

Intersexuality and Transidentity

Opinion of the
Bioethics Commission

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Vienna, 2017

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Table of Contents

1 Introduction	7
2 Medical fundamentals	9
2.1 Sexual differentiation and divergences	9
2.1.1 Chromosomal sex	9
2.1.2 Gonadal sex	9
2.1.3 Anatomical sex (internal and external genitals)	9
2.1.4 Hormonal sex	10
2.1.5 Psychological gender (gender identity)	10
2.1.6 Erotic-emotional gender (sexual orientation)	10
2.1.7 Societal gender	11
2.2 Intersexuality (Differences of Sex Development, DSD)	11
2.2.1 Conceptual clarification	11
2.2.2 Diagnostics	11
2.2.3 Immediate need for treatment	12
2.2.3.1 Severe cases of adrenogenital syndrome (AGS)	12
2.2.3.2 Severe functional impairment of the urogenital system	12
2.2.3.3 Increased tumor risk	12
2.2.4 Sex assignment	13
2.2.4.1 Changes in assessment	13
2.2.4.2 Determining the right point of time	14
2.3 Transidentity (transsexuality, gender dysphoria, gender mismatch)	15
2.3.1 Conceptual clarification	15
2.3.2 Diagnostics	16
2.3.3 Sex change	16
3 Ethical guidelines	18
3.1 Experience of those affected and heightened self-determination	18

3.2	Dissolution of rigid gender stereotypes.....	18
3.3	Beneficence and non-maleficence.....	19
3.4	Right to self-determination.....	20
3.5	The role of parents.....	22
3.6	Justice.....	23
4	General considerations on the protection of fundamental rights.....	24
4.1	Fundamental rights issues.....	24
4.1.1	The European Convention on Human Rights (ECHR).....	24
4.1.2	EU Charter of Fundamental Rights (CFR).....	25
4.1.3	International Conventions.....	26
4.2	Anti-discrimination protection below the level of constitutional legislation.....	27
4.3	Broader protection from exclusion.....	27
4.3.1	Elimination of stigmatising terminology and prejudice.....	27
4.3.2	Sex/gender queries.....	28
4.3.3	Access to gender-segregated facilities.....	28
4.3.4	Competitive sports.....	29
4.3.5	Adequate language and title.....	30
5	Considerations on intersexuality.....	31
5.1	Registration of sex at birth.....	31
5.1.1	Current legal situation.....	31
5.1.2	Third option, blank box and postponement of registration.....	32
5.2	Sex-assigning measures.....	34
5.2.1	Permissibility of sex (re)assignment.....	34
5.2.2	Consent of minors.....	35
5.2.3	Compensation for unjustified measures.....	36
5.2.4	Advice and support for affected families.....	37

6 Considerations on transidentity	39
6.1 Medical sex change	39
6.1.1 Legal requirements.....	39
6.1.2 Reimbursement of costs by social security	40
6.2 Change of legal sex.....	41
6.2.1 Civil status requirements.....	41
6.2.2 Consequences for marriages or registered partnerships.....	43
6.2.3 Aspects of parent and child law.....	44
6.2.4 Consequences under pension law.....	45
6.3 Change of name.....	46
7 Recommendations of the Bioethics Commission	48
7.1 Recommendations against exclusion and discrimination.....	48
7.2 Recommendations with regard to sex assignment.....	49
7.3 Recommendations with regard to gender reassignment.....	50
Literature	53
Materials, Opinions and Position Papers	57
Abbreviations	61
Members of the Bioethics Commission 2017 – 2020	63

1 Introduction

The public is much more aware of intersexuality and transidentity (transsexuality, gender dysphoria, gender incongruence) today than a few years ago. The reason for this is heightened sensitization, which is also due to the activities of persons concerned. Nevertheless, many people know very little about gender identity and gender classification, which can lead to great uncertainty among parents who might suddenly find themselves confronted with a child being born with an unclear anatomical sex, and who think they have to make a decision about the sex of their newborn child immediately. The Austrian Bioethics Commission has taken the opportunity to address the topic of intersexuality. The aim is to improve and thus ensure certainty for parents and children as well as for others, such as health care professionals. The Commission decided to address the issue of transidentity in the same opinion, in view of essential similarities despite many differences. As regards transidentity, the underlying medical and psychological situation of those affected should be highlighted and efforts should be made to prevent discrimination and stigmatization, which continue to exist.

Intersexuality and transidentity are two fundamentally different phenomena and must not be confused. Nevertheless, they are similar on the factual, ethical and legal levels. Thus, both phenomena deal with divergences from the “male”/“female binary anchored in society as a norm, with the search for one’s own gender identity. In the context of both phenomena, medical corrective measures as well as the legal assignment or change of gender or sex are under discussion. The fact that these phenomena lead to a variety of challenges is nevertheless mainly due to society as it identifies deviations in the anatomical sex as early as in newborn children and hormonal divergences in intersexual persons during puberty at the latest. However, the psychological suffering of trans-identical persons first usually remains hidden from their surroundings. The desire for medical corrective measures is therefore first usually expressed by other persons (parents, doctors, etc.), not the intersexual person whereas in cases of transidentity this is almost exclusively voiced by the person concerned.

Although there is no broad public debate on the subjects of intersexuality and transidentity (formerly referred to as “transsexuality”) in Austria, awareness of potential “otherness” is currently growing. Tom Neuwirth aka stage persona “Conchita”, a woman with a beard, has given rise to discussions about gender classification and orientation beyond Austria’s borders through public appearances and, above all, her success at the Eurovision Song Contest 2014; this made a huge contribution to the public debate about acceptance and discrimination.

Outside the realm of culture, discussions are also ongoing in the world of sport; in Austria, ski racer Erika Schinegger was a case in point; she won the downhill world championship at the age of 18 in 1966. She won more important World Cup races as a woman until a medical test in the run-up to the 1968 Olympic Games showed that Erika Schinegger was chromosomally male. She was stripped of her 1966 World Championship title and later on decided to undergo surgery, changed his first name from Erika to Erik. Another case published worldwide was that of the South African runner Caster Semenya, whose participation in women’s athletics competitions was discussed as from 2009, as suspicions were voiced that she was not a woman. Subsequently, an examination of her chromosomal sex was ordered, which gave rise to tremendous criticism. A controversy ensued but eventually Semenya was allowed to compete in women’s competitions and to keep her medals, including the gold medal for winning the 800m competition at the World Championship in Berlin. Her last big victory so far was the 800m women’s race at the 2016 Olympic Games in Rio de Janeiro.

As has been the case with other topics, the Bioethics Commission has not only involved doctors, psychologists and lawyers but also included persons affected in the discussions in order to

obtain the broadest possible overview of the situation of intersexual and trans-identical people in Austria and to look at the ethical and legal aspects from a wider perspective.

The Austrian Bioethics Commission has devoted itself to the topic of intersexuality with a priority focus on the best interests of the child, as well as on respect and care for the persons concerned. Transidentity was included in this discussion. Although these are different phenomena, they are dealt with in one recommendation because of similarities on the factual, ethical and legal levels: both are to do with divergences from the “male” or “female” binary anchored as a norm in society and both concern the search for one’s own gender identity and medical correcting measures. However – and this is one of the most important and intensely discussed aspects for society – they are also about the legal assignment or change of gender or sex.

The discussion on intersexuality and transidentity spanned the period when the Bioethics Commission was reappointed in July this year; it also involved the former members Diana Bonderman, Meinhard Kneussl, Arnold Pollak and Anna Sporrer. Although the opinion had already been adopted by all members on 6 March 2017, it was not published due to the end of the Commission’s seventh term of office. The Bioethics Commission was reappointed on 3 July and the constituent meeting took place on 20 September. The updated opinion was subsequently adopted in a unanimous recommendation on 30 October.

Shortly thereafter, on 8 November, the Federal Constitutional Court of the Federal Republic of Germany published a landmark decision on this subject – albeit in the context of a fundamental rights situation specific to Germany – i.e. on the constitutional requirements of civil status law. This has prompted the Bioethics Commission to include up-to-date information in this publication.

The language depicting gender and sex in the following text was conceived with the utmost respect for all forms not reflected by established heteronormative language. Yet, due to the complexity of the text and the evolving nature of this issue, the terms used might be perceived as inadequate still. The terminology as such is thus a work in progress.

2 Medical fundamentals

2.1 Sexual differentiation and divergences

Sexual differentiation between individuals designated as “male” and “female” happens on different levels; essentially, seven aspects are distinguished: chromosomal, gonadal, anatomical, hormonal sex, as well as psychological, erotic-emotional and societal gender. In contrast to early modern society, in which the existence of intermediate categories – often referred to as “hermaphrodites” – still seemed self-evident, a strictly binary concept has spread since the beginning of the 19th century. It declared the congruent orientation of all seven levels as either “male” or “female” to be the sole ideal and any divergence from it was deviant and undesirable. To this day, many legal norms and social institutions in Western societies are based on such a strictly binary view.

2.1.1 Chromosomal sex

In humans, the chromosomal sex is determined by the karyotype, in particular the number and structure of the sex chromosomes; typically, the 46 chromosomes consist of 22 pairs of autosomes and 2 sex chromosomes each. Depending on which sperm cell fertilises an egg, an embryo with 46,XX (female) or 46,XY (male) is conceived. Deviations from these typical chromosomal distributions may occur, such as 47,XXY (Klinefelter syndrome), 47,XXX (Triple-X syndrome), 45,X0 (only one X chromosome, Turner syndrome), and rare variants with several Y chromosomes. These examples are summarized under the heading of numerical chromosomal anomalies. Moreover, structural chromosomal anomalies such as translocations and deletions as well as so-called point mutations, which are changes in the DNA sequence, can also influence sexual differentiation. If the chromosomal changes do not affect all cells of the organism, this is referred to as a chromosomal mosaic.

2.1.2 Gonadal sex

Up to the 6th to 8th week of pregnancy, male and female gonads cannot be distinguished from each other. In the male embryo, the testicles are formed on the basis of various gene activities of the Y chromosome (in particular the SRY gene). If no Y-chromosome is present or if gene function is impaired, for example in case of a mutation in the SRY gene, the gonads will develop into ovaries. However, if the Y chromosome is active, male gonads, the testicles, will develop. The genetic determination of gonad formation is controlled by a number of genes on the sex chromosomes; this process is very complex, and we are only beginning to develop an understanding of it. In an individual, testicular and ovarian tissue are very rarely present at the same time; if so, this is referred to as “ovotesticular DSD” (“Differences of Sex Development”; formerly: genuine hermaphroditism).

2.1.3 Anatomical sex (internal and external genitals)

The differentiated development of internal and external sexual organs in the embryo happens during a later, relatively narrow window of time during pregnancy – starting from initially common systems, such as the Wolffian and Müllerian ducts, as well as the genital tubercles, folds and bulges. Under the equally complex genetic control of testosterone, the male sex hormone, which is produced in the Leydig cells of the male gonads, the male internal and external genitalia, i.e. the epididymis, seminal duct, seminal vesicles, penis and scrotum develop; in the absence of male hormones, the internal and external female sex organs, i.e. the fallopian tubes, uterus and vagina as well as clitoris and labia, will form. The child’s sex at birth is mainly determined on the basis of the appearance of the external genitals. If the anatomy cannot clearly be identified, this is a form of DSD; the type and extent of the divergent manifestation will also depend on the time at which a genetic defect manifests itself during pregnancy or an exogenous noxious agent affects development.

However, other forms of DSD may also manifest themselves at a later stage (especially during puberty), e.g the masculinisation of a female body or a lack of masculinisation or feminisation.

The development of the urogenital system may also be impaired by various defects, such as persistent urogenital sinus or hypospadias. However, these are often anatomical malformations where there is no evidence of an underlying, known genetic abnormality.

2.1.4 Hormonal sex

Sex hormones are produced by both women and men. A distinction is made between female (oestrogens) and male sex hormones (androgens), both of which belong to the class of steroid hormones. Oestrogens are primarily produced in the ovaries and, to a lesser extent, in the adrenal cortex. During pregnancy, the placenta also contributes to the production of oestrogens. Smaller quantities of oestrogens are also produced in the testicles of men.

Androgens, most of which are produced in Leydig's cells in the fetal testicles, cause the development and maintenance of male characteristics during pregnancy. The most important hormone is testosterone or dihydro-testosterone, which has a direct effect on the testicles; later on, during puberty, it furthers the development of the testicles, penis, gonads and secondary sexual characteristics as well as the growth of body hair and muscles.

The synthesis of the sex hormones is controlled by hormone secretions from the pituitary gland, which in turn are stimulated by hormones from the hypothalamus (interbrain); feedback effects serve to fine-tune this process. Through related genetic disposition or manipulation by way of drugs, such as doping compounds or other agents that interfere with the synthesis of sex hormones, hormonal DSD may occur.

2.1.5 Psychological gender (gender identity)

The gender which a person identifies with does not necessarily have to correspond to the biological sex; it is determined on the basis of the person's own psychological perception. Biologically, sexual differentiation of the brain seems to exist and the dimorphic structure apparently already develops in the uterus, i.e. under the influence of sexual steroid hormones.

Gender identity is one of the most fundamental aspects of life. It refers to the deeply felt and individual experience of gender, something which every human being has – in most cases there is congruence between gender identity and the biological sex affirmed at birth, but in rare instances they may be incongruent.

2.1.6 Erotic-emotional gender (sexual orientation)

Sexual orientation must be distinguished from gender identity; it refers to the sex to which the persons concerned feel sexually attracted and which determine their choice of partner. The term refers both to the sexual attraction of a certain sex as well as the interest in the other person as a potential partner. Not only sexuality, but also the feeling of emotional bonding, affection and love play a role in this context. Sexual orientation, as well as biological sexual characteristics, gender identity and gender role, are components of a person's sexual identity in the broadest sense.

In this context, terms such as "gender inclination", "sexual disposition", "sexual preference", "sexual inclination" or "sexual identity" have been used; however, these are usually more far-reaching or differently connoted.

2.1.7 Societal gender

In contemporary gender studies, the English term “gender” in the sense of societal gender has been adopted in German, referring to all social role conceptions, attributions and expectations regarding manhood and womanhood, including the question of how far only roles clearly denoted as female or male are permitted.

In the context of intersexuality and transidentity, the question arises as to which societal gender role someone plays (clothing, habitus, social role, etc.), regardless of biological sex as defined by the components described in 2.1.1 to 2.1.4. above. In transidentity, “social transition” refers to the switch to a different gender identity at the societal level (clothing, habitus, role behaviour) before sex reassignment surgery.

2.2 Intersexuality (Differences of Sex Development, DSD)

2.2.1 Conceptual clarification

The medical definition of intersexuality is ambiguity in the classification of an individual as belonging to the male or female sex because the differentiating traits reflect an atypical development of the chromosomal, anatomical or hormonal sex (2.1.1 to 2.1.4 above). These sex variants can become evident during pregnancy, immediately after birth or at a later age.

On the basis of the “Chicago Consensus 2005”, the medical terms previously used, such as hermaphrodite or pseudo-hermaphrodite, which had been perceived as stigmatising by those affected, were replaced by the neutral term “Differences of Sex Development (DSD)”. Since then, medicine has used DSD as a generic term for a large number of diagnoses with different causes, developmental processes and manifestations applying to persons who cannot be clearly assigned the female or male sex, either genetically and/or anatomically or hormonally.¹

2.2.2 Diagnostics

DSD is diagnosed at different points in time; often it is first identified due to the ambiguous appearance of a genital at birth, or later on due to abnormal puberty with no masculinisation or feminization, the masculinisation of a female body or the emergence of non-gender-specific characteristics. The biological findings as well as the physical and psychological characteristics of DSD variants are very diverse and by no means always necessarily lead to a functional impairment causing suffering, nor do they always represent an actual “disorder” equivalent to a disease. At present, the developmental genetic and hormonal network is investigated intensely through molecular genetics, which will allow even more precise diagnostic differentiations and assessments whereby possible consequences of malformations, such as the tendency to a malignant degeneration of the gonads, can be predicted in the future. Especially those DSDs where experience has shown an increased cancer risk can be diagnosed according to medical guidelines with great accuracy, and subsequently given personalised treatment. Newborn screening using enzyme tests for AGS (adrenogenital syndrome; see 2.2.3.1) has also been available nationwide in Austria since 2001. In the best-case scenario, the result of the diagnostic examinations is a

¹ Lee/Houk/Ahmed/Hughes, International Consensus Conference on Intersex organized by the Lawson Wilkins Pediatric Endocrine Society and the European Society for Paediatric Endocrinology. Consensus statement on management of intersex disorders. International Consensus Conference on Intersex. Pediatrics 2006; 118:e488-500.

clear determination of the anatomical sex; however, findings can also be contradictory so that this biological classification is not always successful.

DSD also includes a known enzyme deficiency (5 α -reductase, responsible for converting testosterone into dihydro testosterone, which is biologically more effective), androgen insensitivity (partial (PAIS) or complete (CAIS) defects in receptors for testosterone at the target cells) and what is known as adrenogenital syndrome (AGS). AGS is the most common DSD, in which the genes of various enzymes essential in the metabolism of the sex hormones (usually 21 α -hydroxylase) have mutated. This prevents the formation of gluco- and mineralocorticoids and usually leads to an increased concentration of 17-hydroxy-progesterone and consecutively to increased androgen formation during pregnancy, resulting in the masculinisation of female fetuses. If it is less severe, this syndrome sometimes becomes apparent later, e.g. during puberty (late-onset AGS). Transidentity is, by the way, very rare in AGS patients.

Another aspect of DSD diagnostics to be considered, especially at a later age, is the analysis of psychological and psychosocial factors, including self-perception – here, the result can be in contrast to purely medical diagnostic findings.

2.2.3 Immediate need for treatment

2.2.3.1 Severe cases of adrenogenital syndrome (AGS)

In severe cases of AGS, the concomitant lack of aldosterone leads to a life-threatening loss of salt and water in newborns, and aldosterone and cortisol must be substituted for life.

2.2.3.2 Severe functional impairment of the urogenital system

In the event of malformations of the urogenital system, early surgical intervention is clearly indicated if vital functions (e.g. micturation) are severely impaired or if recurrent severe infections occur. Depending on the extent of the malformations operated on, these cases often require psychological support later on.

2.2.3.3 Increased tumor risk

Some DSDs are associated with an increased risk of malignant changes in germ cells. Persons with gonadal dysgenesis with Y chromosomes or partial androgen insensitivity combined with immature gonads within the abdominal cavity seem to be at particular risk while patients with AGS show no increased risk.

The surgical removal of gonads without hormonal function (e.g. abdominal testicles, deformed gonads) may be indicated if, as experience has shown, the risk of malignancy is higher. As the tumour risk is frequently unclear in some syndromes (CAIS, androgen biosynthesis disorders in persons assigned female), control biopsies should be carried out only; if possible, the child should wait for decision-making maturity.

More recent studies often show lower tumor risks after more detailed analysis of case series; these differences can be explained by a lack of uniform histological diagnostic criteria in the past and more recent findings using molecular biology. In determining the exact indication, one must first weigh the risk of degeneration against the lifelong hormone therapy which will become necessary. Compliance of the family and of those affected with a monitoring strategy should also be taken into account. Moreover, the maintenance of reproductive ability has

recently been the subject of intense debate. In any case, according to recent medical guidelines,²³⁴ it is recommended ever more frequently that the decision to remove gonads should be made very carefully, and in any case postponed at least until the person concerned is able to make an autonomous decision, if possible.

2.2.4 Sex assignment

In many cases, therapeutic action aims at creating or assigning a certain sex. This can be tantamount to an intervention in the core of the patient's identity, which is very rarely the case with therapeutic interventions in other disciplines.

2.2.4.1 Changes in assessment

John William Money (1921–2006) was a clinical psychologist focusing on the development of gender identity, sexual orientation and intersexuality; he introduced concepts such as “gender identity” and “gender role”. With his fundamental proposition that there are no essential differences between boys and girls and that masculinity and femininity are merely acquired gender roles, he became one of the most influential American sexual scientists of the 20th century. To support this proposition – which was widely accepted at the time – Money tried to raise one of the two male twins of the Reimer family as a girl. The boy's penis had fallen off after a failed circumcision. At Money's instructions, the boy's testicles were also removed. Money predicted that he would grow up a happy girl. Unfortunately, the opposite happened: The “girl” put up resistance until her parents told him the truth at the age of 14. From then on, the child lived as a boy and later as a man, committing suicide at the age of 38.

Nevertheless, Money was considered the world's undisputed authority when it came to the psychological effects of ambiguous genitalia; he demanded that a child with DSD be assigned a sex, consistently and at an early stage, even by way of surgery – ideally without informing the child and his/her caregivers. An attempt was made to even keep this taboo in adulthood. At the time, the malleability of humans through socialisation was considered stronger than genetic and biological factors. However, this approach often led to mental illness or crises, disorders in sexual life, loss of fertility, chronic pain or other physical complications.

In particular, the criticism voiced by persons affected and pressure, partly made public by interest groups, led to changes, not only within the realm of medicine but also in society as a whole, a move towards more openness and acceptance, great restraint towards therapeutic interventions in childhood, and interdisciplinary information which also included parents.

Since many people with DSD – especially children⁵ – do not have any functional disorders requiring immediate treatment and as, above all, irreversible surgical interventions may often only lead to negative consequences after many years due to sequelae, the utmost restraint is called for in this context. In particular, recurrent genital surgery can be more traumatic in psychosexual development than a ambiguous genital. Interventions in the core of a person's identity, i.e. the individual's sex assignment, require great care in identifying both indication and justification, as well as in providing information and counselling or obtaining “informed consent”, especially in case of patients in childhood and adolescence. Moreover, it must be

2 Sandberg et al., Disorders of Sex Development (DSD): Networking and Standardization Considerations. *Horm Metab Res.* 2015 May;47(5):387–93.

3 Houk/Lee, Update on disorders of sex development. *Curr Opin Endocrinol Diabetes Obes.* 2012 Feb;19(1):28–32.

4 Paris et al., Disorders of sex development: neonatal diagnosis and management. *Endocr Dev.* 2012;22:56–71.

5 Paris F. et al. Disorders of sex development: neonatal diagnosis and management. *Endocr Dev.* 2012;22:56–71.

borne in mind that the great variety of DSD causes lead to very different courses of events in individual cases. This makes it more complicated to gather relevant scientific evidence as hardly any studies have been carried out with larger collectives and as it is difficult to find sufficiently large and homogeneous samples of persons who have undergone treatment for comparison with persons who have not.

2.2.4.2 Determining the right point of time

Physicians differ in their assessments regarding the right time for performing surgery in AGS patients, whose cases occur relatively frequently. Some recommend to wait until the children concerned have developed insight and ability to consent. Other experts argue that the children concerned are not intersexual but female, and at an early age (during the first twelve months) new surgical techniques produce the best results in terms of preserving the child's sexual sentience; moreover, the early point in time helps avoid the psychological stress caused by surgery. In any case, maintaining and fostering the physical conditions which lead to fulfilled sexual relationships later are essential arguments in the overall assessment. In principle, it seems advisable to have surgery performed in accordance with existing medical guidelines and only by doctors who have sufficient experience, i.e. primarily in tried and tested multidisciplinary reference centres; moreover, controlled studies should be carried out. From the 12th month of life until adolescence, surgery is not recommended if there are no medical complications; however, the decision not to have surgery should likewise be discussed with the parents in detail.

Occasionally, parents demand surgery which, according to the current state of knowledge, may have a significant physical and psychological impact on the child later on. Most medical guidelines⁴ for surgical, and thus irreversible, interventions in DSD recommend that these be postponed until the time at which the persons to be treated can decide for themselves. These include sex assignment surgery performed on the genitals and the removal of the gonads – if there is no urgent medical indication (for example, an increased risk of cancer).

2.3 Transidentity (transsexuality, gender dysphoria, gender mismatch)

2.3.1 Conceptual clarification

The terms transidentity, transsexuality, “gender dysphoria” and “transgender”, which have been in use up to now, have recently been subject to a certain amount of criticism and may be abandoned in the forthcoming WHO version 11 of the *International Classification of Diseases* (ICD 11); the term “gender incongruence” will be introduced. However, this is by no means certain, so this opinion will use the easy-to-understand term “transidentity”. In any event, transidentity is defined as a person with a clear genetic and/or anatomical and/or hormonal sex assignment who feels wrongly or inadequately described by this gender or even rejects any form of gender classification and categorisation. Psychological gender or gender identity (2.1.5 above) does not correspond to biological gender (2.1.1 to 2.1.4 above), and in some cases, the person concerned does not want to be assigned any gender at all.

This paradoxical feeling of belonging can almost always be traced back to childhood and usually leads to increasing suffering in the course of life, which in many cases ultimately causes the persons affected to change or adapt their appearance according to their inner feelings. Transidentity also refers to personal body perception and other forms of gender expression such as clothing, language and behaviour. Trans-identical people may have a desire to change their legal, social or physical status (or parts of these) in order to reconcile these with their gender identity. A change in physical appearance or bodily functions through clothing, medical, surgical or other interventions is often part of the personal experience of gender in trans-identical people.

According to meta-analyses, the prevalence of transidentity has increased in recent years, which is probably due to the more liberal approach to this issue in many countries. Overall, according to relevant studies,⁶ the prevalence is estimated at about 5.5 in 100,000 individuals, 6.8 for man-to-woman trans-identical persons and 2.6 for woman-to-man trans-identical persons. However, a non-clinical sample from the Netherlands (n = 8064; 4052 men, 4012 women) provides data whereby even 4.6 % of men and 3.2 % of women experience varying degrees of ambivalence towards their own gender.⁷

In the new issue of the DSM-V of the “American Psychiatric Association”,⁸ people who state that their sex at birth does not correspond to the gender they actually identify themselves with are diagnosed with “gender dysphoria”. In ICD-10, the international diagnostic code issued by the WHO which has been binding throughout Austria since 1 January 2001, this diagnosis falls under the heading of transsexualism and should not be classified as “pathological/psychiatric” or negative, but simply as a variant of the standard. More modern terms such as gender or sex dysphoria, or gender incongruence are even better for trans-identical individuals when it comes to describing the fact that, in trans-identical individuals, anatomical sex differs from psychological gender. In any case, intersexuality and sexual orientation, which describes the emotional and sexual orientation of one person towards another, with its phenomena of hetero-, homo- or bisexuality, must strictly be distinguished from transidentity.

6 Meyer zu Hoberge, Prävalenz, Inzidenz und Geschlechterverhältnis der Transsexualität anhand der bundesweit getroffenen Entscheidungen nach dem Transsexuellengesetz in der Zeit von 1991 bis 2000, in: Sektion für Sexualmedizin (2009).

7 Kuypers, Transgenders in Nederland: prevalentie en attitudes. Tijdschrift voor Seksuologie 2012; 36: 129–135.

8 <https://www.psychiatry.org/psychiatrists/practice/dsm>

2.3.2 Diagnostics

The medical diagnosis and treatment process in transidentity is relatively complex, requiring not only the coordination of several professional groups, but usually also lifelong support to the persons concerned. This is why it is nowadays primarily being offered in specialised competence centres where high-quality care and treatment are available. Recently, young people with gender dysphoria have been a particular challenge.

The treatment standards for persons with gender dysphoria have been summarised by WPATH (the World Association for Transgender Health)⁹ or the “American Psychiatric Association”.¹⁰ They provide certain framework conditions, yet they are flexible so that it is possible to accommodate the individual needs of trans-identical persons. In order to achieve the goal of optimised physical and psychological adaptation for each individual, the persons concerned are first assessed by appropriately trained professionals who establish whether gender dysphoria is present – e.g. by psychiatric, psychological, urological, gynaecological and/or endocrinological diagnosis. In the case of concomitant psychiatric or somatic disorders, further treatment is usually provided by specialists.

2.3.3 Sex change

After the diagnostic process, opposite-sex hormonal therapy can be started if desired provided that medical contraindications have been excluded. As transidentity is still a matter of stigmatisation, social response may occur during the phase in which the person lives with the desired gender for a longer period of time; which can cause stress or other psychological reactions, and the unrealistic expectations and ideas of those affected can become evident. Therefore, before taking any further, irreversible steps, the patients are generally recommended to take an approximately 12-month “everyday test” phase. Potential problems and conflicts can be treated by appropriate psychological therapy.¹¹

Once there is clear consensus among all specialists that the desire for a different gender identity or gender role is present and unchangeable, the indication for sex reassignment surgery is present; clearly, this type of surgery should also be carried out in specialised centres exclusively. Adequate postoperative care is usually provided in these centres.¹²

Sex reassignment basically consists of a surgical part, in which the existing sexual organs are removed. In men, this means the removal of the testicles and penis, in women the removal of the ovaries, fallopian tubes and uterus, and (part of) the vagina as well as the breasts, possibly

9 Coleman et al., Harry Benjamin International Gender Dysphoria Association’s standards of care for gender identity disorders (2011).

10 Byne et al., Report of the American Psychiatric Association Task Force on Treatment of Gender Identity Disorder, *Arch Sex Behav* 2012, 41: 759–796.

11 Coleman/Bockting/Botzer et al., Standards of care for the health of transsexual, transgender, and gender-non-conforming people, version 7. *Int J Transgender* 2012; 13: 165–232; Wylie et al., Serving transgender people: clinical care considerations and service delivery models in transgender health. *Lancet* 2016; 388: 401–11; Nieder et al., Transgender, Transsexualität und Geschlechtsdysphorie: Aktuelle Entwicklungen in Diagnostik und Therapie, *Psych up2date* 2013, 373–388.

12 Hembree et al., Endocrine treatment of transsexual persons: an Endocrine Society clinical practice guideline. *J Clin Endocrinol Metab* 2009;94:3132–54; Hembree et al., Endocrine treatment of gender-dysphoric/gender-incongruent persons: An Endocrine Society Clinical Practice Guideline. *Journal of Clinical Endocrinology and Metabolism* 2017, 102(11):1–35.

including nipple transplantation. This clearly results in infertility, which is why the possibility of preserving fertility by cryopreservation of the gonads has recently been discussed.¹³

The few available data we have on the psychosocial situation of children of trans-identical persons do not suggest that children raised by these people are in any way negatively affected. Data for children of same-sex partners are much more comprehensive, likewise showing no negative effects.¹⁴ This is another reason why it is important to discuss the possible ways and means of preserving fertility with the persons concerned. Options should include all types of assisted reproduction currently possible and the results of related treatments should be incorporated into scientific studies.

The next part of the surgical sex reassignment process consists in reproducing the organs of the reassigned sex, which is usually carried out in two stages today as multiple surgical interventions may be necessary.

As the condition is often non-persistent in children and adolescents with sexual dysphoria, hormonal and, of course, irreversible surgical strategies are initially refrained from and (interdisciplinary) medical support is offered; in case of severe suffering during puberty, puberty suppression with hormone antagonists can be useful to postpone surgery until after at least the age of 12 has been reached.¹⁵

13 Ethics Committee of the American Society for Reproductive Medicine. Access to fertility services by transgender persons: an Ethics Committee opinion. *Fertil Steril* 2015 Nov;104(5):1111–5; Chiland et al., A new type of family: transmen as fathers thanks to donor sperm insemination. A 12-year follow up exploratory study of their children. *Neuropsychiatrie de l'enfance et de l'adolescence* 2013;61:365–70.

14 *Rupp (Hrsg.)*. Die Lebenssituation von Kindern in gleichgeschlechtlichen Lebenspartnerschaften. *Rechtstfatsachenforschung*(2009); Garrett et al., Marriage and the Well-Being of Children. *Pediatrics* 2013, 559.

15 http://www.paediatric.at/home/Spezialbereiche/Endokrinologie_und_Diabetes/Positionspapier--Betreuung-von-Kindern-und-Jugendlichen-mit.php; Adelson S. L. and American Academy of Child and Adolescent Psychiatry AACAP, Practice parameter on gay, lesbian or bisexual orientation, gender nonconformity and gender discordance in children and adolescents, *J Am Acad Child Adol Psychiatry* 2012, 51(9): 957–974; Hembree et al., Endocrine treatment of gender-dysphoric/gender-incongruent persons: An Endocrine Society Clinical Practice Guideline, *Journal of Clinical Endocrinology and Metabolism* 2017, 102(11):1–35.

3 Ethical guidelines

The phenomena of intersexuality and transidentity have in common that, both medically and socially, a particularly sensitive and vulnerable area of human life is at stake, i.e. the gender identity of human beings. In both cases one encounters forms of gender which diverge from the accustomed societal notions of normality, and this has repeatedly led to the repression of these phenomena, to discrimination against those affected and to pressure to adapt to the heterosexual norm, i.a. through medical interventions. In both cases, medicine and society thus face the challenge of having to call the traditional pathologisation of these phenomena into question, recognizing the right to being different, taking the subjective self-perception of those concerned more seriously and thus reaching a new understanding of what it means in this context to respect the right of those affected to care for their well-being, to (sexual) self-determination, to physical integrity, to privacy and to non-discrimination.

3.1 Experience of those affected and heightened self-determination

The current discussion about medical interventions, especially in the case of intersexuality, is characterised by reports from those affected which have given visibility to the suffering inflicted on these persons in the name of “benevolent paternalism”.¹⁶ Many infant and childhood surgeries proved traumatising in retrospect and those affected were often unable to identify with the sex assigned to them.¹⁷ Whereas those affected by intersexuality objected to medical interventions that were too far-reaching and performed too rashly, subsequently proving to be wrong, the protest from trans-identical persons tended to be directed against obstacles to sex reassignment surgery considered unreasonable.¹⁸ In both cases, the increasing importance of the right to self-determination, the protection of privacy and the protection of physical integrity have prompted a critical revision of the previous practices. Along these lines, the internally perceived and freely affirmed gender identity of the mature individual must ultimately be the point of reference for all further considerations, both in case of intersexuality and transidentity.¹⁹

3.2 Dissolution of rigid gender stereotypes

In view of the increasing sensitivity to real and experienced gender identities, which differ from rigidly biologically based heteronormativity, there is an increasing ethical demand to do the needs of affected individuals justice and to avoid forced assignments, which is why the former strategy of early sex assignment surgery must nowadays be questioned and criticised as a societal encroachment.²⁰ Medical interventions come with the risk of being harnessed to wittingly or unwittingly fulfil societal expectations whilst disregarding the well-being of those affected. Given the insight into the societal-constructivistic dimension of the classic gender dichotomy,

16 Wiesemann, Ethical Guidelines.

17 Deutscher Ethikrat (Hrsg.), Intersexualität. Stellungnahme vom 23.2.2012 (2012), 104.

18 *Rauchfleisch*, Transsexualität – Transidentität. Begutachtung, Begleitung, Therapie.

19 This was confirmed by the German Ministry for Family, Senior Citizens, Women and Youth (Bundesministerium für Familie, Senioren, Frauen und Jugend), Situation trans- und intersexueller Menschen im Fokus, Oktober 2016 (<https://www.bmfsfj.de/blob/112092/46d6be33eb8f2b5d2ee81488da03029c/situation-von-tans--und-intersexuellen-menschen-im-fokus-data.pdf>).

20 Wiesemann, Ethical Principles 676.

it is all the more necessary at this point to reject an objective medical indication for sex (re) assignment surgery which would solely be based on the existence of ambiguous sex. Recognised patient autonomy in itself is a reason why care must be taken to give the persons concerned a maximum chance to make their own decisions about all relevant treatment steps, and this must in particular be taken into account when assessing the timing and necessity of a measure.

3.3 Beneficence and non-maleficence

Intersexuality is often detected at or shortly after birth, so that the first questions as to how to proceed correctly arise in a situation where those affected cannot make their own decisions. The situation is different from the end of life, there is no recourse to a presumed wish, so relevant decisions must above all be guided by a careful and differentiated analysis of what serves the sustainable well-being of the child and what may be harmful. The same applies to the treatment of gender dysphoria in children to whom interventions may be explained but who are unable to understand and assess the far-reaching consequences of the treatment options.

In all considerations and decisions about intersexuality and early gender dysphoria, the best possible way of ensuring the well-being of those affected, in the sense of sustainable quality of life throughout all of later life, must therefore take centre stage. Well-being in this context includes not only the *medical success* of measures taken (e.g. the functionality of organs) but also the *lasting satisfaction* of those affected with their own bodies and their own gender identity. It also touches upon the question of later *sexual sentience*, the possibility of having *successful sexual relationships* as well as the preservation of *reproductive ability*.²¹ The aim is always to create the conditions for the utmost subjective satisfaction with one's own body and societal role and for the utmost successful societal integration possible. Potential damage and strain which have to be taken into account are to do with *irreversible changes on physical appearance*, *loss of the gonads*, *loss of reproductive ability*, later *functional failure of organs which were built up with great surgical effort*, permanent *physical pain* as well as later *dissatisfaction of the persons affected with the interventions* up to the point of total rejection.

In the past, intersex persons often paid a high price for unreflected treatment policy in terms of their later quality of life.²² Interventions were retrospectively experienced as stressful, painful and traumatic. Those affected felt they had been mutilated and suffered from the loss of fertility and sexual sentience, the organs formed through surgery often failed to function, they felt alienated from themselves as sexual beings. In summary, Katinka Schweizer concludes: "The results regarding treatment experiences and aspects of quality of life that are available to us are sobering and in some cases shocking."²³ On the one hand, this forces us to correct the former approach of ensuring the quickest and most perfect gender assignment possible. On the other hand, what follows from this that the principle *primum nil nocere* should be given priority here: Irreversible medical interventions should be carried out as sparingly as possible,

21 Wiesemann, Ethical Guidelines 301.

22 In the context of what follows, see Remus, in Deutscher Ethikrat (Hrsg.), Zur Situation von Menschen mit Intersexualität in Deutschland (2012) 67 f.; Rothärmel, Rechtsfragen der medizinischen Intervention bei Intersexualität, MedR 2006/5, 274 (279); Schweizer, Intersexualität anerkennen statt auszulöschen, in Deutscher Ethikrat (Hrsg.), Intersexualität im Diskurs, 29.

23 Schweizer, Intersexualität anerkennen statt auszulöschen, in: Deutscher Ethikrat (Hrsg.), Intersexualität im Diskurs, 29.

they should be as little far-reaching as possible, as reversible and as *late in life* as possible. A life with a gender identity left to one's own decision-making ability can be better for those affected than an early but irreversible sex assignment because there is a risk that those affected will not be able to accept the interventions later or that the price paid (e.g. loss of fertility) is too high. Surgical interventions should therefore initially be limited to cases where they are indicated due to general health concerns. Moreover, they can only be justified to the extent that it is certain to have a lasting positive effect on the child's development. In view of the importance of the right to self-determination, the treatment strategy chosen should always ensure maximum involvement of those affected while minimising the burden and damage to the child.

In both intersexuality and transidentity, we will only know what serves the well-being of those affected best if we take their subjective experience into account. The self-awareness of those affected and the opinions of self-help and interest groups must therefore be considered when general guidelines for professional action are drawn up.²⁴

The complexity of the medical, psychosocial and psychosexual issues arising here requires the best possible option for the child to be determined by an interdisciplinary team and the parents (see below), in each case. Many uncertainties will not be of an ethical nature but based on a lack of reliable factual knowledge: e.g. the assessment of the long-term chances of surgical success, subsequent satisfaction of those affected with the intervention/non-intervention, a tumour risk in immature gonads,²⁵ the question as to whether or not gender dysphoria will persist. The ethical demand lies in openly admitting to ignorance and pleading for a cautious approach. Lack of knowledge should provide an impetus for obtaining reliable knowledge through studies in order to achieve more certainty for actions to be taken.

3.4 Right to self-determination

In the context of intersexuality and transidentity, the right to self-determination (*respect for autonomy*) initially leads to the medical-ethical demand for informed consent in respect of any medical intervention touching the physical integrity of those affected. What follows from this is, if this is not possible, interventions must be particularly justified. Furthermore, this principle requires that, in cases of uncertainty or ambiguity of sex, the individual has the right to find or determine his or her own sex.²⁶ The corresponding processes of self-discovery and the ensuing decisions must be enabled, protected and respected to the greatest possible extent.

However, in cases of intersexuality and transidentity, the demand for informed consent in respect of surgery and consideration of the personal wishes of those affected with regard to their sex cannot be fulfilled directly in many cases. In the context of intersexuality, decisions

24 Deutscher Ethikrat (Hrsg.), Intersexualität. Stellungnahme vom 23.2.2012 (2012).

25 Cf. Deutscher Ethikrat (Hrsg.), Intersexualität. Stellungnahme vom 23.2.2012 (2012).

26 In this context, see the discussion about gender as "choice" or "inherent quality"; *Solomon*, Identity or Behavior. A Moral and Medical Basis for LGBTQ Rights, in: *Hast Cent Rep* (2014) Suppl. 4:4–5; *H. Bielefeld*, Die Leibhaftigkeit der Freiheit. Sexuelle Orientierung und Gender-Identität im Menschenrechtsdiskurs, in: *Bogner/Mügge* (Hrsg.), *Natur des Menschen. Brauchen die Menschenrechte ein Menschenbild?* (2014); a comprehensive presentation of aspects of and loaded fields in sexual autonomy from the perspectives of philosophy of law and gender theory can be found in *Holzleithner*, Sexuelle Selbstbestimmung als Individualrecht und als Rechtsgut. Überlegungen zu Regulierungen des Intimen als Einschränkung sexueller Autonomie, in *Lembke* (Hrsg.), *Regulierung des Intimen, Sexualität und Recht im modernen Staat* (2017) 31 (36 ff.).

must be made in infancy, childhood or early adolescence; symptoms of transidentity sometimes appear as early as in childhood and early adolescence. As mentioned above, it is not possible to rely on a presumed wish of the child and the proxy decision of the parents cannot legitimize interventions either since everything has to be geared to the (objective) well-being of the child. The uncertainty about what really serves the well-being of children best in cases of intersexuality and early gender dysphoria, and the fact that an ambiguous sex can no longer be regarded as an objective defect which should be remedied at all cost, are not only limits to the right to medical intervention but also to the possibility of legitimising surgical interventions through the proxy consent of parents.²⁷

In such a situation, all medical interventions which are indicated for general health reasons and cannot be postponed will be ethically justified and necessary. They do not represent an outside determination of the persons affected by doctors and society because the underlying intention is not to manipulate the sexual identity of an individual but to protect life and health. In this sense, a proxy decision, e.g. by the parents, is possible here.

In interventions aimed at adjusting sexual characteristics, the question arises as to whether it would make sense to radically forego all interventions until those affected can decide for themselves (*full-consent policy*).²⁸ However, such a categorical ban is just as problematic for various reasons as the past policy of optimum sex assignment.

First of all, the prerequisite for this would be that the postponement of interventions would not seriously harm those concerned in any other way. One would moreover assume that it is not possible to identify a series of cases in which a substantial advantage was achieved through an early intervention and later satisfaction of those affected was ensured. In particular, the question arises as to how far the option of radical renunciation would require a societal environment which fully accepts variants of gender expression. Finally, in the event that the decision is postponed to adolescence to enable those concerned to take part in the decision-making, the question remains to what extent self-determination is possible and to what extent decisions taken at this age are a guarantee for later satisfaction.

All things considered, it should always be borne in mind that the right to self-determination also *includes the right to live with an ambiguous sex*. This right to an open future leads to the abovementioned obligation to intervene as sparingly and as late as possible whilst ensuring the maximum involvement of those affected, i.e. to keep sex assignment open for as long as possible without completely ruling out all interventions.²⁹ The right to an open future must be weighed against the obligations to promote the well-being of the child and to avoid harm to the child. In concrete terms, the risks and strains arising due to a renunciation of treatment, both for the respective individual and for all individuals affected, must always be taken into account.

In cases where interventions have taken place during infancy and childhood, the right to self-determination entails the obligation of subsequent information. In this context, too, today's approach is different from that in the past, when interventions were often concealed from

27 Deutscher Ethikrat (Hrsg.), Intersexualität. Stellungnahme vom 23.2.2012 (2012) 101 f: "Vielmehr bilden dort wo stellvertretendes Entscheiden und Handeln anderer ... notwendig sind, Wohl und Wille der Betroffenen den einzigen Maßstab, an dem sich dieses Entscheiden und Handeln zu orientieren hat." ["Where the proxy decisions and actions of others ... are necessary, the well-being and wishes of those concerned are the only yardstick to go by in decision-making and actions."]

28 Kipnis/Diamond, Pediatric ethics and the surgical assignment of sex, *Journal of Clinical Ethics* 1998, 398.

29 Deutscher Ethikrat (Hrsg.), Intersexualität. Stellungnahme vom 23.2.2012 (2012) 102.

those affected. Beyond the obligation to provide information in the context of defined medical interventions, successful self-determination requires the most comprehensive knowledge possible about the conditions under which one leads one's life, shapes one's identity and makes decisions. Misconceptions about important questions regarding one's own life thus prevent authentic self-determination. This means that those affected should be informed in terms adequate for their respective age and be given an opportunity to actively obtain information themselves.³⁰

In the case of adult trans-identical persons, a conflict can arise between the principles of the right to self-determination and the principle of non-maleficence, if the “obstacles” set up for them in the form of various expert opinions and various phases to be gone through are perceived as medical and societal paternalism. On the one hand, it should be noted that with increasing scope and irreversibility of (surgical) interventions, the responsibility of those who perform them increases commensurately. In medical ethics, every surgical intervention requires an indication, which is defined by the fact that the intervention can effectively promote the comprehensive well-being of the person concerned or at least certain aspects of it. On the other hand, all diagnostic and expert actions must be demonstrably capable of facilitating successful transition to the opposite sex and at the same time protect those affected from ill-considered and hasty interventions which they might regret later. They must not be hidden relics of paternalism based on traditional psychopathological views of transidentity. Furthermore, the right to self-determination can only be exercised successfully if people are fully informed. In this sense, comprehensive knowledge of the conditions which need to be fulfilled for successful transition is needed and it must be communicated to those affected and striving for such a transition in an understandable way. Successful self-determination also requires opportunities of “self-enlightenment” and thus options for those affected to critically test their own wishes.

3.5 The role of parents

Apart from the obligation to respect the well-being of the child and his or her right to participate to the greatest possible extent in decision-making, Claudia Wiesemann mentions “respect for the family and the parent-child relationship” as one of the three guiding principles for dealing with DSD children.³¹ A child with ambiguous sex is a great challenge for parents; many of them do not just want a clear sex assignment, they spontaneously also claim the right to make decisions in this respect. However, in experts' discussions, the question to what extent parents' wishes should be taken into consideration in intersexuality is a controversial issue from an ethical perspective.

The right of parents to proxy informed consent is limited here since it is bound to the objective well-being of children and limited by their right to a self-determined life (in the sense of an open future). Fulfilling parents' wishes which have a long-term detrimental effect on the well-being of the child should be avoided. However, it is precisely when the well-being of children and their right to self-determination are at stake that the role of parents comes to bear a new way.

30 Wiesemann, Ethical Guidelines 301 (“the right of the future adult to be comprehensively informed about their condition and about all interventions carried out as well as the multidisciplinary health-care team's obligation to provide the appropriate information and maintain documentation”); see also Gillam/Hewitt/Warne: Ethical Principles for the Management of infants with Disorders of Sex Development, in: *Horm Res Paediatr* 2010 74:412–418.

31 Wiesemann 2010, 676.

The parent-child relationship is a constituent part of psychological and social well-being, in particular for the child: “How the child feels about him- or herself is very strongly influenced by the parent’s attitudes and behaviours, and parent-child relationship [sic] is the basis of the child’s overall well-being.”³² Parents can also best assess the conditions under which their children will grow up, and thus the social dimension of their future quality of life. Moreover, a stable and appreciative parent-child relationship must be regarded as an important prerequisite for subsequent individual self-determination.³³

For these reasons, parents should be involved in all decisions – in the sense of *shared decision-making* – and they should be able to stand by these decisions. They should be supported so that they can be reliable caregivers for their children in their particular situation, persons who accept and affirm them.

3.6 Justice

In the context of intersexuality and transgender, justice primarily plays a role in the sense of non-discrimination.³⁴ Intersexual and transgender persons must not experience unacceptable disadvantages and exclusion in societal life due to their gender identity; they have a right to recognition and societal participation. This leads to problems in areas such as civil status law, which will be described in detail in the legal section of this document. The potential right to redress for interventions which subsequently turned out to be seriously traumatising and detrimental to the affected person’s quality of life is likewise an issue of justice.

32 Wiesemann 2010, 676.

33 Mental and physical health are important prerequisites for autonomy later in life.

34 As contrasting publications in respect to transidentity, see: *Graham*, Navigating community Institutions: Black Transgender Women’s Experiences in Schools, the Criminal Justice System, and Churches, in: *Sex Res Soc Policy* (2014) 11:274–287; *Mansh/Garcia/Mitchell/Lunn*, From Patients to providers. Changing the Culture in Medicine Toward sexual and Gender Minorities, in: *Acad Med* Vol.90 (2015) No5:574–580.

4 General considerations on the protection of fundamental rights

4.1 Fundamental rights issues

Relevant fundamental rights which can be applied fruitfully for the protection of intersexual and trans-identical persons can be found both in Austrian constitutional law, in EU law and in international agreements.

4.1.1 The European Convention on Human Rights (ECHR)

Article 8 of the European Convention on Human Rights (ECHR), which has the rank of constitutional law in Austria, protects the right to respect for private and family life.³⁵ As the European Court of Human Rights has repeatedly stated, aspects of transidentity and intersexuality are also protected by this norm.³⁶ Accordingly, trans-identical and intersexual persons are assured the right to be treated in accordance with their perceived gender identity. The right not to be assigned one of two sexes has also been derived from this and it is concluded that a gender identity which is chosen – often by legal representatives or attending physicians – must not be unchangeable.³⁷

It is precisely due to this interpretation of Article 8 that the right not to be assigned one of two sexes has been inferred for some time now, and even the demand that a third sex be recognised under civil status law is based on this.³⁸ The German Federal Constitutional Court (BVerfG) recently considered it a violation of the general personality right (Article 2.1 in conjunction with Article 1.1 of the *Grundgesetz*) and the prohibition of discrimination (Article 3.3 sentence 1 of the *Grundgesetz*) when persons who cannot be permanently assigned either the female or male sex can only register under the “male” or “female” options or leave the sex entry blank. The German legislator has to react and amend the civil status law now.³⁹ It is up to the legislator either to introduce a third positive option or to completely abolish the entry on sex in civil status registers and documents.

Moreover, Article 8 of the ECHR implies the state’s positive obligation to protect the physical integrity of its citizens. This includes the right to sue and prosecute those responsible for malpractice⁴⁰ under civil and criminal law, and in particular the right to compensation.⁴¹

Art. 12 ECHR, which expressly grants men and women the right to marry, does not guarantee an obligation for states to create access to marriage for same-sex couples.⁴² Based on this, the German Ethics Council has pointed out that Art. 12 ECHR does not guarantee compulsory access to marriage for intersexual persons.⁴³ However, if the wording of Art. 12 ECHR refers

35 For the scope of protection, see *Meyer-Ladewig* in Meyer-Ladewig/Nettesheim/Von Raumer (Hrsg.), *Europäische Menschenrechtskonvention*4 (2017) Art. 8 Rn. 7 and 21 et seq.

36 See references in *Meyer-Ladewig* in Meyer-Ladewig/Nettesheim/Von Raumer, EMRK4 Art. 8 Rn. 26.

37 *Büchler/Cottier*, *Intersexualität, Transsexualität und das Recht – Geschlechtsfreiheit und körperliche Integrität als Eckpfeiler einer neuen Konzeption*, *Freiburger Frauenstudien* 17, 115 (125 et seq.).

38 See e.g. *Büchler/Cottier*, *Intersexualität, Transsexualität und das Recht – Geschlechtsfreiheit und körperliche Integrität als Eckpfeiler einer neuen Konzeption*, *Freiburger Frauenstudien* 17, 115 (125 f.); *Vöneky/Wilms*, in *Deutscher Ethikrat* (Hrsg.), *Zur Situation von Menschen mit Intersexualität in Deutschland* (2011) 4; *Remus*, *Zur Situation von Menschen mit Intersexualität in Deutschland* 4; *Deutscher Ethikrat* (Hrsg.), *Intersexualität. Stellungnahme vom 23.2.2012* (2012) 138 et seq.

39 For more information, please refer to 5.1.

40 *Meyer-Ladewig* in Meyer-Ladewig/Nettesheim/Von Raumer, EMRK4 Art. 8 Rn. 2.

41 ECtHR 15,11,2007, 22750/02, *Benderskiy/Ukraine*.

42 ECtHR 24.6.2010, 30141/04, *Schalk u. Kopf/Austria*.

43 *Deutscher Ethikrat* (Hrsg.), *Intersexualität. Stellungnahme vom 23.2.2012*, 136.

to “man and woman”, this does not necessarily mean a determination of sex according to purely biological criteria.⁴⁴

With reference to Art. 8 and Art. 12 ECHR, the Austrian Administrative Court has held that trans-identical persons must not be denied the right to marry and the right to enter into a registered partnership, which would deprive them of any possibility of legally secured cohabitation; on the basis of their external appearance and psychological condition,⁴⁵ trans-identical persons have the right to be married to a partner who belongs to the opposite sex according to the entry in the birth register.⁴⁶

Finally, different treatment on the basis of intersexuality or transidentity may qualify as discrimination within the meaning of Art. 14 ECHR since it is to be regarded as different treatment on grounds of sex, i.e. on the basis of an “objectionable” differentiation characteristic.⁴⁷ Any justification of different treatment must fulfil very stringent criteria.

4.1.2 EU Charter of Fundamental Rights (CFR)

Within the scope of EU law, the rights guaranteed in the EU Charter of Fundamental Rights (CFR)⁴⁸ must be observed in the first place.⁴⁹ Art. 3 par. 1 CFR secures the right to physical and mental integrity.⁵⁰ This also includes forced treatment or treatment without providing required information⁵¹ and thus medical sex assignment measures taken against the will of the persons concerned or without sufficient prior information. Like Art. 8 ECHR, Art. 7 CFR protects the right to personal identity and development alongside the protection of private life.⁵² Art. 21 par. 1 CFR i.a. frowns upon sex discrimination and thus also on discrimination on grounds of transidentity and intersexuality.⁵³

44 EGMR 11.7.2002, 28957/95, *Goodwin/UK*.

45 As for the requirements for recognition of the “new” gender, see 6.2.1. below.

46 VfGH 95/01/0061 VwSlg. 14.748A. Reference is made to the review decision of the VfGH of 12 October 2017, E 230-231/2016-27 regarding same-sex marriage here.

47 See ECtHR 30.11.2010, 35159/09, *P.V./Spain; Tobler*, Equality and Non-Discrimination under the ECHR and EU Law – A Comparison Focusing on Discrimination against LGBTI Persons, *ZaöRV* 2014, 521 (544).

48 Charter of Fundamental Rights of the European Union, OJ C 2000/364, 1.

49 Mention must be made of numerous European initiatives to advance equal opportunities for LGBTI persons, e.g. European Commission, List of actions by the Commission to advance LGBTI equality; European Union Agency for Fundamental Rights, Updated report on legal protection for LGBTI people in the EU of 11 Dec. 2015; Parliamentary Assembly of the Council of Europe, Resolution 2048 of 22-4-2015: “Discrimination against transgender people in Europe”.

50 In relation to Art. 8 ECHR see *Martin/Borowsky* in Meyer (Hrsg.), *Charta der Grundrechte der Europäischen Union*4 (2014) Art. 3 Rn. 34.

51 *Jarass*, *Charta der Grundrechte der Europäischen Union*3 (2016) Art. 3 Rn. 8 et seq.

52 See *Bernsdorff* in Meyer, *Charta der Grundrechte der Europäischen Union*4 Art. 7 Rn. 14.

53 *Rossi* in *Calliess/Ruffert* (Hrsg.), *Kommentar EUV/AEUV*5 (2016) Art. 21 GRC Rn. 8a; *Streinz* in *Streinz* (Hrsg.), *Kommentar EUV/AEUV*2 (2012) Art. 21 GRC Rn. 4; EuGH 7. 1. 2004, C-117/01, *K.B./National Health Service*; EuGH 27. 4. 2006, C-423/04, *Richards*. However, see also EuGH 29.4.2015, C-528/13, *Léger*: Ausschluss homosexueller Männer von der Blutspende. In this context, mention must be made of the fact that the revised guideline for the preparation of blood and blood components and the use of blood products (haemotherapy guideline), *Gesamtnovelle 2017* (2017), in conjunction with §§ 12a, 18 *Transfusionsgesetz*, now makes it possible for transsexuals to be blood donors in Germany; persons with sexual risk behaviour continue to be excluded. To follow the discussion in Austria, see response to parliamentary question 3193/J-BR/2016 addressed to the Federal Minister of Health of 1-2-2017, 2957/AB-BR/2017.

Finally, Article 23 CFR governs the equality of women and men in all areas, including employment, work and pay. Moreover, the EU Directive on the equal treatment of men and women in matters of employment and occupation⁵⁴ is also applicable to intersexual and trans-identical persons as the principle of equal treatment of men and women also covers protection against discrimination on grounds of sex reassignment (cf. inter alia recital 3).⁵⁵ According to a decision of the European Court of Justice (ECJ),⁵⁶ dismissal of a trans-identical person on grounds of sex reassignment surgery constitutes impermissible sex discrimination.

4.1.3 International Conventions

The UN Convention on the Rights of the Child (UN CRC),⁵⁷ ratified by Austria subject to reservation,⁵⁸ offers protection for underage intersexual and trans-identical persons. Article 2(1) i.a. prohibits any sex discrimination. According to Art. 3 par. 1 UNCRC, all measures taken by social welfare institutions, courts, administrative authorities or legislative bodies must be geared primarily to the best interests of the child.⁵⁹ From Art. 6 UNCRC, which protects the right to life and the right to development of the child, one can in part infer an obligation not to carry out sex reassignment surgery without taking the best interests of the child into account.⁶⁰ One can also conclude from Art. 8 UNCRC, which covers the right to respect for the identity of the child, that the child must be able to decide about his/her gender identity on his/her own.⁶¹

Furthermore, Art. 17 of the International Covenant on Civil and Political Rights⁶² is relevant for trans-identical and intersexual persons as it offers protection from arbitrary or illegal interference in private life, as does Art. 8 ECHR.⁶³

However, due to their lack of direct application and direct effect, the rights under the UN-CRC and the ICCPR are much less important for individuals than those under the ECHR and the CFR.

54 Directive 2006/54/EC of the European Parliament and the European Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation, OJ L 2006/204, 23.

55 See *Agius/Tobler* in Europäische Kommission (Hrsg.), *Trans- und Intersexuelle Menschen, Diskriminierung von trans- und intersexuellen Menschen aufgrund des Geschlechts, der Geschlechtsidentität und des Geschlechtsausdrucks* 50 et seq., presenting the outcomes of a survey on action to advance the equal treatment of inter- and transsexual persons in member states.

56 ECJ 30-4-1996, C-13/94, *P./S. und Cornwall County Council*; as for impacts on Austrian law, see *Greif*, *Diskriminierung von transidenten Personen – Diskriminierung aufgrund des Geschlechts?* (2009) 2 et seq.

57 Übereinkommen über die Rechte des Kindes, BGBl. 1993/7.

58 See ErläutRV 413 BlgNR XVIII. GP 26.

59 The best interests of the child is also a fundamental principle and Austrian parent and child law: ErläutRV 413 BlgNR XVIII. GP 29.

60 E.g. *Remus*, *Zur Situation von Menschen mit Intersexualität in Deutschland* 4.

61 *Dies*, op.cit. In this context, Austrian legislators also indicate that the Civil Status Act offers an option for the protection of identity, i.e. the correction of wrong entries: ErläutRV 413 BlgNR XVIII. GP 33

62 BGBl. 1978/591.

63 See *Vöneky/Wilms*, *Zur Situation von Menschen mit Intersexualität in Deutschland* 4, according to these authors, the assignment to a binary structure of the sexes could also contradict this provision.

4.2 Anti-discrimination protection below the level of constitutional legislation

On the level of sub-constitutional laws, protection against discrimination is ensured by a number of provisions of anti-discrimination law, in particular by the following:

- the Federal Act on Equal Opportunities (Equal Opportunities Act, GIBG):⁶⁴ it applies to the private sector and other areas and was extended in 2004 to include sexual orientation in the grounds for discrimination;
- the Federal Act on Equal Opportunities in the Federal Sphere (Federal Equal Opportunities Act, B-GIBG):⁶⁵ it applies to employment in the federal public service and was also extended accordingly in 2004;
- various equal opportunity laws of the provinces: these govern employment in the *Länder* and municipalities.

To assist in the enforcement of equal opportunities, the Equal Opportunity Commission (for employment in the private sector and other fields) and the Equal Opportunity Ombudsman (for the federal public service) have been established. Details are set forth in the Federal Act on the Equal Opportunity Commission and the Equal Opportunity Ombudsman (GBK/GAW-G)⁶⁶ and in the B-GIBG.

4.3 Broader protection from exclusion

4.3.1 Elimination of stigmatising terminology and prejudice

The greater part of legal discourse follows the medical discourse⁶⁷ and defines deviations from the binary model of the sexes as a disease. This is why sex (re)assigning surgery is qualified as curative treatment in the event of medical indications.⁶⁸ This classification is particularly relevant in the context of social security law as it currently forms a basis for those affected to be reimbursed for the costs of required surgery and therapy.

However, intersexuality or transidentity is not always associated with suffering. If intersexual or trans-identical persons decide against sex (re)assigning surgery and choose a life that deviates from the binary man/woman pattern, their condition should not be regarded as a disease.⁶⁹ The word “disease” should only be used if the persons affected themselves feel that their condition requires treatment and causes functional disorders, severe health impairments or psychological

64 BGBl. I 2004/66.

65 BGBl. 1993/100.

66 BGBl. 1979/108.

67 See e.g. WHO, International Classification of Diseases-10, Chapter V, F 64.

68 From the perspective of criminal law, see e.g. *Schütz* in Höpfel/Ratz, WK StGB2 § 90 Rz. 152 ff; cf. 5.2.1; in respect of civil law implications, see e.g. *Stormann* in Schwimann/Kodek (Hrsg.), Kommentar zum ABGB I4 (2013) § 173 Rz. 4; cf. 5.2.2.

69 In context, see *Petričević*, Zur Legitimität von Geschlechtsnormierungen bei intersexuellen Minderjährigen, *juridikum* 2015, 427.

suffering. Pathologising terminology can be perceived as derogatory and stigmatising for those concerned, leading to the emergence and consolidation of prejudice in society.

Raising public awareness is an important measure to prevent exclusion and stigmatisation. In selected areas (in particular medical care, or child care and education,⁷⁰ as well as in the training of professionals), information is already being provided and non-stigmatising terminology is being used so that intersexuality and transidentity can be recognised in society as a variation of human norms and the needs of intersexual and trans-identical persons can be addressed to a greater extent. This also reduces the pressure on those affected to undergo surgery for purely societal reasons, without any medical indication.

4.3.2 Sex/gender queries

Everyday queries for one's gender and the choice between the binary sexes which is usually still associated with this can cause stressful situations for intersexual and trans-identical persons. A third option could theoretically exclude the disadvantaged position of intersexual persons in this context. However, even then, gender queries can still lead to stigmatisation, and consequently to discrimination against those affected, because the obligation to disclose one's sex/gender can in itself constitute an intrusion into the private sphere.⁷¹

Certain factual reasons could, however, justify a mandatory gender query, such as those of a medical nature (e.g. hospital admission) or of an organisational nature (e.g. accommodation in multi-bed rooms at a holiday camp). If there is no objectively justified reason for a mandatory query, it could remain optional.

4.3.3 Access to gender-segregated facilities

When it comes to access to sanitary facilities, changing rooms, etc., people who do not want to or cannot submit to the binary man/woman scheme may be faced with uncomfortable situations. According to Sec. 33 par. 2 of the Workplace Ordinance,⁷² toilets separated according to gender must be available at workplaces (upwards from a certain total number of employees). For those affected, the choice between doors marked "male" or "female" or the wheelchair symbol can be a stressful matter.

A change of the legal situation would be conceivable: companies and institutions would either have to convert their gender-segregated sanitary facilities into gender-neutral facilities or provide for a third, gender-neutral group of sanitary facilities. However, one must also bear in mind that the introduction of a third group of facilities can represent a considerable economic and logistical burden for the companies and institutions concerned, and it could be perceived as stigmatising by those concerned. In turn, the elimination of gender segregation might affect other people's comfort and is not unproblematic, either.

70 In this context, see the case of suspected discrimination against a transgender child in a Lower Austrian school, followed by an investigation by the Ombudsman Board: Press release of the Ombudsman Board, 20-7-2017 at https://volksanwaltschaft.gv.at/downloads/6ursf/PA_Ausgrenzung%20von%20Kind%20mit%20Diabetes%20in%20Montessorischule.pdf.

71 See poll among intersexual persons about stating gender identity, *Bora* in Deutscher Ethikrat (Hrsg.), *Zur Situation intersexueller Menschen, Bericht über die Online-Umfrage des Deutschen Ethikrates* (2012) 32.

72 Verordnung der Bundesministerin für Arbeit, Gesundheit und Soziales, mit der Anforderungen an Arbeitsstätten und an Gebäuden auf Baustellen festgelegt und die Bauarbeiterschutzverordnung geändert wird (Arbeitsstättenverordnung – AStV), BGBl. II 1998/368.

A right of choice for those affected to access building parts, sports, societal and other institutions which would like to continue to apply a binary gender model would probably be a more appropriate solution,⁷³ although this may lead to confusion and possibly discontent among third parties. At the end of the day, not every interest of third parties warrants protection and it is generally reasonable for a society to tolerate divergences from the norm. Only in exceptional circumstances can the persons concerned be required to accept a visible assignment to one sex in order to protect the legitimate interests of third parties; for example, no interest warranting protection is discernible when a person who clearly dresses as a man, has a man's haircut, acts like a man etc. should be allowed to refuse using the men's toilet and to insist on access to the ladies' room.

4.3.4 Competitive sports

Differentiation according to sex is also objectively necessary in competitive sport. In this context, the question arises whether persons whose sex is not clearly assigned should (also) be allowed to enter competitions reserved for female athletes. Similar problems arise when, for example, a man-to-woman transsexual whose (female) gender has already been registered under civil status law wants to take part in women's competitions.⁷⁴ Since the gender-related differences between men and women in physical characteristics can lead to distortions if both sexes compete in the same competition, limited access to women's competitions can be objectively justified in this case.⁷⁵ With this in mind, in 2011 the International Athletics Federation published a set of rules – its main ideas were also adopted by the International Olympic Committee the following year⁷⁶ – defining the conditions under which intersexual people may compete in women's competitions.⁷⁷ However, in a provisional arbitral award⁷⁸ of 2015, the International Court of Arbitration in Sport ordered that the IAAF regulations which excluded female athletes exceeding certain testosterone limits⁷⁹ from participating in women's competitions be suspended for an initial period of two years.⁸⁰ During these two years, the issue whether an increased testosterone level in women actually represented a competitive advantage in itself should be clarified.⁸¹

In this respect, the solution to be sought should not discriminate against intersexual and trans-identical persons for unobjective reasons and it has to be a solution supported by all parties involved with fairness in sports competitions. Guidelines and testing methods which may be

73 See e.g. *Fuchs/Kempe-Schälicke/Richter/Franzen* in BMFSFJ (Hrsg.), *Geschlechtliche Vielfalt im öffentlichen Dienst* (2017) 13 et seq., 30 et seq.

74 In this context, the Stockholm Consensus on Sex Reassignment in Sports says that transsexual athletes who underwent sex reassignment surgery prior to puberty may enter the competitions of their post-surgery gender whereas this option is restricted for athletes who underwent sex assignment surgery after puberty.

75 For Austria, see the case of Erik/Erika Schinegger discussed in the introduction; more recently, the South African track-and-field athlete Caster Semenya made the headlines; see e.g. *Reinsch*, FAZ vom 20.08.2016, "Der Fall Semenya entzweit die Leichtathletik"; for further examples see *De Antoni*, *Intersexualität als Problem des Hochleistungssports* (2011) 50 et seq.

76 International Olympic Committee (ed.), *IOC Regulations on Female Hyperandrogenism* (2012).

77 International Association of Athletics Federations (ed.), *IAAF Regulations governing Eligibility of Athletes which have undergone Sex Reassignment to compete in Women's Competition* (2011); for critical comments, see *Buzuvis*, *Hormone Check: Critique of Olympic Rules on Sex and Gender*, *Wisconsin Journal of Law, Gender and Society* 2016, 29 (39 et seq., 53 et seq.)

78 The Court of Arbitration for Sport, 2014/A/3759, *Dutee Chand v. AFI & IAAF*.

79 They are of course free to enter men's competitions.

80 This in turn caused the International Olympic Committee to ease their related restrictions: See International Olympic Committee (ed.), *IOC Consensus Meeting on Sex Reassignment and Hyperandrogenism* (2015) 2 et seq.

81 The appeal lodged against this award by International Association of Athletics Federations has not been decided on so far.

considered stigmatising should in any event be avoided.⁸² Even if the Austrian Supreme Court at some point decides on the recognition of a third sex under civil status law on the basis of the relevant German constitutional court ruling,⁸³ it is at present not possible to take part in competitions for a third gender category to be created specifically for this purpose.⁸⁴ In fact, any such attempt would probably also fail because the number of competitors would be too small.

4.3.5 Adequate language and title

The media have so far discussed calls for intersexual and trans-identical persons not to be addressed with as “Mr” or “Mrs”.⁸⁵ In contrast to the recently introduced gender-neutral pronoun “hen”⁸⁶ in Sweden, there is no alternative to gender-related salutations and pronouns in the German language.⁸⁷ Linguistic structures based on a binary conception of the sexes are deeply rooted in Austrian culture (for example: “Ladies and gentlemen...”). A project of the Austrian Standards Institute for a “gender-sensitive use of language” standard was launched but has been dropped.⁸⁸

A separate form of address for intersexuals with the intention of including these groups of persons might not only be received positively by those concerned, it might also be perceived as stigmatising.⁸⁹ Such a form of address would emphasise their “being different”. Except for the opinions of some persons concerned, empirical studies on the effects of a specific form of address for intersexual persons are still lacking. Research and data collection would therefore make sense in this area.

A “de-gendering” of language by means of a uniform type of address for all could in turn lead to a situation in which the complexity of society is no longer reflected in linguistic expression. Such a language could also lead to the focus on gender equality even being lost, something which has not yet been fully achieved. The result of “de-gendering” language further comes with the risk of polarisation instead of fostering acceptance and tolerance in society; this consequence should be avoided.

82 See *Conradi/Wiesemann, Determination von Geschlecht im Sport – ein ethisches Problem, Hessisches Ärzteblatt 2009, 656; Buzuwis, Transsexual and Intersex Athletes, in Sartore-Baldwin (Hrsg.), Sexual Minorities in Sport: Prejudice at Play (2013) 55 (66 et seq.)*.

83 For more information see 5.1.1.

84 National legislators have hardly any leeway in respect of international competitions for as long as the international sports organisations do not have anything in place in this context: see *Deutscher Bundestag (Hrsg.), Ausarbeitung des wissenschaftlichen Dienstes: Intersexualität/Transsexualität und Olympische Wettkämpfe, WD 10 - 3000 - 063/13 (2013) 13*.

85 *Baum, Sagen Sie bitte Profx. zu mir, in: FAZ 17-11-2014; “Sagen Sie Herm zu mir”: Intersexualität beim Namen nennen, in: derStandard.at 5-9-2016*.

86 *FAZ 15-4-2015, Er, sie, “hen”; see also Swedisch standard dictionary “Svenska Akademiens ordlista” under the entry “hen”*.

87 *De lege ferenda* there is a proposal put forward in *Niedenthal, Stellungnahme in BMFSFJ (Hrsg.), Geschlecht im Recht (2017) 36, 38*, which presents the option of entering the desired salutation along with the entry of the third gender option in the civil status register.

88 *Draft ÖNORM A 1080, 37; for the reasons why the project was discontinued, please see <https://www.austrian-standards.at/newsroom/meldung/geschlechtersensibler-umgang-mit-sprache-wird-kein-normprojekt/>*

89 For pragmatic proposals regarding respectful communication in every-day life, see *Fuchs/Kempe-Schällickel/Richter/Franzen in BMFSFJ, Geschlechtliche Vielfalt im öffentlichen Dienst 44 et seq.*

5 Considerations on intersexuality

5.1 Registration of sex at birth

5.1.1 Current legal situation

According to Sec. 2 par. 2 no. 3 of the Civil Status Act (PStG),⁹⁰ the sex of a person forms part of general civil status data. Under Sec. 54 par. 1 no. 2 PStG, the sex of a child must be entered in the birth certificate at birth. The Austrian legal system (cf. e.g. Article 7(3) B-VG and Article 12 ECHR) is based on the male/female binary.⁹¹

If a child is intersexual at birth, the registrar must enter the sex primarily reflected in the physical characteristics of the newborn child, i.e. based on the characteristics predominant at the time of birth;⁹² this is normally done based on the advice of the obstetrician or attending physician.⁹³ According to Austrian law, it is not expressly possible to leave this entry blank if the child cannot be clearly assigned the female or male sex.⁹⁴ However, Sec. 22 par. 3 of the German Civil Status Act (dPStG),⁹⁵ now declared unconstitutional due to the lack of registration of a third option, explicitly provides for this.⁹⁶ Sec. 40 par. 1 of the Austrian PStG would also permit such an approach,⁹⁷ but it is technically impossible to leave this entry blank in the IT input mask used by the civil status authorities, which is why it is not done in practice.⁹⁸ Since a third option is not provided for under current law, intersexual persons are faced with the problem of having to choose one of the two existing options.

A change in this respect is now expected in German law. After an action for the registration of a third sex with the designation “inter”/“diverse” failed before the Federal Supreme Court,⁹⁹ the German Constitutional Court (BVerfG) decided – with reference to the constitutional situation under the German constitution or *Grundgesetz* (GG) – that the registration of a third gender in the birth register must be made possible or that any entry of the sex under civil status law must be foregone completely.¹⁰⁰ The court did not specify a designation for a third option. By the end of 2018, German legislators must have adopted a new law in accordance with this ruling. Until then, Section 22 (3) dPStG must not be applied to persons who do not identify as belonging to either the male or the female sex.

90 Bundesgesetz über die Regelung des Personenstandswesens, BGBl. I 2013/16

91 See VwGH 95/01/0061 VwSlg. 14.748A. As for the legal situation in Germany, see *Helms*, Brauchen wir ein drittes Geschlecht? (2015), 27; for a different view, cf. *Gössl*, Intersexuelle Menschen und ihre personenstandsrechtliche Erfassung, NZFam 2016, 1122 (1127).

92 See also *Althoff/Schabram/Follmar-Otto*, in Deutsches Bundesministerium für Familie, Senioren, Frauen und Jugend (Hrsg.), Gutachten. Geschlechtervielfalt im Recht. (2017) 39.

93 *Edlbacher*, Die Transsexualität im Zivil- und im Personenstandsrecht, ÖJZ 1981, 173.

94 For a comparative law approach, see European Fundamental Human Rights Agency (ed.), The fundamental rights situation of intersex people (2015) 4 et seq.

95 Personenstandsgesetz 2007, dBGBI. I 2007/122.

96 The ruling of the BGH of 22-6-2016, XII ZB 52/15 Rz. 23, also recognises the option of a *later* deletion of the previous entry. This option is also foreseen in a bill (submitted to the Bundestag by the German Green Party) which has already been sent to committees; Sec. 22 dPStG is to be extended by a paragraph 4, see BT-Drucks. 18/12179 (Gesetzesentwurf), 6. Even if legislators do not deal with this anymore when adopting new legislation in this context on the basis of the BVerfG ruling of 10-10-2017, 1 BvR 2019/16 Rz. 65, the option of later deletion will remain in place if the civil courts continue to hand down related judgements even if the third gender option is available in the registers of birth.

97 See also *Petričević*, Rechtsfragen zur Intergeschlechtlichkeit (2017) 177 et seq.

98 Communication by phone from Vienna's Municipal Department MA 26 (Data protection, right to information, civil status matters).

99 BGH XII ZB 52/15 NJW 2016, 2885.

100 BVerfG 10.10.2017, 1 BvR 2019/16 Rz. 65.

In Austria, comparable proceedings were pending at the Upper Austrian Provincial Administrative Court,¹⁰¹ but on 5 October 2016 the application was not granted with reference to the current legal situation for the time being, both with regard to the register of births and passports.¹⁰² However, appeals were lodged at the Austrian Administrative Court and the Constitutional Court, and appeal proceedings are currently pending there.¹⁰³

5.1.2 Third option, blank box and postponement of registration

Gender is an essential aspect of one's own identity and shapes both a person's self-image and the way in which that person is perceived by others in society. The German BVerfG therefore considered the protection of gender identity as an aspect of general personality rights which the provisions of civil status law (based on a binary concept of the sexes) run counter to. If the full recognition of civil status is denied, this will jeopardise the self-determined development of the persons concerned.¹⁰⁴

If an entry in the civil status register which reflects their gender identity is not possible, intersexual persons are at a disadvantage compared to non-intersexual persons. This basically constitutes sex discrimination which requires grounds for justification in the legal sense.¹⁰⁵ The German BVerfG denied the viability of conceivable grounds for justification, such as additional financial expenditure incurred by the authorities.¹⁰⁶ The German BVerfG also did not consider it sufficient to merely omit the information. From the point of view of the German constitutional judges, this would only perpetuate the underlying binary pattern and convey the wrong impression, i.e. that the persons concerned would perceive themselves as sexless. The protection of personality rights would require that sex is considered according to the actual feelings of those affected who identify outside the male or female binary.¹⁰⁷

101 LVwG OÖ 05.10.2016, 750369/5/MZ/MR; 05.10.2016, 750382/2/MZ/MR.

102 For the criteria underlying the decision of the LVwG OÖ see *Petričević*, Rechtsfragen zur Intergeschlechtlichkeit (2017) 184 und 268 et seq.

103 For more about the views of legal experts in respect of these proceedings, see *Kommenda/Özkan*, Bekommt auch Österreich das dritte Geschlecht?, in: Die Presse 8-11-2017.

104 BVerfG 10.10.2017, 1 BvR 2019/16 Rz. 35 ff; building on the line of argument in the ruling on transsexual persons, BVerfG, Beschluss vom 11.1.2011, 1 BvR 3295/07. In this context, see also Deutscher Bundestag (Hrsg.), Unterrichtung durch den deutschen Ethikrat. Stellungnahme des Deutschen Ethikrates "Intersexualität" vom 14.2.2012, BTDrucks 17/9088, 43. *Helms*, Brauchen wir ein drittes Geschlecht? (2015), 26, stands for a dissenting opinion; the argument here is that the public persona can be seen as separate from the entry in the civil status register.

105 See i.a. *Gössl*, Intersexuelle Menschen und ihre personenstandsrechtliche Erfassung, NZFam 2016, 1122 (1123 et seq.); *Petričević*, Rechtsfragen zur Intergeschlechtlichkeit (2017) 268 ff; Deutscher Bundestag (Hrsg.), Stellungnahme des Deutschen Ethikrates "Intersexualität" vom 14.2.2012, BTDrucks 17/9088, 44.

106 BVerfG 10.10.2017, 1 BvR 2019/16 Rz. 56 ff; by contrast, cf. the line of argument of the LVwG OÖ 5.10.2016, 750369/5/MZ/MR Rz. 3.6. rejecting the entry of a third sex, whereby the obligatory entry of the sex as "male" or "female" could not be seen as unobjective because to ensures the application of numerous legal provisions.

107 See also Deutsches Institut für Menschenrechte, Stellungnahme. Regelungsbedarfe zur Stärkung und zum Schutz der Rechte intergeschlechtlicher Kinder (2017) 9.

In this sense, representatives of associations have been calling for a further option in addition to the “male” and “female” sexes, such as “inter” or “diverse”.¹⁰⁸ The German Ethics Council recommended this for several years: among other things, the possibility of registering a third option was to contribute to greater acceptance in society, afford more comprehensive protection and do away with the societal view that those affected were diseased.¹⁰⁹ In a report on the situation of intersex persons, the Human Rights Commissioner of the Council of Europe also called for respect for the gender self-determination of intersex persons when issuing civil status documents and identity cards, in particular to enable them to choose a sex entry other than “male” or “female”.¹¹⁰ Finally, the Parliamentary Assembly of the Council of Europe also called on Member States to consider the possibility of a third gender option for those who wish to use it.¹¹¹ An additional registration option has already been introduced in several countries (e.g. France, Australia, New Zealand, Nepal, India and Pakistan).¹¹²

Moreover, however, there have been repeated calls for not registering sex at all.¹¹³ The German BVerfG is also considering such a general waiver of the sex entry under civil status law.¹¹⁴

Especially in matters of civil status, entering information about the sex or gender of a person serves to identify a person and in principle it does not weigh the person concerned more than the date and place of birth, not to mention biometric data. This is why a general renunciation of the sex entry under civil status law gives rise to concerns. For reasons of consistency this would have to entail the elimination of sex as a constituent element from the entire legal system. Although each individual law must always be critically reviewed as to whether the focus on the sex or gender of a person makes sense and is necessary, a general elimination of gender as a separate category currently appears to be an extremely far-reaching measure, which, at least in the short and medium term, could polarise society and thus be detrimental to the well-being of the persons who are actually concerned.

108 Bundesweiter Arbeitskreis TSG-Reform, Forderungspapier zur Reform des Transsexuellenrechts, 1. Juni 2012; see also Deutsche Antidiskriminierungsstelle des Bundes, Bericht der unabhängigen Expert_innenkommission der Antidiskriminierungsstelle des Bundes (2015); two further options were suggested in addition to male and female (“further gender option” and “no information”) – for all children, the entry would first be “no information” at birth, *Althoff/Schabram/Follmar-Otto*, in Deutsches Bundesministerium für Familie, Senioren, Frauen und Jugend (Hrsg.), Gutachten. Geschlechtervielfalt im Recht 51. For an overview of arguments, see Deutscher Bundestag (Hrsg.), Stellungnahme des Deutschen Ethikrates “Intersexualität” vom 14.2.2012, BT-Drucks 17/9088, 46 f; Deutsches Institut für Menschenrechte, Stellungnahme. Regelungsbedarfe zur Stärkung und zum Schutz der Rechte intergeschlechtlicher Kinder (2017) 9.

109 Deutscher Ethikrat (Hrsg.), Intersexualität. Stellungnahme vom 23.2.2012, 139 et seq., opinion including dissenting opinion.

110 Commissioner for Human Rights, in: Council of Europe (Hrsg.), Human Rights and Intersex People (2015) 9 Recommendation 4.

111 Parliamentary Assembly of the Council of Europe, Resolution 2048 of 22-4-2015: “Discrimination against transgender people in Europe”, Chapter 6.2.1.

112 Gössl, Intersexuelle Menschen und ihre personenstandsrechtliche Erfassung, NZFam 2016, 1122 (1123) passim.

113 See information in Deutscher Ethikrat (Hrsg.), Intersexualität. Stellungnahme vom 23.2.2012, 139 f; see also the idea proposed in 142 op cit. to offer the entry of a freely chosen gender designation; see also *Dethloff*, Stellungnahme, in BMFSFJ (Hrsg.), Geschlecht im Recht (2017) 29 (31); for “post-categorised law” see also *Baer*, Geschlecht und Recht. As for the discussion about the removal of gender boundaries, RZ 2014, 5; *Adamietz*, Geschlechtsidentität im deutschen Recht, APuZ 20-21/2012, 15 (21); *Schmidt*, Das Recht “auf Anerkennung der selbstbestimmten geschlechtlichen Identität” gemäß Art. 2 I, 1 I GG im Hinblick auf den geschlechtlichen Personenstand, in Schochow/Gerhmann/Steger (Hrsg.), Inter* und Trans*identitäten (2016) 231 (251); Deutsches Institut für Menschenrechte, Stellungnahme. Regelungsbedarfe zur Stärkung und zum Schutz der Rechte intergeschlechtlicher Kinder (2017) 9 f; developments in this direction are not excluded in *Kommenda/Özkan*, Bekommt auch Österreich das dritte Geschlecht?, Die Presse 8-11-2017. As for the perspective of “gender-neutral law” see also *Helms, Brauchen wir ein drittes Geschlecht? (2015) 23 et seq.*

114 BVerfG 10.10.2017, 1 BvR 2019/16 Rz. 65.

The introduction of a third option would therefore also be much more of an obvious solution in Austrian law. However, the question arises as to whether there should be a “third gender”, reflected by designation such as “inter” or “diverse”, or rather whether the openness and flexibility of gender assignment should be emphasized so that the third option would for example be “open” or “X”. The latter would have the advantage that it would neither cause a “forced outing” nor impose on the persons concerned a gender identity which is ultimately defined by an unaffected third party. This suggests that the third option should not be designed as a clearly defined gender category in its own right, but as an open alternative to the binary man/woman model.

In addition to the “open” third option, however, there should be a possibility of not having to initially choose any of the three options (“male”, “female” or “open”) and of postponing the decision; as previously indicated, this is already conceivable in Austria *de lege lata* (under Sec. 40 par. 1 PStG) but practically hardly granted. This was also emphasised in the ruling of the German BVerfG.¹¹⁵ The additional option of completing gender entries later on would allow the persons concerned to find and recognise their own gender identity before the entry is made. It would also prevent those affected from rushing to choose one of the three options and being forced into a role that does not correspond to their identity and self-perception. However, in the interest of legal certainty and the protection of third parties, it appears necessary to maintain this “state of uncertainty” for no longer than is absolutely necessary so as to safeguard the interests of the persons concerned. The person concerned would therefore have to choose one of the three options within a reasonable period after turning 18 years of age.

5.2 Sex-assigning measures¹¹⁶

Sex (re)assignment surgery represents a particularly deep-reaching encroachment on the rights of those affected. In view of atypical physical and psychological developments during puberty, such measures can lead to lifelong traumatising, which is why the legislation in these problematic areas requires special sensitivity.¹¹⁷

5.2.1 Permissibility of sex (re)assignment

In principle, sex (re)assignment surgery is classified as curative treatment. Such a classification is necessary to prevent the application of criminal law to these medical interventions, qualifying them as bodily injury. If the intervention is outside the realm of medical treatment – in particular for lack of a medical indication – the consent of the person concerned would be required in accordance with Sec. 90 of the Criminal Code (StGB) to avoid the classification of the intervention as illegal due to the justification of bodily injury. However, under Sec. 90 par. 3 of the Criminal Code, this cannot be validly done if an injury to the genitals is likely to cause a lasting impairment of sexual sentience.

115 BVerfG 10.10.2017, 1 BvR 2019/16 Rz. 43, 65. SE also *Althoff/Schabram/Follmar-Otto*, in Deutsches Bundesministerium für Familie, Senioren, Frauen und Jugend, Gutachten. Geschlechtervielfalt im Recht 45 ff.

116 For a comparative law approach, see Fundamental Rights Agency, The fundamental rights situation of intersex people 5 et seq.

117 This is in particularly pertinent because the dissatisfaction of intersexual persons with such surgical interventions was rated as “dramatic” in the so-called “Hamburger Studie”: *Zeitschrift für Sexuallforschung* 2007, 129 et seq.

While in the past, interventions in childhood were largely advocated by experts, from today's perspective it is no longer important to arrive at a clear sex assignment through an intervention the earliest possible point of time. An early definition of the gender role and thus the development of a potentially stable gender identity is weighed against the uncertainty of prospective gender identity development. The more serious and irreversible the interventions are and the longer the treatment can be delayed, the more it should be postponed until the person concerned has developed a sense of insight and judgment.¹¹⁸ As things stand today, sex-assigning measures in newborn children or in early childhood should therefore be avoided as much as possible.¹¹⁹

Exceptionally, interventions may be justified if they are necessary to remedy severe dysfunctions (e.g. urogenital malformation leading to difficulties in micturation), to avert serious damage to health or as a life-saving measure, subject to the consent of the child's guardian, which may even have to be substituted by the consent of a court of law. However, even in these cases, reversible interventions should always be preferred to irreversible interventions whenever possible.¹²⁰

However, if the intervention is mainly performed for societal reasons, e.g. to avoid problems with social acceptance, it can no longer be considered medical treatment.¹²¹ The mere fear of stigmatisation on the part of families does not constitute a sufficient medical indication for an intervention in a newborn or young child; a well-founded prognosis of depressive disorders in the child or other mental impairments equivalent to a disease may, according to general principles, justify a medical indication. An irreversible sex-assigning associated with physical and psychological damage such as loss of fertility, sexual sentience, chronic pain or traumatising effects on the child cannot be justified by the fact that e.g. the societal environment such as the family or school finds it difficult to accept children in their natural body. Moreover, interventions cannot guarantee that the desired effect of integration will be achieved.

In this context, the UN Committee against Torture (CAT) recommends for Austria to ensure respect for the physical integrity and autonomy of intersexual persons, to guarantee impartial counselling services for intersexual children and their parents to inform them of the consequences of unnecessary and non-urgent operations, to guarantee full, uninfluenced and informed consent to medical treatment and surgery, and to ensure that the persons concerned are adequately compensated for interventions performed without their consent.¹²²

5.2.2 Consent of minors

The requirements for the consent of minors to medical treatment in general and thus also to sex-assigning measures are governed by civil law (Sec. 173 of the Civil Code/ABGB).¹²³ Children capable of insight and judgement (or according to new terminology from 1-7-2018: capable

118 *Schütz* in Höpfel/Ratz, WK StGB2 § 90 Rz. 151; discussed in great detail in *Petričević*, Rechtsfragen zur Intergeschlechtlichkeit (2017) 114 ff; Deutscher Ethikrat (Hrsg.), Intersexualität. Stellungnahme vom 23.2.2012 (2012) 145 ff; BT-Drucks. 18/12783 (Antrag) vom 10.6.2017; Deutsches Institut für Menschenrechte, Stellungnahme. Regelungsbedarfe zur Stärkung und zum Schutz der Rechte intergeschlechtlicher Kinder (2017) 4 et seq.

119 In respect of the self-determination of those concerned, see *Matt*, Überlegungen zur medizinischen Normalisierung intersexueller Kinder, *juridikum* 2006, 144; extensively in *Petričević*, Rechtsfragen zur Intergeschlechtlichkeit (2017) 114 ff

120 This is supported by Deutsche Bundesärztekammer, Stellungnahme "Versorgung von Kindern, Jugendlichen und Erwachsenen mit Varianten/Störungen der Geschlechtsentwicklung (Disorders of Sex Development, DSD)" (2015) 3; Intersex Society of North America, Recommendations for Treatment.

121 *Schütz* in Höpfel/Ratz, WK StGB2 § 90 Rz. 151.

122 UN Committee against Torture, Concluding observations on the sixth periodic report of Austria (2015), CAT/CAUT/CO/6.

123 For an overview, see *Barth*, Medizinische Behandlung Minderjähriger, RdM 2005, 4.

of making decisions)¹²⁴ can only give such consent themselves.¹²⁵ In case of doubt, insight and judgement are assumed to exist in minors who have reached the age of 14;¹²⁶ this is primarily assessed by the physician in charge of treatment.¹²⁷ It depends on whether the minor patient can assess the value of the interests affected by the decision in respect of diagnosis, therapeutic options and alternatives, as well as the opportunities and risks of treatment, and whether he or she can act accordingly.¹²⁸

Insight and judgement are assumed to be given if the child understands the meaning and consequences of a certain action and is also able to withstand outside influences appropriately. It is assumed that a child's ability to judge gradually increases between the ages of 10 and 14 and children must therefore be increasingly involved in decisions that concern them. In order to exclude undue/inadequate influence by third parties as much as possible, to ensure that the wishes expressed are authentic and that the child is not overcharged with such a decision, the decision-making process should be accompanied by an independent psychosocial professional.¹²⁹

If the gonadal, anatomical and/or hormonal sex is unclear, the person affected should always decide for him/herself whether a gender-assigning measure is desirable. Since the treatment has a potential to lastingly affect personality, the legal guardian must also give his or her consent in case the person concerned is under the age of 18 (Sec. 173 par. 2 ABGB).

On condition that the intended intervention is medically indicated, consent may be given by the person entrusted with legal representation, upbringing and education under Sec. 173 (1) sentence 2 ABGB in cases involving minors who are not capable of insight and judgement. If both parents have custody, the consent of one parent will be sufficient under Sec. 167 par. 1. The approval by a family court is not required *de lege lata*.¹³⁰ It goes without saying that the decision of the person having custody must be based on the best interests of the child. However, any risks to the best interests of the child that are associated with such a power of decision-making can currently only be addressed through the application of Sec. 181 ABGB (revocation of and restrictions to custody).

Sec. 163 ABGB, according to which neither a minor child nor the parents can consent to medical measures aimed at permanent inability to reproduce, is not relevant here. The wording of this provision only concerns medical measures targeted at the permanent inability to reproduce, such as castrations and sterilisations.¹³¹

5.2.3 Compensation for unjustified measures

In the past, attempts to assign sex to fit the norm through surgery have caused a tremendous amount of physical and psychological suffering. If medical interventions which are not justified by the above-mentioned reasons are performed on newborn or young children, these are quali-

124 Sec. 24 par. 2, 173 ABGB as amended by the Second Act on the Protection of Adults (2. Erwachsenenschutz-Gesetz, 2. ErwSchG), BGBl. I 2017/59; ErläutRV1461 BlgNR XXV. GP 5.

125 The law does not explicitly tie this to a certain age: *Hopf* in Koziol/P. Bydlinski/Bollenberger (Hrsg.), *Kurzkommentar zum ABGB5* (2017) § 173 Rz. 1.

126 Sec. 173 par. 1 ABGB.

127 ErläutRV 296 BlgNR 21. GP 29.

128 *Hopf* in KBB5 § 173 Rz. 3.

129 See e.g. the opinion of the German Medical Association (Bundesärztekammer), "Versorgung von Kindern, Jugendlichen und Erwachsenen mit Varianten/Störungen der Geschlechtsentwicklung 5; Intersex Society of North America, Recommendations for Treatment.

130 *Hopf* in KBB5 § 173 Rz. 5.

131 *Fischer-Czermak* in Kletečka/Schauer, ABGB-ON1.03 § 163 Rz. 2.

fied as unlawful bodily injury¹³² and in case of culpability, medical personnel and, if applicable, parents are liable for damages.

Thus, in a judgment handed down by the Higher Regional Court of Cologne,¹³³ an intersexual person was awarded damages for an operation in which her (atrophied) female sexual organs were removed. During the operation it became apparent that, contrary to previous expectations, further female genital organs existed and no signs of male genital organs were found. The patient had not been sufficiently informed about the type of intervention (i.a. due to a suicide risk). The court awarded the plaintiff damages, the appeal of the defendant surgeon was rejected by the Higher Regional Court. In the same vein, the Colombian Constitutional Court also ruled several times that fundamental rights had been violated by sex (re)assigning treatments.¹³⁴

As far as can be seen, there is still a lack of relevant jurisdiction from the highest courts in Austria. However, this may not least be due to the fact that the negative effects usually only become apparent years or decades after the illegal interventions were performed. On the one hand, there is a risk that the claims of those affected will become statute-barred; on the other hand, legal proceedings appear to be more difficult for individuals because the doctors in charge at the time may already have passed away or may no longer be found. Moreover, past interventions may not qualify as unlawful because what is unlawful today may have been advocated as *state of the art* at that time.¹³⁵ And eventually, the assertion of claims against legal representatives is not a feasible way for many persons affected because they will not sue their close relatives for the sake of peace in the family.¹³⁶

Therefore, the question as to whether such claims should be borne by third parties in the future is not too far-fetched. In such cases, a compensation fund could e.g. be set up to cover the claims of those concerned without major legal or administrative hurdles. This is also recommended by UN-CAT.¹³⁷

5.2.4 Advice and support for affected families

Usually, the birth of a child with a sex which is not clearly assigned will initially create uncertainty among both parents and the specialists involved. The expectation that a child is either a boy or a girl is called into question due to the variant, without the undiscerning child itself being able to comment. This is usually also an emotionally difficult situation which requires professional advice and support for parents so that a normal emotional bond can develop between parents and child. Thus, the primary aim of counselling is to enable the parents to make the necessary decisions on behalf of the child in a deliberate and calm manner. Time pressure, and above all, societal pressure should be avoided.

132 *Fischer-Czermak*, Zur Handlungsfähigkeit Minderjähriger nach dem Kindschaftsrechts-Änderungsgesetz 2001, ÖJZ 2002, 293 (300).

133 OLG Köln 5 U 51/08 NJW-RR 2009, 960.

134 Corte Constitucional de Colombia T-477/95: Violation of the human dignity and gender identity of a child due to sex-change surgery, SU-337/99: no sex assignment must be performed in an 8-year-old because gender identity has already developed; T-551/99: parental consent is possible for a 5-year-old child if it is sufficiently informed consent.

135 As for the change in attitude and the tendency to take an increasingly critical stance towards early gender assignment surgery, see Deutscher Ethikrat (Hrsg.), *Intersexualität. Stellungnahme vom 23.2.2012*, 61 et seq.

136 As for the problem of enforcing claims for damages in this context, see *Petričević*, *Rechtsfragen zur Intergeschlechtlichkeit* (2017) 157 et seq.

137 UN Committee Against Torture, Concluding observations on the sixth periodic report of Austria, CAT/C/AUT/CO/6.

In practice, the earliest possible referral of parents and their child to a suitable competence centre is helpful; there, an interdisciplinary team with the required medical, psychological, pedagogical, legal, social and ethical expertise will take on counselling and care of parents and child.¹³⁸

In the context of counselling and support, it is first necessary to arrive at the most accurate medical diagnosis possible in order to identify potential health risks and problems at an early stage; nowadays this is mostly done by way of genetically supported diagnosis. Moreover, a comprehensible and basically “open-ended” explanation of therapeutic options and risks, grounded in evidence-based information and related guidelines, is of decisive importance. Information about legal issues and challenges concerning the development of the child during puberty and adulthood, about the societal environment and educational issues, including information on self-help groups and supplementary support services, will also be necessary. If needed, the parents must also be informed about risks for future pregnancies.

In particular, it must be ensured that information on sex-assigning surgery is correctly understood and that surgical interventions are avoided as much as possible because they have no influence on the gender which the person concerned will subsequently feel to be belonging to, nor will they determine his or her sexual orientation. Surgery intervenes in a highly sensitive area in the core of the child’s personality. It has a lasting effect on identity formation, reproductive ability, sexual experience and the parent-child relationship. Potential treatment must be carefully justified, especially as the outcome of surgery will not be the same as the natural male or female sex. Decisions should be made in such a way that they can later be openly advocated vis-à-vis the child or young adult.¹³⁹

In cases of conflict, the interdisciplinary team of advisers should work together with the parents and, if possible, involve the child in the personalised weighing of arguments. As soon as children are mature enough to have a sense of judgment, they must consent to medical treatment.¹⁴⁰

138 See e.g. the opinion of Deutsche Bundesärztekammer, “Versorgung von Kindern, Jugendlichen und Erwachsenen mit Varianten/Störungen der Geschlechtsentwicklung 6 et seq.

139 See the opinion of Deutsche Bundesärztekammer “Versorgung von Kindern, Jugendlichen und Erwachsenen mit Varianten/Störungen der Geschlechtsentwicklung (Disorders of Sex Development, DSD)”; Intersex Society of North America, Recommendations for Treatment.

140 See also 5.2.2. above.

6 Considerations on transidentity

6.1 Medical sex change

6.1.1 Legal requirements

Physically speaking, trans-identical persons clearly belong to one sex, but feel that they belong to the opposite sex. Medical interventions to converge on the traits of the opposite sex therefore usually have purely psychological reasons. Pursuant to Sec. 90 par. 3 of the Criminal Code (StGB), no legally effective consent can be given to genital injury through interventions suited to cause lasting impairment of sexual perception; this is qualified as unlawful bodily injury. Therefore, such interventions are only permissible if they are qualified as curative treatment on the basis of a medical indication.¹⁴¹ According to the “Recommendations for the treatment process in gender dysphoria or transsexualism in the currently valid DSM or ICD version”,¹⁴² published by the Federal Ministry of Health and Family (BMGF), prior urological-gynaecological examination, risk screening and, if necessary, a cytogenetic examination are required.¹⁴³ Moreover, these recommendations require a clinical-psychological or psychotherapeutic opinion before hormone therapy or surgical interventions.

The severe effects of such an intervention on the physical and psychological integrity of those affected suggest particularly stringent demands on their ability to give informed consent. Protection from a rash decision requires intense and well-founded counselling and psychological support for persons desiring a sex change. This includes an expert assessment as to whether this wish is permanent and an explanation regarding the irreversibility of this type of surgery.

Such care and information requirements thus serve to protect the persons concerned and are not meant to be paternalistic. In this sense, the two-stage treatment practiced up to now, which involves a test in everyday life between hormonal treatment and surgery, has proven to be useful. However, it seems worth examining whether it is really necessary – as has been criticised in a communication of the Austrian Medical Chamber to the Federal Ministry of Health¹⁴⁴ – to obtain five different opinions.¹⁴⁵

A self-determined and unalterable desire for a sex change is a prerequisite for such a step, and this can only be determined with sufficient reliability after psychosexual maturity has been reached.¹⁴⁶ A sex change in minors before the age of 14, which is assumed to be the age of consent, is not even possible on the joint request of the minor and the person having custody.¹⁴⁷ In this context, reversible measures such as the suppression of puberty using hormone antago-

141 *Schütz* in Höpfel/Ratz, WK StGB2 § 90 Rz. 155

142 BMGF, Empfehlungen für den Behandlungsprozess bei Geschlechtsdysphorie bzw. Transsexualismus nach der Klassifikation in der derzeit gültigen DSM bzw. ICD-Fassung, as at: 20-6-2017.

143 The requirement of proving the inability to bear children for official approval of a sex change is considered too far-reaching. Such a legal requirement is a violation of u Art. 8 ECHR: ECtHR 10-03-2015, 14793/08, Y.Y./Turkey.

144 Communication of the Austrian Medical Chamber to the Federal Ministry of Health of 18-5-2016 regarding recommendations for the treatment process in gender dysphoria/transsexualism.

145 The communication mentions that the persons concerned consider the diagnostic process as unreasonable; see also information on the website of the Association of Transgender Persons at <http://www.transx.at/Pub/Medizinisches.php>: “running the gauntlet is a gruelling thing”; see *Adamietz/Bager* in BMFSFJ, Regelungs- und Reformbedarf für transgeschlechtliche Menschen 238.

146 *Schütz* in Höpfel/Ratz, WK StGB2 § 90 Rz. 159.

147 According to *Schütz* in Höpfel/Ratz, WK StGB2 § 90 Rz. 159, proxy consent in sex-reassignment surgery is practically impossible, hence if given, this is a punishable (!) act.

nists from about the age of 12 upwards can be helpful.¹⁴⁸ Even after the age of 14 and before the age of 18, the desire for irreversible measures of sex change can only be complied with in very rare exceptional cases. If medically comparable treatment results can also be achieved at a later point in time, reversible measures should in any case be given preference until the person concerned has come of age.¹⁴⁹ Relevant studies should be performed to investigate whether such less severe treatment options can sufficiently meet the wishes of this group of persons.

6.1.2 Reimbursement of costs by social security

In the sense of social security law, transidentity is considered a disease.¹⁵⁰ The clinical picture is complete “if the internal tension between the anatomical sex and the psychological identification with the opposite sex has developed to such an extent that serious symptoms of mental illnesses can only be remedied or alleviated by eliminating this tension.”¹⁵¹ According to the case law of the European Court of Human Rights, an obligation to prove the medical necessity of sex change treatment in order to obtain reimbursement of costs through private health insurance violates the right to respect for private and family life und Article 8 ECHR.¹⁵²

The prerequisite for reimbursement of the psychotherapeutic treatment costs incurred in the course of sex reassignment surgery is that this is either carried out by a physician within the scope of his or her professional licence, or by a psychotherapist who is professionally qualified to do so, a psychotherapist working under the control of a physician under a medical treatment plan or a physician who is otherwise in training within the scope of Sec. 2 par. 3 of the Act on the Medical Profession (ÄrzteG) and supervised by a physician giving training.¹⁵³ The actions required for changing the entry in the register of births with a view to converging on the outward appearance of the new sex are also part of this treatment. In one case of man-to-woman transsexualism, for example, the removal of facial hair and the purchase of a wig or the transplantation of one’s own hair were assessed as medically indicated cosmetic operations and the costs were regarded as deductible medical expenses within the meaning of Sec. 34 (1) of the Income Tax Act (EStG), provided that it is otherwise not possible to achieve the outward appearance of a woman.¹⁵⁴

Whilst, generally speaking, the costs of medical treatment by physicians are reimbursed by the social security institutions in their entirety, the health care regulations for costs of psycho-

148 Österreichische Gesellschaft für Kinder- und Jugendheilkunde (Hrsg.), Positionspapier: Betreuung von Kindern und Jugendlichen mit Störungen der Geschlechtsidentität (Geschlechtsdysphorie, “Transgender”), (2014); the Constitutional Court of Saxonia also advocated a restrictive approach to sex-assigning hormone therapy in minors, see ruling of 28 July 2017, Vf. 99-IV-17 (HS), which says that a revocation of custody in health matters on grounds of actions potentially contrary to the best interests of the child is proportionate when the guardian gives consent to hormone therapy; *Hembree et al.*, Endocrine treatment of gender-dysphoric/gender-incongruent persons: An Endocrine Society Clinical Practice Guideline, *Journal of Clinical Endocrinology and Metabolism* 2017, 102(11):1–35.

149 For German law on options to counter a deficit in self-determination, see *Siedenbiedel*, Selbstbestimmung über das eigene Geschlecht, *Rechtliche Aspekte des Behandlungswunsches transsexueller Minderjähriger* (2016) 229 et seq.

150 OGH 10 Obs 2303/96s SZ 69/209 = DRdA 1997/29 (affirmed by *Mazal*); see OGH 21.12.1995, 3 Ob 570/95: When calculating the assessment base for alimony payments, the added expense incurred for promising psychotherapy to alleviate symptoms needs to be taken into account.

151 (German) BSG 3 RK 15/86 BSGE 62, 83 = NJW 1988, 1550.

152 ECtHR 12-6-2003, 35968/97, *Van Kück*/Germany; 08.01.2009, 29002/06, *Schlumpf*/Switzerland.

153 OGH 10 Obs 2303/96s SZ 69/209 = DRdA 1997/29 (affirmed by *Mazal*).

154 UFS Wien 19-4-2010, RV/2160-W/06 Findok 46698.

therapeutic treatment only provide for contributions to costs.¹⁵⁵ Costs for additional support of a therapeutic nature provided by practitioners who are considered non-medical workers as they do not work the sphere of control of a physician cannot be qualified as costs of medical assistance within the meaning of Sec. 135 par. 1 of the General Social Security Act (ASVG) and will therefore not be refunded at all.¹⁵⁶ It seems reasonable to look into the heightened need for psychotherapeutic treatment in intersexual and trans-identical persons.¹⁵⁷ It is a problem that psychotherapy, which is a mandatory treatment stage according to the recommendations for the treatment process in gender dysphoria or transsexualism, is not fully covered by the health insurance institutions.¹⁵⁸ It is certainly desirable – as demanded in a more recent petition submitted to the Austrian National Council¹⁵⁹ – that psychotherapeutic services be made available at the expense of the social security institutions, not only to intersexual and trans-identical persons, but in general to all persons with a relevant medical indication.

6.2 Change of legal sex

6.2.1 Civil status requirements

According to Sec. 41 par. 1 PStG, the civil status authority has to change an entry if it has become incorrect after registration or has to correct it according to Sec. 42 par. 1 PStG if it was already incorrect at the time of registration. Case law¹⁶⁰ initially set forth the following conditions for an (ex officio) change of the sex entry:

- the person lives with the “compulsive” idea of belonging to a different sex;
- s/he has undergone sex reassignment measures that have led to a clear convergence on the external appearance of the opposite sex;
- it is highly likely that the feeling of belonging to the opposite sex will not change.

In a 2007 decision on the recognition of a sex change under civil law, the European Court of Human Rights left it to the Member States to make sex reassignment surgery a standard prerequisite for the legal recognition of sex change.¹⁶¹ However, in recent decisions on the dependence of sex entries in civil status registers on surgery, the European Court of Human

155 See e.g. Sec. 17 par. 1 Health Insurance Regulations (Krankenordnung) WGKK 2016 in conjunction with Art. 6 of the Constitution of WGKK 2016; Sec. 16 Health Insurance Regulations of BVA 2008 in conjunction with Art. 1 of the Constitution BVA 2011 etc.

156 OGH 23.06.1998, 10 ObS 195/98v.

157 *Richter-Appelt*, Intersexualität – Leben zwischen den Geschlechtern: Erfahrungen aus dem Hamburger Forschungsprojekt (2010) 14; available for download from http://www.ethikrat.org/dateien/pdf/fb_2010-06-23_richter-appelt_referat.pdf

158 Based on a communication of Austrian Medical Chamber to the Ministry of Health of 18-5-2016, 3

159 “Petition Psychotherapie für alle auf Krankenschein – jetzt!” of 26-9-2016, 89/PET XXV.GP (the petition is being dealt with by the Health Committee, 1463 BlgNR XXV. GP. 9).

160 VwGH 95/01/0061 VwSlg. 14.748A etc.; as for the legal challenges, see also *Holzleithner*, Geschlecht als Anerkennungsverhältnis, *juridikum* 2002, 107.

161 ECtHR 11-9-2007, 27527/03, *L./Lithuania*, the violation of Art. 8 ECHR being that there was no rule for complete sex change; a critical opinion on this is found in *Theilen*, The Long Road to Recognition: Transgender Rights and Transgender Reality in Europe, in Schreiber (Hrsg.), *Transsexualität in Theologie und Neurowissenschaften* (2016) 374 (383 et seq.).

Rights declared this to be a violation of Art. 8 ECHR.¹⁶² Accordingly, surgical interventions must not be a prerequisite for a change in sex entry.

Since the leading decision of the Administrative Court in 2008,¹⁶³ the surgical reassignment of primary sexual characteristics is no longer a requirement for a change in the registered sex in Austria.¹⁶⁴ Austria was thus the eighth European country, following Spain, Great Britain, Hungary, Sweden, Switzerland, Finland and Italy to no longer require sex reassignment surgery as a condition for a change in the sex status of persons.¹⁶⁵ The Federal Ministry of the Interior reacted when large parts of the “Transsexual Decree” 1997¹⁶⁶ were repealed by the Constitutional Court (VfGH)¹⁶⁷ in that the Ministry issued a new decree in 2007.¹⁶⁸ This states that “the applicant should be required to submit appropriate expert opinions and findings, in particular a psychotherapeutic expert opinion *and* the medical report pertaining to the sex reassignment surgery. Such evidence is indispensable and if it is clear enough to be used as a basis for a decision, no expert opinion needs to be obtained”. However, according to a more recent ruling of the VfGH,¹⁶⁹ this decree does not imply the necessity of sex reassignment surgery but only that there is no need for an expert opinion if related findings are presented. Furthermore, the decree does not imply that the applicant is required to provide expert opinions and reports from an independent expert as evidence, but that the competent authority is required to investigate the material truth *ex officio*. The German Federal Constitutional Court (BVerfG) also refers to this decision in a ruling¹⁷⁰ in which surgery is expressly qualified as unconstitutional as a legal prerequisite for a gender change. Moreover, the 2007 Transsexual Decree was considered illegal overall – to the same extent and for the same reasons as its predecessor¹⁷¹ – although the VfGH has since at least confirmed its formal conformity with the law.¹⁷²

However, according to case law, a clear convergence on the external appearance of the opposite sex – which is possible without removal of the genitals – is still a prerequisite, in the sense that a person’s identity has to be ascertained in a simple and unambiguous way. By contrast, draft self-determination legislation (BT-Drucks. 18/12179) was introduced in the German

162 ECtHR 6- 7- 2017, 79885/12, *A.P./France*; ECtHR 6- 7- 2017, 52471/13, *Garçon/France* and ECtHR 6- 7- 2017, 52596/13, *Nicot/France*; two proceedings concerning potential violations of Art. 8 ECHR by intransparent requirements for name/sex entry changes in civil status registers are pending, see ECtHR motion of 25.-5- 2013, 36253/13, *R.L./Russia* and motion of 30-5-2013 52516/13, *P.O./Russia*.

163 VfGH 27. 2. 2009, 2008/17/0054; see *Greif*, *Kein Operationszwang für Transsexuelle*, ÖJZ 2009/67, 622.

164 Numerous arguments in favour of this position can be found in dBverfG 1 BvL 3/03 BVerfGE 115, 1 (in particular Rn. 24 et seq.).

165 See the position paper of Wiener Antidiskriminierungsstelle für gleichgeschlechtliche und transgender Lebensweisen (2013) 27 f: <https://www.wien.gv.at/menschen/queer/pdf/broschuere-transidentitaeten.pdf>.

166 Erlass BMI 36.250/66-IV/4/96; printed in VfGH V4/06 VfSlg. 17.849.

167 VfGH V4/06 VfSlg. 17.849: The decree was unlawful because it ought to have been promulgated in the Federal Law Gazette.

168 Decree (Bundesministerialerlass) of 12-1-2007 concerning transsexualism – procedure after sex-reassigning surgery, VA 1300/0013-III/2/2007

169 VfGH B 1973/08 iFamz 2010/41, 71.

170 BVerfG 1 BvR3295/07 BVerfGE 128, 109: “*Legislative demands for proof of sustained belonging and life as a person of the other sex are too stringent and unreasonable for those concerned; if legislation makes it an unconditional and unavoidable requirement for the recognition of a gender under civil status law to tie this to sex reassignment surgery which also leads to a loss of reproduction ability, this is also a violation of Art. 2 par. 1 in conjunction with Art. 1 par. 1 GG when this is stated in Sec. 8 par. 1 no. 3 and 4 TSG (see also ruling of the Austrian Constitutional Court of 3 December 2009 - B 1973/08-13 -, S. 8 ff)*”.

171 *Greif*, ÖJZ 2009/67, 623 et seq.

172 VfGH B 1973/08 iFamz 2010/41, 71.

Bundestag – this was repeatedly called for in Germany¹⁷³ – to simplify the procedure for sex changes, among other things. The only prerequisite should be the gender perception of the person making the application.

However, this would put the selection of the sex entry largely at the discretion of the applicant, which could lead to uncertainty in legal transactions and create undesirable incentives for opportunistic behaviour (e.g. quotas for women in supervisory and management bodies). The disclosure of other personal data – such as date of birth, place of birth or nationality (conforming with the actual circumstances) – must be accepted by individuals in the public interest when identities are checked, although such data is of considerable significance for the citizen's own sense of identity.¹⁷⁴

The ECtHR has ruled that, once sex reassignment has taken place, the issuance of a new birth certificate reflecting the changed sex must not be denied.¹⁷⁵ In the light of this fundamental right requirement and the previously described departure in supreme court rulings from the “obligation of surgery” and associated administrative practice, it now appears necessary in the interest of legal certainty that the new requirements for a change in the civil status sex entry be enshrined in positive law; the requirements for a sex change need to be expressly stated in the Civil Status Act.

It is in any case conceivable that an entitlement to the re-issuance of all documents (identity papers, civil status certificates, educational certificates, etc.) arises after the sex entry has successfully been changed in the civil status register; this way the “new” gender is legally protected and obstacles in dealing with authorities (as described in 4.3.) are avoided, etc. This entitlement could be enforced with both public and private bodies. With regard to the procedure of reissuance, proven rules for this exist for cases such as a change of name due to marriage, and these can probably be applied in this context. Such an entitlement would have to be enshrined in law because it also comes with consequences for third parties, and a moderate compensation for the resulting administrative expenses would also have to be discussed.

6.2.2 Consequences for marriages or registered partnerships

The existence of a marriage does not preclude a change in the sex entry in the register of births.¹⁷⁶ In this respect, the rulings of the Federal Constitutional Court provide intersexual persons with more far-reaching protection than required by the European Court of Human Rights, which does not consider it a violation of Article 8 ECHR if the transformation of marriage into a registered partnership is required as a condition for the legal recognition of the assumed

173 *Adamietz/Bager* in BMFSFJ (Hrsg.), *Regelungs- und Reformbedarf für transgeschlechtliche Menschen* (2016) 11 et seq., 33 et seq. passim; bill in BT-Drucks. 18/12783 (Antrag) of 20-6-2017, i. a. calling upon the federal government to adopt the legal framework prepared by *Althoff/Schabram/Follmar-Otto*, in *Deutsches Bundesministerium für Familie, Senioren, Frauen und Jugend* (Hrsg.), *Gutachten. Geschlechtervielfalt im Recht; Adamietz, Rechtliche Anerkennung von Transgeschlechtlichkeit und Anti-Diskriminierung auf nationaler Ebene – Zur Situation in Deutschland*, in *Schreiber* (Hrsg.), *Transsexualität in Theologie und Neurowissenschaften* (2016) 358 (369 et seq).

174 See also Sec. 118 of the Code of Criminal Procedure (StPO): If persons cannot be identified due to a refusal to show an ID or for other reasons, CID may *ex officio* subject that person to bodily search under par. 4 of the related rule, and according to Sec. 117 sub-par. 3 lit. b StPO this may even include strip-searching.

175 ECtHR 25-03-1992, 13343/87, *B./France*; 11-07-2002, 28957/95, *Goodwin/UK*; in a different vein ECtHR 25-9-1986, 2/1985/88/135, *Rees/UK*; 27-09-1990, 10843/84, *Cossey/UK*, 22-4-1997, 21830/93, *X. Y. & Z./UK*; 30-7-1998, 23390/94, *Sheffield & Horsham/UK*.

176 VfGH V4/06 VfSlg. 17.849. A related matter from Germany: BVerfG 1 BvL 10/05 BVerfGE 121, 175 = NJW 2008, 3117.

sex,¹⁷⁷ or if a Member State requires the termination of marriage so that the sex change can be recognised.¹⁷⁸ As regards the current legal situation in Austria, it is generally assumed that sex reassignment would lead to a same-sex marriage from the date on which the new sex is entered under civil status law; the difference in sex would therefore only be a precondition for getting married,¹⁷⁹ not a condition for staying married.¹⁸⁰

The other spouse may request annulment of the marriage pursuant to Sec. 37 of the Marriage Act (EheG) or a divorce pursuant to Sec. 49 or Sec. 50 EheG; concealment of the sex change constitutes unlawful and culpable conduct within the meaning of Sec. 42 (2) EheG.¹⁸¹

In terms of the impact on an existing marriage or registered partnership, recent judgments of the European Court of Human Rights say that there is a certain degree of leeway for legislators. The pragmatic solution chosen in Austria seems to be in line with the interests at stake so far. However, it should not be overlooked that remaining in an exceptional same-sex marriage or a registered partnership of different sexes can also raise questions in the societal environment, thus running counter to the interests of the persons concerned. Giving those affected a choice could be an adequate solution here. A change in the sex entry in the register of births would have no influence on an existing marriage or registered partnership; however, the persons concerned and their spouses or registered partners could have the right to apply for a switch from registered partnership to marriage or vice versa, depending on the sex constellation after the re-registration.

Marriage to a person of one's former sex is in any case an option open to trans-identical persons after sex-reassignment surgery and entry in the civil status register.¹⁸² According to a decision of the European Court of Justice, this must also apply to persons who have undergone sex change but who have not had the new sex entered in the birth register for lack of such a legal option.¹⁸³

6.2.3 Aspects of parent and child law

Unless absolutely necessary, unfavourable legal effects resulting from sex changes must be avoided to the greatest possible extent. Therefore, it seems quite appropriate that these are not considered to have any effect on the current law of descent. The Austrian law of descent as set out in Sec. 140 et seq. ABGB does not cover the parenthood of two men. This does not mean, however, that in the event of a change of sex from mother to man, parenthood is affected.

The German Federal Supreme Court recently ruled that a woman-to-man transsexual who had given birth to a child after the sex change registration is legally speaking the mother of that child;

177 ECtHR 16-7-2014, 37359/09, *Hämäläinen/Finland*.

178 ECtHR 28-11-2006, 42971/05, *Parry/UK* und 28.11.2006, 35748/05, *R. and F./UK*.

179 However, proceedings for a constitutional review of such a precondition is pending before the Constitutional Court: VfGH, resolution to review 12-10-2017, E 230-231/2016-27.

180 *Kopetzki*, Transsexualität und das Wesen der Ehe, iFamZ 2008, 81; *ibid.*, Transsexuellen-Erlass – Aufhebung, RdM 2007, 56 (59); a different opinion is voiced by *Jaksch-Ratajczak*, Gibt es in Österreich eine Ehe unter Gleichgeschlechtlichen? EF-Z 2006, 111. One has to mention, however, that this opinion dates to the time before the Act on Registered Partnerships (Eingetragene Partnerschaft-Gesetz, EPG), BGBl. I 2009/135, took effect.

181 OGH 3 Ob 84/14w Zak 2014, 290 = iFamZ 2014, 269 (*Deixler-Hübner*) = EF-Z 2015, 122 (*Schoditsch*).

182 VwGH 95/01/0061 VwSlg. 14748A. National legislation which does not allow for such marriages violates Art. 12 ECHR: ECtHR 11-7-2002, 28957/95, *Goodwin/UK*.

183 ECJ 7-1-2004, C-117/01, *K.B./National Health Service Pensions Agency*, Slg. 2004 I-568.

the application of the plaintiff who had applied for registration as a father was not granted.¹⁸⁴ He must therefore be entered as a mother in the birth register and the birth certificate.¹⁸⁵

Under Austrian law, parental custody (Sec.158 et seq. ABGB) and contact rights/obligations (Sec. 186 ff. ABGB) also remain in force after the entry of the new gender. Restrictions on a trans-identical person's contact with his or her minor child have been found permissible in individual cases on the basis of general principles only, i.e. if this is indicated due to the established emotional instability of the trans-identical person during the sex change which has specific repercussions on the best interests of the child concerned.¹⁸⁶ In the event of a conflict of interests, the best interests of the child must be given priority over the needs of the trans-identical parent, as has been the case so far.

In the context of sex reassignment surgery, the removal of germ cells for future medically assisted reproduction may be justified if a permanent inability to reproduce is to be feared.¹⁸⁷ In view of the inconsistent legal situation in the States Parties to the Convention, the ECtHR confirmed the permissibility of a national regulation which does not recognise a trans-identical person previously living as a woman as the father of a child given birth to by the partner after artificial insemination with donor sperm. According to the ECtHR, such a provision is in line with Art. 8 ECHR.¹⁸⁸

According to the Reproductive Medicine Act (FMedG), medically assisted reproduction would also be legally possible in Austria for couples where one partner is a trans-identical or intersexual person; the prohibition of surrogacy needs to be considered in this context. Sec. 143 ff ABGB as amended by the Act amending the Reproductive Medicine Act (FMedRÄG 2015)¹⁸⁹ are basically suited to cover the situation in which a man-to-woman trans-identical person who had his semen preserved before the sex change becomes the "other parent" of the child conceived with this semen. The fact that complications can occur in exceptional cases when the formalities (notarial deed) provided for in Sec. 8 par. 1 Sentence 2 FMedG are circumvented, does not significantly distinguish couples with a trans-identical or intersexual partner from other couples.

6.2.4 Consequences under pension law

With regard to retirement pensions, the ECJ ruled that a sex change must be taken into account when a retirement pension is granted after the respective retirement age for the new sex.¹⁹⁰ The same applies to the possibility of making the partner a beneficiary of a survivor's pension after a sex change.¹⁹¹ The sex change has an *ex nunc* effect, i.e. it takes effect for the future.

184 BGH XII ZB 660/14 NJW 2017, 3379.

185 Such entry in the register is rejected in *Dethloff*, Stellungnahme in BMFSFJ, Geschlecht im Recht 31 et seq., because it would contradict the gender identity of the parents and the best interests of the children not to involuntarily disclose the transgender character of the parent. *Scherpe*, Stellungnahme in BMFSFJ (Hrsg.), Geschlecht im Recht (2017) 45 et seq. pleads not to use the terms "motherhood" and "fatherhood" and replace them by "parenthood".

186 ECtHR 30-11-2010, 35159/09, P.V./Spain; see OGH 26.02.1997, 3 Ob 45/97g.

187 *Leischner-Lenzhofer* in *Aigner/Kletečka/Kletečka-Pulker/Memmer*, Handbuch Medizinrecht, I.23.5.1.1.

188 ECtHR 23-04-1997, 75/1995/581/667, X./UK.

189 Bundesgesetz, mit dem das Fortpflanzungsmedizinengesetz, das Allgemeine bürgerliche Gesetzbuch, das Gentechnikgesetz und das IVF-Fonds-Gesetz geändert werden, BGBl. I 2015/35. This law also amends the Civil Code, the Genetic Engineering Act and the IVF Fund Act.

190 ECJ 27-4-2006, C-423/04, *Richards*, Slg. 2006 I-3585; ECtHR 11-7-2002, 28957/95, *Goodwin/UK*: The refusal to grant the retirement pension according to the new gender is considered a violation of Art. 8 ECHR.

191 ECJ 7-1-2004, C-117/01, *K.B./National Health Service Pensions Agency*. Slg 2004, I-568.

An increase of the retirement pension according to Sec. 261c ASVG will not be granted if the gender change occurs after the age of 60.¹⁹²

6.3 Change of name

Section 13 (2) of the Civil Status Act stipulates that the first name of the child must not contradict its gender. Pursuant to Sec. 2 par. 2 no. 3 Name Change Act (NÄG),¹⁹³ a person's first name may be changed upon application if it does not conform with the applicant's gender. According to Sec. 3 par. 1 no. 7 NÄG, the change of the first name cannot be approved if the first of the first names applied for does not correspond to the applicant's gender. Thus, gender-neutral first names are possible.

If this is in keeping with the origin of the person or the linguistic tradition of the country which the name of the person comes from, the family name can be adapted to the gender according to Sec. 2 par. 1 line 7a NÄG in conjunction with Sec. 93a par. 3 ABGB (for example: Slavic names ending in -ova/ov, -ska/sky etc.). Gender-related additions to names (e.g. Singh, Kaur) may also be registered for persons with a non-Austrian civil status, but these are not considered as first or family names.¹⁹⁴

The change of name is based on a legally binding official decision following administrative proceedings under the NÄG.

Name law does not contain any provisions for the determination of gender. In practice, the first name is not changed before a change in civil status has taken place unless a gender-neutral name is adopted.¹⁹⁵ In this case, the applicant can base the adoption of a gender-neutral name on Section 2 par. 1 no. 10 NÄG by demonstrating that the change of name is necessary in order to avoid unreasonable disadvantages in economic terms or societal relations.

However, the three criteria for determining gender (see above), which have been developed by the courts in connection with civil status law, would not necessarily have to be used for name law.¹⁹⁶ Since there is no uniform definition in the Austrian legal system, the concept of gender can be interpreted separately for each norm.

More than the sex stated in the register of births, a person's names serve to express personal identity; this falls within the scope of protection of private life within the meaning of Art. 8 ECHR. Names are also important for the societal recognition of the gender which the person concerned identifies with. A broad understanding of the gender concept can therefore be used

192 OGH 10 Obs 29/09a SZ 2009/50.

193 BGBl. 1988/195.

194 Bundesministerium für Inneres, Rundschreiben Namensbestimmung vom 18.03.2013, BMI-VA1300/73-III/2/2013, 20.

195 <https://www.wien.gv.at/menschen/queer/transgender/geschlechtswechsel/rechtlich/vorname.html>.

196 According to current case law of the ECtHR it is considered a violation of Art. 8 ECHR when a change of gender or name entry is made dependent on sex change surgery or sterilisation, see ECtHR 6- 7- 2017, 79885/12, *A.P./France*; ECtHR 6- 7- 2017, 52471/13, *Garçon/France* and ECtHR 6- 7-2017, 52596/13, *Nicot/France*; moreover, ECtHR motion of 30- 5-2013 52516/13, *P.O./Russia* (pending) and motion of 13-11- 2008, 55216/08, *S.V./Italy* (pending).

for purposes of name law; instead of focusing on the biological sex and psychological gender, personal gender perception alone can be considered as an assessment criterion.¹⁹⁷

The free choice of name as a person affected creates a loaded field when juxtaposed with the principle of name continuity. Repeated name adjustments could put a strain on legal and societal interactions, as it would be difficult to clearly identify a person. However, the impact of a name change on public interests are not as marked as in civil status law or pension insurance law. However, as with the third condition for changing the sex entry in the register of births (see 6.2.1), it could be a conceivable requirement that there is a high probability for the feeling of belonging to the opposite sex not to change. Furthermore, it could be argued that the need to converge on the external appearance of the opposite sex would continue to underpin precisely those gender dichotomies and stereotypes that need to be overcome in the name of more tolerance and diversity.

197 Vgl. *Gottschamel*, Die Regelung der Geschlechtsnamen, *AnwBl* 2015, 653 (659 f.).

7 Recommendations of the Bioethics Commission

On the basis of the considerations set out in Chapters 1 to 6, the Austrian Bioethics Commission established at the Federal Chancellery submits the following recommendations:

7.1 Recommendations against exclusion and discrimination

1. Divergence from the binary male/female pattern is, as such, not to be seen as a medical condition and any kind of inappropriate pathologisation – including the use of related terminology – must be avoided. However, in the context of intersexuality and transidentity, the qualification as a medical condition cuts both ways: on the one hand, it may be perceived as derogatory and stigmatising by those affected, on the other hand it is a necessary requirement for assumption of costs by social insurance providers. In any case, qualification as a medical condition should be restricted to cases where a condition leads to physical dysfunction, serious health risks or emotional distress and is perceived as potentially requiring treatment by those affected.
2. Any form of discrimination based on (assumed) intersexuality or transidentity should be qualified as a form of sex discrimination. This must be prevented and counteracted in all areas of life and society, such as school, work life and social security. In order to avoid exclusion and stigmatisation, more attention should be given to awareness-raising measures in kindergarten and school already. The training of medical and nursing staff as well as educational staff in kindergarten and school should specifically address the situation of intersexual and trans-identical individuals.
3. Overall, there seems to be an urgent need to raise public awareness for the special situation of intersexual and trans-identical individuals, for example through appropriate media work. If a sufficient degree of awareness is achieved, there can be no doubt that traditional language and cultural practices may be maintained (such as “Ladies and gentlemen...” for addressing an audience or in ballroom dancing), in particular as they do not imply any intention to segregate or exclude.
4. Public and private entities should carefully reconsider any requests that individuals disclose their gender in day-to-day registrations and similar situations. Compulsory disclosure of gender requires special justification, such as medical or organisational reasons (e.g. accommodation in multi-bed rooms). Where new legislation is introduced the legislator must carefully re-examine any provisions that differentiate on the basis of sex or gender and check whether this distinction is objectively justified.
5. The Bioethics Commission calls on the Federal Government to commission studies with the aim of determining the form of address etc. which best meets the wishes of those concerned. This should have a direct effect on the design of forms and similar pre-formulated statements, especially if they are used by public authorities.
6. In planning buildings, sports facilities, societal events, etc., more consideration should be given to the possibility that people cannot or do not want to be identified with either the male or the female sex or gender. In the case of sanitary facilities, it is advisable to re-label existing barrier-free facilities, which until now have usually only been marked with the wheelchair symbol. However, no legal obligation should be introduced for public and/or private entities to provide for an additional gender-neutral option, for example

with regard to changing facilities or physical education. Quite apart from considerations of economic proportionality, this would not seem advisable because such measures may again be perceived as stigmatising.

7. If only the options “male” or “female” are available in everyday situations – for example in public sanitary facilities – trans-identical persons as well as persons with physically ambiguous sex characteristics should have a choice. Exceptionally, the individuals concerned may be requested to act consistently in terms of external appearance if this is necessary to protect the legitimate interests of third parties. Any compulsory differentiation according to sex or gender requires objective justification; in competitive sports, for example, such a differentiation should be seen as a way to create a level playing field between competitors.

7.2 Recommendations with regard to sex assignment

8. If the biological sex is unclear, the individuals concerned must decide for themselves whether or not to undergo sex-assignment measures. For this reason, sex-assignment measures in new-born or young children must in any case be avoided; the individuals concerned must at least be able to give consent on their own, which is presumed to be the case from the age of 14 (Sec. 173 par. 1 ABGB). Since the treatment is potentially associated with a lasting impairment of the individual’s personality, the person having custody must also give his or her consent where the individual concerned has not yet reached the age of 18 (Sec. 173 par. 2 ABGB).
9. Sex-assignment measures in new-born or young children are only justified where there exists a medical indication. This is e.g. the case if measures are required to remedy dysfunctions (for example, urogenital malformations leading to difficulties in micturation) or to avert serious damage to health or even as a life-saving measure, and the person having custody over the child has given their consent, which may even have to be substituted by the court. Mere fear of stigmatisation on the part of families does not constitute a sufficient medical indication for an intervention in a new-born or young child; however, a well-founded prognosis of depressive or similar psychological disorders may amount to a medical indication in accordance with general principles.
10. Even where there exists a medical indication, reversible interventions should be preferred to irreversible interventions wherever possible. Particular attention should be paid to potential fertility-maintaining measures, such as the preservation of removed gonadal tissue.
11. Any medical intervention that lacks a medical indication qualifies as unlawful bodily injury; in the event of fault, medical personnel and parents may be liable for damages. The Federal Government is called upon to examine whether a compensation fund can be set up to indemnify those who were injured by a medical intervention in the past and for whom the pursuit of individual legal claims is no longer possible or too difficult. This fund should also allow for symbolic compensation that is independent of prescription or fault.

12. Sex-assignment measures should only be carried out in specialised centres, on the basis of a comprehensive risk-benefit assessment and after detailed counselling of the individuals concerned and their families, which, in addition to the medical options, should also take into account potential risks to the later psychological well-being of the individuals concerned. Measures involving a loss of fertility or ability to have sexual intercourse should only be taken after thorough discussions in an interdisciplinary concilium.
13. Decentralised counselling and support services should be made available to the individuals concerned and their families on a permanent basis. They should provide support in coping with everyday problems, in deciding on possible medical measures or in taking legal action in case of discrimination.
14. In the civil status register, an additional option, e.g. “open”, should be available as an alternative to “male” or “female” under the heading “sex entry”; this third option would not represent a separate sex of its own but would stand for a broad spectrum of ambiguous sex and gender identities as an alternative to the binary man/woman model. In the case of new-born children with ambiguous sex characteristics, the person having custody should have a right to decide whether to choose the category closer to the child’s characteristics or the additional option, or whether no entry should be made at all at that point of time. If it turns out over time that the wrong entry has been selected, the person having custody should be entitled to have the entry changed after having heard the child in an age-appropriate manner. Civil status law should provide for flexibility in giving first names.
15. If, at the request of the person having custody, no entry was made at all the individual concerned should choose one of the three options within a reasonable period after turning 18.
16. The legislator is called upon to make appropriate arrangements for persons who have chosen the “open” option if they wish to enter into a marriage or registered partnership, as regards their retirement pension, military service, etc. These arrangements should respect the individuals’ strong desire for a classification that corresponds to their gender identity and, at the same time, avoid incentives for opportunistic behaviour.

7.3 Recommendations with regard to gender reassignment

17. The Bioethics Commission expressly supports the idea that individuals who are suffering due to the disparity between their psychological gender (gender identity) on the one hand and their anatomical sex on the other and who feel they are “living in the wrong body” are entitled to comprehensive interdisciplinary advice and care in Austria and have access to medical gender reassignment treatment. Treatment costs should be eligible for reimbursement by the statutory health insurance under general rules if the measures are necessary according to the applicable recommendations for treatment in cases of gender dysphoria or transsexualism.
18. Intensive counselling and psychological support for individuals with a desire for medical gender reassignment – including assessment of the seriousness and permanence of that wish by experts – are an important protection against rash decisions which will have

serious consequences for the future life of the individuals concerned. Such protection has nothing to do with undue paternalism. Counselling and support is not only justified from an ethical point of view; on the contrary, it is indispensable. The two-stage procedure currently in practice, which provides for a test in everyday life after hormonal treatment and before surgery, should be maintained. However, a reduction in the number of expert opinions required should be discussed, as the diagnostic process with multiple expert opinions from different professional groups currently appears disproportionate and could be a special barrier for an individual's wish for gender reassignment.

19. Medical gender reassignment for minors before they reach the age of consent, which is presumed to occur at the age of 14, should not even be carried out at the joint request of the minor and the person having custody. The Bioethics Commission calls on the Federal Government to commission studies on how the desire for gender reassignment measures can best be met for people who are 14 years of age but not yet 18.
20. Gender reassignment is often not only a drastic measure for the individual concerned, but also for close relatives, especially for underage children and other family members. Therefore, appropriate counselling and support should also be available for these family members.
21. Wherever the law differentiates between individuals of different sex or gender, the conditions under which sex or gender may be considered as having changed must be determined separately for each individual legal context according to the purpose of the relevant law. Just like parentage, date of birth, place of birth or nationality, the entry relating to sex in civil status registers or identity papers serves to ascertain a person's identity. It is also important in a legal context where differentiation is justified by biological circumstances (such as compulsory military service, retirement pension, women's quotas in committees, breast cancer screening, etc.). It may therefore be justified to request, in accordance with case law of the European Court of Human Rights (ECHR), externally manifest changes that will probably be of a permanent nature for changing the entry in civil status registers. Just like the indication of a date of birth does not constitute ageism, the indication of sex as such has no discriminatory effect. This will particularly hold true if – following the recommendations of the Bioethics Commission – a further option is introduced in addition to “male” or “female”.
22. An individual's name is a fundamental aspect of expressing one's own identity. A change of first name should not be made dependent on a change of the entry on sex in the civil status register. A broad understanding of the concept of gender should be used in the context of adapting the first name or surname to gender. In contrast to the entry in the civil status register, this should not be based on biological aspects, but on personal gender perception. However, legal certainty may require that the individual's perception is of an enduring nature.
23. With regard to the effects of gender reassignment on an existing marriage or registered partnership, the individuals concerned should have a choice whether they wish to switch to the respective other legal option or whether they wish to continue living in a marriage (which would, exceptionally, be a same-sex marriage) or registered partnership (which would, exceptionally, be an opposite-sex partnership). Gender reassignment should continue to have no automatic effect on surnames, parentage and similar legal relationships.

24. Once a change has been registered in the civil status register, the individuals concerned should be entitled vis-à-vis public and private entities to have all documents reissued which that individual can reasonably be expected to need also in the future (e.g. identity papers, civil status documents, educational certificates). Given that this implies a burden for third parties the details would have to be set out in the law, and a moderate compensation for the resulting administrative expenses would have to be discussed.
25. Given that this issue is highly relevant for fundamental rights protection the requirements for a change of the entries on sex and name in the civil status register, as well as the consequences for existing legal relationships under family law, should be clearly set out in the relevant legislation.

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Abbreviations

ABGB	Civil Code, Allgemeines Bürgerliches Gesetzbuch
AFI	Athletics Federation of India
AGS	adrenogenital syndrome
AnwBl	Anwaltsblatt
Art	article
ASVG	General Social Security Act, Allgemeines Sozialversicherungsgesetz
BGBI	Federal Law Gazette, Bundesgesetzblatt
BGH	(German) Federal Court of Justice, Bundesgerichtshof
B-GIBG	Federal Act on Equal Opportunities in the Federal Sphere, Bundes-Gleichbehandlungsgesetz
BMFSFJ	(German) Federal Ministry for Family Affairs, Senior Citizens, Woman and Youth, Bundesministerium für Familie, Senioren, Frauen und Jugend
BMGF	Federal Ministry for Health and Family
BMI	Federal Ministry of the Interior
BSG	(German) Federal Social Court and social jurisdiction, Bundessozialgericht
BT-Drucks	Deutscher Bundestag – Drucksachen
BVerfG	(German) Federal Constitutional Court, Bundesverfassungsgericht
B-VG	Federal Constitutional Law, Bundes-Verfassungsgesetz
CAIS	complete androgen insensitivity syndrome
CAT	Committee against Torture
cf.	compare
CFR	Charter of Fundamental Rights
dBGBl	(German) Federal Law Gazette, deutsches Bundesgesetzblatt
DMS	Diagnostic and Statistical Manual of Mental Disorders
DNA	deoxyribonucleic acid
dPSTG	German Civil Status Act, deutsches Personenstandsgesetz
DRdA	Das Recht der Arbeit
DSD	Differences of Sex Development; formerly: genuine hermaphroditism
e.g.	for example
ECHR	European Convention on Human Rights
ECJ	European Court of Justice
ECtHR	European Court of Human Rights
EF-Z	Zeitschrift für Familien- und Erbrecht
EheG	Marriage Act, Ehegesetz
Endocr Dev	Endocrine Development
ErläutRV	explanatory remarks to the government bill, Erläuterungen zur Regierungsvorlage
EStG	Income Tax Act, Einkommenssteuergesetz
et al	et alii
EUV	TEU, Treaty on European Union, Vertrag über die Europäische Union
AEUV	TFEU, Treaty on the Functioning of the European Union, Vertrag über die Arbeitsweise der Europäischen Union
MedG	Reproductive Medicine Act, Fortpflanzungsmedizingesetz
FMedRÄG	Act amending the Reproductive Medicine Act, Fortpflanzungsmedizin-rechts-Änderungsgesetz
GBK/GAW-G	Federal Act on the Equal Treatment Commission and the Ombud for Equal Treatment, Bundesgesetz über die Gleichbehandlungskommission und die Gleichbehandlungsanwaltschaft

GG	Basic Law, Grundgesetz
GIBG	Federal Equal Treatment Act, Gleichbehandlungsgesetz
GP	legislative period, Gesetzgebungsperiode
i.a.	inter alia
IAAF	International Association of Athletics Federations
ICCPR	International Covenant on Civil and Political Rights
ICD	International Classification of Diseases
iFamZ	Interdisziplinäre Zeitschrift für Familienrecht
KBB	Comment to the Civil Code named after the editors Koziol/Bydlinski/ Bollenberger
LGBTI	Lesbian, Gay, Bisexual and Transgender and Intersexual
LGBTQ	Lesbian, Gay, Bisexual and Transgender and Queer/Questioning
NÄG	Name Change Act, Namensänderungsgesetz
NJW	Neue Juristische Wochenschrift
NZFam	Neue Zeitschrift für Familienrecht
ÖJZ	Österreichische Juristen-Zeitung
OLG	Higher Regional Court, Oberlandesgericht
PAIS	partial androgen insensitivity syndrome
par.	paragraph
para	paragraph
PStG	Civil Status Act, Personenstandsgesetz
RdM	Recht der Medizin
Sec.	Section
StGB	Criminal Code, Strafgesetzbuch
StPO	Code of Criminal Procedure, Strafprozessordnung
Suppl.	Supplementary
UFS Wien	Unabhängiger Finanzsenat
UNCRC	United Nations Convention on the Rights of the Child
VfGH	Constitutional Court, Verfassungsgerichtshof
VwGH	Higher Administrative Court, Verwaltungsgerichtshof
VwSlg	Sammlung der Erkenntnisse und wichtigsten Beschlüsse des Verwaltungsgerichtshofs
VfSlg	Sammlung der Erkenntnisse und wichtigsten Beschlüsse des Verfassungsgerichtshofs
WHO	World Health Organization
WPATH	World Association for Transgender Health
ZäöRV	Zeitschrift für ausländisches öffentliches Recht und Völkerrecht
TSG	(German) Transsexual Law, Transsexuellengesetz

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