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NEWS REPORT

Country:	Austria
Title:	Austrian Constitutional Court recognizes the right to "third gender" in civic registry entries
Date:	01 August 2018
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<u>Context</u>	
Issue at stake:	Third gender option in civic registry
Ground of discrimination:	Gender identity
Sources:	Constitutional Court, verdict of 20 June 2018
Field:	Other
Applicable law:	Civic Registry Act (<i>Personenstandsgesetz 2013, PStG</i>)

Case development: This case concerns the constitutionality of a passage in the Act on Registration of Civic Status. The Act requires personal data entered into the civic registry have to identify the relevant person as either belonging to the male or to the female sex.¹ The proceedings in the case were started by an intersex person whose current registration status is male. He/she applied to the competent local authority to have his/her civic status registration changed to "inter". The local authority and the administrative review court denied this request stating that the relevant rules do not contain the right of a person to change their civic registration to a status that is neither male nor female. The administrative review court also stated that the relevant regulations, while appearing neutral, could not be interpreted as containing the possibility of intersex registrations. They argued that civic registration is fundamental to the application of a large area of law, most importantly family law. An additional civic status could result in extensive legal uncertainty for the person in question and persons in a legal relationship to him/her. The administrative review court also rejected the applicability of ECtHR jurisdiction concerning the right of transgender persons to live in accordance with their gender identity to the current case, arguing that there is no indication of the ECtHR verdicts going beyond binary gender identities and their possible reassignment. The claimant entered a constitutional appeal against the decision of the administrative review court. The appeal was not based on arguments of legal errors of the decision, but objections against the underlying law on the grounds of constitutionality, which the Constitutional Court decided to take into consideration.

Following a preliminary decision on 14 March 2018, the constitutional Court has issued a verdict on 15 June 2018 that clarifies the lawfulness of civic registry entries for intersex persons. Persons who do not have a gender that is distinctly male or female are now free

¹ Press release: https://www.vfgh.gv.at/medien/Weiterer_Geschlechtseintrag_neben_weiblich_und_maennl.de.php, Prüfungsbeschluss: https://www.vfgh.gv.at/downloads/VfGH_Pruefungsbeschluss_E_2918-2016_unbest_Geschlecht_ano.pdf, both accessed 31 July 2018.

to apply for a corresponding civic registration change. In its final verdict the Constitutional Court saw no unconstitutionality of the relevant passage in the Civic Registry Act² and consequently no necessity to overturn it. Instead, the Court argued for a mandatory interpretative understanding of the regulation according to constitutional requirements.

Under the scope of Article 8 of the European Convention on Human Rights (ECHR), which is also implemented as constitutional law on the national Austrian level, every person "with a variant of gender development vis-à-vis male or female has the constitutionally guaranteed right that gender related regulations respect their variation of gender development as an autonomous gender identity. Art 8 ECHR consequently "especially protects persons with alternative gender identities against heteronomous ("fremdbestimmt") allocations of gender identities". The law requires certain data for civic registration, among them "Geschlecht". It is to be noted that "Geschlecht" covers both the meaning of sex and of gender, and the Court has found that is not restricted to a strictly binary meaning as a legal term. The Court further suggests for registration authorities to use descriptive terms such as "divers", "inter" or "offen" (open), which were recommended by the Austrian Commission on Questions of Bioethics (Bioethikkommission des Bundeskanzlers).³

According to its legal mandate, the Constitutional Court has limited its verdict to the question at hand, namely the constitutionality of the legal rule for mandatory entries in the civic registry. Due to the interpretation guideline contained in the verdict, authorities are from now on required to issue birth certificates and other civic documents with the gender related data with which the applicant most identifies.

The recognition of a "third gender" denomination opens interesting additional legal questions, e.g. which retirement age applies to someone officially registered as "inter".

Internet link source: Press release by the Constitutional Court: https://www.vfgh.gv.at/downloads/VfGH_Presseinfo_G_77-2018_unbestimmtes_Geschlecht.pdf, accessed 10 July 2018.

Verdict of 29 June 2018, G 77/2018:

http://www.ris.bka.gv.at/Dokumente/Vfgh/JFR_20180615_18G00077_01/JFR_20180615_18G00077_01.pdf, accessed 10 July 2018.

² Paragraph 2 section 2 n° 3, <http://www.ris.bka.gv.at/Dokumente/Bundesnormen/NOR40189607/NOR40189607.pdf>, accessed 10 July 2018.

³ Bioethikkommission des Bundeskanzleramts, Intersexualität und Transidentität, 28.11.2017, https://www.bundeskanzleramt.gv.at/documents/131008/549639/Intersexualitaet+und+Transidentitaet_BF/ba132a48-b3ad-4513-82e7-f4125aa6b837, accessed 10 July 2018.