

Helmut Graupner

Marriage Equality

The Situation in Europe and in Austria

Winning the Freedom To Marry

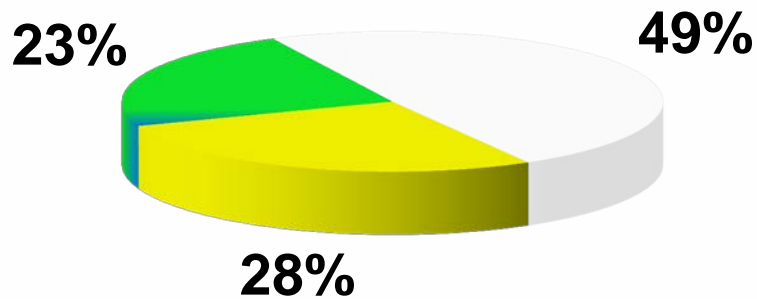
U.S. Embassy Vienna (Amerika Haus)

12 October 2015

Helmut Graupner www.ehe-gleich.at



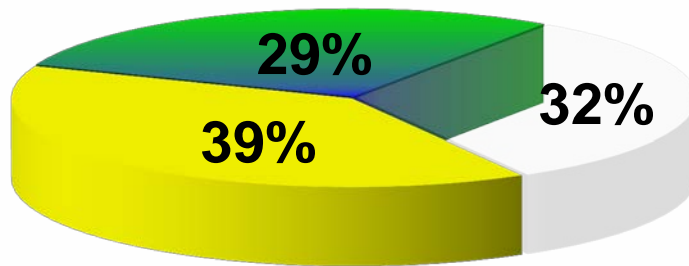
Council of Europe (47 member-states)



- Marriage
- Registered Partnership
- No Registration



European Union (28 member-states)



- Marriage
- Registered Partnership
- No Recognition



Discrimination on the basis of sexual orientation

- is unacceptable
- is as serious as discrimination on the ground of race, ethnic origin, religion and sex
- differentiation requires *particularly serious (convincing and weighty)* reasons
- margin of appreciation is narrow
- distinctions must be *necessary* (not only suitable) to realise a legitimate aim
- distinctions *solely* on the basis of sexual orientation
-> always discrimination

(European Court of Human Rights ECtHR: *Lustig-Prean & Beckett vs. UK* 1999; *Smith & Grady vs. UK* 1999; *Salgueiro da Silva Mouta vs. Portugal* 1999; *L. & V. vs Austria* 2003, *S.L. vs Austria* 2003, *E.B. vs France* [GC] 2008, *Kozak vs Poland* 2010, *P.B. & J.S. vs Austria* 2010, *J.M. vs UK* 2010; *X et. al. vs Austria* [GC] 2013, *Vallianatos et al v GR* [GC] 2013; *Hamalainen v FIN* [GC] 2014; *Oliari et al v I* 2015)

Art. 12 ECHR grants the right to marry a partner of the *same biological sex* (post-operative transsexual with a member of his/her former sex)

- the inability of any couple to conceive or be a parent to a child cannot be regarded *per se* as removing their right to marry.
- Article 9 of the Charter of Fundamental Rights of the European Union *removed the reference to men and women* and doing so departs, *no doubt deliberately*, from the wording of Article 12 of the Convention

(Goodwin vs. UK 2001, I. vs. UK 2001)

Schalk & Kopf vs. A (2010)

- Court applies right to marry (Art. 12) to same-sex couples

But:

- then only 6 out of 47 Convention States (today 13) had allowed same-sex-marriage
 - > “as matters stand”, same-marriage **not (yet) part of the very essence** of the right to marry (Art. 12)
 - > member-states may prohibit marriage by same-sex couples (under part two of Art. 12: “according to the national laws governing the exercise of this right”).



Oliari et al vs. I (2015)

- (at least) registered partnership
- including the „core rights“ of marriage

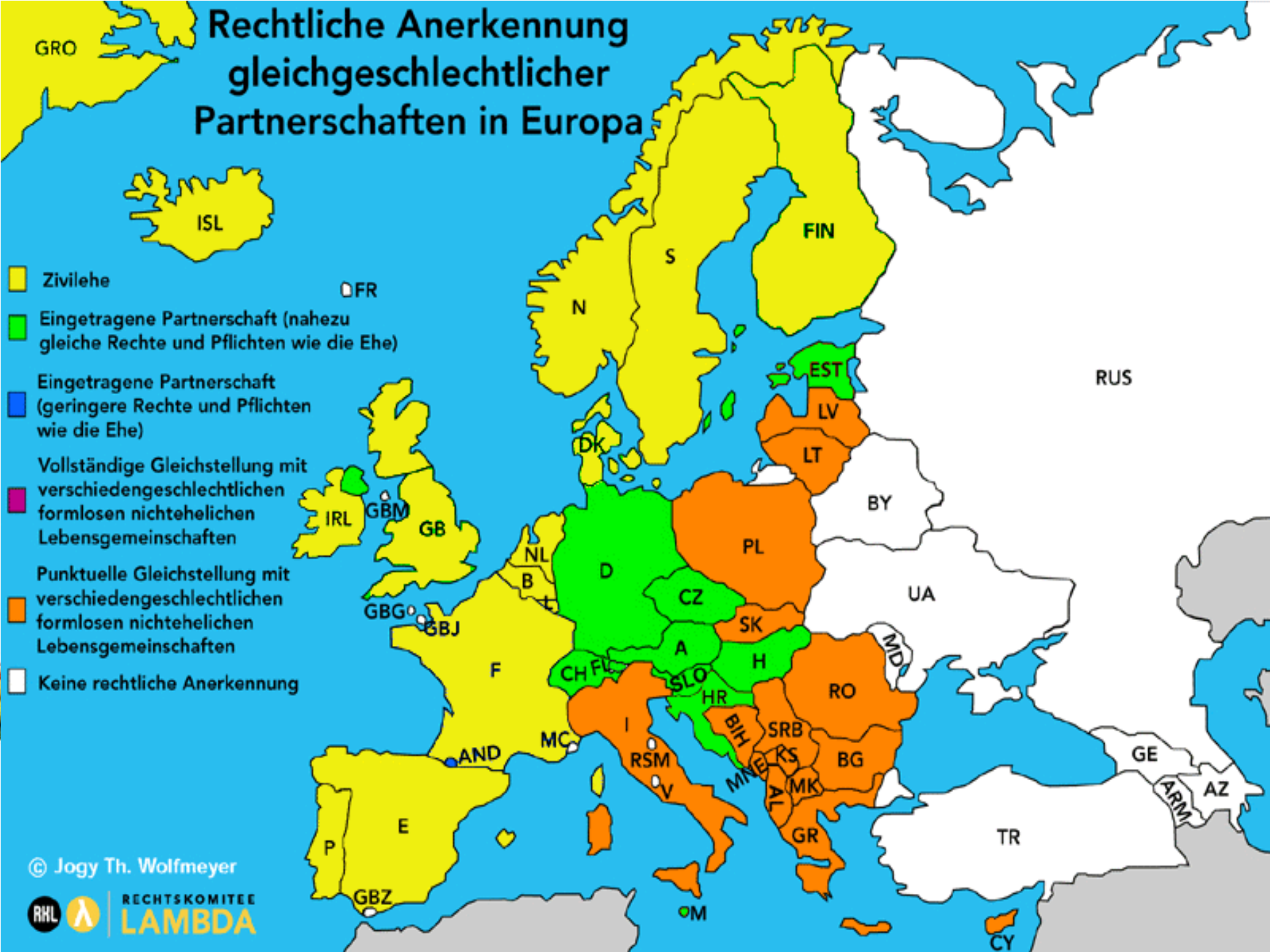
-> registered partnership now:

the „Russian standard“



Rechtliche Anerkennung gleichgeschlechtlicher Partnerschaften in Europa

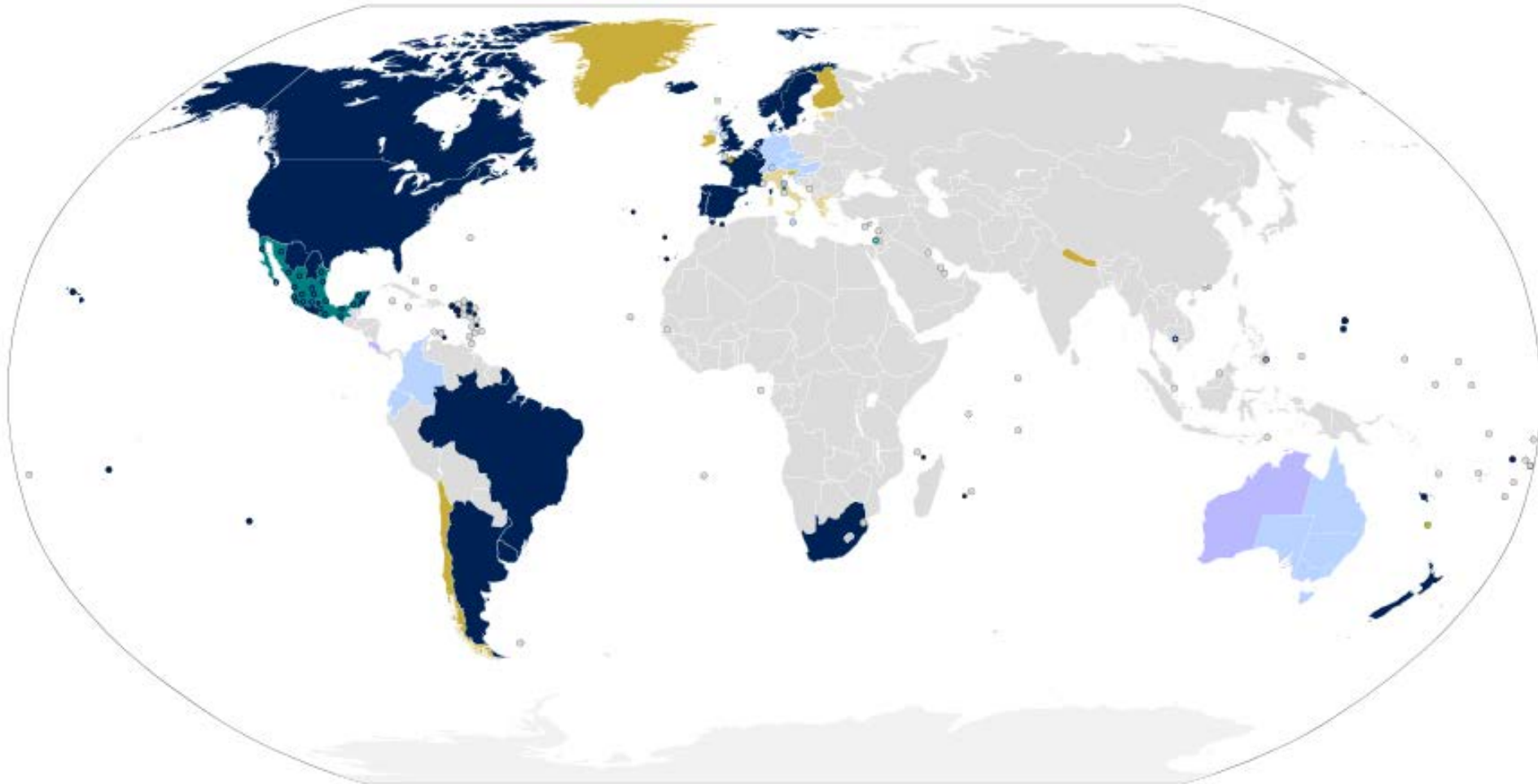
- Zivilehe
- Eingetragene Partnerschaft (nahezu gleiche Rechte und Pflichten wie die Ehe)
- Eingetragene Partnerschaft (geringere Rechte und Pflichten wie die Ehe)
- Vollständige Gleichstellung mit verschiedengeschlechtlichen formlosen nichtehelichen Lebensgemeinschaften
- Punktuelle Gleichstellung mit verschiedengeschlechtlichen formlosen nichtehelichen Lebensgemeinschaften
- Keine rechtliche Anerkennung



Marriage Equality standard in the western world



Dark-blue (and brown): marriage
light-blue: registered partnership



It is time for Austria to proceed

- „best interests of the child shall be the paramount consideration“ (Art. 21 UN-Childrens Rights Convention; ECtHR: *X et. al. vs Austria* [GC] 2013; *E.B. v F* [GC] 2008)
- Domestic law should be coherent (ECtHR: *Oliari et al v I* 2015; *X et. al. vs Austria* [GC] 2013)



Austrian Constitutional Court



Only justification for exclusion of same-gender couples from marriage:

*marriage is, on principle,
targeted on parenthood*

(„auf die grundsätzliche Möglichkeit der Elternschaft ausgerichtet“: VfGH 12.12.2003, B 177/03; VfGH 09.10.2012, B 121/11; B 137/11)



Since 2012

- Step-parent adoption
- Joint adoption (from 1 Jan 2016)
- Medically assisted procreation
- Automatic co-parenthood for lesbian couples
- Recognition of motherhood (by the co-mother) (just as a recognition of fatherhood by the father of a child born out of wedlock)



Austria today

Same-gender couples:
absolutely equal right to found a family

BUT:

their child -> compulsory illegitimate

ONLY COUNTRY IN THE WORLD!

Coherent?

Best interest of the child?



Best interest of the child

- „children suffer the stigma of knowing their families are somehow lesser. They also suffer the significant material costs of being raised by unmarried parents“(US-Supreme Court, *Obergefell et al v Hodges et al* judg. 26.06.2015)
- “Children who are raised by married parents benefit from the social and legal status that civil marriage conveys to their parents” (**American Academy of Pediatrics**, Technical Report: Promoting the Well-Being of Children Whose Parents Are Gay or Lesbian, Pediatrics Vol. 131 No. 4, April 2013)
 - ““Legal recognition` (in addition to `protection`) of family relationships are important in fighting discrimination against LGBT parents and children” (**UNICEF**, Eliminating Discrimination Against Children and Parents Based on Sexual Orientation and/or Gender Identity, November 2014)



-> Cases are on the way in the courts

BUT:

-> we want politicians to do their job: to act and form society

-> not just to follow judgments of the courts (what is the only thing they have done in the past 20 years)

-> what is why we have started citizens initiative



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over 43.000 voters signed
within a couple of weeks

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