, RISKS* 171 (Dianne Otto ed., 2017); Maura Ryan, *Beyond Thomas Beatie: Trans Men and the New Parenthood*, in *WHO'S YOUR DADDY? AND OTHER WRITINGS ON QUEER PARENTING* 139 (Rachel Epstein ed., 2009); Lara Karaian, *Pregnant Men: Repronormativity, Critical Trans Theory and the Re(conceive)ing of Sex and Pregnancy in Law*, 22 *Soc. & LEGAL STUD.* 211 (2013).

⁸ See [SFS] 2018:1279, *supra* note 5.

2. Parental (mis)recognition and questions for human rights law

With the abolition of previous legal requirements of sterilization, castration, and infertility in many European countries—motivated, for example, by the imagined inappropriateness of trans people’s parenting⁹—new legal questions related to trans parenthood appear. How are states to regulate situations where trans men give birth or trans women beget children? In determining their parental status, should states be guided by the gender identity of parents, their legally registered gender, their birth-assigned gender, or the modalities of reproduction? Addressing these questions entails considering what weight, if any, should be attributed to a multiplicity of—often understood as competing—legal principles, such as the legal certainty of family affiliations, the coherence of public registries, the right to respect for private and family life of all individuals involved, the child’s right to know about their origins, the best interests of the child, the right to non-discrimination, and indirectly also other rights, among which the affected individuals’ freedom of movement.

Public authorities’ failure to assign legal parenthood in line with gender identity, gender expression, and/or legal gender is likely to have a negative impact on the parent’s psychological ease and parental security and, consequently, on their children’s wellbeing. According to Freddy McConnell, who was registered as the mother of the children he gave birth to, “for a man to have to declare himself as ‘mother’ is [a] deeply distressing, subjectively traumatic and procedurally taxing requirement.”¹⁰ Sally Hines, commissioned as an expert by McConnell in his case before English courts, has added that “social stigmatisation of children of trans parents could be exacerbated if gender markers of parents do not conform with their gendered name, presentation or parenting role.”¹¹ Moreover, in the everyday lives of trans families, the “mismatch” between, for example, outward appearance, registered gender, and legal parent–child relationships can give rise to situations in which authorities doubt the veracity of the family affiliation between trans individuals and their children. As a result of parental misrecognition, trans parents are also likely to experience situations where they repeatedly have to disclose intimate details to people outside of their families.

Transgender Europe (TGEU) has recorded testimonies of trans parents reporting several challenges following their incorrect parental registration, affecting their freedom of movement.¹² A trans father from Germany, for example, recalls how the situation has led him to completely avoid travelling with his child:

I’m not traveling abroad with my child, especially not by plane. The reason is that there are currently no identity documents with which I can prove my parenting internationally. I gave birth

⁹ See DANIELA ALAATTINOĞLU, *GRIEVANCE FORMATION, RIGHTS AND REMEDIES: INVOLUNTARY STERILISATION AND CASTRATION IN THE NORDICS, 1930s–2020s*, ch. 3 (forthcoming 2023); Daniela Alaattinoğlu & Ruth Rubio-Marín, *Redress for Involuntarily Sterilised Trans People in Sweden against Evolving Human Rights Standards: A Critical Appraisal*, 19 HUM. RTS. L. REV. 705 (2019).

¹⁰ Re T.T. and Y.Y. [2019] EWHC 2384, ¶ 211(c) (U.K.).

¹¹ *Id.* ¶ 219.

¹² DODO KARSAY, *STUCK ON THE SWING: EXPERIENCES OF TRANS PARENTS WITH FREEDOM OF MOVEMENT IN THE EU* (2021).

to my child shortly before my legal transition. As a result, I am listed in the birth certificate of my child as a mother and with my old female name. In my own personal documents, I am registered as male and with a new, male first name. Since children in Germany have their own passports for some years and are no longer registered in the passport of the parents, the only proof of parenting (and thus to legitimize the transport of the child abroad) is the birth certificate of the child. Since I am not listed there with my new name and civil status, this opportunity is not open to me. In addition, I would have to bring the administrative court decision on my transsexual [l]aw procedure to prove that I'm the designated mother in the birth certificate. This is written in German and not an internationally recognized document.

Thus, I'm not flying abroad because I'm very worried that I can no longer prove at the latest on the return flight that I'm the parent of my child. The idea of being in the presence of my child in a situation in which it is not clear whether I may travel with them and whether I manage to prove my parenting I find unbearable for me as well as for my child.¹³

The adverse consequences of parental misrecognition, such as the ones recounted above, have also been acknowledged—to some extent—by supranational human rights institutions.¹⁴ In a 2018 Council of Europe Parliamentary Assembly (PACE) report, Rapporteur Jonas Gunnarsson emphasized that trans parents and their children might face “serious issues” when “the former are registered on their children’s documents according to the gender assigned to them at birth.”¹⁵ The report highlights the state’s responsibility to resolve such issues “by providing for trans parents’ gender identity to be correctly recorded on their children’s birth certificates.”¹⁶ The report was followed by a resolution, in which the PACE added that states ought to “ensure that persons who use legal gender markers other than male or female are able to have their partnerships and their relationships with their children recognised without discrimination.”¹⁷ Within the European Union framework, moreover, a European Parliament’s 2021 resolution called on member states to introduce “measures to facilitate the recognition of the legal gender of transgender parents” as necessary to ensure full respect for the right to private and family life without discrimination and free movement of all families.¹⁸

In April 2023, the European Court of Human Rights (ECtHR) intervened on the matter of legal recognition of trans parents in two cases brought against Germany.¹⁹

¹³ *Council of Europe Recognises Trans Parents*, TGEU, <https://tgeu.org/council-of-europe-recognises-trans-parents/> (last visited Apr. 14, 2023).

¹⁴ See also the Yogyakarta Principles Plus 10: Additional Principles and State Obligation on the Application of International Human Rights Law in Relation to Sexual Orientation, Gender Identity, Gender Expression and Sex Characteristics to Complement the Yogyakarta Principles, principle 24(I), Nov. 10, 2017, https://yogyakartaprinciples.org/wp-content/uploads/2017/11/A5_yogyakartaWEB-2.pdf.

¹⁵ JONAS GUNNARSSON, PRIVATE AND FAMILY LIFE: ACHIEVING EQUALITY REGARDLESS OF SEXUAL ORIENTATION 14, ¶ 55 (2018).

¹⁶ JONAS GUNNARSSON, PRIVATE AND FAMILY LIFE: ACHIEVING EQUALITY REGARDLESS OF SEXUAL ORIENTATION 15, ¶ 55 (2018).

¹⁷ Council of Europe Res. 2239, art. 4.6 (2018).

¹⁸ Eur. Parl. Res. 2021/2679(RSP) on LGBTIQ rights in the EU, esp. art. 4 (Sept. 14 2021).

¹⁹ The Court has previously decided on the attribution of parental rights to trans parents. In the case *A.M. and Others v. Russia*, the Court ruled that depriving a trans mother of contact rights with her children and restricting her parental rights on the grounds of her gender identity, without close scrutiny, violated the

In *O.H. and G.H. v Germany* and *A.H. and Others v. Germany*, the applicant trans parents—a trans birthing man and a trans woman—were registered in accordance with their birth-assigned gender and under their dead name.²⁰ In both cases, the ECtHR ruled against the applicants and considered their incorrect parental registration to be compatible with Article 8 (the right to respect for private and family life).²¹ As expected, the doctrine of the margin of appreciation has played a major role in determining the outcome of these cases.²² The Court observed indeed that the birth registration of trans parents raises delicate moral and ethical issues, on which there is no European common ground, and requires balancing competing public and private interests.²³ National authorities therefore enjoy a wide margin of appreciation. Another decisive factor has been the Court’s “minimalistic approach”²⁴ to assessing the proportionality of misrecognition, which has become a trend when deciding on the (lack of) legal recognition of unconventional family ties. With an attitude which resembles that taken in previous cases concerning surrogacy and trans fatherhood,²⁵ the Court insisted on the fact that the existence of a legal relationship between the trans parents and their children was not challenged. Accordingly, whether the recognition was correct or not was not deemed as very important, also considering the limited number of scenarios in which the children would be asked to submit a birth certificate and the trans identity of the applicant parents would therefore be disclosed.²⁶

right to respect for private and family life (European Convention on Human Rights, art. 8, Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter ECHR]) and the right to non-discrimination (ECHR, art. 14). *A.M. & Ors. v. Russia*, App. No. 47220/19 (July 6, 2021), <https://hudoc.echr.coe.int/eng?i=001-210878>. On the potential impact of this judgment on the rights of LGBT parents and their children, see Alice Margaria, *Trans Parenthood in A.M. and Others v. Russia: Breaking New Grounds?*, ECHR BLOG (Aug. 23, 2021), www.echrblog.com/2021/08/guest-post-on-trans-parenthood-in-am.html.

²⁰ See *O.H. & G.H. v. Germany*, App. Nos. 53568/18, 54741/18 (Apr. 4, 2023); *A.H. & Ors. v. Germany*, App. No. 7246/20 (Apr. 4, 2023). Another case of this kind is still pending: *Y.P. v. Russia*, App. No. 8650/12, communicated on (Feb. 23, 2017), <https://hudoc.echr.coe.int/eng?i=001-172234>. Here, a trans father seeks the amendment of the birth certificate, on which he is listed as “mother” of his biological child born before transition, in order to reflect his legal (male) gender. His request, supported by the child (fourteen years old at the time of national proceedings), was dismissed by domestic courts on the basis that Mr. G., the applicant’s former spouse, was the biological father of the child and maintaining the records in their original form was in the child’s best interests.

²¹ The applicants complained also of a violation of Article 14 (non-discrimination), but the Court considered the claim manifestly unfounded.

²² Margaria, *supra* note 2, at 242.

²³ *O.H. & G.H. v. Germany*, App. Nos. 53568/18, 54741/18, paras. 114–15 (Apr. 4, 2023); *A.H. & Ors. v. Germany*, App. No. 7246/20, paras. 114–15 (Apr. 4, 2023).

²⁴ Alice Margaria & Ivana Isailovic, *Conversations on Transnational Surrogacy and the ECtHR case Valdís Fjölfnisdóttir and Others v. Iceland*, CONFLICT OF LAWS (June 27, 2021), <https://conflictoflaws.net/2021/conversations-on-transnational-surrogacy-and-the-ecthr-case-valdis-fjolfnisdottir-and-others-v-iceland-2021/>.

²⁵ *X, Y & Z v. United Kingdom*, 24 Eur. H.R. Rep. 143 (1997); *Mennesson v. France*, App. No. 65192/11 (June 26, 2014), <https://hudoc.echr.coe.int/eng?i=001-145389>; *Valdís Fjölfnisdóttir and Others v. Iceland*, App. No. 71552/17 (May 18, 2021), <https://hudoc.echr.coe.int/eng?i=001-209992>.

²⁶ *O.H. & G.H. v. Germany*, App. Nos. 53568/18, 54741/18, para. 134 (Apr. 4, 2023); *A.H. & Ors. v. Germany*, App. No. 7246/20, para. 132 (Apr. 4, 2023).

3. Sweden: Regulating trans legal parenthood within a gendered system

Facing requests from the individuals affected and civil society organizations, the Swedish 1949 Children and Parents Code was reformed in 2018 to include trans legal parenthood.²⁷ This reform, which provides for the registration of trans parents according to their legal gender, makes Swedish law on parenthood original, even if particularizing. The law, its context, and the discussions that it has raised offer valuable lessons for other countries seeking a more inclusive legal regulation of contemporary forms and practices of parenthood.

3.1. Strategic litigation: Challenging commonsensical understandings of biology

Swedish legal recognition of trans people and their parenthood has come a long way over the last years. In 1972, as the first country in the world, Sweden established a law to render an amendment of legally registered gender possible, enabling legal gender recognition for trans people.²⁸ However, one precondition to access legal gender recognition was infertility, which in practice meant mandatory surgical sterilization for anyone who wanted to change their legally registered gender.²⁹ The motivation for such a requirement was to “completely eliminate the risk of confusion in family relations,”³⁰ and to avoid that “one who officially has male gender becomes a mother and one who officially has female gender becomes a father.”³¹ After civil-society campaigning and successful strategic litigation,³² the sterilization requirement was removed from the legislation in 2013.³³ Not requiring trans people to be infertile to access legal gender recognition meant to an increasing extent that trans people could also have biological children after amending their registered gender. Trans legal parenthood was however not much pondered upon in the Government Bill that removed the sterilization requirement.³⁴ The Government wished to swiftly remove the sterilization requirement,

²⁷ LAG OM ÄNDRING I FÖRÄLDRABALKEN (SFS 2018:1279) (Swed.).

²⁸ LAG OM FASTSTÄLLANDE AV KÖNSTILLHÖRIGHET I VISSA FALL [ACT ON GENDER RECOGNITION UNDER CERTAIN CIRCUMSTANCES] (Svensk författningssamling [SFS] 1972:119).

²⁹ The other requirements were that the applicant held Swedish citizenship, was a legal adult, was unmarried, had identified with the gender in question since childhood, and acted gender-conformingly.

³⁰ Proposition [Prop.] 1972:6, at 50: Kungl. Maj:ts proposition med förslag till lag om fastställande av könstillhörighet i vissa fall, m.m. [Royal Bill with Proposals for an Act on Gender Recognition under Certain Circumstances, etc.] [government bill].

³¹ *Id.* at 49.

³² Kammarrätten i Stockholm [The Stockholm Administrative Court of Appeal], Case No. 1968-12, Dec. 19, 2012.

³³ See ALAATTINOĞLU, *supra* note 9; Alaattinoğlu & Rubio-Marín, *supra* note 9.

³⁴ Proposition [Prop.] 2012/13:107: Upphävande av kravet på sterilisering för ändrad könstillhörighet [Repeal of the Requirement for Sterilization for Legal Gender Recognition] [government bill]. A previous Bill that had sought to remove the sterilization requirement, but was stalled, had, however, considered that the situation where a person had changed their legally registered gender from woman to man and given birth to a child might contribute to legal insecurity surrounding the recognition of parenthood. See Proposition [Prop.] 2011/12:142, at 56: Ändrad könstillhörighet [Legal Gender Recognition] [government bill].

and concluded that the 1949 Children and Parents Code³⁵ could also apply to determine the legal parenthood of trans parents, without needing further amendments.³⁶ Yet, since the legislation builds on the notion of parenthood within the confines of a heterosexual family consisting of cis people, its application outside of this framework soon encountered issues in practice.

The Swedish Tax Agency, which oversees civil registration, refused to register trans parents according to their legal gender after the sterilization requirement was removed. Instead, it relied on a combination of old registry entries and notions about how the child was conceived and delivered. Hence, a person giving birth to a child was automatically registered as “mother.” It was also impossible to change the registration or familial relationship (for example, “mother–child” to “father–child”) in case a parent amended their legally registered gender after the child was born. As an example, a trans man could be registered as both “man” and “mother”: a situation which would be impossible for a cisman, resulting in continuous forced disclosure of gender history—for trans men.

To challenge the Swedish Tax Agency’s application of the law, two cases concerning the recognition of trans people’s parenthood according to their gender identity were litigated in Swedish administrative courts in the period 2013–15.³⁷

The first case concerned a trans man who had given birth to his child *after* amending his legally registered gender. The Swedish Tax Agency registered him as “mother” to his child. The applicant brought a case before administrative courts, demanding the amendment of his parental registration from “mother” to “father.” He submitted that the incongruence between his male legal gender and physical appearance, on the one hand, and his registration as “mother,” on the other hand, caused him and his child significant difficulties. For instance, in encounters with public officials, the applicant’s family situation was often questioned. He also claimed that registering him as “mother” was an incorrect application of the law since it did not correspond to reality, and the Tax Agency is obliged to register parenthood in a correct and coherent manner. For the situation at hand, the 1949 Children and Parents Code did not specify how such a registration should be carried out. The applicant pointed out that the tax authorities had invented a legal category of “biological mother” in their registration, one that did not figure in legislation. The applicant concluded by arguing that his registration as “mother” violated his and his child’s right to respect for private and family life and right to personal integrity. He also labelled the incorrect registration a form of discrimination against trans people.³⁸ In his view, parental misrecognition

³⁵ FÖRÄLDRABALK [FB] [Children and Parents Code] 1949:381.

³⁶ Proposition [Prop.] 2012/13:107, at 19–20: Upphävande av kravet på sterilisering för ändrad könstillhörighet [Repeal of the Requirement for Sterilization for Legal Gender Recognition] [government bill].

³⁷ The applicants were supported by the Swedish Federation for Lesbian, Gay, Bisexual, Transgender, Queer and Intersex Rights (RFSL).

³⁸ In line with rights protected in the ECHR, *supra* note 19 and the Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3. The specific articles referred to, and the grounds of discrimination, in the applicant’s claim are not specified in the judgment. Förvaltningsrätten i Stockholm [The Stockholm Administrative District Court], Case No 24685-13, Apr. 14, 2014, Annex 1, at 2. Annex 1 of the judgment is confidential and has been accessed and quoted with the permission of the applicant.

endangered their familial relationship and forced them to reveal intimate details to outsiders in their daily lives. Being listed as the child's mother hence invalidated the applicant's right to legal gender recognition.

The Tax Agency in turn contested all the applicant's submissions, claiming that his registration as "mother" was based on the fact that he had given birth. The applicable principle raised was *mater semper certa est* ("mother is always known"), since *mater est quam gestatio demonstrat*—meaning that gestation determines legal motherhood. The Tax Agency considered this principle to mean "that the one giving birth shall be registered as a mother in the civil registry regardless of gender," thus disconnecting parental status from legal gender.³⁹ It further pointed out that "there is no regulation that states that the person giving birth needs to be a woman or that the mother of a child needs to be a woman."⁴⁰ Reflecting upon the consequences of the requested change, the Tax Agency added that registering the applicant as "father" would mean that the child would have "two fathers and no mother" in terms of registration,⁴¹ a situation that it stated to lack support under Swedish law. In so arguing, therefore, the Tax Agency assumed that, legally, children ought to have a mother and a father—or at least, it seems, a mother.

The Administrative Court of First Instance recognized that the 1949 Children and Parents Code did not include any provision concerning the determination of legal parenthood in the situation at stake.⁴² Given this legislative lacuna, the Court thought that the more appropriate application of the law was the one that would be "most reasonable and respects [the applicant and his child's] rights" in accordance with Swedish law and Swedish commitments to international human rights.⁴³ The Court highlighted that a legal void such as the one at hand should not be interpreted in a manner that would be to the detriment of individuals.⁴⁴

The Court identified a variety of rights and interests at issue. Referring to the practice of the ECtHR,⁴⁵ it considered that the right to respect for private and family life (art. 8 ECHR) entails a state obligation to recognize amendments of legal gender with full legal force, to avoid forced disclosure of one's gender history to third parties.⁴⁶ Additionally, the Court mentioned a public interest to ensure that civil registries contain correct information. Yet, it did not consider that designating the applicant as "father" would be incorrect or limit the purpose of civil registration.⁴⁷ Furthermore, the position of the applicant's child was to be considered. According to the Court, the principle of the child's best interests, established by articles 3 and 4 of the 1989

³⁹ Förvaltningsrätten i Stockholm [The Stockholm Administrative District Court], 24685-13, Annex 1, at 2.

⁴⁰ *Id.* Annex 1, at 2–3.

⁴¹ *Id.* Annex 1, at 3.

⁴² *Id.* Annex 1, at 4.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.* Annex 1, at 5, citing *Christine Goodwin v. United Kingdom*, App. No. 28957/95 (July 11, 2002), <https://hudoc.echr.coe.int/eng?i=001-60596>.

⁴⁶ Förvaltningsrätten i Stockholm [The Stockholm Administrative District Court], 24685-13, Annex 1, at 5.

⁴⁷ *Id.*

Convention on the Rights of the Child and reflected in national legislation,⁴⁸ placed states under an obligation not to put the applicant's child in a vulnerable situation threatening their personal integrity.⁴⁹ In view of safeguarding the right to personal integrity for individuals—both the applicant and his child—the Court concluded that it was most reasonable to register the applicant as a father.

The judgment contained an obligation for the Swedish Tax Agency to change their registration practice, which led to an appeal by said authority. The Administrative Court of Second Instance came to the same conclusion as the First Instance Court on identical legal grounds. It further clarified that the child already having one registered father was not an obstacle for also registering the applicant as one.⁵⁰ The Tax Agency then appealed to the Supreme Administrative Court, but retracted the appeal soon after,⁵¹ giving the Second Instance ruling legal force.

The second case concerned a trans man (the main applicant) who had given birth to his child (the second applicant) *before* changing legal gender. The Swedish Tax Agency had first not registered the main applicant with his new personal identification number as “father” and legal guardian of his child, leaving their family relationship legally unrecognized. After the applicant's post-transition request to be registered as “father,” the authority however registered him as “mother.” This registration had, according to the applicant, led to various problems and general confusion about his relationship to his child when entering in contact with, for example, the school, pharmacies, the health care system, and other authorities.⁵² Relying on similar arguments as in the first case, the main applicant argued that being registered as “mother” breaches his and his child's right to respect for private and family life (art. 8 ECHR) and amounts to discrimination based on gender contrary to article 14 ECHR.⁵³ The Tax Agency nevertheless rebutted all the applicant's claims and reiterated the position held in the first case.⁵⁴

The Administrative Court of First Instance concluded that the main applicant should be registered as “father” of the second applicant on the following grounds. Designating the applicant as “mother” would, according to the Court, contravene his right to respect for private and family life (art. 8 ECHR) and the right to non-discrimination (art. 14 ECHR).⁵⁵ In comparison to the first case, the Court was however more explicit, with the public interest giving way to the rights of the individuals involved:

⁴⁸ See, e.g., FÖRÄLDRABALK [FB] [Children and Parents Code] 1949:381, ch. 6, sec. 2(a).

⁴⁹ Förvaltningsrätten i Stockholm [The Stockholm Administrative District Court], 24685-13, Annex 1, at 3, 5.

⁵⁰ Kammarrätten i Stockholm [The Stockholm Administrative Court of Appeal], Case No. 3201-14, Jul. 9, 2015, Annex A, 10. Annex A of the judgment is confidential and has been accessed and quoted with the permission of the applicant.

⁵¹ The withdrawal resulted in the Supreme Administrative Court dismissing the appeal. Högsta förvaltningsdomstolen [The Supreme Administrative Court], Case No. 4632-15, Nov. 4, 2015.

⁵² Förvaltningsrätten i Göteborg [The Gothenburg Administrative District Court], Case No. 11453-13, Oct. 30, 2014, at 4.

⁵³ *Id.* at 4–7.

⁵⁴ *Id.* at 7. None of the parties hence differentiated between whether the parent–child relationship was established before or after the amendment of legal gender.

⁵⁵ *Id.* at 11.

On the one hand, *A* has given birth to *B* in a biological sense before changing his legal gender. The right for *A* to legal gender recognition and his and *B*'s right to legal protection are, however, given a heavier legal weight in comparison to the public need to register a “biological mother” to each child.⁵⁶

Following appeal, the Administrative Court of Second Instance upheld the first instance ruling on the same grounds.⁵⁷ The final judgment thus created an obligation for Swedish tax authorities to recognize the applicant as “father” of his child in line with his legal gender.

In spite of the change of legal gender happening at different times (before versus after childbirth), the two cases share outcomes and many traits in the legal reasoning. In both cases, the Courts' leading principles were the human and constitutional right to legal recognition⁵⁸ for trans people and their families, and the international and national legal obligation to protect the best interests of the child. The Courts' construction of the public interests at stake was nevertheless different in the two cases. In the first case, the relevant public interest was considered to be the correctness of civil registries. In the second case, as the above quote suggests, it was the (more specific) public interest for every child to have a person registered as their mother—an interest recognized neither in the first case, nor in fact by Swedish law (at least not explicitly).⁵⁹ Taking the reasoning further, the Courts did not seem to construct legal motherhood differently from fatherhood in the first case, while the Courts did so in the second case, supported by the arguments submitted by the Tax Agency. The reason for differentiating between the (gendered) categories of “motherhood” and “fatherhood” was left unstated. The gendered differentiation is particularly visible in the underlying assumption that having two fathers and no mother endangered the wellbeing of the child. The different construction of the public interest at stake led the Court in the first case *not* to see a conflict between public and individual interests (as the registration was correct), while in the second case, such a conflict was created (as there was no mother). However, as stated earlier, individual rights were accorded primacy in the conflict. The cases and their outcomes were moreover important to start a Swedish legal and political discussion about the parental registration of trans people and the need for legislation that clarified the matter.

3.2. An inclusive, yet particularizing, reform

Spurred by the need to regulate parenthood in relation to assisted reproductive technologies and to include single, same-sex, and trans parents in the legislation, in

⁵⁶ *Id.*

⁵⁷ Kammarrätten i Göteborg [The Gothenburg Administrative Court of Appeal], Case No. 6186-14, Oct. 5, 2015.

⁵⁸ See ECHR, *supra* note 19, art. 8 (the right to respect for private and family life). The European Convention on Human Rights has a constitutionally recognized position in Sweden. REGERINGSFORMEN [RF] [Instrument of Government] 1974:152, ch. 2, sec. 9.

⁵⁹ The fact that such an interest does not enjoy legislative protection is the authors' own reflection and was not pointed out by the Court. The Court did not expound on this interest. See Förvaltningsrätten i Göteborg [The Gothenburg Administrative District Court], Case No. 11453-13, Oct. 30, 2014, at 11.

2013, the Swedish Government initiated a public investigation aiming to propose a reform of the Children and Parents Code.⁶⁰ The comprehensive investigation report, published in 2016, made two main recommendations regarding the recognition of parenthood for people who have changed legally registered gender. First, while noting that the ECtHR had not yet ruled on the specific issue of trans parenthood and that there was no European consensus, the report recommended—in line with the preceding case law—that legal gender should be a guiding principle when determining trans people’s legal parenthood.⁶¹ Second, the report called for a special legal status to be accorded to trans parents, taking into account that the rights, benefits, and obligations ensuing from legal motherhood and legal fatherhood/parenthood differ to some extent in Sweden.⁶² More specifically, the rules regarding, for example, the child’s nationality, parental benefits, and guardianship for single parents put mothers in a different, often advantageous, legal position in comparison to fathers/parents. With the aim of ensuring that trans fathers would not be deprived of maternal rights and as such discriminated against, the investigation therefore recommended that people who have changed their legal gender maintain the social and legal benefits according to their formerly registered legal gender.⁶³ Trans parents were hence, unlike cis parents, given a separate, “hybrid” category of parents,⁶⁴ in which *both* their former *and* current legal gender determine their legal position.

In the subsequent Government Bill, a few points were clarified. First, special rules would apply to parents who had changed legal gender.⁶⁵ Second, a presumption of paternity or maternity for the person not giving birth would not apply to married couples where one or both parties had an amended legal gender. In such cases, the Bill pointed out, a parent–child relationship should be established through an administrative procedure or a court judgment. This meant a differential treatment of married couples based on whether members had amended their legal gender or not. The Bill justified this difference by referring to the genetic bond implied in the presumption of paternity, which did not exist for couples in which one or both parties were trans individuals.⁶⁶

The Bill finally stated that special rules should not be introduced for cases in which a person amends their legally registered gender after a child has been born. This was based on the technical argument that the Children and Parents Code regulates

⁶⁰ See Statens Offentliga Utredningar [SOU] 2016:11: Olika vägar till föräldraskap [Different Routes to Parenthood] [government report].

⁶¹ *Id.* at 601–5.

⁶² A point of clarification is in order here, as Swedish parental legislation currently operates with three categories of parenthood: “mother,” “father,” and “parent.” Despite the gender-neutral sound of the last category, it is nevertheless a restricted label only applicable to same-sex female couples. More specifically, “parent” is the partner who does not give birth, but consents to her partner using assisted reproductive technologies to become pregnant and give birth. Legally, a “parent” has the same position as a “father.” FÖRÄLDRABALK [FB] [Children and Parents Code] 1949:381, ch. 1, sec. 9.

⁶³ See SOU 2016:11, *supra* note 60, at 601–5.

⁶⁴ Elin Jonsson & Erik Mägi, *Ändrad könstillhörighet och rättsligt föräldraskap* [Changed Legal Gender and Legal Parenthood], JURIDISK PUBLIKATION, no. 2, at 273 (2021).

⁶⁵ Proposition [Prop.] 2017/18:155, at 57–9: Modernare regler om assisterad befruktning och föräldraskap [More Modern Rules on Assisted Reproduction and Parenthood] [government bill].

⁶⁶ *Id.* at 60.

parenthood at children's birth, and not later in life. If a person amends their legally registered gender after a child has been born, the Bill left it to the Swedish Tax Agency to manage parental registration on a case-by-case basis.⁶⁷

After some heated debates,⁶⁸ the Bill was passed by the Swedish Parliament in 2018. The general rules laid down were two. The first one was that a man who gives birth is registered as a father of his child, but his legal position was otherwise considered as that of a mother (the "motherly father").⁶⁹ The second one was that, in cases where one parent has changed their legal gender, paternity or maternity was not presumed but confirmed through a special acknowledgement or judgment regardless of the parents' marital status.⁷⁰ Hence, the 2018 reform included trans people as parents in line with their legal gender. It however did so in a way that particularized the legal status of their parenthood and their families.

The fact that the revised Swedish Children and Parents Code recognizes trans parenthood in accordance with legal gender is to be considered innovative, at a European and even global level.⁷¹ The law nevertheless has been criticized for treating cis and trans parents differently; for leaving trans parents in a position where they have to disclose sensitive information to public officials and third parties;⁷² and for favoring

⁶⁷ *Id.* at 60–1.

⁶⁸ The objections came from right-wing populists, conservatives, and liberals. The objections criticized the possibility of a person's legal gender being different from the gender assigned at birth (the Sweden Democrats, SD), or the possibility for familial relations to change after a person already has become a parent (the Christian Democrats, KD), or emphasized the need to introduce a gender-neutral parental presumption (the Liberals, L). All of these motions were nevertheless dismissed, and the Bill was passed in 2018 and entered into force on January 1, 2019. See Committee Motion 2017/18:4108 by Carina Ståhl Herrstedt et al. (SD); Committee Motion 2017/18:4102 by Emma Henriksson et al. (KD); Committee Motion 2017/18:4123 by Barbro Westerholm et al. (L); Socialutskottet [Parl. Comm. on Health & Welfare], Report 2017/18:SoU20, at 30–1 (2018).

⁶⁹ FÖRÄLDRABALK [FB] [Children and Parents Code] 1949:381, ch. 1, sec. 11.

⁷⁰ *Id.* ch. 1, secs. 10, 12–14. This legislative amendment meant that the parental position for trans people was legally weakened, as before the amendment, the presumption for cis couples applied analogously to trans parents. See Ulrika Westerlund, *Regeringens lagförslag försämrar för transpersoner som är föräldrar* [The Government's Proposition Worsens the Situation for Trans People Who Are Parents], FEMINISTISKT PERSPEKTIV (Mar. 2, 2018), <http://feministisktperspektiv.se/2018/03/02/regeringens-lagforslag-forsamrar-transpersoner-som-ar-foraldrar/>. See also Statens Offentliga Utredningar [SOU] 2017:92, at 253; Transpersoner i Sverige. Förslag för stärkt ställning och bättre levnadsvillkor [Trans People in Sweden. Proposal for Strengthened Position and Better Living Conditions] [government report]. A subsequent public investigation for further reforms on the regulation of parentage however suggested that a presumption of paternity or maternity should also apply to married trans people. Statens Offentliga Utredningar [SOU] 2018:68, at 147–50: Nya regler om faderskap och föräldraskap [New Rules on Paternity and Parentage] [government report]. Through a legal amendment in 2021, a presumption of paternity or maternity was introduced to married trans people in Sweden. FÖRÄLDRABALK [FB] [Children and Parents Code] 1949:381, ch. 1, sec. 11a.

⁷¹ On European approaches to regulate the parental status of trans birthing men, see Alice Margaria, *Trans(forming) Fatherhood? European Legal Approaches to Seahorse Fatherhood*, in CHANGING FAMILIES, CHANGING FAMILY LAW: CONVERGENCE OR DIVERGENCE IN EUROPE? (J. Antomo, K. Duden & D. Wiedemann eds., forthcoming 2023).

⁷² See, e.g., Swedish Government Bill 2017/18:155, at 59 (criticizing the obligation for trans people to share their gender history); SOU 2016:11, *supra* note 60, at 619–21 (pointing out the lack of knowledge and understanding of, and respect for, trans people's rights among Swedish public officials and the social and healthcare sector); SOU 2017:92, *supra* note 70 (an effort to map and combat such discrimination of trans people in Sweden).

detailed, particularizing regulation, instead of opting for general, gender-neutral solutions. The earlier-mentioned public investigation had considered the option of making the language of the whole Children and Parents Code gender neutral, but eventually did not pursue it, as it held that such a reform would require a “thorough analysis of the related consequences and changes of a considerable number of different laws.”⁷³

Despite many legal reforms in recent years to make Swedish regulation on parenthood more gender equal,⁷⁴ the law still mainly uses the categories of motherhood and fatherhood/parenthood—ultimately boiling down to the entrenched heteronormative idea that a child’s parents are two: a mother and a father.

4. Alternative legal approaches: Degendering legal parenthood and gender misalignment

Moving beyond Sweden, other jurisdictions that provide legal gender recognition for trans people have adopted alternative approaches to regulating trans legal parenthood.⁷⁵ Here, two legal models are identified as the most prominent ones: degendering legal parenthood and gender misalignment.⁷⁶

Starting from degendering legal parenthood, Ontario, Canada, chose such a cutting-edge approach in the 2016 All Families Are Equal Act (Parentage and Related Registrations Statute Law Amendment).⁷⁷ As a result of the amendment, all parents of a child are simply referred to as “parents” in the English version of the law.⁷⁸ The multiple forms of parenthood included in the amended Children’s Law Reform Act are: parentage through birth,⁷⁹ sexual intercourse,⁸⁰ marriage or conjugal relationship with the birth parent (for assisted reproduction or insemination by sperm donor),⁸¹ pre-conception parentage agreements,⁸² surrogacy,⁸³ posthumous conception,⁸⁴ declaration,⁸⁵ and adoption.⁸⁶ The legislation embraces familial diversity by avoiding gendered references and assumptions, instead defining parenthood through

⁷³ SOU 2016:11, *supra* note 60, at 600. The investigation also pointed out that parental registration should *not* be a matter of choice, since this would diminish the predictability of civil registries.

⁷⁴ Among these reforms are importantly those to increase the rights and benefits of fathers, such as parental leave.

⁷⁵ Due to space considerations, not all jurisdictions that provide legal gender recognition for trans people are included in this section. The chosen jurisdictions exemplify, either through legislation or case law, versions of the two models analyzed.

⁷⁶ This comparison is not exhaustive, as there are also other models.

⁷⁷ S.O. 2016, c. 23—Bill 28 (Ont.). Another example is Malta, where birth certificates use gender-neutral terminology such as “Parent 1” and “Parent 2.”

⁷⁸ The French version, however, contains references to “*le père ou la mère*,” “*le père et la mère*,” etc.

⁷⁹ Children’s Law Reform Act, R.S.O. 1990, c. C-12, § 6 (Can.).

⁸⁰ *Id.* § 7.

⁸¹ *Id.* § 8.

⁸² *Id.* § 9.

⁸³ *Id.* §§ 10–11.

⁸⁴ *Id.* § 12.

⁸⁵ *Id.* § 13.

⁸⁶ *Id.* § 4 par. 2 subpar. b.

existing varieties of biological reproduction and social bonds.⁸⁷ Accordingly, situations in which there is a “mismatch” between parental recognition and gender identity are avoided, treating cis and trans parents similarly. This solution—decoupling legal gender from legal parenthood—should, at least in theory, minimize the risk of trans parents having to recount intimate details about their gender identities, transitions, means of conception, and other private matters to public officials and third parties.

The Israeli legal system has taken a step in the same direction, but only jurisprudentially so far. In May 2021, the High Court of Justice ruled that trans parents can now be registered as “parents” on their child’s birth certificate.⁸⁸ Following this ruling, trans men who give birth to their child in Israel are able to preserve their male gender classification in the population registry. Yet, they need to apply to the Gender Adjustment Committee to confirm that the birth does not change their gender classification. While Israel and Ontario might be exceptional, non-representative examples from a comparative perspective, they demonstrate that degendered legal parenthood is no longer merely an abstract discussion, but a legal reality in some jurisdictions.

The second alternative approach is to misalign legal gender and parental status: i.e., blurring gendered parental binaries (a legal man can be a mother and a legal woman can be a father). Paradoxically, this situation is often the result of public authorities’ intention to preserve traditional gender binaries and biological ties in the recognition of parenthood. This approach is seen in multiple countries. These are, for example, England and Wales, Germany, and Norway, which all offer some kind of legal gender recognition for trans people but have not amended provisions on legal parenthood to regulate trans people’s parenting experiences. It follows that there can be “male mothers” and “female fathers” under the law of these jurisdictions.⁸⁹

In some countries, the blurring of the binary appears to have arisen as a consequence of the combination of unchanged laws on parenthood and a changed regime of legal gender recognition. Norway, for one, introduced legal gender self-determination in 2016.⁹⁰ According to the rules on parenthood in the Norwegian Children’s Act, however, parents are designated as “father,” “mother,” or “co-mother.”⁹¹ The Act does not include separate rules pertaining to trans parents in the assumption that a child is always born to a woman, who becomes the child’s mother through the act of giving birth.⁹² With this presumption in mind, the more specific regulations in the Act

⁸⁷ On the intentions of inclusivity and equality behind the amendment, see Robert Leckey, *One Parent, Three Parents: Judges and Ontario’s All Families Are Equal Act, 2016*, 33 INT’L J. L., POL’Y & FAMILY 298 (2019).

⁸⁸ HJC 3148/18 Ploni v. Ministry of Interior, Nevo Legal Database (May 5, 2021) (Isr.). See similarly Cour d’appel Toulouse, 6e ch., Feb. 9, 2022, n. 20/03128 (Fr.) (where a trans woman was registered as mother on the birth certificate of her genetically related child, born to her female partner). At the same time, in order to limit—to the extent possible—situations where trans individuals become genetic parents and the ensuing legal complexities, the French Constitutional Council recently decided that trans men cannot access assisted reproductive services as they are *not* women in the eyes of the law. Conseil Constitutionnel [CC] [Constitutional Court], decision No. 2022-1003QPC, July 8, 2022 (Fr.).

⁸⁹ Re T.T. and Y.Y. [2019] EWHC 2384, ¶ 251 (U.K.).

⁹⁰ Lov om endring av juridisk kjønn [Act on Amendment of Legal Gender] June 17, 2016 nr. 46 (Nor.).

⁹¹ Lov om barn og foreldre (barnelova) [Act on Children and Parents] Apr., 8., 1981 nr. 7 (Nor.) [hereinafter Children’s Act].

⁹² *Id.*, § 2.

then relate to who can legally be considered the father or co-mother of the child, generally based on this person being the biological parent or the partner of the mother. As no provision exists for the situation where a man gives birth or a woman begets children, this means that trans parents cannot gain parental recognition in line with their legal gender.⁹³

In some of the countries adopting this approach, trans parents have resorted to the judiciary in their quest to obtain parental recognition according to their legal gender, albeit in vain. Two illustrative examples are cases brought in Germany and England, where courts have been called on to determine the parental status of two trans fathers, Freddy McConnell and O.H., who gave birth to their children after changing their legal gender.⁹⁴ In both jurisdictions, the courts confirmed the Registrar’s decision to designate the men involved as “mothers” of their children. While acknowledging that the incongruence between the applicants’ lived and legal family realities amounted to an interference with their right to respect for private and family life,⁹⁵ this violation was eventually considered to be substantially outweighed by two other interests: the need for “certainty in family law,”⁹⁶ and the child’s right to know their origins.

As to the former, English and German courts stressed the need to preserve an administratively coherent and stable scheme for the registration of births in which the person who gives birth is consistently registered as “mother,” in accordance with the rule *mater semper certa est*.⁹⁷ One of the most compelling reasons underlying this legislative choice lies in the importance attached to the right of children to know their biological origins. The German Federal Court argued that, should birth registration not clarify the exact biological function in which the parent–child relationship is grounded (be it contribution of sperm or pregnancy and childbirth), children would be deprived of vital information on their descent.⁹⁸ Along similar lines, the UK High Court explained that registering a trans man who has given birth to a child as “father” or “parent” implies that this child “will not have, and will never have had, a ‘mother’ as a matter of law, he will only have a father.”⁹⁹ According to English courts, this outcome would run counter to the child’s best interests to have a mother and to discover who that person is.¹⁰⁰ As a result, in spite of being fathers in social life, O.H.

⁹³ *Id.* ch. 2. See Sørlie, *supra* note 7.

⁹⁴ For the case of Freddy McConnell, see *Re T.T. and Y.Y.* [2019] EWHC 2384 (Sept. 25, 2019, *aff’d* in *R (McConnell and Y.Y.) v. Registrar General* [2020] EWCA Civ 559 (Apr. 29, 2020)). The UK Supreme Court denied permission to appeal in November 2020, because McConnell’s application did “not raise an arguable point of law.” For the case of O.H. & G.H. v. Germany, App. Nos. 53568/18, 54741/18 (Apr. 4, 2023), which was recently decided also by the ECtHR, see *Amtsgericht [AG] [District Court] Berlin*, Dec. 13, 2013, 71 III 254/13, *juris*; *Kammergericht [KG] [Superior Court] Berlin*, Oct. 30, 2014, 1 W 48/14, *juris*; *Bundesgerichtshof [BGH] [Federal Court of Justice]*, Sept. 6, 2017, XXI ZB 660/14, *juris*. The German Federal Court of Justice reached the same decision in a more recent case. *Bundesgerichtshof [BGH] [Federal Court of Justice]*, Jan. 26, 2022, XII ZB 127/19, *juris*.

⁹⁵ *R [2020] EWCA Civ 559*, ¶ 55; *Bundesgerichtshof [BGH] [Federal Court of Justice]*, Sept. 6, 2017, XXI ZB 660/14, ¶ 35, *juris* (Ger.).

⁹⁶ Dunne, *supra* note 1, at 564.

⁹⁷ BGH, Sept. 6, 2017, XXI ZB 660/14, ¶ 27; *R [2020] EWCA Civ 559*, ¶¶ 64–71.

⁹⁸ BGH, Sept. 6, 2017, XXI ZB 660/14, ¶ 29.

⁹⁹ *Re T.T. and Y.Y.* [2019] EWHC 2384, ¶ 258.

¹⁰⁰ *Id.*; *R [2020] EWCA Civ 559*, ¶ 86.

and McConnell continue to be “mothers” in the eyes of the law. In sum, even if sterilization is not required for legal gender recognition in both Germany¹⁰¹ and the United Kingdom¹⁰² and, accordingly, trans men—so wishing—can give birth to their biological children, the determination of legal parenthood remains anchored to the specific role played in the procreation process regardless of the person’s legal gender. As a consequence of the misalignment between legal gender and parental status, in the above jurisdictions, (legal) motherhood and fatherhood are no longer the exclusive domain of women and men respectively.

Overall, by contrasting the Swedish example with these two models, two insights are gained. The first is that trans legal parenthood questions the cis- and hetero-normative legal assumption that every family with children has two parents: a mother and a father. The second insight is that freeing themselves of this assumption is the biggest challenge legal systems seem to face when regulating trans legal parenthood. This explains, *inter alia*, the large prevalence of the misalignment model over the other two.

5. Persisting challenges: Ways ahead?

Existing approaches engender several pervasive questions relating to the disestablishment of the gender order and the recognition of contemporary forms and experiences of parenthood in their plurality and complexity. The misalignment model, while blurring the lines of gender binaries, demonstrates states’ reluctance to abandon the traditional, legally entrenched idea of the family as consisting of father, mother, and child(ren). The Swedish approach may formally seem to have rid itself of such a cis- and hetero-normative model, designating trans fathers as “fathers,” but this amendment has apparently occurred only at the surface. The reformed Swedish provisions in fact appear to be a variant of the misalignment model, as they create a binary legal discrepancy between mothers and fathers/parents in a traditional, mother-father family model. On account of particularizing legislation, this model continues to pose problems for parents who do not fit in, such as trans or non-binary people.

5.1. Moving towards a degendering approach

A more comprehensive legal amendment has nevertheless appeared on the political agenda. The Swedish Minister for Gender Equality at the time, Åsa Lindhagen, authored a newspaper article in 2019 in which she declared the wish of the Swedish Government to make laws and public administration more inclusive of sexual orientation, gender identity, and family diversities, and “to abandon the limiting hetero norm.”¹⁰³ Regarding the possibility of introducing

¹⁰¹ Transsexuellengesetz [TSG] [Transsexuals Act] 1980, as amended by Bundesverfassungsgericht [BVerfG.] [Federal Constitutional Court], Jan. 11, 2011, 1 BvR 3295/07 (Ger.).

¹⁰² Gender Recognition Act 2004, c. 7 (U.K.).

¹⁰³ Åsa Lindhagen, *Dags för en könsneutral familjerättslig lagstiftning* [Time for a Gender-Neutral Family Law], DAGENS NYHETER (July 31, 2019), www.dn.se/debatt/dags-for-en-konsneutral-familjerattslig-lagstiftning/.

a gender-neutral law, Lindhagen wrote: “Gender-specific legislation can indicate that some families are the norm and others are not. It should be investigated how legal regulation of parenthood could be made gender-neutral and how the rules can become more modern, clear and appropriate.”¹⁰⁴ As emphasized by this quote, the Swedish experience foregrounds many of the evident problems when trying to adapt gender-binary, cis- and hetero-normative parental legislation to a diversity of families without prior challenging of the rationales and assumptions underlying the legislation.

In 2020, the state appointed a committee responsible for exploring ways to reform and make the law on parenthood more inclusive and suited to contemporary Swedish society.¹⁰⁵ An important political aim behind the intended reform was to adopt gender-neutral language in order for the law to accommodate family arrangements beyond the hetero norm.¹⁰⁶ While any future legal reform ultimately depends on the political response to the committee’s findings and recommendations, the committee’s final report suggests that Sweden is likely to opt for a degendering model in the future.¹⁰⁷ Whilst considering officially abandoning the hetero norm, the Government insisted on the importance of identifying the birthing parent and the other parent: “Also in the future there will, to a certain extent, be a need to differentiate parents. . . . The most relevant issue is likely being able to indicate the parent who gave birth to the child and the parent who should be considered as the child’s other parent.”¹⁰⁸

Similar to what the pre-reform public investigation had revealed (see Section 3.2), the Swedish Government explains that differentiating between the birthing parent and the other parent is relevant because the position of legal mothers and legal fathers is not identical under Swedish law. It remains to be seen how the Swedish legislator will manage to reconcile the desire for greater inclusion that calls for a single parental status, on the one hand, and the wish to maintain a distinction between legal motherhood and legal fatherhood through a gendered nomenclature, on the other hand. One example of gendered, differential roles is the guardianship of the child, which by legal presumption belongs to the mother alone unless the parents are married.¹⁰⁹ Legally linking the care responsibilities for the child to the mother by default demonstrates a second, deeper layer: a lingering legal and cultural attachment to a gendered division of care work.

¹⁰⁴ *Id.*

¹⁰⁵ Directive [Dir.] 2020:132: En föräldraskapsrättslig lagstiftning för alla [A Parenting Law for All] [government directive] (Swed.). For the Committee’s findings, see in Statens Offentliga Utredningar [SOU] 2022:38: Alla tiders föräldraskap—ett stärkt skydd för barns familjeliv [Parentage of All Times—Strengthened Protection for Children’s Family Life] [government report]. In fact, another aspect considered to be in need of improvement is the law’s accessibility. The current text of the law consists mainly of cross-references. Therefore, the state-appointed committee was tasked with making the legislation easier to understand as well.

¹⁰⁶ Dir. 2020:132, *supra* note 105, at 3–7.

¹⁰⁷ SOU 2022:38, *supra* note 105.

¹⁰⁸ *Id.* at 6.

¹⁰⁹ FÖRÄLDRABALK [FB] [Children and Parents Code] 1949:381, ch. 6, sec. 3.

5.2. Degendering care?

The Government Directive's explanation begs the question of whether degendering legal parenthood (i.e., abandoning the gender-specific and dichotomous terminology) would be enough and/or capable to bring about more inclusion and greater equality among families.¹¹⁰ In order to answer this question, another sub-question must first be addressed: What concrete advantages and risks would be brought about by replacing the legal categories of "mother" and "father" with the gender-neutral term "parent"? In the context of trans parenthood, this solution would solve once for all the issue of whether parental status should reflect the birth-assigned gender or the gender identity. Moreover, degendering parental status would also cater to those parents who transition to a non-binary gender form rather than to the male or female gender.¹¹¹ This solution would also create more structural advantages that go beyond the context of trans parenthood. It would certainly contribute to reducing the legal and cultural power of heteronormativity, enable the law to accommodate a wide(r) variety of families, and possibly even be an inevitable turn towards increasing access to adoption and ART by same-sex couples.¹¹²

Without discounting the significance of these advantages, doubts as to the transformative sufficiency of nominally degendering legal parenthood remain. As exemplified by the earlier-mentioned connection between care responsibilities and gestation implied in the Government Directive, if the rationales underlying gendered structures in registration laws are not questioned, degendering legal parenthood is at risk of playing out as a mere semantic strategy with no concrete impact on gendered notions and arrangements of care at the core of the traditional gender order. Challenging underlying rationales would require "degendering care." This concept is distinct from degendering legal parenthood and consists in detaching care and parenting from traditional gender structures—i.e., from mothering.

How can degendering care be achieved? One way to degender care is to reconstruct fatherhood, taking it beyond the conventional paradigm and centering it around care.¹¹³ The cases involving trans men mentioned in the previous sections offer precious opportunities in this sense. In giving birth to their children and seeking to be recognized as their fathers, trans men are "active agents"¹¹⁴ in challenging traditional understandings of fatherhood and, more importantly, in making care a relevant

¹¹⁰ The question of degendering parenthood is intimately connected to that of degendering or decertifying gender in law. See Flora Renz & Davina Cooper, *Reimagining Gender Through Equality Law: What Legal Thoughtways Do Religion and Disability Offer?*, 30 FEMINIST LEGAL STUD. 129 (2022).

¹¹¹ Ruth Pearce, *If a Man Gives Birth, He's the Father: The Experiences of Trans Parents*, CONVERSATION (Sept. 25, 2019), <https://theconversation.com/if-a-man-gives-birth-hes-the-father-the-experiences-of-trans-parents-124207>.

¹¹² Jens M. Scherpe, *Breaking the Existing Paradigms of Parent-Child Relationships*, in INTERNATIONAL AND NATIONAL PERSPECTIVES ON CHILD AND FAMILY LAW: ESSAYS IN HONOUR OF NIGEL LOWE 347 (Gillian Douglas, Mervyn Murch, & Victoria Stephens eds., 2018).

¹¹³ See Alice Margaria, *When the Personal Becomes Political: Rethinking Legal Fatherhood*, 20 INT'L J. CONST. L. 1281 (2022).

¹¹⁴ See Ryan, *supra* note 7, at 140.

characteristic of legal fatherhood.¹¹⁵ They are biologically connected to their children, but not in conventionally paternal terms, as they did not contribute to conception through sperm but rather through gestation and, at times, oocytes. The image of the trans man who gives birth does not only question the allegedly stable and fixed nature of gender (that lies at the core of heteronormativity), but it also breaks away from the assumption that “one’s sex, gender identity and identification as mother/father neatly align.”¹¹⁶ While departing from conventional fatherhood, the experiences of trans birthing men bring out “care”—intended as their intention to become fathers, and their involvement in the child’s life—as a “new,” potential father–child legal connector. In accepting their request to be recognized as fathers, deeply entrenched gendered assumptions about reproduction and parenting would be contested. This would imply an acknowledgment of the fact that men, and even more controversially trans men, are able to care, and that trans men are not “mothers” if they do (care).¹¹⁷ Degendering care would hence not only mean to nominally amend parental legislation but would also call into question and destabilize its underlying, gendered presumptions of care division.

Apart from being necessary in itself, degendering care through a reconstruction of fatherhood should precede or at least accompany any attempt to nominally degender legal parenthood. In other words, not only the manner but also the timing is of relevance. Degendering care by making it a paternal characteristic and ability as well would indeed prepare the terrain for making degendering legal parenthood not a merely nominal but also a practically meaningful move. Degendering legal parenthood without a prior or concomitant reconstruction of fatherhood around care would indeed involve the risk of neutering care and, as a consequence, neutering mothering. In this respect, some valuable insights can be gained from the writings of Martha Fineman. Back in the 1990s, Fineman coined the notion of “neutered mother” to express the negative repercussions of degendering (US) family laws for mothers, especially in the context of child custody. She argued that the shift towards gender-neutral language in family laws in the name of (formal) equality has failed to acknowledge the unique role of mothers in child-rearing.¹¹⁸ Mothering therefore has been replaced by parenting semantically but not in practice, to the detriment of mothers who de facto continue to undertake the largest share of childcare in heterosexual families.

Merely nominally degendering legal parenthood would accordingly equate to pushing towards (formal) equality without first challenging the existing gender imbalances in the family and society at large. It would most likely support a questionable reconstruction of fatherhood that is based on an aspirational, as opposed

¹¹⁵ Margaria, *supra* note 2, at 237.

¹¹⁶ Karaian, *supra* note 7, at 213.

¹¹⁷ Margaria, *supra* note 2, at 245. See also Damien W. Riggs, *Transgender Men’s Self-Representations of Bearing Children Post-transition*, in CHASING RAINBOWS: EXPLORING GENDER FLUID PARENTING PRACTICES 62, 70 (Fiona Joy Green & May Friedman eds., 2013).

¹¹⁸ Martha Albertson Fineman, *The Neutered Mother*, 46 U. MIAMI L. REV. 653 (1992).

to a realistic, view of fathering.¹¹⁹ As such, it would not lead to significant concrete change in the division of reproductive labor as currently practiced. This threat is mitigated by incorporating degendering care, which in turn presupposes degendering mothering, into degendering legal parenthood reforms.¹²⁰ Rather than “robbing a woman of her gender, or subjugating her to sex-neutral rules that devalue their gendered realities,”¹²¹ degendering care makes care a responsibility and ability of people of all genders. Women are therefore not deprived of their status as mothers, but that status is made available to parents regardless of gender.¹²² It is only through this intermediary step that degendering legal parenthood reforms may effectively contribute to transforming the way that care is currently conceptualized and organized. Moreover, by bringing to the fore the element of care as a potential parameter of legal fatherhood, cases involving trans birthing men are exceptionally suitable contexts for triggering processes of degendering care.¹²³

6. Concluding remarks

Following the recent ECtHR decisions in *O.H. and G.H. v. Germany* and *A.H. and Others v. Germany*,¹²⁴ one can reasonably expect that Sweden—which has in the meantime been joined by Denmark and Iceland¹²⁵—will most likely remain the exception as far as the regulation of trans legal parenthood is concerned—at least for now. Considering that any parental recognition is sufficient to meet the ECHR requirements, why would states be inclined to depart from decades-old filiation rules to accommodate the realities of trans parents and their families? This article’s critical analysis of the contemporary Swedish regulation remains nonetheless relevant as it complexifies the dichotomy between gender alignment and gender misalignment, taking legal provisions and developments into their wider legal and cultural contexts. As it has showed, the Swedish example is illustrative of the challenges experienced by states when trying to adapt gendered, cis- and heteronormative provisions on parenthood to a diversity of

¹¹⁹ For the different context of UK contact laws, see Julie Wallbank, *(En)Gendering the Fusion of Rights and Responsibilities in the Law of Contact*, in RIGHTS, GENDER AND FAMILY LAW 93 (Julie Wallbank, Shazia Choudhry, & Jonathan Herring eds., 2010).

¹²⁰ Degendering care may take various forms depending on the field and matter of law at stake. One example is making family leave policies more assertive to encourage fathers’ take-up, thereby contributing to a more equal sharing of caring responsibilities. For further examples, see Margaria, *supra* note 113. That being said, the authors are aware that the law is only one of the many forces at play and the success of a “degendering care project” also, or even especially, hinges on social and cultural responsiveness and change.

¹²¹ Darren Rosenblum, *Unsex Mothering: Toward A New Culture of Parenting*, 35 HARV. J. L. & GENDER 57, 83 (2012).

¹²² *Id.*

¹²³ Margaria, *supra* note 2, at 236.

¹²⁴ See *O.H. & G.H. v. Germany*, App. Nos. 53568/18, 54741/18 (Apr. 4, 2023); *A.H. & Ors. v. Germany*, App. No. 7246/20 (Apr. 4, 2023).

¹²⁵ See Lög 49/2021 um breytingu á barnalögum (kynrænt sjálfræði) [Act 49/2021 Amending the Children’s Act (gender autonomy)] (Ice.); Lov nr 227 af 15.2.2022 om ændring af børneloven, navneloven og forskellige andre love [Act no. 227 of Feb. 15, 2022 on Amendment of the Children’s Act, the Name Act and Several Other Acts] (Den.).

families—and to trans parents in particular. A move towards a degendering model—in line with Sweden’s vision of the future—formally disestablishes the traditional gender order. Yet, a more profound problem that states face when attempting to decouple gender and parenthood is the risk of only nominally changing parental categories without redefining and redistributing gendered notions of care, thus perpetuating existing inequalities.