Article

Same-Gender Parenting and the Best Interests of the Child: The European Perspective with the Example of Austria

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ABSTRACT

Austria, like Taiwan, but unlike all the other European countries, opened up marriage to same-gender couples by way of a Constitutional Court's judgment. Different from Taiwan, Austria realized equality also in parenting (second-parent adoption, joint adoption, and automatic co-parenthood) with the Constitutional Court's core argument of the best interests of each individual child. This article presents how Austria, once the first country in the world to repeal the death penalty for homosexual contact and later on one of the last to remove its criminal prosecution, paved the way to full family law equality for same-gender and opposite-gender couples, and elaborates how children's rights turned out to be crucial in this process.

Keywords: *Same-Gender Marriage, Same-Gender Parenting, Children's Rights, Adoption, LGBT-Rights*

DOI：10.53106/181263242021121602002

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CONTENTS

I. BACKGROUND

Let us start with a look at recognition of same-gender partnerships in Europe,[1] especially in the Council of Europe, which consists of 47 member states, all European states with the exception of Belarus.[2] Today a majority of European countries legally recognize same-gender partnerships, one-third have full equality in the form of civil marriage, and a bit over 20% instead allow registered partnerships.[3] The European Union[4] presents a different picture, with already half of its 27 member states granting full marriage equality and one third allowing registered partnership, meaning that around 80% recognize same-gender partnerships. Hence, legal recognition of same-gender partnerships is standard in the European Union. Only a minority of member states still do not recognize same-gender partnerships.[5] All countries with marriage equality also allow joint adoption by same-gender couples. The article will present the developments in one of these countries, Austria, a small country in the heart of Europe.

In Europe, traditionally, the jurisdictions with marriage equality did it the legislative way, the European way, creating marriage equality by legislation. Parliaments and politicians did their jobs in reforming outdated laws and implementing human rights. Things went differently in Austria. Austria is the only exception in Europe, the only country in Europe which created marriage equality through judicial action. I will describe how that has been achieved. Austria today has marriage equality and parental equality, which means we have second-parent adoption, joint adoption, and medically assisted procreation (access to donor insemination for lesbian couples). We have automatic co-parenthood (which is automatic motherhood for lesbian couples after medically assisted procreation). We have motherhood

1. For international overviews on (the development of) sexual orientation and human rights *See generally* CARLO CASONATO & ALEXANDER SCHUSTER, RIGHTS ON THE MOVE-RAINBOW FAMILIES IN EUROPE (2014); Kees Waaldijk, *Same-Sex Partnership-International Protection*, *in* THE MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (R. Wolfrum ed., 2013), https://opil.ouplaw.com/home/mpil; Helmut Graupner, *Gay Rights*, *in* THE MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (R. Wolfrum ed., 2010), https://opil.ouplaw.com/home/mpil; KATHARINA BOELE-WOELKI & ANGELIKA FUCHS, LEGAL RECOGNITION OF SAME-SEX RELATIONSHIPS IN EUROPE (2nd ed. 2012); ALEXANDER SCHUSTER, EQUALITY AND JUSTICE-SEXUAL ORIENTATION AND GENDER IDENTITY IN THE XXI CENTURY (2011); HELMUDT GRAUPNER & PHILIP TAHMINDJIS, SEXUALITY & HUMAN RIGHTS-A GLOBAL OVERVIEW (2005); ROBERT WINTEMUTE & MADS ANDENAES, LEGAL RECOGNITION OF SAME-SEX PARTNERSHIPS-A STUDY OF NATIONAL, EUROPEAN AND INTERNATIONAL LAW 549-61 (2001); DONALD J. WEST & RICHARD GREEN, SOCIOLEGAL CONTROL OF HOMOSEXUALITY-A MULTI-NATION COMPARISON 269-87 (1997).

2. COUNCIL OF EUROPE, https://www.coe.int (last visited Oct. 25, 2020).

3. *Rechtsvergleich in Europa*, RECHTSKOMITEE LAMBDA, https://www.rklambda.at/index.php/de/rechtsvergleich#partner (last visited Oct. 25, 2020).

4. EUROPEAN UNION, https://europa.eu/ (last visited Oct. 25, 2020).

5. *Rechtsvergleich in Europa*, *id*.

recognition, which means the second parent in the lesbian relationship may recognize the child under the same terms and conditions as a male partner may recognize a child, in an absolutely analogous manner. And these rights are not granted by legislators but recognized by the Constitutional Court as constitutionally protected fundamental rights. Hence these rights cannot be withdrawn from couples by political majorities in parliament. How did this come about, you might ask yourself, in good old Austria? MAustria is often seen asan old-fashioned, conservative Catholic country, so how did such rights come to be recognized in this good old conservative country? This is the topic of my talk.[6]

II. A HISTORY OF CRIMINALISATION

Austria however was not always slow in progress in this area. In 1787 Austria was the first country in the world to repeal the death penalty for homosexuality, among those countries which had ever had a death penalty or a total ban.[7] All of the Christian countries originally applied the death penalty for homosexual contact. Burning alive was the traditional sanction for homosexuality, for sodomy.[8] Austria was the first state to do away with the death penalty. But then the progress was over. It took until 1971 for the total ban against homosexuality to be repealed. Two years after Austria had repealed the death penalty (1787), France, during the French Revolution (1789), implemented human rights and decriminalized almost all consensual sexual activity. Austria did not do so. It repealed the death penalty but continued to criminally prosecute same-sex contact. It took almost 200 more years, until 1971, for the total criminal ban against homosexuality to be abolished.[9]

But even then, when the total ban on homosexual behaviour (Art. 129 I Criminal Code 1852) was repealed, four other anti-homosexual criminal

6. For the legal history of homosexuality in Austria *see* Helmut Graupner, *Austria "Against the Order of Nature"-A History of Persecution*, *in* SOCIOLEGAL CONTROL OF HOMOSEXUALITY-A MULTI-NATION COMPARISON 269, 269-87 (Donald J. West & Richard Green eds., 1997) and Helmut Graupner, *The First Will Be the Last: Legal Recognition of Same-Sex Partnerships in Austria*, *in* LEGAL RECOGNITION OF SAME-SEX PARTNERSHIPS-A STUDY OF NATIONAL, EUROPEAN AND INTERNATIONAL LAW 549, 549-61 (Robert Wintemute & Mads Andenaes eds., 2001) (this 2001 publication I had closed with the following remark: "[opinion polls among young people] in some way nurture[. . .] the hope that my country, which once stood at the forefront of legal progress in this field, and which subsequently fell so blatantly behind, will once again meet European legal standards. Hopefully it will not take too much time.").

7. Graupner, *Austria "Against the Order of Nature", id*. at 270; Graupner, *The First Will Be the Last, id*. at 549.

8. Graupner, *Austria "Against the Order of Nature", id*. at 269.

9. Graupner, *Austria "Against the Order of Nature", id*. at 270-72; Graupner, *The First Will Be the Last*, *supra* note 6, at 550.

offences were introduced:[10] 1) a higher age of consent (age of consent for gay males of 18, as opposed to 14 for heterosexuals and lesbians) (§ 209 Criminal Code), 2) a ban on just gay male prostitution (§ 210 Criminal Code) (heterosexual prostitution was legalized in 1787 and lesbian prostitution in 1971), 3) merely expressing public approval of both same-sex lewdness and lewdness with animals (Art. 220 Criminal Code) Homosexuality and bestiality were merged into one offence. Notice the parallel to the propaganda laws which recently have been introduced in some Eastern European countries. 4) a ban on associations promoting same-sex lewdness (founding, being a member of, or advertising such associations) (Art. 221 Criminal Code). The first of these four anti-homosexual criminal offences was repealed in 1989: the ban on gay male prostitution (§ 210 CC).[11] In 1996, quite late, at the very end of the 20th century, we got rid of the offences of public approval of homosexuality (Art. 220 CC) and of associations promoting homosexuality (Art. 221 CC).[12] For the repeal of these two offences a free vote in parliament was needed, as the government coalition could not agree on decriminalisation.[13] This was the last time that politics produced progress on LGBT rights in Austria. Since 1996 all progress has been driven by the courts.

A. *Age of Consent*

For the last of the four anti-homosexual criminal offences, the higher age of consent, parliament could not agree on a repeal. It was also voted on in the 1996 free vote, but the vote resulted in a deadlock: 91 against 91.[14] The law stayed on the books, and homo- and bisexual men continued to be jailed on the basis of this last of the homophobic criminal offences.[15] This means that at the end of 20th-century Austria, not even decriminalization was feasible. It took until the next century, when the courts took up the subject. In 2002 the Constitutional Court repealed Art. 209 CC.[16] The Constitutional Court turned down the higher age of consent, ruling that it was seriously unreasonable, as relationships, over time, could change from being legal to constituting a criminal offense and back again. For instance, a relationship between 14- and 17-year-olds would be legal, both being under 18 (and over

10. Graupner, *Austria "Against the Order of Nature", id*. 6, at 272-78; Graupner, *The First Will Be the Last*, *id*. at 550.

11. Graupner, *Austria "Against the Order of Nature", id*. at 273.

12. *Id*. at 275-77, 286.

13. *Id*. at 286.

14. *Id*.

15. *Id*. at 273-75.

16. Verfassungsgerichtshof [VfGH] [ConstitutionaI Court] Jun. 21, 2002, ERAENNTNISSE UND BESCHLÜ SSE DES VERFASSUNGSGERICHTS-HOFES [VFSLG] No. 16565/2002 (Austria).

14, the general age of consent for all). Once the older one got to 19, the relationship (legal up to then) would turn into a criminal offense. Then, when the younger partner turned 18, relationship would become legal again. The same relationship between the same people would change from legal to criminal to legal again. The Constitutional Court overturned the age of consent of 18 for male-male contacts on the basis of its violating the constitutional right to equality before the law. The Austrian Constitutional Court, the world's first and oldest constitutional court, traditionally interprets the federal constitution's equality clause as rendering any "seriously unreasonable" ("grob unsachlich") legislation unconstitutional. Back then the Constitutional Court had not addressed sexual orientation or gender discrimination. It explicitly considered it unnecessary to address these issues, as it found the law unconstitutional already on another basis (serious unreasonableness). The court's unwillingness to address discrimination stemmed from the fact that as late as 1989 it upheld the higher age of consent for gay male sex, arguing that it would provide reasonable protection of adolescent men against being turned into homosexuals by a loving, consensual relationship with an adult male.[17] It was much easier for the court to turn down the law on the basis of a new argument not considered back in 1989 than to admit a wrong decision.

B. *Sexual Orientation Discrimination*

While the Austrian Constitutional Court has not based its judgment on a discrimination argument, it motivated another court to do so. Hungary had the same law (Art. 199 CC: age of consent of 18 for gay male relations, in addition to the general age of consent, for all, of 14 years). Just a few weeks after the Austrian Constitutional Court's judgment, the Hungarian Constitutional Court decided a case, at that time having been pending for over eight years, and turned down the higher age of consent on a clear and strong sexual orientation discrimination argument.[18] And different from the Austrian Constitutional Court, it ordered the reconsideration of all convictions under the repealed offence, as such convictions still produced negative legal consequences for the convicts.

Two years later the European Court of Human Rights (ECtHR) stepped in. In a series of judgments it declared that higher ages of consent for male homosexual contacts compared to heterosexual and lesbian contacts were in violation of Art. 14 of the European Convention of Human Rights (ECHR)

17. Verfassungsgerichtshof [VfGH] [Constitutional Court], Oct. 3, 1989, ERAENNTNISSE UND BESCHLÜSSE DES VERFASSUNGSGERICHTS-HOFES [VFSLG] No. 12182/1989 (Austria).

18. Alkotmánybíróság (AB) [Constitutional Court] September 3, 2002, 1040/B/1993/23 (Hung.).

(Art. 14: prohibition of discrimination).[19] It found sexual orientation discrimination unacceptable and as serious as discrimination on the grounds of race, ethnic origin, religion, and sex, which means that differentiation on that basis requires particularly serious (convincing and weighty) reasons.

C. *Unmarried Couples*

In the same year, 2003, the Court extended this case law to recognition of partnerships and benefits and rights granted to partnerships. In the *Karner v. Austria* decision, which was about succession into tenancy rights after the death of one of the partners, the Court held that the protection of the traditional family is a legitimate aim for national legislators. But disadvantageous treatment of unmarried same-sex couples versus unmarried opposite-sex couples nevertheless requires particularly serious reasons and must be *necessary* to achieve a legitimate aim (like the protection of a traditional family). And the Court found that eviction of a surviving same-sex partner from an apartment does not protect any traditional family. How would a traditional family benefit from evicting a surviving same-sex partner from an apartment? Hence, the Court found a violation of Art. 14 of the European Convention on Human Rights (prohibition of discrimination).[20]

Two years later, in 2005, the Austrian Constitutional Court followed that lead, and for the first time, turned down legislation on the basis of sexual orientation discrimination. Austrian social insurance legislation granted health insurance coverage to unmarried opposite-gender partners but not to same-gender partners. Following the European Court of Human Rights *Karner*-judgment, the Constitutional Court required distinction on the basis of sexual orientation to be necessary for particularly serious reasons, and turned down the law.[21]

III. REGISTERED PARTNERSHIP

Four years later, in 2009, Austria's parliament introduced same-gender registered partnerships, but again not out of its own motions. Politicians had discussed the issue for years, but nothing had happened. Then, a case (*Schalk and Kopf*) came up at the European Court of Human Rights challenging Austria for the lack of legal recognition of same-gender partnerships. The

19. L. & V. v. Austria, Eur. Ct. H.R. (2003); S.L. v. Austria, Eur. Ct. H.R. (2003); Woditschka & Wilfling v. Austria, Eur. Ct. H.R. (2004); F. L. v. Austria, Eur. Ct. H.R. (2005); Thomas Wolfmeyer v. Austria, Eur. Ct. H.R. (2005); H.G. & G.B. v. Austria, Eur. Ct. H.R. (2005); R.H. v. Austria, Eur. Ct. H.R. (2006).

20. Karner v. Austria, Eur. Ct. H.R. (2003).

21. Verfassungsgerichtshof [VfGH] [Constitutional Court], Oct. 10, 2005, ERAENNTNISSE UND BESCHLÜSSE DES VERFASSUNGSGERICHTS-HOFES [VFSLG] No. 17659-17680/2005 (Austria).

Court summoned the Austrian government to an oral hearing in January 2010. The summons was delivered in October 2009, and, surprisingly, within three weeks, the government came up with a bill which was passed by Parliament on the 10th of December 2009, the International Day of Human Rights, and entered into force on 1 January 2010. Immediately afterward, the Austrian government argued to the European Court of Human Rights that the case (*Schalk & Kopf*) was resolved and should be closed. However, the Courtdid not close the case, declared it of general importance for the whole of Europe, and took a decision finding that, according to the state of law in Europe back then, it was not yet too late for Austria to introduce legal recognition of same-gender partnerships.[22]

Registered partnership constituted remarkable progress. But the government inserted into the bill 100 inequalities compared to marriage. Parliament reduced these inequalities to 70. With time 42 of these inequalities have been brought down, by litigation in the courts, not by politicians, to 28 differences between registered partnerships and marriage remaining.[23]

Back then, marriage was exclusively for opposite-gender couples, and registered partnership was exclusively for same-gender partners. Hence, each difference between the institutions constituted a difference based on sexual orientation and gender.

A. *Hyphen Discrimination*

The first case on these inequalities was decided by the Constitutional Court in 2011, on hyphen discrimination. You might wonder what that is. The Austrian government had been quite creative in inventing differences between marriage and registered partnership. Under Austrian law, double surnames of spouses are connected by hyphens. Under the Registered Partner Act however, it was provided that registered partners may connect their names to form a double-surname, like married couples, but in their case: without a hyphen. If you had a double surname without a hyphen in Austria back then, that meant that you were a partner in a registered partnership, which means that you were outing yourself as a partner in a same-gender partnership. It constituted forced outing.

On that basis, the Constitutional Court found that practice unconstitutional.[24] The court referred to the *Schalk & Kopf* case, where the

22. Schalk & Kopf vs Austria, Eur. Ct. H.R. (2010).

23. For a list of past and present differences between registered partnership and marriage, *see* Helmut Graupner & Raoul Fortner, Ungleichbehandlungen zum Eherecht, RECHTSKOMITEE LAMBDA https://www.rklambda.at/index.php/de/publikationen (last visited Oct. 18, 2020).

24. Verfassungsgerichtshof [VfGH] [ConstitutionaI Court], Spet. 20, 2012, ERAENNTNISSE UND

European Court of Human Rights emphasized that same-sex couples, just as opposite sex couples, do fall under the definition of family life in Art. 8 of the European Convention of Human Rights. *Schalk & Kopf* (2010) was the first time the European Court of Human Rights acknowledged that same-gender couples come under "family-life". The Constitutional Court found no necessity with particularly serious reasons for the hyphen distinction, and it added that distinctions are inadmissible under any circumstance if their sole reason is segregation as a principle.

B. *Joint Names and Ceremony*

One year later, in 2012, came the next case, on name change. Married couples may change their family names into a joint family name at the wedding or later on. Registered partners were allowed to do so just at the conclusion of registering the partnership, not later on. The Constitutional Court struck that down, with the same line of argument as in the hyphen case.[25]

In 2012 again, there was a case on ceremonies. The Austrian legislature had created registered partnerships, but it did not want a ceremony taking place for conclusion of these partnerships. Same-gender couples were not allowed to conclude their partnership at the same places where marriages are performed: in the wedding halls at the civil registry. Austria's legislature relegated registered partners to the district administrative authorities, which traditionally issue prostitution licenses and industrial licences and deal with waste control. This was an especially degrading kind of discrimination.[26] And even there, no ceremonies were allowed to take place. There were to be no vows and no witnesses, just signing a paper and leaving. The Constitutional Court held that to be unconstitutional and ruled that same-sex registered partners are also entitled to a ceremony with vows and witnesses.[27] Despite the fact that a ceremony or the lack of it has no material legal effect, the Constitutional Court found no necessity, with particularly serious reasons, for the prohibition of a ceremony, and added again that

BESCHLÜ SSE DES VERFASSUNGSGERICHTS-HOFES [VFSLG] No. 18520/2012 (Austria).

25. Verfassungsgerichtshof [VfGH] [ConstitutionaI Court], Mar. 3, 2012, ERAENNTNISSE UND BESCHLÜ SSE DES VERFASSUNGSGERICHTS-HOFES [VFSLG] No. 19623/2012 (Austria).

26. When, as late as 2017, this discrimination was ended and the wedding halls opened to registered partners, the European Court of Human Rights closed the pending case on this issue for having been resolved, but at the same time it awarded compensation for costs and expenses to the applicants, thus recognizing a violation of the applicant's rights (Manfred Hörmann & Felix Maximilian Moser v. Austria, Eur. Ct. H.R. 2017.).

27. Verfassungsgerichtshof [VfGH] [ConstitutionaI Court], Oct. 9, 2012, ERAENNTNISSE UND BESCHLÜ SSE DES VERFASSUNGSGERICHTS-HOFES [VFSLG] No. 19682/2012 (Austria); Verfassungsgerichtshof [VfGH] [ConstitutionaI Court], Sept. 13, 2012, ERAENNTNISSE UND BESCHLÜ SSE DES VERFASSUNGSGERICHTS-HOFES [VFSLG] No. 19730/2012 (Austria).

distinctions with the sole purpose of segregation are inadmissible under any circumstance.

In 2013, the next decision came, on an absurd form of discrimination: compulsory in-office registration. Marriage may be performed in any place, not just at the premises of the civil registry. A registrar comes to your farm, or to a hotel, or a ship, or a castle to perform your wedding. That service was prohibited for registered partnerships. Conclusion of registered partnerships was allowed exclusively within the office of the authority. The Constitutional Court repealed this regulation too, stressing that merely symbolic differences are also important for partners, sometimes even more important than some benefits.[28]

C. *Step-Parent Adoption*

2013 was also the year of the groundbreaking, landmark European Court of Human Rights judgement on step-parent adoption in *X et al. vs Austria*, a judgment by the Grand Chamber. The author personally represented all three as an attorney in this case: mother, step-mother, and the child. Also, the child had applied to the European Court of Human Rights, and the Court stressed that all three, not just the two partners, but also the child, were directly affected by the difference in treatment, by the ban on step-parent adoption for same-gender couples.[29] Also, the child could claim to be a victim of the alleged discrimination,[30] and all three (mother, step-mother and the child) were affected as a family, not just as individuals but as an entity, by the inequality of treatment.[31] The Court found the ban on step-parent adoption to be a violation of the right to non-discrimination (Art. 14 European Convention of Human Rights) and found it appropriate to make a joint award in respect of non-pecuniary damage, as they are a family and have been discriminated against as an entity, including the child.[32] The Court underlined the importance of granting legal recognition to de facto family life.[33] Most importantly, the Court made clear that the burden of proof for necessity of a distinction based on sexual orientation is on the government.[34] Hence, it is not incumbent on the families to prove that they are not dangerous; the burden rests upon the discriminator to prove that unequal treatment is necessary for particularly serious or weighty reasons.

28. Verfassungsgerichtshof [VfGH] [ConstitutionaI Court], June 19, 2013, ERAENNTNISSE UND BESCHLÜ SSE DES VERFASSUNGSGERICHTS-HOFES [VFSLG] G 18, 19/2012 (Austria).
29. X. et al. v. Austria, Eur. Ct. H.R (2013), ¶ 127.
30. *Id.*
31. *Id.* ¶ 157.
32. *Id.*
33. *Id.* ¶ 145.
34. *Id.* ¶ 141.

There is not just one way or one choice when it comes to leading one's family or private life, the Court stressed.[35] Protection of traditional families was recognized by the Court as a legitimate aim. Legislators are free to protect and promote traditional families. But this legitimate aim and interest of member states has to be balanced against the Convention rights of sexual minorities, with the margin of appreciation being narrow when it comes to sexual orientation.[36] The Court found no evidence that it would be detrimental to the child to be brought up by a same-sex couple or to have two legal mothers or two legal fathers.[37] It referred to the Convention on the Rights of the Child and emphasized that the best interests of the child shall be the paramount consideration.[38]

Furthermore, the Court pointed out that legislation must be coherent. The least you can expect from legislators is to pass legislation which does not contradict itself. Legislation must be coherent. And the court found that Austrian legislation on step-parent adoption appeared to lack coherence because Austria allowed single-parent adoption by one person, including one homosexual. 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 insisted that a child should not have two mothers or fathers, which the Court found incoherent.[39]

On that basis, the Court found that the general total ban on step-parent adoption for same-gender couples violated the right to non-discrimination (Art. 14 European Convention on Human Rights). The Court stressed the absolute nature of the ban. Austrian courts had no opportunity to examine a child´s best interests in each individual case. Judges should however, the Court held, be allowed to examine and decide each case in line with the best interests of each individual child.[40] Judges must be able to find the best solution for each child in each individual case. If same-gender couples are generally banned from adoption, then the judges cannot find the best solution for a child for whom being adopted into a same-gender family would be the best solution. Not each and every same-gender step-parent is fit for adoption, of course, but not all opposite-gender step-parents are fit either. It must be up to the judges to decide, the Court held, not for the legislators to decide beforehand in a general way and thereby taking away from judges the power to decide cases in line with the best interests of each individual child.

X et al. was decided by a majority of ten to seven. The seven dissenting

35. *Id.* ¶ 139.
36. *Id.* ¶ 151.
37. *Id.* ¶ 142, 144, 146, 151.
38. *Id.* ¶ 49.
39. *Id.* ¶ 144.
40. *Id.* ¶ 146, 152.

judges agreed that the three applicants (two women with a child) enjoyed the protection of family life and that the child received a proper upbringing from his mother and her partner.[41] Hence, on these two points, the judgment was even unanimous.

D. *Medically Assisted Procreation*

After *X et al. v. Austria* it came down to the Austrian Constitutional Court again. The next case was on medically assisted procreation: access to donor insemination for lesbian couples. Donor insemination was restricted to opposite-gender couples in Austria at that time. Not only married opposite-gender couples had access, but also unmarried couples. All same-gender couples were excluded. The Court struck that down on the same reasoning as it did the several inequalities between registered partnerships and marriage: Same-gender families are protected by the right to respect of family life (Art. 8 European Convention of Human Rights). Differentiation on the basis of sexual orientation must be necessary for particularly serious reasons. And the court stressed that everyone, not just married couples, does enjoy the right to procreate.[42]

The Constitutional Court pointed out that donor insemination was a lawful method, and hence same-gender couples were banned from using a lawful method for making use of a fundamental right: the right to procreate. The Court added that same-gender couples do not substitute but complement opposite-gender couples. Same-sex couples and their ability to procreate therefore posed no danger to marriage or cohabitation of opposite gender couples.[43]

E. *Joint Adoption*

the next year, 2014, saw a case on joint adoption. Joint adoption was still restricted to married opposite-gender couples in Austria at that time. I represented two women in a registered partnership who had engaged in second-parent adoption. One of the two women was the biological mother of a child born into the partnership by donor insemination, and the other woman had adopted the child when Austria allowed that after *X et al. v Austria*. The two women therefore were already joint legal mothers to the child. Hence, they were recognized by law as good mothers, otherwise the

41. *Id.* dissenting opinion ¶ 2 &10.

42. Verfassungsgerichtshof [VfGH] [ConstitutionaI Court], Dec. 10, 2013, ERAENNTNISSE UND BESCHLÜ SSE DES VERFASSUNGSGERICHTS-HOFES [VFSLG] 19824/2013 (Austria).

43. Verfassungsgerichtshof [VfGH] [ConstitutionaI Court], Dec. 10, 2013, ERAENNTNISSE UND BESCHLÜ SSE DES VERFASSUNGSGERICHTS-HOFES [VFSLG] 19824/2013 (Austria).

adoption would not have been granted. So why should they be banned from being joint-adoption mothers for another child who is not biologically affiliated to one of them? The Constitutional Court agreed. It repeated that differentiation on the basis of sexual orientation must be necessary for particularly serious reasons, and stressed that joint parenthood by same-gender couples was already available. Restricting it to a partner's biological children and refusing it to children adopted by the partner was considered by the court to be seriously unreasonable, even more so because withholding legal bonds (such as maintenance rights, inheritance rights, etc.) vis-à-vis the second parent compromises the child's best interests.

Furthermore, the Court emphasized that registered partnerships,[44] just like marriages,[45] are oriented towards lasting, stable partnerships. Again it said that same-sex couples do not substitute but rather complement opposite-gender couples. Joint adoption by them therefore poses no danger to marriage and the traditional family. Hence, the courts must be allowed to make decisions in the best interests of the child based on the concrete circumstances of each individual case and not based on general, abstract rules, but upon the merits of each individual case. The best interest of the child is paramount. 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.[46] In other words: give the discretion to the judges and the courts and trust them.

In a parallel case decided on the same day, the Austrian Constitutional Court, along the same line of argument, turned down an age difference requirement of at least 16 years between the adoptive parent and adoptive child. The court said that there might be cases where there is a 15-year difference or 14-year difference, and it nevertheless is in the best interest of the child to be adopted by that adoptive parent. Hence such adoptions should be possible. Judges should be able to grant adoption if it is in the best interest of the child, and not be barred to do so by general rules.[47]

F. *Same-Gender Marriage*

In *Schalk & Kopf v. Austria* (2010) the European Court of Human Rights held that Article 12 of the Convention, which enshrines the right to marry and found a family, is applicable also to same-gender couples.

44. Restricted to same-gender couples back then.

45. Restricted to opposite-gender couples back then.

46. Verfassungsgerichtshof [VfGH] [ConstitutionaI Court], Dec. 10, 2013, ERAENNTNISSE UND BESCHLÜ SSE DES VERFASSUNGSGERICHTS-HOFES [VFSLG] 19824/2013 (Austria).

47. Verfassungsgerichtshof [VfGH] [ConstitutionaI Court], Dec. 11, 2014, ERAENNTNISSE UND BESCHLÜ SSE DES VERFASSUNGSGERICHTS-HOFES [VFSLG] 19941/2014 (Austria).

Nevertheless, as matters stood back then, the Court said that same-sex marriage, different from opposite-gender marriage, was not yet part of the very essence of the right to marry. This means that it can be regulated and even banned by member states under paragraph 2 of Art. 12, which says that the right to marry is granted according to the regulations in the national member states. The Court emphasized "as matters stand," so it likely will change in the future. Back in 2010, only six out of 47 Convention States had allowed same-sex marriage. The Austrian Constitutional Court followed that at first in 2012 and ruled that there's no fundamental right for same-gender couples to marry, despite its rejection of segregation in other cases.[48] It referred to the ability to act in joint parenthood. As marriage, as a matter of principle, would be oriented towards joint parenthood, marriage may be restricted to opposite-gender couples, the court said.[49]

Hence, the final challenge in family law was same-sex marriage. Since the 1st of January of 2016, in Austria, same-gender couples have been enjoying absolutely the same equal rights to found a family. Since then, same-gender couples in Austria have had access to step-parent adoption, joint adoption, medically assisted procreation (donor insemination for lesbian couples), automatic co-parenthood, and motherhood recognition. But, as the state of the law was back then in 2016, the parents of these children were not allowed to marry. As a result, these children were compulsorily illegitimate, born out of marriage. In those days, Austria was the only country in the world with such a state of the law: full equality in joint parenthood for same-gender couples but a ban on marriage between the parents of these children. Other states in the world at that time which granted full-parental equality and equal rights to found a family, as a matter of course, let the parents of these children, two legal fathers or two legal mothers, marry. I represented five children, and their same-gender parents, who applied to the Constitutional Court complaining about their illegitimate status due to the marriage ban on their parents (consisting of two mothers or two fathers).

Inter alia we relied on an old case from the European Court of Human Rights: *Johnston v. Ireland* (1986), a case on quite identical facts. This case also was on a child whose parents were not allowed to marry. The reason was that the father was married to one woman, and then fathered the child another woman, and divorce was not available in Ireland back then. Hence,

48. *See* the judgments on several differences between registered partnership and marriage (2011-2013) above.

49. Verfassungsgerichtshof [VfGH] [ConstitutionaI Court], Oct. 9, 2012, ERAENNTNISSE UND BESCHLÜ SSE DES VERFASSUNGSGERICHTS-HOFES [VFSLG] 19682/2012 (Austria); Verfassungsgerichtshof [VfGH] [ConstitutionaI Court], Dec. 14, 2011, ERAENNTNISSE UND BESCHLÜ SSE DES VERFASSUNGSGERICHTS-HOFES [VFSLG] 19596/2011 (Austria).

the parents of the child were not allowed to marry, due to the ban on divorce. The European Court of Human Rights, on divorce, back then had a similar case law as on same-gender marriage today: Divorce bans were considered within states' margin of appreciation. Member states were free to ban divorce and did not need to grant divorce (as is the case with same-gender marriage today under *Schalk & Kopf*). Nevertheless, the Court, in *Johnston v Ireland* found a violation of the Convention, considering the best interest of the child, pointing out that the child, as a result of the divorce ban, was compulsorily illegitimate, that is, barred from becoming a legitimate child. We thought this was an almost identical situation and were quite eager to bring the case to the European Court of Human Rights, but we won it already in the Austrian Constitutional Court.

It would have been an interesting case for the European Court of Human Rights, as an intermediate step towards equal marriage. At the same time that we litigated this case in the Constitutional Court, we also organized a citizens' initiative brought to the federal Parliament. We called it "ehe gleich": "ehe" is marriage and "gleich" has multiple meanings--it means "equal", hence equal marriage--but it also has the meaning of "immediately", "right now". We produced postcards and posters with slogans like "Why are our parents not allowed to marry?", "Why is our child not allowed to be a legitimate child?", "Why are our children not allowed to be legitimate?", and "Why are our grandchildren not allowed to be legitimate?". Our efforts turned out to be quite successful. We produced the most successful citizen initiative so far in the history of Austria: 60.000 signatures with only persons who are eligible to vote for the Austrian federal Parliament allowed to sign. Austria has only eight million inhabitants, so this is a large number of signatures. Convert it to your country to see how much it would be there. It's quite a lot without the support of media.

The Constitutional judgment came down in 2017. The Constitutional Court opened marriage to same-gender couples and, at the same time, opened registered partnership to opposite-gender couples, as the court considered segregation discriminatory both ways. The Court held that same-gender couples enjoyed full equality in parenting rights, rendering segregation seriously unreasonable. The court considered its reasoning put forward in 2012 (that marriage, as a matter of principle, would be oriented towards joint parenthood) as not anymore serving as a valid basis for excluding same-gender couples from marriage, because the right to found a family now is granted under absolutely equal footing as to opposite-gender couples. The Court went on to say that legal segregation between one institute for opposite-gender couples and another one for same-gender couples signals that homosexual persons are not equal to heterosexual persons, and outs persons as having a same-sex partner when declaring their

family status to be "registered partnership" (as long as registered partnerships were exclusively for same-gender partners).[50]

As Austria has had marriage equality from the 1st of August 2019, one problem remained. Capacity to marry under Austrian law traditionally is determined according to the law of the home country of each of the spouses. Hence marriage was not allowed when the home country of one of the partners banned same-gender marriage. This problem was fixed by the legislature in August 2019. Since 1 August 2019 capacity to marry is determined under Austrian law if the home country of (at least) one of the partners does not allow same-gender marriage.[51] This means that, since 1st August 2019, all same-gender couples in the world are entitled to marry in Austria, literally *every* same-gender couple, because Austria traditionally has no residence requirement or citizenship requirement for marriages. Austria is a traditional destination of wedding tourism, and since 1st of August 2019, this has also been possible for same-gender couples.

IV. CONCLUSION

What conclusions can be drawn from the developments in Austria? At first, one could say Austria is a good example for courts enforcing human rights, and a good example for how far you can get in a historically short period, with courts committed to such enforcement. Austria went from criminalization to full marriage and parental equality in 17 years: 2002 to 2019, or 15 years if you count not the date of entry into force of marriage equality but the judgement of the Constitutional Court on marriage equality. In history, 15 years is close to nothing. Note that these rights are not just granted by legislators but constitutionally protected fundamental human rights recognized by the Constitutional Court: marriage, medically assisted procreation, step-parent adoption, and joint adoption. They cannot be taken away by legislators. In addition, Austria is the first and so far only country in Europe granting marriage equality and joint adoption as constitutionally protected fundamental human rights. With access to donor insemination for lesbian couples, Austria is even the only country worldwide, so far, granting this as a constitutionally protected human right.

Second, legislation must be coherent. Allowing individual adoption but banning second-parent adoption, and granting second-parent adoption but banning joint adoption is incoherent, and therefore violates human rights.

Third, the best interests of the child and sexual orientation equality are

50. Verfassungsgerichtshof [VfGH] [ConstitutionaI Court], Dec. 4, 2017, ERAENNTNISSE UND BESCHLÜ SSE DES VERFASSUNGSGERICHTS-HOFES [VFSLG] 20225/2017 (Austria).

51. Internationales Privatrecht--Gesetz [International Private Law], § 17, as amended by federal statute of 31 July 2019 (BGBl I 72/2019).

not in conflict, but, on the contrary, 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. Sexual orientation discrimination compromises the best interests of the child, which, according to the Convention of Human Rights and according to the Convention on the Rights of the Child, are paramount.

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同性養育和孩子的最大利益：以奧地利為例的歐洲觀點

Helmut Graupner

摘　要

奧地利與臺灣一樣，是通過憲法法院的判決來開放同性夫婦間之婚姻，但這也與其他歐洲國家有所不同。與臺灣不同的是，奧地利在養育子女（另一半收養、共同收養和自動視為父母機制等方面）方面也實現了平等，因為其憲法法院是以每個孩子的最大利益為核心論點。本文介紹了奧地利，這個曾經是世界上第一個廢除同性戀接觸者需判處死刑的國家，後來又是最後一個取消對同性戀刑事起訴的國家，如何為了實現同性和異性在家庭法中的完全平等而進行改革。本文並詳細闡述了兒童權利在這個過程中為何變得至關重要。

關鍵詞：同性婚姻、同性養育、兒童權利、收養、LGBT權利