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# **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“**

**Days of Slovenian Lawyers 2016**

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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 offence „prostitution“ repealed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 offences „public approval“ & „associations“ repealed  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”

# 2003

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

- > *medically assisted procreation (donor insemination)*  
(VfGH 10.12.2013, G 16/2013, G 44/2013)
- > 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 and cohabitation of opposite-gender couples

# 2014

- > *joint adoption*  
(VfGH 11.12.2014, G 119-120/2014)
- > 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  
(VfGH 09.10.2012, B 121/11, B 13/11 = ECtHR: *Dietz & Suttasom v A*, 31185/13, *Hörmann & Moser v A*, 31176/13, pending)
- > 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)*

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