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Same-Gender Parenting & The Best Interests of the Child

**The European Perspective
with the Example of Austria**

Conference

Beyond 748 - Same-Sex Marriage and Family

Academia Sinica

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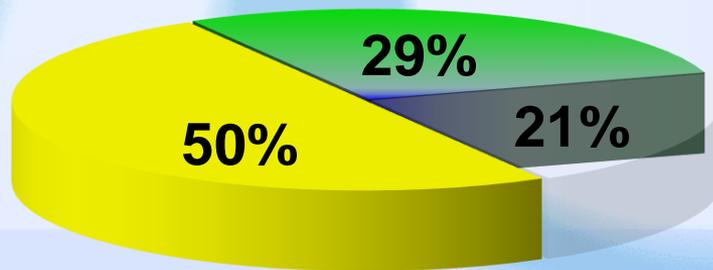
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Council of Europe (47 member-states)



European Union

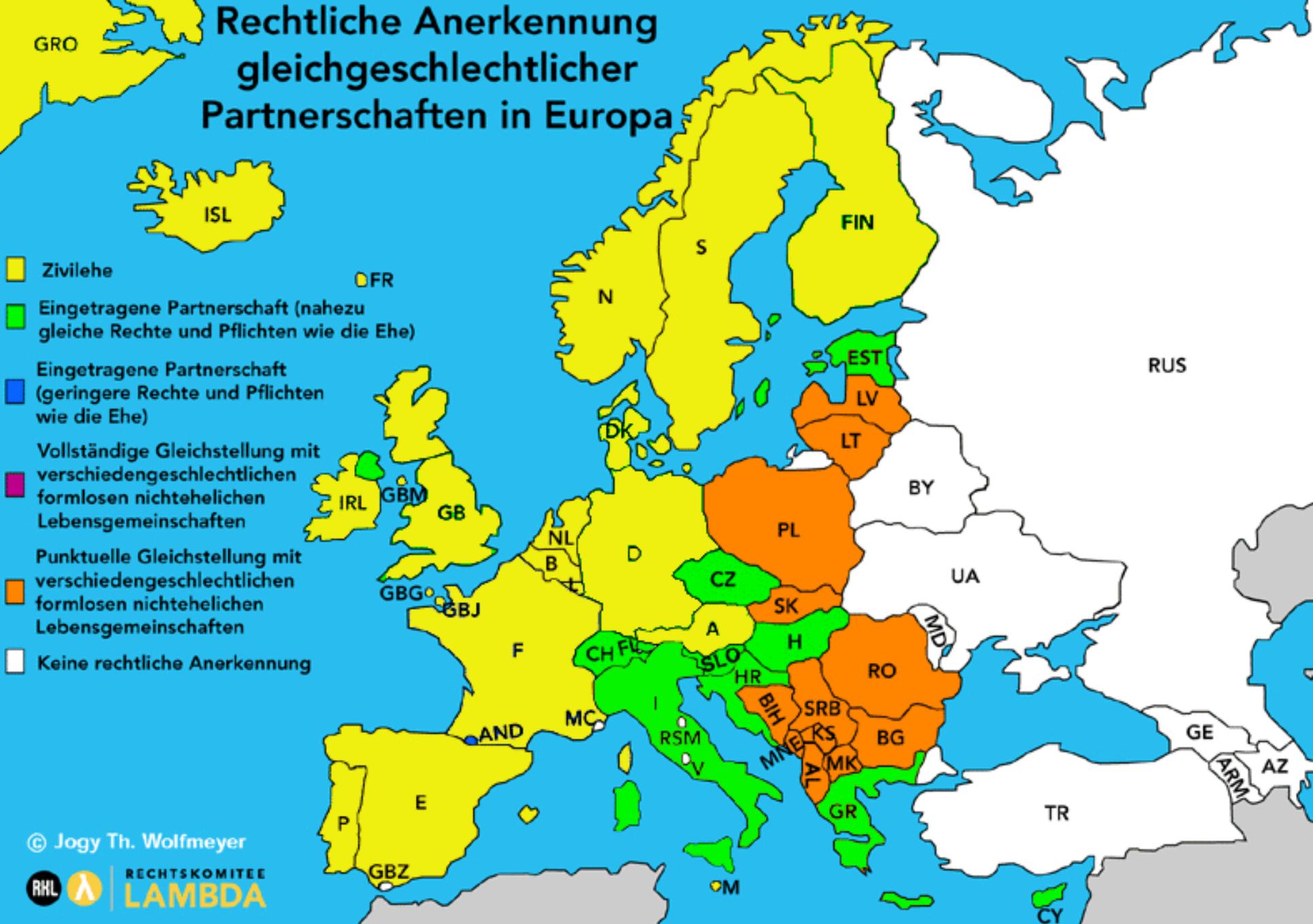
(28 member-states)



- Marriage
- Registered Partnership
- No Recognition

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



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RHL  RECHTSKOMITEE
LAMBDA

All European countries with same-gender marriage
-> marriage equality on the legislative way

Only exception

-> Austria:
the judicial way

Austria today:

-> marriage equality

-> parental equality

-> second-parent adoption

-> joint adoption

-> medically assisted procreation

-> automatic co-parenthood

-> motherhood recognition

-> recognized by the Constitutional Court as constitutionally protected fundamental rights

-> (majorities in) parliament cannot withdraw

-> how did that come in good old (conservative) Austria?

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 offence „prostitution“ repealed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 offences „public approval“ & „associations“ repealed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 (out of ist own) produced
LGB-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)
- Court (par. 49) refers to Art. 21 Convention on the Rights of the Child:
“States Parties that recognize and/or permit the system of adoption shall ensure that the **best interests of the child** shall be the **paramount** consideration”
- **legislation must be coherent:**
“Austrian legislation appears to lack coherence. Adoption by one person, including one homosexual, is possible ...The legislature therefore accepts that a child may grow up in a family based on a same-sex couple, thus accepting that this is not detrimental to the child. Nevertheless, Austrian law insists that a child should not have two mothers or two fathers“ (par. 144)

- **absolute prohibition:** courts no opportunity to examine child's best interest in each individual case (par. 146, 152)
- courts should be allowed to **examine each individual case in line with the best interests of each individual child** (par. 146, 152)
- 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)

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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 seriously unreasonable

- > compromises best interests of the child (withholds maintenance rights, inheritance rights etc. vis a vis second parent)
- > 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

- > courts must be allowed to make decision in the best interests of the child based on the concrete circumstances of each individual case
- > excluding certain groups from the outset takes away from courts the power to decide each case according to the best interests of the individual child
- > in a parallel case the CC (on that basis) turned down an age difference requirement of at least 16 years (VfGH 11.12.2014, G 18/2014)

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-sex-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 (since 1 Jan 2016):
absolutely equal rights to found a family

(step-parent adoption, joint adoption, medically assisted procreation, automatic co-parenthood, motherhood recognition)

BUT:

parents of these children -> banned from marriage
these children -> compulsory illegitimate

ONLY COUNTRY IN THE WORLD

5 cases in Constitutional Court:

5 children with 2 mothers or 2 fathers

Johnston v IRL (1986)

- > also child whose parents not allowed to marry
- > father married to another woman
- > no divorce allowed in Ireland back then

ECtHR:

- > no right to divorce under the Convention
- > ban of divorce within states' margin of appreciation (as same-sex marriage under *Schalk & Kopf*)
- > nevertheless found a violation of the Convention as the child was barred from becoming a legitimate child.



Warum dürfen unsere Eltern nicht heiraten?

JETZT ONLINE UNTERSCHREIBEN: ehe-gleich.at



Warum darf unser Kind nicht ehelich sein?

JETZT ONLINE UNTERSCHREIBEN: ehe-gleich.at



Warum dürfen unsere Kinder nicht ehelich sein?
JETZT ONLINE UNTERSCHREIBEN: ehe-gleich.at



Warum dürfen unsere Enkel nicht ehelich sein?
JETZT ONLINE UNTERSCHREIBEN: ehe-gleich.at

2017

- > *marriage (and registered partnership) equality*
(from 1 Jan 2019) (VfGH 04.12.2017, G 258-259/2017)
- > full equality in parenting rights: segregation seriously unreasonable
- > legal segregation
 - > signals that his persons are not equal to hts persons
 - > outs persons as having a same-sex partner when declaring their family status „registered partnership“

From 1 Aug 2019:

- > capacity to marry determined under Austrian law if home country does not allow same-sex marriage
- > *All same-sex couples of the world may marry in Austria*
(as traditionally no residence and no citizenship requirement for marriages in Austria)

Conclusions

- 1) good example
 - > for courts enforcing human rights and
 - > how far you can get in a historically short period (Austria: from criminalization to full marriage and parental equality in 17 years: 2002-2019) with courts committed to such enforcement

2) Legislation must be coherent

-> allowing individual adoption but banning second-parent-adoption, and

-> allowing second-parent adoption but banning joint adoption

is incoherent

3) Best interests of the child & sexual orientation equality

-> not in conflict, but

-> excluding persons from parenting on the basis of their gender or sexual orientation bars courts from deciding each case according to the best interests of each individual child

-> hence sexual orientation discrimination compromises the bests interests of the child which is paramount (Art. 21 CRC)



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