Headnote

to the Order of the First Senate of 6 December 2005

1 BvL 3/03

In respect of homosexual transsexuals, § 7(1) no. 3 of the Transsexuals Act violates the right to one's name protected under Article 2(1) in conjunction with Article 1(1) of the Basic Law, as well as the right to the protection of one's intimate sphere, insofar as a legally protected partnership is not available to homosexual transsexuals without having to give up their first name, which had been changed to correspond to their internally felt gender.

FEDERAL CONSTITUTIONAL COURT

- 1 BvL 3/03 -

IN THE NAME OF THE PEOPLE

In the proceedings

for constitutional review of

§ 7(1) no. 3 of the Act on the Change of First Names and of Officialy Assigned Sex in Special Cases of 10 September 1980 (BGBl I, p. 1654)

– Order of Suspension and Referral of the Itzehoe Regional Court of 26 March 2003 (4 T 497/02) –

the Federal Constitutional Court – First Senate –

with the participation of Justices

President Papier,

Haas,

Hömig,

Steiner,

Hohmann-Dennhardt,

Hoffmann-Riem,

Bryde,

Gaier

held on 6 December 2005:

1. **§ 7(1) no. 3 of the Act on the Change of First Names and of Officially Assigned Sex in Special Cases (Transsexuals Act) of 10 September 1980 (BGBl I, p. 1654) is incompatible with Article 2(1) in conjunction with Article 1(1) of the Basic Law insofar as a legally protected partnership is not available to homosexual transsexuals who have not undergone gender reassignment without them having to give up their first name, which had been changed pursuant to § 1 of the Transsexuals Act.**

2. **§ 7(1) no. 3 of the Transsexuals Act is not applicable until a legal provision has been enacted that enables homosexual transsexuals who have not undergone gender reassignment to enter into a legally protected partnership without having to give up their first name.**

REASONS:

A.

The referral concerns having to give up, by reason of marriage, the first name that had previously been changed to express the gender a transsexual person identifies with. 1

I.

The Act on the Change of First Names and of Officially Assigned Sex in Special Cases of 10 September 1980 (BGBl I, p. 1654) was enacted following the foundational decision by the First Senate of the Federal Constitutional Court of 11 October 1978 (BVerfGE 49, 286) to accommodate the special situation of transsexuals. In addition to a procedure that, following gender reassignment surgery, establishes a change of officially assigned sex and allows first names to be changed (the so-called big solution), the Act provides for an option for transsexuals to change their first names upon application without first having to undergo surgery (the so-called small solution). 2

1. § 1 of the Transsexuals Act sets out the requirements for a change of first names without gender reassignment […]. 3

[…] 4-8

[…] A change of first names concluded this way […] may become void under certain circumstances. This is laid down in § 7 of the Transsexuals Act […]: 10

§ 7 11

Voidness 12

(1) The decision that changes the first names of the applicant shall become void if 13

1. within a period of three hundred days after the decision has attained legal validity, a child is born of the applicant, effective from the day the child is born, or 14

2. (...), or 15

3. the applicant enters into marriage, effective from the declaration [before the registrar] under § 1310(1) of the Civil Code 16

(2-3) […] 17-21

[…] However, in the case of the birth of a child, but not in the case of marriage, § 7(3) of the Transsexuals Act provides those concerned with the option of reverting to their changed first name under the circumstances specified therein. […] In addition, a married transsexual can obtain a change of first name under § 1 of the Transsexuals Act without consequences for their marriage. […] 22

2. […] 23

II.

[…] 24-26

III.

The plaintiff in the initial proceedings is male. His first name Kai was changed to Karin Nicole by order of the Hamburg Local Court of 9 July 1997 pursuant to § 1(1) of the Transsexuals Act. He did not undergo gender reassignment pursuant to §§ 8 and 10 of the Transsexuals Act, which requires surgery among other things. After the plaintiff had married, on 5 April 2002, the woman with whom he is, in his view, in a same-sex relationship, the registrar noted in the birth register that the plaintiff was from now on once again named Kai. 27

The plaintiff then initiated two legal proceedings in order to regain his female first name of which he had been deprived. Firstly, he invoked the provisions of the Transsexuals Act. His application to reinstate his changed first name, which is the subject matter of the constitutional complaint 1 BvR 2201/02 lodged by the plaintiff, was unsuccessful in all instances. Secondly, the plaintiff applied for his birth register entry to be corrected by means of a further margin note pursuant to § 47 of the Civil Status Act declaring the registrar's note of 19 September 2002 to be void. The Itzehoe Local Court rejected this application by order of 28 October 2002. […] 28

By order of 26 March 2003, the Itzehoe Regional Court suspended the proceedings concerning the plaintiff's immediate complaint (*sofortige Beschwerde*) against the order of the Itzehoe Local Court; it referred to the Federal Constitutional Court the question whether § 7(1) no. 3 of the Transsexuals Act is unconstitutional. In the referring court's view, § 7(1) no. 3 of the Transsexuals Act violates Art. 1(1) in conjunction with Art. 2(1) of the Basic Law as well as Art. 3(1) and Art. 6(1) of the Basic Law. Moreover, the court has doubts as to the provision's compatibility with Art. 2(2) first sentence of the Basic Law. 29

[…] 30

IV.

Statements on the referral were submitted by the Federal Ministry of the Interior on behalf of the Federal Government, the German Conference of Family Courts (*Deutscher Familiengerichtstag*), the German Society for Sexology (*Deutsche Gesellschaft für Sexualforschung*), the Lesbian and Gay Association (*Lesben- und Schwulenverband*), the Ecumenical Working Group 'Homosexuals and the Church' (*Ökumenische Arbeitsgruppe Homosexuelle und Kirche*), the German Society for Trans Identity and Intersexuality (*Deutsche Gesellschaft für Transidentität und Intersexualität*) and the *sonntags.club*. 31

[…] 32-45

B.

The Transsexuals Act is not compatible with Art. 2(1) in conjunction with Art. 1(1) of the Basic Law insofar as, on the basis of § 7(1) no. 3 of the Transsexuals Act, it does not provide homosexual transsexuals who have not undergone gender reassignment with the option of a legally protected partnership without giving up their changed first name. 46

I.

1. a) Art. 1(1) of the Basic Law protects human dignity, the way humans understand themselves as individuals and become aware of themselves (cf. BVerfGE 49, 286 <298>). Art. 2(1) of the Basic Law, as the fundamental right to the free development of one's personality in conjunction with Art. 1(1) of the Basic Law, protects the personal sphere that is closer to the core of private life (*engere persönliche Lebenssphäre*), which also encompasses intimate sexual matters (cf. BVerfGE 96, 56 <61>), comprising sexual self-determination and thus also the finding and recognising of one's gender identity and sexual orientation. 47

In this context, Art. 2(1) in conjunction with Art. 1(1) of the Basic Law protects a person's first name, firstly as a means of forging identity and developing one's own individuality (cf. BVerfGE 104, 373 <385>), and secondly as an expression of the gender identity felt or attained by that person (cf. BVerfGE 109, 256 <266>). Individuals have the right to demand that the legal order respect their first names, so that these names can develop their function of forging and expressing one's identity. In this respect, the general right of personality protects name bearers from deprivation or forced change of their first names (cf. BVerfGE 109, 256 <267>). 48

b) However, the protection of names is not guaranteed unconditionally. The right to one's name must be designed so that it can fulfil the social function that names take on as a distinguishing feature (cf. BVerfGE 78, 38 <49>). This also applies to first names, which, in our legal system, serve to express the name bearer's gender. Having a person's gender identity correspond to the gender expressed in their first name reflects the desire, protected by the general right of personality, to express one's gender identity through one's name, and serves to protect the best interest of the child when choosing a name. 49

c) Gender identity cannot be determined exclusively on the basis of physical sexual characteristics. It also greatly depends on a person's psychological condition and their lastingly felt gender. § 1 of the Transsexuals Act takes this scientifically proven fact into account. Under certain conditions specified in the Act, persons who, based on their transsexualism, no longer identify with the sex stated in their birth entry but rather with the opposite gender are given the option of changing their first name in order to establish a link between their felt gender and their name. The gender identi- 50

fication that is reflected in the first name that is thus chosen and borne belongs to a person's most intimate part of personality, which is in principle beyond the reach of the state. Therefore, interference with the right to one's first name, which is the result of a person's own search for gender identity and reflects this, is only permissible if there are particularly weighty public interests justifying it (cf. BVerfGE 49, 286 <298>).

2. § 7(1) no. 3 of the Transsexuals Act interferes with this right to a first name chosen under § 1 of the Transsexuals Act which expresses the name bearer's felt gender identity, and which is protected under Art. 2(1) in conjunction with Art. 1(1) of the Basic Law. In case of marriage, the provision deprives the name bearer of the first name chosen and borne, and imposes on them the reversion to their previous first name, which is in conflict with their felt gender. At the same time, depriving a person of their first name also affects that person's intimate sexual matters which are protected by fundamental rights; the obligation to give up one's first name and to revert to one's former name renders it obvious that the name bearer's gender identity is in conflict with the name they are required to bear and which expresses a different gender. 51

It cannot be presumed that the name bearer consented to this interference with their right to their name and with their intimate sphere […] 52

This holds true in particular if, as in the case of the applicant in the initial proceedings, no option other than marriage is available to the person concerned for legally protecting their relationship. The applicant is a transsexual who identifies as female, but who has not undergone surgery to change the external sexual characteristics. In addition, his sexual orientation is homosexual. § 1 of the Transsexuals Act provides him the option of adapting his first name to his felt female gender, but in terms of civil status law, he is still treated as a man. If he wants to legally protect a homosexual relationship with a woman, the option of a civil partnership is not available to him, as only two persons of the same sex may enter into a civil partnership under § 1(1) first sentence of the Civil Partnerships Act. […] Therefore, the only option available to a homosexual transsexual who has not undergone gender reassignment, such as the applicant, to legally protect his partnership, is marriage. […] If he decides [to enter into marriage] […], this does not constitute a voluntary abandoning of his name. 53

3. This interference cannot be justified with the assumption that by entering into marriage, transsexuals show that they once again identify with the sex stated in their birth entry […]. This assumption, which the legislator used to justify depriving the persons concerned of their first names, is no longer supported by current findings in sexology. It has been proven by now that a large proportion of male-to-female transsexuals in particular is gynephile, i.e. with a homosexual orientation, and that this is the case irrespective of whether they have undergone gender reassignment surgery […]. Accordingly, a person's internally felt gender cannot be deduced from their sexual orientation. […] 54

Thus, the legislative purpose of achieving a realignment of assigned sex and first 55

name, by way of the obligation to revert to the previous first name, cannot be considered a weighty public interest that could justify an interference with the right to one's first name under Art. 2(1) in conjunction with Art. 1(1) of the Basic Law.

4. Depriving the persons concerned of their first names under § 7(1) no. 3 of the Transsexuals Act does pursue the legitimate public interest of avoiding the impression that same-sex couples may enter into marriage as well. 56

a) […] 57-58

b) The legislator pursues a legitimate objective in avoiding the false impression that marriage is also available to same-sex couples. 59

When shaping marriage, the legislator must take into consideration its essential structural principles that are informed by pre-existing realities of marriage as a form of living on which Art. 6(1) of the Basic Law builds in line with the freedom dimension of this fundamental right and other constitutional guarantees (cf. BVerfGE 31, 58 <69>; 105, 313 <345>). It is part of the core content of marriage, which has been preserved irrespective of social change and the associated changes in its legal design, and which has been shaped by the Basic Law, that marriage is the union of a man and a woman in a long-term partnership, established of their own free will with the participation of the state (cf. BVerfGE 10, 59 <66>; 29, 166 <176>; 62, 323 <330>; 105, 313 <345>). It is compatible with this core content of marriage, which follows from Art. 6(1) of the Basic Law, that the legislator may prevent same-sex couples from entering into marriage. In this context, the legislator obviously looks to the official sex assigned under civil status law. In order to emphasise this and to distinguish marriage from other legal institutions, it is also legitimate to enact provisions with which the legislator seeks to avoid even the impression that marriage might also be available to same-sex couples. […] 60

5. Likewise, revoking the first name pursuant to § 7(1) no. 3 of the Transsexuals Act is suitable and necessary to avoid the false impression that marriage is also available to same-sex couples. […] 61

6. However, the interference of § 7(1) no. 3 of the Transsexuals Act with transsexuals' right to their name protected under Art. 2(1) in conjunction with Art. 1(1) of the Basic Law and with their right to protection of their intimate sphere is unreasonable (*nicht zumutbar*) for the persons concerned given its interactions with the provisions of the Transsexuals Act, civil status law and the provisions of marriage law and the Civil Partnerships Act. As long as the law does not provide homosexual transsexuals who have not undergone gender reassignment with the option of entering into a legally protected partnership without giving up the first name that corresponds to their felt gender identity, it is unconstitutional that they must give up their first name when entering into marriage under § 7(1) no. 3 of the Transsexuals Act. 62

a) The assumptions on transsexuality underlying the Transsexuals Act have become scientifically untenable in essential aspects. 63

The Transsexuals Act was enacted in 1980, following the foundational decision of the Federal Constitutional Court of 11 October 1978 (BVerfGE 49, 286). In that decision, the Court held that Art. 2(1) in conjunction with Art. 1(1) of the Basic Law requires that a transsexual's male sex entry be corrected if transsexuality is irreversible according to medical findings and if gender reassignment surgery has been carried out. The legislator satisfied these requirements by way of provisions on the 'big solution', in §§ 8 to 12 of the Transsexuals Act. Under the circumstances specified there, these provisions not only provide transsexuals who have undergone gender reassignment surgery with the option of choosing a first name corresponding to their felt gender, but they also provide them the option of being treated, in civil status law, in accordance with their felt gender. In addition, the legislator introduced the 'small solution', in §§ 1 *et seq*. of the Transsexuals Act, to enable transsexuals to adapt their first name to their felt gender without undergoing gender reassignment surgery, but also without any change in civil status. 64

aa) Based on the scientific findings at the time, the legislator assumed that the 'small solution' would only be a temporary stage for transsexuals, until they transition to the 'big solution'. According to the explanatory memorandum to the Act, the 'small solution' was meant to give those concerned the opportunity of changing their first name and thus of taking on the role of the other gender early on (cf. BTDrucks 8/2947, p. 12). This was based on the assumption, which was also cited by the Federal Constitutional Court at the time, that transsexuals considered their sexual organs and characteristics that do not match their felt gender to be an error of nature and therefore sought to correct them, by any means available, through gender reassignment (cf. BVerfGE 49, 286 <287 and 288>). […] 65

In the meantime, these assumptions on transsexuality which underlie the Transsexuals Act have proven untenable in light of new scientific findings. In cases of a largely certain diagnosis of transsexuality, today's experts no longer consider it right to always recommend gender reassignment measures. Rather, it must be determined individually and over the course of treatment whether gender reassignment surgery is recommendable. In addition, the 20 to 30% share of lasting transsexuals without gender reassignment out of the total number of transsexuals […] shows that the assumption that transsexuals seek to change their sexual characteristics by any means is not true. Thus, the hypothesis of a temporary stage in which transsexuals with the 'small solution' find themselves before transitioning to the 'big solution' is no longer tenable. Expert literature does not see justifiable reasons for treating transsexuals who underwent gender reassignment surgery differently than transsexuals who did not […]. 66

bb) Also, the fact that a significant share of – particularly male-to-female – transsexuals are homosexual, as current research indicates […], did not play any role when the Transsexuals Act came about. […] It is not only well-known today that there is homosexuality also among transsexuals, but it has also been proven that even among transsexuals who have undergone gender reassignment a sizeable number are homosexual. Thus, it can no longer be assumed that transsexuality is called into 67

question when transsexuals opt for same-sex relationships.

b) The legal consequences that the legislator derived at the time from the now outdated scientific findings, to define the civil status of transsexuals and the possibility of their entering into legally protected partnerships, are, given the new findings, no longer justified. This is because, in interaction, these provisions unreasonably require homosexual transsexuals to give up a first name that expresses their felt gender identity when entering into a legally protected partnership. 68

aa) As such, the Transsexuals Act is based on the necessity, recognised by the legislator, of providing transsexuals with the option of having a first name that corresponds to their felt gender identity, thus contributing to the development of an identity-building effect on the name bearer. However, the legislator has attributed different consequences under civil status law to the change of first names depending on whether or not transsexuals had previously undergone gender reassignment surgery. Only if they had done so did the legislator provide for official recognition of the felt gender following the name change. […] [By contrast,] the felt gender expressed in the first name diverges from the sex officially assigned under civil status law in respect of transsexuals who have not undergone gender reassignment. […] Thus, a […] male-to-female transsexual must be addressed by his female first name, but continues to be considered male under civil status law. 69

bb) Both the legal institution of marriage, protected under Art. 6(1) of the Basic Law, and the institution of civil partnership, created by the legislator, refer to the sex of the partner, and not to their sexual orientation, to limit who may legally unite. Marriage is thus a union between a man and a woman, while a civil partnership is established by two persons of the same sex, pursuant to § 1(1) of the Civil Partnerships Act. […] 70

cc) Both the fact that sex assigned under civil status law is determined by external sexual characteristics, as well as the fact that legal forms of partnership are linked to this officially assigned sex under civil status law result in the situation that a homosexual male-to-female transsexual who has not undergone gender reassignment and who wants to establish a union with a woman cannot enter into a civil partnership, because he is considered male under civil status law. The only option for a long-term legal union available to him is marriage. However, this gives the impression of a same-sex marriage, specifically not intended by the legislator, and he is also forced to give up his first name, which expresses his felt gender identity, in order to rule out that such an impression is created by the first names of the spouses. Even though the person concerned acts in conformity with the only option to enter a union that is legally available to him, a sanction is imposed on him as he must give up the first name that had been recognised in a legal procedure and expresses his gender identity. This interaction of different rules violates a transsexual's right to protection of their intimate sphere and of their gender identity expressed in their first name, protected under Art. 2(1) in conjunction with Art. 1(1) of the Basic Law. 71

II.

1. This violation of the Constitution does not result in specific provisions of the Transsexuals Act being declared void. The legislator must ensure that homosexual transsexuals who have not undergone gender reassignment have the option of entering into a legally binding partnership without having to give up their first name. In this respect, there are several options for new provisions. […] 72

2. As long as the legislator has not enacted provisions allowing homosexual transsexuals who have not undergone gender reassignment to enter into a legally protected partnership without having to give up their first name, § 7(1) no. 3 of the Transsexuals Act is to be declared not applicable by way of an order pursuant to § 35 of the Federal Constitutional Court Act. 73

Papier Haas Hömig

Steiner Hohmann-Dennhardt Hoffmann-Riem

Bryde Gaier

Bundesverfassungsgericht, Beschluss des Ersten Senats vom 6. Dezember 2005 - 1 BvL 3/03

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