



## Civil Status Law Must Allow a Third Gender Option

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The provisions of civil status law are incompatible with the Basic Law's requirements to the extent that § 22(3) of the Civil Status Act (*Personenstandsgesetz* – PStG) does not provide for a third option - besides the entry “female” or “male”, allowing for a positive gender entry. This is what the First Senate of the Federal Constitutional Court held in an order published today. The general right of personality (Art. 2(1) in conjunction with Art. 1(1) of the Basic Law, *Grundgesetz* – GG) also protects the gender identity of those who cannot be assigned either the gender “male” or “female” permanently. In addition, the current civil status law also violates the ban on discrimination (Art. 3(3) GG) to the extent that it rules out the registration of a gender other than “male” or “female”. The legislature has to enact new provisions by 31 December 2018. Courts and public authorities may not apply the provisions at issue insofar as they impose an obligation on persons to state their gender if those persons' gender development deviates from female or male gender development and thus do not permanently identify as male or female.

### Facts of the Case:

The complainant filed a request with the competent registry office for correcting the complainant's birth registration by deleting the previous gender entry “female” and replacing it with “inter/diverse”, alternatively only with “diverse”. The registry office rejected the request and pointed out that under German civil status law a child needs to be assigned either the female or the male gender in the birth register, and emphasised that – if this is impossible – no gender entry is made (§ 21(1) no. 3, § 22(3) PStG). The request for correction filed thereupon with the Local Court (*Amtsgericht*) was rejected; the complaint filed against this decision was unsuccessful. With the constitutional complaint, the complainant claims a violation of the general right of personality (Art. 2(1) in conjunction with Art. 1(1) GG) and discrimination based on gender (Art. 3(3) first sentence GG).

### Key Considerations of the Senate:

1. a) The general right of personality also protects gender identity, which is regularly a constituent element of an individual's personality. The assignment of gender is of paramount importance for individual identity; it usually plays a key role both for a person's self-conception and for the way this person is perceived by others. The gender identity of persons who can be assigned neither male nor female gender is also protected under this right.

b) Current civil status law interferes with this right. It requires a gender entry, but does not allow the complainant, who permanently identifies as neither male nor female, an entry corresponding to this gender identity. Even if this person chose the option “no entry”, it would not reflect that the complainant does not see themselves as a genderless person, but rather perceives themselves as having a gender beyond male or female.

This specifically threatens the self-determined development and protection of the individual's personality. Civil status is not a marginal issue; rather, it is the “position of a person within the legal system”, as stated by the law. Civil status defines the central aspects of the legally relevant identity of a person. Therefore, denying individuals the recognition of their gender identity in itself threatens their self-determined development.

c) The interference with fundamental rights is not justified under constitutional law. The Basic Law does not require that civil status be exclusively binary in terms of gender. It neither requires that gender be governed as part of civil status, nor is it opposed to the civil status recognition of a third gender identity beyond male and female.

The interests of third parties cannot justify that current civil status law does not offer a third gender option, allowing for a positive entry. The mere possibility of entering a further gender does not oblige anyone to assign themselves to this third gender. In a regulatory system that requires information on gender, the existing options for persons with deviating gender development to be registered as male, female or without gender entry certainly need to be preserved. Additional bureaucratic or financial burdens or organisational interests of the state cannot justify the denial of a third standardised positive entry option either. A certain additional effort will have to be accepted. However, the general right of personality does not grant a claim to the entry of random gender-related identity features as civil status information. Furthermore, allowing a positive entry for a third gender with a standardised third designation does not result in any assignment

difficulties that do not already exist under current law anyway. In the case that a further positive gender option is allowed for, the questions to be clarified are the same that already arise when opting for no gender entry, which is possible under the current legal situation.

2. In addition, § 21(1) no. 3 in conjunction with § 22(3) PStG violate Art. 3(3) first sentence GG. According to this fundamental right, gender may generally not serve as a basis for unequal legal treatment. Art. 3(3) first sentence GG also protects persons against discrimination who do not identify as male or female, since the purpose of Art. 3(3) first sentence GG is to protect persons from being disfavoured that belong to groups structurally prone to being discriminated against. Yet § 21(1) no. 3 in conjunction with § 22(3) PStG disadvantages persons who are neither male nor female precisely because of their gender, given that they cannot - unlike men and women - be registered in accordance with their gender.

3. Due to the violations of the Constitution, § 21(1) no. 3 in conjunction with § 22(3) PStG are declared incompatible with the Basic Law, because the legislature has several options to correct these violations. For instance, the legislature could generally dispense with information on gender in civil status. Alternatively, it could also create the possibility for the persons concerned to choose another positive designation of a gender that is not male or female. In this respect, the legislature is not limited to choosing one of the designations put forward by the complainant in the proceedings before the regular courts.

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