**Headnotes**

**to** **the** **Order** **of** **the** **First** **Senate** **of** **10** **October** **2017**

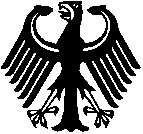
1 BvR 2019/16

**1.** **The** **general** **right** **of** **personality** **(Article** **2(1)** **in** **conjunction** **with** **Article** **1(1)** **of** **the** **Basic** **Law,** ***Grundgesetz*** **–** **GG)** **protects** **gender** **identity.** **It** **also** **protects** **the** **gender** **identity** **of** **those** **who** **cannot** **permanently** **be** **assigned** **either** **the** **male** **or** **female** **sex.**

**2.** **Article** **3(3)** **first** **sentence** **GG** **also** **protects** **persons** **who** **do** **not** **perma-nently** **identify** **as** **male** **or** **female** **against** **discrimination** **on** **the** **basis** **of** **sex.**

**3.** **Both** **of** **these** **fundamental** **rights** **of** **persons** **who** **do** **not** **permanently** **identify** **as** **male** **or** **female** **are** **violated** **if** **civil** **status** **law** **requires** **that** **one** **sex** **be** **registered** **but** **does** **not** **allow** **for** **a** **further** **positive** **catego-ry** **other** **than** **male** **or** **female.**

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FEDERAL CONSTITUTIONAL COURT

– 1 BvR 2019/16 –

**IN** **THE** **NAME** **OF** **THE** **PEOPLE**

**In** **the** **proceedings**

**on**

**the** **constitutional** **complaint**

of K(...),

– authorised representatives: 1. ,

2. ,

3. –

1. directly against

a) the order of the Federal Court of Justice (*Bundesgerichtshof*) of 22 June 2016 – XII ZB 52/15 –,

b) the order of the Celle Higher Regional Court (*Oberlandesgericht*) of 21 January 2015 – 17 W 28/1

c) the order of the Hanover Local Court (*Amtsgericht*) of 13 October 2014 – 85 III 105/14 –

2. indirectly against

§ 21(1) no. 3 of the Civil Status Act (*Personenstandsgesetz* – PStG) in the version of

Article 1 of the Act to Reform Civil Status Law (Civil Status Law Reform Act,

*Personenstandsrechtsreformgesetz* – PStRG) of 19 February 2007 (Federal Law

Gazette, *Bundesgesetzblatt* – BGBl I p. 122), § 22(3) of the Civil Status Act in the

version of Article 1 no. 6 letter b of the Act to Amend Civil Status Law (Civil Status

Law Amending Act, *Personenstandsrechts-Änderungsgesetz* – PStRÄndG) of 7 May

2013 (BGBl I p. 1122)

the Federal Constitutional Court – First Senate –

with the participation of Justices:

Vice-President Kirchhof,

Eichberger,

Schluckebier,

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Masing,

Paulus,

Baer,

Britz,

Ott

held on 10 October 2017:

**1.** **§** **21(1)** **no.** **3** **of** **the** **Civil** **Status** **Act** **(*Personenstandsgesetz*** **–** **PStG)** **in** **the** **version** **of** **Article** **1** **of** **the** **Act** **to** **Reform** **Civil** **Status** **Law** **(Civil** **Status** **Law** **Reform** **Act,** ***Personenstandsrechtsreformgesetz*** **–** **PStRG)** **of** **19** **February** **2007** **(Federal** **Law** **Gazette,** ***Bundesgesetzblatt*** **–** **BGBl** **I** **p.** **122)** **in** **conjunction** **with** **§** **22(3)** **of** **the** **Civil** **Status** **Act** **in** **the** **version** **of** **Article** **1** **no.** **6** **letter** **b** **of** **the** **Act** **to** **Amend** **Civil** **Status** **Law** **(Civil** **Status** **Law** **Amending** **Act,** ***Personenstandsrechts-Änderungsgesetz*** **–** **PStRÄndG)** **of** **7** **May** **2013** **(BGBl** **I** **p.** **1122)** **is** **incompatible** **with** **Article** **2(1)** **in** **conjunction** **with** **Article** **1(1)** **and** **Article** **3(3)** **first** **sentence** **of** **the** **Basic** **Law** **(*Grundgesetz*** **–** **GG)** **insofar** **as** **it** **imposes** **an** **obligation** **on** **persons** **to** **state** **their** **sex** **and** **does** **not** **allow** **for** **a** **positive** **entry** **other** **than** **“female”** **or** **“male”** **for** **persons** **whose** **gender** **development** **deviates** **from** **female** **or** **male** **and** **who** **permanently** **identify** **as** **neither** **male** **nor** **female.**

**The** **legislature** **must** **enact** **provisions** **that** **are** **compatible** **with** **the** **Constitution** **by** **31** **December** **2018.**

**2.** **The** **Orders** **of** **the** **Federal** **Court** **of** **Justice** **of** **22** **June** **2016** **–** **XII** **ZB** **52/15** **–,** **of** **the** **Celle** **Higher** **Regional** **Court** **of** **21** **January** **2015** **–** **17** **W** **28/14** **–** **and** **of** **the** **Hanover** **Local** **Court** **of** **13** **October** **2014** **–** **85** **III** **105/** **14** **–** **violate** **the** **complainant’s** **fundamental** **rights** **under** **Article** **2(1)** **in** **conjunction** **with** **Article** **1(1)** **and** **Article** **3(3)** **first** **sentence** **of** **the** **Basic** **Law.** **The** **Orders** **of** **the** **Federal** **Court** **of** **Justice** **of** **22** **June** **2016** **–** **XII** **ZB** **52/15** **–** **and** **of** **the** **Celle** **Higher** **Regional** **Court** **of** **21** **January** **2015** **–** **17** **W** **28/14** **–** **are** **reversed.** **The** **matter** **is** **remanded** **to** **the** **Higher** **Re-gional** **Court.** **The** **proceedings** **must** **be** **suspended** **until** **new** **provi-sions** **have** **been** **enacted.**

**3.** **The** **Federal** **Republic** **of** **Germany** **must** **reimburse** **the** **complainant** **for** **necessary** **expenses.**

**Reasons:**

**A.**

The constitutional complaint concerns the question whether the challenged deci- 1

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sions and the underlying provisions of § 21(1) no. 3 in conjunction with § 22(3) of the Civil Status Act (*Personenstandsgesetz* – PStG) violate the complainant’s fundamen-tal rights. At birth, the complainant was assigned the female sex and registered as a girl in the birth register. The complainant has an atypical set of chromosomes (so-called Turner syndrome) and permanently identifies neither as female nor as male. The complainant filed an application for a positive entry as “inter/diverse”, or alter-natively as “diverse”, in the birth register. The registry office rejected the application, claiming that § 21(1) no. 3, § 22(3) PStG did not permit such an entry. The com-plainant considers the provisions to be unconstitutional.

**I.**

1. a) When a child is born, its sex, too, must be documented in the birth register 2 under German civil status law. The child must be assigned either the female or the

male sex. If this is not possible, the entry is left blank. […]

b) […] 3

c) […] 4-5

d) […] 6

e) […] 7

2. […] 8

3. […]. 9

4. […] 10

**II.**

[…] 11-14

**III.**

With the constitutional complaint, the complainant claims a violation of their general 15 right of personality under Art. 2(1) in conjunction with Art. 1(1) of the Basic Law (*Grundgesetz* – GG), discrimination on the basis of sex under Art. 3(3) first sentence

GG and a violation of the right to equal treatment under Art. 3(1) GG.

[…] 16-17

**IV.**

[…] 18-34

**B.**

The constitutional complaint is admissible and well-founded. § 21(1) no. 3 in con- 35 junction with § 22(3) PStG is unconstitutional insofar as § 21(1) no. 3 PStG requires

a sex entry under civil status law, but § 22(3) PStG does not allow for a further posi-

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tive entry for persons whose gender development deviates from female or male de-velopment and who permanently identify as neither male nor female. The decisions challenged with the constitutional complaint are based on these provisions. They vi-olate the complainant’s general right of personality (Art. 2(1) in conjunction with Art. 1(1) GG) and the prohibition to disadvantage a person on the basis of their sex (Art. 3(3) first sentence GG).

**I.**

§ 21(1) no. 3 in conjunction with § 22(3) PStG violates the general right of person- 36 ality (Art. 2(1) in conjunction with Art. 1(1) GG) in its manifestation as the protection

of one’s gender identity. The general right of personality also protects the gender identity of persons who can be assigned neither the male nor the female sex (see 1 below). There is an interference with their fundamental right because current civil sta-tus law requires that sex be registered, but does not allow a gender entry other than female or male (see 2 below). This interference with fundamental rights is not justified (see 3 below).

1. The general right of personality protects the complainant’s gender identity. 37

a) Art. 2(1) GG grants every person the right to the free development of their per- 38 sonality. This fundamental right encompasses both the general freedom of action and

the general right of personality (Art. 2(1) in conjunction with Art. 1(1) GG). As a “non-listed” freedom, the general right of personality supplements the specific (“listed”) freedoms, which also protect fundamental aspects of one’s personality (cf. Decisions of the Federal Constitutional Court, *Entscheidungen* *des* *Bundesverfassungsgerichts* – BVerfGE 54, 148 <153>). One of the purposes of the general right of personality is to guarantee the essential prerequisites for the individual to develop and protect their individuality in self-determination (cf. BVerfGE 35, 202 <220>; 79, 256 <268>; 90, 263 <270>; 117, 202 <225>). However, the general right of personality only protects those aspects of the development of one’s personality which – without already being covered by the specific freedoms guaranteed under the Basic Law – are equal to these freedoms in terms of their constitutive significance for one’s personality (cf. BVerfGE 79, 256 <268>; 99, 185 <193>; 120, 274 <303>; established case-law). Thus, it does not afford protection against anything that could in any way impair the self-determined development of one’s personality; in any case, no person is able to develop their individuality independent of external conditions and affiliations. Yet where the self-determined development of and respect for one’s personality is specif-ically jeopardised, this is covered by the protection of the general right of personality, which serves to fill gaps in protection (BVerfGE 141, 186 <201 and 202 para. 32>).

b) Accordingly, the general right of personality also protects one’s gender identity 39 (cf. BVerfGE 115, 1 <14 *et* *seq*.>; 116, 243 <259 *et* *seq*.>; 121, 175 <190 *et* *seq*.>;

128, 109 <123 *et* *seq*.>), which is usually a constitutive aspect of an individual’s per-sonality. Under the given circumstances, the official assignment of sex is of para-mount importance for one’s individual identity; it typically occupies a key position both

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in a person’s self-image and in the way this person is perceived by others. Gender identity plays an important role in everyday life: in part, sex determines entitlements and obligations provided for by law; it also often forms the basis for identifying a per-son, and, beyond legal provisions, gender identity is also significant in everyday life. To a large extent it determines, for instance, how persons are addressed or what is expected of them in terms of their appearance, upbringing or behaviour.

The gender identity of persons who can be assigned neither the male nor the female 40 sex is protected as well. These persons might be able to develop their personality

more freely if less significance were attributed to the assigned sex in general. Yet un-der the given circumstances, assigned sex is a particularly relevant factor for how persons are perceived by others and for how they see their own personality. The complainant, too, emphasises the practical importance of assigned sex and argues that under these circumstances, gender identity is a constitutive aspect of their per-sonality.

2. § 21(1) no. 3 in conjunction with § 22(3) PStG interferes with the general right of 41 personality in its manifestation as protection of one’s gender identity (see a below)

and specifically jeopardises the development of and respect for the complainant’s personality in their gender identity (see b below).

a) The provisions that are indirectly challenged interfere with the general right of 42 personality in its manifestation as protection of one’s gender identity. Civil status law requires that sex be registered, but does not allow the complainant, whose gender development deviates from female or male development and who permanently iden-

tifies as neither male nor female, a gender entry under civil status law that corre-sponds to their gender identity (on the qualification as interference cf. BVerfGE 49, 286 <298>; 60, 123 <132 *et* *seq*.>; 116, 243 <259 *et* *seq*.>; 121, 175 <190 *et* *seq*.>; 128, 109 <124>). Under civil status law, a person’s sex must be documented in the birth register pursuant to § 21(1) no. 3 PStG. The only positive categories available for this are “female” and “male”; there is no further category. This follows from § 22(3) PStG (“no entry”), according to which the entry in the birth register should be left blank if the child can be assigned neither the female nor the male sex. In this case, no positive entry can be made in the birth register. Accordingly, the complainant must tolerate an entry that does not correspond to their constitutionally protected gender identity.

Pursuant to § 22(3) PStG, the complainant has the option of deleting their female 43 entry in the birth register. However, this does not eliminate the interference with fun-damental rights: The complainant’s gender identity is not only impaired by their incor-

rect assignment of the female sex, but also by the legal alternative “no entry” under current law (§ 22(3) PStG). “No entry” would not show that, while indeed not identify-ing as a man or a woman, the complainant does not identify as without gender either, and sees themselves as gendered beyond male or female. The “no entry” option does not alter the exclusively binary pattern of assigned sex; it gives the impression

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that official recognition of another gender identity is ruled out and that the sex entry has simply not been clarified yet, that a solution has not been found yet or even that it has been forgotten. This does not amount to official recognition of the complainant in their felt gender. From the complainant’s view, the entry remains inaccurate, because merely deleting a binary sex entry creates the impression that they are not gendered at all (cf. […]).

b) If civil status law requires a sex entry, but at the same time denies persons recog- 44 nition of their gender identity under civil status law, it specifically jeopardises the self-determined development of and respect for these persons’ personality.

aa) Under the given circumstances, the official recognition of sex under civil status 45 law has an identity-building and expressive effect. Civil status is not a marginal issue;

rather, it is the “position of a person within the legal system”, as stated by the law (§ 1(1) first sentence PStG). Civil status measures a person according to statutory cri-teria; it defines the central aspects of the legally relevant identity of a person. Thus, denying the recognition of felt gender identity under civil status law in itself, i.e. irre-spective of the consequences associated with the sex entry outside of civil status law, specifically jeopardises the self-determined development of and respect for one’s personality.

The entry under civil status law in itself only takes on specific significance for gender 46 identity because civil status law requires that a sex be stated in the first place. If it did

not require a sex entry, it would not specifically jeopardise the development of and respect for one’s personality as the specific assigned sex of a person would not be registered under civil status law. […]

However, pursuant to § 21(1) no. 3 PStG, civil status currently includes a person’s 47 sex. Despite several reforms of civil status law, the legislature has maintained the registration of sex as an identifying feature under civil status law. Given that the leg-

islature regards sex as so crucially important for describing a person and their legal status in civil status law, the recognition of a person’s specifically assigned sex under civil status law has an identity-building and expressive effect in itself, regardless of the substantive legal consequences of the civil status entry outside of civil status law (on the independent relevance for fundamental rights of the register entry in the case of transsexuality cf. BVerfGE 49, 286 <297 and 298> – *Transsexuals* *I*; on naming see also BVerfGE 104, 373 <385>; 109, 256 <266>; 115, 1 <14>). If, under these circumstances, the gender identity of a person is not recognised under civil status law, it specifically jeopardises the self-determined development of and respect for their personality.

bb) In particular, the requirement of a sex entry under civil status law combined with 48 the limited entry options make it difficult for affected persons to move about in public

and be seen by others as the persons they are with regard to their gender identity. Yet the way a person is depicted and perceived in public and by others is significant for the free development of their personality and may result in specific risks [to fun-

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damental rights] (cf. BVerfGE 99, 185 <193>; 114, 339 <346>; 119, 1 <24> […]). Civil status law requires a sex entry, but does not allow affected persons an entry in the birth register that is in line with their self-image. This contributes to the fact that their individual identity is not perceived and recognised in the same way and as naturally as that of female or male persons. The complainant plausibly argues that an individ-ual often cannot just pass over their sex entry under civil status law when appearing in public.

3. The interference is not justified. The court decisions are based on an unconstitu- 49 tional legal provision, because compelling persons to have a sex entry under civil sta-

tus law while denying them a further positive entry other than “female” or “male” is not based on a legitimate purpose for which the provision would be suitable, neces-sary and appropriate.

a) The Basic Law does not require that civil status be exclusively binary in terms of 50 sex. It neither requires that sex be governed by civil status law, nor is it opposed to

the civil status recognition of a third gender identity beyond male and female. It is true that Art. 3(2) first sentence of the Basic Law refers to “men” and “women”. However, this does not amount to a conclusive determination that the term “sex” only means men and women. It follows from the requirement of equal rights under Art. 3(2) of the Basic Law that existing social disadvantages between men and women should be eliminated. The aim of this provision is mainly to eliminate discrimination against women based on sex (cf. BVerfGE 85, 191 <207>; […]), but its aim is not to enshrine gender identity in civil status law or to rule out introducing another category in addi-tion to “male” and “female”. To the extent that the Federal Constitutional Court did state in the past that our legal order and our social life are based on the principle that every person is either “male” or “female” (cf. BVerfGE 49, 286 <298>), even then this was not a finding that the Constitution prescribes sex as being binary. Rather, it was a mere description of the social and legal notion of gender prevailing at the time.

b) The interests of third parties cannot justify that § 22(3) PStG does not offer a third 51 option allowing for a positive entry in the birth register. The status of men and women

under civil status law remains unaffected by a further entry category. […]

c) The fact that the introduction of a third positive entry may be associated with bu- 52 reaucratic and financial costs during a transitional period does not justify denying the

option of a further gender entry. […]

d) Organisational interests of the state cannot justify the denial of a third standard- 53 ised and positive entry option either. […]

Allowing a positive entry for a third gender with a standardised third designation […] 54 does not result in any difficulties in assigning sex that do not already exist under cur-

rent law anyway. Uncertainties may occur where a provision outside of civil status law is linked to sex and presumes that a person is either female or male. In that case it would indeed be unclear how a person officially assigned a third gender should be

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treated. However, the same issue exists already under current law if the sex entry is left blank pursuant to § 22(3) PStG. In this case, assigning a person the male or female sex is not possible either. In this respect, substantive law neither sets out which sex-based provisions apply, nor has the legislature created specific provisions for persons without a sex entry. If a further positive entry is allowed, the questions to be clarified are thus the same as those that already arise when opting for the no sex entry, which is possible *de* *lege* *lata*. In fact, the positive entry of a third gender could provide greater clarity given that – unlike a sex entry that is permanently left blank – it does not convey the wrong impression that the entry was left blank inadvertently.

The permanent nature of civil status is also not affected by the option of a third gen- 55 der entry, because the mere creation of another entry option does not say anything

about the requirements for changing one’s civil status.

**II.**

Insofar as § 21(1) no. 3 in conjunction with § 22(3) PStG excludes an entry other 56 than “male” and “female”, it also violates the prohibition of discrimination of Art. 3(3)

first sentence GG. The provisions that are indirectly challenged disadvantage per-sons who are neither male nor female and who permanently identify with another gender. Article 3(3) first sentence GG not only protects men and women against dis-crimination on the basis of sex, but also protects persons who do not permanently identify with these two sex categories. The disadvantaging is not justified.

**C.**

[…] 57-68

**D.**

This decision was taken with 7:1 votes.

Kirchhof

Masing

Eichberger

Paulus

Schluckebier

Baer

Britz Ott

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**Bundesverfassungsgericht,** **Beschluss** **des** **Ersten** **Senats** **vom** **10.** **Oktober** **2017** **-1** **BvR** **2019/16**

**Zitiervorschlag**

**ECLI**

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