Same-Sex Partnerships in Austria

The Case-Law of the Constitutional Court and the European Court of Human Rights

Panel

„Regulation of Same-Sex Unions and Families in Slovenian and Foreign Jurisdictions“

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1787 -> repeal of death penalty (first country of the world)

1971 -> repeal of total ban, but
   -> 4 new homophobic offences
      (age of consent [gay male only], prostitution [gay male only], public approval [lesbian and gay], associations [lesbian and gay])

1989 -> offence „prostitution“ repealed

1996 -> offences „public approval“ & „associations“ repealed
       (free vote)
       -> last time that politics produced LGBT-progress
2002

-> Constitutional Court repeals discriminatory age of consent (VfGH 21.06.2002, G 6/02)

-> seriously unreasonable:
   relationships could change from being legal to fulfilling a criminal offence

-> for instance:
   14/17 legal
   16/19 criminal offence
   18/21 legal

-> sexual orientation and gender discrimination
   “not necessary to be addressed”
ECtHR: *L.&V. v A, S.L. v A* (age of consent)
sexual orientation discrimination
-> is as serious as discrimination on the ground of race, ethnic origin, religion and sex
-> differentiation requires particularly serious (convincing and weighty) reasons

ECtHR: *Karner v A* (succession in tenancy after death)
-> protection of traditional family is a legitimate aim
-> Disadvantageous treatment of (unmarried) same-sex couples vs. (unmarried) opposite-sex couples requires particularly serious reasons and must be necessary to achieve a legitimate aim (Art. 14 ECHR)
2004

-> partner benefits in public health insurance (unmarried couples) (VfGH 10.10.2005, G 87-88/05, V 65-66/05)

-> based on *Karner v A*
2009

-> registered partnership
   (after summon to oral hearing in ECtHR in Schalk & Kopf)

-> over 100 inequalities to marriage in government bill

-> over 70 in the law passed (in force since 1 Jan 2010)

-> until today reduced to 28

-> due to litigation
2011

-> hyphen discrimination
   (VfGH 22.09.2011, B 518/11)

-> double-names:
   Marriage: hyphen
   RP: no hyphen
   forced outing

-> family life (reference to Schalk & Kopf 2010 etc.)
-> particularly serious reasons & necessary (Karner 2003 etc.)
-> sole reason of segregation (as a principle): inadmissible
2012

-> name change  
   (VfGH 03.03.2012, G 131/11)

-> Marriage: at the wedding or later  
RP: only at conclusion of RP

-> family life (reference to Schalk & Kopf 2010 etc.)
-> particularly serious reasons & necessary (Karner 2003 etc.)
-> sole reason of segregation (as a principle): inadmissible
2012

-> ceremony (vow, witnesses etc.)
    (VfGH 12.12.12, B 121/11, B 137/11)

-> family life (reference to Schalk & Kopf 2010 etc.)
-> particularly serious reasons & necessary (Karner 2003 etc.)
-> sole reason of segregation (as a principle): inadmissible
2013

-> office room compulsion
   (VfGH 29.06.2013, G 18, 19/2012)

-> Marriage: at any place
   RP: only within the office rooms of the authority

-> family life (reference to Schalk & Kopf 2010 etc.)
-> particularly serious reasons & necessary (Karner 2003 etc.)
-> sole reason of segregation (as a principle): inadmissible
-> also merely symbolic differences important for the partners
X et. al. v Austria [GC]
19 Feb 2013 (10 : 7)

- All three (mother, step-mother and the child) were directly affected by the difference in treatment and could claim to be victims of the alleged violation (par. 127)
- All three (mother, step-mother and the child) were affected as a family by the violation and therefore the Court found it appropriate to make a joint award in respect of non-pecuniary damage (par. 157)
- Importance of granting legal recognition to de facto family life (citing Wagner 2007 and Emonet 2007) (par. 145)
- The burden of proof for the necessity of a distinction based on sexual orientation is on the government (par. 141)
- There is not just one way or one choice when it comes to leading one’s family or private life (par. 139)
- The protection of the family in the traditional sense has to be balanced against the Convention rights of sexual minorities, with the margin of appreciation being narrow (par. 151)
• no evidence before the Court that it would be detrimental to the child to be brought up by a same-sex couple or to have two legal mothers and two legal fathers (par. 142, 144, 146, 151)

• Also the dissenting minority stated
• that the three applicants (two women with child) enjoy the protection of family life (par. 2)
• that the child received a proper upbringing from his mother and her partner (par. 2 & 10)
2013


-> restricted to opposite-gender couples (married and unmarried)

-> family life (reference to Schalk & Kopf 2010 etc.)

-> particularly serious reasons & necessary (Karner 2003 etc.)

-> right to procreate: everyone (not just married persons) (Art. 8 ECHR) (S.H. v A etc.)

-> donor insemination: basically legal method

-> same-sex couples do not substitute but complement opposite-gender couples;

-> ss-couples & their procreation are therefore no danger for marriage and cohabitation of opposite-gender couples
2014

-> joint adoption

-> restricted to married opposite-gender couples

-> applicants joint mothers of a child after second-parent adoption), nevertheless excluded from joint adoption

-> particularly serious reasons & necessary (Karner 2003 etc.)

-> stepparent-adoption: joint parenthood by same-gender couples already

-> to deny it to adopted children (for instance after individual adoption) is unreasonable (i.e. in the light of the best interests of the child)
-> RP, just as marriage, oriented towards lasting stable partnerships

-> same-sex couples do not substitute but complement opposite-gender couples;

-> joint adoption by same-gender couples are therefore no danger for marriage and the traditional family
Not successful:

-> segregated place of conclusion for registered partnerships vs civil marriage

-> exclusion of opposite-sex couples from registered partnership
  (VfGH 22.09.2011, B 1405/10 = ECtHR: Ratzenböck & Seydl v A, 28475/12, pending)

-> no reference to particularly serious reasons and necessity
-> despite rejection of segregation in other cases
-> despite other cases: also merely symbolic differences important for the partners
**Schalk & Kopf vs. A (2010)**

- the **right to marry** enshrined in Art. 12 of the Convention is **applicable to same-sex couples** (Art. 12 par. 1)

**But:**

- then only 6 out of 47 Convention States 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 par. 2 of Art. 12).

**Constitutional Court:**

- no right to marry (VfGH 09.10.2012, B 121/11, B 13/11)
- despite rejection of segregation in other cases
Same-gender couples: absolutely equal right to found a family 
(step-parent adoption, joint adoption, medically assisted 
procreation, automatic co-parenthood, motherhood recognition)

BUT: 
their children -> compulsory illegitimate

ONLY COUNTRY IN THE WORLD

5 cases pending in Constitutional Court: 
5 children with 2 mothers or 2 fathers
(Johnston v IRL 1986)