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Same sex couples / heterosexual couples and the right to marry or to enter into a registered partnership

REPORT BY

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In December 2017 the Austrian Constitutional Court (ACC) rendered a decision on a highly politicical issue, which was long and controversially discussed at the national as well as at the supra- and international levels: the Court granted same-sex couples free access to marriage. In addition, the ACC enabled heterosexual couples to opt for registered partnership. These options will become effective only after 31 December 2018 since the Court set this time-limit for the legislator to "repair" the law by adopting new and constitutional provisions.

It is remarkable to note that opening marriage to same sex couples was entirely done by the Court and not by the legislator. As the ACC was obviously Europe's first Court to do so, it is not surprising that this decision triggered another discussion – in particular in the academic world.

The facts

Two women, living in a registered partnership since 2012 and parents of a minor, requested the Vienna Municipal Office (*Magistrat Wien*) to allow them to enter into marriage (which means: asking them to determine their capacity to enter into a marriage contract, the authorisation to do so, the registration of their marriage and finally, the issuing of a marriage certificate). Their request was dismissed both the Municipal Office and by the Vienna Administrative Court (*Verwaltungsgericht Wien*). These decisions referred to Article 44 of the Civil Code (*Allgemeines bürgerliches Gesetzbuch*), which stipulates that a marriage contract could only be entered into by two persons of the opposite sex. Accordingly, marriage between two persons of the same sex must be regarded as null and void as it lacked the most essential requirement to render it a valid legal act.

All three applicants lodged a complaint with the ACC alleging that the legal ban to marry violated their right to respect for private and family life and the principle of non-discrimination. They argued that the concept of marriage and its restriction to couples of the opposite sex was outdated. Since the entry into force of the Civil Code and its Article 44 in 1812, a lot had changed, in particular, the legal situation of same-sex couples and their right to procreation, co-parenting and the education of their children. The marriage ban would, moreover, harm the best interest of the child since the children concerned would unavoidably be considered as born outside wedlock. A fact that gives children the impression that their families are not of equal value to families with parents of the opposite sex. The inconsistency of the legal order would thus indicate a difference ("an otherness") that would automatically lead to the stigmatisation of these children. The applicants also argued that there was no objective reason to exclude same-sex couples from entering into marriage.

As the complaint gave rise to concerns, the ACC initiated *ex officio* review proceedings, which resulted in the repeal of the words "different sex" in Article 44 of the Civil Code AND to the repeal of the words "same sex" in the Registered Partnership Act of 2009 (*Eingetragene Partnerschaft-Gesetz – EPG*) as unconstitutional.

The reasoning of the Court

According to Article 44 of the Civil Code, marriage is only allowed between two persons of different sex while § 2 of the Registered Partnership Act stipulates that a registered partnership may be formed only by two persons of the same sex. The Court noticed that both marriage and registered partnerships were designed for a stable and committed relationship of two equal persons living together on the basis of mutual assistance and respect. Both concepts – marriage as well as registered partnerships – provide a legal framework for couples who want to have their lasting and stable relationship institutionalised and recognised.

Looking into the preparatory works of the Registered Partnership Act and the history of its origins, the Court found that the legislator creating the legal framework clearly chose a concept that was different from marriage. A registered partnership should literally not constitute a “light” marriage. However, the ACC found that the differences between marriage and registered partnerships have faded away over the years to the extent that – despite a few differences – today, the two concepts correlate. Pursuant to the recent amendments allowing same-sex couples to become parents either through adoption or by using legal means of medically assisted reproduction, all provisions of family and matrimonial law, also in matters of divorce or separation, apply to registered partners and their children.

Referring to its established case-law, the ACC reiterated that the principle of equality also binds the legislator (cf. e.g. VfSlg. 13.327/1993, 16.407/2001) prohibiting unequal treatment which cannot be justified on substantive grounds (VfSlg. 14.039/1995, 16.407/2001). Yet, only particularly serious reasons can justify unequal legal treatment which is connected to potentially discriminating characteristics, such as differences based on sex and sexual orientation as explicitly mentioned in Article 7 (1) second sentence of the Constitution (VfSlg. 19.942/2014).

Based on this analysis, the Court reasoned that today one could not stick to a distinction between the legal concepts of marriage and registered partnerships without discriminating against same-sex couples. As persons of same sex orientation have had to suffer social and legal discrimination for long and until very recently the distinction of relationships which are the same by nature in the significance to the individuals concerned results in a discriminatory effect just as much prohibited by the principle of equality. From the perspective of same-sex couples, it is this distinction that makes it obvious and clear to everyone that their relationship is something else than the relationship of two heterosexuals who are married to each other although both relationships are based on the same values and on the same legal background.

The discriminatory effect is made apparent whenever persons living in a same-sex partnership have to specify their marital status using the term “living in a registered partnership” disclosing in that very moment their sexual orientation even in situations in which it is not and must not be of any significance. By that, and especially against the historical background of this issue, these persons are at risk of being discriminated against. Article 7 (1) second sentence of the Constitution provides special protection from such discriminatory effect.

Thus, the Court repealed the phrase “of different sex” in Article 44 of the Civil Code reserving the right to marry exclusively to opposite-sex couples as well as the phrase “same sex” used by the Registered Partnership Act granting the right to enter a registered partnership exclusively to same-sex couples.

Case law of the ACC leading to nondiscrimination of same-sex couples:

Considering the relevant case law of the ECtHR, and in particular of the ACC, one can draw the conclusion that some of their decisions paved the way for today’s legal situation and the adaption of a registered partnerships towards marriage.

The ACC decided on questions such as: whether a partnership could be registered only at the district administrative authority – instead of at the register offices and approved premises (VfSlg. 19.758/2013); whether and when registered partners could choose a common last or a family name (VfSlg. 19.623/2012); whether health insurance of one registered partner could also cover the needs of his/her partner (VfSlg. 17.659/2005 and VfSlg. 18.214/2007).

Decisive judgments of the ECtHR on the joint adoption of a child by registered partners (EctHR, case of E.B. v. France, 22.1.2008 and case of X and others vs Austria, 19.2.2013) had an impact. This decision motivated the Austrian legislator to amend the law to allow second-parent

adoption also for registered partners. In that context, questions arose concerning medically assisted procreation and the ACC repealed provisions excluding same-sex couples from intrauterine insemination (VfSlg. 19.842/2013). It was only about one year later that the ACC opened the (general) adoption of a child to same-sex couples (VfSlg. 19.942/2014).

But, once again, it must be pointed out that all these cases were brought to the Court and had to be decided by the Court. None of its decisions could have prevented the legislator from giving answers to these pressing issues and societal challenges by enacting laws.

Media-echo and the reception in the academic world

There was large and wide positive media coverage of this judgment. The media interest focused on questions such as: who, homo- or heterosexual couples, can do what, when and under what circumstances.

The academic world had a more critical approach: Criticism was voiced that the ACC, when deciding such a politically sensitive issue and taking such a ground-breaking decision, had failed to give sufficient and adequate reasons. In this context, questions were raised such as: how could the initial difference between the two legal concepts, marriage and RP, fade away over the years? The ACC was also confronted with its former case law by which it had accepted and justified the two different concepts. The Court had even expressly stated that the legislator was free to reserve marriage exclusively to opposite-sex couples (VfSlg. 17.098/2003, 19.865/2014). A case law which had been in line with the ECtHR's case law and still valid (Schalk and Kopf v. Austria, 24.06.2010; Ratzenböck and Seydl v Austria, 26.10.2017; Orlandi and others v. Italy, 14.12.2017).

Furthermore, the ACC was criticised for changing its standard of review in discrimination matters. Contrary to former decisions, the ACC had stated a violation of equality when there was simply a risk to be treated in a discriminatory manner. This argument could be rebutted by the reasoning of the ACC when referring to the history of discrimination against persons of same-sex orientation. On the basis of this argument, the Court went on to say that keeping two concepts for the same kind of relationship had created a separation of the groups which had a stigmatising effect on registered partners as same-sex couples. A fact that becomes all more clear when the question is put otherwise: what if a heterosexual couple is denied access to RP? Could that also amount to a discriminatory impact? The answer to that question was already given: such a decision would not result in the separation of a minority from the majority (see VfSlg. 19.492/2011; ECtHR, § 33, case of Ratzenböck and Seydl v Austria, 27.10.2017; Lamiss Kakzadeh-Leiler in EF-Z 2/2018, 52ff).