

# AUT-2018-2-003

a) Austria / b) [Constitutional Court](#) / c) / d) 15-06-2018 / e) G 77/2018 / f) / g) / h) CODICES ([German](#)).

## Keywords of the systematic thesaurus:

[05.01.03](#) Fundamental Rights - General questions - **Positive obligation of the state.**

[05.02.02.01](#) Fundamental Rights - Equality - Criteria of distinction - **Gender.**

[05.03.32](#) Fundamental Rights - Civil and political rights - **Right to private life.**

## Keywords of the alphabetical index:

Discrimination, gender / Gender, identity / Gender, difference, biological / Sexual identity, self-determined, recognition.

## Headnotes:

The fundamental right to respect for private life also protects gender identity, regardless of whether an individual is male or female or intersexual. If the gender of an individual is part of the general civil status data to be entered into the register of births, the relevant provisions must allow for a gender entry reflecting the specific gender identity of individuals with a variation of gender development.

## Summary:

1. Under the Civil Status Act (*Personenstandsgesetz*), the general civil status data to be entered into the register of births include the individual's gender (Section 2.2, no. 3). However, civil status legislation only refers to «gender» without specifying certain categories of sexual identity such as male and female.

2. The applicant, a person openly living as an «intersexual individual», filed a request with the competent registry office for correcting the applicant's birth registration by deleting the previous gender entry «male» and replacing it with «inter», alternatively with «diverse», «X» or «indefinite». The registry office, however, refused this request, pointing out that the Civil Status Act did not provide for a right to a specific gender entry other than «male» or «female». This decision was upheld by the competent administrative court.

The applicant filed a constitutional complaint with the Constitutional Court, claiming that the public authorities' refusal to register the applicant's true gender identity violated the applicant's right to respect for private life under [Article 8 ECHR](#).

3. The Constitutional Court noted that, in some cases, an individual's gender development may differ from male or female gender development. In accordance with current scientific knowledge, it is important to distinguish between intersexuality (differences of sex development) and transsexuality (trans identity, gender dysphoria, transgender, gender

incongruence). In cases of transsexuality, gender determination is beyond doubt but the person concerned does not feel comfortable with this determination or declines any gender determination at all. By contrast, in the instant case of intersexuality, gender determination is inconclusive because of an atypical development of the anatomic, chromosomal or hormonal gender. This is simply a variation of sex development which may by no means be considered to be pathological.

Referring to the case-law of the European Court of Human Rights, the Constitutional Court reiterated that the concept of «private life» covers the physical and psychological integrity of a person and can sometimes embrace aspects of an individual's physical and social integrity. In particular, gender identification, name, and sexual orientation and sexual life fall within the personal sphere protected by [Article 8 ECHR](#).

[Article 8 ECHR](#) is therefore to be understood as guaranteeing a right to respect for individual gender identity. This requires that official gender assignments be in conformity with individual gender identity, and that variations of gender development be recognised officially as a specific gender identity. Likewise, [Article 8 ECHR](#) embraces the right not to disclose a variation of gender development.

The Court further observed that, while the essential object of [Article 8 ECHR](#) is to protect the individual against arbitrary interference by the public authorities, it does not merely compel the State to abstain from such interference: in addition to this negative undertaking, there may be positive obligations inherent in an effective respect for private or family life.

Individuals who are neither male nor female belong to a minority specifically in need of protection. This holds true especially for children, as parents may feel under pressure to have their child assigned to one or the other «normal» genders. The State is therefore obliged to take measures to effectively enable individuals concerned to determine their gender identity fully on their own.

[Article 8.2 ECHR](#) sets out that there shall be no interference by a public authority with the exercise of the right to respect for private life except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others. The Constitutional Court accepted that safeguarding the principle of the inalienability of civil status, ensuring the reliability and consistency of civil-status records and, more generally, ensuring legal certainty, are in the general interest. However, this general interest cannot justify the denial of a third gender entry option.

The Constitutional Court noted that the Civil Status Act only refers to «gender» in general without specifying certain gender identities. The Court therefore established that the Civil Status Act may, and shall, be applied in a manner safeguarding the rights of individuals with a variation of gender development, i.e., in a manner allowing these individuals to be registered as male, female or with a third gender entry reflecting their specific gender identity.

As a result, the Constitutional Court decided not to repeal any provision of the Civil Status Act as unconstitutional, but allowed the constitutional complaint since the administrative court decision had been based on an interpretation that violated the applicant's right to respect for private life.

### **Cross-references:**

Federal Constitutional Court of Germany:

- 1 BvR 2019/16, 10.10.2017; *Bulletin* 2017/3 [[GER-2017-3-020](#)].

European Court of Human Rights:

- *A.P., Garçon and Nicot v. France*, nos. 79885/12, 52471/13, 52596/13, 06.04.2017, *Reports of Judgments and Decisions* 2017;

- *Christine Goodwin v. United Kingdom* (GC), no. 28957/95, 11.07.2002, *Reports of Judgments and Decisions* 2002-VI;

- *Hämäläinen v. Finland*, no. 37359/09, 16.07.2014, *Reports of Judgments and Decisions* 2014;

- *Schlumpf v. Switzerland*, no. 29002/06, 08.01.2009;

- *Van Kück v. Germany*, no. 35968/97, 12.06.2003, *Reports of Judgments and Decisions* 2003-VII;

- *Y.Y. v. Turkey*, no. 14793/08, 10.03.2015, *Reports of Judgments and Decisions* 2015 (extracts).

### **Languages:**

German.