Headnotes

to the judgment of the First Senate of 11 January 2011

- 1 BvR 3295/07 –

It violates Article 2 paragraph 1 and paragraph 2 in conjunction with Article 1 paragraph 1 of the Basic Law (Grundgesetz – GG) that a transsexual who fulfils the requirements of § 1 paragraph 1 nos. 1 to 3 of the Transsexual Act (Transsexuellengesetz), for the legal safeguarding of her same-sex partnership, may only establish a civil partnership if she has previously, in accordance with § 8 paragraph 1 no. 3 and 4 of the Transsexual Act, undergone a surgical intervention changing her exterior sexual characteristics and is permanently infertile and due to this has found recognition with regard to personal status law in her felt and lived gender.

Federal Constitutional Court

- 1 BvR3295/07 -

1. In the Name of the People

1.1 in the proceedings on the constitutional complaint

of Ms L. I. Freifrau ....,

- authorised representative:
Rechtsanwalt Christian Tümmler,
in Sozietät Rechtsanwälte Tümmler, Wesser, Lenz,
Leibnizstraße 59, 10629 Berlin -

against

a) the decision of the Berlin Court of Appeal (Kammergericht) of 23 October 2007 - 1 W 76/07 -,

b) the decision of the Berlin Regional Court (Landgericht Berlin) of 25 January 2007 - 84 T 442/06 -,

c) the decision of the Schöneberg District Court (Amtsgericht Schöneberg) of 30 August 2006 - 70 III 101/06 -

the Federal Constitutional Court – First Senate – with the participation of Justices

Vice-President Kirchhof,
Hohmann-Dennhardt,
Bryde,
Gaier,
Eichberger,
Schluckebier,
Masing,
Paulus

held on 11 January 2011 as follows:

1. § 8 paragraph 1 no. 3 and 4 of the Act on the Change of First Names and the Determination of the Sexual Affiliation in Special Circumstances (Transsexual Act/Transsexuellengesetz – TSG) of 10 September 1980 (Federal Law Gazette I, page 1654) is incompatible with Article 2 paragraph 1 and paragraph 2 in conjunction with Article 1 paragraph 1 of the Basic Law for the stated reasons.
2. § 8 paragraph 1 no. 3 and 4 of the Transsexual Act is inapplicable until the coming into force of a statutory new regulation.
3. The decision of the Berlin Court of Appeal (Kammergericht) of 23 October 2007 - 1 W 76/07 -, the decision of the Berlin Regional Court (Landgericht Berlin) of 25 January 2007 - 84 T 442/06 – and the decision of the Schöneberg District Court (Amtsgericht Schöneberg) of 30 August 2006 - 70 III 101/06 – violate the complainant's fundamental rights under Article 2 paragraph 1 and paragraph 2 in conjunction with Article 1 paragraph 1 of the Basic Law. The decision of the Berlin Court of Appeal (Kammergericht) is reversed and the case is remitted to the Berlin Court of Appeal (Kammergericht).
4. The Federal Republik of Germany must reimburse the complainant for her necessary expenses.

Reasons:

A.

1 The constitutional complaint concerns the question if a man-to-woman transsexual with a so called "minor solution" can be denied the entering into a civil partnership with a woman with reference to the possibility to enter into marriage, because for this a change in the personal status records must have taken place, which requires that the transsexual is infertile and has undergone sex-changing surgical interventions.

I.

2 1. Prerequisite for a marriage is the difference in sex of the spouses. In contrast, § 1 Civil Partnership Act (Lebenspartnerschaftsgesetz – LPartG) requires that persons entering into a civil partnership have the same sex. In both cases it is only focused on the sex according to the personal status law.

3 2. a) The Act on the Change of First Names and the Determination of the Sexual Affiliation in Special Circumstances (Transsexual Act/Transsexuellengesetz – TSG) of 10 September 1980 (Federal Law Gazette I, page 1654) as amended on 17 July 2009 (Federal Law Gazette I, page 1978) provides two procedures which are intended to enable transsexuals a life in their felt gender.

4 The so called “minor solution” permits to change the first name without requiring that surgical sex-adapting interventions must have taken place beforehand. The preconditions for this are laid down in § 1 TSG, which reads as follows:

5 Requirements

6 (1) The first names of a person have to be changed upon his petition by the court, if

7 1. he due to his transsexual influence does no longer feel related to the sex declared in his birth registration, but the other sex, and he has been for at least three years under the compulsion to live in accordance with his mental image,

8 2. it is to be assumed in all probability that his feeling of affiliation to the other sex will not change, and

9 3. he

10 a) is German within the meaning of the Basic Law,
b) has his habitual residence as a stateless person or a homeless foreigner in-country,
c) has his residence as a person entitled to asylum or an foreigner refugee in-country,
d) as a foreigner whose home state has no regulation comparable to this Act
aa) has an indefinite residence permit or
bb) has a renewable leave to remain and is permanently located lawfully in-country.

11 (2) The first names the applicant will carry in the future are to be stated in the petition.

12 For the assessment of the requirements listed in § 1 paragraph 1 TSG the district court in charge of the decision (cf § 2 paragraph 1 TSG) obtain expert reports of two experts who are due to their education and their professional experience sufficiently familiar with the special issues of transsexualism and who have to act independent of each other (cf § 4 paragraph 3 TSG).

13 § 8 TSG establishes the requirements for the so called “major solution”, which leads to the recognition of the felt gender in the personal status records, and has the following wording:

14 Requirements

15 (1) Upon the petition of a person, who due to his transsexual influence does no longer feel related to the sex declared in his birth registration, but the other sex, and who has been for at least three years under the compulsion to live in accordance with his mental image, it has to be declared by the court that he must be considered as belonging to the other sex, if he

16 1. fulfils the requirements of § 1 paragraph 1 nos. 1 to 3,

17 2. (repealed)

18 3. is permanently infertile and

19 4. has undergone a surgical intervention changing her exterior sexual characteristics due to which a considerable approximation to the appearance of the other sex has been achieved.

20 (2) The first names the applicant will carry in the future are to be stated in the petition; this is not required if his first names have already be changed based on § 1.

21 In case the petition will be met by means of a judicial decision according to the procedure provided for in § 9 TSG, in accordance with § 10 TSG the applicant has to be considered as belonging to the other sex from the legal effect of the decision onward with the consequence that his rights and obligations depending on his sex are principally determined by the new sex. However, according to § 11 TSG the relation of the transsexual to his descendants and parents remains unaffected. In compliance with § 9 paragraph 3 TSG in connection with § 6 TSG the personal status may be aligned to the birth sex again upon petition.

22 b) In the formation of the Transsexual Act it was undisputed during the legislative procedure that a change in the personal status required a surgical sex alignment. The Federal Government (Bundesregierung) reasoned that it had to be prevented that a man could marry a man who then could in this respect even become prosecutable in accordance with § 175 StGB (Criminal Code/Strafgesetzbuch). In case the person concerned could not undergo the surgery, he had to content himself with the "minor solution" (Bundestagsdrucksache – BTDrucks 8/2947, page 12).

23 The requirement of infertility has not been reasoned. However, the relationship of transsexuals with their children has been discussed. The Federal Assembly (Bunderat) induced in this context with the later affirmation of the Federal Government (Bundesregierung) (BTDrucks 8/2947, page 27 under 10) to apply the parent-child-relation regulated in § 11 TSG to all natural children of the persons concerned no matter if they have been born prior or after the recognition of the felt gender in the personal status records. According with experiences up to that date it was not ruled out that persons who were deemed to be infertile could procreate and conceive children. These children ought not to be deprived of the possibility to let their descent be determined (BTDrucks 8/2947, page 23 under 10).

24 3. By 7 April 2009, the Federal Ministry of Interior (Bundesministerium des Innern) had elaborated a draft of an act for the reformation of the transsexual law, which was however not introduced into the legislative procedure in light of the already advanced legislative period (BTDrucks 16/13157, page 1). The draft kept the division between "minor" and "major solution". For the "major solution" leading to the change in the personal status records the permanent infertility and henceforth, instead of the surgery required heretofore by § 8 TSG, an approximation in corporal respect to the appearance of the other sex were to be established as a prerequisite, but only insofar as the necessary medical treatment did not lead to a danger to life or to a severe and permanent impairment of the health of the person concerned.

25 On that point, in the reasoning of the draft law it was stated that the requirement of the permanent infertility could not be given up principally. The sex-depending association in the coexistence of the society ought to be preserved; in particular it has to be precluded that

persons legally assigned to the male sex bear children and persons legally assigned to the female sex procreate children. However, in the past due to the requirement of the surgical sex transformation more surgeries have taken place than it has been therapeutically advisable. Therefore, in the future medical interventions ought to be determined by the individual development and medical assessment.

26 4. a) In almost all jurisdictions of Europe there are possibilities for the legal recognition of transsexuals in their felt gender. These can be distinguished based on whether they require a surgical sex transformation for the recognition with regard to personal status law (like France <cf Court de Cassation, Assemblée plénière of 11 December 1992, Bulletin civil no. 13> and Turkey <Article 40 of the Turkish Civil Code>) or refrain from on it (like Belgium <Article 62b of the Belgian Civil Code>, Finland <§ 1 of the Finish Transsexual Act>, Austria <cf Austrian Constitutional Court, Decision of 3 December 2009 - B 1973/08-13 -, page 8ff>, Sweden <§ 3 of the Swedish Transsexual Act>, Spain <Article 4 of the Spanish Transsexual Act> and Great Britain <Section 3 Gender Recognition Act 2004>). Certain jurisdictions require a visual adaptation to the felt gender, for instance by means of a hormone therapy (like Belgium <Article 62b § 2 no.2 of the Belgian Civil Code>, Italy <Article 1 of the Italian Transsexual Act> and the Netherlands <Article 28 paragrpah 1 B.W.>, although Belgium and the Netherlands in turn provide for exceptions in cases in which on a case-by-case basis health risks exist <Article 62b § 1 paragraph 1 of the Belgian Civil Code> and <Article 28 paragraph 1 B.W.>). While accordingly only a small number of states establishes the conduct of a surgical sex alignment as a requirement for the change in the personal status records, the number of countries that require an infertility is larger (Belgium <Article 62b § 2 no. 3 of the Belgian Civil Code>, Finland <§ 1 no. 1 of the Finish Transsexual Act>, Netherlands <Article 28 paragraph 1 B.W.>, Sweden <§ 3 of the Swedish Transsexual Act>, Turkey <Article 40 of the Turkish Civil Code>). In all jurisdictions decisions concerning the recognition of the felt gender are to be made based on medical and psychiatric expert reports.

27 b) In Finland (§ 1 of the Finish Civil Partnership Act), France (PACS, Article 515 of the French Civil Code), Austria (Registered Partnership Act), Switzerland (Partnership Act) and the UK (Civil Partnership Act 2004) there exists, besides marriage, a special institution of family law for the legal safeguarding of same-sex partnerships. In these states, too, the determination of the same-sexuality follows the personal status.

28 In contrast, Belgium (Article 143 of the Belgian Civil Code), the Netherlands (Article 1:30 B.W.), Norway (Article 1 of the Norwegian Marriage Act), Spain (Article 9 of the Spanish Civil Code) and Sweden (Article 1 of the Swedish Marriage Act) have open the entering into marriage not only for different sex, but also for same sex partners. The personal status law related recognition of the felt gender has in those countries for the transsexual no consequences regarding the entering into a legally safeguarded partnership.

29 5. Since the entry into force of the Transsexual Act new findings concerning transsexuality have been gained (cf already BVerfGE 115, 1 <4ff>). Transsexuals live in the irreversible and permanent consciousness to belong to the sex which they have not been assigned to at the point of their birth due to their physical sexual characteristics. Their sexual orientation in their felt gender can, like in case of non-transsexuals, be hetero- or homosexual.

30 a) With the emergence of sex adapting surgery in the 1960s transsexuality has been defined as suffering from the wrong body and treatment has been focused on somatic interventions (cf. Becker, in: Kockott/Fahrner, Sexualstörungen, 2004, page 153 <153ff>). The

understanding resulting from this that all transsexuals would seek sex adapting surgery, has proven to be wrong by now (cf BVerfGE 115, 1 <5>). A desire for surgery alone is no longer considered to be a reliable diagnostic indicator by experts, since the wish for a "sex transformation" can be a solution pattern for psychosis, discomfort with established images of gender roles or for the denial of a homosexual orientation (Pichlo, in: Groß/Neuschaefer-Grube/Steinmetzer, Transsexualität und Intersexualität, Medizinische, ethische, soziale und juristische Aspekte, 2008, page 39, 121f).

31 A sex adapting surgery provides a considerable relief of their psychological stress for many transsexuals,, which some try to achieve by means of self-mutilation and self-castration. However, in Germany between 20 and 30% of the transsexuals who file a petition for changing their first name remain permanently within the "minor solution" without surgery (with further references Hartmann/Becker, Störungen der Geschlechtsidentität, 2002, page 15; Becker/Berner/Dannecker/Richter-Appelt, ZfS 2001, page 258 <264>). The desire for and the conduct of surgery are according to new insights not characteristic for the presence of transsexuality. The stability of the transsexual desire is rather considered to be determining (cf Becker/Berner/ Dannecker/Richter-Appelt, ibid, page 258 <260>; Pichlo, loc. cit., page 121). Therefore, individual therapeutic solutions are regarded as necessary, which can range from a life in the other sex without somatic measures to hormonal treatments to a surgical sex adaptation (with further references Pichlo, loc. cit., page 119, 122; Rauchfleisch, Transsexualität - Transidentität, 2006, page 17; Becker, loc. cit., page 153 <180, 181>). In reference to these insights, the requirements of § 8 paragraph 1 nos. 3 and 4 TSG are identified as being problematic under constitutional law (Becker/Berner/Dannecker/ Richter-Appelt, loc cit., page 258 <264>; Grünberger, StAZ 2007, page 357 <360f>).

32 b) The living in the new gender role (so called "every day test") is of great significance in both, the diagnosis as well as the treatment, in order to ascertain if a change of the gender role can be accomplished. Often a counter-sex hormonal treatment is subsequently conducted. This enables a physical approximation to the felt gender and neutralizes characteristics of the birth sex, which are perceived as burdensome by the person concerned, such as menstruation, ejaculation and the growth of a beard (Becker, loc. cit., page 153 <191f>; Eicher, in: Clement/Senf, Transsexualität, Behandlung und Begutachtung, 1996, page 55ff). The counter-sex hormonal therapy is a drastic step, which has with the emergence of female breasts or otherwise the development of a deeper voice and possibly permanent infertility already irreversible physical consequences (Pfäfflin, in: Clement/Senf, Transsexualität, Behandlung und Begutachtung, 1996, page 37) and which brings along health risks, such as a heightened thrombosis-risk, diabetes, chronical hepatitis and liver damages (cf Rauchfleisch, loc. cit., page 105). Where applicable, after conducted surgeries which are a requirement for the recognition with regard to personal status law according to the Transsexual Act, the hormonal therapy has to be continued lifelong (Eicher, Transsexualismus, 2nd edn., 1992, page 84).

33 c) In accordance with the Transsexual Act, for the recognition with regard to personal status law, in case of a man-to-woman transsexual, the amputation of the penis shaft and the testicles as well as the generation of a neo vulva, a neo clitoris and a neo vagina with the creation of a new urethra are necessary (cf on the medical techincs: Eicher, in: Clement/Senf, loc. cit., page 61ff; Sohn/Schäfer, in: Groß/Neuschaefer-Grube/Steinmetzer, Transsexualität und Intersexualität, 2008, page 135ff). In case of a healing without complications the patient can be discharged after two weeks of stationary treatment, whereby at least the first week a strict bedrest has to be observed. Since the surgery constitutes a substantial intervention, the

surgeon has to ponder the surgery and anesthesia risks (cf. Pichlo, loc. cit., page 126f). In case of 40 % of the patients correcting surgeries have to be conducted after the first surgery (Sohn/Schäfer, loc. cit., page 139f; Eicher, loc. cit., page 117ff). Among concerned man-to-woman transsexuals who aspire physical changes, the development of a female breast is regarded as the biggest desire for a physical change, which however often already develops due to the hormonal therapy. While some of the concerned persons feel the utmost repulsion regarding their male hairiness, wish for epilation and reject their penis as a sign of masculinity, others can accept it (Becker, loc. cit., page 153 <191>).

34 In case of woman-to-man transsexuals, for the change in the personal status in accordance with § 8 paragraph 1 nos. 3 to 4 TSG the surgical removal of the uterus, the ovaries and the oviduct as well as in many cases a breast reduction are necessary for the adaptation to the appearance of the male sex. A vaginal obstruction and the construction of a penile prosthesis are however not required as a prerequisite. For woman-to-man transsexuals who seek for physical interventions the removal of the breast as a visible sign of femininity has priority. In second place comes the termination of the menstruation, which is already accomplished through a hormonal therapy, with the result that the removal of the uterus and the ovaries is only sought by the fewest concerned persons on their own motivation. The desire for a penile prosthesis is in many concerned persons not highly developed (Becker, loc. cit., page 190).

35 d) The number of transsexuals who re-change to their birth sex after changing their first names or after sex transformation is only inadequately known. The change of roles back is considered to be a rare exception (Becker/Berner/Dannecker/Richter-Appelt, loc. cit., page 258 <263>). According to a study of 1993, since the entry into force of the Transsexual Act only six persons (0.4% of the persons who made a change concerning their first names or personal status) filed a petition in Germany for the re-conversion or the re-admission of their former first names, 5 of which after executed change in first name and one person after realized change in the personal status (with further references Hartmann/Becker, loc. cit., page 96). According to information of the German Society for Sexual Research (Deutsche Gesellschaft für Sexualforschung) the cases in which a return to the starting sex has been realized lie considerably under 1% of all conducted TSG procedures (Becker/Berner/Dannecker/Richter-Appelt, loc. cit., page 258 <264>).

II.

36 1. The complainant has been born in 1948 with male exterior sexual characteristics and has been given the first name “R. R.”. However, she does feels as a member of the female sex. As such, she is homosexually oriented and lives in a partnership with a woman. She has changed her first name in accordance with § 1 TSG into “L. I.” and has converted her title of nobility into the female form (“minor solution”). A change in the personal status according to § 8 paragraph 1 TSG (“major solution”) has not been realized. But, she is treated hormonally. In her birth certificate the complainant is accordingly specified as “L. I. Freifrau …, male sex”.

37 With application of 8 December 2005 the complainant requested together with her partner at the Civil Registry Office T. of Berlin the registration of a civil partnership. With decision of 2 February 2006 the registrar rejected the application, since a civil partnership could only be registered for two concerned persons of the same sex. Thereupon, the complainant requested

on 8 February 2006 the party to 2) to order the registrar to register the civil partnership with her partner.

38 The district court denied the petition with decision of 30 August 2006. The establishment of a civil partnership required that it is entered into by two persons of the same sex. This requirement was missing here. A judicial finding in accordance with § 8 paragraph 1 TSG that the complainant had to be considered as belonging to the female sex could not be issued without a sex-adapting surgery. The parties had only the possibility of a marriage. This did not constitute a discrimination against their personage. The law focused for the entering into a marriage or civil partnership on the sex defined by the personal status law, not on the sexual orientation of the partners. This was not be objectionable under constitutional law. The objection against this was rejected by the regional court with decision of 25 January 2007. The further complaint, too, was unsuccessful. The Berlin Court of Appeal validated with decision of 23 October 2007 the legal opinion of the lower court.

39 2. Against this the complainant filed a constitutional complaint on 28 December 2007. She asserts the violations of her rights under Article 2 paragraph 1 in conjunction with Article 1 paragraph 1 of the Basic Law. She had an entitlement protected by fundamental rights to live with a person in a legally and socially recognized civil partnership. As a felt woman, who has a woman as a partner, she liked to enter into a civil partnership. Based on the scientific level of knowledge it was outdated by now merely focus on a sex transformation for the classification according to the personal status law and not on the felt gender. This led to unconstitutional results. For her, as a meanwhile 62 year old the sex-adapting surgery required for the change of the person status was connected with non-assessable health risk due to her age.

40 The referral to marriage for the establishment of a legally protected partnership was not reasonable for her. Marriage was by its nature the bond of man and woman for the entire future life. Since she felt herself as a woman und liked to enter into a partnership with a woman, she was virtually forced to enter into a same-sex marriage. This would on the one hand harm the institution of marriage. On the other hand, she would be legally classified as a man in the solemnization of the marriage, at the same time she carried like her partner a female first name, which met her felt gender. The impression that same-sex partners can also enter into marriage would not only be created by this. It would be made evident to every third party by this that one of the women is transsexual. An inconspicuous life free from discrimination in this new role would be made impossible. This violated her personality right.

41 3. On 10 May 2010 the complainant has communicated that she has entered into marriage by now. It had been no longer acceptable to her to live without legal safeguarding with her partner. She was supposed to receive a claim for widow’s benefits. The couple felt obliged to know that the other partner is provided for without waiting for the court decision first.

III.

42 On the constitutional complaint the Federal Ministry of the Interior (Bundesministerium des Innern) in the name of the Federal Government (Bundesregierung), the State of Berlin (Land Berlin), the Lesbian and Gay Federation in Germany (Lesben- und Schwulenverband Deutschland), the German Society for Transidentity and Intersexuality (Deutsche

Gesellschaft für Transidentität und Intersexualität), the Oecumenic Workgroup Homosexuals and Church (Ökumenische Arbeitsgruppe Homosexuelle und Kirche), the sundays.club (sonntags.club) and the Transgender-Network Berlin (Transgender-Netzwerk Berlin) commented.

43 1. The Federal Ministry of the Interior (Bundesministerium des Innern) considers the legal situation to be constitutional. The "minor solution" was introduced in order to enable the concerned persons to act in the role of the new sex as fast as possible. Furthermore, the persons that do not like to undergo surgery should be helped. However, the "minor solution" had precisely have no consequences for the sexual classification in accordance with the personal status law, but only constituted a concession towards the persons concerned. The marriage as a union of man and woman was only available for persons of different sex, the civil partnership on the other hand only for persons of the same sex. The legal allocation to a sex could result in hardships in case of a discrepancy from the psychologically felt gender. However, the regulatory function of the personal status law required a legally definitely paraphrased criterion for the classification of a sexual affiliation. A scarcely ascertainable, solely felt sex was as unsuitable for this purpose as the mere appearance or behavior of a person. Therefore, the legislator has built on the "major solution" for the recognition with regard with the personal status law of the new sex and prescribed a special procedure.

44 Admittedly, the wrongful appearance that marriage is also available to same-sex has to be avoided in principle. However, due to the "minor solution" provided for the avoiding of hardships the principles of the different sexuality of marriage and of the legally definite, objective connection for the determination of the legally relevant sex could not in any case be consistent with each other. Such a case was, for instance, if an already married transsexual liked to adopt a new first name. The principle to preserve the appearance of different sexuality of the marriage had to step back behind the definite determination of the sex.

45 2. In contrast, the State of Berlin (Land Berlin), the Lesbian and Gay Federation in Germany (Lesben- und Schwulenverband Deutschland), the German Society for Transidentity and Intersexuality (Deutsche Gesellschaft für Transidentität und Intersexualität), the Oecumenic Workgroup Homosexuals and Church (Ökumenische Arbeitsgruppe Homosexuelle und Kirche), the sundays.club (sonntags.club) and the Transgender-Network Berlin (Transgender-Netzwerk Berlin) deem the constitutional complaint to be founded. They emphasize that the sex-adapting surgery necessary for the recognition with regard to the personal status law due to the current legal situation exercised a strong pressure on transsexuals with "minor solution" to undergo somatic measures in order to be able to enter into the civil partnership or marriage conceived as right, even if physical procedures were not advisable from a medical or psychotherapeutic standpoint. The Transsexual Act prized somatic measures above the right of self-determination rooted in the Basic Law. The pressure for a sex-adapting surgery in order to be able to enter into a same-sex partnership was unacceptable. It can be experienced as burdening to dramatic for a man-to-woman transsexual to be "outed" due to her status as married.

46 According to the specifications of the Federal Constitutional Court the legislator ought to provide transsexuals with a homosexual orientation the possibility to be able to enter into a legally secured partnership with a person of his choice. The legislator has tried in the creation of the Transsexual Act to prevent marriages in which the spouses legally or even only seemingly belong to the same sex. It was not consistent with this that the legislator urges homosexual transsexuals without a change in their personal status into a marriage.

47 The requirements of § 8 paragraph 1 nos. 3 and 4 TSG originated from misguided ideas. The desire for a surgery was not necessarily part of transsexuality. Besides, transsexuality was not a matter of “transformation” or “want to become”, but rather an issue of finding legal recognition in the sex already experienced as right.

B.

48 The constitutional complaint is admissible. In particular, the legitimate interest of the complainant has not lapsed, because she has entered into a marriage by now.

49 The impairment of the sexual identity of the complainant due to the legal non-recognition of her felt gender and the possibility not opened to her by this to enter into a civil partnership continue also after her marriage (cf BVerfGE 33, 247 <257f>; 69, 161 <168>; 81, 138 <140f>). The complainant has explained reasonably to have only entered into marriage, because she could due to her age and the extending procedure no longer wait to legally secure her partnership. It was insofar not reasonable for her and her partner put their want for reciprocal safeguarding and maintenance further aside. That the courts and the Federal Constitutional Court can often not decide on difficult question in a short time, must not lead to a repudiation of a constitutional complaint as inadmissible due to the passage of time and changes occurring in this context (cf BVerfGE 81, 138 <140>). Because the complainant had only the possibility of marriage for the safeguarding of her partnership, she is furthermore by the fact that in her marital relation to her partner she remains legally associated with her birth sex still affected in her sense of identity as a woman and confronted with the fact that her transsexuality has become apparent due to her marital union with her partner.

C.

50 § 8 paragraph 1 nos. 3 and 4 TSG are incompatible with Article 2 paragraph 1 and 2 in conjunction with Article 1 paragraph 1 of the Basic Law insofar as the requirements regulated there indirectly prevent a transsexual who fulfils the requirements of § 1 paragraph 1 no. 1 to 3 TSG to enter into a civil partnership.

I.

51 1. Article 2 paragraph 1 in conjunction with Article 1 paragraph 1 of the Basic Law protects with the closer personal sphere of life also the intimate sexual sphere of persons, which includes the sexual self-determination and the finding and cognition of the own sexual identity as well as the own sexual orientation (cf BVerfGE 115, 1 <14>; 121, 175 <190>). It is scientifically assured knowledge that the affiliation of a person to a sex can be determined not only by the exterior sexual characteristics at the moment of his birth, but also depends significantly on his psychological constitution and his self-felt sexuality (cf BVerfGE 115, 1 <15>). In case the own sense of sexuality in case of a transsexual contradicts permanently with the sex legally attributed to him based on his exterior sexual characteristics the human dignity in conjunction with the fundamental right of protection of personality demand to account for the right of self-determination of the person concerned and legally acknowledge

his self-felt sexual identity in order to enable him to be able live according to his felt gender without being exposed in his sphere of privacy by the contradiction between his appearance which he adapted to his felt gender and his legal treatment (cf BVerfGE 116, 243 <264>). It rests on the legislator to shape the legislation in that regard that these requirements are met and in particular the legal affiliation to the permanently felt gender is not made dependent on unreasonable prerequisites.

52 2. It is not compatible with these principles if transsexuals with a same-sex orientation for the legal safeguarding of their partnership have to either enter marriage or expose themselves to sex-adapting and infertility causing surgical interventions in order to be recognized in their felt gender by the personal status law and thereby being enabled to enter into a civil partnership, which corresponds to his partner relationship which he conceives as homosexual. The recognition of the felt gender with regard to the personal status law must not be made dependent on conditions which require severe impairments of the physical integrity and which are connected with health risks, if according to the scientific state of knowledge these are no necessary conditions of a permanent and recognizable change in gender affiliation.

53 a) The right of each person to enter into a permanent partnership with a person of his choice and to legally safeguard this in an institution provided for this purpose by the law is covered by the free development of personality protected by Article 2 paragraph 1 of the Basic Law (cf BVerfGE 115, 1 <24>). In accordance with the constitutional dictate of Article 6 paragraph 1 of the Basic Law this is on the one hand possible by entering into marriage, which is open to couples of different sex (cf BVerfGE 105, 313 <344f>). On the other hand, the legislator has created for same-sex partnerships the institute of the civil partnership. The access to the respective institute is insofar currently based in the German law on the sexual constellation of the couple, who want to legally unite with each other, not on the sexual orientation, even if the decision of a person for a marriage or a civil partnership if generally linked with his sexual orientation (cf BVerfGE 124, 199 <221>). In this context the sex of the partner determined by the personal status law at the moment of the entering of the legal union is leading. The distinction between the both possibilities for couples to legally commit themselves provided for by the legislator, which is only oriented at the legally attributed sex of the both possibilities, is under constitutional law not objectionable (cf BVerfGE 115, 1 <23>; 121, 175 <195>). It enables an objective and simple assessment of the admission requirements for marriage and civil partnership, avoids that partners have to reveal intimate information about their sense of sexuality or their sexual predisposition before entering into marriage or civil partnership and thus serves the protection of privacy (cf BVerfGE 107, 27 <53>).

54 b) But, the fact that for the initiation of marriage or civil partnership the respective sex according to the personal status law is leading impairs the right to sexual self-determination under Article 2 paragraph 1 in conjunction with Article 1 paragraph 1 of the Basic Law if in the legal determination of the sexual affiliation of a person only his sex determined based on his external sexual characteristics is taken into account and not his felt gender, which has been confirmed by an expert report, and a discrepancy between the sexual affiliation according to the personal status law and the felt gender cannot be eliminated in a manner acceptable for the person concerned with the result that for the safeguarding of his partnership he has only an institution as an option, the entering of which forces him to live according to his feeling in a wrong sex.

55 This is the case with a transsexual with homosexual orientation who does in fact meet the requirements of § 1 paragraph 1 nos. 1 to 3 TSG, but who has not undergone a surgery changing his exterior sexual characteristics and leading to infertility which is prerequisite according to § 8 paragraph 1 nos. 3 and 4 TSG in order to be recognized under personal status law in the self-felt gender. Thus, a man-to-woman transsexual with a "minor solution", such as the complainant, perceives herself as a woman and has accordingly adapted her name and her appearance to the felt gender, but is still treated as man under personal status law. Like the courts have established in the case at hand according to the effective legal framework, it is not possible for the complainant for the legal safeguarding of her relationship to a woman, which is in accordance to her feeling homosexual, to enter into a civil partnership, albeit this institution has been particularly created by the legislator for same-sex couples, in order to reserve marriage as a union of man and woman for couples of distinct sex (cf BVerfGE 115, 1 <18>). In case a man-to-woman transsexual wants to legally bond her partner, she therefore faces the options to either enter into marriage with her partner (aa) or undergo sex-adapting surgery leading to infertility in order to achieve the recognition of her felt gender with regard to the personal status law and thereby fulfil the requirements for the establishment of a civil partnership corresponding to her homosexual relationship (bb). Both options she has impair her right to sexual self-determination in an unacceptable manner.

56 aa) With the reference to marriage as a possibility to legally safeguard the partnership, a transsexual with a so called "minor solution" and homosexual orientation is legally and in a for the environment perceptible manner urged in a gender role contradicting his self-felt one. At the same time his transsexuality becomes evident. This does not conform to the dictate of Article 2 paragraph 1 in conjunction with Article 1 paragraph 1 of the Basic Law of the recognition of the self-felt sexual identity of a person and of the protection of the protection of his sphere of intimacy.

57 In case marriage, like in some European states, is open to couples of different sex as well as same-sex couples (see A. I. 4.), no inferences can be deduced from the entering into marriage on the sexual affiliation or sexual orientation of the spouses. However, when the legal system provides besides marriage with the civil partnership another institution for the safeguarding of the legally binding partnership like in Germany and distinguishes both institutions depending of the sex ratio of the partners, with the assignment to the respective institution an attribution of sex roles in the partnership takes places. The designation as spouses or civil partnership partners alone does influence the self and external perception of the respective partners and their relationship. In case a transsexual with "minor solution" and homosexual orientation is referred to enter into marriage to legally safeguard his partnership and he does so out of necessity, because sex-adapting surgeries are out of question for him, but he does not want to refrain from a legal bonding with his partner, as a result he does expose himself to a questioning of his sexual identity and sexual orientation. On the one hand, he comes into conflict between the appearance of sexual affiliation communicated by the marriage and his own contradicting sense of sexuality. On the other hand, he is attributed a role in marriage as a heterosexual union which contradicts his sexual orientation.

58 Admittedly, the transsexual may even after the entering into the marriage keep his name which he changed in accordance with § 1 TSG and which is in line with his felt gender (cf BVerfGE 115, 1ff). But, precisely this name and his appearance adapted to the sexual feeling, which reveals his relation to his bond partner as homosexual, put him and his partner in turn in contradiction to their status as a married couple. They appear as a couple that is actually in marriage like a fish out of water. It becomes apparent that one of them has to be a

transsexual. Due to the discrepancy between their marital bonding and their perceptible homosexual relation both have to expect again and again to be addressed with regard to their sexual affiliation. Admittedly, it might be avoidable in everyday life to reveal oneself as spouses. But, it is unreasonable for the persons concerned under constitutional law to have to conceal their legally assigned status from the outside world in order to live in compliance with their felt gender roles. The protection of the sphere of intimacy of the transsexual and his partner from unwanted insights by Article 2 paragraph 1 in conjunction with Article 1 paragraph 1 of the Basic Law is thereby not sufficiently maintained (cf. BVerfGE 88, 87 <97f>). Therefore, it is not reasonable for both to be referred to marriage for the safeguarding of their relationship.

59 bb) It is not objectionable under constitutional law that the legislator with regard to the access to a civil partnership in case of transsexuals with a homosexual orientation, too, focuses on the partners' sex as determined by the personal status law and that he makes the sex determination dependent on objectifiable requirements. However, it violates the right on sexual self-determination under Article 2 paragraph 1 in conjunction with Article 1 paragraph 1 of the Basic Law if he ties the recognition of a transsexual with regard to the personal status law on too high and thus unreasonable prerequisites.

60 (1) A civil partnership is only available to same-sex couples. A homosexual transsexual with his partner might classify himself as such. However, as long as he has found no recognition with regard to the personal status law in his felt gender his relationship is legally not recognized as homosexual. He may only enter into a civil partnership in accordance with his feeling if he previously meets the requirements of which the legislator makes the change of the personal status conditional on. The linkage to the sex determined by the personal status law serves the unambiguous sexual affiliation of the partners in the assessment if they have to be granted access to a civil partnership. The legislator pursues a legitimate goal when he with the requirement of a proof of the sex according to the personal status law wants to undertake to ensure that the civil partnership is available only to couples which are legally recognized as homosexual (cf BVerfGE 105, 313 <351f>).

61 (2) The legislator may in principle take the exterior sexual characteristics at the moment of birth as a starting point in the determination of the sexual affiliation of a person and make the recognition with regard to personal status law of a felt gender of a person in contradiction to this dependent on particular conditions. Since the sex can be essential for the allocation of rights and duties and familial assignments are dependent on it, it is a legitimate concern of the legislator to vest permanence and unambiguity on the personal status, prevent as possible a distinction between biological and legal sexual affiliation and to permit a change in the personal status only if there are sound reasons for this and otherwise rights guaranteed by the constitution would be insufficiently maintained. In this context he may in order to rule out arbitrary changes of the personal status require a proof based on objectified criteria that the self-felt gender affiliation, which contradicts the determined sex, is indeed of perpetuity and the recognition is of essential significance for the person concerned.

62 Accordingly, the legislator first requires for a change of the sex with regard to the personal status law in accordance with § 8 paragraph 1 no. 1 TSG with reference to § 1 paragraph 1 TSG that a person who perceives himself as belonging to the sex other than the determined one proves by means of two expert reports of independent experts who have the relevant professional knowledge and professional experience in the field of transsexuality to have been for at least three years under the compulsion to live in accordance with the notion of his

sex. Furthermore, it has to be assumed in all probability that the feeling of affiliation to the other sex will not change. It is not objectionable under constitution law to tie the recognition with regard to the personal status law to such requirements.

63 (3) The legislator may indeed qualify how the proof of the stability and irreversibility of the feeling and life of a transsexual in the other sex has to be furnished. In this context he may also beyond the requirements of 3 1 paragraph 1 TSG specify his demands, for instance concerning the medical counsel of the transsexual, his appearance or the quality of the assessment. But, the legislator imposes demands on the proof of the permanence of the felling and life in the other sex, which are too high, unreasonable for the person concerned and insofar incompatible with Article 2 paragraph 1 in conjunction with Article 1 paragraph 1of the Basic Law, when he requires in § 8 paragraph 1 nos. 3 and 4 TSG of a transsexual for the recognition of the felt gender with regard to the personal status law by all means and without exceptions to undergo surgeries which change his sexual characteristics and result in infertility (cf Austrian Constitution Court, Judgment of 3 December 2009 - B 1973/08-13 -, page 8ff).

64 (aa) In order to be able to determine and prove if the transsexual desire is really stabile and irreversible a longer diagnostic-therapeutic procedure is necessary according to contemporary medical knowledge (cf A. I. 5. a) bis c). For a life of the person concerned in the other sex an approximation of his appearance and an adaptation of his behavior to the felt gender is required. This is initially induced by means of respective garments, makeup and manner of appearance in order to test in everyday life if a permanent change in the gender role is psychologically manageable at all. In case this succeeds, the transsexual in most cases undergoes a permanent hormonal treatment which is capable of disabling physical characteristics results of the birth sex, such as the growth of a beard, ejaculation or menstruation, which causes a visual approximation of the body to the felt gender and which may bring along infertility. Finally, as the furthest-reaching step of treatment a surgical intervention can be taken into consideration in the case of which the exterior sexual characteristics of the transsexual are adapted to the felt gender whereby his infertility is caused. Quite often such a surgery has consequence that further corrective surgeries are required. After sex-adapting surgeries hormonal treatment has to be undertaken lifelong.

65 A surgery removing for the most part the sexual characteristics of a person or transforming them in such a manner that they conform to a great extent to the appearance of the felt gender as possible, constitutes a severe impairment of the physical integrity protected by Article 2 paragraph 2 of the Basic Law with considerable health risks and adverse effects for the person concerned. Depending on the health situation and the age these risks can be so high that from a medical point of view such a surgery has to be discouraged. Admittedly, it is part of the therapy in case of many transsexuals to ease their psychological strain which arises from the feeling to live physically in the wrong sex and correspondingly to also permit them according to their desire and urge to approximate to their felt gender und adapt to it by means of surgical intervention. However, it is unacceptable to expect from a transsexual that he undergoes such surgeries which are risky and connected with potentially permanent health damages and impairments when they are not medical indicated in order to demonstrate thereby proof for the sincerity and permanence of his transsexuality and to obtain the recognition of the felt gender with regard to personal status law.

66 Like the Federal Constitutional Court has already established in its judgment of 6 December 2005 (BVerfGE 115, 1) in light of the contemporary scientific level of knowledge it can no

longer be assumed that existence of a sincerely and irrevocably felt transsexuality can be solely ascertained by the fact that the person concerned efforts by all means to correct his sexual organs and characteristics as an error of nature by means of sex transformation. The experts have rather realized by now that sex-adapting surgery even in case of an almost certain diagnosis of transsexuality is not always indicated. If a sex transformation is from a medical viewpoint justifiable and advisable has to be assessed after medical diagnosis individually for each person concerned (cf BVerfGE 115, 1 <21>). The permanence and irreversibility of the felt gender of a transsexual cannot be measured by the degree of adaptation of his exterior sexual characteristics to the felt gender by means of surgical interventions, but has to be determined according to the fact how consequent the transsexual lives in his felt gender and perceives himself as arrived in it (cf Becker/Berner/Dannecker/Richter-Appelt, loc. cit., page 258 <260f>). Conducted sex-adapting surgeries are thus a definite indication for the transsexuality of a person. But, in case they are set as absolute prerequisite for the recognition with regard to the personal status law, the transsexual is required to undergo physical interventions and to tolerate health impairments even if this is not indicated in his case and not necessary for the determination of the permanence of his transsexuality. Thereby the legislator sets an excessive requirement for the proof of the permanent existence of a transsexuality which does not sufficiently take into account the fundamental right to be protected of the persons concerned under Article 2 paragraph 1 in conjunction with Article 1 paragraph 1 of the Basic Law.

67 Besides, the legislator also does not require surgeries in other cases in order to guarantee a largely conformity between the legal sex affiliation of a person and his exterior sexual characteristics. § 9 paragraph 3 in conjunction with § 6 paragraph 1 TSG provides after sex-changing surgeries the possibility to reverse the recognition of the wished for sex with regard to the personal status law and return to the birth sex without new sex-adapting surgeries being set as a condition for this purpose. By doing so, the legislator accepts that not all members of a sex affiliation do completely correspond to the appearance of this sex regarding their exterior sexual characteristics.

68 (bb) With the permanent infertility the legislator has also set in § 8 paragraph 1 no. 3 TSG an unacceptable requirement for the recognition with regard to the personal status law of the felt gender of a transsexual, insofar as for the permanence of the infertility surgical interventions are set as a requirement. The realization of the right of sexual self-determination under Article 2 paragraph 1 in conjunction with Article 1 paragraph 1 of the Basic Law is thereby made dependent to the surrender of the right to physical integrity without reasons of sufficient severity being present which could justify the impairment of fundamental rights occurring to the concerned transsexual by this (cf BVerfGE 121, 175 <202>).

69 The infertility of a person is under the protection of Article 2 paragraph 2 of the Basic Law and is part of the right to physical integrity (cf BVerfGE 79, 174 <201f>). In case a transsexual is required to undergo surgical interventions for the obtainment of the recognition with regard to the personal status law in his felt gender, which result in his permanent infertility, this places him into predicament to either reject this and by doing so to have to give up his legal recognition in the felt gender, which forces him to permanently live in contradiction to his legal sex affiliation, or to undergo surgeries with serious consequences which do not only bring along for him physical changes and functional losses, but also touch his human self-conception in order to reach on this only possible way to the recognition with regard to personal status law of his felt gender. Whichever decision the person concerned

reaches, he will be affected in essential fundamental rights which concern his psychological or physical personal integrity.

70 The reasons given for the inevitable and severe fundamental rights impairment do not sustain. However, the legislator does pursue a legitimate interest when he wishes to preclude with the permanent infertility as a requirement for the recognition with regard to the personal status law of the felt gender that that persons legally assigned to the male sex bear children and persons legally assigned to the female sex procreate children, because this contradicted understanding of sex and would have far-reaching consequences for the legal order (cf BTDrucks 8/2947, page 12).

71 It is correct that such probabilities can occur when it is refrained from the requirement of the permanent infertility for the recognition with regard to the personal status law of the felt gender. However, concerning woman-to-man transsexuals this will only happen in rare cases, since they are predominantly heterosexually oriented (cf Becker, in: Kockott/Fahrner, loc. cit., page 162). In contrast, in case of man-to-woman transsexuals with homosexual orientation it cannot be excluded when infertility is not set as a requirement for their recognition with regard to the personal status as a woman that they procreate children as then legally classified woman. However, it has to be considered that already the hormonal treatment which is conducted in most cases for the treatment of the transsexuals causes at least a temporal infertility. Moreover, in light of the stage of development of the contemporary reproductive medicine it cannot be precluded even in case of retaining the requirement of a permanent infertility that a man-to-woman transsexual which has undergone respective surgeries and classified as a woman under personal status law later by means of her sperm which has been cryopreserved before the surgery procreates a child, like the case decided by the Köln Higher Regional Court (Oberlandesgericht) shows (cf OLG Köln, Decision of 30 November 2009 - 16 Wx 94/09 -, StAZ 2010, page 45).

72 Such cases of discrepancy between legal sex affiliation and role as procreator or respectively bearer, which will due to the small number of transsexual persons occur rather rarely, affect primarily the assignment of the born children to father and mother. It is a legitimate concern to assign children to their biological parents also legally in a manner that their descent is not ascribed to two legal mothers or fathers contradicting their biological procreation. Like § 11 TSG shows such a definite legal assignment corresponding with the biological circumstances of children to a father or mother is already legally provided for. This regulation rules that the relationship of a transsexual recognized in accordance with § 8 TSG to his descendants remains untouched, in case of adopted children however only insofar as these have been accepted as a child before the legal effect of the decision concerning the recognition of a new sex. Thus, according to § 10 in conjunction with § 5 paragraph 3 TSG the first name of the transsexual which was legally determinative before his name change in accordance with § 1 TSG has to be registered in the entry of birth of a natural child or one adopted before his legal recognition. According to the view of the Köln Higher Regional Court (Oberlandesgericht) § 11 TSG in conjunction with §§ 10 and 5 paragraph 3 TSG have to be interpreted in such a manner that this applies regardless whether the natural child has been born prior or after the legal recognition of the parent in his felt gender (cf OLG Köln, loc. cit., page 46). This ascertains that the children concerned are or will be despite the legal change in sex of one parent always legally ascribed a father and a mother. Balancing insofar the reasons which have motivated the legislator to set the permanent infertility as a prerequisite for the legal recognition in the felt gender in accordance with § 8 TSG with the severe impairments of the fundamental rights of the transsexual which he experiences as a result of him finding only

legal recognition ins his felt gender if he undergoes surgeries that strongly trench on his physical integrity, even if they are not medically indicated and in case of man-to-woman transsexuals furthermore there is an infertility in existence due to the hormonal treatments, the right of the transsexual to sexual self-determination protecting his physical integrity has to be prioritized. This holds especially, since there are legal possibilities to guarantee that children one of whose parents is a transsexual are nevertheless legally assigned to their father and mother. Therefore, § 8 paragraph 1 TSG proves to be unconstitutional not only concerning its no. 4, but also with regard to its no. 3.

II.

73 The appealed decision of the court of appeal, the regional court and the district court are based indirectly on unconstitutional provisions and violate the complainant in her fundamental rights under Article 2 paragraph 1 and paragraph 2 in conjunction with Article 1 paragraph 1 of the Basic Law. The decision of the court of appeal has to be rescinded according to § 95 paragraph 2 of the Federal Constitutional Court Act (Bundesverfassungsgerichtsgesetz – BverfGG) and the case has to be remitted to the court of appeal for a decision on the procedural costs.

D.

74 The unconstitutionality of § 8 paragraph 1 nos. 3 and 4 TSG does not result in nullity, but to the incompatibility of this norm with Article 2 paragraph 1 and paragraph 2 in conjunction with Article 1 paragraph 1 of the Basic Law. Because the legislator has, like mentioned, the possibility to establish more specific requirements for the recognition with regard to the personal status law of the felt gender of a transsexual as a proof of the sincerity of his need to live in the other sex in § 8 paragraph 1 TSG than in § 1 paragraph 1 TSG or may take in hand a revision of the Transsexual Act as a whole in order to cause a constitutional legal situation.

75 In light of the severity of the impairment a transsexual suffers as a result of his felt gender being not recognized with regard to personal status law, in case he does not met the requirements of § 8 paragraph 3 nos. 3 and 4 TSG and therefore a transsexual cannot enter into a civil partnership, which corresponds to his sexual orientation, § 8 paragraph 3 nos. 3 and 4 TSG are declared inapplicable until the entry into force of a revision.

76 The decision concerning the costs is based on § 34a paragraph 2 BVerfGG.

77 The decision was reached with a 6:2 vote.

Kirchhof	Hohmann-Dennhardt	Bryde
Gaier	Eichberger	Schluckebier
Masing		Paulus