

The Constitutional Court stated that, it follows from Article 62 of the Constitution that the term “damage” includes both pecuniary and non-pecuniary damage and the right to compensation for damage applies to pecuniary and non-pecuniary damage caused by the violation of constitutionally enshrined rights and freedoms of a person. Henceforth, in all cases in which the constitutionally enshrined rights and freedoms have been violated, a person shall have the unconditional right to claim compensation for the damage caused by those violations.

The Constitutional Court declared that, in the event that the legal possibility of claiming non-pecuniary damage caused by unlawful administrative actions is restricted to violations of a limited number of rights, and until the National Assembly has clarified the relevant legal regulations and has closed the legislative gap, the right to compensation for non-pecuniary damage caused by unlawful administrative actions shall be recognised as exercisable under both domestic and international law (*inter alia*, the Constitution) in cases where a person’s rights have been violated.

As a result, the Constitutional Court declared Article 104.1 of the Law to be in accordance with the Constitution within the constitutional legal framework that implies that, until the National Assembly has clarified the relevant legal regulations and has closed the legislative gap, the possibility of compensation for non-pecuniary damage caused by unlawful administrative actions is ensured in cases of violation of any of the basic human and citizen rights enshrined in the Constitution and in the international human rights treaties ratified by Armenia.

The Constitutional Court also declared that the final judicial judgment rendered against the applicant is subject to review on the grounds of new circumstances, in accordance with the procedure provided for by law.

Languages:

Armenian.



Austria Constitutional Court

Important decisions

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a) Austria / **b)** Constitutional Court / **c)** / **d)** 04.12.2017 / **e)** G 258/2017 / **f)** / **g)** / **h)** CODICES (German).

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5.2.2.11 Fundamental Rights – Equality – Criteria of distinction – **Sexual orientation**.
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Headnotes:

Legislative provisions, according to which marriage may only be contracted by different-sex partnerships, whereas registered partnership is only available to same-sex couples, are discriminatory on the grounds of sexual orientation and accordingly not compatible with the principle of equality.

Summary:

I. The applicants, a female same-sex couple living in a registered partnership, requested the Vienna Office for Matters of Personal Status to proceed with the formalities to enable them to contract marriage. By a decision of August 2015, the Vienna Municipal Office refused the applicants' request. Referring to Article 44 of the Civil Code, it held that marriage could only be contracted between two persons of opposite sex. According to constant case-law, a marriage concluded by two persons of the same sex was null and void. Since the applicants were two women, they lacked the capacity to contract marriage.

The applicants lodged an appeal with the Vienna Administrative Court but to no avail. In its judgment, the Vienna Administrative Court confirmed the Municipal Office's legal view.

In a constitutional complaint, the applicants alleged that the legal impossibility of their marrying constituted a violation of their right to respect for private and family life and of the principle of non-discrimination. They argued that the notion of marriage had evolved since the Civil Code came into force in 1812. In particular, the procreation and education of children no longer formed an integral part of marriage. According to present-day perceptions, marriage was rather a permanent union encompassing all aspects of life. There was no objective justification for excluding same-sex couples from concluding marriage.

II. Under Article 44 of the Civil Code, marriage can only be contracted between two persons of opposite sex. Therefore, a marriage concluded by two persons of the same sex is null and void. Article 44 provides that “under the marriage contract two persons of opposite sex declare their lawful intention to live together in indissoluble matrimony, to beget and raise children and to support each other”. Same-sex couples have been provided with a formal mechanism for recognising and giving legal effect to their relationships by establishing a registered partnership. Under Article 2 of the Registered Partnership Act of 2009, a registered partnership may be formed “only by two persons of the same sex (registered partners). They thereby commit themselves to a lasting relationship with mutual rights and obligations”.

The Constitutional Court pointed out that the Registered Partnership Act was intended to counter discrimination against homosexual women and men by giving same-sex couples the opportunity to obtain a legal status equal or similar to marriage in many respects. Over the past few years, same-sex registered partnerships have been equated to married couples even in regard of parental rights; in particular, they may adopt children and make use of artificial insemination on the same terms as different-sex partnerships.

However, keeping marriage and registered partnership separate still suggests that people with same-sex sexual orientation are not equal to people with heterosexual orientation although same-sex and different-sex partnerships are equal in nature and in terms of their significance for the individuals concerned. This distinction cannot therefore be maintained today without discriminating against same-sex couples. The discriminatory effect of this distinction is that whenever registered partners refer to their specific family status (“living in a registered partnership”), they cannot avoid disclosing their sexual orientation even where sexual orientation does not – and must not – matter at all, and run the risk of being discriminated against. Yet providing protection

from such discriminatory effects is the core aim of the constitutional principle of equality as laid down in Article 7 of the Federal Constitutional Act.

The Constitutional Court therefore found that the provisions of the Civil Code and of the Registered Partnership Act stipulating that marriage may only be concluded by different-sex couples and that registered partnerships may only be established by same-sex couples are contrary to the principle of equality, and repealed them as unconstitutional. The Court set a time-limit for the legislator to the effect that the unconstitutional provisions would remain applicable until 31 December 2018.

Cross-references:

European Court of Human Rights:

- *Schalk and Kopf v. Austria*, no. 30141/04, 24.06.2010, *Reports of Judgments and Decisions* 2010.

Languages:

German.

