

■ CONSTITUTIONAL DEVELOPMENTS IN AUSTRIA

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Marriage between Homosexuals Equal treatment and right to marriage

Austrian Constitutional Court
Judgement of December 12th, 2003 (B 777/03)
(VfSlg. 17.098/2003)

The Circumstances of the Case

Proceedings were initiated by two homosexual appellants who wanted to obtain the permission for marriage before the Austrian registry office of Vienna-Ottakring.

This application was rejected by the registry office on grounds that according to Austrian civil law (pursuant to section 44 of the civil code – ABGB) marriage was only possible between two people of different sexes. The appeal against this decision was rejected as unfounded by the governor of Vienna. The two appellants challenged the decision of the governor before the Constitutional Court under Article 144 of the Austrian Constitution.

The appellants argued that the decision infringed their right to respect for private and family life, the prohibition of discrimination and the protection of property.

They argued that the character of marriage was a lifelong cohabitation which includes every aspect of life. Under current legislation, there is no condition that this form of living has to be insoluble nor that descendants have to be conceived.

On this basis it was argued that the exclusion of homosexual relationships can not be objectively justified any longer.

According to the appellants the prohibition of discrimination pursuant Article 14 ECHR is also applicable to issues which are linked to sexual orientation (which is protected under Article 8 and Article 12 ECHR, the latter with reference to the right to conclude marriage), as earnings and savings accumulated in the course of the relationship would not enjoy tax privileges in case of death of one of the partners, so that the surviving partner would have to face more economic strains in comparison to a widow(er). This economic disadvantage consequently constitutes an infringement of the property right of this person and is in violation of Article 1 of the 1st additional protocol to the ECHR.

It also has to be pointed out that the appellants stated that their appeal dealt with a highly political issue, but that it would be desirable that the Republic of Austria should follow the examples of other western societies that have already created forms of legal relations open to heterosexual and homosexual relationships. Further, the appellants urged the Constitutional Court to indicate the legislator the legal deficits in that aspect, as the German Federal Court of Justice had done before.

The Constitutional Court decided that the appeal was unfounded.

Relevant Austrian Law

Section 44 ABGB:

This provision states that family ties are constituted through a marriage-contract in which two people of different sexes declare their will to cohabit, conceive descendants and render each other assistance.

Findings of the Court

Firstly, the Constitutional Court stated that the administrative proceedings leading to the notification in question exclusively concerned the admissibility of marriage of the appellants. Consequently, their application only concerned section 44 of the Civil Code as far as it stipulates the requirement that two persons entering into marriage must be of different sexes. In this context, the challenge of the provision on the grounds of violation of property only aims at pleading inadequacy of this provision under equal treatment requirements.

Referring to Article 12 of the ECHR (which is attributed constitutional value within the Austrian legal system) the Court reiterated the wording of this provision: "*Men and women* of marriageable age have the right to marry *and to found a family*, according to the national laws governing the exercise of this right." (italics are ours).

Neither the equal treatment principle of the Austrian Constitution nor the ECHR (due to the wording "men and women") demand an extension of the scope of this provision to relationships other than those in which parenthood is at least in principle possible. The very nature of marriage as encompassing possible parenthood is not put into question by the facts that a divorce or separation is possible and that the partners may decide to not have children. Also the ECtHR deems a restriction of the scope of marriage to partners of different sexes justified: The ECtHR in its *Cossey* judgement (27.09.1990, application no 10843/84) found "that the attachment to the traditional concept of marriage provides sufficient reason for continued adoption of biological criteria for determining a person's sex for the purpose of marriage". Later case law with regard to the specific situation of transsexuals (11.07.2002, application no 28957/95, *Goodwin*) does not lead to the necessity to permit marriage between homosexuals.

Even though also homosexual relationships qualify as private life protected under Article 8 of the convention, no obligation to modify national marriage provisions can be deduced from Article 12.

Finally, the Constitutional Court stated that in the case at hand it was not called upon to decide whether and with regard to which legal issues the law discriminated against homosexual relationships by making special provisions for married couples. Further, it is not the task of the Constitutional Court to give the legislator advice with regard to constitutional or even law-making issues.

Consequently, the Constitutional Court dismissed the application.

Assessment

First, it has to be noted that the Court was rather limited in supplying arguments for its conclusion, which is supposedly due to the fact that there is established case law in regard to this context. Two issues may be of a certain interest in this context:

The Court decided the case only with regard to constitutional equal treatment requirements and the right to marriage, but did not assess the facts on the grounds stated by the appellants who also argued a violation of the provisions aiming at protection of property. Certainly, this "narrow" approach is correct and convincing, though not necessarily the only option: In other cases, the Constitutional Court – in line with the ECtHR's case law – took the view that not only the sole property, but also certain rights having a connection to the property (lease contracts, fishing rights, taxes and charges) were covered by the scope of this provision. The reason why the appellants pleaded a violation of this provision is obvious: First, at the time when the claim was filed, the ECtHR's decision in the *Cossey* case was well established and there was little hope that the Constitutional Court would depart from this case law and overturn the decision at hand on the grounds of violation of article 12 ECHR. Second, the property protection provision in Article 1 of the 1st additional protocol to the ECHR contains a positive obligation for the legislator to protect property. Accordingly, a successful claim would have entailed an obligation for Austria to legally ensure protection of property in the context of the case at hand.

The Constitutional Court's finding that marriage as referred to in Article 12 ECHR only covers marriages between persons of different sexes (what the ECHR calls the "traditional" approach) is in line with the ECtHR's case law. The Constitutional Court used this argument as the departing point for its finding that accordingly, a distinction may be drawn between same-sex and different-sex couples. The Court then underlined that this does not mean that homosexual couples were not protected under Article 8 ECHR, but only that there was no obligation to open marriage to them. Further, this does not – in line with the ECtHR's case law – mean that there is a prohibition to do so.

In this context, the dynamic nature of the ECHR has to be noted: It cannot be ruled out that one day, when a vast majority of the signatory states has introduced same-sex marriages, the "traditional" concept may no longer apply to Article 12 ECHR. Accordingly, in this case the Austrian parliament might be obliged to modify Austrian marriage legislation.

The distinction the Constitutional Court draws – once again with reference to the ECtHR's case law – between homosexual (i.e. same sex couples) and couples including one transsexual partner (i.e. couples now consisting of partners with different sexes of which one has undergone a sex change) appears to be well founded, as transsexuals after a sex change belong to the other sex and may accordingly be protected by Article 12 ECHR when engaging marriage with a person of the other sex (even though it is at least questionable whether this can be called a more "traditional" marriage than the one between two same-sex partners, as also in this relationship parenthood is biologically impossible). Legal questions in this context are rather related to possible differences with regard to "biological" sex (according to biological criteria) and "legal" gender (according to evidence from public registers) of the concerned person before and after the sex change. With regard to the case at hand, the invalidation of the so-called transsexuals-ordonnance ("Transsexuellenerlass") by the Austrian constitutional court (VfSlg. 17.849), which created a situation in which after a sex modification of a transsexual two persons of the same sex were married, did not lead automatically to deletion of the entry of marriage in the register of births, deaths and marriages, brought no substantial modification of the situation: The judgement of the Constitutional Court was based on formal arguments, not on an appraisal of equal treatment provisions.

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