Austrian Constitutional Court Paves the Way for Third Gender

By a decision of 14 March 2018, delivered on 19 March 2018, the Austrian Constitutional Court opened proceedings for the repeal of state registration of sex (E 2918/2016). 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 preliminarily 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.

The Constitutional Court follows the European Court of Human Rights which already back in 2003 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 hold that gender identity and self-determination belong to one of the most intimate aspects of private life and that registration of a person´s sex in the state´s birth register (and the display of sex in certificates and identity documents) thus has identity building effects (par. 28, 37).

The Constitutional Court preliminarily stated that persons have to accept only state sex assignments which correspond to their gender identity (Rz 29). The state has to accept individual decisions for or against a certain gender (par. 29, 33). The constitution protects individuals from heteronomous sex assignment, in especially persons with alternative gender identity (par. 29). Notably intersex persons are a particularly vulnerable group due to their small numbers and due to their – from the perspective of the majority – “otherness” (par. 31).

There is no constitutional obligation to register sex, the Consitutional Court said, but the constitution does neither ban the registration of sex (par 36, 38). 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, in especially children, autonomously assign their gender (par 31f).

The Constitutional Court preliminarily found that the legal provision in force restrict sex entries rigidly binary to male and female and do not allow for an adequate display of a self-determined gender identity and that it lacks precautions for the effective exercise of self-determined assignment of sex, in especially for children (par 39). At the same time the Court made clear that there can only be claims to sex entries which have a real relation to social life and are not imaginary (par 39).

Finally the Constitutional Court says that 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 26). Families´ fears of stigmatisation could never serve as an indication for intervention into sex development (par 26).

The government now has some weeks for observations. The final judgment of the Court is expected not before June. “This case is the first of its kind in Austria”, says Dr. Helmut Graupner, counsel of the applicant and president of Rechtskomitee LAMBDA (RKL), “It is ground-breaking for the rights of intersex persons”.

Text taken from Rechtskommittee Lambda

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