Marriage Equality
The Situation in Europe and in Austria

Winning the Freedom To Marry
U.S. Embassy Vienna (Amerika Haus)
12 October 2015
Council of Europe
(47 member-states)

- 49% Marriage
- 28% Registered Partnership
- 23% No Registration
European Union
(28 member-states)

- 39% Marriage
- 29% Registered Partnership
- 32% 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

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)*
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 (eingeschränkte Rechte und Pflichten wie die Ehe)
- Vollständige Gleichstellung mit verschiedengeschlechtlichen formlosen nichtehelichen Lebensgemeinschaften
- Punktuelle Gleichstellung mit verschiedengeschlechtlichen formlosen nichtehelichen Lebensgemeinschaften
- Keine rechtliche Anerkennung

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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

over 43,000 voters signed within a couple of weeks

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