

## 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 permanently 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 category other than male or female.



**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/  
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,

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 Regional Court. The proceedings must be suspended until new provisions 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-

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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 fundamental 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 alternatively 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 complainant considers the provisions to be unconstitutional.

**I.**

- 1. a) When a child is born, its sex, too, must be documented in the birth register 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. [...] 2
- 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 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. 15

[...] 16-17

**IV.**

[...] 18-34

**B.**

The constitutional complaint is admissible and well-founded. § 21(1) no. 3 in conjunction 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- 35

tive entry for persons whose gender development deviates from female or male development and who permanently identify as neither male nor female. The decisions challenged with the constitutional complaint are based on these provisions. They violate 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 personality (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 status 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).

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

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a) Art. 2(1) GG grants every person the right to the free development of their personality. 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 specifically 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>).

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b) Accordingly, the general right of personality also protects one's gender identity (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 personality. Under the given circumstances, the official assignment of sex is of paramount 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 person, 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 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 under 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 personality. 40

2. § 21(1) no. 3 in conjunction with § 22(3) PStG interferes with the general right of 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). 41

a) The provisions that are indirectly challenged interfere with the general right of 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 identifies as neither male nor female, a gender entry under civil status law that corresponds 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. 42

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

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 recognition of their gender identity under civil status law, it specifically jeopardises the self-determined development of and respect for these persons' personality. 44

aa) Under the given circumstances, the official recognition of sex under civil status 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 criteria; 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. irrespective 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. 45

The entry under civil status law in itself only takes on specific significance for gender 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. [...] 46

However, pursuant to § 21(1) no. 3 PStG, civil status currently includes a person's 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 legislature 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. 47

bb) In particular, the requirement of a sex entry under civil status law combined with 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- 48

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 individual 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 unconstitutional legal provision, because compelling persons to have a sex entry under civil status 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, necessary and appropriate. 49

a) The Basic Law does not require that civil status be exclusively binary in terms of 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 addition 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. 50

b) The interests of third parties cannot justify that § 22(3) PStG does not offer a third 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. [...] 51

c) The fact that the introduction of a third positive entry may be associated with bureaucratic and financial costs during a transitional period does not justify denying the option of a further gender entry. [...] 52

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

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



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 gender entry, because the mere creation of another entry option does not say anything about the requirements for changing one’s civil status. 55

**II.**

Insofar as § 21(1) no. 3 in conjunction with § 22(3) PStG excludes an entry other 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 persons 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 discrimination on the basis of sex, but also protects persons who do not permanently identify with these two sex categories. The disadvantaging is not justified. 56

**C.**

[...] 57-68

**D.**

This decision was taken with 7:1 votes.

Kirchhof	Eichberger	Schluckebier
Masing	Paulus	Baer
Britz		Ott

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

**Zitiervorschlag** BVerfG, Beschluss des Ersten Senats vom 10. Oktober 2017 -  
1 BvR 2019/16 - Rn. (1 - 57-68), [http://www.bverfg.de/e/  
rs20171010\\_1bvr201916en.html](http://www.bverfg.de/e/rs20171010_1bvr201916en.html)

**ECLI** ECLI:DE:BVerfG:2017:rs20171010.1bvr201916