

## TransGender and Human Rights in Austria

### ***Preliminary note***

The term “**transsexual**” is used according to the WHO definition of ICD10 F64.0 for people, who “desire to live and be accepted as a member of the opposite sex, *usually* accompanied by the wish to make his or her body as congruent as possible with the preferred sex through surgery and hormone treatment.” Their need for medical treatment varies widely and does not necessarily include a demand for genital reassignment surgery (SRS).

The term “**transgender**” is an umbrella term covering transsexuals as well as temporary gender switcher and people with ambivalent performance and identities.

### ***Legal conditions for gender migration***

In Austria the civil status law (§16, Personenstandsgesetz, 1983) grants the opportunity for legal gender reassignment. Up to June 6<sup>th</sup> 2006 the conditions were regulated by the so-called Transsexual Edict, which was repealed by the High Constitutional Court of Austria (Verfassungsgerichtshof) due to the fact that it required married transsexuals to divorce before their new gender was legally recognised.

Since that the civil status of about five married post-operative transsexuals has been changed.

Since there is no statutory source, which declares under which circumstances the gender status entry should be corrected, the decision is left to government agencies. These uniformly require genital surgery, even from people who have already lived in their chosen gender for years, and have had other medical treatment, which has changed their appearance completely.

### ***Required reassignment surgeries***

Born men, who want to be recognised as women, have to accept castration (penectomy and orchidectomy) and have to prove the construction of a neo vagina. Born women, who want to be recognised as men, have to undergo mastectomy (chest ablation), hysterectomy and ovariectomy. The required removal of inner organs can only be understood as compulsion to infertility, which for instance is explicit formulated in the German transsexual law (1980). Since the construction of a penis is very risky, time consuming and expensive such surgeries are not in demand.

### ***Discrimination***

As these people have no right to ask for legal documents that reflect their lived gender and a first name consistent with it, they are forced to disclose their transsexuality in every day life. This leads to discrimination in various ways:

- In many professions transsexuals lose their job as soon they starting their real life experience, which is the period of at least one year that transsexual have to life full time in their chosen gender before being accepted for genital surgery.
- Transsexuals who could stay employed have to be prepared to face mobbing.
- According to an analysis of TransX about 75% of all transgender people loose their job whilst transition.
- In almost all cases the formal reason for the dismissal of transsexuals is not their gender identity.
- It's almost impossible to find another job as long as transsexuals have to identify themselves with documents that do not fit their gender appearance.
- These people are confronted with inconveniences, insults and bad jokes, as soon as they have to declare their birth-gender.
- There is an immense social and economic pressure on individuals who do not wish to undergo genital reassignment surgery to have such surgery in order to obtain legal recognition.

## ***Current development***

A transwoman who has lived for more than 20 years as a woman (without genital reassignment surgery) is trying to get legal gender recognition through the courts of law. The case is now in the second level of national jurisdiction.

The government is aware that a new transgender law should be passed, but up to now it is not obvious that the force to SRS will be abolished similarly as in UK (2004) or Spain (2007).

## ***Human Rights***

The refusal of legal recognition and proper identity papers to transgender people who have not undergone genital reassignment surgery contradicts Article 8 of the Convention. It is obvious, that the enforced disclosure of one's transgender status violates the right to respect for one's privacy (see the court's judgement *Christine Goodwin v. U.K., I. v. U.K.*, 11 July 2002).

Making legal status recognition and (effectively) the enjoyment of fundamental rights (e.g. to non-discrimination) dependent on genital/gender reassignment surgery violates the right to physically integrity of the person (Art. 3, ECHR), since the individual is obliged to undergo major and irreversible surgery, whether he/she wishes to, or not.

For transgender people the compulsion to declare the birth gender in identity papers is equivalent to having to disclose highly sensitive data on their health. Transsexuality is accepted as illness worldwide (ICD 10, F 64.0). The dissemination and storage of medical data is restricted according to the Austrian Data Protection Act (DSG 2000) based on the EU directive 97/66. This offers transgender people the opportunity to ask for the deletion/ change of their gender entry marks in all private databases as long as these store the birth gender.

However the paragraph excludes information that is stored according to a law, e.g. the data used for registration and identity papers. The state can violate the protection of privacy under the conditions of Article 8.2 of the Convention (§1, DSG 2000). But there is no evidence that these criteria fit in these cases.

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