Chapter 10
Germany

10.1. Constitutional framework

This first section discusses two Articles of the German Basic Law that are fundamental to the present case study, namely Article 3 (equality before the law) and Article 6 (protection of marriage and the family). The right to free development of the personality (including personal autonomy and private sphere) of Article 2 German Basic Law was introduced Chapter 4.[1] Reference is also made to that Chapter for a discussion of how the principle of the best interests of the child is consolidated in German law.[2]

10.1.1. Article 3 Basic Law: equality before the law

Article 3 of the German Basic Law lays down a guarantee for equality before the law. Its third paragraph lists a number of prohibited discrimination grounds, such as race and sex. Sexual orientation – in some German legislation and case law also referred to as sexual identity[3] – is not amongst these grounds.[4] By amendment of 1994 disability was included as a suspect ground,[5] but the proposal to also include sexual orientation did not receive the required two thirds majority in Parliament. Inclusion of this ground was considered to be unnecessary as Article 2(1) (the right to free development of the personality) and Article 1 Basic Law (protection of human dignity), as well as the case law of the German Federal Constitutional Court (*Bundesverfassungsgericht*, BVerfG), were considered to offer sufficient protection to homosexuals. Further – it was held – remaining deficits in the protection could best be remedied by the legislature and not by amendment of the Constitution.[6]

LGBT people nevertheless enjoy protection against discrimination by the general principle of equality of Article 3(1) Basic Law. This provision demands that all

1 Ch. 4, section 4.1.2.
2 Ch. 4, section 4.1.5.
3 See for instance Art. 1 Allgemeines Gleichbehandlungsgesetz (AGG) [Equal Treatment Act] and BVerfG 7 July 2009 (dec.), Az. 1 BvR 1164/07, *NJW* 2010 p. 1439, para. 55.
4 Art. 3(3) Basic Law reads: 'No person shall be favoured or disfavoured because of sex, parentage, race, language, homeland and origin, faith, or religious or political opinions. No person shall be disfavoured because of disability.' Translation taken from www.gesetze-im-internet.de/englisch_gg/englisch_gg.html#p0034, visited June 2014.
5 Gesetz zur Änderung des GG [Act on the Amendment of the Constitution] Act of 27 October 1994, *BGBl.* p. 4216.
6 *BT-Drs.* 12/6000, p. 54.

persons be treated equally before the law. It does not necessarily stand in the way of the granting of favourable treatment to one group of persons while it is denied to another group of persons.[7] Following established case law of the BVerfG, the general principle of equality results in differing limits for the legislature or rulemaker, varying from the mere prohibition of arbitrariness to a strict subjection to proportionality requirements. The subject involved and the 'differentiating elements' (grounds of discrimination), are relevant factors to be taken into account in setting this limit.[8] If unequal treatment is linked to sexual orientation, a strict standard of review is applied. As the Constitutional Court explained in 2009, while referring to European law standards:

> 'If a legal provision treats a group of persons to whom a specific statute applies differently from other persons to whom the statute applies, although there are no differences between the two groups of such a nature and such weight that they could justify the unequal treatment, it violates the general principle of equality of Article 3.1 of the Basic Law […]. Article 3.1 of the Basic Law requires that the unequal treatment must be linked to a factually justified distinguishing element. It is not sufficient to justify unequal treatment of groups of persons that the legislator or rulemaker took account of a distinguishing element that was suitable by its nature. Instead, there must also be an inner connection between the differences found and the differentiating provision to justify the degree of differentiation, a connection which can be adduced as an objectively justifiable differentiating factor of sufficient weight […]. […] The requirements in the case of unequal treatment of groups of persons are all the stricter the greater the danger is that a link to personal characteristics that are comparable to those of Article 3.3 of the Basic Law will lead to the discrimination of a minority […]. This is so in the case of sexual orientation.'[9]

For justification of a difference in treatment based on sexual orientation serious grounds ('*ernstlichte Gründe*') are thus required.[10]

'Sexual identity' is furthermore included as a prohibited ground of discrimination in Article 1 of the Equal Treatment Act (*Allgemeines Gleichbehandlungsgesetz* (AGG)),[11] by which Germany implemented Directive 2000/78/EC.[12] The scope of this Act encompasses labour law, social security and public health matters, education and access to public goods and services.[13] Further, a handful of other provisions concerning the legal position of employees and civil servants, explicitly prohibit

7 BVerfG 7 July 2009 (dec.), Az. 1 BvR 1164/07, *NJW* 2010 p. 1439, para. 85.
8 *Idem*.
9 *Idem*, para. 86–87.
10 E.g. OLG Hamburg 22 December 2010 (dec.), Az. 2 Wx 23/09, *NJW* 2011 p. 1104, para. 16.
11 Act of 14 August 2006, *BGBl.* I 2006, p. 1897. This Act entered into force on 18 August 2006.
12 Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation [2000] OJ L303/16. The Member States were required to have transposed the Directive into national law no later than 2 December 2003.
13 Art. 2 AGG.

discrimination on ground of sexual identity.[14] Lastly, the constitutions of several German States ('*Länder*') also contain a prohibition of unequal treatment on grounds of sexual identity[15] or sexual orientation.[16]

In more recent years, bills were tabled which saw at the inclusion of 'sexual orientation' as a prohibited ground in Article 3(3) Basic Law,[17] but at the time this research was concluded (i.e., 31 July 2014), none of them had yet made it into law. The *Bundesrat* held in 2009 that such inclusion would only be 'symbol politics', as the Constitutional Court had in the meantime granted strong protection against discrimination on grounds of sexual orientation (see 10.4 below).[18] Other objections voiced in the debates have been the suggestion that including sexual orientation would also mean including and protecting a particular sexual orientation towards children (paedophilia) and that it would do away with the special protection of marriage.

10.1.2. Article 6(1) Basic Law: special protection of marriage and the family

According to Article 6(1) of the German Basic Law, 'Marriage and the family shall enjoy the special protection of the state.' The second paragraph of Article 6 Basic Law provides that parents have a natural right to as well as a duty for the care and the upbringing of children, while the State watches over them in the performance of this duty. While the third and the fifth paragraphs provide for special protection for children,[19] the fourth paragraph concentrates on the mother and provides that 'every mother shall be entitled to the care and protection of the community.' The '*Mutterkult*', of which this provision is an expression, can be considered unique to the German legal culture.

Article 6(1) finds its origin in Article 119 of the Weimar Constitution of 1919, which provided that marriage, 'as the foundation of the family and the preservation and expansion of the nation', enjoyed the special protection of the Constitution. The Weimar Article furthermore stated that it was task of both the State and the

14 Art. 75(1) Betriebsverfassungsgesetz [Works Constitution Act]; Art. 9 Bundesbeamtengesetz [Federal Civil Service Act]; Art. 9 Beamtenstatusgesetz [Act on the status of members of the State civil service] and Art. 19a Vierten Buches Sozialgesetzbuch [Social Code, Fourth Volume].

15 Art. 10(2) Constitution of Berlin; Art. 12(2) Constitution of the State of Brandenburg and Art. 2 Constitution of the Free Hansa town of Bremen.

16 Art. 2(3) Constitution of the Free State of Thüringen.

17 For example, *BR-Drs.* 741/09, *BT-Drs.* 16/13596, p. 3; *BT-Drs.* 17/88 p. 1 and *BT-Drs.* 17/254.

18 The Bundesrat decided on 27 November 2009 not to put the Bill before the German Bundestag. See U. Kischel, 'BeckOK GG Art. 3–2. Sexuelle Orienterung' ['BeckOK GG Art. 3–2. Sexual Orientation'], in: V. Epping and C. Hillgruber (eds.), *Beck'scher Online-Kommentar GG* [Beck Online Commentary to the German Basic Law], 21st edn. (München, Verlag Beck 2014) Rn. 130.

19 Art. 6(3) Basic Law reads: 'Children may be separated from their families against the will of their parents or guardians only pursuant to a law, and only if the parents or guardians fail in their duties or the children are otherwise in danger of serious neglect.' and Art. 6(5) reads: 'Children born outside of marriage shall be provided by legislation with the same opportunities for physical and mental development and for their position in society as are enjoyed by those born within marriage.' Translations taken from www.gesetze-im-internet.de/englisch_gg/englisch_gg.html#p0034, visited June 2014.

communities to strengthen and socially promote the family.[20] While the reference to the expansion of the nation was removed in the Basic Law of 1949, the special protection of 'marriage and the family' was included in Article 6, expressly and deliberately mentioning marriage and the family in one and the same sentence. Legal opinion differs strongly, however, as to the question of whether this also means that these two institutions are inseparably – or at least closely – interconnected. There is wide agreement that the Basic Law is more subjective and individualistic oriented than the Weimar Constitution was.[21] In respect of Article 6 in particular, a clear freedom-oriented trend ('*freiheitliche Tendenz*') since the Weimar Constitution, has been observed.[22] Hofmann nevertheless argued that also the drafters of the Basic Law had population policy considerations in mind when awarding marriage a privileged status in the Basic Law.[23] Robbers, for his part, claimed that from the systematics and wording of the Basic Law it follows that marriage and the family are 'socially and legally' connected with one another – together with the care and upbringing of children, the protection of the mother and the protection of children born outside of marriage, as protected in paragraphs 2 to 5 of Article 6.[24] The author has held that the Basic Law protects an ideal of the free development of the personality as well as an 'in life positively perceived normality'. Marriage is the principled foundation of the family, he argues, and Article 6 protects and structures with the help of legal institutions, social relations. Others have disagreed with this interpretation of Article 6(1). Grösschner, for example, has held the word 'and' between 'marriage' and 'the family' in Article 6(1) to be 'dogmatically meaningless'.[25] He holds that Article 6 represents the difficult dilemma of 'dualism' ('*Dualismus*'), whereby the provision is intended to have both personal meaning for the individual, as well as 'transpersonal' meaning for the society and the State (see also 10.1.2.2 below, concerning the three functions of Article 6).[26]

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20 Art. 119(1) and (2) *Die Verfassung des Deutschen Reichs* ('*Weimarer Reichsverfassung*') [Weimar Constitution of 11 August 1919], *Reichsgesetzblatt* 1919, No. 152, pp. 1383–1418. Other than the subsequent Basis Law of 1949, did the Weimar Constitution not foresee in the possibility for individuals to enforce their rights before a Constitutional Court. H. Dreier (ed.), *Grundgesetz-Kommentar*, *Band 1, Präambel, Artikel 1–19* [Commentary to the Basic Law, Volume 2, Preamble, Articles 1–19], 2nd edn. (Tübingen, Mohr Siebeck 2004) p. 55. On the history of Art. 6 Basic Law, see also A. Saunders, 'Marriage, Same-Sex Partnership, and the German Constitution', 13 *German Law Journal* (2012) p. 911 online available at www.germanlawjournal.com/index.php?pageID=11&artID=1448, visited June 2014.

21 H. Hofmann, `Art 6', in: B. Smidt-Bleibtreu et al., *GG Kommentar*, 11th edn. (Berlin, Carl Heymanns Verlag 2011) at pp. 269–270 and G. Robbers, 'Artikel 6' ['Article 6'], in: C. Starck et al., *Kommentar zum Grundgesetz* [Commentary to the Basic Law] (München, Verlag Franz Vahlen 2010) p. 683 at p. 687, Rn. 5.

22 R. Grösschner, 'Art. 6' ['Art. 6'], in H. Dreier (ed.), *Grundgesetz-Kommentar*, *Band 1, Präambel, Artikel 1–19* [German Basic Law Commentary, Volume 1, Preamble, Articles 1–19], 2nd edn. (Tübingen, Mohr Siebeck 2004) p. 748 at p. 755, Rn. 4.

23 Hofmann 2011, *supra* n. 21, at pp. 269–270.

24 Robbers 2010, *supra* n. 21, at p. 691, Rn. 17.

25 Grösschner 2004, *supra* n. 22, at p. 755, Rn. 4.

26 *Idem*, at p. 755, Rn. 5.

10.1.2.1. Definition of 'marriage' and 'family' in Article 6(1) Basic Law

The Basic Law itself contains no definition of the terms 'marriage' and 'the family'. The German Constitutional Court has repeatedly defined marriage as the union of one man with one woman to form a permanent partnership, based on a freely made decision and with the support of the State,[27] in which man and woman are in an equal partnership[28] and may decide freely on the organisation of their cohabitation.[29] The fact that the spouses are of a different sex is considered one of the constitutive characteristics of marriage.[30] Therefore, no right to marry for same-sex couples can be derived from Article 6(1), as the BVerfG has on several occasions explicitly held.[31] This case law is discussed in further detail in section 10.3 below.

The 'family' within the meaning of this Article has been defined by the BVerfG as '*die umfassende Gemeinschaft von Eltern und Kindern*',[32] thus limiting the protection to the first bloodline. Müller-Terpitz argues that the notions of 'family' and 'marriage' ex Article 6(1) are dogmatically separated from one another and that family exists, 'where there are children'. Accordingly, the author claims, the notion should be broadly interpreted, encompassing, *inter alia*, a right to found a family for same-sex oriented persons, for instance through heterologous insemination.[33]

10.1.2.2. The meaning of 'special protection' in Article 6(1) Basic Law

Under Article 6(1) marriage and the family enjoy the 'special protection' of the State. This entails a positive obligation on the State to protect marriage and the family from third party interference ('*Drittbeeinträchtigungen*'), as well a negative obligation for the State not to interfere with marriage and family matters.[34] In legal scholarship, three – closely related – functions ('*Regelungsinhalte*') of Article 6(1) are identified: it contains an individual fundamental right ('*Grundrecht'*); it functions as an institutional guarantee ('*Institutsgarantie*'); and it constitutes a general principle of law ('*Grundsatznorm*') that influences all areas of law that relate to marriage and the

27 BVerfG 17 July 2002, Az. 1 BvF 1/01, *NJW* 2002 p. 2543.

28 *Idem*.

29 *Idem*.

30 *Cf.* BVerfG 27 May 2008 (dec.), Az. 1 BvL 10/05, *NJW* 2008 p. 3117 and BVerfG 27 May 2008 (dec.), Az. 1 BvL 10/05, *NJW* 2008 p. 3117, para. 50.

31 See K.S. Gerhard, *Die eingetragene Lebensparterschaft – Eine historisch-dogmatische Bestands-aufnahme zur Frage nach einem neuen familienrechtlichen Institut* [The German Civil partnership – a historic-dogmatic inventory of the question for a new family law institute] (Göttingen, Sierke Verlag 2009), p. 25, and BVerfG 4 October 1993 (dec.), Az. 1 BvR 640/93, *NJW* 1993 p. 3058.

32 BVerfG 29 July 1959, Az. 1 BvR 205/58 a.o., *NJW* 1959 p. 1483.

33 R. Müller-Terpitz, 'Das Recht auf Fortpflanzung – Vorgaben der Verfassung und der EMRK' ['The right to procreate – guidelines of the German Constitution and the ECHR'], in: H. Frister and D. Olzen (eds.), *Reproduktionsmedizin, Rechtliche Fragestellungen. Dokumentation der Tagung zum 10-jahrigen Bestehen des Instituts fur Rechtsfragen der Medizin Dusseldorf* [Reproduction medicine, legal questions. Proceedings of the Conference for the 10 year anniversary of the Düsseldorf institute for medical legal issues] (Düsseldorf, Düsseldorf University Press 2010) p. 9 at. p. 14.'

34 *Cf.* BVerfG 17 January 1957, Az. 1 BvL 4/54, *NJW* 1957 p. 417 and BVerfG 17 July 2002, Az. 1 BvF 1/01, *NJW* 2002 p. 2543.

family.[35] As a fundamental right, it has been held to be first of all a negative right ('*Abwehrrecht*'), entailing, *inter alia*, the right to unhindered access to marriage with a freely chosen partner[36] and the right to decide upon the marriage settlement.[37] As institutional guarantee Article 6(1) provides spouses with a normative framework which provides legal clarity and certainty for third parties.[38] Article 6(1) protects an '*Ordnungskern*' that the legislature must take into account when legislating on the institute of marriage,[39] whereby the legislature enjoys considerable discretion.[40] The role of Article 6(1) as institutional guarantee finds its expression in, *inter alia*, the matrimonial property rights and the role of registrars ('*Standesbeamten*'). As a general principle, Article 6(1) implies a binding value judgment ('*eine verbindliche Wertentscheidung*') for all areas of law concerning marriage and the family.[41] According to Schmitt-Kammler and Von Coelln, from this a (positive) State obligation to protect and to give preferential treatment to marriage follows. The latter obligation to give preferential treatment means that marriage can not be put at a disadvantage *vis-à-vis* other partnerships, or ways of living.[42] This reading has had a particular effect in economic areas of law, such as social insurance law.[43] It has been widely discussed in legal commentaries as well as in case law whether this obligation to give preferential treatment also means that other partnerships cannot be treated as favourably as marriage. In other words, the question is whether Article 6(1) of the Basic Law contains a so-called 'requirement of distance' ('*Abstandsgebot*'), an obligation to differentiate between marriage and other partnerships, to the disadvantage of the latter. This discussion will recur throughout the various sections of this chapter. As will be set out in more detail, the BVerfG has held there not to be any such requirement of distance or disadvantage to other partnerships, because

35 A. Schmitt-Kammler and C. von Coelln, 'Art. 6 [Ehe und Familie]' ['Art 6 [Marriage and Family']], in M. Sachs, *Grundgesetz Kommentar* [Basic Law Commentary], 5th edn. (München Verlag C.H. Beck 2009 p. 348 at p. 357 and Hofmann 2011, *supra* n. 21, at pp. 270–271.

36 *Cf.* BVerfG 4 May 1971, Az 1 BvR 636/68, *NJW* 1971 p. 1509; BVerfG 14 November 1973 (dec.), Az. 1 BvR 719/69, *NJW* 1974 p. 545; BVerfG 17 July 2002, Az. 1 BvF 1/01, *NJW* 2002 p. 2543 and BVerfG 9 November 2004, Az. 1 BvR 684/98, *NJW* 2005 p. 1413. See Schmitt-Kammler and von Coelln 2009, *supra* n. 35, at p. 359 and M. Antoni, 'Art 6 [Schutz von Ehe und Familie, nichteheliche Kinder]' ['Art. 6 [Protection of marriage and family, children born out of wedlock]'], in D. Hömig (ed.) *Grundgesetz für die Bundesrepublik Deutschland* [Constitution for the Federal Republic of Germany], 9th edn. (Baden-Baden, Nomos Verlagsgesellschaft 2010) p. 110 at p. 112.

37 Schmitt-Kammler and von Coelln 2009, *supra* n. 35, at p. 360 under reference to, *inter alia*, BVerfG 14 November 1984 (dec.), Az. 1 BvR 14/82 and 1642/82 and BVerfG 5 February 2002 (dec.), Az. 1 BvR 105/95 a.o., *NJW* 2002 p. 1185.

38 *Idem*, at pp. 361–362.

39 *Idem*.

40 *Cf.* BVerfG 28 February 1980, Az. 1 BvL 136/78 and BVerfG 17 July 2002, Az. 1 BvF 1/01, *NJW* 2002 p. 2543.

41 BVerfG 17 July 2002, Az. 1 BvF 1/01*, NJW* 2002 p. 2543, para. 90. Schmitt-Kammler and von Coelln 2009, *supra* n. 35, at p. 363 and Antoni 2010, *supra* n. 36, at p. 110. Saunders speaks of an 'objective value'. Saunders 2012, *supra* n. 20, at p. 917.

42 *Cf.* Schmitt-Kammler and von Coelln 2009, *supra* n. 35, at p. 363 and M. Forkert, *Eingetragene Lebenspartnerschaften im deutschen IPR: Art. 17b EGBGB* [Civil partnerships in German Private international law: Art. 17b EGBGB] (Tübingen, Mohr Siebeck 2003) p. 32.

43 Antoni 2010, *supra* n. 36, at p. 115.

it considers marriage not be endangered by such other partnerships.[44] In literature however, this ruling has met with strong criticism.[45]

10.1.2.3. The relationship of Article 6(1) to other provisions of the Basic Law

Article 6(1) is considered to strengthen the right to free development of one's personality of Article 2(1).[46] As discussed in section 10.3 below, it was the desire to give further protection to homosexuals' right to free development of the personality that was a basis for the introduction of the registered civil partnership in Germany. From the latter right, however, no right to contract a marriage follows.[47]

For a long time Article 6(1) was considered to be a *lex specialis* of Article 3(1) and (3) Basic Law (the principle of equality) and thus to have precedence over this provision.[48] As will become clear from section 10.3, the relationship between these two provisions has over time been reversed. Henkel has spoken of a change of perspective in respect of the relationship between Article 3 and Article 6 of the Basic Law, which according to the author found its cause in European law impulses in particular.[49]

10.1.2.4. Article 6(1) Basic Law as expression of a cultural identity

Hofmann has argued that, next to the 'identity essence' of Articles 1 (human dignity) and 20 (basic institutional principles; defence of the constitutional order), the German Basic Law contains various cultural identity elements. The author holds that the institutional guarantee of marriage – together with the right to equal treatment, the protection of Sundays and holidays and the prohibition of a State Church – belongs to these cultural identity elements.[50] Hofmann distinguishes between the culturally infused constitutional order in its totality and the exceptional cultural infusion ('*Prägung*') of certain fundamental rights in the Basic Law. Following this distinction, the constitutional protection of freedoms ('*verfassungsrechtliche Freiheitsverbürgung'*) is allegedly dependent upon the fulfilment of culturally

44 BVerfG 17 July 2002, Az. 1 BvF 1/01, *NJW* 2002 p. 2543 and BVerfG 7 July 2009 (dec.), Az. 1 BvR 1164/07, *NJW* 2010 p. 1439.

45 *Inter alia*, Hofmann 2011, *supra* n. 21.

46 *Cf.* Antoni 2010, *supra* n. 36, at p 110. See also P. Badura 'GG Art 6' ['Art. 6 Basic Law'] in: R. Herzorg et al. (eds.), *Maunz und Dürig Grundgesetz-Kommentar* [Maunz and Dürig Commentary to the Basic Law], 71st edn. (München, Verlag Beck 2014).

47 Schmitt-Kammler and von Coelln 2009, *supra* n. 35, at p. 352.

48 *Idem*, at pp. 353 and 356, under reference to BVerfG 17 January 1957 (dec.), Az. 1 BvL 4/54, *NJW* 1957 p. 417. See also W. Pauly, 'Sperrwirkungen des verfassungsrechtlichen Ehebegriffs' ['Barrier effects of the constitutional concept of marriage'], *NJW* (1997) p. 1955.

49 Henkel refers primarily to Case C-267/06 *Tadao Maruko* v. *Versorgungsanstalt der deutschen Bühnen* [2008] ECR I-1757, ECLI:EU:C:2008:179. J. Henkel, `Fällt nun auch das "Fremdkindadoptionsverbot"?' ['Is the 'ban on international abortion' now also being dropped?'], *NJW* (2011) p. 259 at p. 262. See R. Wiemann, `Rosige Aussichten für die Gleichstellung gleichgeschlechtlicher Lebenspartner mit Ehegatten?' ['A rosy future for the equal treatment of registered partners and spouses?'] *NJW* (2010) p. 1427 at p. 1428.

50 Hofmann 2011, *supra* n. 21, at p. 271. The author refers to A. Uhle, *Freiheitlicher Verfassungsstaat und 'kulturelle Indentität*, (Tübingen, Mohr Siebeck 2004) p. 505.

infused preconditions, of which the constitutional protection of marriage is illustrative. From a cultural perspective, so Hofmann argues, the institute of marriage is open to one man and one woman only. The Constitutional State with a Basic Law based on freedom is bound to guarantee and protect its 'cultural identity' through the totality of the cultural State's power to act ('*die Gesamtheit kulturstaatlicher Handlungsoptionen*'). The Constitutional State is thus obliged to found a legal order based on human dignity, respect for freedom and equality, the rule of law and democracy, the institutional protection of the constitutive characteristics of marriage, the protection of Sundays and on the prohibition of a State Church. In other words, the State is bound to found an institutional order that is infused by identity ('*einer identitätsgeprägten institutionellen Ordnung*'), which, so Hofmann argues, excludes constitutional neutrality.

The view of this author has not been widely endorsed in German legal academia and so far no German Court has adopted such reasoning in respect of Article 6(1) Basic Law. On the other hand, it is noted that in its important so-called 'Lisbon judgment' of June 2009 the Constitutional Court qualified decisions on family law as 'of particular cultural importance' and therefore as '[…] particularly sensitive for the ability of a constitutional state to democratically shape itself […].'[51] The BVerfG explained this by the fact that 'the law on family relations' particularly affected '[…] established rules and values rooted in specific historical traditions and experience.'[52]

10.2. (De-)criminalisation of homosexual activities

Articles 175ff of the Prussian Criminal Code of 1871 criminalised sexual acts between men. In 1949, when the German Basic law was adopted, this provision was still in force. During World War II and also during the decades after the war, in the FRG, Article 175 Criminal Code was far from obsolete: on the basis of this provision homosexuals were persecuted in the name of the State with considerable numbers of convictions as a result. Between 1950 and 1965, nearly 2,800 homosexuals were convicted annually.[53] Under reference to the principle of morality, the BVerfG ruled in 1957 that Article 175 of the Criminal Code was compatible with the Basic Law.[54] The Court, *inter alia*, held the prohibition not to be incompatible with the right to

51 BVerfG 30 June 2009, Az. 2 BvE 2/08 a.o., *NJW* 2009 p. 2267, para. 253.

52 *Idem*, para. 260.

53 EU Fundamental Rights Agency, *Legal Study on Homophobia and Discrimination on Grounds of Sexual Orientation – Germany*, February 2008, p. 3, online available at www.fra.europa.eu/fraWebsite/attachments/FRA-hdgso-NR_DE.pdf, visited June 2014. The report refers to J. Müller, *Ausgrenzung der Homosexuellen aus der 'Volksgemeinschaft': die Verfolgung von Homosexuellen in Köln 1933–1945* (Cologne, Emons 2003) p. 218. From this reference it is not clear if this goes for the former FRG only or whether the former GDR is included in these calculations. See also Gerhard 2009, *supra* n. 31, at pp. 17–19 who refers, *inter alia*, to H.-G. Stümke, *Homosexuelle in Deutschland, Eine politische Geschichte* (München, Beck 1989) p. 127 and 132 and to F.J Wetz, *Homosexualität, Ein rechtlicher Vorstoß als moralischer Anstoß*, 88 ARSP (2002) pp. 102–113.

54 BVerfG 10 May 1957, Az. 1 BvR 550/52, *NJW* 1957 p. 865.

free development of the personality (Article 2(1) Basic Law),[55] because homosexual conduct was considered to be in violation of the moral law, a factor which constituted a justification for interferences with this right. Under influence of the emancipation movement of the end of the 1960s, at beginning of the 1970s this criminal law provision was amended for the first time. In 1969 the complete prohibition on sexual acts between men was lifted and an age limit was set: from then on, only sexual acts between an adult man and a man under 21 years old were punishable with imprisonment.[56] In 1973 this age limit was further lowered to the age of 18 years.[57] It was only in 1994 that Article 175 of the Criminal Code was repealed in its entirety, thus paving the way for further equalisation of the legal position of homosexuals and heterosexuals through the introduction of a registered civil partnership for same-sex couples.[58]

10.3. Legal recognition of same-sex relationships under German law

10.3.1. Early (legislative) developments

The first parliamentary initiatives to introduce legislation opening up marriage to same-sex couples in the Federal Republic of Germany were taken in 1990 by the Greens (‘*die Grünen’*), a political party holding a small number of seats in the federal parliament (*Bundestag*).[59] Although this proposal did not lead to any concrete legislative change, the (academic and public) discussion on the topic was initiated.[60] In August 1992, during the so-called ‘*Sturm of die Standesämter*’ (Siege of the Registry Offices) on the initiative of the *Schwulenverbands in Deutschland* (the Gay Federation in Germany), approximately 250 lesbian and gay couples ‘besieged’ Registry Offices throughout the country, to apply for the issuances of notices of their intended marriage.[61] Having met with refusals by the Registry Offices, several couples initiated judicial proceedings, but to no avail.[62] Only one couple was successful in

55 Art. 2(1) Basic Law reads: ‘Every person shall have the right to free development of his personality insofar as he does not violate the rights of others or offend against the constitutional order or the moral law.’ Translation taken from www.gesetze-im-internet.de/englisch_gg/englisch_gg.html#p0034, visited June 2014.

56 Erste Gesetz zur Reform des Strafrechts (1. StrRG) [First Act on the Reform of the Criminal Law] Act of 25 June 1969, *BGBl. I* p. 645.

57 The Constitutional Court confirmed in 1973 that this provision was compatible with the Basic Law. BVerfG 2 October 1973, Az. 1 BvL 7/72, *NJW* 1973 p. 2195.

58 Act of 31 May 1994, *BGBl.* I, p. 1168. Reportedly in the year 1987 there had still been over 100 convictions on the basis of Art. 175 Criminal Code. See C. von der Tann, ‘Entwicklungen in der Rechtsstellung eingetragener Lebenspartnerschaften’ [‘Developments in the legal position of civil partnerships’], *FamFR* (2012) p. 195 at p. 196.

59 *BT-Drs.* 11/7197.

60 Gerhard 2009, *supra* n. 31, at p. 24, footnote 167.

61 See the website of the present *Lesben- und Schwulenverbands in Deutschland* (LSVB) www.lsvd.de/1399.0.html, visited June 2014.

62 See Gerhard 2009, *supra* n. 31, at p. 25, footnotes 170 and 171.

first instance: in December 1992, the district court (*Amtsgericht*) of Frankfurt am Main held non-recognition of same-sex marriage to be against the Basic Law.[63] This judgment was however shortly overturned by the State Court (*Landesgericht*) of Frankfurt.[64]

Another couple filed a constitutional complaint with the Federal Constitutional Court, but the BVerfG did not take that complaint into consideration, as it considered it to contain no fundamental constitutional interest.[65] In its decision of 1993, the Court held that the complaint did not raise any new points: the BVerfG's case law was clear on the point that marriage within the meaning of Article 6(1) of the Basic Law was defined as a union between one man and one woman.[66] Furthermore, it held that no right to access to marriage for same-sex couples could follow from the right to free development of the personality nor the right to equal treatment (Articles 2(1) and 3 Basic Law respectively), as Article 6(1) as their *lex specialis* had precedence over these provisions. The Court added that the question of whether the legislature was under an obligation to provide same-sex couples with some form of legal recognition of their relationship would be one of fundamental constitutional interest.[67] As that question was however not raised by the complaint at hand, the Court did not examine the matter.

A Resolution of the European Parliament of 1994[68] triggered the discussion anew.[69] In this Resolution the European Parliament called on the EU Member States to avoid unequal treatment of persons of same-sex orientation in their individual legal and administrative provisions, and appealed to the European Commission to grant same-sex couples access to marriage or to corresponding legal institutions. In the years following the Resolution, several new proposals entailing the opening up of marriage[70] or the introduction of a registered civil partnership for same-sex couples were tabled in German Parliament, but none of them was followed up.[71] In the meantime, however, the State of Hamburg introduced the possibility for same-sex couples to have their partnerships registered in a designated register

63 AG Frankfurt a.M. 21 December 1992 (dec.), Az. 40 UR III E 166/92, *NJW* 1993 p. 940.

64 LG Frankfurt 22 March 1993 (dec.), Az. 2/9 T 17/93, *NJW* 1993 p. 1998.

65 Fundamental constitutional interest ('*grundsätzliche verfassungsrechtliche Bedeutung*') is one of the admissibility criteria ex Art. 93a (2) BVerfGG. BVerfG 4 October 1993 (dec.), Az. 1 BvR 640/93, *NJW* 1993 p. 3058.

66 The Court referred to, *inter alia*, BVerfG 29 July 1959, Az. 1 BvR 205/58 a.o, *NJW* 1959 p. 1483; BVerfG 11 October 1978, Az. 1 BvR 16/72, *NJW* 1979 p. 595 and BVerfG 17 November 1992, Az. 1 BvL 8/87, *NJW* 1993 p. 643.

67 See also Pauly 1997, *supra* n. 48.

68 European Parliament Resolution on equal rights for homosexuals and lesbians in the EC [1994] OJ C61/20, pp. 40–41.

69 As referred to in BVerfG 17 July 2002, Az. 1 BvF 1/01, *NJW* 2002 p. 2543, para. 2. See also K. Strick, 'Gleichgeschlechtliche Partnerschaft – Vom Straftatbestand zum Status?' ['Same-sex partnership – from criminal offence to legal status?'], *Deutsches und Europaisches FamilenRecht*, *DEuFamR* (2002) p. 82 at p. 86.

70 *BT-Drs.* 13/2728.

71 See *BT-Drs.* 13/7228; *BT-Drs.* 13/10081 and *BT-Drs.* 544/98.

('*Partnerschaftsbuch*') at the Civil Registry.[72] This so-called '*Hamburger Ehe*' ('Hamburger Marriage') had no legal effect,[73] and has therefore often been referred to as 'symbol politics'.[74]

After the parliamentary elections of 1998, the introduction of a registered partnership for same-sex couples was included in the coalition agreement of the new governing parties, the Social Democrats and the Greens.[75] While the Liberals were the first to draw up a bill to this effect,[76] it was the bill of the coalition, as tabled in July 2000,[77] that resulted in the adoption of the Civil Partnerships Act in 2001.[78]

Given the division of seats amongst the political parties at the time and the anticipated opposition of the *Bundesrat* to the introduction of a civil partnership for same-sex couples, the governing parliamentary parties intended to divide the original civil partnership bill into two statutes: one requiring the approval of the *Bundesrat* and the other requiring no such approval. After the Committee on Legal Affairs of the *Bundestag* also advised to that effect,[79] the bill was indeed divided into two statutes: firstly, the Civil Partnerships Act (Act on the Termination of the Discrimination of Same-Sex Couples: Civil Partnerships (*Gesetz zur Beendigung der Diskriminierung gleichgeschlechtlicher Gemeinschaften: Lebenspartnerschaften,* LPartEDiskrG))[80] which concerned the civil partnership itself and its essential legal consequences; and secondly, the Civil Partnerships Act Supplementary Act (Act to Supplement the Civil Partnerships Act and other Acts (*Gesetz zur Ergänzung des Lebenspartnerschaftsgesetzes und anderer Gesetze, Lebenspartnerschaftsgesetzergänzungsgesetz*, LPartGErgG)), which concerned primarily procedural law implementing regulations.[81]

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72 *BT-Drs.* 16/1288. See also I. von Münch, `Antidiskriminierungsgesetz – notwendig oder überflüssig?' ['Anti-discrimination Act – necessary or superfluous?'] *NJW* (1999) p. 260 at p. 261.

73 As Gerhard explains, the Hamburger Senate held that such an issue could only be regulated at State level. On the basis of Art. 74 Basic Law, does the registration of marriages belong to the list of subjects where the Federation and the States have concurrent legislative power. Gerhard 2009, *supra* n. 31, at p. 30.

74 On the symbolic character of the '*Hamburger Ehe*', see also M. Schüffner, *Eheschutz und Lebenspartnerschaft, Eine verfassungsrechtliche Untersuchung des Lebenspartnerschaftsrechts im Lichte des Art. 6 GG* [Marriage protection and civil partnership, a constitutional examination of the law on civil partnership in light of Art. 6 of the German Basic Law] (Berlin, Duncker & Humblot 2007) p. 101.

75 Coalition agreement of 20 October 1998, *ZRP* 1998, 485 ff.

76 *BT-Drs.* 14/1259.

77 *BT-Drs.* 14/3751.

78 Gesetz zur Beendigung der Diskriminierung gleichgeschlechtlicher Gemeinschaften: Lebenspartnerschaften [Act on the Termination of the Discrimination of Same-Sex Couples: Civil Partnerships] Act of 16 February 2001, *BGBl. I*, p. 266. Henkel 2011, *supra* n. 49, at p. 260, points at various constitutional concerns that were expressed at the time, *inter alia*, U. Diederichsen, 'Homosexuelle – von Gesetzes wegen?' ['Homosexual – by law?'], *NJW* (2000) p. 1841; P. Kirchhof, 'Lebenspartnerschaftsgesetze und Grundgesetz' ['Law on civil partnerships and the Constitution'], *FPR* (2001) p. 436 and R. Scholz and A. Uhle, ''Eingetragene Lebenspartnerschaft' und Grundgesetz' ['Civil partnership' and Basic Law'], *NJW* (2001) p. 393 at p. 398.

79 *BT-Drs.* 14/4545 with annexes.

80 Act of 16 February 2001, *BGBl. I* p. 266.

81 See also BVerfG 17 July 2002, Az. 1 BvF 1/01, *NJW* 2002 p. 2543, para. 5.

In November 2000, the Committee on Legal Affairs of the Bundestag advised adopting the bill. It explained that the intimate personal sphere was constitutionally protected by Article 2(1) in conjunction with Article 1(1) of the German Basic Law, and encompassed – as an element of the right to free development of the personality – the freedom to live in a same-sex partnership.[82] It acknowledged that such partnerships between same-sex partners did not enjoy the special protection of Article 6(1) of the Basic Law, but stressed that the different treatment of certain groups in society required special justification on the basis of Article 3 of the Basic Law. Reference was made to judgments of the Constitutional Court (BVerfG) and the Federal Administrative Court (BVerwG) of 1993 and 1996 respectively (see above),[83] from which it followed – as the Committee observed – that the legislature could protect the personality rights of same-sex partners and their rights to equal treatment without opening up the institution of marriage. While the Courts had held that the legislative measures taken in various European states strengthening the legal position of same-sex partnerships, had at that time not yet resulted in a European consensus that same-sex partnerships fell within the scope of the right to respect for family life ex Article 8 ECHR,[84] the Committee stressed that they had accepted that such partnerships enjoyed the protection of the right to private life.[85]

The Civil Partnerships Act (LPartG) was adopted in February 2001 and was passed by the *Bundesrat* unaltered.[86] The Civil Partnerships Act Supplementary Act, on the other hand, was approved by the *Bundestag*, but it encountered the opposition of the State of Bavaria in the *Bundesrat*. As a consequence, it was not approved by the *Bundesrat* and therefore did not make it into law.[87] As a result, certain matters, such as the position of civil servants, were not covered (see 10.4.4.2 below).

10.3.2. The Civil Partnerships Act (2001)

The Civil Partnerships Act introduced a registered civil partnership for same-sex partners – and for same-sex couples only – as of 1 August 2001.[88] The Explanatory Memorandum to the draft Act[89] explained that the Act intended to reduce the discrimination of same-sex couples *vis-à-vis* different-sex-couples. It aimed to give shape to the constitutional protection of relationships between persons of the same sex on the basis of Article 2(1) Basic Law, through the creation of a new

82 *BT-Drs.* 14/4550, pp. 4–5.

83 BVerfG 4 October 1993 (dec.), Az. 1 BvR 640/93, *NJW* 1993 p. 3058 and BVerwG 27 February 1996, Az. 1 C 41/93, *NJW* 1997 p. 956.

84 The Committee on Legal Affairs refers to BVerwG 27 February 1996, Az. 1 C 41/93, *NJW* 1997 p. 956.

85 *BT-Drs.* 14/4550, pp. 4–5.

86 *BT-Prot.*14/131, p. 12629 D *BR-Prot.* 757, p. 551 (C, D).

87 *BT-Drs.* 14/4875 and *BR-Prot.* 757, p. 551 (D).

88 This partnership has also been referred to as a `life partnership'. See, *inter alia*, Case C-267/06 *Tadao Maruko* v. *Versorgungsanstalt der deutschen Bühnen* [2008] ECR I-1757, ECLI:EU:C:2008:179. Here the English term 'civil partnership' or 'registered civil partnership' as used in the official English translations of BVerfG judgments (that can be found on www.bverfg.de/en/index.html, visited June 2014) will be used.

89 *BT-Drs.* 14/3751, p. 33 ff.

legal institution.[90] It was stressed that the Civil Partnerships Act aimed to adopt and transpose two documents of European origin in which States were called upon to create legal options for the registration of same-sex unions, namely the aforementioned EP Resolution on equal rights for homosexuals and lesbians in the EC of 1994[91] as well as a draft Recommendation of the Parliamentary Assembly of the Council of Europe of 6 June 2000.[92]

A civil partnership is created by a contract between two persons of the same sex that is registered with the public office responsible for marriage ceremonies ('*Standesamt*').[93] A civil partnership is terminated by a decree of annulment by a Court, on the application of one or both partners.[94]

While the responsibilities of partners engaging in a partnership are the same as for married couples, the set of rights awarded to registered partners was more limited in the first version of the Act. In 2002 the BVerfG summarised the main features of the civil partnership as follows:

> 'The partners are bound to each other in care and support and committed to plan their lives together. They are responsible for each other (Article 1 § 2). The statute does not require sexual intercourse. The legal consequences of the registered partnership are in part based on the legal consequences of marriage, but they also diverge from the latter. Thus, the partners owe each other support. This applies to a modified extent also to persons living apart and after the termination of the partnership (Article 1 §§ 5, 12 and 16). The partners must make a statement on their financial status; they may choose between a property regime of equalisation of surplus and a contract governing their financial relations (Article 1 §§ 6 und 7). They may choose a joint name (Article 1 § 3). The civil partner or former partner of a parent who has lived for a long period in a domestic community with the child has a right of access (Article 2 number 12, § 1685.2 of the German Civil Code). A partner is deemed to be a member of the other's family (Article 1 § 11). A right of intestate succession of the civil partner corresponding to that of the spouse has been introduced (Article 1 § 10). In social security law too, entering into the civil partnership has legal consequences (Article 3 §§ 52, 54 und 56). Thus, for example, in the statutory health insurance scheme civil partners are covered by the family insurance (Article 3 § 52 number 4). In the law concerning foreign nationals, the provisions relating to the right of entry of foreign families that apply to marital relationships are correspondingly extended to same-sex partnerships (Article 3 § 11). In addition the Civil Partnerships Act grants the partner of a parent with sole custody, with the consent of the latter, the authority to

90 *Idem*, p. 33.

91 *Idem*. For the Resolution, see *supra* n. 68. The Resolution was also printed in *BT-Drs.* 12/7069.

92 *BT-Drs.* 14/4550, pp. 4–5 and Parliamentary Assembly to the Council of Europe Doc. 8755 (6 June 2000), *Situation of lesbians and gays in Council of Europe member states*.

93 Art. 1(1)(1) LPartG. As Saunders explained, originally the States were free to choose whether they assigned the partnership ceremony '[…] to private notaries or to the public office responsible for marriage ceremonies ('*Standesamt*'). Since 1 January 2012, however, partnership ceremonies are performed in all German Federal states at the Standesamt.' Saunders 2012, *supra* n. 20, at p. 926.

94 Art. 15 LPartG.

make joint decisions in matters of the child's everyday life, known as "limited custody" (Article 1 § 9)."[95]

Hence, while the legal consequences of the registered partnership were in part based on the legal consequences of marriage and while they show considerable resemblance, some differences in rights and entitlements between civil partners and married partners remained. These concerned, first of all, certain taxes, social benefits and social insurances. The Act did not, for instance, provide for adjustment of old-age pension rights between the civil partners if their partnership was annulled, and contained no rules on pensions in case of death.[96] Further differences remained in respect of asylum applications,[97] the legal position of civil servants and parental rights (see 10.4.5 below).

Most issues regarding the legal position of members of the public service were excluded from the scope of the Civil Partnerships Act. Because the legal position of civil servants at State level is a matter of so-called concurrent legislative power,[98] the German federal legislature may only enact so-called framework legislation; more detailed legislation requires the approval of the *Bundesrat*.[99] The original bill for the Civil Partnerships Act was – as explained in section 10.3.1 above – divided over two statutes. The bill for the Act to Supplement the Civil Partnerships Act and other Acts, provided for the equalisation of civil servants in a civil partnership and married civil servants, but this bill was rejected by the *Bundesrat*. Only the bill for the Civil Partnerships Act, which did not require the approval of the *Bundesrat*, made it into law. This Act – and its 2004 Revision – necessarily applied only marginally to federal civil servants.[100] The division of competences between the *Bundestag* and the *Bundesrat* and the political make up of both bodies at the time of the introduction of the Civil Partnerships Act, thus resulted in the exclusion of federal civil servants from the scope of this Act.

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95 BVerfG 17 July 2002, Az. 1 BvF 1/01, *NJW* 2002 p. 2543.

96 Description of the law in BVerfG 17 July 2002, Az. 1 BvF 1/01, *NJW* 2002 p. 2543.

97 See *BT-Drs.* 16/13596, p. 3.

98 Art. 75(1)(27) Basic Law, which reads: 'Concurrent legislative power shall extend to the following matters: […] the statutory rights and duties of civil servants of the Länder, the municipalities and other corporations of public law as well as of the judges in the Länder, except for their career regulations, remuneration and pensions […].' In 2006 the powers of the States were widened. C.D. Classen, 'Die Lebenspartnerschaft im Beamtenrecht' ['The registered partnership in civil servants law'], *FPR* (2010) p. 200.

99 Arts. 75, 74a and 73(8) Basic Law.

100 Originally full equalisation was foreseen (Art. 3 (10) of the LPartG Bill (*BT-Drs.* 14/3751)), however those regulations were taken up in the Statute that required, but did not obtain Bundesrat approval. The 2001 Act nevertheless provided for equalisation in respect of certain matters of secondary importance, namely in respect of special leave (Art. 12 III SUV); career regulations (Art. 10 IV BundeslaufbahnVO), travel expenses (Art. 6 IV BundesreisekostenG), costs for moving and in respect of allowances in case of divorce (Art. 1 II BundesumzugskostenG). Differences remained in respect of essential partner-related allowances (Art. 40 I Nr. 1 BBesG and Art. 4 BeihVO) and survivors pensions (Art. 18 and Art. 27 BeamtVG). The 2004 Revision Act provided for full equalisation in respect of maintenaince and in respect of the legal situation of civil servants. See also Classen 2010 *supra* n. 98, at p. 200.

In the years following the entry into force of the Civil Partnerships Act, the existing differences in rights between civil partners and spouses were gradually removed through successive legislative amendments and court decisions. Below, in section 10.3.4, these gradual changes are discussed in greater detail. The following section, however, first discusses the 2002 BVerfG judgment upholding the constitutionality of the Act in its original form.

10.3.3. The 2002 BVerfG judgment upholding the Civil Partnerships Act

The constitutionality of the Civil Partnerships Act was challenged by the governments of the States (*Länder*) of Bavaria and Saxony. They initially applied for an interim injunction against the entry into force of the Act before the Federal Constitutional Court, but were unsuccessful in their action.[101] The applicant States held the Act to be unconstitutional on both procedural and substantive grounds.[102] They, *inter alia*, argued that the requirement of differentiation and distance of Article 6 Basic Law (special protection of marriage) was violated, because civil partnership imitated marriage.[103] The Court considered there to be no urgent need justifying an interim injunction, as the entering into force of the Act was not to be expected to cause irreparable harm to the institute of marriage and because no serious detriment to the common weal[104] was identifiable.[105]

After the entry into force of the Civil Partnerships Act, these same States, together with the Free State of Thuringia, again applied to the Federal Constitutional Court to have the compatibility of the Act with the Federal Basic Law examined. The applicant States again put forward both procedural and substantive grounds for their claim that the Act was unconstitutional. Here, only the substantive arguments as put forward by the States and the assessment thereof by the Court in its judgment of 17 July 2002 are discussed.[106]

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101 BVerfG 18 July 2001 (dec.), Az. 1 BvQ 23/01, *NJW* 2001 p. 2457. Such an action is possible on the basis of Art. 32 BVerfGG. See also A. Maurer, 'Federal Constitutional Court Does Not Issue Temporary Injunction to Block the Entry Into Force of the Lifetime Partnership Law', 2 *German Law Journal* (2001), available at www.germanlawjournal.com/index.php?pageID=11&artID=73.

102 The procedural grounds concerned the fact that the *Bundestag* had divided the subject-matter between two statutes in order to prevent the *Bundesrat* from preventing provisions that in themselves were not subject to its consent. The BVerfG held this to be constitutionally unobjectionable.

103 The applicant States further held the Act to be in violation of Art. 3(1), Art. 2(1) and Art. 15(1) Basic Law, because they held it to interfere unjustifiably with civil partners' parental rights, their maintenance and care rights and their right to and testamentary freedom respectively.

104 Art. 93(2) Basic Law and Art. 32(1) Gesetz über das Bundesverfassungsgericht, BVerfGG [Law on the Federal Constitutional Court]. Art. 32(1) BVerfGG reads: 'In a dispute the Federal Constitutional Court may deal with a matter provisionally by means of a temporary injunction if this is urgently needed to avert serious detriment, ward off imminent force or for any other important reason for the common weal.' English translation taken from: www.iuscomp.org/gla/statutes/BVerfGG.htm#32, visited June 2014.

105 The judgment was based on a two to one vote.

106 BVerfG 17 July 2002, Az. 1 BvF 1/01, *NJW* 2002 p. 2543. For the English translation of the judgment, see www.bverfg.de/en/decisions/fs20020717_1bvf000101en.html, visited June 2014. The BVerfG held the fact that the *Bundestag* had divided the subject-matter between two statutes in order to prevent

The applicant States held that marriage enjoyed special protection as an essential element of State order to guarantee the conditions for the care and upbringing of children in the interest of parents and children, but also of the State community. They alleged that if parallel institutions were created for other forms of partnership that would be equal to marriage, marriage would be robbed of its special protection.[107] According to the applicant States, Article 6(1) of the Basic Law prohibited not only that marriage was made available to same-sex partnerships, but also that, besides marriage, an institution was created incorporating structural elements of marriage, without there being any objective necessity to do so. They held that the Basic Law required a differentiation to be made between the legal form of marriage and that of a civil partnership and a prohibition on the reproduction of the legal structure of marriage by other partnerships. The applicant States argued that the partnership created by the Act was to a large extent brought into line with marriage, and therefore constituted an infringement of this prohibition and the 'requirement to differentiate'.[108]

The Federal Government asserted that the Act did not violate Article 6(1) of the Basic Law, as this provision did not outlaw other institutions than marriage and contained no requirement to discriminate against persons who did not have access to marriage by reason of their sexual orientation. According to the government, the civil partnership in the statute was essentially different from that of marriage:

> 'The Act contains no provisions on the housekeeping of civil partners and does not impose on them an obligation to show consideration for each other when they choose and exercise a gainful occupation. Civil partners are merely permitted to decide on a common name. Civil partners are not permitted to make a joint adoption or to adopt a stepchild. Under maintenance law, each partner is in principle referred to his or her own gainful employment. This and other differences show that the registered civil partnership is not a duplication of marriage.'[109]

The BVerfG held that the institution of marriage as guaranteed by the Basic Law had to be interpreted in correspondence with prevailing opinions,[110] while taking into account '[…] the essential structural principles that follow from the application of Article 6.1 of the Basic Law to marriage as it is actually encountered in connection with the nature of the fundamental right guaranteed as a freedom and in connection with other constitutional norms'.[111] On that basis, the Court provided the following definition of marriage:

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the *Bundesrat* from preventing provisions that in themselves were not subject to its consent, to be constitutionally unobjectionable.

107 *Idem*, para. 20.

108 *Idem*.

109 *Idem*, para. 31.

110 *Idem*. The Court referred to BVerfG 4 May 1971, Az 1 BvR 636/68, *NJW* 1971 p. 1509.

111 *Idem*.

> 'Part of the content of marriage, as it has stood the test of time despite social change and the concomitant changes of its legal structure and been shaped by the Basic Law, is that it is the union of one man with one woman to form a permanent partnership, based on a free decision and with the support of the state […], in which man and woman are in an equal partnership with one another […] and may decide freely on the organisation of their cohabitation […].'[112]

With five votes to three,[113] the Federal Constitutional Court agreed with the government that the registered civil partnership was not interchangeable with marriage and could not enter into competition with marriage, '[…] if for no other reason than that the group of persons for whom the institution is intended does not overlap with the group of married persons'.[114] According to the majority of the Court the introduction of the legal institution of the registered civil partnership for same-sex couples did not infringe Article 6(1) of the Basic Law: it infringed neither the right to unhindered access to marriage guaranteed by this provision nor the institutional guarantee laid down in it.[115] The Court furthermore held the registered civil partnership to be compatible with Article 6(1) in its character as a fundamental principle on which values are based. The Court considered that the special protection accorded to marriage by Article 6(1) Basic Law did not cover the institution of the registered civil partnership:

> 'The fact that the partners are of the same sex distinguishes it from marriage and at the same time constitutes it. The registered civil partnership is not marriage within the meaning of Article 6.1 of the Basic Law. It grants rights to same-sex couples. In this way, the legislature takes account of Article 2.1 and Article 3.1 and 3.3 of the Basic Law, by helping these persons to better develop their personalities and by reducing discrimination.'[116]

According to the Court the particular protection of marriage in that provision did not prevent the legislature from offering legal forms for permanent cohabitation other than the union of man and woman to different groups. Thus, the Court held, the special protection accorded to marriage by Article 6(1) did not prohibit the legislature from providing rights and duties for the same-sex civil partnership that are equal or similar to those of marriage, precisely because it relates only to marriage.[117] The Court considered the institution of marriage could not actually be at risk as a result of the introduction of an institution that is directed at persons who cannot be married to each other. In introducing the new institution of the registered civil partnership, the legislature did not violate the requirement of promoting marriage as a way of life.

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112 BVerfG 17 July 2002, Az 1 BvF 1/01, *NJW* 2002 p. 2543, para. 87.

113 On the basis of Art. 30(2) BVerfGG a judge holding a dissenting opinion on the decision or the reasons during deliberations may have it recorded in a separate vote (or dissenting opinion) which shall be annexed to the decision. In their decisions the Senates of the Court may state the number of votes for and against. In the here discussed case, two of the three dissenting judges, Papier and Haas, wrote dissenting opinions which were annexed to the judgment. These opinions will be discussed below.

114 BVerfG 17 July 2002, Az. 1 BvF 1/01, *NJW* 2002 p. 2543, para. 103.

115 *Idem*, para. 70.

116 *Idem*, para. 88.

117 *Idem*, para. 89.

A second substantive argument put forward by the applicant States, was that the Act infringed the principle of equality of Article 3(1) of the Basic Law because persons of a different sex cohabiting with each other and groups of people related to each other and living together had no possibility of becoming registered civil partners. The Federal Government rebutted that the fact that the registered civil partnership was reserved to persons of the same sex was not in violation of Article 3(3) (prohibition of discrimination on suspect grounds) of the Basic Law, since it was based not on gender, but on the choice of partner, which is not included in the list of suspect grounds of Article 3(3) Basic Law. The Constitutional Court (with a seven to one vote) followed the reasoning of the Federal Government on this point and held:

> 'Men and women are always treated equally. They may enter into marriage with a person of the opposite sex, but not with one of their own sex. They may enter into a civil partnership with a person of their own sex, but not with one of the other sex.'[118]

The Court left open the option of the introduction of a civil partnership for different-sex couples, but held there to be no constitutional requirement to create such a possibility.[119] It held that the Civil Partnerships Act violated neither the prohibition of discrimination of Article 3(3) of the Basic Law nor the general principle of equality in Article 3(1) of the Basic Law. As the Court explained, this Article prohibited treating a group of persons who are addressed by a statute differently from other persons addressed by the statute while there were no differences between the two groups of such a nature and such weight that they could justify the unequal treatment. The Court held such differences to exist, however, 'between same-sex couples and the other social communities of persons'.[120] The Court emphasised that civil partnership was open to same-sex couples only, while marriage was only open to couples of a different sex. The fact that children of both spouses could be born to a permanent two-person relationship between man and woman, but not to a same-sex partnership, justified directing heterosexual couples to marriage if they wished to give their relationship a permanent legally binding form.[121] Further, the Court held that there were differences in the relationship of the same-sex partnerships to the communities of mutual support between siblings or other relatives, and that these differences justified different treatment.[122] Lastly, the Court held the legislature to be free, but not constitutionally required, to create new possibilities for different-sex couples or for other communities of mutual support to acquire legal recognition

118 *Idem*, para. 106.
119 *Idem*, para. 111.
120 *Idem,* para. 108.
121 *Idem*, para. 109.
122 *Idem*, para. 110. The Court held: 'This relates even to the exclusivity of the registered civil partnership, which admits no further relationship of the same kind beside itself, whereas communities of mutual support between siblings and other relations are often part of further comparable relationships and also exist side-by-side with another relationship by marriage or partnership. Communities of mutual support between relations, in addition, are given a certain support even under existing law, a support that was first granted to same-sex couples in the form of the civil partnership. Thus, in connection with relations, there are rights to refuse to give evidence, rights of succession and in part also rights to a compulsory portion and for it to be given favourable tax treatment.'

of their relationships if this could be done without the given institute being interchangeable with marriage.[123] The arguments put forward by the applicant States that the provisions in the Act on the rights to custody and succession of civil partners and on maintenance law were objectionable from a constitutional point of view, were unanimously rejected by the Constitutional Court.

Judges Papier and Haas dissented. They both held that the principle that marriage was the union of one man and one woman in a comprehensive, essentially indissoluble partnership,[124] was an essential fundamental principle defining the institution of marriage[125] that enjoyed special protection under Article 6(1) of the Basic Law. With the creation of a civil partnership between persons of the same sex, with rights and duties corresponding to those of marriage, the legislature disregarded this essential structural principle, laid down by Article 6(1) of the Basic Law. The judges considered it '[…] a false conclusion to assume that precisely because of deviation from an essential structural principle the constitutional institutional guarantee cease[d] to apply as a standard.' Judge Haas opined that the Constitutional Court should have examined more closely whether the civil partnership was comparable to that of the institution of marriage. Judge Papier was convinced that this was the case; the Judge held that the civil partnership as created by the disputed Act resembled marriage in basically all respects but its name.

Following the judgment, an intense debate was initiated in German academic literature about the compatibility of the Act with the German Basic Law.[126] One of the issues widely debated was whether the Act was in violation of fundamental rights as enshrined in Article 3 (principle of equal treatment) and Article 6(1) (special protection of the marriage and the family) of the Basic Law.[127] Hofmann was very critical to the 'obvious' watering down ('*Relativierung*') of the wording of Article 6(1) by the Court. According to the author, the Court did not satisfactorily take into account the legislative history of the Article and its predecessor, Article 119 of the Weimar Constitution (see 10.1.2 above).[128]

123 *Idem*, para. 111.

124 Judge Papier referred to BVerfG 30 November 1982, Az. 1 BvR 818/81, *NJW* 1983 p. 511.

125 Judge Papier referred to BVerfG 4 May 1971, Az 1 BvR 636/68, *NJW* 1971 p. 1509.

126 See Forkert 2003, *supra* n. 42, at p. 12; J. Braun, 'Das Lebenspartnerschaftsgesetz auf dem Prüfstand' ['The Civil Partnership Act in trial phase'], *Juristische Schulung, JuS* (2002) p. 21; R. Kemper, `Die Lebenspartnerschaft in der Entwicklung – Perspektiven für die Weiterentwicklung des Lebenspartnerschaftsrechts nach dem Urteil des BVerfG vom 17. 7. 2002' ['The civil partnership in development – Prospects for the further development of the law on civil partnership after the judgment of the German Constitutional Court of 17 July 2002'], *FPR* (2003) p. 1; A. Maurer, 'Federal Constitutional Court To Decide Whether to Issue a Temporary Injunction Against Germany's New Lifetime Partnerships Law for Homosexual Couples', 2 *German Law Journal* (2001), available at www.germanlawjournal.com/index.php?pageID=11&artID=42, visited June 2014; Maurer 2001B, *supra* n. 101 and S. Stüber, `Lebenspartnerschaft – viele offene Fragen' ['Civil partnership – many open questions'], *NJW* (2003)p. 2721.

127 E.g. Forkert 2003, *supra* n. 42, at p. 16, footnotes 29 and 33. The procedural elements of the case, that have not been discussed here, were also a great cause for discussion. This critique will not be discussed here.

128 Hofmann 2011, *supra* n. 21, at p. 270, para. 50.

In 2008, in a judgment concerning the German Transsexuals Act,[129] the Federal Constitutional Court once again stressed that the institute of marriage was exclusively reserved for partners of different sex.[130] However, because post-operative transsexuals also have a right under Article 2(1) in combination with Article 1(1) Basic Law to choose their own sexual identity, the Court held that marriages concluded before one of the spouses had a change-sex operation, deserved legal protection after the sex change.[131] The Court left it up to the legislature to decide in such situation how a yet existing marriage was to be registered: as marriage ('*Ehe*'), as civil partnership ('*Lebenspartnerschaft*') or as civil union sui generis ('*Lebensgemeinschaft sui generis*').[132] Following this judgment the German legislature struck out the impugned provision (Article 8(1)(2))[133] of the Transsexuals Act.[134] The Administrative Court of Berlin ruled in 2010 that from the fact that the legislature had thus allowed for a same-sex marriage in the exceptional circumstance that one of the spouses had changed sex during marriage, it did not follow that in general same-sex marriage was permitted in Germany.[135]

As the following sections show, in the years after its entry into force, the German civil partnership was made increasingly more equivalent to marriage. On the one hand, this mitigated the debate on the constitutionality of the partnership in itself, yet on the other hand, it made the question as to the meaning of Article 6(1) Basic Law even more pressing.

10.3.4. Further equalisation of the Civil Partnership with marriage

In the years after the entry into force of the Civil Partnerships Act, the civil partnership was 'gradually made equivalent to […] marriage.'[136] The first amendment

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129 Gesetz über die Änderung der Vornamen und die Feststellung der Geschlechtszugehörigkeit in besonderen Fällen (Transsexuellengesetz – TSG) [Act on changing the first name and on determination of one's sex in special circumstances (Act on Transsexuals)], Act of 10 September 1980 (BGBl. I p. 1654).

130 BVerfG 27 May 2008 (dec.), Az. 1 BvL 10/05, *NJW* 2008 p. 3117, para. 50.

131 *Idem*, para. 36 ff.

132 *Idem*, paras. 67- 71.

133 Art. 8(1)(2) TSG provided: ‚Auf Antrag einer Person, die sich auf Grund ihrer transsexuellen Prägung nicht mehr dem in ihrem Geburtseintrag angegebenen, sondern dem anderen Geschlecht als zugehörig empfindet und die seit mindestens drei Jahren unter dem Zwang steht, ihren Vorstellungen entsprechend zu leben, ist vom Gericht festzustellen, dass sie als dem anderen Geschlecht zugehörig anzusehen ist, wenn sie […] nicht verheiratet ist […]'.

134 Art. 1 Act of 17 July 2009, *BGBl. I* p. 1978.

135 VG Berlin 15 June 2010, Az. 23 A 242/08, para. 13. For discussion of other elements of this judgment see section 10.4 below.

136 As observed by the CJEU in Case C-267/06 *Tadao Maruko* v. *Versorgungsanstalt der deutschen Bühnen* [2008] ECR I-1757, ECLI:EU:C:2008:179, para. 67. On this equalisation, see for example, F. Brosius-Gersdorf, 'Gleichstellung von Ehe und Lebenspartnerschaft' ['Equalisation of marriage and civil partnership'], *FamFR* (2013) p. 169 and G.D. Gade and C. Thiele, 'Ehe und eingetragene Lebenspartnerschaft: Zwei namensverschiedene Rechtsinstitute gleichen Inhalts?' ['Marriage and civil partnership: Two legal institutions with a different name but the same content?'], *DÖV* (2013) p. 142.

of the Act dates from 2005.[137] The drafters of this Civil Partnership Law (Revision) Act ('*Gesetz zur Überarbeitung des Lebenspartnerschaftsrechts*') held that the 2002 BVerfG judgment, upholding the constitutionality of the Civil Partnerships Act, had paved the way for a far-reaching equalisation of the civil partnership with marriage.[138] The 2004 Revision Act – which entered into force on 1 January 2005 – has indeed been held to contribute to 'the gradual harmonisation of the regime put in place for the life partnership with that applicable to marriage.'[139] It governed the adoption of matrimonial property law; a more extensive harmonisation of maintenance law; the assimilation of the requirements for dissolution of a registered partnership to those of divorce law; the introduction of second-parent adoption;[140] the introduction of pension rights adjustment; and the extension of the statutory old-age pension scheme to civil partners. Certain areas, such as taxes and the legal position of civil servants, were not covered by this Act. Consequently, various differences remained between civil partners and spouses.

After the 2004 revision of the Civil Partnership Act, several other bills envisaging (further or full) equalisation of the civil partnership with marriage were drafted and tabled, both at federal[141] and state level.[142] None of these, however, resulted in legislative amendments.[143] Instead, it proved to be judicial decisions – both at the national and the European levels – in cases concerning issues like taxes, social benefits for civil servants and adoption rights that prompted the legislature to adopt further amendments to civil partnership law. The latest change to the Civil Partnerships Act, for example, was implemented in 2014, as a follow-up to the judgment of the Constitutional Court on successive adoption (see section 10.3.5.3 below).[144]

The following (sub)sections discuss in more detail four important fields of law in which full equalisation has long been no reality or was no reality at the time this research was concluded (i.e., 31 July 2014). These concern employment law (section 10.3.4.1), the legal position of civil servants (section 10.3.4.2), tax issues (section 10.3.4.3), and parental rights. Because of their centrality to the present case study, the latter are discussed separately in section 10.3.5.

137 Gesetz zur Überarbeitung des Lebenspartnerschaftsrechts [Civil Partnership Law (Revision) Act], Act of 15 December 2004, *BGBl. I* No. 69, p. 3396. The Act was passed on 12 October 2004 by the *Bundestag* [Parliament] and entered into force on 1 January 2005.

138 *BT-Drs.* 15/3445, p. 14.

139 Observation of the Bayerisches Verwaltungsgericht München, the referring Court in the case of *Maruko*, as discussed below, and as quoted in Case C-267/06 *Tadao Maruko* v. *Versorgungsanstalt der deutschen Bühnen* [2008] ECR I-1757, ECLI:EU:C:2008:179, para. 68.

140 See section 10.3.5.1 below.

141 *BT-Drs.* 16/497 and *BT-Drs*. 16/3423.

142 For example, *LT-Drs.* 14/2724.

143 For example, Plenarprotokoll 14/55 of the Landestag Nordrhein-Westfalen of 8 March 2007, p. 6199.

144 *BGBl. I*, p. 786.

10.3.4.1. Employment law

A prominent issue under employment law in respect of which *Lebenspartners* were, for a long time, treated differently from spouses concerns survivors' pensions. This difference in treatment resulted in various court proceedings and in one of these a preliminary reference to the Court of Justice of the European Union (CJEU) was made. The *Maruko* case concerned the occupational pension scheme managed by the German Theatre Pension Institution ('*Versorgungsanstalt der deutschen Bühnen*'), under which a civil partner – contrary to a spouse – did not receive a survivor's pension after the death of the partner. This was reason for the Bavarian Administrative Court to make a preliminary reference to the CJEU in June 2006.[145] The principal question of the referring court was whether Article 1, in conjunction with Article 2(2)(a) of Directive 2000/78/EC,[146] precluded regulations governing a supplementary pension scheme of the kind at issue in the case.

As discussed in more detail in Chapter 9, the CJEU ruled in its judgment of 1 April 2008 in the *Maruko* case[147] that an occupational pension scheme under which a civil partner did not receive a survivor's pension after the death of the partner like spouses did, was indeed precluded if, under national law, the civil partnership placed persons of the same sex in a situation comparable to that of spouses so far as that survivor's benefit was concerned. The CJEU left it up to the referring court to determine in a concrete case whether such comparability of situations could be found. In the CJEU judgment it was, however, already indicated that the referring court itself had acknowledged that in Germany a 'harmonization between marriage and life partnership' existed, which could be regarded as 'a gradual movement towards recognizing equivalence' and that therefore the registered civil partnership, while not identical to marriage, placed persons of the same sex in a situation comparable to that of spouses as far as the survivor's benefit was concerned.[148] Therefore it came not by surprise that the Bavarian Administrative Court subsequently decided in the plaintiff's favour.[149] It held that, as a surviving civil partner, Maruko was in a situation comparable to that of a spouse who was entitled to the survivor's benefit provided for under the occupational pension scheme managed by the '*Versorgungsanstalt der deutschen Bühnen*'.

A year later, the Federal Labour Court (*Bundes Arbeitsgericht*, BAG) confirmed that since the entry into force of the Civil Partnership (Revision) Act of January 2005, civil partners of the same sex were in a situation comparable to that of spouses,

145 VG München 1 June 2006 (dec.), Az. M 3 K 05.1595.

146 Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation [2000] OJ L303/16.

147 Case C-267/06 *Tadao Maruko* v. *Versorgungsanstalt der deutschen Bühnen* [2008] ECR I-1757, ECLI:EU:C:2008:179. See M. Bruns, 'Die Maruko-Entscheidung im Spannungsfeld zwischen europäischer und nationaler Auslegung' ['The Maruko judgment in the area of tension between European and national reading'], *NJW* (2008) p. 1929 and S. Stüber, 'Was folgt aus "Maruko"?' ['What follows from "Maruko"?'], *NVwz* (2008) p. 750.

148 *Idem*, para. 69.

149 VG München 30 October 2008, Az. M 12 K 08.1484.

as far as survivors' benefits were concerned.[150] Referring to the BVerfG judgment of 2002 concerning the Civil Partnerships Act,[151] the Labour Court held that while Article 6(1) Basic Law prohibited the legislature from giving preferential treatment to other ways of life over marriage, there was no obligation on the legislature in the form of a '*Abstandsgebots*' (requirement of distance) to disadvantage other ways of life *vis-à-vis* marriage.[152]

10.3.4.2. The legal position of civil servants

As explained above, civil servants were not covered by the 2001 Civil Partnerships Act, nor by its 2004 revision. Subsequently, also in this area of law, court litigation eventually forced the legislature to take action.

In cases decided at the time when the *Maruko* case was pending before the CJEU,[153] and shortly after the CJEU judgment in that case was delivered,[154] both the Federal Administrative Court[155] and the Second Senate of the Constitutional Court held differences in treatment between civil servants in a civil partnership and married civil servants as regards social benefits to be compatible with the German Basic Law. The Constitutional Court held that the situation of civil partners and spouses in respect of child benefits was not comparable, because of the special role marriage played in the raising of children and because of the resultant connected loss of income.[156] Decisive importance was attached to the fact that the German legislature had not provided for full equalisation of civil servants in the Civil Partnerships Act, nor in its 2004 Revision Act.[157] In a judgment delivered soon thereafter, the Federal Administrative Court even held the situation of civil partners and spouses to be generally incomparable.[158]

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150 BAG 15 September 2009, Az. 3 AZR 294/09, *NJW* 2010 p.1474. See A. Bissels and M. Lützeler, `Aktuelle Rechtsprechung zum Allgemeinen Gleichbehandlungsgesetz 2009/2010 (Teil 2)' ['Recent case-law on the General Equal Treatment Act 2009–2010 (Part 2)'], *BB* (2010) p. 1725 at pp. 1728–1729 and U. Langohr-Plato, 'Hinterbliebenenversorgung für eingetragene Lebenspartner' ['Survivors' pensions for registered partners'], *juris Praxis Report -ArbR* 11/2010 Anm. 5. By judgment of 14 January 2009 the Federal Labour Court had yet held that in respect of company pensions ('betrieblichen Altersversorgung'), civil partners and spouses were in a comparable situation. BAG 14 January 2009, Az. 3 AZR 20/07. See also BAG 29 April 2004, Az. 6 AZR 101/03, where the BAG had held that civil partners were like spouses entitled to residence allowance ('*Ortszuschlag*').

151 See 10.3.3 above.

152 BAG 15 September 2009, Az. 3 AZR 294/09, *NJW* 2010 p.1474, para. 23.

153 BVerfG 20 September 2007 (dec.), Az. 2 BvR 855/06, *NJW* 2008 p. 209 and BVerfG 8 November 2007 (dec.), Az. 2 BvR 2466/06.

154 BVerfG 6 May 2008 (dec.), Az. 2 BvR 1830/06, *NJW* 2008 p. 2325.

155 BVerwG 15 November 2007, Az. 2 C 33/06, *NJW* 2008 p. 868. See D. Kugele, 'Kein Anspruch auf Familienzuschlag der Stufe 1 bei eingetragener Lebenspartnerschaft' ['No entitlement to family benefits in category 1 for civil partnerships'], *jurisPR-BVerwG* 10/2008 Anm. 3.

156 BVerfG 6 May 2008 (dec.), Az. 2 BvR 1830/06, *NJW* 2008 p. 2325, para. 17.

157 *Idem*, para. 13.

158 BVerwG 15 November 2007, Az. 2 C 33/06, *NJW* 2008 p. 868. See Wiemann 2010, *supra* n. 49, at p. 1427, footnote 7.

In 2009 – possibly under influence of the CJEU judgment in the *Maruko* case – the BVerfG departed from this line of case law. In a judgment of 7 July 2009, the First Senate of the BVerfG took a diametrically opposite position on the matter than the Second Senate had taken before, by holding that that the unequal treatment of married civil servants and civil servants in a civil partnership in respect of survivors' pensions was contrary to the general principle of equality of Article 3(1) Basic Law.[159] The First Senate held the unequal treatment of marriage and registered civil partnerships with regard to survivors' pensions under an occupational pension scheme, for civil service employees who had supplementary pensions insurance with the Supplementary Pensions Agency for Federal and State Employees ('*Versorgungsanstalt des Bundes und der Länder*'), to be incompatible with Article 3(1) of the Basic Law.[160] The Federal Court of Justice (BGH), against whose judgment this appeal with the BVerfG had been lodged, had held that personal or marital status constituted the differentiating criterion for the unequal treatment, and had considered that this status was available to the persons affected irrespective of their sexual orientation. The BVerfG considered that line of reasoning to be 'too formal' and not doing justice to reality.[161] The Constitutional Court stressed that the civil partnership was introduced with the explicit objective to terminate discrimination against same-sex couples. Therefrom it followed that 'provisions which govern[ed] the rights of registered civil partners […] typically relate[d] to homosexual persons, and those which govern the rights of spouses typically relate[d] to heterosexual persons.'[162] On that ground the Court concluded that the difference in treatment between marriages and civil partnerships with regard to survivors' pensions, constituted unequal treatment on the basis of sexual orientation.[163] From established case law it followed that such unequal treatment was to be subjected to a strict review under Article 3(3) Basic Law.[164] The BVerfG considered that a mere reference to marriage and its protection under Article 6(1) of the Basic Law was not sufficient to justify the unequal treatment on the basis of sexual orientation. The Court held:

> 'If the privileged treatment of marriage is accompanied by unfavourable treatment of other ways of life, even where these are comparable to marriage with regard to the life situation provided for and the objectives pursued by the provisions, the mere reference

159 BVerfG 7 July 2009, 1 BvR 1164/07, *NJW* 2010 p. 1439. See M. Grunberger, 'Die Gleichbehandlung von Ehe und eingetragener Lebenspartnerschaft im Zusammenspiel von Unionsrecht und nationalem Verfassungsrecht. Das Urteil des BVerfG zur VBL-Hinterbliebenenrente' ['The equal treatment of marriage and civil partnership in interaction with Union law and national constitutional law'], *FPR* (2010) p. 203.

160 BVerfG 7 July 2009 (dec.), Az. 1 BvR 1164/07, *NJW* 2010 p. 1439. For an analysis of the retroactive effects of this finding, see T. Hoppe, 'Verpartnerte Beamte: Rückwirkender Anspruch auf Gleichstelling?', *ZBR Heft* (2010) p. 189 at pp. 189–191. This case concerning survivor's pensions also had a tax dimension. This limb of the case is discussed in further detail below (section 10.3.4.3).

161 Wiemann welcomed that the BVerfG took real life considerations into account, which reminded her of the reasoning by which the CJEU in the *Maruko* case came to the conclusion that there was indirect discrimination on the ground of sexual orientation. Wiemann 2010, *supra* n. 49, at p. 1428.

162 BVerfG 7 July 2009 (dec.), Az. 1 BvR 1164/07, *NJW* 2010 p. 1439, para. 92.

163 *Idem*. The wording of the judgment does not allow for a conclusion as to the question whether the BVerfG considered this to be direct or indirect discrimination.

164 *Idem*, para. 88. See, *inter alia*, BVerfG 26 January 1993, Az. 1 BvL 43/92, *NJW* 1933 p. 1517.

> to the requirement of protecting marriage does not justify such a differentiation. For the authority to give favourable treatment to marriage over other ways of life in fulfilment and further refining of the constitutional mandate to promote marriage does not give rise to a requirement contained in Article 6.1 of the Basic Law to disadvantage other ways of life in comparison to marriage. It cannot be constitutionally justified to derive from the special protection of marriage a rule that other partnerships are to be structured in a way different from marriage and to be given lesser rights […]. Beyond the mere reference to Article 6.1 of the Basic Law, a sufficiently weighty factual reason is required here which, measured against the given subject and objective of regulation, justifies the unfavourable treatment of other ways of life.'[165]

The Court did not consider there to be any viable objective reasons for unequal treatment in the area of occupational survivors' pensions: such objections did not result from the objectives and the concrete structure of this pensions system, nor from a difference of the life situations of married couples and civil partners. The Court held both civil partnership and marriage to be of a permanent nature and to create a mutual obligation of support.[166] The BVerfG rejected the reasoning of the Federal Court of Justice that a reason for differentiating between marriage and civil partnership could be found in the fact that married couples typically had a different pension requirement than civil partners because of gaps in their working lives due to their care for children. Not only could the image of the 'breadwinner marriage' no longer be regarded as the yardstick for assigning survivors' benefits, but this argument also overlooked that just as in marriage, in civil partnerships the community of the partners could be structured in such a way that one partner had an increased need for provision. The Court ruled that 'insofar as privileged treatment of marriage is based on the fact that it produces children, the constitutionally permissible and constitutionally required promotion of parents is primarily the subject of the constitutional protection of the fundamental rights of the family, and as such it is not restricted to married parents'.[167] By thus holding that raising children was not a typical distinction between marriage and civil partnership, the Court disconnected the special protection of marriage from the special protection of the family (see also section 10.3.5, concerning parental issues).[168]

This judgment had implications for other areas of law in which civil partners and spouses were treated unequally, for instance concerning taxes (see section 10.3.4.3) and parental rights (see section 10.3.5).[169] However, the judgment did not solve all issues concerning the legal position of civil servants in civil partnerships,[170] nor did

165 *Idem*, para. 105. See also Bissels and Lützeler 2010, *supra* n. 150, at p. 1729.

166 *Idem*, para. 102.

167 *Idem*, para. 103.

168 Wiemann 2010, *supra* n. 49, at p. 1429 and Henkel 2011, *supra* n. 49, at p. 259.

169 See also K. Muscheler, 'Die Reform des Lebenspartnerschaftsrechts' ['The reform of the Civil Partnership Act'], *FPR* (2010), *supra* n. 49, at p. 1429.

170 It is therefore not without reason that Musscheler wrote in 2010 that 'chaos had broken out' in this area of law. Muscheler 2010, *supra* n. 169, at p. 233.

its implementation law of 2011.[171] Another step towards full equalisation was taken by the Constitutional Court in a judgment of June 2012, when it outlawed differences in treatment in respect of family benefits (‘*Familienzuschlag*’).[172] By the time this research was concluded (i.e., 31 July 2014), the position of federal civil servants in a registered partnership was equalised with civil servants who were married in basically all respects.[173]

10.3.4.3. Tax issues

Tax law has for a long time been another area of law in which civil partnerships and marriage have been treated differently. The Civil Partnerships Bill had originally foreseen some equalisation in this area, however this was included in the statute that required the approval of the *Bundesrat* and that subsequently did not make it into law.[174]

An example of such unequal treatment concerned income tax. Under the Income Tax Act (*Einkommensteuergesetzes* (EStG)) civil partners, contrary to spouses,[175] had no option of combining their incomes for the purpose of tax assessment (‘*Zusammenveranlagung*’), which also implied that they had no entitlement to the financial benefit of income splitting (‘*Ehegattensplitting*’), whereby the total income of a married couple was taxed on the basis of equal halves.[176] In 2004 and 2005 various financial district courts held this difference in treatment between civil partners and spouses to be compatible with the Constitution, because Article 6(1) Basic Law allowed for privileged treatment of marriage over other forms of cohabitation in respect of taxes.[177] The Federal Financial Court (BFG) confirmed this approach on various occasions.[178] It thereby underlined that the legislature had explicitly not opted for a full equalisation of civil partnership and marriage in respect of income taxes.

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171 Gesetz zur Übertragung ehebezogener Regelungen im öffentlichen Dienstrecht auf Lebenspartnerschaften [Act on the application of marriage-related regulations in civil service law on civil partnerships], Act of 14 November 2011, *BGBl. I* 2011, No. 58, p. 2219.

172 BVerfG 19 June 2012 (dec.), Az. 2 BvR 1397/09, *NJW* 2012 p. 2790. As a result of this judgment the law was amended at Federal level. Gesetz zur Neuregelung der Professorenbesoldung und zur Änderung weiterer dienstrechtlicher Vorschriften, Professorenbesoldungsneuregelungsgesetz [Act introducing a new regulation on the pay of professors and on the amendment of other applicable regulations], Act of 20 June 2013. *BGBl. I* 2013, 1514. The Act entered into force on 1 August 2013.

173 On its website, the LSVD has provided a useful overview of the situation in the several States. See www.lsvd.de/recht/ratgeber-zum-lpartg/7-arbeiter-angestellte-und-beamte.html#c1372, visited June 2014.

174 See J. Selder, ‘Das Bundesverfassungsgericht und die Homo-Ehe im Steuerrecht’ [‘The German Constitutional Court and same-sex marriage in the area of tax law’], *DStR* (2013) p. 1064 at p. 1065. See also section 10.3.1 above.

175 As provided for at the time under Arts. 26, 26b and 32a (5) EStG.

176 For a calculation example of the resulting differences of the tax assessment between civil partners and spouses, see M. Maurer, ‘Die rechtliche Behandlung von Lebenspartnern im Steuernrecht’ [‘The legal treatment of civil partner in the area of tax law’], *FPR* (2010) p. 196 at pp. 196–197.

177 FG Saarland 21 January 2004, Az. 1 K 466/02, *NJW* 2004 p. 1268; FG Berlin 21 June 2004, Az. 9 K 9037/03; FG Hamburg 8 December 2004, Az. II 510/03; FG Niedersachsen 15 December 2004, Az. 2 K 292/03 and FG Niedersachsen 8 June 2005, Az. 2 K 267/03.

178 BFH 26 January 2006, Az. III R 51/05, *NJW* 2006 p. 1837. See also BFH 20 July 2006, Az III R 8/04, *NJW* 2006, 3310 and BFH 19 October 2006, Az. III R 29/06. By decision of 8 June 2011 the

The Constitutional Court in the end ruled differently in a judgment of May 2013. However, before that judgment is discussed, first its line of case law on another tax issue, namely inheritance tax, is set out. Under the Gift and Inheritance Tax Act of 1996 and the 1997 Annual Tax Reform Act,[179] registered civil partners were significantly more burdened than spouses in respect of inheritance tax: civil partners were placed in a different tax class from spouses and were consequently not granted the same personal exemptions.[180] Following the Inheritance Tax Reform Act (*Erbschaftsteuerreformgesetz, EStG*) of 24 December 2008,[181] the personal exemption and the exemption for retirement benefits were determined in the same way for both inheriting civil partners and spouses. Still, civil partners continued to be treated like distant relatives and unrelated persons and taxed at the highest tax rates. The lawsuits of two individuals, who were in a civil partnership and who were disadvantageously affected by these regulations, reached the BVerfG.

By order of 21 July 2010, the First Senate of the BVerfG ruled that the inheritance tax law discrimination against civil partners in comparison to spouses regarding the personal exemption and the tax rate, as well as their exclusion from the exemption for retirement benefits, was incompatible with the general principle of equality (Article 3(1) of the Basic Law).[182] The Court considered that there was no difference

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Bundesfinanzhof rejected the claim that civil partners could claim change of their income tax category. BFH 8 June 2011 (dec.), Az. III B 210/10.

179 Erbschaftsteuer- und Schenkungsteuergesetz a.F., ErbStG a.F. [Gift and Inheritance Tax Act. old version], version dated 20 December 1996.

180 The BVerfG's press office described the relevant provisions as follows: 'While pursuant to §§ 15.1 and 19.1 ErbStG a.F. spouses were subject to the most beneficial Tax Class 1 and, depending upon the amount of the inheritance, were subject to a tax rate between 7 and 30%, civil partners were classified as "other recipients" and placed in Tax Class III, which provides for tax rates of between 17 and 50%. Moreover, § 16.1 no. 1 ErbStG a.F. granted spouses a personal exemption in the amount of DM 600,000/€ 307,000 and § 17.1 ErbStG a.F. granted a special exemption for retirement benefits in the amount of DM 500,000/€ 256,000. On the other hand, registered civil partners, because of their placement in Tax Class III, were only entitled to an exemption in the amount of DM 10,000/€ 5,200 (§ 16.1 no. 5, § 15.1 ErbStG a.F.). They were completely excluded from the benefit of the tax exemption for retirement benefits. In the Inheritance Tax Reform Act (*Erbschaftsteuerreformgesetz*) of 24 December 2008, the provisions described above in the Gift and Inheritance Tax Act were amended to the benefit of registered civil partners to the extent that the personal exemption and the exemption for retirement benefits are determined in the same way for both inheriting civil partners and spouses. Nevertheless, registered civil partners continue to be treated like distant relatives and unrelated persons and taxed at the highest tax rates. Pursuant to the Federal Government's draft legislation for the 2010 Annual Tax Reform Act of 22 June 2010, complete equality for civil partners and spouses in the gift and Inheritance tax law – also in regard to tax rates – is intended.' Press release of the Press Office of the Federal Constitutional Court of Germany, no. 63/2010 of 17 August 2010, online available at: www.bverfg.de/pressemitteilungen/bvg10-063en.html, visited July 2011.

181 Gesetz zur Reform des Erbschaftsteuer- und Bewertungsrechts (ErbStRG) [Inheritance Tax Reform Act] *BGBl. I* 2008 p. 3018. This Act was adopted following a judgment of the BVerfG of 2006 (BVerfG 7 November 2006 (dec.), Az. 1 BvL 10/02, *NJW* 2007 p. 573), in which the Constitutional Court held the Inheritance Tax Act to be partly incompatible with Art. 3(1) Basic Law, on grounds that were not related to the difference in treatment between civil partners and spouses.

182 BVerfG 21 July 2010 (dec.), Az. 1 BvR 2464/07, *NJW* 2010 p. 2783. See M. Messner, 'Lebenspartnerschaft – Steuerliche Konsequenzen des BVerfG-Beschlusses vom 21. 7. 2010' ['Civil partnership – implications of the decision of the German Constitutional Court of 21 July 2010 for tax law'], *DStR* (2010) p. 1875.

between civil partners in comparison to spouses that was of such weight that it could justify the disadvantage to civil partners in the Gift and Inheritance Tax Act in the version pursuant to the 1997 Annual Tax Reform Act.[183] Granting a privilege to spouses and not to civil partners under the law regarding the personal exemption could not be justified solely by reference to the State's special protection of marriage and the family (Article 6(1) Basic Law). Referring to its judgment concerning survivors' pensions for civil servants of July 2009 (see 10.3.4.2 above), the Court reiterated that if the promotion of marriage was accompanied by unfavourable treatment of other ways of living together – even where these were comparable to marriage with regard to the life situation provided for and the objectives pursued by the legislation – the mere reference to the requirement of protecting marriage under Article 6(1) of the Basic Law did not justify such a differentiation. The Court held that the authority of the State to be active in respect of marriage and the family in fulfilment of its duty of protection as set forth in Article 6(1) remained completely unaffected by the question of the extent to which others can assert claims for equal treatment.[184] Only the principle of equality (Article 3(1) Basic Law), in accordance with the relevant principles as developed by the Federal Constitutional Court, determined whether and to what extent others – in this case registered civil partners – had a claim for treatment equal to the statutory or actual promotion of married spouses and family members.[185] The Constitutional Court noted that marriage was fundamentally different from civil partnership in its suitability as 'starting point for the succession of generations'. For a civil partnership it was fundamentally impossible to produce joint children, because of its limitation to same-sex couples. Marriage, on the contrary, – as a union between different sex couples and despite the free choice of spouses for parenthood – was considered by the Court to be the privileged legal institute for family building.[186] The Court accepted that it could be argued that this suitability of marriage as a starting point for the succession of generations could justify higher personal allowances for spouses in tax law, with a view to the possible inheritance of the family property by joint children. However, now that the legislature had not made a distinction between marriages with children and childless marriages in setting the personal allowance rates, the Court rejected this argument.[187]

The Court gave the legislature until 31 December 2010 to enact a new rule for those old cases affected by the (former version of the) Gift and Inheritance Tax Act. These new rules were to remove the infringement on equality from the time period between the effective date of the Civil Partnerships Act of 16 February 2001 until the effective date of the Inheritance Tax Reform Act of 24 December 2008.[188] The legislature did not immediately take action, however, presumably because it was awaiting the judgment of the Second BVerfG in the pending cases in respect of income splitting.

183 The Court considered that this applied to the personal exemption pursuant to § 16 ErbStG a.F., to the exemption for retirement benefits pursuant to § 17 ErbStG a.F., and to the tax rate pursuant to § 19 ErbStG a.F.

184 BVerfG 21 July 2010 (dec.), Az. 1 BvR 2464/07, *NJW* 2010 p. 2783, para. 92.

185 *Idem*, para. 92.

186 *Idem*, para. 106.

187 *Idem*, para. 107.

188 See also Maurer 2010, *supra* n. 176.

Before the Constitutional Court issued that long-awaited ruling it firstly found, in another case, the unequal treatment of spouses and civil partners in respect of conveyance tax ('*Grunderwerbsteuerrecht*') incommensurable with Article 3 Basic Law and thus unconstitutional.[189]

This judgment of July 2012 was received as fitting in with a consistent line of case law of the BVerfG.[190] It therefore did not come as a surprise that in respect of income tax also, the BVerfG ruled that civil partners had to be treated equally with spouses. This was decided by the Second Senate of the BVerfG in May 2013, when it dealt with the tax dimension of the 2009 judgment of the First Senate of the BVerfG concerning survivors' pensions for civil servants, as discussed above.[191]

On 7 May 2013, the BVerfG ruled that the unequal treatment of registered partners when compared to spouses in respect of income splitting constituted indirect discrimination on grounds of sexual orientation.[192] This implied that a strict proportionality test applied. The Court reiterated that the special protection of marriage ex Article 6(1) Basic Law was in itself no sufficient justification.[193] Further, neither the aim of the income splitting for spouses, nor the legislature's competence to apply categorisation in tax law constituted a sufficiently weighty reason justifying the indirect discrimination. The Court underlined that the legislature had from the beginning structured civil partnership 'in a way comparable to marriage as a community of extensively shared responsibility'[194] and that it had continuously equalised civil partnership further with marriage.[195] Both marriage and civil partnership formed unions of economic production and consumption ('*Gemeinschaften des Verbrauchs und Erwerbs*').[196] Because the income splitting applied to spouses irrespective of whether they were raising children, any 'family-related intentions'[197] could not justify the indirect discrimination either. Supporting family-building was no justification for category-based preferential treatment of marriage over civil partnership. The fact that generally more children were raised within marriage when compared to civil partnership, did not alter this conclusion, as it could not be ignored that children were also raised in civil partnerships.[198]

189 BVerfG 18 July 2012 (dec.), Az. 1 BvL 16/11, *NJW* 2012 p. 2719. See F. Strohal, 'Verfassungswidrige Ungleichbehandlung von Ehegatten und eingetragenen Lebenspartnern im Grunderwerbsteuerrecht' ['Unconstitutional unequal treatment between spouses and registered partners in the area of conveyance tax law'], *FamFR* (2012) p. 432.

190 S. Muckel, 'Ungleichbehandlung von Ehe und eingetragener Lebenspartnerschaft – Grunderwerbsteuer' ['Unequal treatment of marriage and civil partnership – conveyance tax'], *JA* (2012) p. 877.

191 BVerfG 7 May 2013 (dec.), Az. 2 BvR 909/06 a.o., *NJW* 2013 p. 2257.

192 *Idem*, para. 78.

193 *Idem*, paras. 80–85.

194 Federal Consitutional Court Press Office, Press release no. 41/2013 of 6 June 2013, online available at: www.bundesverfassungsgericht.de/pressemitteilungen/bvg13-041en.html, visited August 2013.

195 BVerfG 7 May 2013 (dec.), Az. 2 BvR 909/06 a.o., *NJW* 2013 p. 2257, para. 90.

196 *Idem*, paras. 95 and 102.

197 Federal Consitutional Court Press Office, Press release no. 41/2013 of 6 June 2013, online available at: www.bundesverfassungsgericht.de/pressemitteilungen/bvg13-041en.html, visited August 2013.

198 BVerfG 7 May 2013 (dec.), Az. 2 BvR 909/06 a.o., *NJW* 2013 p. 2257, paras. 102–103.

The Court concluded that the legislature had to eliminate the established violation of Article 3(1) Basic Law, and it had to do so retroactively to the moment of the entry into force of the Civil Partnerships Act in August 2001.[199] Because the legislature could choose between different means in order to achieve this, the BVerfG issued a declaration of incompatibility of the relevant provisions of the Income Tax Act with the Basic Law.[200] Until the legislature had introduced new legislation, the relevant provisions had to be applied to civil partners and spouses equally.[201]

Two out of eight Judges disagreed with the majority finding and wrote a separate opinion. They disputed that the legislature had from the outset intended to structure civil partnership in a similar fashion as marriage. This could only be said from the moment the Civil Partnerships Revision Act had entered into force, hence from the year 2005. Since the facts of the cases before it originated from fiscal years 2001 and 2002, the preferential treatment of marriage during that period could be justified, exactly because civil partnership and marriage were not comparable. Justices Landau and Kessal-Wulf warned that the 'Senate [had replaced] the assessment of the legislature, which [was] the only legitimate authority, with its own.'[202]

This ruling was generally considered to be consistent with the existing line of BVerfG case law in respect of equal treatment of civil partners, which had been based on the legislature's own principled choices.[203] That the BVerfG accorded retroactive effect to its ruling to the moment of introduction of the civil partnership, may have come more as a surprise. The costs involved for the German State were estimated at approximately 175 million euro in 2013 and around 60 million annually from then on.[204]

This time the legislature acted quickly. On 19 July 2013, a new Article 2(8) in the Income Tax Act (*Einkommensteuergesetz*) entered into force, providing that those clauses that applied to spouses, equally applied to civil partners.[205] The legislature thus deliberately chose to equalise the position of civil partners with that of spouses in respect of the entire Income Tax Act, and not just the question of income splitting. Not

199 *Idem*, paras. 107–111.

200 *Idem*, para. 112.

201 *Idem*, para. 113.

202 Federal Consitutional Court Press Office, Press release no. 41/2013 of 6 June 2013, online available at: www.bundesverfassungsgericht.de/pressemitteilungen/bvg13-041en.html, visited August 2013.

203 E.g. S. Muckel, 'Ausschluss eingetragener Lebenspartner vom Ehegattensplitting verfassungswidrig' ['Exclusion of civil partners from income splitting unconstitutional'], *JA* (2013) p. 714. Brosius-Gersdorf regretted that the Court did not examine whether the income splitting in itself was constitutional. The author held that the measure constituted gender discrimination. F. Brosius-Gersdorf, 'Verfassungswidrigkeit der Ungleichbehandlung von Ehen und eingetragenen Lebenspartnerschaften beim Ehegattensplitting' ['Unconstitutionality of unequal treatment of marriage and civil partnership in respect of income splitting'], *FamFR* (2013) p. 312.

204 'Ehegattensplitting für eingetragene Lebenspartner: Koalitionsfraktionen bringen Gesetzentwurf ins Parlament ein', *Becklink* 1026983 (Verlag C.H. Beck 2011).

205 Art. 1(1) Gesetz vom 15. 7. 2013 zur Änderung des EStG in Umsetzung der Entscheidung des BVerfG vom 7. 5. 2013 [Act of 15 July 2013 on the Amendment of the EStG with a view to implementation of the judgment of the BVerfG of 7 May 2013], *BGBl. I*, p. 2397.

all related tax acts were simultaneously amended at the time, but some amendments followed suit.[206] Moreover, in April 2014 the Federal Government tabled a bill that provided for equal treatment of civil partners and spouses in all tax laws.[207] This Act entered into force on 24 July 2014.[208]

On the basis of the discussed line of BVerfG case law in tax matters, Selder concluded that the Constitutional Court had 'dismantled the constitutional position of marriage in tax law in a radical way'. According to the author the special protection of marriage under Article 6(1) Basic Law had become an empty shell that had developed over time from an obligation to privilege marriage to a prohibition on discrimination.[209]

10.3.5. Parental rights for same-sex couples

Parental rights for same-sex couples have been much debated in German politics and it is in this area that marriage and registered partnership have not (yet) been fully equalised under the law.

When civil partnership was introduced in 2001, the legislature held that same-sex civil partnerships were 'fundamentally' different from different-sex unions, because no common genetic children could be born within civil partnerships.[210] It was acknowledged that nonetheless in civil partnerships children could also be, and were, raised, and that their best interests required that certain measures were taken. Provision was therefore made for a right to parental access for civil partners.[211] The possibility was also introduced that in the case of death, an order could be given that the child remained with the person(s) to whom it related (so-called '*Verbleibensanordnungen*'). Civil partners were furthermore given the power to share in decisions on matters relating to the child's everyday life if he or she lived together with the parent (the so-called '*kleines Sorgerecht*').[212]

More far-reaching parental rights for civil partners were only granted gradually over the past decade, and the most principled amendments were commanded by rulings of the German Constitutional Court. The various subsections below contain a chronological and – mostly – thematical discussion of the (development of) the relevant laws.

206 E.g. Act of 18 July 2014, *BGBl. I* p. 1042, providing for the relevant amendment of the *Einkommensteuer-Durchführungsverordnung (EStDV)* [Income Tax Implementation Decree].
207 *BT-Drs.* 18/1306.
208 *BGBl. I* 2014, no. 32, p. 1042.
209 Selder 2013, *supra* n. 174, at p. 1067.
210 *BT-Drs.* 14/3751, p. 33.
211 Art. 2 no. 12 LPartG, now provided for in Art. 1685(2) BGB.
212 Art. 9(1) LPartG.

10.3.5.1. 2004: Introduction of second-parent adoption

When the Civil Partnerships Act was revised in 2004, it was felt that the best interests of the child had not been not sufficiently served by the 2001 Act.[213] Measures were considered necessary to strengthen the legal position of children raised in civil partnerships, as well as their parents. The 2004 Revision Act therefore made it possible for a civil partner to adopt the genetic child of the other civil partner, so-called *Stiefkindadoption* (step-child adoption), hereafter referred to as second-parent adoption.[214] The BVerfG later held such second-parent adoption to be compatible with the Basic Law.[215] In its judgment, the Court made clear that each parent individually enjoyed the constitutional parental rights of Article 6(2) Basic Law and not merely two parents as a union.[216]

The pre-existing option of single-parent adoption had not been affected by the Civil Partnerships Act of 2001. Since the 2004 revision it is, however, provided that if a person in a civil partnership wishes to adopt a child, the consent of one's civil partner is required. The 2004 Revision Act explicitly did not provide for successive adoption ('*Sukzessivadoption*') or joint adoption by civil partners.[217] While the latter is still[218] not possible for civil partners under German law (see 10.3.5.4 below), legislative change in respect of successive adoption was only achieved after court proceedings (see 10.3.5.3 below). Before the relevant BVerfG ruling of 2013 is discussed, first the relevant aspects of the Court's case law of the preceding years are set out.

10.3.5.2. 2009 and 2010: principled BVerfG rulings

As noted above, the rulings of the Constitutional Court on survivors' pensions and inheritance also had implications for parental rights for civil partners. For long it has been a controversial matter in German law and doctrine whether the close intertwining of marriage and the family in the wording of Article 6(1) of the Basic Law, implied that only the families of married partners enjoy constitutional protection.[219] In its ruling of July 2009 on survivors' pensions for civil partners (see 10.3.4.2 above) the Constitutional Court rejected this reading of Article 6(1) Basic Law. It held:

213 *BT-Drs.* 15/3445, p. 14.

214 Art. 9(7) LPartG, Art. 1755(1) and (3), Art. 1755(2) BGB, as introduced by the 2004 Revision Act.

215 BVerfG 10 August 2009 (dec.), Az. 1 BvL 15/09. See also AG Elmshorn 20 December 2010 (dec.), Az. 46 F 9/10, *NJW* 2011 p. 1085. The case concerned a lesbian couple in a civil partnership, one of whom had become pregnant with the use of anonymously donated sperm. The Elmshorn Court ruled that it was in the child's best interest for the civil partner of the biological mother not to have to comply with the year of caring for the child before adoption could take place ('*Adoptionspflegejahr*'), as had been requested by the competent child welfare office.

216 BVerfG 10 August 2009 (dec.), Az. 1 BvL 15/09, para. 15.

217 *BT-Drs.* 15/3445, p. 15.

218 State of affairs on 31 July 2014.

219 E.g. Grösschner 2004, *supra* n. 22, at p. 825; W. Heun, 'Art. 3', in H. Dreier (ed.), *Grundgesetz-Kommentar, Band 1, Präambel, Artikel 1–19* [German Basic Law Commentary, Volume 1, Preamble, Articles 1–19], 2nd edn. (Tübingen, Mohr Siebeck 2004) p. 399 at p. 482, Rn. 140.

> '[…] the constitutionally permissible and constitutionally required promotion of parents is primarily the subject of the constitutional protection of the fundamental rights of the family, and as such it is not restricted to married parents […].'[220]

With this ruling the Court disconnected the special protection of marriage from that of the family (see also 10.3.4.2 above). The Court furthermore took into account the reality that a growing number of children were raised outside marriage.[221] On the other hand, in its 2010 judgment on inheritance tax (see 10.4.4.2 above), the Court held that marriage differed in principle from civil partnership '[…] in its qualification as a starting point for a succession of generations'.[222] It therefore considered marriage a privileged area of law for family building. It has been concluded on the basis of this reasoning that the Court had thus '[…] stated cautiously that the reproductive abilities of a married couple may justify providing benefits for married couples that are not provided for civil partners.'[223] This has indeed proven true in respect of reimbursement for AHR treatment (see 10.4.5.6 below). However, the relevant case law of the Constitutional Court predates the judgment here discussed. In later case law of the Constitutional Court no such reasoning has been repeated. In fact, the Constitutional Court took a different approach in its ruling of 2013 on successive adoption by civil partners, by instead focusing on the right to equal treatment of the children concerned.

10.3.5.3. 2013: Successive adoption

As explained above, there has for long been a prohibition on successive adoption for civil partners ('*Verbot der Kettenadoption*') under German law.[224] Thus, for civil partners, it was not possible to adopt the minor adopted child[225] of the other civil partner.[226] A bill tabled by the Greens in 2007, aiming at the abolition of this difference in treatment, did not make it to the debate stage.[227]

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220 BVerfG 7 July 2009 (dec.), Az. 1 BvR 1164/07, *NJW* 2010 p. 1439, paras. 102–103.

221 *Idem*, para. 113, where the Court refers to 'Rupp/Bergold, in: Rupp, *Die Lebenssituation von Kindern in gleichgeschlechtlichen Lebenspartnerschaften*, Staatsinstitut für Familienforschung an der Universität Bamberg 2009, p. 282', from which it followed that at that time an estimated number of approximately 2,200 children in Germany lived in 13,000 registered civil partnerships. See also Wiemann 2010, *supra* n. 49, at p. 1429 referring to a study of the Central Statistical Office of 2008, which showed that in 2006 in West Germany 23 per cent and in Eastern Germany 42 per cent of all children under 18 were raised in so-called alternative types of family situations. See www.destatis.de/jetspeed/portal/cms/Sites/destatis/Internet/DE/Content/Publikationen/Querschnittsveroeffentlichungen/Datenreport/Downloads/Datenreport2008Familie,property=file.pdf, p. 32ff.

222 BVerfG 21 July 2010 (dec.), Az. 1 BvR 2464/07, *NJW* 2010 p. 2783. English translation by Saunders in Saunders 2012, *supra* n. 20, p. 935.

223 Saunders 2012, *supra* n. 20, at p. 935.

224 Art. 1742 BGB and Art. 9(7) of the Civil Partnerships Act (LPartG).

225 In principle this adopted child was also the non-genetic child, although this could be different in surrogacy cases. See ch. 4, section 4.3.9.

226 Art. 1742 BGB read at the time: 'An adopted child may, as long as the adoption relationship exists, in the lifetime of an adoptive parent only be adopted by that parent's spouse'.

227 *BT-Drs.* 16/5596.

By judgment of 1 December 2009, the Court of Appeal (*Oberlandesgericht*, OLG) of Hamm held the prohibition on successive adoption by civil partners to be compatible with the Basic Law.[228] This Court held that while the emotional and social parentage of the civil partner of a parent enjoyed protection under Article 6(1) Basic Law, from this provision no imperative requirement for the legislature to provide for adoption by same-sex couples followed.[229] According to the OLG, the institutes of marriage and family within the meaning of Article 6 Basic Law were based on the view that the upbringing of children was the task of the family consisting of mother, father and child.[230] The judgment received considerable criticism in legal scholarship. Often, it was argued that the principled question of whether it would be contrary to the child's best interests to be raised by a same-sex couple, had already been answered by the legislature when the possibility of second-parent adoption was introduced in 2005.[231] Further, the critique was issued that primarily children raised by parents in a civil partnership were put in a disadvantaged position *vis-à-vis* children raised by married couples.[232] Other scholars agreed with the Court that the upbringing of children by same-sex couples would be contrary to the child's best interests.[233]

In April 2010 the Greens tabled another bill seeking full equalisation of civil partnership and marriage in respect of adoption rights.[234] Considering how the political parties were balanced in the German Parliament at the time, Henkel observed in 2011 that this bill had limited chances of making it into law.[235] This proved to be different, however, after the issue of successive adoption by civil partners had been put before the BVerfG.[236]

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228 OLG Hamm 1 December 2009 (dec.), Az. 15 Wx 236/09, *NJW* 2010 p. 2065. Earlier decisions in this matter had been rendered LG Münster 16 March 2009 (dec.), Az. 05 T 775/08 and AG Münster 30 September 2008 (dec.), Az. 105 XVI 5/08.

229 The Court referred to BVerfG 17 July 2002, Az. 1 BvF 1/01,*NJW* 2002 p. 2543, in particular to para. 103.

230 The Court held that the at the time most recent judgment of the BVerfG on the matter – namely BVerfG 7 July 2009 (dec.), Az. 1 BvR 1164/07, *NJW* 2010 p. 1439 – did not alter this conclusion.

231 L. Milzer, `Anmerkung zum OLG Hamm, Beschluss vom 01.12.2009 – 15 Wx 236/09' ['Case-note to OLG Hamm decision of 1 December 2009 – 15 Wx 236/09'], *FamFR* (2010) p. 47 and Henkel 2011, *supra* n. 49, at p. 263. See also H. Grziwotz, 'Anmerkung zum Urteil des OLG Hamm vom 01.12.2009 (I-15 Wx 236/09, FamRZ 2010, 1259) – Partner einer eingetragenen Lebenspartnerschaft kann Adoptivkind des anderen Partners nicht an Kindes statt annehmen' ['Commentary to the judgment of the OLG Hamm of 01.12.2009 (I-15 Wx 236/09, FamRZ 2010, 1259) – Civil partner cannot adopt adoptive child if his or her partner'], *Zeitschrift für das gesamte Familienrecht*, *FamRZ* (2010) p. 1261.

232 Muscheler 2010, *supra* n. 169, at p. 231; N. Dethloff, 'Adoption und Sorgerecht – Problembereiche für die eingetragenen Lebenspartner?' ['Adoption and parental authority – area of concern for the civil partner?'], *FPR* (2010) p. 208; W. Enders, 'Stiefkindadoption' ['Second-parent adoption'], *FPR* (2004) p. 60 and G. Müller, 'Anmerkung zu OLG Hamm: Sukzessivadoption eines Kindes durch den eingetragenen Lebenspartner' ['Case note to OLG Hamm: successive adoption of a child by a registered partner'], *DNotZ* (2010) p. 698.

233 Schüffner alleged that there was an increased risk of phaedophilic offences if a child was raised by a same-sex couple. Schüffner 2007, *supra* n. 74, at pp. 161–162.

234 *BT-Dr* 17/1429.

235 Henkel 2011, *supra* n. 49, at p. 259. Henkel, however, also refers in his comment to an opinion poll which showed wide public support for the introduction of joint adoption for civil partners. He refers to www.mingle-trend.respondi.com/de/28_06_2010/deutsche-befurworten-adoption-durch-gleichgeschlechtliche-paare (Opinion poll of 28 June 2010).

236 Request for constitutional review of 29 December 2009, Az. 1 BvR 3247/09.

Only a year after the OLG of Hamm had held the prohibition on successive adoption by civil partners in the German Civil Code to be compatible with the Basic Law, another OLG, namely the Hanseatic Court of Appeal (Hamburg) ruled to the contrary and held this prohibition to be in violation of the principle of equal treatment of Article 3(3) of the Basic Law.[237] This court therefore referred the constitutional issue at hand to the BVerfG.[238] The Hanseatic OLG acknowledged that the wording of Article 1742 BGB – following which '[…] an adopted child may, as long as the adoption relationship exists, in the lifetime of an adoptive parent only be adopted by that parent's spouse' – was unambiguous. The Hanseatic OLG also acknowledged that during the various revisions of the Civil Partnerships Act, the legislature had deliberately not introduced the option of a simultaneous or subsequent joint adoption by civil partners. The fact that the 2004 Revision Act provided for second-parent adoption by the civil partner, was considered a political compromise, at a time when no parliamentary majority could be formed for a full equalisation of civil partnership with marriage.[239] Nevertheless, the OLG ruled that there were no weighty reasons for this difference in treatment on grounds of sexual orientation. At the time when the Adoption law was drafted in the 1970s, a distinction between marriage and other types of partnerships was considered justified because only marriage enjoyed legal protection.[240] According to the OLG that justification ground was superseded in the meantime, since civil partnership and marriage had been equalised in terms of legally binding responsibilities for the partner.[241] The OLG did not, furthermore, accept that the difference in treatment could be justified on the basis of the child's best interests. As the OLG observed, the upbringing of children by a same-sex couple had yet been made possible under German law. The Court held as unconstitutional the assumption of the legislature that the best interests of a child who was adopted by one of the civil partners by whom it was raised would be harmed, while that would not be the case for a child that was genetically related to one of the civil partners by whom it was raised. On the contrary, the OLG reasoned that an adopted child was even more in need of legal protection. The OLG held the legal implications of the prohibition on joint adoption by civil partners for the inheritance and maintenance rights of the child adopted by one parent only to be harmful to the child's best interests. It also referred to a study of 2009 conducted by order of the Ministry of Justice,[242] which

237 OLG Hamburg 22 December 2010 (dec.), Az. 2 Wx 23/09, *NJW* 2011 p. 1104.

238 Art. 100(1) Basic Law in combination with Art. 13 No. 11, 80 ff. BVerfGG.

239 OLG Hamburg 22 December 2010 (dec.), Az. 2 Wx 23/09, *NJW* 2011 p. 1104, para. 12.

240 *BT-Drs.* 7/3061, p. 30.

241 The Court referred to, *inter alia*, BVerfG 7 July 2009 (dec.), Az. 1 BvR 1164/07, *NJW* 2010 p. 1439; C. Hillgruber, 'Über die Ungleichbehandlung von Ehe und eingetragener Lebenspartnerschaft im Bereich der betrieblichen Hinterbliebenenversorgung – Kritische Anmerkung zum Beschluss des Bundesverfassungsgerichts vom 07.07.2009 (AZ: 1 BvR 1164/07)' ['On the unequal treatment of marriage and registered civil partnership in respect of survivor's pensions – A critical note on the decision of the German Constitutional Court of 7 July 2009 (AZ: 1 BvR 1164/07)'], *JZ* (2010) p. 41 at p. 44 and to T. Hoppe, 'Die Verfassungswidrigkeit der Ungleichbehandlung von Ehe und eingetragener Lebenspartnerschaft im Bereich der betrieblichen Hinterbliebenenrente (VBL)' ['The unconstitutionality of the unequal treatment of marriage and civil partnership in respect of occupational survivor's pensions (VBL)'], *DVBl.* (2009) p. 1516 at p. 1517.

242 M. Rupp (ed.), *Lebenssituation von Kindern in gleichgeschlechtlichen Lebenspartnerschaften* [The social situation of children in same-sex partnerships] (Köln, Bundesanzeiger Verlag 2009).

had shown that for a sound development it was not necessary for a child to be raised by parents of different sex. Instead, the quality of the inner family ties was decisive. The report had concluded that full equalisation of civil partnership with marriage in respect of adoption would be in the child's best interests.[243] Under reference to the BVerfG decision of 7 July 2009,[244] the OLG Hamburg ruled that the special protection of marriage on the basis of Article 6(1) Basic Law could not justify the difference in treatment between civil partners and married partners in this respect.

While the case was pending before the BVerfG,[245] various bills aiming to lift the prohibition on successive adoption for civil partners were tabled.[246] The Federal Government announced in December 2011 that the issue was under consideration, but that it first wished to await the BVerfG judgment.[247] It asserted that successive adoption was prohibited under Article 6(2) of the European Convention on the Adoption of Children. At the time, Germany was investigating signing of the 2008 Revised European Convention on the Adoption of Children, which provides for an opt-in for adoption by same-sex (married or civil) partners.[248]

In February 2013, the First Senate of the BVerfG rendered its long awaited judgment in the case.[249] The Court unanimously ruled that the exclusion of registered partners from successive adoption was in violation of the right to equal treatment of both the children living in such a relationship and the respective civil partners under Article 3(1) of the German Basic Law. The Court held the exclusion of civil partners from successive adoption not to be in violation of certain rights under Article 6 of the German Basic Law, however, more precisely the right of children to be ensured parental care by the State under Article 2(1) in combination with Article 6(2) of the Basic Law; the natural right of parents to the care and upbringing of their children (Article 6(2)) and the special protection of the family under Article 6(1) Basic Law.

On the outset, the Court noted that the legislative proceedings did not provide any explanations as to why the legislature had not provided for successive adoption by civil partners, while in fact the bill for the 2004 Revision Act had – without distinguishing between genetic and non-genetic children – pointed at the beneficial consequences for both child and parents of an adoption by a civil partner.[250]

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243 OLG Hamburg 22 December 2010 (dec.), Az. 2 Wx 23/09, *NJW* 2011 p. 1104, para. 30.

244 BVerfG 7 July 2009 (dec.), Az. 1 BvR 1164/07, *NJW* 2010 p. 1439, paras. 104–105.

245 Request for constitutional review of 29 December 2009, Az. 1 BvR 3247/09. See also Henkel 2011, *supra* n. 49, at p. (264) and the position paper ('*Stellungnahme*') of the *Lesben- und Schwulenverbandes in Deutschland* on case 1 BvR 3247/09 of 17 February 2010, online available at www.tmp.lsvd.de/fileadmin/pics/Dokumente/Adoption/Adoption-100217.pdf, visited July 2011.

246 For example, *BT-Drs.* 17/1429 and *BR-Drs.* 124/11.

247 *BT-Drs.*17/8248.

248 Germany finally signed the Revised European Convention on the Adoption of Children in May 2014. See also *BT-Drs.* 17/2329.

249 BVerfG 19 February 2013, Az. 1 BvL 1/11, 1 BvR 3247/09, *NJW* 2013 p. 847.

250 The Court referred to *BT-Drs.* 15/3445, p. 15.

As to the State's obligation under Article 6(2) Basic Law to watch over parents in the performance of their duty, the Court ruled that this did not include an obligation for the legislature to provide for successive adoption for civil partners.[251] The Court acknowledged that the prohibition on successive adoption implied in practice that the children concerned could only have one legal parent.[252] It held, however, that this in itself did not exceed the discretion that the legislature enjoyed as regards the manner in which it made constitutional rights effective, particularly not now that the child concerned was not parentless and that the civil partner of the adoptive parent could obtain the power to share in decisions on matters relating to the child's everyday life.[253] In the same vein, the Court held that the exclusion of civil partners from the option of successive adoption did not violate the right to special protection of the family under Article 6(1). Even though a family consisting of two civil partners and a biological or adopted child of one of them enjoyed protection under this provision, there was no obligation on the State under the Basic Law to create a possibility to adopt the non-biological child of the civil partner. While the legislature had an obligation to provide for a legal framework within which family relations could develop, it also enjoyed a certain discretion as to the family forms it provided for.[254]

The Constitutional Court further ruled that the 'parental constitutional right' ('*Elterngrundrecht*') ex Article 6(2) Basic Law was not violated. The Court reiterated that the best interests of the child are an essential element of this Article and that the rights of legal parents in the first place served the protection of children.[255] While legal parents of the same sex were included in the scope of this right and while each legal parent on his or her own was a bearer of this right,[256] 'mere' social parenthood did not come within the scope of this Article, the Court ruled. Because the civil partner of a person who adopted a child was not the legal parent of that child, he or she could not rely on the constitutional parental right under Article 6(2) of the Basic Law. Hence, civil partners could not claim any right to successive adoption on this ground.[257]

The Court also ruled, however, that the exclusion of civil partners of successive adoption violated the right to equal treatment of the children concerned (Article 3(1) Basic Law). It held that those children who had been adopted by a person in a registered partnership were denied possibilities for their personal development ('*Entwicklung und Lebensgestaltung*'), which children adopted by married persons and children born with a person in a civil partnership did enjoy.[258] In particular, the law excluded that these children would have a second legal parent, who could fully

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251 The second paragraph of Art. 6 Basic Law provides that parents have a natural right to as well as a duty for the care and the upbringing of children, while the State watches over them in the performance of this duty.

252 BVerfG 19 February 2013, Az. 1 BvL 1/11, 1 BvR 3247/09, *NJW* 2013 p. 847, para. 44.

253 *Idem*, paras. 45–46.

254 *Idem*, para. 68.

255 *Idem*, para. 49.

256 *Idem*, paras. 49–50.

257 *Idem*, paras. 58–59.

258 *Idem*, para. 73.

take up the care and upbringing of the child, as envisaged in the Constitution.[259] This difference in treatment could not be justified, the Court held. The court examined no less than eight possible justifications, but rejected them all.

Principally the Court considered that the difference in treatment was not in the interests of the child. It could not be maintained that to grow up within a same-sex relationship or that the practice of successive adoption in itself harmed the child's interests. The Court noted that successive adoption had a stabilising effect on the child's developmental psychology and served the integration and consolidation of the adopted child in the new family. An equal legal position of the parents towards the child would have an equally stabilising effect and could strengthen the child's sense of belonging and the parents' sense of responsibility. The denial of legal recognition of such a family, on the other hand, could be experienced by the child as a rejection of its person and its family.[260] The Court also noted that successive adoption would improve the legal position of the children concerned in respect of parental authority, as well as succession and maintenance, in situations of separation or decease of (one of) the parents.

In respect of a general aim to restrict the practice of successive adoption, the Court held there to be no justification to distinguish in that regard between children adopted by persons in a civil partnership and children adopted by married persons. The Court also was not convinced by the argument that the exclusion served to prevent that the legal prohibition on joint adoption by civil partners was circumvented. The Court stressed that the case before it was not about the constitutionality of the prohibition on joint adoption by civil partners, but noted in this regard that the exclusion of civil partners from successive adoption could not prevent that an adopted child lived together with its adoptive parent and his or her civil partner. Justifications on grounds of protection of marriage and family or the constitutional parental rights, were equally rejected by the Court.

The Court further held that the unequal treatment of civil partners when compared with spouses in respect of successive adoption under Article 9(7) LPartG violated Article 3(1) Basic Law.[261] The same held for the unequal treatment of civil partners of parents with an adopted child, when compared to civil partners of genetic parents.[262] The Court left open the question of whether the unequal treatment of children who were adopted by a parent in a civil partnership when compared to children who were adopted by a married parent, violated the prohibition on unequal treatment between children born within marriage and children born out of wedlock.[263]

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259 *Idem*, para. 73. In its oral submission to the Constitutional Court, *Bündnis 90/Die Grünen* had extensively set out the beneficial effects of successive adoption for the children concerned. For an account of their argument, see in particular para. 33 of the BVerfG judgment.

260 *Idem*, para. 83.

261 *Idem*, para. 104.

262 *Idem*, para. 105.

263 *Idem*, para. 103.

As a rule a violation of the Basic Law results in the nullity of the relevant legislative provision. In the present case, however, the Court merely declared Article 9(7) LPartG incompatible with the Basic Law, because, so the Court noted, the legislature had various options to remedy the unequal treatment, including a general non-discriminating restriction of the legal possibilities for adoption.

In academia this judgment was generally received as fitting in well with the existing case law of the BVerfG that eliminated unequal treatment of civil partners when compared to spouses.[264] However, the approach of the Court in this case was received differently. Some praised the Constitutional Court for its courage to base its reasoning on the best interests of the child.[265] Others, were (very) critical instead, and claimed that the Court had unjustifiably completely shunted off Article 6(1) Basic Law.[266] It was furthermore observed that marriage had now been completely untied of its historical connotation and was only seen from a functional perspective.[267] Again it was concluded that Article 6(1) Basic Law was now read as a prohibition on discrimination against other relationship forms ('*Lebensformen*').[268]

The question was also raised whether the judgment implied that the legislature now also had to legislate for joint adoption for same-sex couples.[269] The BVerfG judgment left this question open. Although a bill to that effect had been pending since 2010,[270] Parliament was divided over this matter and could not reach agreement on this point.[271] It therefore only legislated on successive adoption. On 27 June 2014 a new Article 9(7) LPartG entered into force, which reads: 'A civil partner may adopt the child of his civil partner alone.'[272] While the introduction of this provision thus brought an end to the debate on successive adoption for same-sex couples, the question of joint adoption for these couples remained open.

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264 S. Muckel, 'Sukzessive Adoption – Ablehnung für eingetragene Lebenspartner verfassungswidrig' ['Successive adoption – nonadmission of civil partners unconstitutional'], *JA* (2013) p. 396 and W. Frenz, 'Eheschutz ade? BVerfG stärkt gleichgeschlechtliche Paare', *NVwZ* (2013) p. 1200.

265 E.g. Muckel 2013A, *supra* n. 264 and I. Kroppenberg, 'Unvereinbarkeit des Verbots der sukzessiven Stiefkindadoption durch eingetragene Lebenspartner mit dem Grundgesetz' ['The incompatibility of the prohibition of successive adoption by civil partners with the German Basic Law'], *NJW* (2013) p. 2161 at p. 2162.

266 E.g. Brosius-Gersdorf 2013A, *supra* n. 136, at p. 170 and P. Reimer and M. Jestaedt, *JZ* 2013, 468, at 469.

267 W. Frenz, 'Eheschutz ade? BVerfG stärkt gleichgeschlechtliche Paare' ['Protection of marriage, farewell? German Constitutional Court supports same-sex couples'], *NVwZ* (2013) p. 1200 at p. 1201.

268 *Idem*, at p. 1202.

269 Kroppenberg 2013, *supra* n. 265, at p. 2162.

270 *BT-Drs.* 17/1429.

271 Legal academia was also divided. For references see Kroppenberg 2013, *supra* n. 265, at p. 2162, footnote 19.

272 Gesetz zur Umsetzung der Entscheidung des Bundesverfassungsgerichts zur Sukzessivadoption durch Lebenspartner [Act on the implementation of the judgment of the German Constitutional Court on successive adoption by civil partners], Act of 20 June 2014, *BGBl. I* p. 786. The Article further reads: 'In this case, section 1743, first sentence, section 1751(2) and (4), second sentence, section 1755(1) and (3), section 1755(2), section 1756(2), section 1757(2), first sentence, and section 1772(1), first sentence, letter c of the Civil Code shall apply mutatis mutandis.'

10.3.5.4. Exclusion of civil partners from joint adoption

Same-sex couples are excluded from joint adoption.[273] The lifting of the successive adoption prohibition implies that same-sex civil partners can establish the same legal situation in two (albeit in principle time-consuming) steps.[274] Joint adoption of a child has nonetheless been considered a different matter. As Kroppenberg has explained, to allow for joint adoption by civil partners, would require the legislature to definitively depart from its traditional norm, underlying German adoption laws, of the 'core family', consisting of spouses and their natural children.[275] Kroppenberg has also questioned whether this norm is still consistent with the present day and whether it serves the best interests of the child.[276]

In March 2013 the Administrative Court (AG) of Schöneberg asked the Constitutional Court to rule on the constitutionality of the exclusion of civil partners from joint adoption,[277] but because the referring Court had not yet taken the recently issued judgment on successive adoption into account, this referral was declared inadmissible in January 2014 for insufficient motivation.[278]

In May 2014 the German government signed the Revised European Convention on the Adoption of Children in May 2014, which allows for – but does not impose on States – joint adoption by same-sex partners. Whether this was an indication that legislative change on this point was forthcoming was insufficiently clear at the time this research was concluded (i.e., 31 July 2014).

10.3.5.5. Legal parenthood by operation of the law

Under the present state of the law, German law does not provide for legal parenthood by operation of the law for same-sex couples. Under German law only the woman who gave birth can be registered on the birth certificate of the child as mother of the child (see also Chapter 4, section 4.3.9). If she is married, a rebuttable presumption that her husband is the child's father applies (Article 1592 Civil Code).[279] No such presumption applies between civil partners, as a case of 2010 has confirmed.

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273 Art. 1741(2) Civil Code reads: 'A person who is not married may adopt a child only alone. A married couple may adopt a child only jointly. A spouse may adopt a child of his spouse alone. He may also adopt a child alone if the other spouse cannot adopt the child because he is incapable of contracting or has not yet reached the age of twenty-one.'

274 M. Zschiebsch, 'Nichtzulassung der Sukzessivadoption durch eingetragenen Lebenspartner verfassungswidrig' ['Non-admission of successive adoption by a civil partner unconstitutional'], *Juris Praxiz Report FamR* 22/2013, Anm. 6. The author further explains that parents who give up their child for adoption cannot require that the child is not placed with a same-sex couple. Increasingly more Courts, however, deal with both adoptions in one and the same sitting.

275 Kroppenberg 2013, *supra* n. 265, at p. 2163.

276 *Idem*.

277 AG Berlin-Schöneberg 8 March 2013, Az. 24 F 250/12.

278 BVerfG 23 January 2014 (dec.), Az. 1 BvL 2/13.

279 Art. 1592 BGB.

In 2009 two women in a civil partnership, one of whom had given birth to a child after heterologous insemination, applied to the Courts to have the child's birth certificate changed. They wished to be both registered on it as parents of the child and thus to have the blank space on the certificate filled with the name of the civil partner of the birth mother. The two women relied on Articles 3 and 6 of the Basic Law. They also claimed that the presumption of parenthood of Article 1592 was to be applied analogously in their case. As they explained, the legal father of a child was either the man who was married to the birth mother at the time of birth, or the man who recognised the child. Whether this man was also the genetic father of the child and whether he was its carer was irrelevant for the establishment of legal parenthood under German Law. The Hamburg District Court rejected this reasoning and ruled instead that the presumption of Article 1592 Civil Code was based on a presumption of descent and that such descent could be ruled out in the case at hand. The Court further noted that the legislature had already provided for a possibility to establish parental links between a child and the civil partner of that child's parent, by introducing second-parent adoption in 2005. The District Court accordingly dismissed the claim as being unfounded.[280]

The two women unsuccessfully appealed their case before the competent appeals courts.[281] Moreover, by judgment of 2 July 2010, the Constitutional Court rejected their constitutional complaint.[282] Because the complainants in this case subsequently (unsuccessfully) lodged a complaint with the ECtHR under Article 8 in conjunction with Article 14, the latter Court's summary of the findings of the Constitutional Court can be quoted here:

> 'The Constitutional Court observed, at the outset, that there was no indication that the lower courts had failed to take into account the requirements of the European Convention on Human Rights. It further considered that the refusal to insert the first applicant into the birth certificate prior to adoption did not violate the applicants' right to the enjoyment of their family life. Article 6 of the Basic Law protected the family as a union of parents and children. It did not matter in this respect whether the children descended from their parents and whether they were born in or out of wedlock. However, the entry of the name of a civil partner into the birth certificate did not concern the family life between the civil partners and the child. The birth certificate had the sole purpose of giving evidence of the child's descent. It did not interfere in any way with the child's living together with his or her parents within the family. […] The Constitutional Court further considered that the applicant had not been discriminated against. Civil partners did not have a right to be treated equally to legal or biological fathers with respect to their entry into the birth certificate. In this respect, the two groups were not comparable, as biological or legal paternity established a legal relationship comprising mutual rights and duties. Such a legal relationship did not exist between the civil partner and the child, as long as the child was

280 AG Hamburg 24 June 2009 (dec.), Az. 60 III 35/09.

281 On 4 November 2009 the Hamburg Regional Court rejected the applicants' appeal. LG Hamburg 4 November 2009 (dec.), Az. 301 T 596/09. On 26 January 2010 the Hanseatic Court of Appeal rejected the applicants' appeal on points of law. OLG Hamburg 26 January 2010 (dec.), Az. 2 Wx 125/09.

282 BVerfG 2 July 2010 (dec.), Az. 1 BvR 666/10, *NJW* 2010 p. 2783.

> not adopted. The fact that there was no legal presumption that the mother's civil partner was the child's second parent did not amount to discrimination vis-à-vis married couples, as the legal presumption was based on biological descent and did not have a basis in the case of civil partners.'[283]

In May 2013 the Strasbourg Court declared this complaint manifestly ill-founded and therefore inadmissible (see Chapter 8, section 8.2.4.2).[284]

10.3.5.6. Access to AHR treatment

As more extensively explained in Chapter 4, single women and women with a same-sex partner are in many German States excluded from access to AHR treatment with the use of donated gametes.[285] Further, only married couples are entitled to reimbursement for artificial insemination.[286] By judgment of 28 February 2007 the BVerfG upheld this regulation as compatible with the Basic Law.[287] The Court considered that by reason of the constitutional protection of marriage, the legislature was not, in principle, prevented from treating marriage more favourably than other ways of life. To give preferential treatment to marriage in the social law provisions on the financing of artificial insemination was at the time considered justified by the Court, in particular out of consideration for the legally protected status of marriage as a responsible relationship and a guarantee of stability.[288] Whether this reasoning is commensurable with the above-discussed later BVerfG case law in respect of equal treatment of registered partners and spouses in other realms of law, may, however, be questioned.

10.3.6. Towards access to marriage for same-sex couples?

From the moment civil partnership for same-sex partners was introduced in Germany in 2001, the question as to whether and to what extent it should be equalised with marriage has been on the table in politics, court proceedings and academia.[289] As the

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283 ECtHR 7 May 2013 (dec.), *Boeckel and Gessner-Boeckel* v. *Germany*, no. 8017/11, paras. 13–14. A comparable line of reasoning was adopted by the Court of Appeals of Karlsruhe in a case concerning parental access after the separation of civil partners. In a 2010, this Court ruled that the female civil partner of a mother did not have a right to access to the child after separation of the civil partners. The Court noted that the legislature had deliberately not provided for parenthood by operation of the law for female civil partners and thus not for automatic parenthood of the social mother (the civil partner of a mother). In the case at hand the Court furthermore did not consider access by the social mother in the interests of the child. OLG Karlsruhe 16 November 2010 (dec.), Az. 5 UF 217/10, *NJW* 2011 p. 1012.

284 ECtHR 7 May 2013 (dec.), *Boeckel and Gessner-Boeckel* v. *Germany,* no. 8017/11.

285 Ch. 4, section 4.3.3.

286 Art. 27a (1)(3) SGB V.

287 See BVerfG 28 February 2007, Az. 1 BvL 5/03, *NJW* 2007 p. 1343, as referred to in BVerfG 21 July 2010 (dec.), Az. 1 BvR 2464/07, *NJW* 2010 p. 2783.

288 See BVerfG 28 February 2007, Az. 1 BvL 5/03, *NJW* 2007 p. 1343. See also BVerfG 7 July 2009 (dec.), Az. 1 BvR 1164/07, *NJW* 2010 p. 1439, paras. 102–103, where the BVerfG refers to its judgment of 28 February 2007.

289 An important question in academia has been what was left of the special protection of Art. 6 Basic Law. Wiemann answered this question in 2010 with 'not much'. Wiemann 2010, *supra* n. 49, at p. 1430.

discussion above has shown, the Federal Constitutional Court's case law has been a major driving force in indeed establishing further equalisation between these two institutions.

While many differences in areas such as tax law, social protection and the position of civil servants have thus been lifted over the course of time, certain differences still remain today. These mainly concern parental rights for same-sex civil partners (see 10.3.5 above). Legislative initiatives to achieve full equalisation of civil partnership and marriage have so far been unsuccessful.[290]

Over the years there have also been various bills tabled seeking the opening up of marriage to same-sex couples.[291] In a bill of 2010 it was held that public opinion on the institute of marriage had changed in German society and it was argued that there was therefore no longer a justification for different treatment between homosexual and heterosexual couples and to limit marriage to couples of different sex only.[292] The German debate about the opening up of marriage gained a particular momentum in 2013 when the two important Constitutional Courts rulings in respect of income splitting and successive adoption came out (see above). In that same year more than 3,000 prominent Germans petitioned the German Parliament for the equal access of same-sex couples to marriage.[293] Various bills seeking the opening up of marriage were also tabled in Parliament by left-wing parties.[294] In the Senate (*Bundesrat*) several States jointly tabled a bill seeking the opening up of marriage to same-sex couples.[295] The Senate consequently tabled a bill to that effect in Parliament.[296] The Explanatory Memorandum to the Bill explained, *inter alia*, that marriage was by then understood as a union in which partners supported each other and carried responsibilities for one another ('*Beistands- und Verantwortungsgemeinschaft*'), irrespective of whether they were also raising children. A new definition and understanding of the term 'marriage' in Article 6(1) of the Basic Law, to the effect of including same-sex spouses, was considered possible without amending the text of the Article. The Explanatory Memorandum also pointed out that civil partnership was perceived as marriage by the public and that research had shown that a clear majority of the population was in favour of opening up marriage to same-sex couples.[297] Finally, reference was made to the legislation of countries that had yet legislated for access to marriage for same-sex couples.

Henkel spoke of a `fight' in German academia about the question what from a constitutional point of view was the difference between the institute of marriage and that of the registered civil partnership. Henkel 2011, *supra* n. 49, at p 259. Henkel did not explicitly refer to authors with different points of view on this matter. Concerning the terminology used, however, the author referred to Hillgruber 2010, *supra* n. 241, at p. 43. Saunders has held that the concept of marriage in Art. 6(1) had to include civil partnerships. Saunders 2012, *supra* n. 20, at p. 930.

290 *Inter alia BT-Drs.* 16/497; *BT-Drs.* 16/3423 and *BT-Drs.* 17/2113.

291 *Inter alia BT-Drs.* 16/13596; *BT-Drs.* 17/2023 and *BT-Drs.* 17/6343.

292 *BT-Drs.* 17/2113.

293 'Prominente fordern volle Gleichstellung der Homo-Ehe', *Becklink* 1026468 (Verlag C.H. Beck 2013).

294 *BT-Drs.* 17/12677; *BT-Drs.* 17/13912 and *BT-Drs.* 18/8.

295 *BR-Drs.* 196/13.

296 *Idem* and *BT-Drs.* 17/13426.

297 *BT-Drs.* 17/13426, p. 7.

In late 2011 a new government was formed, as a result of which the above discussed bill ceased to be pending.[298] The newly governing Christian parties, the CDU and CSU, openly opposed the opening up of marriage,[299] and the coalition agreement between the CDU, CSU and SPD (the Social Democrats) parties of November 2013 did not include the matter.[300] As a result, the opening up of marriage to same-sex couples had not materialised at the time this research was concluded (i.e., 31 July 2014) and it was uncertain if and, if so, when access to marriage for same-sex couples would become reality in Germany. It was further insufficiently clear to what extent the possible opening up of marriage would also provide for full equalisation between same-sex and different-sex spouses in respect of parental rights.

10.4. Same-sex relationships and cross-border movement

This section discusses the cross-border perspective of the German laws on legal recognition of same-sex relationships. Following the structure of the other chapters of this case study as set out in Chapter 1, section 1.5, the relevant German Private International Law regime, as well as implementation of the relevant EU Directives are discussed. It is furthermore noted here that in 2010 Germany and France concluded a bilateral agreement on optional matrimonial property regimes.[301] The agreement provides for a matrimonial property regime of the 'community of accrued gains' model, that all married couples whose matrimonial property regime is covered by the substantive law of one of the contracting states can choose. Also couples who have concluded a registered partnership under German law may opt for this regime.[302] The Agreement, that is open to other EU Member States,[303] was received as revolutionary and of 'European significance', because it was the first step in the direction of harmonisation of substantive family law in Europe.[304]

298 See www.dipbt.bundestag.de/extrakt/ba/WP17/517/51735.html, visited 18 April 2012.

299 G. Bohsem, 'Union verweigert volle Gleichstellung der Homo-Ehe', *Süddeutsche.de* 4 June 2014.

300 'Deutschlands Zukunft Gestalten, Koalitionsvertrag Zwischen CDU, CSU UND SPD' ['Giving shape to Germany's future. Coalition Agreement between CDU, CSU UND SPD'], 18th legislative period, online availabe at www.cdu.de/koalitionsvertrag, visited 2 February 2014.

301 Deutsch-französische Güterstand der Wahl-Zugewinngemeinschaft [Franco-German Agreement on the Optional Matrimonial Property Regime], adopted in January 2010. The Agreement and its implementation Act entered into force on 1 May 2013. See *BGBl.* 2013 II, 431 and *BGBl.* 2012 II, 178.

302 Art. 7 LPartG in combination with Art. 1519 German Civil Code. See T. Jäger, 'Der neue deutsch-französische Güterstand der Wahl-Zugewinngemeinschaft – Inhalt und seine ersten Folgen für die Gesetzgebung und Beratungspraxis' ['The new Franco-German Agreement on the Optional Matrimonial Property Regime – Content and ist first consequences for the legislative process and consulting practice'], *DNotZ* (2010) p. 804 at p. 822.

303 Art. 21 of the Franco-German Agreement, *supra* n. 301.

304 European Parliament, Directorate-General for Internal Policies Policy Department C: Citizens' Rights And Constitutional Affairs Legal And Parliamentary Affairs, 'The Franco-German agreement on an elective 'community of accrued gains'matrimonial property regime', Note PE 425.658. See also A. Fötschl, 'The COMPR of Germany and France: Epoch-Making in the Unification of Law', 18 *European Review of Private Law* (2010) p. 881.

10.4.1. Cross-border movement; some statistics

There are only limited statistics available in respect of Germany that are relevant for the present case study. According to the data provided by the German Federal Statistical Office, 32,000 civil partnerships had been concluded in Germany by the year 2012, while in total 72,000 same-sex couples were living together in a shared household.[305] The statistics did not provide for information about the nationality or country of residence of the civil partners. However, it was also clear that in that same year more than 7 million non-German citizens were living in Germany.[306] How many of them had concluded a civil partnership in Germany, or had yet entered into a registered partnership or marriage with a same-sex partner in a foreign country, can only be guessed. The case law below on cross-border cases shows that, in any case also, cross-border movement to from and Germany by same-sex couples and their families has taken and is taking place.

10.4.2. (Development of) the relevant German conflict-of-laws rules

As noted in Chapter 4,[307] German Private International Law is laid down in the Second Chapter of the Introductory Act to the Civil Code (*Einführungsgesetz zum Bürgerlichen Gesetzbuche*, EGBGB).[308] The Third Section of this Chapter sees at Family Law. Articles 13 to 17 EGBGB determine the applicable law on marriage and related issues. Guiding principles thereby are the nationality or citizenship ('*Staatsangehörigkeit*') and the habitual residence ('*domicile*') of the (future) spouses.[309]

The introduction of same-sex civil partnerships in other European states and in particular the opening up of marriage to same-sex couples in the Netherlands in 2001,[310] raised the question as to if, and if so, how, such partnerships and marriages were to be recognised. Until the entry into force of the Civil Partnerships Act in 2001, German law itself did not provide for any form of registered partnership for same-sex couples.[311] At the time, the prevailing view in legal scholarship was that a marriage between two persons of the same sex conflicted with the German

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305 Statistisches Bundesamt, *Statistisches Jahrbuch 2013*, p. 56, online available at: www.destatis.de/DE/Publikationen/StatistischesJahrbuch/Bevoelkerung.pdf;jsessionid=A0654F39FB762DD168CF40CCABC19328.cae3?__blob=publicationFile, visited 2 February 2014.

306 *Idem*, p. 40.

307 Ch. 4, section 4.5.3.

308 Einführungsgesetz zum Bürgerlichen Gesetzbuche, EGBGB [Introductory Act to the Civil Code], promulgated on 21 September 1994, *BGBl. I* p. 2494.

309 Translation taken from www.gesetze-im-internet.de/englisch_bgbeg/index.html, visited June 2014.

310 See ch. 12, section 12.3.5.

311 Röthel therefore at the time pleaded for recognition of foreign same-sex partnerships under the marriage regime of Art. 13ff EGBGB. A. Röthel, 'Registrierte Partnerschaften im internationalen Privatrecht' ['Civil partnerships in international private law'], *IPRax* (2000) p. 74.

public order (Article 6 EGBGB)[312] and therefore had to be refused recognition under German law.[313]

The Civil Partnerships Act of 2001 provided for the incorporation of a new Article on registered partnerships in the Introductory Act to the Civil Code.[314] This new Article, now Article 17b EGBGB,[315] promised to put an end to the debate in German legal scholarship as to which German Private International Law regime was to be applied to foreign same-sex partnerships and marriages.[316] While it may have tentatively done so, soon new debates were evoked, as will become clear from the subsections below.

Foreign judgments in family matters are in principle recognised under German law,[317] unless such recognition is considered manifestly incompatible with fundamental principles of German law, in particular when it is incompatible with fundamental rights.[318]

10.4.3. Access to registered partnership for foreign same-sex couples

The German Civil Partnerships Act contains no requirements in respect of nationality or habitual residence of the future registered partners. In fact, Article 17b (1) EGBGB provides that '[t]he formation of a registered life partnership, its general effects and property regime, as well as its dissolution are governed by the substantive provisions of the country in which the life partnership is registered.'[319] This also

312 Art. 6 EGBGB provides that '[a] provision of the law of another country shall not be applied where its application would lead to a result which is manifestly incompatible with the fundamental principles of German law.' The Article adds to this that inapplicability ensues, in particular, if the application of foreign law 'would be incompatible with civil rights.'

313 See A. Röthel 2000, *supra* n. 311, at p. 78.

314 Art. 3 (25) LPartG.

315 Originally this Article was numbered Art. 17a EGBGB (Act of 16 February 2001, *BGBl. I* p. 266, entry into force 1 August 2001). This changed to Art. 17b EGBGB by Act of 11 December 2001, *BGBl. I* p. 3513, entry into force 1 January 2002.

316 See for example Röthel 2000, *supra* n. 311, at pp. 74–79, who pleaded for recognition of such foreign partnerships under the marriage regime of Art. 13ff EGBGB.

317 Art. 108 Gesetz über das Verfahren in Familiensachen und in den Angelegenheiten der freiwilligen Gerichtsbarkeit (FamFG) [Act on the Procedure in Family Matters and in Matters of Non-contentious Jurisdiction], Act of 7 December 2008, *BGBl. I* p. 2586.

318 Art. 109(4) FamFG.

319 The English translation of the first para. of Art. 17b reads: 'The formation of a registered life partnership, its general effects and property regime, as well as its dissolution are governed by the substantive provisions of the country in which the life partnership is registered. Matters related to maintenance and succession shall be governed by the law designated as applicable by the general rules; if under these rules, the life partnership fails to qualify for statutory rights to maintenance or succession, the first sentence of this Article shall apply mutatis mutandis. The balancing of future pensions is governed by the law applicable under sentence 1; it shall only be carried out if accordingly German law is applicable and if the law of one of the countries, whose nationals the life partners are at the time when the application for termination of the life partnership is filed, recognizes a balancing of future pensions of life partners. Otherwise, it shall be carried out pursuant to German law on application of a life partner if the other life partner has acquired during the subsistence of the life partnership an

goes for the balancing of future pensions (the so-called '*Versorgungsausgleich*').[320] Matters related to maintenance and succession on the other hand, are governed by 'the law designated as applicable by the general rules'.[321] Certain areas, including parental issues ('*Kindschaftsrecht*'), are not covered by Article 17b EGBGB;[322] here, the general conflict-of-laws rules of Articles 19–22 EGBGB apply.[323]

The fact that Article 17b EGBGB makes the law of the country of registration (and not the nationality or the habitual residence (domicile)) decisive in determining the applicable law, was new in German Private International Law[324] and unique in its inclusiveness when compared to the Private International Law regimes of other European states.[325] By making the law of the country of registration decisive in the determination of the applicable law, the German legislature deliberately enabled foreigners to enter into a registered civil partnership in Germany, even if that was not possible under the law of their state of nationality.[326] Moreover, the third paragraph of this Article enables couples who entered into a civil partnership abroad to re-register their partnership under the German civil partnership regime.[327] This also deviates from general international practice: more commonly previous registration abroad forms an obstacle to such re-registration.[328]

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inland future pension right insofar as carrying it out would not be inconsistent with equity in light of the economic circumstances of both sides also during the time which was not spent within the country.' Translation taken from: www.gesetze-im-internet.de/englisch_bgbeg/englisch_bgbeg.html#p0099, visited June 2014.

320 There is considerable German case law on the balancing of future pensions in cross-border situations. This is not discussed in detail in this chapter. Refence is made to, *inter alia*, AG Stadtroda 3 April 2012, Az. 2 F 151/11 and BGH 16 October 2013 (dec.), Az. XII ZB 176/12, *NJW* 2014 p. 61.

321 Art. 17b (1)(2) EGBGB.

322 Apart from parental issues, also rent law is excluded. Coester claimed in this regard that the German legislature obviously did not consider parental issues relevant for same-sex couples. M. Coester, 'Art. 17b EGBGB Eingetragene Lebenspartnerschaft' ['Art. 17b EGBGB Civil Partnership'], in: F. Jürgen Säcker and R. Rixecker (eds.), *Münchener Kommentar zum BGB* [Münchener Commentary to the BGB], 5th edn. (München, Verlag C.H. Beck 2010) Rn. 76.

323 See Coester 2010, *supra* n. 322, Rn. 73 and V. Gärtner, 'Art. 17b EGBGB, Eingetragene Lebenspartnerschaft' ['Art. 17b EGBGB, civil partnership'], in: M. Herberger et al., *Juris Praxiskommentar BGB* [Juris Commentary on the BGB for legal practitioners], 7th edn. (Saarbrücken, juris GmbH 2014) Rn. 54–58.

324 A. Röthel, 'Art. 17b EGBGB', in: M. Würdinger, *Juris Praxiskommentar BGB, Band 6 – Internationales Privatrecht* [Juris Commentary on the BGB, Volume 6 – International Private Law], 5th edn. (Saarbrücken, juris GmbH 2010).

325 Coester 2010, *supra n*. 322, Rn. 9.

326 *BT-Drs.* 14/3751 p. 60 and *BT-Drs.* 17/8248, p. 3. See, *inter alia*, R. Süß, 'Notarieller Gestaltungsbedarf bei Eingetragenen Lebenspartnerschaften mit Ausländern' ['The need for notary guidance in civil partnerships with foreign partners'], *DNotZ* (2001) p. 168 at p. 169.

327 Art. 17b (3) provides that if a civil partnership between the same persons is registered in different countries, '[…] its effects shall, from the time of its registration on, be determined on the basis of the last life partnership entered into'.

328 Coester 2010, *supra n*. 322, Rn. 18. Coester observed in 2013 that the clause was becoming increasingly more redundant, because European Union law increasingly more covered the relevant areas, such as maintance and inheritance. M. Coester, 'Art. 17b EGBGB unter dem Einfluss des Europäischen Kollisionsrechts' ['Art. 17b EGBGB under the influence of European conflict-of-laws rules'], 22 *IPRax* (2013) pp. 114- 122 at p. 121.

The fact that the legislature thus accepted or even encouraged 'registration tourism',[329] received only limited criticism in legal scholarship.[330] As Coester explains, both the registration criterion and the possibility of re-registration fitted in with the central aim of the Civil Partnerships Act, which was the abolition of discrimination on grounds of sexual orientation. The German aspirations in this respect where clearly not limited to its own citizens and residents; the legislature explicitly permitted couples from foreign countries with no or with weaker same-sex partnership regimes to enter into the stronger German civil partnership.[331] There are, however, no statistics available on whether, and if so, the extent to which, this option was indeed also taken up by foreign couples (see 10.4.1 above). In other words, the scope of any possible 'registration tourism' is unknown.

10.4.4. Implementation of Directives 2004/38 and 2003/86 in German law

Regulation (EEC) 1612/68 was implemented in German law by means of the Residence Act of (*Aufenthaltsgesetz/EWG*) of 1969.[332] Its Article 7 provided for rights of entry and residence for the family members of workers. Family members were defined in line with the Regulation as the worker's spouse and their children who were under 21 years old or were dependants, as well dependent relatives in the ascending line of the worker and his spouse. The Aliens Act 1990[333] provided for rules in respect of family reunification, both to German nationals, as well as to foreigners legally resident in Germany. Spouses, children and dependent family members of foreigners with a residency permit, and those of Germans, could qualify for such family reunification.[334] The Act also provided for a hardship clause for other family members.[335] By way of the 2001 Civil Partnerships Act the group of qualifying family members for family reunification under the Aliens Act was extended to civil partners.[336] No provision was made at the time for any amendment

329 Röthel 2010, *supra* n. 324, Rn. 18, referring, *inter alia*, to D. Henrich, 'Kollisionsrechtliche Fragen der eingetragenen Lebenspartnerschaft' ['Conflict-of-laws questions on Civil Partnership'], *Zeitschrift für das gesamte Familienrecht*, *FamRZ* (2002) p. 137.

330 Röthel refers to T. Rauscher, *Internationales Privatrecht*, 3rd edn. 2009, p. 196.

331 Coester 2010, *supra* n. 322, Rn. 12 and 17–18. See also B. Heiderhoff, 'BeckOK EGBGB Art. 17b' ['Beck Online Commentary Art. 17b EGBGB'], in: H.G. Bamberger and H. Roth (eds.), *Beck'scher Online-Kommentar BGB* [Beck Online commentary to the BGB], 32nd edn. (München, Verlag C.H. Beck 2014) Rn. 2. Coester has observed that this fitted in with the general trend of 'materialisation' of Private international law. The author has explained that Art. 17(3) furthermore aimed to provide clarity and legal certainty as well as to provide a choice of law to registered partners. Coester 2013, *supra* n. 328, at pp. 115–116.

332 Gesetz über Einreise und Aufenthalt von Staatsangehörigen der Mitgliedstaaten der Europäischen Wirtschaftsgemeinschaft (AufenthG/EWG) [Act on the entry and residence of nationals of EC Member States], Act of 22 July 1969, *BGBl. I* p. 927, Revised by Act of 31 January 1980, *BGBl. I* p, 116, as well as by by the Ausländergesetz [Aliens Act], Act of 9 July 1990, *BGBl. I* p. 1354 at p. 1356 ff.

333 Gesetz über die Einreise und den Aufenthalt von Ausländern im Bundesgebiet (Ausländergesetz) [Act on the entry and residence of aliens in the Federal State (Aliens Act)], Act of 9 July 1990, *BGBl. I* p. 1354, at p. 1356.

334 Arts. 17 to 23 of the Aliens Act 1990 (*no longer in force*).

335 Art. 22 of the Aliens Act 1990 *(no longer in force*).

336 Art. 3 (11)(1) LPartG, inserting a new Art. 27a in the Ausländergesetz [Aliens Act].

to the Residence Act to provide for civil partners of workers within the meaning of Regulation 1612/68.

In September 2004 the Administrative Court of Karlsruhe delivered a judgment in a case in which a Chinese man who was married to a Dutchman appealed against the refusal of the German authorities to grant him an EU residence permit for spouses of EU citizens (at the time called a '*Aufenthaltserlaubnis-EG*') on the basis of Article 7 Aufenthaltsgesetz/EWG.[337] The Chinese citizen and his same-sex Dutch partner had married in the Netherlands in 2001. The Dutchman was employed in Germany and he therefore had a residence permit as a worker. His spouse had lived and studied in Germany since 1986 and had on that ground been repeatedly granted a student residence permit for a period of two years. Soon after the marriage, the student residence permit was going to expire, and the Chinese husband had submitted an application for the issuing of an EU residence permit for spouses of EU workers for a period of five years. The German authorities refused to issue such a permit, as recognition of the Dutch same-sex marriage as marriage for this purpose was held to conflict with German public order (Article 6 EGBGB).[338] The Chinese man could accordingly not be considered a 'spouse' within the meaning of Article 10(1)(a) Directive 1612/68 EEC.[339] The marriage of the couple was nevertheless recognised as a registered civil partnership. On that basis the Chinese man was granted a residence permit for a duration of two years.[340] The Chinese man appealed to the Administrative Court of Karlsruhe, which confirmed that a marriage between same-sex partners concluded under Dutch law was not a lawful German marriage. From CJEU case law it followed that 'spouse' within the meaning of the relevant Article 10(1)(a) of Directive 1612/68, related to traditional different-sex marriages only. This interpretation was confirmed by the newly enacted Directive 2004/38/EC which had not yet been transposed into German law, as well as by Article 9 of the – at the time non-binding – EU Charter of Fundamental Rights. Under reference to the CJEU judgment in the *Reed* case[341] the Court of Karlsruhe concluded that only a general, Europe-wide societal change could justify the extension of the term 'spouse' to include same-sex partners. In the Court's opinion the sole fact that the Netherlands and Belgium had opened up marriage to same-sex couples could not be regarded as such a societal change. Accordingly, the German court upheld the refusal to issue the five-year residence permit for spouses of EU citizens.

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337 VG Karlsruhe 9 September 2004, Az. 2 K 1420/03, *IPrax* (2006) p. 284. See also A. Röthel, 'Anerkennung gleichgeschlechtlicher Ehen nach deutschem und europäischem Recht' ['Recognition of same-sex marriage under German and European law'], *IPrax* (2006) p. 250 and R. Koolhoven, 'Het Nederlandse opengestelde huwelijk in het Duitse IPR. De eerste rechterlijke uitspraak is daar!' ['The Dutch opened up marriage in German Private international law. The first court judgment has been issued!'], *NIPR* (2005) p. 138. The subsequent appeal lodged with the BVerwG in this case (Az. 1 C 26.04) was repealed.

338 See ch. 4, section 4.5.3.

339 Art. 7(1) AufenthG/EWG, as applicable at the time, was based on Art. 10 (1a) Directive 1612/68. The Act was lifted as of 1 January 2005, and replaced by the Gesetz über die allgemeine Freizügigkeit von Unionsbürgern (Freizügigkeitsgesetz/EU – FreizügG/EU) [Act on the Free movement of EU-citizens (Free movement Act EU)], Act of 30 April 2004, *BGBl. I*, p. 1950.

340 Art. 27a in combination with Art. 18 I No. 1 AuslG and Art. 15 AufenthG/EWG.

341 Case 59/85 *Netherlands* v. *Reed* [1986] ECR 1283, ECLI:EU:C:1986:157. See ch. 9, section 9.6.1.

The subsequent Free Movement Directive (2004/38), as well as the EU Family Reunification Directive (2003/86) were implemented in German law by means of the Immigration Act ('*Zuwanderungsgesetz*') that entered into force on 1 January 2005.[342] This Act contained both the Residence Act (AufenthG)[343] and the Free Movement Act (FreizügG/EU),[344] as well as amendments to several other acts.

The Free Movement Act of 2004 provided that spouses of EU citizens, being family members within the meaning of the Directive, had a right to entry and residence. It was not clarified in this Act, however, whether this included same-sex spouses. As explained in more detail below (sections 10.4.5 and 10.4.6) later case law has confirmed the above discussed ruling of the Karslruhe Administrative Court holding that same-sex spouses of EU citizens are not recognised as 'spouses' and thus not as 'family members' within the meaning of the Free Movement Act.[345] They have nonetheless been granted entry and residence rights, because – as explained more elaborately below[346] – spouses have been, and still are, recognised as civil partners ('*Lebenspartners*') under German law. The latter group was, as noted above, not included in the definition of 'family member' under the relevant Article 3(2) of the Free Movement Act.[347] Instead, in respect of the entry and residence of civil partners of EU citizens, who did not have a free movement right of their own, those provisions of the Residence Act (AufenthG) that applied to civil partners ('*Lebenspartners*') of German nationals, applied in these cases.[348] As illustrated by the ruling of the Administrative Court of Karlsruhe discussed above, this meant that the residency permits issued to civil partners could be shorter in duration than those of spouses who were granted derived rights under the Free Movement Act.

Some authors wondered whether the relevant provisions of the Free Movement Act were in conformity with Article 2(2) of the Free Movement Directive, which provides that registered partners are recognised as 'family members' if the legislation of

342 Gesetz zur Steuerung und Begrenzung der Zuwanderung und zur Regelung des Aufenthalts und der Integration von Unionsbürgern und Ausländern (Zuwanderungsgesetz) [Act on the regulation and limitation of immigration and regulating the residence and integration of EU-citizens and aliens (Immigration Act)], Act of 30 July 2004, *BGBl. I* p. 1950. This Act revoked the Aufenthaltsgesetz/EWG.

343 Gesetz über den Aufenthalt, die Erwerbstätigkeit und die Integration von Ausländern im Bundesgebiet (Aufenthaltgesetz, AufenthG) [Act on the residence, access to the labour market and integration of aliens in the Federal State (Residence Act)], Act of 30 April 2004, *BGBl. I*, p. 1950.

344 Gesetz über die allgemeine Freizügigkeit von Unionsbürgern (Freizügigkeitsgesetz/EU – FreizügG/EU) [Act on the Free movement of EU-citizens (Free movement Act EU)], Act of 30 April 2004, *BGBl. I*, p. 1950.

345 In 2008, in a case concerning a Brazilian national who had concluded a marriage under Spanish law with a same-sex Spanish national, the Administrative Court of Darmstadt left open the question of whether the Brazilian national was entitled to free movement as the spouse or as the civil partner of an EU citizen. VG Darmstadt 5 June 2008 (dec.), Az. 5 L 277/08.

346 See section 10.4.6.

347 This Art. 3(2) FreizügG/EU only concerned spouses, the direct descendants who were under the age of 21 or were dependants and those of the spouse, as well as at the dependent direct relatives in the ascending line and those of the spouse.

348 Art. 3(6) FreizügG/EU.

the host Member State treats registered partnerships as equivalent to marriage.[349] Particularly as civil partnership and marriage were increasingly more equalised under German law, it was claimed that same-sex registered partners of EU citizens[350] had to be granted entry and residence as family members under the Free Movement Directive.[351] In 2013, the legislature indeed amended the Free Movement Act, so as to provide expressly that in respect of entry and residence, civil partners and spouses were treated equally under this Act.[352] This also implied that same-sex spouses of migrating EU citizens, who were, and are, recognised as civil partners under the Free Movement Act, were from then on effectively treated equally with different-sex spouses in respect of entry and residence.

The Residence Act (AufenthG) of 2005 contains rules in respect of family reunification, including for third-country nationals. The relevant Articles 27 to 31 of the Act provide family reunification rights for spouses, as well as for minor relatives in the direct descending line, and for carers of these children. It has not been made explicit in the Act whether the term 'spouses' includes same-sex spouses. Generally, however, same-sex spouses have instead been recognised as civil partners ('*Lebenspartners*') under German law, as noted above and explained more elaborately below. In respect of family reunification that does not make any difference, since Article 27(2) of the Residence Act provides that the rules regarding family reunification also apply to partners in a 'partnership-like relationship' ('*lebenspartnerschaftlichen Gemeinschaft*'). It has been held that this category concerns same-sex partners only, as the term would refer to civil partners within the meaning of the German Civil Partnership Act (see more elaborately below).[353] In any case, it follows from this Article 27(2) that both same-sex spouses and same-sex registered partners of third-country nationals may qualify for family reunification on an equal footing with different-sex spouses.

The following subsections explain how foreign same-sex marriages and registered partnerships are recognised under German Private International Law. As will become clear, marriages between partners of the same sex are recognised under German law as civil partnerships, not as marriages. The question has come before a German Court whether such 'downgrading' is commensurable with EU free movement law. This matter is discussed in subsection 10.4.7.

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349 H. Hoffmann, 'FreizügG/EU § 3' ['§ 3 FreizügG/EU'], in R. Hofmann and H. Hoffmann, *Ausländerrecht* [Aliens law], 1st edn. (Baden-Baden, Nomos 2008)Rn. 19; H. Tewocht, 'Die Neuregelung des Freizügigkeitsgesetzes/EU' ['The new regulation of the EU freedom of movement Act'], *ZAR* (2013) p. 221 at p. 225. See also G. Brinkmann, 'Zehn Jahre Freizügigkeitsgesetz' ['Ten years Free Movement Act'], *ZAR* (2014) p. 213 at p. 217.

350 As explained in section 10.4.5 below, under German law only same-sex partners may be recognised as registered partners within the meaning of the Civil Partnerships Act.

351 Tewocht 2013, *supra* n. 349, at p. 225.

352 *Gesetz zur Anderung des Freizugigkeitsgesetzes/EU* [Act amending the Free Movement EU Act], Act of 21 January 2013, *BGBl. I* p. 86, entry into force on 29 January 2013.

353 R. Göbel-Zimmermann, 'Gleichgeschlechtliche Lebenspartnerschaften (§ 27 Abs 2)' ['Same-sex civil partnerships (§ 27 para. 2)'], in: B. Huber, *Aufenthaltsgesetz* [Residence Act], 1st edn. (München, Verlag C.H. Beck 2010) Rn. 45.

10.4.5. Recognition of foreign same-sex registered partnerships under German law

As noted above, Article 17b EGBGB provides for conflict-of-laws rules in respect of registered partnerships. The German civil partnership sets the standard for the functional qualification of partnerships registered abroad. Constitutive for this qualification is the formal establishment of a relationship in a foreign country, resulting in a certain civil status with legal effects.[354] Whether it is required that both partners are of the same sex is a controversial matter. While some answer this question in the negative,[355] other scholars have held this to be a constitutive element for the German civil partnership.[356]

The fourth paragraph of Article 17b limits the effects of civil partnerships registered abroad. This so-called '*Sperrklausel*' or '*Kappungsgrenze*'[357] reads:

> 'The effects of a life partnerships registered abroad shall not exceed those arising under the provisions of the German Civil Code and the Registered Partnerships Act.'[358]

Article 17b (4) is considered to be a *lex specialis* of the general public order clause of Article 6 EGBGB (see Chapter 4, section 4.5.3).[359] It limits the effects of more advanced civil partnership regimes to those of the German civil partnership. The effects of more limited foreign partnership regimes are however not lifted to the German standard.[360] Effectively, in all situations the 'weakest' regime is applied.[361]

While most scholars agree that the clause should be broadly interpreted,[362] it is unclear what the term 'effects' covers exactly[363] and when such effects can be considered to 'exceed' those of the German civil partnership.[364] There is wide agreement that

354 Coester 2010, *supra* n. 322, Rn. 10.

355 *Idem*, Rn. 11 and Heiderhoff 2014B, *supra* n. 331, Rn. 13–14.

356 Röthel 2010, *supra* n. 324, Rn. 6.

357 *Idem*, Rn. 2.

358 Translation of the Introductory Act to the Civil Code (in the version promulgated on 21 September 1994, *BGBl. I* p. 2494, last amended by law of 25 June 2009, *BGBl. I* p. 1574) provided by Dr. Juliana Mörsdorf-Schulte LL.M. (Univ. of California, Berkeley), online available at: www.gesetze-im-internet.de/englisch_bgbeg/englisch_bgbeg.html, visited June 2014.

359 Art. 17b (4) EGBGB is perceived as not to rule out application of Art. 6 EGBGB entirely; the general public order clause forms the fall-back option. Forkert 2003, *supra* n. 42, at p. 296; Röthel 2010, *supra* n. 324, Rn. 50 and 55; P. Kiel, `Hk-LpartR' ['Hk-LpartR'], in: M. Bruns and R. Kemper, *Lebenspartnerschaftsrecht, Handkommentar* [Civil Partnership Commentary], 2nd edn. (Baden-Baden, Nomos Verlagsgesellschaft 2006) at pp. 427–428.

360 As noted above, partners instead have the option of re-registering their partnership under the German law (Art. 17b (3)). See Coester 2010, *supra* n. 322, Rn. 84 and Röthel 2010, *supra* n. 324, Rn. 50.

361 Kiel 2006, *supra* n. 359, at p. 427.

362 M. Gebauer and A. Staudinger, 'Registrierte Lebenspartnerschaften und die Kappungsregel des Art. 17b Abs. 4 EGBGB' ['Civil partnerships and the limitation clause of Art. 17b para. 4 EGBGB'], *IPRax* (2002) p. 275 at p. 276 and Coester 2010, *supra* n. 322, Rn. 10.

363 *Inter alia*, Gebauer and Staudinger 2002, *supra* n. 362, at p. 276; Forkert 2003, *supra* n. 42, at p. 297 and Kiel 2006, *supra* n. 359, at p. 427.

364 Wagner 2001, *supra* n. 358, as referred to by Coester 2010, *supra* n. 322, Rn. 87. Coester has furthermore pointed out that since Art 17(4) EGBG was introduced, increasingely more matters have been regulated

effects in respect of parental rights, in any case fall under the '*Kappungsgrenze*', as these are expressly excluded from the scope of Article 17b (1) EGBGB.[365]

Legal scholarship has furthermore been divided over the question of whether a tie with Germany is required for the application of Article 17b (4). In other words, it is debated whether Article 17b (4) contains a so-called '*Inlandsbezug*', as is the case in respect of the general public order clause of Article 6 EGBGB. Strictly following its wording, Article 17b (4) seems to apply even in cases where the partners have no (strong) ties with Germany.[366] Many scholars have therefore held the existence or the intensity of such ties not to be required or relevant for the application this provision.[367] Others are critical,[368] while some even argue that the '*Inlandsbezug*' is an implied constitutive element of Article 17b (4).[369]

From the moment of its introduction, the '*Kappungsgrenze*' of Article 17b (4) received considerable criticism in legal scholarship.[370] A fundamental line of criticism concerns the aims pursued by the legislature with the provision.[371] The Explanatory Memorandum to the Article explained that this provision was intended as a compromise between the protection of the good faith of interested parties ('*Vertrauensschutz für die Beteiligten*') on the one hand and legal certainty and the guarantee and facilitation of national judicial matters ('*Sicherheit und Leichtigkeit des Rechtsverkehrs im Inland*') on the other.[372] In legal scholarship, it has been questioned whether this aim was indeed achieved with this clause.[373] A general consensus consists that the fourth paragraph was additionally – or perhaps even primarily – inspired by the legislature's wish to give material protection to the institution of marriage,[374] as well as by the national legal discussion about the constitutionality of the Civil Partnerships Act.[375] The clause was held to implement the requirement of distance ('*Abstandsgebot*'), which the legislature at that time considered to be required by

by EU law, such as maintenance and inheritance, as a result of which these effects no longer fall under this 'Kappungsgrenze'. Coester 2013, *supra* n. 328, at p. 121.

365 Forkert 2003, *supra* n. 42, at p. 301; Röthel 2010, *supra* n. 324, Rn. 52. See also Coester 2013, *supra* n. 328, at p. 121.

366 Kiel 2006, *supra* n. 359, at p. 427.

367 Wagner 2001, *supra* n. 358, at p. 292; Süß 2001 *supra* n. 326, at p. 171; Röthel 2010, *supra* n. 324, Rn. 53, P. Mankowski*, J. von Staudingers Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengestezen* [J. von Staudinger's Commentary to the Civil Code, with the Introductory Act and anciliary acts] (Sellier, Berlin 2011) p. 863, Rn. 86.

368 Gebauer and Staudinger 2002, *supra* n. 362, pp. 280–281.

369 Coester 2010, *supra* n. 322, Rn. 96. The author holds that the aims of 'guaranty and facilitation of national judicial matters' and the special protection of marriage can only be pursued in cases with a clear link with the German jurisdiction (see below).

370 Kiel 2006, *supra* n. 359, at p. 427. For an example of such criticism see D. Jakob, *Die eingetragene Lebenspartnerschaft im internationalen Privatrecht* [Civil partnership in International Private Law] (Köln, Schmidt 2002) p. 183 ff and 232 ff.

371 E.g. Süß 2001, *supra* n. 326.

372 *BT-Drs.* 14/3751, p. 61.

373 *Inter alia* Kiel 2006, *supra* n. 359, at pp. 427–428.

374 Coester 2010, *supra* n. 322, Rn. 87.

375 *Idem*, Rn. 84.

Article 6(1) Basic Law.[376] The tenability of this aim became, however, questionable[377] after the BVerfG had ruled in 2002 that from this Article no such '*Abstandsgebot*' followed (see also 10.3.3 above).[378] In search for an alternative legitimate aim that could justify the maintenance in force of Article 17b (4) EGBGB after the 2002 BVerfG judgment, Coester observed that this judgment could be interpreted such that from Article 6(1) Basic Law a prohibition of disfavouring of marriage *vis-à-vis* civil partnership followed. If the special protection of marriage was interpreted in that manner, the author considered, the function of the fourth paragraph would be to ensure that foreign law concerning same-sex partnerships did not negatively affect the legal position of spouses in Germany.[379] Kiel thought the legislature had primarily aimed to ward off foreign regulations concerning the effects of same-sex partnerships in respect of parental rights.[380] The author maintained, however, that parental rights established under foreign law could not be undone by Article 17b (4). Nevertheless, the clause prevents that partners who entered into a civil partnership under the law of a foreign country, can in respect of their parental rights rely on that foreign partnership regime in Germany.

Various scholars further have questioned why the legislature felt the need to create a special reservation clause ('*Vorbehaltsklausel*'), instead of trusting the general public order clause of Article 6 EGBGB to be sufficient to deal with 'dubious' foreign institutions.[381] Also the criticism was issued that the '*Kappungsgrenze*' scaled down or even contradicted the openness towards foreign law of the registration criterion of the first paragraph of Article 17 EGBGB.[382] The '*Kappungsgrenze*' was furthermore held to be difficult to reconcile with the EU law principle of mutual recognition, to the extent that this could be held to apply in cross-border family law matters.[383] Coester observed that the combination of paragraphs 3 and 4 of Article 17b EGBGB showed the – what he called the – 'questionable' and 'disproportional' tendency of the German legislature to impose the German civil partnership model at the

376 *Idem*, Rn. 85. See also Gebauer and Staudinger 2002, *supra* n. 362, at p. 282; Henrich 2002, *supra* n. 329, at p. 144), Süß 2001, *supra* n. 326, at p. 172 and K. Thorn, 'Entwicklungen des Internationalen Privatrechts 2000–2001' ['Developments in International Private Law 2000–2001'], *IPRax* (2002) p. 349 at p. 355.

377 Röthel 2010, *supra* n. 324, Rn. 51.

378 BVerfG 17 July 2002, Az. 1 BvF 1/01, *NJW* 2002 p. 2543.

379 Coester 2010, *supra n*. 322, Rn. 87.

380 Kiel 2006, *supra* n. 359, at p. 428.

381 Coester 2010, *supra* n. 322, Rn. 84 and A. Röthel, jurisPK-BGB, Article 17b EGBGB, 5th edn. 2010, Rn. 51.

382 Jakob 2002, *supra* n. 370, at p. 183ff; Coester 2010, *supra* n. 322, Rn. 84 and 88; Röthel 2010, *supra* n. 324, Rn. 50 and B. Heiderhoff, 'BeckOK EGBGB Art. 17b' ['Beck Online Commentary Art. 17b EGBGB'], in: H.G. Bamberger and H. Roth (eds.), *Beck'scher Online-Kommentar BGB* [Beck Online commentary to the BGB], 19th edn. (München, Verlag C.H. Beck 2011) Rn. 45.

383 Coester 2010, *supra* n. 322, Rn. 88. See also R. Baratta, 'Problematic elements of an implicit rule providing for mutual recognition of personal and family status in the EC', *IPRax (*2007) pp. 4–7.

international level as far as possible.[384] Gebauer and Staudinger argued that the rule led to contradictory values ('*Wertungswidersprüchen*') and to discrimination.[385]

With a view to all these points of criticism it has been suggested in legal scholarship from the moment of its introduction that Article 17b (4) EGBGB had to be abolished.[386] The ongoing process of equalisation of the German registered civil partnership with marriage, provided even more ground for such appeals.[387] By way of alternative, a case has been made for a reasonable teleological interpretation and application of the clause.[388] By the time this research was concluded, however, i.e., by 31 July 2014, the provision was still in force, and being applied by the German courts.

10.4.6. Recognition of foreign same-sex marriages under German law

As explained above, the opening up of marriage to same-sex couples in other European states, starting with the Netherlands in 2001, raised the question as to which German Private International Law regime had to be applied to these marriages: Articles 13–17 EGBGB concerning marriage, or Article 17b EGBGB concerning civil partnerships?

German legal scholarship was divided on the matter. Firstly there were legal scholars who argued that a same-sex marriage registered abroad between two spouses of the nationality of a country in which such a marriage was provided for, had to be qualified and recognised as a marriage within the meaning of Article 13ff EGBGB under German law.[389] They mostly stressed that habitual residence (domicile) and nationality were the criteria on the basis of which the applicable law was to be determined. In their view there only would be an obstacle to recognition of a foreign same-sex marriage as marriage if one of the spouses was a national from a country which law did not provide for a same-sex marriage – as was the case if one of the spouses was German. Such an obstacle to marriage would result in the nullity of the marriage (a so-called '*Nichtehe*',[390] a void marriage). Others opined that since the entry into force of the German Civil Partnerships Act, when the German legislature expressly awarded legal recognition and protection to formal partnerships between

384 Institutions with less far-reaching legal effects than the German registered civil partnership can be lifted to the German level through re-registration (Art. 17b (3) EGBGB). At the same time more advanced institutions are levelled down to the German standard (Art. 17b (4) EGBGB), in order to maintain the difference between marriage and partnership also at the international level. Coester 2010, *supra* n. 322, Rn. 18. See also Röthel 2010, *supra* n. 324, Rn. 50.

385 Gebauer and Staudinger 2002, *supra* n. 362, at p. 276.

386 *Idem*, at pp. 275–282.

387 Coester 2010, *supra* n. 322, Rn. 88.

388 *Idem*, Rn. 88 ff. See also Kiel 2006, *supra* n. 359, at p. 428.

389 *Inter alia* Kiel 2006, *supra* n. 359, at pp. 427–428. See also a 2006 Bill of the Greens (*BT-Dr* 16/3423), which proposed to recognise foreign same-sex marriages as marriage, instead of a registered civil partnerships. For a critical note to this proposal, see Muscheler 2010, *supra* n. 169, at p. 227.

390 For marriage, a relevant factor is the nationality of the spouses. So if a German national is involved, a same-sex marriage is for certain a '*Nichtehe*' (void marriage). It can only be recognised as a registered civil partnership. Compare VG Berlin 15 June 2010, 23 A 242/08.

two persons of the same sex, it could no longer be maintained that a same-sex marriage was manifestly incompatible with the fundamental principles of German law. These authors therefore argued that a foreign same-sex marriage could no longer be refused recognition on the basis of public order arguments.[391] They contended that the mere fact that the foreign legislature had moved further forward in the process of equal treatment of same-sex couples and different-sex couples than the German legislature had, could not form a justification for the warding off of foreign law.[392]

Yet other scholars opined that a foreign same-sex marriage could be registered in Germany as a civil partnership only.[393] This view has been confirmed by case law. The first relevant case dates from June 2002, when the Financial Court of Niedersaksen ruled that a marriage between two Dutch women, concluded in conformity with Dutch law, could not be recognised as a marriage within the meaning of German law. The applicant could therefore not claim child benefits for the children of her lesbian partner, as were granted to spouses under German law.[394] By judgment of 30 November 2004, the Federal Financial Court ('*Bundesfinanzhof*' (BFH)) confirmed that on the basis of Article 17b (4) EGBGB a marriage between a couple of the same sex that was concluded abroad could under German law only be recognised as a civil partnership, as from Article 17b (4) EGBGB it followed that the effects of a civil partnership registered abroad did not exceed those arising under the German civil partnership.[395] Hence, as confirmed in various judgments of a later date,[396] a same-sex marriage concluded under foreign law can only be registered in Germany as civil partnership ('*Lebenspartnerschaft*').[397] This is not different if the spouses are German nationals.[398]

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391 Kiel 2006, *supra* n. 359, at p. 429, under reference to, *inter alia*, A. Röthel, 'Gleichgeschlechtliche Ehe und ordre public' [Same-sex marriage and *ordre public*], *IPRax* (2002) p. 496 at p. 498f and Gebauer and Staudinger 2002, *supra* n. 362, at p. 277.

392 Kiel 2006, *supra* n. 359, at p. 429.

393 E.g. Coester 2010, *supra* n. 322, Rn. 144–148 and Gärtner 2014, *supra* n. 323, Rn. 11. As Martiny explained in 2012: 'From the point of view of the existing German law, it is not a same-sex relationship as such, but only the exceeding effect which is offensive. It would be inconsistent if a foreign life partnership in Germany were recognised, whereas an exceeding relationship would find no recognition at all. This is an argument for the recognition of the same-sex marriage at least as a life partnership in the sense of Art. 17b Introductory Law.' D. Martiny, 'Private International Law Aspects of Same-Sex couples under German Law', in: K. Boele-Woelki and A. Fuchs (eds*), Legal recognition of same-sex Relationships in Europe, National, cross-border and European perspectives*, 2nd edn. (Cambridge, Intersentia 2012) p. 189 at p. 198.

394 FG Niedersachsen 4 June 2002, Az. 6 K 525/98 Ki. See also FG Niedersachsen 10 June 2004, Az. 5 K 156/03.

395 BFH 30 November 2004, Az. VIII R 61/04 (NV).

396 E.g. VG Münster 13 December 2007, Az. 3 K 1845/05, in which the Court held that the legal effects of a Dutch same-sex marriage could not extend further than those of a registered civil partnership under German law (i.e. the BGB and the LPartG). See also VG Köln 19 March 2009, Az. 13 K 1841/07 and VG Berlin 15 June 2010, Az. 23 A 242/08; OLG Zweibrücken 21 March 2011 (dec.), Az. 3 W 170/10, *NJW-RR* 2011 p. 1156; AG München 4 January 2011 (dec.), Az. 721 UR III 193/10; OLG Zweibrücken 21 March 2011 (dec.), Az. 3 W 170/10, *NJW-RR* 2011 p. 1156 and OLG München 6 July 2011 (dec.), Az. 31 Wx 103/11.

397 Art. 35 *Personenstandsgesetz* (*PStG*) [Civil Status Act].

398 OLG Köln 5 July 2010 (dec.), Az. 16 Wx 64/10 and KG 3 March 2011 (dec.), Az. 1 W 74/17.

Interestingly, however, the Court of Appeal ('*Kammergericht*' (KG)) of Berlin has been willing to apply Dutch law to a request for a divorce between a couple who had concluded same-sex marriage under Dutch law.[399] The Court held that the Dutch same-sex marriage was valid on the basis of Article 13(1), as its conclusion was governed by Dutch law.[400] Further, from Article 15(1)(17)(1) first sentence EGBGB it followed that Dutch law applied to the dissolution of a marriage between two persons of the same sex that had been concluded under Dutch law. The Court held that the application of Dutch law did not lead to a result that was manifestly incompatible with the fundamental principles of German law, precisely because its result was that a same-sex marriage was no longer existent.[401] Other courts have reportedly instead applied the conflict-of-laws rule for registered partnerships to the dissolution of foreign marriages.[402]

10.4.7. 'Downgrading' and free movement law according to the German Courts

The previous subsections have shown that 'downgrading' may take place under German law. Consequently the question has been raised before the German Courts as to whether this 'downgrading' constituted a violation of EU free movement rights.

The Administrative Court ('*Verwaltungsgericht*' (VG)) of Berlin ruled in 2010 that the fact that a same-sex marriage concluded between two EU citizens under foreign law was registered as a civil partnership in the German register ('*Lebenspartnerschaftsregister*'), did not impede the free movement rights of Articles 21(1) and 22(1) TFEU of the EU citizens concerned.[403] The fact that the same-sex marriage was registered as marriage in the register of another EU Member State did not alter this conclusion.

The case was brought by a German national who had entered into a marriage with a Spanish same-sex partner in Canada, hence under Canadian law. While their marriage had been registered in the Spanish marriage register, in Germany their marriage was registered as a civil partnership ('*Lebenspartnerschaft*'). The plaintiff requested this to be changed into 'marriage' ('*Ehe*'), but the authorities instead changed his civil status into 'unmarried' ('*ledig*'), because a marriage between same-sex partners was considered void ('*Nichtehe*'). The plaintiff asked the Administrative Court of Berlin

399 KG 19 June 2008 (dec.), Az. 16 WF 163/08.

400 Art. 13(1) EGBGB reads: 'The conditions for the conclusion of marriage are, as regards each person engaged to be married, governed by the law of the country of which he or she is a national.'

401 KG 19 June 2008 (dec.), Az. 16 WF 163/08.

402 D. Martiny, 'Workshop: cross-border recognition (and refusal of recognition) of registered partnerships and marriages with a focus on their financial aspects and the consequences for divorce, maintenance and succession', in: K. Boele-Woelki and A. Fuchs (eds.), *Legal recognition of same-sex Relationships in Europe, National, cross-border and European perspectives*, 2nd edn. (Cambridge, Intersentia 2012) p. 225 at p. 241, referring in footnote 39 to AG Münster 20 January 2010, Az. 56 F 79/09, *NJW-RR* 2010 p. 1308.

403 VG Berlin 15 June 2010, Az. 23 A 242/08. See B. Heiderhoff 2011, supra n. 382, Rn. 46.

to have the entry in the German register changed into 'married', or, alternatively, into '*Lebenspartnerschaft*'. He argued that the EGBGB was not applicable as it only dealt with private law matters, while here a public law matter was concerned. He furthermore claimed that from EU law an obligation followed to recognise his same-sex marriage.[404] The Berlin Court rejected this reasoning. It ruled that the entry had to be changed into '*Lebenspartnerschaft*', but that an entry as 'married' was not required. Because of a lack of an interstate element, the Court held that the case before it fell outside the scope of EU law.[405]

Even if EU law was applicable, the Court held, there was no interference with EU law, as the entry of the plaintiff's marriage into the register as '*Lebenspartnerschaft*' did not have any serious disadvantages of a professional or a private character.[406] Further, the record in the register was not legally binding.[407] Even if there were an interference with free movement law, the Court held this to be justified on grounds of the special protection of marriage ex Article 6(1) Basic Law.[408] The Court considered that – other than name, which is part of a person's identity[409] – civil status was not of great importance in judicial matters. The general prohibition on discrimination ex Article 18 TFEU was not violated, as the entry into the register affected all citizens equally. Besides, the entry into the register was not in violation of Directive 2000/78 as the lack of a Union competence in respect of the question of whether a marriage is concerned, prevented the matter from falling within the scope of this Directive. Lastly, on the basis of Article 2 (2b) of the Free Movement Directive (Directive 2004/38) the Court concluded that there was no obligation under EU law to recognise the same-sex marriage of the plaintiff.[410] The Court saw no reason to make a preliminary reference to the CJEU as it held there to be no uncertainty about the interpretation of Union Law in the matter before it.[411] In addition and conclusion, the VG Berlin held the ECHR not to be violated as its Article 12 did not require the recognition of same-sex marriages.[412]

It is noted that this judgment of the Administrative Court of Berlin – as far as the present author is aware, so far the only judgment of a German Court on the

404 *Idem*, para. 3.

405 The Court held that there was no interstate element because the plaintiff was a German national who lived in Germany and because the question at issue concerned only the legal relationship between him and the State. See para. 18 of the judgment, in which the Court referred to Joined Cases C-64/96 and C-65/96 *Ücker/Jacquet* [1997] ECR I-3171, ECLI:EU:C:1997:285.

406 VG Berlin 15 June 2010, Az. 23 A 242/08, para. 19.

407 *Idem*, para. 19.

408 *Idem*, para. 20.

409 *Idem*, para. 20. The Court referred to Case C-148/02 *Garcia Avello* [2003] ECR I-11613, ECLI:EU:C:2003:539 and Case C-353/06 *Grunkin* [2008] ECR I-7639, ECLI:EU:C:2008:559.

410 Following Art. 2(2)(b) of Directive 2004/38 a 'family member' is '[…] the partner with whom the Union citizen has contracted a registered partnership, on the basis of the legislation of a Member State, if the legislation of the host Member State treats registered partnerships as equivalent to marriage and in accordance with the conditions laid down in the relevant legislation of the host Member State.' See more elaborately Ch. 9, section 9.6.2.

411 VG Berlin 15 June 2010, Az. 23 A 242/08, para. 24.

412 *Idem*, para. 25.

matter – dates from 2010. Since that time, the German civil partnership has only been more equalised with marriage. That fact may render it less likely that a German Court would rule otherwise on the question of the commensurability of this type of downgrading with EU free movement rules.

10.4.8. Cross-border parental issues

There have also been several cross-border cases relating to parental rights of same-sex couples before the German courts. Generally, the parental rights established by couples under foreign law, have been recognised by the courts, including in cases where such rights could not have been established under German law.

In cross-border cases concerning second-parent adoption by same-sex partners, German courts have applied German law. For example, in 2010 the District Court (‘*Amtsgericht*’ (AG)) of Nürnberg decided a case that concerned an American from California who lived in Germany and who wanted to adopt the biological child of his Italian same-sex spouse, with whom he was married under Belgian law. The child had Russian and Italian citizenship.[413] While in principle the relevant Californian adoption was to apply, because the adopter had American nationality,[414] the Court applied German law instead. It did so under Article 4(2)(1) EGBGB (*renvoi*, ‘*Rückverweisung*’), because for application of the relevant Californian law it was required that the adoptive parent and child had been living in California for at least six uninterrupted months, a criterion that was not fulfilled in the case at hand. The adoption was approved by the Court on the basis of Article 9(7) of the Civil Partnership Act, which allows for second-parent adoption by civil partners, in combination with Articles 1755(1) and 1755(2) of the German Civil Code (BGB). In another case of 2010,[415] the District Court (AG) of Stuttgart applied German law to a case involving a foreign national who wanted to adopt the biological child of her German civil partner, with whom she had concluded a civil partnership under German law.[416]

There are also examples of recognition by German Courts of foreign court orders concerning joint adoptions by same-sex partners. As noted, above, foreign judgments in family matters are in principle recognised under German law,[417] unless such recognition is considered manifestly incompatible with fundamental principles of

413 AG Nürnberg 25 September 2010 (dec.), Az. XVI 57/09.

414 As explained in Ch. 4, section 4.5.3, Art. 22 EGBGB provides that the adoption of a child is governed by the law of the country of which the adopter is a national at the time of the adoption. Art. 23 EGBGB further provides that ‘[t]he necessity and the granting of the consent of the child, and of a person who is related to the child under family law, to a declaration of descent, to conferring a name, or to an adoption are additionally governed by the law of the country of which the child is a national.’ However, where the best interest of the child so requires, German law is applied instead.

415 AG Stuttgart 25 October 2010 (dec.), Az. 29 F 2062/09.

416 The Court held Art. 22(1) second sentence EGBGB applicable, following which adoption by (one or both) spouses is subject to the law governing the general effects of marriage.

417 Art. 108 FamFG.

German law.[418] In a judgment of 2012, the Berlin Court of Appeal (‘*Kammergericht*’ (KG)) held that it could not be maintained that the recognition of a foreign adoption order, concerning a joint adoption by a same-sex couple, would be contrary to the foundations of the German legal order, to such an extent that it would lift the fundamental rule that foreign adoption orders could not be challenged.[419] The Court noted that this was particularly so since the question of the validity of a same-sex joint adoption under German law was much debated. The obligation to observe German law could not be pursued by trampling upon the interests of the children concerned. Instead, holding on to the fundamental rule that adoption orders could not be challenged, served the best interests of the child to a much greater extent, the Court ruled.[420]

A similar line of reasoning was adopted by the Appeals Court (*Oberlandesgericht* (OLG)) of Schleswig-Holstein in a judgment of March 2014.[421] The case concerned a joint adoption by a German national and her same-sex US-national partner under US law. At the time the adoption order was issued, the relationship of the two women was not legally recognised in any way. This was ground for the competent German administrative court of first instance to refuse to recognise the American adoption order.[422] While that judgment was appealed, the two women got married in California (USA). In its judgment of March 2014, the Appeals Court ruled that in view of the increasing extension of adoption rights to same-sex partners under German law, it could not be maintained that recognition of the contested adoption order was manifestly incompatible with the foundations of German law. The Court therefore recognised the adoption.

All these judgments date from recent years, and the German courts evidently grounded their reasoning in recent developments in the area of adoption rights for same-sex couples under German law. That fact may also explain that same-sex couples have been less successful in claiming legal parenthood by operation of the law in cross-border situations. As explained in section 10.4.5 above it is not possible under German law for so-called ‘co-mothers’ to be recognised by operation of the law as legal parent of the child of their same-sex partner who is the biological parent. On the basis of Article 1592(1) German Civil Code (BGB) the father of a child is the man who is married to the mother of the child at the date of birth, but there is no such presumption of parenthood for same-sex registered partners. In March 2011, the OLG of Celle ruled that the presumption of paternity did not analogously apply to a

418 Art. 109(4) FamFG.

419 KG 11 December 2012 (dec.), Az. 1 W 404/12; See also F. Strohal, jurisPR-FamR 3/2013 Anm. 4 and B. Heiderhoff, ‘BeckOK EGBGB Art. 22’ [‘Beck Online Commentary Art. 22 EGBGB’], in: H.G. Bamberger and H. Roth (eds.), *Beck'scher Online-Kommentar BGB* [Beck Online commentary to the BGB], 32nd edn. (München, Verlag C.H. Beck 2014) Rn. 64–65. The case concerned an adoption order by a South-African Court.

420 KG 11 December 2012 (dec.), Az. 1 W 404/12, para. 20. This case was subsequently appealed to the Federal Court (BGH), which case was still pending (Az. XII ZB 730/12) at the time this research was concluded (i.e. 31 July 2014).

421 OLG Schleswig 14 March 2014 (dec.), Az. 12 UF 14/13.

422 AG Schleswig 4 January 2013 (dec.), Az. 91 F 276/11.

situation involving two women, one German national and the other Italian, who had concluded marriage under Spanish law.[423] The so-called 'co-mother', who had been recognised as such under Spanish law, could not be registered on the German birth register as (co-)mother of the child, because German filiation law did not allow for the granting of paternity to two same-sex partners, except for in adoption situations.[424]

10.4.9. Recognition of German civil partnerships in other Member States

The present author has not become aware of any report of couples in a German civil partnership having particular difficulties with having that civil status recognised in other EU Member States. These couples presumably encounter refusals of such recognition in those Member States that do not provide for any form of legal recognition of same-sex relationships. Because of the fact that the German civil partnership has been extensively equalised with marriage, it is unlikely that Member States that have themselves introduced a registered partnership for same-sex partners, will refuse the German partnership recognition under their national law. Countries that have refrained from introducing a separate regime, but have instead opened up marriage to same-sex couples, may possibly be willing to recognise the German civil partnership as marriage under their national law, now that it has been equalised with this institute to such a great extent.

10.5. Conclusions

The German debate and standard-setting on legal recognition of same-sex couples has pre-eminently been a step-by-step process. The first concrete step by means of the introduction of the German civil partnership in 2001, was followed by numerous legislative amendments over the subsequent 13 years. With a view to further equalising the legal position of civil partners with that of spouses, amendments were introduced in areas of law varying from tax law to parental rights. Such change was frequently imposed by a Court judgment, in many cases by the Constitutional Court.

This phased process can be explained by a long existing tensed relation between the special protection of marriage under Article 6 of the German Basic Law and the right to equality before the law under Article 3 Basic Law. While initially the former was seen as a *lex specialis* of the latter, and thus as having precedence, over time this relationship has been reversed. The most recent line of case law of the Constitutional Court in relation to same-sex relationships is no longer about the special protection of marriage, so it has been observed, but about the protection of civil partnership

423 OLG Celle 10 March 2011 (dec.), Az. 17 W 48/10, *NJW-RR* 2011 p. 1157. See also AG Hannover 3 November 2010 (dec.), Az. 85 III 103/10 and B. Heiderhoff, 'Der gewönliche Aufenthalt von Säuglingen' ['The habitual residence of infants'], *IPRax* (2012) p. 523.

424 *Idem*.

against discrimination.[425] The special protection of marriage under Article 6(1) Basic Law has consequently been qualified by some as 'an empty shell'.[426]

In particular in relation to parental matters, the equal treatment argument provided for an important new perspective, as it was directly related to the rights of the child. In the ground-breaking 2013 judgment of the Constitutional Court on successive adoption, it was the *child's* right to equal treatment on the basis of which the Court ruled that the prohibition on successive adoption by civil partners could not be justified.

Regardless of these developments, the opening up of marriage to same-sex couples, while debated at various occasions, has proven a bridge too far. It is possible that the far-reaching equalisation of civil partnership with marriage has taken the sting out of this debate. On the other hand, there are still clear differences between civil partners and spouses in the sphere of parental rights, namely in respect of joint adoption and legal parenthood by operation of the law. For some, these differences may be reason for finding the opening up of marriage even more important, yet others may hold these differences justified because of the special status of marriage and the biological differences between different-sex and same-sex couples.

In cross-border situations, change has been brought about at the same fairly slow, perhaps even slower, pace. For example, it took until 2013, before the legislature amended the Free Movement Act, so as to provide expressly that in respect of entry and residence, civil partners and spouses were treated equally under this Act. Further, in cross-border situations, a clear domination of the German standard is visible. On the one hand, the German Civil Partnership is unique in its openness to foreign same-sex couples, exactly because the German legislature wished to broaden its aspirations for equal treatment to couples from outside Germany. On the other hand, the special protection of marriage as a bond between a man and a woman under Article 6(1) Basic Law has also found expression in German Private International Law. Under the so-called '*Kappungsgrenze*', foreign same-sex marriages are downgraded to the standard of the German Partnership. Such downgrading has been held unproblematic under EU free movement rules, by German courts. Serious criticism has also been issued, however, on the German conflict-of-laws rules in this context, particularly because of the increased equalisation of civil partnership with marriage. Interestingly, in cross-border parental matters, such developments under German law have – together with the best interests of the child – been grounds for German courts to recognise parental links that same-sex couples had established abroad.

425 Coester 2013, *supra* n. 328, at p. 121.
426 Selder 2013, *supra* n. 174, at p. 1067. See section 10.3.4.4 above.