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Intersex persons have the right to adequate entry into the civil register

The Constitutional Court decides that the Civil Register Act must be interpreted in conformity with the Constitution, thus none of its provisions needs to be repealed.

Intersex people, who are biologically neither clearly “male” nor “female”, have the right to be registered according to their sex characteristics in the civil register or in official documents. The Constitutional Court arrived at its decision by way of an interpretation of the Civil Register Act in conformity with the Austrian Constitution. A specific provision of the act was subjected to an ex officio review, but the Constitutional Court ruled that there is no need to repeal the provision in question.

The Court’s decision of 15 June 2018 is based on Article 8 of the European Convention on Human Rights (ECHR), which guarantees the respect for private and family life. This also covers the protection of a person’s identity, individuality and integrity, including his/her gender identity. The right to individual gender identity also means that individuals only have to accept gender designations assigned by the state that correspond to their gender identity.

As stated in the decision, “Article 8 of the ECHR therefore grants individuals with variations in sex characteristics other than male or female the constitutionally guaranteed right to have their gender variation recognized as a separate gender identity in gender-related provisions; in particular, it protects individuals with alternative gender identities against having their gender assigned by others.”

This requirement is met by the 2013 Civil Register Act. The act requires a person’s sex to be entered both into the Central Civil Register and in civil status documents, but does not specify the civil status entry to be made under “sex”, i.e. it does not limit the entry exclusively to “male” or “female”. The Constitutional Court’s statement on this point reads as follows: “The term used in sect.2 para.2 point 3 of the 2013 Civil Register Act is so general that it can, without any difficulty, be interpreted to include alternative gender identities.”

A single classification for such alternative gender identities cannot be derived from the Civil Register Act or from other legal provisions. However, as stated in the decision, “a sufficiently concrete and specific term can be found by reference to the common usage of the language”.

The decision continues as follows: “It is important to note that a single classification for a corresponding gender diversity has not (yet) emerged, but a (limited) number of terms have come into use for the identification of an individual’s gender and/or the expression of the gender identity of a person with a variation of gender characteristics other than male or female. In particular, the Constitutional Court refers to the terms “diverse”, “inter” or “open”, which have also been suggested by the Bioethics Commission of the Federal Chancellor’s Office.

The requirements of Article 8 of the European Convention on Human Rights do not prevent the determination and definition of a concrete gender designation by way of a law or regulation. Moreover, the civil register authorities have the right to verify if the entry requested by the person

concerned is adequate, since Art.8 ECHR does not demand that individuals be free to choose any term for their own gender.

The ex officio review was performed on the occasion of a complaint filed by a person from Upper Austria, who tried to have the gender entry into the Central Civil Register changed to a term other than “male” or “female”. As the application was rejected both by the mayor’s office in charge and by the competent provincial administrative court, the applicant subsequently turned to the Constitutional Court. The judges of the Constitutional Court granted the complaint.