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Distinction between marriage and registered partnership violates ban on discrimination

The Constitutional Court repeals legal provisions which distinguish between opposite-sex and same-sex couples as of the end of 31 December 2018.

In the future, same-sex couples will have the right to marry in Austria. With its decision of 4 December 2017, the Constitutional Court repealed those legal provisions which, for the time being, deny same-sex couples access to marriage. In its reasoning, the Court justified this move by referring to the ban on discrimination enshrined in the principle of equal treatment. The repeal will take effect as of the end of 31 December 2018. As of the same date, the instrument of registered partnership will also be open to opposite-sex couples.

The Constitutional Court performed an ex-officio review of the legal provisions on marriage and registered partnerships. The case was brought before the Court through a complaint lodged by two women who live in a registered partnership and petitioned for the right to marry. The petition was rejected by the municipal authority of the City of Vienna in charge of the matter and, subsequently, by the Vienna Administrative Court.

The Registered Partnership Act (Eingetragene Partnerschaft-Gesetz – EPG) was adopted in 2009 and entered into force in 2010. At that time, the legislator pursued the goal of eliminating discrimination of same-sex couples, but against the background of a “certain traditional perception” upheld two different legal institutions, i.e. marriage and registered partnership.

Since then, there has been a progressive convergence between a registered partnership and marriage, the effect being that today the two legal institutions are largely equivalent in terms of their substantive content and their legal consequences, despite the “few remaining differences”. In particular, recent developments of the law have made joint parenthood of same-sex couples possible: Same-sex couples are allowed to (jointly) adopt children and make use of the lawful forms of medically assisted procreation on the basis of equal rights.

However, the distinction between marriage and a registered partnership can no longer be maintained today without discrimination against same-sex couples. The very existence of two separate legal institutions is an expression of the fact that individuals with a same-sex sexual orientation are not equal to those with a heterosexual orientation.

On this point, the Constitutional Court’s decision reads as follows: “The resulting discriminating effect is reflected in the fact that on account of the different terms used to designate a person’s marital status (‘married’ vs. ‘living in a registered partnership’), persons living in a same-sex partnership have to disclose their sexual orientation even in situations in which it is not and must not be of any significance and, especially against the historical background of this issue, they are at risk of being discriminated against.” The Court therefore arrives at the following conclusion: “The distinction of the law between

opposite-sex and same-sex relationships as two different legal institutions violates the principle of equal treatment, which forbids any discrimination of individuals on grounds of personal characteristics, such as their sexual orientation.

The repeal pronounced by the Court refers to the phrase “of different sex” in the provisions of the General Code of Civil Law on marriage and those provisions of the Registered Partnership Act which limit registered partnerships to same-sex couples. Thus, following the repeal, the institutions of marriage and registered partnership are open to same-sex as well as opposite-sex couples.

Questions and answers regarding the Constitutional Court’s decision on same-sex marriage

- **When can the first same-sex marriage be concluded?**

In accordance with the Constitutional Court’s decision, the legal provisions currently in effect (marriage for opposite-sex couples, registered partnerships for same-sex couples) remain in force until 31 December 2018, unless the legislator repeals or amends them before that date. Thus, same-sex couples can marry, at the latest, after 31 December 2018.

The situation is different for those couples who filed a complaint with the Constitutional Court before it pronounced the repeal. For them, the repeal takes effect as of the date of service of the decisions of the Constitutional Court. In the absence of other obstacles, they can therefore marry before 31 December 2018. Besides the case that triggered the judicial review procedure of the Constitutional Court, another four cases are pending.

- **Why did the Constitutional Court not repeal the Registered Partnership Act in its entirety?**

To restore the constitutionality of the law, it was sufficient to repeal those provisions which govern the prerequisites for access to marriage for same-sex and opposite-sex couples. The Registered Partnership Act is to remain in force as a legal basis for existing partnerships. The status of couples living in a registered partnership remains unchanged, with all rights and duties provided for by the law.

- **Will registered partners additionally have to enter into marriage?**

Yes, if they wish to be deemed married in the future. No, if they are satisfied with their current status as registered partners.

- **Do same-sex couples now have a choice of either marriage or a registered partnership?**

Given the legal basis created through the Constitutional Court's decision, they have a choice after 31 December 2018, at the latest. However, the legislator could adopt a new provision which might result in a change in the legal situation.

- **Will it also be possible for heterosexual couples to opt for a registered partnership?**

Given the legal basis created through the Constitutional Court's decision, this will be possible after 31 December 2018, at the latest. Opposite-sex couples will then have the same choice as same-sex couples. However, the legislator

could adopt a new provision which might result in a change of the legal situation.

- **What will people living in a registered partnership have to do to get married?**

Except for those whose cases are already pending with the Constitutional Court, they have to wait until the deadline set by the Constitutional Court (31 December 2018) expires or the legislator amends the new legislation and decides on an earlier date of entry into force. As soon as access to the institution of marriage is possible for same-sex couples, they have to register with the local registry office, going through the same procedure as heterosexual couples.

- **Does an existing registered partnership constitute an obstacle to marriage?**

Persons living in registered partnerships have to have their registered partnerships declared null and void or dissolved (section 9 of the Austrian Marriage Act) before they are allowed to marry. It is up to the competent authorities and the courts to decide whether this provision also applies to persons already living in registered partnerships and additionally wanting to get married.