

## GENDER STUDIES

# **Beyond the Binary. On the Introduction of a Third Gender Option in German Civil Status Law**

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*Abstract:* The introduction of a third gender option in German civil status law for persons who identify as beyond the binary gender model, with effect from December 22, 2018, illustrates that the appropriate gender designation can be of eminent importance for a person's individual identity, i.e. the formational process of a person's self-perception in its continual interaction with others' perceptions of this self. With sustained reference to the ground-breaking decision of the German Federal Constitutional Court (*Bundesverfassungsgericht*) on October 10, 2017, which led to the authorization of a positive gender entry other than "female" or "male" in German civil status law, this article will discuss the significance of an appropriate gender designation for an individual's personal and social life. I will argue that gender self-determination is an infeasible element of personality, and that it is founded on human dignity and human rights.

*Key words:* sex/gender, third gender option, civil status law, binary gender model, gender designation, intersex/intersexuality, differences of sex development (DSD), general right of personality, human dignity, human rights, gender identity, Federal Constitutional Court of Germany.

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## I. Introduction

“Congratulations! It’s a girl!” “Congratulations! It’s a boy!” These short missives from midwives and medical staff to a mother who has just given birth are far more significant than simply a clichéd form of congratulation. Indeed, in an individual’s biography, there is hardly a more significant determination than that of their sex at the moment they enter this world. Depending on the appearance of their external genitalia, a newborn child is assigned to a certain sex whenever possible. This assignment is existentially important for a person’s self-conception as well as for the ways in which others perceive them. Their individual patterns of thought, feelings, and behavior develop in constant interaction with their social environment on the basis of their sex, as entered in the official birth register. The gender of any individual human being is usually considered to be an invariant, unambiguously determinable, and unchangeable fact from birth onward (Garfinkel 1967, pp. 122–128). However, if a person’s gender, which is associated with certain expectations and idealizations over the course of their life, does not unambiguously “fit” into the binary gender model and/or comes to contradict first appearances, then perceptions become confused, and this may evoke feelings of insecurity or even rejection among their fellow human beings.

Since the binary gender model has been asserted as the general view of human gender in modern Europe in the wake of certain social and structural developments with the emerging bourgeoisie (Tyrell 1986; Honegger 1991; Laqueur 1992; Karle 1996 & 2014), it has evoked and continues to perpetuate manifold experiences of exclusion for people who either locate themselves beyond the categories of “male” and “female” in relation to their gender, or who do not (only) identify with the gender to which they were officially assigned at birth. To what extent can a legal system based on this binary gender model also do justice to people who identify as beyond gender binarity? This brings us to the issue at the heart of the successful constitutional complaint (1 BvR 2019/16) in Germany against a registry office’s refusal to change the complainant’s gender entry to “inter/diverse” on their birth certificate. This constitutional complaint led to the introduction of a positive gender entry other than “female” or “male” in the German Civil Status Act (*Personenstandsgesetz* — PStG), with effect from December 22, 2018. Before I proceed to outline the background and development of this constitutional complaint, the arguments put forward in this context, and certain issues and considerations that seem rele-

vant to me, I would like to briefly discuss the complexity of sex and gender in general, and the term “intersexuality” in particular.

## II. Sex and Gender as Complex Phenomena

Undoubtedly, the division of human beings into the two sexes/genders “male” and “female” is not only a characteristic of our daily interactions, but also the basis of our existing social and legal order. However, if one claims that these two sexes/genders are mutually exclusive in their polarity yet at the same time complement one another, then we must stress that such an assertion is untenable — both with regard to the diversity of human bodies, as empirically registered, and in view of the complexity of sex and gender. Social scientific and psychological studies on so-called “gender-dependent characteristics” have long since shown that “man” and “woman” are not “two categorically different beings”, but rather that “the individual differences within a group of men or women are far greater than any differentiation arising from gender” (Wiedemann 1982, p. 98)<sup>1</sup>. Rather, there are zones of gender ambiguity that make any contradictory opposition between “male” and “female” seem obsolete.

Biology has been and is regarded as the scientific guarantor of the determination of sex and gender *sub utraque specie*. But in fact, biology impressively demonstrates how breathtakingly diverse the sex manifestations and gender expressions of “male” and “female” individuals are, and how fluid the transitions between the two are and can be (Roughgarden 2004). More precisely, sex exhibits manifold variances at the chromosomal or genetic, gonadal, hormonal, and morphological levels. As a result, there are not only two sexed bodies, but a continuum of merging, individually varying sexual characteristics. According to the American ecologist and evolutionary biologist Joan E. Roughgarden (2016, p. 413):

Biology, and zoology in particular, offers no support for a universal and clearly delineated dichotomy between male and female sexes, nor for a universal gender binary expressed in morphology and/or behavior. Indeed, in biology it might be said, ‘nature abhors a category’, a truism that applies to all attempts to define natural categories, including species, races, sexes and genders.

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<sup>1</sup> When no official translation exists, translations from German texts in this contribution are my own.

Congruent with the classical maxim *natura non facit saltus* (“nature makes no leaps”), the American biologist and sexologist Alfred C. Kinsey (1948, p. 639), with regard to human sexual behavior, postulated:

The world is not to be divided into sheep and goats. Not all things are black nor all things white. It is a fundamental of taxonomy that nature rarely deals with discrete categories. Only the human mind invents categories and tries to force facts into separated pigeonholes. The living world is a continuum in each and every one of its aspects.

Nature is organized in a continuous fashion, and therefore our perception of discrete categories is an understandable illusion, arising from habit and from our inclination to dichotomize when we classify things. “It is a characteristic of the human mind that it tries to dichotomize in its classification of phenomena. Things either are so, or they are not so” (Kinsey et al. 1953, p. 469). Kinsey’s “continuum model” (Friedman 1988, p. 8; see Gagnon 1990, pp. 113f.) of (human) sexual orientation can also be applied to (human) sexuality as such, thus enabling us to speak of “patterns of sexual diversity” (Haupt 2016, pp. 75–88; Schreiber 2017b, p. 56) rather than “sexual categories”. From this perspective, the binary gender model leads to a problematic reduction in complexity, blocks access to further insights, and makes it difficult to deal openly with variability and difference. Furthermore, the fact that our “societal images of sex and gender” are also influenced and shaped by “historical, social and cultural factors...that have not always resulted in a rigid binary system of categorization” (German Ethics Council 2013, p. 95) makes this complex model all the more necessary.

### III. Intersexuality

The term “intersexuality” is not a medical diagnosis, but rather stands for a multitude of phenomena with different physical preconditions. More precisely, the term indicates *variations* or *differences of sex development* (Tamar-Mattis/Diamond 2007; Diamond/Beh 2008) — be these on the chromosomal or genetic, gonadal, hormonal, or morphological levels — which in each case might lead to the result that a person cannot — nor wants to — be clearly assigned to either the “male” or the “female” gender. Here and in what follows, this is a question of people who neither define themselves nor allow third parties to define them as unambiguously “male” or “female”.

According to expert estimates, between 0.018% (Sax 2002, p. 174) and 1.7% (Fausto-Sterling 2000, pp. 51–53; Blackless 2000) of the

population is born with intersex traits. Whereas in the latter case, “intersex” is understood as a combination of typically “male” and typically “female” corporeal characteristics — including chromosomal variants such as Turner Syndrome (TS), Klinefelter Syndrome (KS), Androgen Insensitivity Syndrome (AIS), classical Congenital Adrenal Hyperplasia (CAH), and non-classical or late-onset CAH — in the former case, “intersex” is “restricted to those conditions in which chromosomal sex is inconsistent with phenotypic sex, or in which the phenotype is not classifiable as either male or female” (Sax 2002, p. 174). Fausto-Sterling’s (2000) much broader definition of “intersex” and her widely quoted suggestion that the frequency of intersexuality might be as high as “1.7 percent of all births” — a figure that “should be taken as an order-of-magnitude estimate rather than a precise count” (p. 51) — means that being “intersex” is as common as having red hair, for example. According to the latest (267<sup>nd</sup>) edition of the *Pschyrembel Clinical Dictionary* (*Pschyrembel Klinisches Wörterbuch*), published in 2017, the frequency of intersexuality is between 1:100 and 1:500 (p. 884) — that is, between 0.2 % and 1.0 % of the population. These include not only (in the narrower sense) “disorders of prenatal sexual determination and differentiation...in which internal and external genitals develop to different degrees in contradiction to chromosomal sexual determination”, but also — “[i]n the broader sense” — agonadism and gonadal dysgenesis.

Nevertheless, under the fundamental proviso that questions regarding the frequency of certain physical circumstances must always remain secondary to questions of discrimination against and deprivation of people on the basis of these same circumstances, we must ask: If the binary gender model insinuates that “something is wrong” with a great number of people because they cannot — nor want to — be clearly assigned to the “male” or the “female” gender, then it is not unreasonable to assume that “something is wrong” with this model instead (Roughgarden 2004, p. 1).

#### **IV. Background and Development of Constitutional Complaint**

##### **1 BvR 2019/16**

The actual starting point of constitutional complaint 1 BvR 2019/16, which came before the German Federal Constitutional Court (*Bundesverfassungsgericht*), was the statement published by the German Ethics Council (*Deutscher Ethikrat*) on February 23, 2012 regarding

the situation of intersex people in Germany. This statement “deals only with the less common variants of anatomical appearance, in which the designation of an individual as male or female is doubtful because the internal and external sex organs of that individual include both typically female and typically male characteristics” (German Ethics Council 2013, p. 23), which includes persons with AIS, but not persons with “atypical chromosome sets” (p. 35). Although this statement was limited to “DSD [i.e. *differences of sex development*] with an intersex appearance” (German Ethics Council 2013, p. 12), probably not least in a factually unnecessary (Klöppel 2010, pp. 395–403; Gregor 2015, pp. 78–79) effort to reduce complexity (to a “simplified description”, p. 35), the German Ethics Council came to the conclusion that previous medical practice in treating intersexuality should be regarded as an “undesirable medical development” (p. 162), since

[m]any affected individuals have been profoundly wounded in their personal identity by past treatments which cannot, or can no longer, be deemed from today’s perspective to conform to the state of medical science and technology and were based on discriminatory societal conceptions of sexual normality. They have sustained pain, personal suffering, difficulties and permanent restrictions of their quality of life (p. 166).

#### Such irreversible but medically unnecessary

sex assignment measures in people with DSD whose sex is ambiguous constitute an interference with the rights to physical integrity, to the preservation of sexual and gender identity, to an open future and often also to procreative freedom. Decisions on such measures are strictly personal and should therefore always be taken by the individual concerned when competent to decide (pp. 163f.).

As regards civil status law, the German Ethics Council holds the view that “if persons whose physical constitution is such that they cannot be categorized as belonging to either the *female* or the *male* sex are compelled by law to be designated in one of these categories in the civil register” (p. 166), then this constitutes an unjustifiable interference with their right of personality and their right to equal treatment. Thus the council proposes the following recommendations:

1. Provision should be made for persons whose sex cannot be unambiguously determined to register not only as “female” or “male” but also a “other”. Provision should also be made for individuals’ sex not to be registered until they have decided for themselves...
2. In addi-

tion..., provision should be made for affected individuals to request amendment of their registered sex should the original entry prove to be incorrect. 3. If provision exists for a person's sex to be entered as "other" in the civil register, such a person must also be allowed to enter into a responsible and reliable relationship recognized by the state and in law... 4. As a basis for future decisions on legislation, the purposes of compulsory registration as provided by current law should be evaluated. A review should be undertaken to determine whether the recording of a person's sex in the civil register is in fact still necessary (pp. 166f.).

The government's Draft Act Amending the Civil Status Law (*Personenstandsrechts-Änderungsgesetz*, PStRÄndG) of May 25, 2012 did not follow the recommendations of the German Ethics Council in this regard. Only after other factions in the Bundestag protested was the Civil Status Act (PStG) amended, with effect from November 1, 2013, to indicate that a "person's civil status shall be documented in the birth register without indicating the person's gender" if "the child can be assigned neither the female nor the male gender" (§ 22[3] PStG). To be clear, this open gender entry option is merely a temporary entry in the register, which can be made without fixing any time limit in this regard and also subsequently (i.e. retroactively). Therefore, we can only speak of an "introduction of gender variance" with reservations, since "[t]he new option should be more correctly described as an unspecified gender, since the law did not create an explicit third category" (von Wahl 2017, p. 46).

In constitutional complaint 1 BvR 2019/16, the complainant — who has an atypical set of chromosomes (TS) and was assigned to the female gender and correspondingly registered as "female" in the birth register — requested that the responsible registry office delete this gender entry and replace it with "*inter/divers*", or alternatively with "*divers*". In their request, the complainant argued that neither the previous entry in the birth register ("female"), nor changing the entry to "male", nor again the option of leaving the gender entry blank corresponded to the facts — the latter because the complainant's gender identity is not unclear, as may be the case with a newborn, but is a stable, consolidated intersex identity (Schreiber 2017a, p. 12). The registry office rejected the request and argued that, under German civil status law, the only possibility for people who identify as neither male nor female is to leave a blank space where the gender entry is typically made (§ 22[3] PStG). Thus the request to correct this entry, filed with

the responsible local court in Hanover, was rejected; the complaint's appeals against this decision were all unsuccessful until the summer of 2016, when the appeal was accepted as a constitutional complaint (file number 1 BvR 2019/16), which was filed on September 2, 2016.

In a letter dated October 17, 2016, the Federal Constitutional Court then gave a total of 19 institutions and associations the opportunity to submit statements as “expert third parties” in accordance with § 27a of the Federal Constitutional Court Act (*Bundesverfassungsgerichtsgesetz* — BVerfGG). The court received 16 submissions, including several submitted by sources other than those the court specifically consulted, all of which — with two exceptions (for one of them, see Section VII below) — more or less clearly supported the constitutional complainant's goal of establishing a third gender entry (Schreiber 2018a)<sup>2</sup>.

## V. Arguments

In its order dated October 10, 2017, the First Senate of the Federal Constitutional Court of Germany argued that the legislature must create a third gender option in German civil status law for “persons whose gender development deviates from female or male gender development and who permanently identify with neither the male nor the female gender” (BVerfG 2017, § 35)<sup>3</sup>. Thus the registry office's refusal to change the complainant's gender entry to a positive gender entry in addition to the entries “male” or “female”, together with the provisions of civil status law that justified this refusal as well as the decisions based on these provisions — which were subsequently challenged in the constitutional complaint — are incompatible with the requirements of the German Constitution, i.e. the Basic Law of the Federal Republic of Germany (*Grundgesetz* — GG). Such provisions violate not only the complainant's general right of personality (Art. 2[1], in conjunction with Art. 1[1] GG, see BVerfG 2017, § 38), but also the prohibition of discrimination on the basis of sex (Art. 3[3] first sentence GG, see BVerfG 2017, § 59): “Both of these fundamental rights of persons who do not permanently identify as male or female are violated if the civil status law requires that the gender be registered but does not allow for a further positive entry other than male or fe-

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<sup>2</sup> A summary of these submissions can (only) be found in §§ 18–34 of the German version of this order, BVerfGE 147, 1–30 (online available at: [http://www.bverfg.de/e/rs20171010\\_1bvr201916.html](http://www.bverfg.de/e/rs20171010_1bvr201916.html)).

<sup>3</sup> The paragraph indicators (in the main text) refer to the numbers in the margins.

male”, as stated in no. 3 of the Headnotes to this order. Gender identity “is regularly a constitutive element of an individual’s personality. Under the given circumstances, the assignment of gender is of paramount importance for individual identity; it typically occupies a key position both in a person’s self-image and in the way this person is perceived by others” (§ 39). Thus the legislature must either enact new provisions compatible with the constitutional law by December 31, 2018, or it was “free to completely dispense with a gender entry in matters under civil status law” (§ 52).

It is not possible here to go into detail on this ground-breaking decision of the German Federal Constitutional Court (Wapler 2018). I will limit myself to making three points, which seem essential to me:

1) For the first time, the supreme constitutional court of the Federal Republic of Germany explicitly ruled that the “gender identity of persons who can be assigned neither the male nor the female gender” (§ 40) was protected under the scope of the general right of personality (Art. 2[1], in conjunction with Art. 1[1] GG). Moreover, the court also considered “sex” (*das Geschlecht*), with recourse to “medical and psychosocial science”, as “also dependent on social and psychological factors”: “sex [*das Geschlecht*] cannot be determined, let alone created, by genetic, anatomical and chromosomal features alone” (§ 9)<sup>4</sup>.

2) In contrast to what was reported in almost all of the subsequent media coverage, the court’s order is not concerned with the creation of a “third gender,” but rather with the introduction of a third option for entering gender in the birth register. This fact must be emphasized because, although “gender” is presupposed as a fixed category in the law, it remains an indeterminate legal concept (Adamietz 2012, p. 15; German Ethics Council 2013, pp. 115f.).

3) In its reasoning, the court does not speak of “intersexual persons” per se, but explicitly refers to “persons with variations of sex development”<sup>5</sup> (*Personen mit Varianten der Geschlechtsentwicklung*) who permanently assign themselves neither to the “male” nor to the “female” gender. This is a clear departure from the pathologization of intersexual bodies.

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<sup>4</sup> Translation slightly altered. The official English translation of the order in both places reads “gender” instead of “sex”. Note that only the German version is authoritative.

<sup>5</sup> My translation. The official English translation of the order surprisingly reads “persons with deviating gender development”.

As is well known, the German parliament adopted the Act Amending the Information to Be Entered in the Birth Register (*Gesetz zur Änderung der in das Geburtenregister einzutragenden Angaben*) on December 18, 2018. With effect from December 22, 2018, the relevant article of the German Civil Status Act (PstG) reads as follows: “If the child can be assigned neither the female nor the male gender, a person’s civil status can be entered in the birth register without indicating the person’s gender, or with the indication ‘*divers*’” (§ 22[3] PStG). This introduction of the German word “*divers*”, which can be roughly translated as “miscellaneous” or “various”, as a gender marker in addition to “male” and “female” in the birth register made Germany the first country in the European Union to offer a “third gender” option in civil status law and, as can be expected, in other official identification records. Strictly speaking, four gender options now exist for people under German civil status law, both at birth and at later stages: “female”, “male”, “*divers*”, and no gender marker at all.

While many press statements and media interviews as well as some intersex activists and lawyers praised this decision as “revolutionary”, this modification of the civil status law also met with tremendous opposition from several intersex and trans organizations, since persons who identify as beyond the binary gender model need to prove their “variation in sex development” (*Variante der Geschlechtsentwicklung*) with a medical certificate — a requirement which can be waived only in exceptional cases (§ 45b PStG). According to these criticisms, the new provision can thus be considered “a missed historical opportunity”, since “the third option does not fully recognize gender diversity”, (Baars 2018) as it will only be available to those medically diagnosed with an intersex condition. Furthermore, some critics objected that the German legislature had not seriously considered the alternative option proposed by the Federal Constitutional Court: “to completely dispense with a gender entry in matters under civil status law” (§ 52).

## **VI. Issues and Considerations**

I would like to highlight at least four issues and considerations which seem to me to be essential to any assessment of the above arguments.

1) Intersexuality includes psychological and social aspects in addition to biological ones, and thus touches on questions of personal self-determination, social visibility, and the sovereignty of one’s social self-definition. Hence, for a person who identifies as beyond the binary gender model, an entry in the birth register which corresponds to their

own sexuality is by no means a purely declaratory statement, but, beyond all doubt, can be a matter of enormous personal and social significance. Assigning a person to a gender “does not constitute a neutral diagnosis...but affects the person’s self-perception and identity” (German Ethics Council 2013, p. 24).

2) A person’s right to an entry in the civil status register which corresponds to their self-perception of their gender, as well as protection against compulsory assignment to a particular sex, result from the fundamental rights guaranteed to every human being under constitutional law. In principle, therefore, the right to gender self-determination as an indefeasible element of personality cannot be justified on different grounds than the general right to self-determination; this is not a matter of the subjective constitution of the person, but rather of the equal, unique and inviolable dignity of every human being. The recognition of all human beings as “born free and equal in dignity and rights”, as stated in Article 1 of the Universal Declaration of Human Rights (UDHR), adopted by the United Nations General Assembly on December 10, 1948, demands respect for the right of persons who identify as beyond the binary gender model to make self-determined decisions about their own sexuality. Therefore, in principle, until the person concerned has made an explicit self-declaration, *any* gender entry in the birth register made on the basis of a decision by a third party — the options for which are now “female”, “male”, “*divers*”, or no gender marker at all — can only ever be *provisory*.

3) The guiding principle of the primacy of self-determination over external determination must also be respected and applied in the medical setting. The possibilities modern medicine offers for “correcting” sexual “ambiguity” or assigning sex (German Ethics Council 2013, pp. 26f.) carry with them a special responsibility when it comes to dealing with gender and sexuality. Previous medical practice has not infrequently failed to demonstrate the necessary respect for a person’s sexual self-determination by focusing more on the principle of feasibility than on the real-life needs of the persons concerned; these people are not simply objects undergoing medical treatments and procedures, but also self-determined “carriers of dignity”. It is therefore to be hoped that this new legal regulation will effectively put a stop to the still-common medical practice of genital surgery on children (Klöppel 2016; Hoenes et al. 2019). The organizations and associations concerned with these potentially irreversible sex assignment

procedures performed on children with so-called “ambiguous” physical sex characteristics, which may not be medically necessary and which are often performed shortly after birth, understandably equate such procedures with medical torture and the practice of female genital mutilation.

4) The demand for legal recognition of intersex persons or persons who identify as beyond the binary gender model by enabling a non-binary option for entering gender in the birth register is not merely essential for consistency in the legal system. Rather, it is done out of respect for and appreciation of the right to sexual self-determination, which has its origin in the inviolable dignity of every human being, as guaranteed under Article 1 of the German Constitution. Against the background of the reference to God (“before God and man”) in the preamble to the German Constitution, this human dignity — which precedes all concrete political and social models, all cultural patterns of interpretation, and all legislation — can be understood as an inviolable and inalienable gift of God. It cannot be acquired, but is given to humankind by God, whereby it simultaneously establishes the equality of humankind *coram Deo* in all their individual differences *coram hominibus* (Schreiber 2018a).

## VII. Concluding Remarks

Sex and gender as complex phenomena clearly allow for a broader spectrum of options than the simple binary classification of human beings as “male” or “female”. The legal recognition of non-binary gender identities in social policy and in society more broadly is thus a *challenge* to established anthropological presumptions, which not only characterize our daily interactions, but also dominate our social lives. In its official statement to the Federal Constitutional Court, the Federal Association of German Civil Status Registrars (*Bundesverband der Deutschen Standesbeamtinnen und Standesbeamten e.V.* [BDS]) voted against the introduction of a third gender option in German civil status law, arguing that such an option would not only carry “no legal relevance” (p. 9<sup>6</sup>), but would also have only “limited social relevance” (p. 10): “Instead, the actual problem for intersex

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<sup>6</sup> In what follows, I quote and otherwise make use of the page numbers of the BDS’s original statement, which was submitted to the German Federal Constitutional Court on January 16, 2017 (all translations of this text are my own). This statement was subsequently published as Dutta/Helms 2017.

people is that there are still no generally accepted gender identities and social roles for intersex people in social reality” (p. 10). Therefore, they argued that it was not clear what concrete benefit intersex people would obtain if the entry “inter” or “*divers*” were included in the birth register. Although they acknowledged that the refusal to include such an entry did indeed constitute an “encroachment on the general right of personality” in the complainant’s case, they argued that this encroachment was “comparatively minor” and “justified” (p. 12)!

However, prioritizing the goal of legal certainty and clarity over the protection of personal rights, as exemplified in the official statement quoted above, completely ignores the fact (which was already emphasized by the German Ethics Council, as cited in Section VI above) that assigning a person to a gender “does not constitute a neutral diagnosis... but affects the person’s self-perception and identity” (German Ethics Council 2013, p. 24). Intersex people are not sexless beings. The question of providing an entry in the civil register that corresponds to a person’s sex and gender therefore inevitably impacts upon questions of personal self-determination, social visibility, and the sovereignty of one’s social self-definition. As the American biologist and sexologist Milton Diamond aptly notes at the end of his lectures: “Nature loves variety. Unfortunately, society hates it”. And yet, the legal recognition of non-binary gender identities is not only a challenge; it is also an *opportunity*, insofar as the treatment of minorities is one basis on which to judge how open a modern society is as well as what it actually stands for — it reveals the true worth of our values. To make this point as clearly as possible: It is not intersex people who are a “problem”, but rather society itself. And Christian people — no matter what denomination — bear responsibility before God for a humane social order!

Therefore, in my opinion, it is all the more regrettable that also mainstream Christian theology continues to adhere unquestioningly to the binary gender model as a matter of course and to presume the complementarity of “normal” male and “normal” female physiology as a precondition imposed by God as part of the irrevocable order of creation (for an intriguing analysis of the theological implications of intersex conditions and their medical treatment, see Cornwall’s groundbreaking 2010 study). Particularly among the Evangelical Free Churches, as well as in neo- or traditional conservative groups originating both within and outside of the church, the recognition of gender diversity is often interpreted as a “declaration of war on the order

of creation” (Ammicht Quinn 2019, p. 238). If “diversity” were to be recognized, this would result in a fatal “arbitrariness” — an “anything goes” approach that would have devastating consequences for human coexistence. Without the order implied in the binary gender model, they fear that the world threatens to sink into the chaos of ambiguity and indeterminacy. However, one may ask: “Why does it disturb us so much when God does not keep the laws made by humankind?” (p. 239). Additionally, acknowledging that some people do not “fit” into the binary gender model in no way contradicts the central biblical, Jewish and Christian theological confession that God, the Creator, has called *all* created things into being — that is, *no* human being walks on the Earth unless they are put there in accordance with God’s creative will (see Schreiber 2018b). It is therefore important that we no longer close ourselves off from social realities and extra-theological stores of knowledge, and moreover, that we recognize intersexuality as proof of the multiplicity and variety of God’s creation. In view of this, any attempt to standardize gender represents a human presumption and potentially a transgression of the competence according to which God’s autonomous creative action is subjected to the human propensity toward definition.

Against the background of the assumption that gender self-determination is an indefeasible element of personality, grounded in human dignity and human rights, the German Federal Constitutional Court’s decision of October 10, 2017 is, beyond doubt, an important step in the “right direction” (Pikramenou 2019, p. 174). However, even this decision — and above all the subsequent legislative regulation — does not change the fact that a person’s gender affiliation is still initially the result of an external attribution and an external determination by third parties on the basis of external physical characteristics. Gender is not accessible to such determination, but is subject to the individual’s self-determination, because the individual alone is the real expert on their gender. The legal order of a society, *sit venia verbo*, is not set in stone and is therefore always an expression and a mirror of the social reality — of social and cultural norms, values, and scientific findings, which by definition can always be expanded upon and changed. From this perspective, gender determination should no longer be the government’s concern.

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