Special Section
Same-Sex Marriage: Comparative Reflections

When, if not Now? An Update on Civil Partnership in Germany

By Anne E.H. Sanders[*]

Abstract

Following the article "Marriage, Same-Sex Partnership, and the German Constitution," which was published in the *German Law Journal* in 2012 (*see* Anne Sanders, *Marriage, Same Sex Partnership and the Constitution*, 13 GERMAN L.J. 911 [2012]), this article provides an update on recent developments in relation to same sex partnerships in Germany. The focus of this Article is case law of the German Constitutional Court from 2002 through today, but it also discusses other court decisions in relation to the rights of same sex parents. The Article concludes with an examination of a recent draft law which—if successful—will open marriage to same sex couples. While its chances for success are extremely slim, this Article argues that same sex marriage will eventually be introduced in Germany.

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A. Introduction

In a growing number of countries, marriage is now open to same-sex couples. Some countries like France and the United Kingdom[1] have opened marriage through legislation. In Catholic Ireland, the public voted to allow same-sex marriage in a referendum. In the United States, the denial of marriage to same-sex couples was declared unconstitutional by the Supreme Court decision in *Obergefell v. Hodges*.[2]

Germany introduced the *Lebenspartnerschaft*, the registered civil partnership, in 2001. The established understanding of Article 6 (1) of the German Constitution is that it prohibits same-sex marriage, but support of this idea has waned in recent years. On one hand, the *Bundesverfassungsgericht* (German Federal Constitutional Court or BVerfG, FCC) has decided in a number of cases, since 2009, in which it found that the different treatment of registered partners and spouses is unconstitutional. As a result of this line of cases, registered partners and married couples now enjoy nearly all the same rights. On the other hand, inspired by international developments—like *Obergefell v. Hodges* or the European Court of Human Rights' (ECtHR) decision *Oliari v. Italy*[3]—more and more scholars are discussing the introduction of same-sex marriage in Germany. As a next step, the federal legislature in Germany may introduce same-sex marriage. A draft law which suggests opening marriage in the *Bürgerliches Gesetzbuch* (German Civil Code or GCC) for same-sex couples is currently under discussion in the *Bundestag* (the German Federal Parliament, the German equivalent of the US House of Representatives). The draft law was introduced for discussion in the *Bundestag,* which must vote on amendments of the GCC, by the *Bundesrat* (the German legislature which consists of representatives of the *Länder*, the German federal states).[4]

This Article aims at exploring recent developments in Germany following my article "Marriage, Same-Sex Partnership, and the German Constitution," which was published in the German Law Journal in 2012.[5] The focus of this Article is case law of the FCC from 2002 through today, but the Article will also discuss decisions from other courts. After an introduction in Part B to the FCC decision of 2002, which accepted civil partnerships as constitutional, Part C.I will examine the FCC case law following its 2009 decision. While

[1] LOI n° 2013-404 du 17 mai 2013 ouvrant le mariage aux couples de personnes de même sexe [Law 2013-404 of May 17, 2013 on the opening marriage to same-sex couples], JOURNAL OFFICIEL DE LA REPUBLIQUE FRANCAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], May 17, 2013, 8253**;** Marriage (Same Sex Couples) Act of 2013 (Eng).

[2] Obergefell v. Hodges, 135 S. Ct. 2584 (2015).

[3] Oliari v. Italy, App. No. 18766/11, 36030/11 (July 21, 2015), http://hudoc.echr.coe.int/eng?i=001-156265&sa=X&ved=0CDUQ9QEwD2oVChMIwICr1bn2xgIVI75yCh186Qh-#{"itemid":["001-156265"]}.

[4] Regierungsentwurf [Cabinet Draft], BUNDESRAT DRUCKSACHEN 273/15 (Ger.).

[5] *See* Anne Sanders, *Marriage, Same Sex Partnership and the Constitution*, 13 GERMAN L.J. 911 (2012).

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those decisions considered marriage and civil partnership as separate institutions, they demanded equal benefits for both. Part C.II will be dedicated to decisions concerning the rights of same-sex parents and their children. In Part D, the Article concludes with a brief look at the draft law and its chances for success. I will argue that same-sex marriage should, and will, be introduced in Germany. The question is not *if* it will happen, but *when*.

B. Civil Partnership and the Constitution

The *eingetragene Lebenspartnerschaft*, civil or registered partnership,[6] is the legal institution in family law[7] that allows same-sex partners to legalize their union in a public ceremony and obtain roughly the same rights and duties as a married couple. In 2001, a coalition of the Social Democratic Party (SPD) and the Green Party (Bündnis 90/Die Grünen) under Chancellor Gerhard Schröder introduced the civil partnership. Since its drafting, the relationship between this new institution and Article 6 of the Basic Law was in question. Article 6 (1) of the Basic Law protects marriage, the family, and parenthood.[8] It reads:

> Article 6
> (1) Marriage and the family shall enjoy the special protection of the state.
> (2) The care and upbringing of children is the natural right of parents and a duty primarily incumbent upon them. The state shall watch over them in the performance of this duty.
> (3) 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.
> (4) Every mother shall be entitled to the protection and care of the community.
> (5) Children born outside of marriage shall be provided by legislation with the same opportunities for physical

[6] "Civil partnership" is the term used in the United Kingdom. The literal translation of the *eingetragene Lebenspartnerschaft* would be "registered partnership for life."

[7] Bundesverfassungsgericht [BVERFG] [Federal Constitutional Court], July 7, 2009, 1 BvR 1164/07, para. 35, http://www.bundesverfassungsgericht.de/entscheidungen/rs20090707_1bvr116407en.html.

[8] PETER BADURA, KOMMENTAR GRUNDGESETZ art. 6 abs. 1 paras. 40–43 (Theodor Maunz & Günther Dürig eds., 2005).

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> and mental development and for their position in society as are enjoyed by those born within marriage.[9]

Established case law of the BVerfG[10] and the current predominant view of academic commentators[11] define marriage in Article 6 of the Basic Law as a union between a man and a woman. According to this traditional definition of marriage, same-sex partnerships cannot be considered marriages in the sense of Article 6 (1) of the Basic Law even after legal recognition and a public ceremony.[12] This approach considers the civil partnership as being fundamentally different from marriage. When developing the civil partnership, drafting politicians and officials in the Federal Ministry of Justice feared—for good reason—that conservative politicians would reject the institution as an unconstitutional attack on marriage. To secure the consent of both houses of the German parliament, the

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[9] Translation by Professor Christian Tomuschat & Professor David P. Currie. Translation revised by Professor Christian Tomuschat and Professor Donald P. Kommers in cooperation with the Language Service of the German Bundestag, the German house of representatives, see *Basic Law for the Federal Republic of Germany*, DEUTSCHER BUNDESTAG, Dec. 23, 2014, https://www.btg-bestellservice.de/pdf/80201000.pdf

> (1) Ehe und Familie stehen unter dem besonderen Schutze der staatlichen Ordnung.
>
> (2) Pflege und Erziehung der Kinder sind das natürliche Recht der Eltern und die zuvörderst ihnen obliegende Pflicht. Über ihre Betätigung wacht die staatliche Gemeinschaft.
>
> (3) Gegen den Willen der Erziehungsberechtigten dürfen Kinder nur auf Grund eines Gesetzes von der Familie getrennt werden, wenn die Erziehungsberechtigten versagen oder wenn die Kinder aus anderen Gründen zu verwahrlosen drohen.
>
> (4) Jede Mutter hat Anspruch auf den Schutz und die Fürsorge der Gemeinschaft.
>
> (5) Den unehelichen Kindern sind durch die Gesetzgebung die gleichen Bedingungen für ihre leibliche und seelische Entwicklung und ihre Stellung in der Gesellschaft zu schaffen wie den ehelichen Kindern.

Id.

[10] Bundesverfassungsgericht [BVERFG] [Federal Constitutional Court], July 29, 1959, 1 BvR 205/58; Bundesverfassungsgericht [BVERFG] [Federal Constitutional Court], Feb. 28, 1980, 1 BvL 136/78.

[11] ARND UHLE, BECK'SCHER ONLINE KOMMENTAR art. 6 GG paras. 4–5 (Volker Epping & Christian Hillgruber eds., 2015); PETER BADURA, GRUNDGESETZ-KOMMENTAR art. 6 GG para. 4 (Theodor Maunz & Günter Dürig eds., 2012); INGRID SCHMIDT, ERFURTER KOMMENTAR ZUM ARBEITSRECHT art. 6 para. 4 (Rudi Müller-Göge, Ulrich Preis & Ingrid Schmidt eds., 2016).

[12] Bundesverfassungsgericht [BVERFG] [Federal Constitutional Court], Oct. 4, 1993, 47 NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 3058.

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Bundestag and the *Bundesrat* faced a difficult task. Although the government held the majority of seats in the *Bundestag*, the necessary votes in the *Bundesrat*—which were required for some parts of the new law—were more difficult to obtain because many *Bundesländer* (states) were conservative. Therefore, the law introducing the *Lebenspartnerschaft* was split into two parts and only one required the *Bundesrat's* consent.[13] With this move, the government successfully introduced the civil partnership, but the law had not passed full scrutiny. The conservative states of Saxony and Bavaria petitioned the BVerfG to review the constitutionality of the new law. They argued that the legislature was not free to regulate a legal issue in multiple statutes for the sole purpose of avoiding the necessary consent of the *Bundesrat* for all controversial new rules.[14] Moreover, they asserted that the new law violated the institution of marriage and was thus unconstitutional.[15] The word "special" in Article 6 (1) of the Basic Law meant that it granted "special" protection to marriage and that no other union should be granted protection or benefits even remotely like it.[16] Therefore, the legislature had to maintain a distance between marriage and other unions (so called *Abstandsgebot)*.[17]

The government foresaw this argument and had introduced some differences between marriage and civil partnership. Civil partners needed to choose a property regime when registering their partnership. Also, civil partners did not have the right to adopt children. They were also treated as single with respect to inheritance and income tax law and had no rights to survivors' benefits like widow or widower pensions. Finally, the federal legislature, which has competence over family law, allowed the states to assign the conclusion of civil partnerships to private notaries or to the public office responsible for marriage ceremonies (*Standesamt*).[18] These admittedly artificial differences were not sufficient to convince the conservative petitioning states, however. [19]

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[13] Bundesverfassungsgericht [BVERFG] [Federal Constitutional Court] July 17, 2002, 1 BvF 1/01.

[14] *Id.* at 546–48.

[15] *Id.* at 548–49.

[16] *See* PETER BADURA, KOMMENTAR GRUNDGESETZ art. 6 abs. 1 paras. 58 (Theodor Maunz & Günther Dürig eds., 2005). Martin Burgi, *Schützt das Grundgesetz die Ehe vor der Konkurrenz anderer Lebensgemeinschaften?,* DER STAAT 487, 504–05 (2000); Roman Herzog*, Schutz von Ehe und Familie durch die Verfassung*, *in* BITBURGER GESPRÄCHE 15, 16 (Gesellschaft für Rechtspolitik Trier ed., 1988).

[17] The term *"Privilegierungsgebot"* means duty to privilege marriage. Detlef Merten, *Eheliche und nichteheliche Lebensgemeinschaften unter dem Grundgesetz*, *in* FREIHEIT UND EIGENTUM, FESTSCHRIFT FÜR WALTER LEISNER ZUM 70 GEBURSTAG 615, 619 (Josef Isensee & Helmut Lechler eds., 1999). *"Öffnungs-und Bezeichnungsverbot,"* is prohibition to open marriage to other unions or to call other unions marriage are used as well. *See* Walter Pauly*, Sperrwirkungen des verfassungsrechtlichen Ehebegriffs,* 30 NEUE JURISTISCHE WOCHENSCHRIFT 1955, 1956 (1997); Martin Burgi, *Schützt das Grundgesetz die Ehe vor der Konkurrenz anderer Lebensgemeinschaften?,* DER STAAT 487, 502–05 (2000).

[18] Since January 1, 2012, partnership ceremonies are performed in all German Federal States at the *Standesamt.* The last state to change the law was the state of Baden-Württemberg. *See* Gesetz zur Aufhebung des Gesetzes zur

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The BVerfG declared on July 17, 2002 that the legislature was free to regulate one topic in several different statutes to avoid the *Bundesrat's* consent. As long as they respected the formal order of competences and procedures in Article 84 of the Basic Law, the legislature and government were free to craft laws with political considerations in mind.[20]

The BVerfG further held that civil partnership was constitutional because it was different from marriage.[21] Marriage was the lifelong union between a man and woman,[22] but the legislature was free to introduce a legally secured partnership for same-sex couples who could not marry. Marriage was not damaged by the introduction of a partnership not available to heterosexual couples.[23] Civil partnerships were not marriages, but rather legal relationships that did not compete with marriage.[24] The court rejected the opinion that the wording of Article 6 (1) of the Basic Law demanded that a significant distance must be kept between marriage and other relationships. Marriage must not be discriminated against, but the German Basic Law does not require that other relationships be treated worse than marriage:

> On account of the constitutional protection of marriage under Article 6 (1) of the Basic Law, the legislature is not barred from treating marriage more favorably than other ways of life (cf. BVerfGE 6, 55 (76)). But the admissibility of giving favorable treatment to marriage over other ways of life in fulfilling and structuring the requirement to promote it 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. . . . Article 6 (1) of the Basic Law gives favorable treatment to marriage in a constitutional protection granted only to marriage and

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Ausführung des Lebenspartnerschaftsgesetzes vom [Act on the implementation of the Civil Partnership], Dec. 13, 2011, Gesetzblatt für Baden-Württemberg, S. 550.

[19] Bundesverfassungsgericht [BVERFG] [Federal Constitutional Court], July 17, 2002, Decisions of the Bundesverfassungsgericht - Federal Constitutional Court - Federal Republic of Germany: Vol. 5: Family Related Decisions 1957-2010 No. 35, 541, 548–49 (FCC trans. & ed., 2013).

[20] *Id.* at 550–58.

[21] *Id.* at 560–61. The conservative Justice Haas and Chief Justice Papier delivered dissenting opinions at 569–76.

[22] *Id.* at 560.

[23] *Id.* at 562.

[24] *Id.*

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> imposes on the legislature a duty to promote it with the means appropriate to it. But a requirement to treat other ways of life unfavorably cannot be derived from this. The extent of the legal protection and promotion of marriage is in no way decreased if the legal system also recognises [sic] other ways of life that cannot enter into competition with marriage as a community of heterosexual partners. Nor can it be justified constitutionally to derive from the special protection of marriage a rule that such partnerships are to be structured in a way distant from marriage and to be given lesser rights. However, the legislature's duty to protect and promote marriage does require it to ensure that marriage can fulfil [sic] the function accorded it by the Constitution.[25]

Following this decision, the legislature reformed civil partnerships and removed some of the differences between marriage and civil partnerships. Now, parallel rules exist when it comes to matrimonial property, spousal support, and pension rights.

C. Case Law on Civil Partnerships

I. Separate but Equal[26]

After the BVerfG decided that the civil partnership was constitutional but not a marriage, some commentators concluded that civil partners had no constitutional right to be treated like married couples.[27] Because Article 6 (1) requires that the state support and protect marriage, commentators argued that it also justifies the promotion of marriage over other relationships. The portion of the BVerfG's decision cited above supported this opinion.

In its decision of July 7, 2009,[28] however, the BVerfG held that the special protection of marriage in Article 6 (1) of the Basic Law was not enough to justify a privileged treatment of marriage in relation to civil partnerships. The BVerfG addressed this in the context of the

[25] *Id.* at 563.

[26] Michael Grünberger, *Die Gleichbehandlung von Ehe und eingetragener Lebenspartnerschaft im Zusammenspiel von Unionsrecht und nationalem Verfassungsrecht,* 16 FAMILIE PARTNERSCHAFT RECHT 203, 208 (2010).

[27] FRIEDHELM HUFEN, 2 SAATSRECHT II, 268 (2009).

[28] Bundesverfassungsgericht [BVERFG] [Federal Constitutional Court], July 7, 2009, 1 BvR 1164/07, para. 35, http://www.bundesverfassungsgericht.de/entscheidungen/rs20090707_1bvr116407en.html [hereinafter *Judgment of July 7, 2009*].

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disparate treatment of survivors' pensions under an occupational pension scheme for employees in the civil service;[29] the FCC declared such treatment unconstitutional because it violated the right to equal protection under Article 3 (1) of the Basic Law. As marriage and civil partnerships were functionally comparable, the FCC held that "the mere reference to the requirement of protecting marriage did not justify such a differentiation."[30] The FCC stressed the similarities between marriage and civil partnerships:

> The justification of the privileged treatment of marriage, even where it is childless, in particular when it is considered separately from the protection of the family, lies in the responsibility for the partner which is assumed in the long term and which is also legally binding. In this respect, however, there is no difference between registered civil partnerships and marriage. Both are of a permanent nature and create a mutual obligation of support.[31]

The legal rights and duties of civil partners primarily concerns homosexuals.[32] Only substantial reasons could justify differentiating between marriage and civil partnership on the basis of sexual orientation. In this decision, the BVerfG referred to ECtHR's case law that developed a high scrutiny test for differentiations based on sexual orientation.[33] Discrimination made on the basis of sexual orientation paralleled discrimination of gender, language, origin, and race—all of which are forbidden according to Article 3 (3) of the Basic Law.[34] This high level of scrutiny makes sense because victims of discrimination, on these particular bases, have no power to change their characteristics, even if they desired.

The BVerfG applied this approach in a number of decisions. On July 21, 2010, the BVerfG declared the different treatment of civil partners and spouses under inheritance tax law

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[29] *Judgment of July 7, 2009* at para. 35.

[30] *Judgment of July 7, 2009* at para. 105.

[31] *Judgment of July 7, 2009* at para. 102.

[32] *Judgment of July 7, 2009* at para. 92.

[33] Karner v. Austria, App. No. 40016/98, para. 24.7 (2003), http://www.echr.coe.int/ECHR/EN/Header/Case-Law/Decisions+and+judgments/HUDOC+database. For information on the decision`s influence in Germany see Lothar Michael, *Lebenspartnerschaften unter dem besonderen Schutze einer (über-) staatlichen Ordnung Legitimation und Grenzen eines Grundrechtswandels kraft europäischer Integration,* 63 NEUE JURISTISCHE WOCHENSCHRIFT 3537 (2010).

[34] Bundesverfassungsgericht [BVERFG] [Federal Constitutional Court], July 7, 2009, 1 BvR 1164/07, para. 35, http://www.bundesverfassungsgericht.de/entscheidungen/rs20090707_1bvr116407en.html.

unconstitutional,[35] again invoking the reasoning of the 2009 decision. The following suggests that the legislature might differentiate between spouses and civil partners in respect to joint children:

> In its qualification as a starting point for a succession of generations, marriage differs in principle from civil partnerships. Because civil partnerships are limited to same-sex couples[,] joint children in principle cannot come from the relationship. In contrast, marriage, as a bond between heterosexual partners, can be the starting point of their own generational succession. It also is a privileged legal area for building a family based upon multiple statutory provisions, regardless of the freedom of the spouses to choose parenthood.
>
> It need not be dealt with whether the better abstract qualification of marriage as the starting point for generational succession can justify higher exemptions benefitting spouses with a view toward possible further devolution of the family assets to joint children. If the legislature took account of this point in the applicable tax law at all, it did so in any event with a rule that does not sufficiently implement this approach and, thus, also cannot be used as a basis for differing treatment of spouses and civil partners.[36]

On July 18, 2012,[37] the First Senate of the BVerfG declared the different treatment of married couples and civil partners when it comes to real estate transfer tax unconstitutional. This was no surprise given the reasoning in previous decisions. Yet, the court did not again mention "marriage as the starting point for a succession of generations" in this or in following decisions.[38] Instead, in subsequent decisions, the court argued that civil parents can also raise children and provide a stable environment for those children. The paragraph of the 2010 decision on "generational succession" could have

[35] Bundesverfassungsgericht [BVERFG] [Federal Constitutional Court], July 21, 2009, 1 BvR 2464/07, http://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2010/07/rs20100721_1bvr061107en.html [hereinafter *Judgment of July 21, 2009*].

[36] *Judgment of July 7, 2009* at paras. 93–95.

[37] Bundesverfassungsgericht [BVERFG] [Federal Constitutional Court], July 18, 2012, 10 ENTSCHEIDUNGEN DES BUNDERSVERFASSUNGSGERICHTS [BverfGE] 132, 179.

[38] *Judgment of July 21, 2009* at para. 93.

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been an argument planted to justify future distinctions between civil partners and married couples, like a built-in emergency exit for possible future judicial use. The fact that this argument was never used could prove an increasing tolerance of homosexual relationships and families.

Another interesting aspect of the 2012 decision is its retroactive effect. The BVerfG held that, based on the reasoning of the 2002 decision, the legislature should have known that treating married couples and civil partners differently would be unconstitutional.[39] To support this, the BVerfG referred to the part of the 2002 decision quoted above. This quote, however, does not state that married couples and civil partners need to be treated equally, and a number of scholars had previously understood the decision differently.[40] This mistaken understanding was even echoed in a chamber decision of the Second Senate of the BVerfG, which rejected extending family benefits for married civil servants to civil partners.[41] Thus, the BVerfG's reprimand of the legislature was not entirely fair.[42]

On June 19, 2012, the Second Senate declared different treatment of married and partnered civil servants in relation to family benefits unconstitutional. This decision was important insofar as it was the first decision in which the Second Senate took up the case law of the First Senate. After the 2007 chamber decision,[43] it was not certain whether the Second Senate would follow the lead of the First Senate in its 2009 decision. The Second Senate could have asked for a plenary decision or rejected the benefits and done so justifiably by using the 2010 decision that only married couples can be the "starting point of a succession of generations."[44] Instead, the Second Senate expressed the view that both marriage and civil partnerships could offer a secure child-rearing framework.[45] The fact

[39] Bundesverfassungsgericht [BVERFG] [Federal Constitutional Court], July 18, 2012, 10 ENTSCHEIDUNGEN DES BUNDERSVERFASSUNGSGERICHTS [BVERFGE] 132, 179, paras. 57–58.

[40] FRIEDHELM HUFEN, 2 SAATSRECHT II, 268 (2009); Karlheinz Muscheler, *Die Reform des Lebenspartnerschaftsrechts,* 16 FAMILIE PARTNERSCHAFT RECHT 227, 228 (2010); Stefan Muckel, *Zur Frage des Familienzuschlages für Beamte in eingetragener Lebensgemeinschaft*, 41 JURISTISCHE AUSBILDUNG 76 (2009).

[41] Bundesverfassungsgericht [BVERFG] [Federal Constitutional Court], Sept. 20, 2007, NEUE JURISTISCHE WOCHENSCHRIFT 209, 211 (deciding case in first Chamber of the Second Senate).

[42] Anne Sanders, *Auf dem Weg zur Ehe – Lebenspartnerschaften vor dem BVerfG,* 16 FORUM FAMILIENRECHT 391, 394 (2012).

[43] Bundesverfassungsgericht [BVERFG] [Federal Constitutional Court], June 19, 2012, 10 ENTSCHEIDUNGEN DES BUNDERSVERFASSUNGSGERICHTS [BVERFGE] 132, 179, para. 76.

[44] Bundesverfassungsgericht [BVERFG] [Federal Constitutional Court], July 21, 2010, 1 BvR 1164/07, paras. 93–95 http://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2010/07/rs20100721_1bvr061107en.html.

[45] Bundesverfassungsgericht [BVERFG] [Federal Constitutional Court], Sept. 20, 2007, NEUE JURISTISCHE WOCHENSCHRIFT 209, 211 (deciding case in first Chamber of the Second Senate).

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that four out of eight justices of the Second Senate changed viewpoints between 2010 and 2012 may explain this new approach.[46]

Following this decision, the next important decision came as no surprise.[47] On May 7, 2013, the Second Senate declared different treatment of married couples and civil partners under income tax law *(Ehegattensplitting*) unconstitutional. As in previous decisions, Article 3 (1) of the Basic Law was evoked to show that marriage and civil partnerships needed to be treated equally. This decision was especially important because the privileges of married couples under income tax law are substantial. This privilege would allow partners to combine the couples' income, then split it in half, and then calculate the income tax in relation to the two halves. If both partners earn roughly the same amount, this scheme makes no difference. If, however, one partner—namely the homemaker—earns significantly less, a taxpayer saves money in the system of progressive taxation. Critiques view these tax benefits as preserving gender inequality because this system may disincentivize women from entering the workforce.[48]

Such tax benefits can also be seen, however, as the necessary complement of the spousal duty to support each other. If one partner does not earn any money, whether he or she lost his job or was the stay-home parent, the couple lives on one salary. This fact is simply reflected by the income tax benefits. Nonetheless, the legislature could certainly decide its abolishment or reform–for example, in favor of or against tax benefits for families. The BVerfG held that civil partners, just like married couples, decide who should raise children, take care of the home, and earn the family income. Therefore, they should have the same tax benefits married couples enjoy. As held in the 2012 opinion by the First Senate, the decision had a problematic effect, which Justices Landau and Kessal-Wulf criticized in their dissenting opinion.

Grünberger summarized the treatment of civil partnership and marriage in BVerfG case law concisely with the words "separate but equal."[49] Marriage and civil partnership are

[46] Sanders, *supra* note 42, at 392–93.

[47] Johannes Selder, *Das Bundesverfassungsgericht und die Homo-Ehe im Steuerrecht,* 51 DEUTSCHES STEUERRECHT 1064 (2013); Erkan Elden*, Lebenspartnerschaften im Einkommenssteuerrecht,* 19 FAMILIE PARTNERSCHAFT RECHT 262, 264 (2013); Sanders, *supra* note 42, at 392–93.

[48] Margarete Schuler-Harms*, Ehegattensplitting und (k)ein Ende?,* 18 FAMILIE PARTNERSCHAFT RECHT 297 (2012); Frauke Brosius-Gersdorf*, Gleichstellung von Ehe und Lebenspartnerschaft,* 5 FAMILIENRECHT UND FAMILIIENVERFAHRENSRECHT 169, 171 (2013); Ute Sacksofsky*, Steuerung der Familie durch Steuern,* 53 NEUE JURISTISCHE WOCHENSCHRIFT 1896, 1902–03 (2000).

[49] Michael Grünberger, *Die Gleichbehandlung von Ehe und eingetragener Lebenspartnerschaft im Zusammenspiel von Unionsrecht und nationalem Verfassungsrecht,* 16 FAMILIE PARTNERSCHAFT RECHT 203, 208 (2010). Both Professor Grünberger and I are aware that the phrase "separate but equal" has a very loaded meaning in American jurisprudence based on its use in the context of cases like *Plessy v. Ferguson*, 163 U.S. 537 (1896) concerning racial discrimination.

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regulated separately, but BVerfG case law demands equal protection. Using Article 3 (1) of the Basic Law, the BVerfG has extended all protections of Article 6 (1) to civil partners.[50] Several scholars have criticized this extension, suggesting that if the "special protection of marriage" required by Article 6 of the Basic Law was insufficient to justify privileges, marriage's special constitutional protection lacked a foundation.[51] The BVerfG first equalized marriage constitutional protection and then made it wholly obsolete.[52] Marriage, it seemed, was in deep crisis.[53] In the United States, Chief Justice John Roberts and Justice Antonin Scalia claimed the Supreme Court, rather than the United States legislature, improperly introduced same-sex marriage.[54] In Germany, Professor Hillgruber bemoaned abandoning the constitutional protection of marriage by a court's decision rather than the legislature's two-thirds majority, which may have been perceived as being more legitimate.[55]

Contrary to these views, I do not think that same-sex marriage signals a crisis for the institution of marriage. Rather, it shows that while many couples today cohabitate without marrying, same-sex couples deeply value marriage to the extent that they will fight for their right to marry.[56] Politicians should thank same-sex couples for highlighting the importance of marriage rather than perceive their fight for marriage as a crisis. I agree that

[50] Lothar Michael, *Lebenspartnerschaften unter dem besonderen Schutze einer (über-) staatlichen Ordnung Legitimation und Grenzen eines Grundrechtswandels kraft europäischer Integration,* 63 NEUE JURISTISCHE WOCHENSCHRIFT 3537, 3539–42 (2010); Christian Hillgruber, *Anmerkung*, 65 JURISTENZEITUNG 41 (2010).

[51] Hillgruber, *supra* note 50, at 42; Sebastian Hopfner*, Lebenspartnerschaft ist gleich Ehe - Verfassungsinterpretation oder Verfassungsänderung?*, BETRAV 772 (2009); CHRISTIAN VON COELLN, GRUNDGESETZ KOMMENTAR art. 6 para. 50 (Michael Sachs ed., 6th ed. 2011). For a more approving approach, see Lothar Michael, *Lebenspartnerschaften unter dem besonderen Schutze einer (über-) staatlichen Ordnung Legitimation und Grenzen eines Grundrechtswandels kraft europäischer Integration,* 63 NEUE JURISTISCHE WOCHENSCHRIFT 3537 (2010); Claus Dieter Classen, *Der besondere Schutz der Ehe — aufgehoben durch das BVerfG?*, 65 JURISTENZEITUNG 411, 412 (2010); Claus Dieter Classen, *Die Lebenspartnerschaft im Beamtenrecht*, 16 FAMILIE PARTNERSCHAFT RECHT 200 (2010); Tilman Hoppe, *Die Verfassungswidrigkeit der Ungleichbehandlung von Ehe und eingetragener Lebenspartnerschaft im Bereich der betrieblichen Hinterbliebenenrente (VBL),* 124 DEUTSCHES VERWALTUNGSBLATT 1516 (2009).

[52] Günter Krings*, Vom Differenzierungsgebot zum Differenzierungsverbot — Hinterbliebenenversorgung eingetragener Lebenspartner*, 30 NEUE ZEITSCHRIFT FÜR VERWALTUNGSRECHT 26 (2011); Jörn Benedict*, Die Ehe unter dem besonderen Schutz der Verfassung - Ein vorläufiges Fazit,* 68 JURISTENZEITUNG 477, 486 (2013); Gunther Gade and Christoph Thiele, *Ehe und eingetragene Lebenspartnerschaft: Zwei namensverschiedene Rechtsinstitute gleichen Inhalts?,* 67 DIE ÖFFENTLICHE VERWALTUNG 142, 151 (2013).

[53] Jörn *Benedict, Die Ehe unter dem besonderen Schutz der Verfassung — Ein vorläufiges Fazit,* 68 JURISTENZEITUNG 477, 481–86 (2013).

[54] Obergefell, 135 S. Ct. 2584.

[55] Hillgruber, *supra* note 50.

[56] Justice Anthony Kennedy expressed a comparable view in *Obergefell* on page 28 of his opinion.

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Article 6 (1) of the Basic Law can certainly justify privileges given to married couples. Nevertheless, the decisions of the BVerfG have been correct. The court failed to recognize that civil partnership is essentially marriage in the constitutional sense and is thus already protected by Article 6 (1) of the Basic Law. Therefore, giving married couples privileges civil partners do not receive is a discrimination against couples already protected by Article 6 (1).[57] This, however, also suggests that marriage must be opened to same sex couples in order to end the regulation of marriage in the sense of Article 6 (1) in two separate institutions, marriage in the GCC and civil partnership. Even if civil partners have (almost) equal rights now, they are discriminated against because their union is regulated in an institution separate from marriage.

II. Same-Sex Parents and Their Children

1. Parenthood and Adoption

The right of same-sex couples to adopt children is a divisive and debated issue that the BVerfG has addressed. At the time this Article is written, in early 2016, civil partners in Germany cannot adopt a child jointly as a couple in the same manner as married couples. Like everybody else, same-sex individuals can still adopt a child on their own if they can convince the adoption office that they will make good parents. In *E.B. v. France*, the ECtHR held that denying adoption to prospective homosexual parents would violate their human rights under Article 14 and Article 8 of the ECtHR.[58]

Often, one partner's children from a previous relationship live with the same-sex couple. The legislature has granted the parent's civil partner the same limited rights of a spouse to make everyday decisions for the child, especially in emergency situations, under Section 9 (1) and (2) of the Civil Partnership Act (*Lebenspartnerschaftsgesetz*). A civil partner may also adopt this "step-child" under Section 9 (7) of the Civil Partnership Act. Before the BVerfG's decision in 2013, this kind of adoption was impossible if the child was first adopted by the other parent rather than born to that parent. The German adoption law, Section 1742 of the GCC, forbids secondary adoption if the first adoption is valid in order to avoid a "passing on" of adopted children from one person to another.[59] This ban on

[57] Sanders, *supra* note 5, at 930–39.

[58] E.B. v. France, App. No. 43546/02, paras. 77–98 (Jan. 22, 2008), http://hudoc.echr.coe.int/eng#%7B%22appno%22:[%2243546/02%22]%7D; Bundesverfassungsgericht [BVERFG] [Federal Constitutional Court], Feb. 19, 2013, 1 BvR 3247/09, para. 81, http://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2013/02/ls20130219_1bvl000111en.html.

[59] For the reasoning accompanying the draft of section see DEUTSCHER BUNDESTAG: DRUCKSACHEN [BT] 7/3061; Bundesverfassungsgericht [BVERFG] [Federal Constitutional Court], Feb. 19, 2013, 1 BvR 3247/09, para. 77 http://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2013/02/ls20130219_1bvl000111en.html [hereinafter *Judgment of Feb. 19, 2013*].

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successive adoption always included an exception for married couples, because in their case, the adoption by the second spouse did not cause a "passing on of the child". Quite the opposite: If the adoptive parent's spouse also adopted the child, the child had two parents rather than one. There was no such exception for civil partners. While spouses were free to adopt the adopted child of their wife or husband, civil partners could not adopt their partner's child.

On February 19, 2013, the BVerfG held that distinguishing between adopted and biological children, as well as between civil partners and spouses, discriminates against civil partners and their children.[60] The legislature decided in favor of adoption by a homosexual step-parent and preempted the argument that growing up with homosexual parents was inherently harmful. To support this conclusion, the available data showed no evidence that children in same-sex families failed to thrive. A child whose adopted parent had concluded a civil partnership already lived in a family with homosexual parents. Adoption by the other parent would only benefit the child because the child could then receive rights to maintenance and rights in succession for both partners. Adoption in Germany completely extinguishes all connections between an adopted child and his or her genetic parents (see Section 1755 GCC). Thus, a child who is adopted by one person has only one legally recognized parent. Adoption by the stepparent logically provides a second legal parent for children who previously had only one legal parent.

As with other decisions conferring rights on civil partners, the BVerfG based its 2013 decision on Article 3 (1) of the Basic Law, which provides the right of equal protection. The court also held that same-sex couples living with a child are protected as families under Article 6 (1) of the Basic Law irrespective of the legal parenthood of both adults.[61]

The court denied a violation of Article 6 (2) of the Basic Law, the right of parenthood, but discussed the question of whether same-sex couples could be parents protected under Article 6 (2) of the Basic Law. The BVerfG confirmed the established case law by holding that Article 6 (2) of the Basic Law protected both legally recognized and biological parents. Professor Jestaedt had argued that by referring to the "natural" right of parents, Article 6 (2) of the Basic Law defined parents as only one man and one woman.[62] Indeed, in a 2003 decision, the BVerfG held that while Article 6 (2) of the Basic Law could protect two fathers, the legal father and the biological father, the holder of parental rights under Article 6 (2) could be only one father and one mother. The court's English translation stated that "[t]he very fact that a child can have only two parents leads to the conclusion

[60] *Judgment of Feb. 19, 2013* at para. 52.

[61] *Judgment of Feb. 19, 2013* at paras. 40–43.

[62] Matthias Jestaedt, *Elternschaft und Elternverantwortung unter dem Grundgesetz*, *in* FESTSCHRIFT FÜR RICHARD BARTLSPERGER ZUM 79, 88–92 (Geis & Umbach eds., 2006).

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that the legislature creating the constitution intended to give the parental rights for a child to two parents."[63] It should be noted, however, that the court's English translation is unclear. In German, the text of the article reads "dass ein Kind nur von einem Elternpaar abstammen kann." "Abstammen" means not only "to have," but in this context, "to descend from." The translation should read that a child "can only descend from two (biological) parents." Therefore, the 2003 holding spoke only about a child's biological parents and said nothing, directly, about same-sex parents. Therefore, in 2013, the BVerfG clearly did not feel bound by previous decisions like its 2003 judgment.

The 2013 BVerfG decision recognized that same-sex couples can be parents when both are legally recognized, such as when a partner of a parent adopts her partner's child.[64] Once same-sex couples were legally recognized, they became legally protected parents under Article 6 (2) of the Basic Law similar to other parents. The Basic Law does not mention "mother and father," but instead speaks of "parents."[65] People holding parental rights, guaranteed in the first sentence of Article 6 (2) of the Basic Law, were not parents as a mixed-sex unit, but were individual parents in their own right, irrespective of gender.[66] Neither previous opposition against homosexuality—which could still be prosecuted as a criminal offense at the Basic Law's drafting—nor the fact that a homosexual couple could not biologically be the child's parents precluded recognition of same-sex parents.[67] The court further argued that the constitution granted parental rights in the interests of the children. Because no person or institution cared as much about children as their parents, the constitution protected the rights of parents against the state in the interests of children. For this protection, the sex of the parents was immaterial.[68] The BVerfG clarified its 2003 decision in 2013 by saying that it had not focused on excluding same-sex parents, but rather on limiting parental responsibility to a particular number of people to prevent role conflicts.[69] No right to legal recognition, however, followed from the fact that same-sex partners could be parents. Article 6 (2) of the Basic Law did not provide a right to become the legal parents of a child simply to turn the social connection between the

[63] Bundesverfassungsgericht [BVERFG] [Federal Constitutional Court], Apr. 9, 2003, 40 ENTSCHEIDUNGEN DES BUNDERSVERFASSUNGSGERICHTS [BverfGE] 642, 652, Decisions of the Bundesverfassungsgericht – Federal Constitutional Court – Federal Republic of Germany, Vol. 5: Family Related Decisions 1957–2010 (FCC trans. & ed., 2013).

[64] Judgment of Feb. 19, 2013; Jestaedt argued that by referring to the "natural" right of parents, Article 6 (2) of the Basic Law could only allow mixed-sex parents as shown in Jestaedt's work. *See* Jestaedt, *supra* note 62, at 88–92.

[65] *Judgment of Feb. 19, 2013* at para. 51.

[66] *Judgment of Feb. 19, 2013* at paras. 50–51.

[67] *Judgment of Feb. 19, 2013* at para. 49.

[68] *Judgment of Feb. 19, 2013* at para. 49.

[69] *Judgment of Feb. 19, 2013* at para. 52.

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parent's partner and her child into legal parenthood. Therefore, the fact that the civil partner of the parent lived in a family with her partner and the child gave her no constitutional claim to adoption. Thus, Article 6 (2) had not been violated[70]

With respect to the child, the court developed a new fundamental right. According to the 2013 decision, Article 2 (1), read in conjunction with the first sentence of Article 6 (2) of the Basic Law, grants the child a right against the state to guarantee parental care and education (*"Recht auf staatliche Gewährleistung elterlicher Pflege und Erziehung.)"*[71] Justice Gabriele Britz, the court's expert on family law cases who likely drafted the decision, elaborates upon the new right in an academic article.[72] She suggests that when a public institution removes a child from his or her parents, not only does it infringe parental rights according to Article 6 (2), but also children's rights to have parents take care of and support them in their development. In that sense, a child's rights to state-guaranteed parental care and education is a classic fundamental right that prohibits government interference with one's personal life. Moreover, the child's right to state guaranteed parental care and education creates an affirmative duty on the state to act. If a child's parents struggle to care of their child, the state may bear the duty to support the parents. If a child has no parents, the government can be under a duty to allow other people to become the child's parents. Thus, the legislature's decision not to allow an adoption by the adopted parent's same-sex partner affected children's rights. But, if an adopted child already has one parent—the adopted parent—the legislature's decision not to allow the other partner to adopt the child was not a violation of this duty.[73]

The exclusion of the adoptive parent's civil partner from adoption, however, violated equal protection rights of both the adopted child and the civil partner under Article 3 (1) of the Basic Law. Unlike the adoptive child of a married couple, or the biological child of a civil partner, the child could only have one parent. The child already lived in a family of two same sex parents, but only had the right to be supported, inherit from, and cared for by one partner. Civil partners were treated differently simply because the child they wanted to adopt was the adopted, rather than the biological, child of their partner.[74]

The court's decision was foreseeable. During oral arguments, the government's representatives showed so little enthusiasm to defend the law that one of the Justices

[70] *Judgment of Feb. 19, 2013* at para. 52.

[71] *Judgment of Feb. 19, 2013* at paras. 40–43.

[72] Gabriele Britz, *Das Grundrecht des Kindes auf staatliche Gewährleistung elterlicher Pflege und Erziehung—jüngere Rechtsprechung des Bundesverfassungsgerichts*, 69 JURISTEN ZEITUNG 1069 (2014).

[73] *Judgment of Feb. 19, 2013* paras. 40–43.

[74] *Judgment of Feb. 19, 2013* paras. 40–43.

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reprimanded the representative's performance. The judgment became a land-mark decision in the rights of parents and children, whether they live in a same-sex family or a more traditional family.

The court has not yet addressed the issue of same-sex joint adoption. On January 23, 2014,[75] the BVerfG declared a number of applications on joint adoption inadmissible. The possibility to adopt through successive adoptions still allows same-sex partners to nevertheless assume joint responsibility of a child.

2. Surrogacy

Many same-sex couples consider surrogacy a means to having a child biologically related to at least one of the partners. Therefore, a recent decision of the FCJ is of particular importance in this context.[76] German law prohibits surrogacy.[77] Parentage law in Germany defines the woman who gives birth to the child as the child's mother.[78] A doctor who transfers an embryo to a woman willing to give up her child as part of a surrogacy agreement[79] or a person who arranges surrogacy agreements,[80] commits a criminal offense. Because an increasing number of couples enter into surrogate agreements abroad, a question arises on what law applies to judge the legality of parents of children born abroad

[75] Bundesverfassungsgericht [BVERFG] [Federal Constitutional Court], Jan. 23, 2014, 69 ZEITSCHRIFT FÜR DAS GESAMTE FAMILIENRECHT 537.

[76] Bundesgerichtshof [BGH] [Federal Court of Justice] Dec. 10, 2014, NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 479 (2015).

[77] *See* Nina Dethloff, *Leihmütter, Wunscheltern und ihre Kinder,* 69 JURISTEN ZEITUNG 922 (2014); Tobias Helms, *Reproduktionsmedizin und Abstammungsrecht: Hat Deutschland die internationale Entwicklung verpasst?* 19 FORUM FAMILIENRECHT 234 (2015); Tobias Helms, *Leihmutterschaft, ein rechtsvergleichender Überblick,* 66 DAS STANDESAMT 114 (2013); CHRIS THOMALE, MIETMUTTERSCHAFT (2015); Bettina Heiderhoff, *Rechtliche Abstammung im Ausland geborener Leihmutterkinder*, 67 NEUE JURISTISCHE WOCHENSCHRIFT 2673 (2014); KONRAD DUDEN, LEIHMUTTERSCHAFT IM INTERNATIONALEN PRIVATRECHT 151 (2015); Paul Lagarde, *Die Leihmutterschaft: Probleme des Sach- und des Kollisionsrechts,* 23 ZEITSCHRIFT FÜR EUROPÄISCHES PRIVATRECHT 233 (2015); Claudia Mayer, *Ordre public und Anerkennung der rechtlichen Elternschaft in internationalen Leihmutterschaftsfällen,* 78 RABLES ZEITSCHRIFT FÜR AUSLÄNDISCHES UND INTERNATIONALES PRIVATRECHT 551 (2014); Herbert Grziwotz, *Kinderwunscherfüllung durch Fortpflanzungsmedizin und Adoption,* 1 NEUE ZEITSCHRIFT FÜR FAMILIENRECHT 1065 (2014); Hartmut Kreß, *Samenspende und Leihmutterschaft,* 19 FAMILIE PARTNERSCHAFT RECHT 240 (2013); Andreas Bernard, *Samenspender, Leihmütter, Retortenbabies: Neue Reproduktionstechnologien und die Ordnung der Familie*, 66 DAS STANDESAMT 136 (2013); Rolf Wagner, *Abstammungsfragen bei Leihmutterschaften in internationalen Sachverhalten,* 65 DAS STANDESAMT 294 (2012); ROLAND ZIMMERMANN, REPRODUKTIONSMEDIZIN UND GESETZGEBUNG (2012); MICHAELA LEHMANN, DIE IN-VITRO-FERTILISATION UND IHRE FOLGEN (2007); ULRIKE WANITZEK, RECHTLICHE ELTERNSCHAFT BEI MEDIZINISCH UNTERSTÜTZTER REPRODUKTION (2002).

[78] BURGERLICHES GESETZBUCH [BGB] [Civil Code], § 1591.

[79] EMBRYONENSCHUTZGESETZ [Embryo Protection Act], § 1(1).

[80] ADOPTIONSVERMITTLUNGSGESETZ [Adoption Law], § 13(c).

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concerning agreements which are valid and legal in another country. Another question in this context is if a judgment of a court in another country recognizing the commissioning parents as the child's legal parents can be recognized in Germany. On December 10, 2014, the Federal Court of Justice (*Bundesgerichtshof*), FCJ, the supreme appellate court for the interpretation of civil and criminal law) held that such a foreign judgment may be recognized in Germany when one of the parents is genetically related to the child.[81] The case concerned a same-sex couple living in a civil partnership in Berlin who entered into a surrogacy agreement with a Californian woman, where surrogacy agreements are considered valid.[82] The decision recognized both partners as the legal parents of their child in Germany. Although the decision did not change the law of surrogacy in Germany, it signifies a change in the German attitude towards surrogacy. Previously, courts and academic commentators felt that recognizing such a decision would violate the *ordre public* and thus the fundamental principles of German law.[83] The 2014 decision has changed this view.[84]

3. Co-Motherhood

Egg donation makes it possible for different women to be the respective genetic and birth mother of a child. This allows both partners in a lesbian couple to establish a connection with their child. According to German family law, however, only the birth mother is considered the child's mother (Section 1591 GCC). The genetic mother cannot contest the birth mother's motherhood and, if she wants to become the child's mother, she must adopt the child.[85] The FCJ took this position in the 2014[86] surrogacy decision, and the Court

[81] Bundesgerichtshof [BGH] [Federal Court of Justice] Dec. 10, 2014, NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 479 (2015) [hereinafter *Judgment of Dec. 10, 2014*]; For case notes on the decision see Tobias Helms, *Anmerkung zur Entscheidung des BGH, Beschluss vom 10.12.2014, XII ZB 463/12* 62 ZEITSCHRIFT FÜR DAS GESAMTE FAMILIENRECHT 245 (2015); Dieter Henrich, *Leihmütterkinder: Wessen Kinder? zu BGH, 10.12.2014 - XII ZB 463/13,* 35 PRAXIS DES INTERNATIONALEN PRIVAT- UND VERFAHRENSRECHTS 229 (2015); Jürgen Soyka, *Anmerkung zu einer Entscheidung des BGH, Beschluss vom 10.12.2014 (XII ZB 463/13) – Zur Anerkennung eines ausländischen Leihmutterschaftsvertrags bei eingetragener Lebenspartnerschaft*, 26 FAMILIE UND RECHT 227 (2015); Claudia Meyer, *Verfahrensrechtliche Anerkennung einer ausländischen Abstammungsentscheidung zugunsten eingetragener Lebenspartner im Falle der Leihmutterschaft,* 68 DAS STANDESAMT 33 (2015); Christian Schall, *Anmerkung zum Beschluss des BGH vom 10.12.2014 (XII ZB 463/13) - Zur Anerkennung ausländischer Gerichtsentscheidungen zur rechtlichen Verwandtschaft,* 110 DEUTSCHE NOTAR-ZEITSCHRIFT 306 (2015); Finn Zwißler, *Anmerkung zur Entscheidung des BGH vom 10.12.2014 (Az: XII ZB 463/13),* 3 NEUE ZEITSCHRIFT FÜR FAMILIENRECHT 118 (2015); for a case note in English see Susanne L Gössl, *The recognition of a "Judgement of Paternity" in a case of cross-border surrogacy — Commentary to BGH, 10 December 2014, Az. XII ZB 463/13*, 7 CUADERNOS DEL DERECHO TRANSNACIONAL 7 (2015).

[82] *Judgment of Dec. 10, 2014* at 480.

[83] Kammergericht Berlin, Aug., 1, 2013, 1 W 413/12, para. 20–21; CHRIS THOMALE, MIETMUTTERSCHAFT 41–51 (2015).

[84] Nina Dethloff, *Leihmütter, Wunscheltern und ihre Kinder,* 69 JURISTEN ZEITUNG 922 (2014).

[85] *Id.* at 930.

[86] *Judgment of Dec. 10, 2014* at para. 35.

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of Appeal of Cologne ruled similarly in a March 26, 2015 decision.[87] In the Court of Appeal of Cologne case, a lesbian couple, living in a registered partnership, travelled to Belgium where the egg of one partner was fertilized with a donor's sperm. The other partner was impregnated, carried, and gave birth to the child and was thus considered the mother under German law. The couple failed to have the genetic mother registered as a co-mother. Both women argued that German family law discriminated against the genetic mother, especially because the law recognized a genetic father.

The Court of Appeal held that there was no discrimination because German law demanded that there be only one father and one mother, even if the child was genetically related to the other woman.[88] In a same-sex relationship, the child could only be related to one partner. The BVerfG had held that the legislature had discretion to determine the best solution regarding parenthood. In this case, the sole solution for joint parenthood was adoption[89] and any other possible solution would have to be introduced by the legislature.[90] These decisions show that although German family law is developing, many questions remain unanswered, especially those concerning same-sex partnerships and parenthood. German rules of parenthood need to be discussed fundamentally, especially in light of the fact that today more than one father and one mother can be connected to a child.

D. What Now, My Love?

This Article depicts recent case law in relation to civil partnerships. Similar to how United States Supreme Court case law developed from *Bowers v. Hardwick*[91] to *Lawrence v. Texas*[92] to *Obergefell v. Hodges*,[93] German decisions have built on one another and show increasing tolerance of same-sex couples. Civil partnerships now hold rights nearly equal to those enjoyed by married couples. Leaving joint adoption aside, the remaining primary differences between marriage and civil partnership are in their names and prestige. Given BVerfG case law developments and growing public tolerance of homosexual couples in Germany, the question of whether marriage in the German Civil Code could and should be

[87] Oberlandesgericht [OLG] [Court of Appeal of Cologne] Mar. 26, 2015, Case No II-14 UF 181/14.

[88] Oberlandesgericht [OLG] [Court of Appeal of Cologne] Mar. 26, 2015, Case No II-14 UF 181/14. para. 14 (referring to the Judgment of Dec. 10, 2014).

[89] *Id.* para. 16.

[90] *Id.* para. 20.

[91] 478 U.S. 186 (1986).

[92] 539 U.S. 558 (2003).

[93] Obergefell v. Hodges, 135 S. Ct. 2584 (2015).

opened to same-sex couples is prompting more and more discussion. The majority of public law professors still argue that opening marriage to same-sex couples would violate the constitution. Those scholars argue that marriage according to Article 6 (1) of the Basic Law can, as the BVerfG still holds, be only a union between a man and a woman. Yet an increasing number of scholars, including Professor Brosius-Gersdorf, argue that Article 6 (1) does not define the gender of partners.[94] While the legislature could not abandon the spouses' duty to support each other, the legislature is free to open marriage to same-sex couples. If the government and legislature would follow this line of thinking, marriage could be opened. There is a chance—even though not a real one—that this could happen.

On June 5, 2015, the federal states of Rheinland-Pfalz, Baden-Württemberg, Schleswig-Holstein, and Thüringen introduced a draft law in the *Bundesrat* which would open marriage for same-sex couples in the German Civil Code.[95] The draft argues that the meaning of "marriage" in the constitution has changed. On September 25, 2015, the *Bundesrat* finally agreed on the proposed law and passed it on to the *Bundestag* for discussion and vote. In their statements, politicians from Rheinland-Pfalz, Niedersachsen, and Hamburg urged the other states to catch up to international developments and bring the law in line with reality. They relied on polls which found that seventy percent of the German population supports same-sex marriage.[96] By the end of 2015, nine of the sixteen *Länder* already supported the draft: Rheinland-Pfalz, Baden-Württemberg, Schleswig-Holstein, Thüringen, Brandenburg, Bremen, Hamburg, Niedersachsen, and Nordrhein-Westfalen.

The proposed law primarily suggests a change to the first sentence of Section 1353 (1) GCC. The first paragraph of the section now reads: "(1) Marriage is entered into for life. The spouses have a mutual duty of conjugal community; they are responsible for each other."[97] The proposed law suggests changing the section to read: "Marriage is entered into by two persons of mixed or the same[-]sex for life. The spouses have a mutual duty of conjugal community; they are responsible for each other."[98] Moreover, a new Section 20a

[94] FRAUKE BROSIUS-GERSDORF, GRUNDGESETZ KOMMENTAR art. 6, 81, 83 (Horst Dreier ed., 3d ed. 2013).

[95] Regierungsentwurf [Cabinet Draft], BUNDESRAT DRUCKSACHEN 273/15; For another draft law which would have granted more rights to civil partners and transsexuals was introduced by the opposition in 2014 in the Bundesrat unsuccessfully see Regierungsentwurf [Cabinet Draft], DEUTSCHER BUNDESTAG: DRUCKSACHEN [BT] 18/3031.

[96] *See Sitzung des Bundesrates*, BUNDESTRAT, Sept. 25, 2015, https://www.bundesrat.de/SharedDocs/TO/936/tagesordnung-936.html?nn=4732016#top-10 (showing videos of the debate).

[97] *See German Civil Code (BGB),* BUNDESMINISTERIUM DER JUSTIZ UND FÜR VERBRAUCHERSCHUTZ, http://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html#p4832 (last visited May 31, 2016). Translation was provided by the Langenscheidt Translation Service. Translation regularly is updated by Neil Mussett and most recently by Samson Übersetzungen GmbH, Dr. Carmen v. Schöning.

of the Civil Partnership Act would allow civil partners to change their civil partnership into a marriage through mutual consent of the partners.[99]

If this draft would be successful, the constitutionality of the new law would likely be challenged before the BVerfG, possibly by the state of Bavaria, which already voted against the draft in the *Bundesrat*. In such an event, the BVerfG would have to, once again, decide on same-sex partnerships under Article 6 (1) of the Basic Law. Given the recent developments, the BVerfG would probably not declare such a new law on marriage unconstitutional even though this would demand a change to its previous case law. There are, I believe, strong arguments which would allow the BVerfG to justify such a decision.[100]

A change to the constitution, which requires a two-third majority in the *Bundestag* and *Bundesrat*, is unlikely. Moreover, the wording of Article 6 (1) of the Basic Law would be difficult to improve. Wording like "[m]arriage, concluded between two partners of opposite or the same-sex, and family is under the special protection of the state" would be less elegant. I suggest, however, that a change of the constitution would not be needed to change the GCC. Adjusting the constitution first would, however, have the advantage of giving clear democratic support to a change in marriage law in the GCC.

As much as I wish the legislature would make such a bold step, at the moment, this is highly unlikely. The current ruling coalition as of early 2016 includes Angela Merkel's Christian Democratic Union (CDU) and the social democrats (SPD). While the opposition favors the strengthening of same sex couples, the CDU and especially their strong, conservative Bavarian sister party, the Christian Social Union (CSU) does not. The refugee crisis has also put great pressure on the government and on Angela Merkel. While I doubt that Angela Merkel would have a problem with same-sex marriage personally, she will not invest political capital in a fight over it. On November 20, 2015, the ruling coalition passed a law in the *Bundestag* which removes most of the remaining differences between civil partners and spouses (not including joint adoption).[101] While sticking to the distinction between civil partnership and marriage, the new law removes discriminations which could be challenged before the BVerfG. If the coalition had wanted to introduce same sex marriage, it would probably not have passed this law but rather joined forces with the

[98] Regierungsentwurf [Cabinet Draft], BUNDESRAT DRUCKSACHEN 273/15, 2. For a more detailed discussion of the draft, see Anne Röthel, *Öffnung der Ehe – wenn ja: wie?* 62 ZEITSCHRIFT FÜR DAS GESAMTE FAMILIENRECHT 1241 (2015).

[99] Regierungsentwurf [Cabinet Draft], BUNDESRAT DRUCKSACHEN 273/15, 2.

[100] *See e.g.*, FRAUKE BROSIUS-GERSDORF, GRUNDGESETZ KOMMENTAR art. 6, 74–83 (Horst Dreier ed., 3d ed. 2013).

[101] Gesetz zur Bereinigung des Rechts der Lebenspartner v. 20.11.2015, BGBl 2010 (2015), see for the draft law Regierungsentwurf [Cabinet Draft], DEUTSCHER BUNDESTAG: DRUCKSACHEN [BT] 18/5901. For the September 29, 2015 debate, see BT-Prot 18/124, 12091–98.

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draft of the *Bundesrat*. The draft law of the *Bundesrat* was formally introduced in the *Bundestag* on November 11, 2015 is still up for a vote.[102] It could wait some time for it.

Although it would be preferable if the democratically-elected legislature were to officially recognize same-sex marriage, the BVerfG could also introduce same-sex marriage. The BVerfG could, as in the United States, demand the introduction of same-sex marriage through a judgment. The BVerfG could take the view that both civil partnerships and marriages regulated in the German Civil Code are marriages in the constitutional sense protected by Article 6 (1) of the Basic Law. This is the view I have taken previously in the German Law Journal.[103] Because both civil partnership and marriage are constitutionally the same, regulating one under a different name could be regarded as discrimination. Introducing an "old age partnership" for couples over 60 years of age, or a "double-income-no-kids partnership" for young professionals who care for their career and not for children, instead of marriage, would be constitutionally problematic. It remains to be seen if this view will find a majority vote in the court soon. I am certain that the legislature or the court will extend marriage to same-sex couples sooner or later. The question is not if, but when.

[102] As a document of the Bundestag, it now is cited as Regierungsentwurf [Cabinet Draft], DEUTSCHER BUNDESTAG: DRUCKSACHEN [BT] 18/6665.

[103] *See also* FRAUKE BROSIUS-GERSDORF, GRUNDGESETZ KOMMENTAR art. 6, 83 (Horst Dreier ed., 3d ed. 2013); Sanders, *supra* note 5, at 925–40; Kai Möller, *Der Ehebegriff des Grundgesetzes und die gleichgeschlechtliche Ehe*, 58 DIE ÖFFENTLICHE VERWALTUNG 64, 65 (2005).

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