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From Zukrigl to X et al

and beyond

LGBTI HUMAN RIGHTS 2017:

THE EUROPEAN AND INTER-AMERICAN COURTS

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1992

Zukrigl v Austria

1989 Austrian Constitutional Court

- > upholds discriminatory age of consent (gay relations: 18, lesbian & hts relations: 14)
- > adolescents seduced into a homosexual orientation („imprinting“)
- > not so much imprinting through lesbian relations
- > lesbian imprint not as bad
- > criminal proceedings: „real“ lesbian acts not distinguishable from amicable caressing and assistance in personal hygiene

European Commission of Human Rights

- > margin of appreciation

1997

Sutherland v UK

European Commission of Human Rights

- > no such thing like seduction into a homosexual orientation
- > higher age of consent: violation of Art. 8, 14

1998

- > two men convicted under Austrian discriminatory age of consent, and
- > 17 year old adolescent (desiring relations with adults) applied to the Commission
- > Commission sent back the applications (referring to old case-law)
- > applicants insisted on the registration (referring to *Sutherland*)
- > referred to the new Court
- > Government: *Sutherland* not relevant as in Austria adolescents not co-perpetrators, but protected victims

2003

L. & V. v Austria & S.L. v Austria

(and follow-up cases)

European Court of Human Rights

- > Just like differences based on sex, differences based on sexual orientation require *particularly serious reasons* by way of justification
- > Compensation: EUR 15.000,-- for a criminal conviction plus EUR 5.000,- per month imprisonment
- > S.L.: from 14 to 18 years of age prevented from entering into relations corresponding to his disposition (with adult men) -> compensation for non-pecuniary damage: EUR 5.000,--

2002

Austrian Constitutional Court struck down higher age of consent

2013

E.B. v Austria

After repeal of discriminatory age of consent
-> Austria refused to delete convictions from criminal records

ECtHR

- > treating convictions violating human rights like other convictions is discriminatory
- > obligation to make exceptions from general rules

2015

Criminal record repeal act

CJEU

Maruko (2008) & Römer (2011)

Directive 2000/78/EC

- > treating another person less favourably than another in a comparable situation = direct discrimination
- > prohibited in employment, including pension rights

German courts

- > employees in registered partnerships (available only for same-gender couples)
- > maybe treated less favourably than employees in a marriage (available only for opposite-gender couples)
- > because: no comparable situation
- > as under German law rp and marriage not identical (differences in tax law, adoption etc.)

Comparability:

criteria **must** be:

- > *comparable* (not identical) situations
- > *specific and concrete* (not global and abstract) comparison
- > in the light of the *benefit concerned*
- > focus on **relevant** rights and obligations
(according to the *purpose* and the *condition* for the benefit at issue)

-> **NOT (“must not”)**: overall comparison between marriage and registered partnership

*People (couples) are to be compared,
not abstract legal institutions!*

- > relevant rights/obligations for partner-supplement to retirement pension:
mutual care and support
- > those obligations comparable for both:
registered partners married partners
- > direct discrimination

2003

Karner v Austria

- > 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)

***X et. al. v Austria* [GC]**

19 Feb 2013 (10 : 7)

- Austria: step-parent adoption for married and unmarried opposite-gender couples but not for same-gender couples
- 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)

Austria

Impact of X et al:

- > 2013: *step-parent adoption*
- > 2015: *medically assisted procreation (donor insemination)*
(VfGH 10.12.2013, G 16/2013, G 44/2013)
- > 2015: *automatic co-parenthood & motherhood recognition*
- > 2016: *joint adoption* (VfGH 11.12.2014, G 119-120/2014)

Without ECtHR & CJEU

Austria and Germany would not be where they are now

Still more to go

- > CJEU: *E.B. v BVA* (C-258/17) (lower pension today as a result of a discriminatory dismissal of a police-man in the 1970s)
- > Austrian Constitutional Court: marriage equality (five children, together with their parents, complain about their status as illegitimate children due to their parents prohibited from marrying – despite full equality in parental rights)

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