

■ CONSTITUTIONAL DEVELOPMENTS IN AUSTRIA

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FOCUS: Same-sex partnership and marriages

In the last decade a major shift in the legal acceptance of same-sex partnerships and the enabling of same-sex marriage brought new tolerance to Europe. The situation in Austria is still in between a conservative approach of discriminating against same-sex partnerships and a liberal approach of tolerating same-sex marriages. The developments towards tolerance are rather slow and the constitutional court finds itself under the quite conservative legal statutes and the considerably liberal case-law of the European Court of Human Rights. The European Court of Human Rights has declared several times that Austria is violating the European Convention of Human Rights regarding same-sex provisions in Austria.

Looking back at the historical situation in Austria, homosexuality was criminalized until the 1970s. The crime was called "Fornication against nature with persons of the same sex" ("*Unzucht wider die Natur mit Personen desselben Geschlechts*") regarding Sec. 129 and 130 Penal Code 1852. The penalty was imprisonment up to five years.

In the last few decades only one provision in the Austrian Criminal Code remained: Sec. 209 "Same-Sex Fornication between Persons below 18 years". Sexual intercourse between heterosexual partners was not prosecuted over the age of 14, but same-sex partnership under the age of 18 could be prosecuted until the year 2002. With the Austrian Constitutional Court's judgement of June 21st 2002 (VfSlg. 16.565), the Court declared this provision as not reasonable and void.

More recently, the Austrian constitutional court was confronted with several cases regarding same-sex partnerships. The rationale of the Austrian constitutional court is as follows. The Court makes two distinctions: firstly between same-sex partnerships and opposite-sex partnerships, and secondly between partnerships and marriage. The first has to be treated equally whereas the latter can be treated unequally.

The concept of the Austrian Constitutional Court is well exemplified in the cases presented by *Patrick Segalla*, which deal with non-discrimination of same-sex partners in insurance matters (Austrian Constitutional Court judgement of October 10th, 2005, VfSlg. 17.659/2005 and judgement of September 27th, 2007, case B 1829/06). The Court declared provisions as void, which violated the constitutional right to equal treatment because they excluded from their ambit persons of the same sex as the insurant. The renewed legal provisions

differentiated, if the partner was raising children living in the common household. The Constitutional Court declared that these provisions were not unconstitutional.

Graciela Faffelberger and *Stefan Huber* present case law about marriage between homosexuals and the right to equality as well as the right to marriage. In the Austrian Constitutional Court judgement of December 12th, 2003 (VfSlg. 17.098/2003) the Court decided that neither the principle of equal treatment nor the ECHR demand an extension of the scope of the provision regarding relationships other than those in which parenthood is, at least in principle, possible.

Christoph Bezemek discusses a follow-up decision regarding the cross-border effects of same-sex marriages. In the Austrian constitutional court judgement of October 16th, 2004 (VfSlg. 17.337/2004) the court did not find any violation of the right to equality and other human rights as the constitutional court understood marriage as only legally possible between opposite-sex partnerships.

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