Austria: Intersex Genital Mutilation Not Constitutional – Immediate Third Gender Recognition Ordered

Also sex-“normalising” surgery on children held inadmissible

Austrian Constitutional Court orders immediate third gender recognition

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By a judgment of 15 June 2018, delivered today, the Austrian Constitutional Court has ordered, with immediate effect, that sex entries in the civil registries and in identity documents have to reflect individual self-determined gender identity (G 77/2018). An intersex person, being neither male nor female, had asked the civil status office to correct the entry in the birth register from male to “inter”, “other”, “X” or a similar designation, or to delete the sex-entry as a whole. After the civil status office had refused and the Administrative Court confirmed the Constitutional Court now has found in favor of the intersex person. Rechtskomitee LAMBDA (RKL), Austria´s LGBTI-civil rights organisation, calls the case ground-breaking for the rights of intersex persons in Austria and world-wide making Austria the first country in Europe and the third world-wide recognising third gender as a human right.

The Constitutional Court follows the European Court of Human Rights which already back in 2003 (in a trans case) has held that the freedom to define one´s gender identity form to one of the most basic essentials of self-determination (van Kück v Germany). The 14 judges of the Austrian Constitutional Court hold that gender identity and self-determination belong to a central and especially sensible area of private life and that registration of a person´s gender in the state´s birth register (and the display of gender in certificates and identity documents) thus has identity building effects (par. 17, 31).

The Constitutional Court stated that persons have to accept only state sex assignments which correspond to their gender identity (Rz 18). The state is required to respect an individual decision for or against a certain gender and to provide a sex entry which reflects and adequately expresses a person´s individual gender identity (par. 23). The constitution protects individuals from heteronomous sex assignment, in especially persons with alternative gender identity (par. 18). Notably intersex persons are a group in special need of protection due to their small numbers and due to their – from the perspective of the majority – “otherness” (par. 20).

There is no constitutional obligation to register sex, the Consitutional Court said, but the constitution does neither ban the registration of sex (par 30, 32). If the state opts for registration it makes a central and intimate aspect of private life publicly visible, which is why the state is under the obligation to guarantee that the sex entries do reflect individual gender identy and it must allow to refrain from an entry until the persons, particularly children, assign their gender out of an autonomous decision (par 31f).

Adequate sex entry or no sex entry

Departing from its preliminary decision and following the arguments of the complainant the Constitutional Court found that the legal provisions in force do not restrict sex entries rigidly binary to male and female and do allow for an adequate display of a self-determined gender identity and provide precautions for the effective exercise of self-determined assignment of sex, particularly for children (par 43). With immediate effect authorities have to register the gender of a person in a way which resembles individual gender identity, or to leave the sex entry open (in case of not yet autonomously established gender identity), or delete the entry without replacement (par. 37, 38).

At the same time the Court made clear that there can only be claims to sex entries which adequately reflect one´s gender identity, hence have a real relation to social life and are not imaginary (par 33, 37-42). The Court held “diverse”, “inter”, “open” and comparable terms explicitly admissible (par. 37, 38).

Finally the Constitutional Court made clear that Intersex constitutes an alternative sex development and not an expression of a pathological development (par. 16). Thus sex-assigning medical interventions in newborns and children should be avoided as much as possible and could only be justified in exceptional cases of sufficient medical indication (par 16). Families´ fears of stigmatisation could never serve as an indication for intervention into sex development (par 16, 20). Such sex-assigning medical interventions today face resolute rejection (par. 16).

“Today´s judgment of the world´s first and oldest Constitutional Court makes Austria the first country in Europe and the third world-wide, after Nepal 2007 and India 2014, recognising third gender as a human right after a high court decision”, says Dr. Helmut Graupner, counsel of the applicant and president of Rechtskomitee LAMBDA (RKL), “It is historic and ground-breaking for the rights of intersex persons in Austria, in Europe and world-wide”.

Statement from Rechtskommitee LAMBDA (RKL)**.**

Read the statement in German