Marriage Equality: Legal Protection of Homosexual Couples from the Point of View of German Constitutional Law**

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I. Introduction

In Japan, discussions have emerged on whether to allow homosexual couples to marry including the question on whether this would be a task for the legislature[1] or the judiciary[2]. Against this background, the following article aims to explain the legal situation in Germany and discuss the relevant arguments under German Constitutional Law in order to add some material that could be helpful for the discussion in Japan.

II. Registered civil partnership and its constitutionality

1. The law

In 2001, the German legislature created registered civil partnership (eingetragene Lebenspartnerschaft) in order to give homosexual couples the possibility of having their relationship legally recognized.[3] This partnership was on the one hand comparable to traditional civil marriage between a man and a woman in that it was concluded between two partners on principle for the rest of their lives by mutual declaration before the relevant authority.[4] Each partner was considered part of the other partner's family.[5] They owed each other maintenance[6] and could inherit from each other[7]. Like a civil marriage between a man

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1) https://www.nbcnews.com/feature/nbc-out/japanese-mp-floats-idea-revising-constitution-allow-gay-marriage-n1062636.

2) https://mainichi.jp/english/articles/20200305/p2a/00m/0na/006000c; https://mainichi.jp/english/articles/20190905/p2a/00m/0na/023000c.

3) BGBl. [Federal Law Gazette, part] I 2001, p. 266 et seqq. The Federal Law Gazette is available here: https://www.bgbl.de.

4) § 1 para. 1 of the Gesetz über die eingetragene Lebenspartnerschaft (Lebenspartnerschaftsgesetz – LPartG), l.c. (footnote 3). German (federal) laws are available here: http://www.gesetze-im-internet.de.

5) § 11 LPartG.

6) §§ 5, 12, 16 LPartG.

7) § 10 LPartG.

and a woman, the partnership could also only be dissolved by a court judgment.[8] On the other hand it was not referred to as "marriage", the provisions of the Civil Code on marriages did not apply directly,[9] and some differences continued to exist that led to further proceedings before the German Federal Constitutional Court as will be described below (see III.).

2. The judgment of the German Federal Constitutional Court confirming the constitutionality of the law

As the constitutionality of this law was contested, proceedings were introduced before the German Federal Constitutional Court, which gave its judgment on July 17, 2002.[10] In its (majority[11]) decision, the Court confirmed the constitutionality of the law and especially its compatibility with the special protection of the state enjoyed by marriage and the family under Article 6 Paragraph 1 of the constitution[12] [13].

In its reasons, the Court stated that marriage in the sense of this article is a union of a man and a woman.[14] As the article therefore does not protect homosexual couples, the Court had thus to rule on the question of whether marriage between a man and a woman is affected by legally recognizing homosexual couples as well by offering them an institution different from marriage. In doing so, the Court had to consider that Article 6 Paragraph 1 offers protection in three different ways: The article contains, first, a basic right that shields against interferences (Abwehrrecht). Additionally, it comprises an institutional guarantee (Institutsgarantie), and, finally, it reveals a value decision (objektive Wertentscheidung).[15]

The Court did not see any interference with the basic right as the law did not make anybody abstain from marrying.[16] Additionally it also did not find any violation of the institutional guarantee: This guarantee, which ensures that marriage as a legal institution continues to exist, only relates to this specific union. As the registered civil partnership did not deal with marriage, it did not concern marriage as an institution.[17]

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8) § 15 para. 1 LPartG.

9) Yet the law stipulated that some of the provisions governing marriage should apply *mutatis mutandis* to registered partnerships, see § 5 sentence 2, § 6 para. 2 sentence 4, § 7 para. 1 sentence 3, § 8 para. 1 sentence 2 and para. 2, § 9 para. 1 sentence 2, § 10 para. 4 sentence 2, para. 5, para. 6 sentence 2 and para. 7, § 12 para. 2 sentence 2, § 16 para. 2 sentence 2. See also § 18 para. 3 and § 19 sentence 1 for further references to provisions applicable to marriages.

10) BVerfGE [Rulings of the German Federal Constitutional Court, volume] 105, [the decision starts at page] 313. Rulings of the Federal Constitutional Court are available here: https://www.bundesverfassungsgericht.de.

11) BVerfGE 105, 313, 357.

12) An English translation of the German Constitution (Grundgesetz – GG) can be found here: http://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html.

13) BVerfGE 105, 313, 314, 331, 342 et seqq.

14) BVerfGE 105, 313, 342, 345.

15) For all three aspects, see BVerfGE 105, 313, 342.

16) BVerfGE 105, 313, 342 et seq.

17) For the whole aspect, see BVerfGE 105, 313, 344 et seqq. Note the dissenting opinions of Judges Papier, BVerfGE 105, 313, 357 et seqq., and Haas, BVerfGE 105, 313, 359 et seqq.

When it comes to the value decision, marriage must first not be impaired. However, the Court could not see any impairment as marriage was not brought by the new partnership to a position worse than before legal recognition of their partnership was available for homosexual couples. Additionally, married couples were not discriminated against compared to the homosexual couples.[18)]

Yet, to honor the value decision it is not enough not to impair marriage; the state is also obliged to promote it.[19)] In that respect, the Court first observed that the introduction of the registered civil partnership did not reduce the promotion of marriage by the state.[20)] However, the question remained whether promotion additionally implies an obligation on the state to privilege marriage compared to other partnerships in the sense that it *obliges* the state to discriminate against the latter ones.

In order to answer this question, the Court had a look at the history of origins. It revealed that when deliberating the constitution several versions circulated that spoke of either protection or special protection. Nevertheless, no difference was intended by the different proposals. The article should not contain any statement on its relationship with other ways of life. When choosing special (besonderen) protection, the members of the Parliamentary Council (Parlamentarischer Rat) only opted for the better expression. The article, therefore, does not contain an obligation to discriminate, and the state can thus also offer legal protection to homosexual couples.[21)]

III. Subsequent jurisprudence of the German Federal Constitutional Court

As already indicated, some differences between marriages and registered civil partnerships continued to exist concerning retirement pension,[22)] tax law,[23)] the remuneration of civil servants,[24)] and adoption law[25)] that led to further proceedings before the German Federal Constitutional Court. These cases were no longer directed against the legal recognition of homosexual partnerships as such. These proceedings originated rather with the registered partners themselves, who complained about a difference in treatment to their detriment under Article 3 Paragraph 1 of the constitution.

As unequal treatment of groups of persons was at stake,[26)] the Court did not content

18) For the whole paragraph, see BVerfGE 105, 313, 346 et seq.
19) BVerfGE 105, 313, 346.
20) BVerfGE 105, 313, 347.
21) BVerfGE 105, 313, 348 et seqq.
22) BVerfGE 124, 199. See also the decision of the German Federal Constitutional Court of December 11, 2019, in the case 1 BvR 3087/14.
23) BVerfGE 126, 400; 133, 377. See also BVerfGE 132, 179.
24) BVerfGE 131, 239.
25) BVerfGE 133, 57.
26) BVerfGE 124, 199, 219; 126, 400, 417 et seq., 430. See also BVerfGE 131, 239, 256.

itself with ensuring that the measures were not arbitrary. Although sexual orientation is not enumerated in Article 3 Paragraph 3 of the GG among the criteria that generally exclude a different treatment, it is comparable to them. To reach this conclusion, the Court referred also to the Charter of Fundamental Rights of the European Union and the jurisprudence of the European Court of Human Rights based on the European Convention on Human Rights.[27] As a consequence, the Court applied a more severe standard[28] and verified whether the provisions strictly adhered to proportionality requirements[29].

A justification of the different treatment was therefore, on one hand, not excluded from the outset, but, on the other hand, it was also needed. In that regard the Court first considered whether the special protection offered to marriages in Article 6 Paragraph 1 of the GG could be invoked as such a justification. It stated that this provision indeed allows the legislature to treat marriages more favorably.[30] However, preferences for married couples must not result in discrimination against other relationships that are equally reliable.[31] To verify whether registered civil partnerships of homosexual couples could be compared to marriages between men and women in that respect, the Court had a look at the conclusion of the partnership, the associated obligations such as maintenance, and the provisions for a possible dissolution. Because of their similarity with the rules on married couples as indicated above,[32] the Court accepted that this condition of equal reliability was fulfilled.[33] The special protection of marriages under Article 6 Paragraph 1 of the GG can, therefore, not justify the difference in treatment.[34]

Second, the question was raised as to whether the existence of children could serve as a justification. The Court, however, could not ignore the fact that not all married couples have children and that there are homosexual couples who raise children together.[35] Since no justification could be found for the different treatment, the related provisions were declared unconstitutional by the German Federal Constitutional Court.[36]

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27) For the whole aspect, see BVerfGE 124, 199, 220 et seqq. See also BVerfGE 126, 400, 419, 430; 131, 239, 256 et seq.; 133, 57, 98. Concerning the influence of European Law, see *L. Michael*, Lebenspart nerschaften unter dem besonderen Schutze einer (über-)staatlichen Ordnung, Legitimation und Grenzen eines Grundrechtswandels kraft europäischer Integration, NJW 2010, p. 3537, 3539 et seqq.

28) BVerfGE 124, 199, 219; 126, 400, 416, 429; 133, 57, 98.

29) BVerfGE 126, 400, 417; 133, 377, 413.

30) BVerfGE 124, 199, 225; 126, 400, 420; 131, 239, 259; 133, 57, 96; 133, 377, 410.

31) BVerfGE 124, 199, 226; 126, 400, 420; 131, 239, 260; 133, 57, 96; 133, 377, 411 et seq.

32) P. 55 et seq.

33) For the whole aspect see BVerfGE 131, 239, 261; 133, 377, 414 et seq. See also BVerfGE 124, 199, 227 et seq.; 126, 400, 422 et seq., 426; 131, 239, 262 et seq.; 133, 57, 88 et seq.; 133, 377, 417 et seq., 420. Note the dissenting opinion of Judges Landau and Kessal-Wulf, BVerfGE 133, 377, 426 et seqq.

34) BVerfGE 124, 199, 224, 226; 126, 400, 419 et seq.; 131, 239, 261; 133, 57, 95 et seq.; 133, 377, 413. Note the dissenting opinion of Judges Landau and Kessal-Wulf, BVerfGE 133, 377, 426 et seqq.

35) BVerfGE 124, 199, 229 et seq.; 131, 239, 263; 133, 377, 420. But note BVerfGE 126, 400, 427 et seq.

36) BVerfGE 126, 400, 401 et seq.; 131, 239, 240; 133, 57, 60; 133, 377, 378. See also BVerfGE 124, 199 et seq. Note the dissenting opinion of Judges Landau and Kessal-Wulf, BVerfGE 133, 377, 426 et seqq.

As an interim result, it can thus be concluded that not only does the special protection of marriage not exclude a legal recognition of homosexual partnerships under German Constitutional Law but also that at least after the legislature decided to introduce an instrument for such legal recognition, the rule of equality even demands the treatment of legally recognized couples in a way comparable to marriages.[37]

IV. Marriage for same-sex couples

1. The amendment to the Civil Code

In 2017 the federal legislature enabled homosexual couples also to marry by amending the Civil Code in the way that a marriage could henceforth be concluded by two persons of different or of the same sex for their lifetime.[38]

2. Arguments in favor

a. Equal treatment

The first argument advanced in favor of opening marriage to homosexual couples pointed to the discrimination these couples faced by being barred from marrying.[39] Though registered civil partnership had become more and more similar to marriage,[40] some differences persisted[41]—and the different wording obliged heterosexual and homosexual persons to unnecessarily reveal their sexual identity on several occasions[42] [43].

37) Concerning the dynamic effects of the rule of equality, see also *M. Germann*, Dynamische Grundrechtsdogmatik von Ehe und Familie?, VVDStRL 73 (2013), Berlin 2014, p. 257, 280.

38) Article 1 no. 2 of the Gesetz zur Einführung des Rechts auf Eheschließung für Personen gleichen Geschlecht, BGBl. I 2017, p. 2787 et seq. The English translation of the Civil Code (http://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html) does not yet include the amendment. Concerning the history of origin see *D. Schwab*, Eheschließung für Personen gleichen Geschlechts – Informationen und Fragen, FamRZ 2017, p. 1284 et seq.

39) BT-Drs. [printed paper of the German federal parliament] 18/12989, p. 2. Differing *Chr. v. Coelln*, Wenn, dann richtig: „Ehe für alle" nur per Verfassungsänderung, NJ 2018, p. 1, 5. Documents of the German federal parliament can be found here: http://dip21.bundestag.de/dip21.web/br.

40) See p. 57 et seq.

41) *Chr. Görisch*, Einfach-gesetzliche, verfassungsrechtliche und rechtsvergleichende Perspektiven eines gewandelten Ehebegriffs, Der Staat 54 (2015), p. 591, 601 et seq.; *Chr. Schmidt*, „Ehe für alle" – Ende der Diskriminierung oder Verfassungsbruch, NJW 2017, p. 2225, 2226; *F. Wapler*, statement given at the public hearing of experts by the committee on law and consumer protection of the German federal parliament on September 28, 2015 (available here: https://www.bundestag.de/resource/blob/388586/19734e760e692cbd5bd09723db73f2ad/wapler-data.pdf), p. 2.

42) *J. Benedict*, Protocol of the 68th meeting of the committee on law and consumer protection of the German federal parliament on September 28, 2015 (available here: https://www.bundestag.de/resource/blob/401100/2abf98cc60216588674f75e52d8aa4e0/wortprotokoll-data.pdf), p. 35.

43) Rather relying on the similarity between marriage and registered partnerships and therefrom drawing the conclusion that it would be irrational to oblige the legislature to denominate them differently, *J. Wasmuth*, Ende einer langen staatlichen Diskriminierung: Die Erweiterung des Ehebegriffs auf gleichgeschlechtlich orientierte Personen, NJ 2017, p. 353, 359 et seq.

b. Constitutional change

Second, constitutional change (Verfassungswandel) was adduced[44]: Those who relied on this argument conceded that initially marriage was considered a relationship between a man and a woman.[45] Yet they referred to a social change that had occurred in the meantime: In that regard they pointed to the fact that colloquially the word "marriage" was also used for homosexual couples entering into a registered civil partnership.[46] Additionally, they quoted surveys showing that more than 80% of the German population were in favor of marriage being opened to homosexual couples as well.[47] Finally, they invoked the international development that also had been going in that direction.[48]

In their opinion this change was not restricted to society, but could also be found in law: In that respect they pointed to the fact that when protecting the family (Familie), the same Article 6 Paragraph 1 of the GG that protects marriage is not restricted to families composed of heterosexual parents but also includes those families where homosexual couples raise children together[49][50]. Additionally, they referred to paragraph 2 of the article, which comprises the rights of parents (Eltern), and quoted jurisprudence[51] showing that also parents need not be heterosexual, but can also be homosexual, in order to be able to rely on that provision.[52]

This argumentation is, however, difficult: "Family" in the sense of Article 6 Paragraph 1 refers to something factual rather than something legal.[53] Thus it is perfectly normal that,

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44) BT-Drs. 18/6665, p. 7 (draft bill by the Bundesrat); *M. Bruns*, statement given at the public hearing of experts by the committee on law and consumer protection of the German federal parliament on September 28, 2015 (available here: https://www.bundestag.de/resource/blob/385490/75e885af41b4aa8f1b9ed84c44275840/bruns-data.pdf), p. 13; *S. Pschorr/St. Drechsler*, Die Verfassungsmäßigkeit der Ehe für alle, Jura 2018, p. 122, 126 et seq.; contesting a relevant change *G.D. Gade/Chr. Thiele*, Ehe und eingetragene Lebenspartnerschaft: Zwei namensverschiedene Rechtsinstitute gleichen Inhalts? – 10 Jahre Rechtsprechung des Bundesverfassungsgerichts zur eingetragenen Lebenspartnerschaft –, DÖV 2013, p. 142, 144 et seq. Deducing from the change that the history of origin cannot be relevant for the understanding *Th. Blome*, Die Geschlechterverschiedenheit der Ehegatten – Kerngehalt der Ehe nach Art. 6 I GG?, NVwZ 2017, p. 1658, 1661.

45) BT-Drs. 18/6665, p. 7; *S. Pschorr/St. Drechsler*, l.c. (footnote 44), p. 126.

46) BT-Drs. 18/6665, p. 7 et seq.; *M. Bruns*, l.c. (footnote 44), p. 13.

47) BT-Drs. 18/12989, p. 7. Contesting the pertinence of the surveys *Chr. Schmidt*, l.c. (footnote 41), p. 2227.

48) BT-Drs. 18/6665, p. 8 et seq.; *M. Bruns*, l.c. (footnote 44), p. 14 et seqq. For the international development, see also *M. Bäumerich*, Einfachrechtliche Öffnung der Ehe – ein Verfassungsverstoß?, DVBl. 2017, p. 1457, 1458; *Chr. Görisch*, l.c. (footnote 41), p. 595 et seqq. Yet, pointing to the differences among the national constitutions, *J. Benedict*, Die Ehe unter dem besonderen Schutz der Verfassung – Ein vorläufiges Fazit, JZ 2013, p. 477, 484; *Chr. v. Coelln*, l.c. (footnote 39), p. 3 et seq.; *G. D. Gade/Chr. Thiele*, l.c. (footnote 44), p. 151.

49) BVerfGE 133, 57, 82 et seqq.

50) *M. Bruns*, l.c. (footnote 44), p. 19 et seq.

51) BVerfGE 133, 57, 77 et seqq.

52) BT-Drs. 18/6665, p. 8; *M. Bruns*, l.c. (footnote 44), p. 20 et seq.

53) Likewise BVerfGE 133, 57, 82 et seqq.; *C.D. Classen*, Dynamische Grundrechtsdogmatik von Ehe und Familie?, DVBl. 2013, p. 1086, 1092; *M. Germann*, l.c. (footnote 37), p. 274.

if there are changes in the factual situation, the understanding of Article 6 Paragraph 1 also changes. Yet marriage is not a factual term but a legal one.[54] If the constitution is related to something factual such as a couple, a change in that regard would have an effect as well. However, as marriage does not exist outside the law, this reasoning cannot apply to it.

While the situation is different when it comes to parents, the argumentation still cannot be transferred: Indeed, those who are considered a parent by law can rely on Article 6 Paragraph 2 of the GG, this provision thus (also) having a link to a legal situation.[55] However, there still existed a difference between those parents and homosexual couples, as the former were acknowledged by law while the latter were not acknowledged as married on the legal level before the legislature amended the law, excluding, therefore, a transfer of the argumentation.

Additionally, constitutional change has to be regarded hesitantly[56]: As the constitution itself stipulates a procedure to amend it, which especially contains the need to do it explicitly[57] and to observe 2/3 majorities in both the Federal Parliament (Bundestag) and the Federal Council (Bundesrat),[58] accepting constitutional change implies ignoring these provisions.[59] This was even more true in the context at stake: Can a change at the (higher) level of the federal constitution be claimed if no change at the (lower) level of federal legislation can be observed? [60]

Finally, the argumentation invoking constitutional change is not consistent: If a constitutional change could have and had taken place, (Article 6 Paragraph 1 of) the constitution would protect homosexual couples, which would *oblige* the legislature to open marriage to them, making a provision of the Civil Code banning them from doing so or an interpretation of the provision to that effect unconstitutional and thus void. Yet those claiming that constitutional change had taken place did not draw that conclusion. They stated that because of the constitutional change, the legislature was allowed but not obliged to introduce same-sex marriage.[61] As Article 6 Paragraph 1 of the GG is a basic right that is binding on the legislature,[62] the legislature could not choose freely whether to extend marriage to homosexual couples if the protection of marriage by the basic right included

54) Likewise *C. Bäcker*, Begrenzter Wandel, Das Gewollte als Grenze des Verfassungswandels am Beispiel des Art. 6 I GG, AöR 143 (2018), p. 339, 354 et seq., 373; *K. Möller*, Der Ehebegriff des Grundgesetzes und die gleichgeschlechtliche Ehe, DÖV 2005, p. 64, 66. Differing *J. Wasmuth*, l.c. (footnote 43), p. 358.

55) BVerfGE 133, 57, 77 et seqq. Likewise *M. Germann*, l.c. (footnote 37), p. 276.

56) Likewise *C. Bäcker*, l.c. (footnote 54), p. 358 et seqq.; *M. Germann*, l.c. (footnote 37), p. 261; *J. Wasmuth*, l.c. (footnote 43), p. 358. Nevertheless, against obstacles that cannot be overcome: *M. Ludwigs/D. Kuhn*, Referendarexamensklausur – Öffentliches Recht: Grundrechte – Ehe für alle, JuS 2018, p. 629, 633.

57) Article 79 para. 1 sentence 1 GG.

58) Article 79 para. 2 GG.

59) Also critically *Chr. v. Coelln*, l.c. (footnote 39), p. 3; *Chr. Hillgruber*, VVDStRL 73 (2013), Berlin 2014, p. 298.

60) Likewise *L. Michael*, VVDStRL 73 (2013), Berlin 2014, p. 300.

61) BT-Drs. 18/6665, p. 7.

62) Article 1 para. 3 GG.

them.

c. Difference of sex no deliberate decision

As a further argument in favor of the amendment, it was alleged that difference of sex could not be considered as a constituent element of marriage. In this respect, it was advanced that the Parliamentary Council could not imagine homosexual couples marrying, as at the time of the deliberation of the constitution in 1948-49, homosexual acts between men were established as criminal offences. In the opinion of those invoking this argument, it did not follow that the members of the Parliamentary Council excluded homosexual couples from marriage;[63] the former concluded that the latter just did not make a (deliberate) decision on the matter.[64]

However, the institutional guarantee contained in Article 6 Paragraph 1 GG[65] obliges parliament to refer to the existing institution when legislating[66]—and the existing legal institution of marriage was a relationship of a heterosexual couple.

d. Authority of the legislature to form

Those arguing in favor of the amendment, thus, relied on the authority of the legislature to form (ausgestalten) marriage.[67] However, this argument as well is difficult: Article 14 Paragraph 1 sentence 2 of the GG explicitly allows the legislature to define the *content* of property. Thus, would the constitution not use the same wording if the same were true with respect to marriage? [68] The weight of this doubt increases if one thinks of Article 1 Paragraph 3 of the GG, which explicitly states that the legislature is bound by the basic rights, making it still more difficult to claim that the legislature should be free to form marriage.[69]

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63) Considering that it was self-evident for the members of the Parliamentary Council that marriage is one of a man and a woman *Chr. v. Coelln*, l.c. (footnote 39), p. 2; *M. Ludwigs/D. Kuhn*, l.c. (footnote 56), p. 632; *Chr. Schmidt*, l.c. (footnote 41), p. 2227; *J. Wasmuth*, l.c. (footnote 43), p. 357. See also *Th. Blome*, l.c. (footnote 44), p. 1660.

64) For the whole paragraph, see *F. Brosius-Gersdorf*, Die Ehe für alle durch Änderung des BGB, Zur Verfassungsmäßigkeit der Ehe für gleichgeschlechtliche Paare, NJW 2015, p. 3557, 3559 et seq.

65) See above p. 56.

66) *B. Daiber*, Grenzen staatlicher Zuständigkeit, Berlin 2006, p. 120 et seq.

67) *F. Brosius-Gersdorf*, l.c. (footnote 64), p. 3559; *St. Rixen*, Das Ende der Ehe? – Neukonturierung der Bereichsdogmatik von Art. 6 Abs.1 GG: ein Signal des spanischen Verfassungsgerichts, JZ 2013, p. 864, 872 et seq. See also *M. Böhm*, Dynamische Grundrechtsdogmatik von Ehe und Familie?, VVDStRL 73 (2013), Berlin 2014, p. 211, 223.

68) Likewise *J. Lege*, VVDStRL 73 (2013), Berlin 2014, p. 303.

69) As already shown in *B. Daiber*, Ehe – ein Vertrag zu Lasten Dritter? Zur Anfechtung der Vaterschaft des rechtlichen Vaters durch den biologischen Vater, NZFam 2016, p. 916, 917 et seq. Likewise *C. Bäcker*, l.c. (footnote 54), p. 374 et seq.; *J. Froese*, Die „Ehe für alle“: Mehr Symbolik als Kohärenz, DVBl. 2017, p. 1152, 1153.

e. European Convention on Human Rights

Finally, those arguing in favor of the amendment point to the jurisprudence of the European Court of Human Rights, which they interpret in a way that does not restrict the right to marry to different-sex couples.[70] Yet it cannot be said that this court deducts the right to marry someone of the same sex from Article 12 of the European Convention on Human Rights:[71] While it acknowledges under Article 8 "that same-sex couples are in need of legal recognition and protection of their relationship"[72], it has repeatedly ruled that Article "12 of the Convention does not impose an obligation … to grant a same-sex couple … access to marriage."[73] "The question whether or not to allow same-sex marriage is [therefore] left to regulation by the national law of the Contracting" States.[74]

f. Interim Result

If it is accepted that marriage initially was considered a relationship between a man and a woman,[75] the previous reasoning has shown that it is difficult to claim that marriage in the sense of Article 6 Paragraph 1 of the GG includes homosexual couples as well. It also results therefrom that it cannot be convincingly established that the legislature has leeway to define marriage in the sense of that paragraph. That provision thus results in neither a protection of homosexual couples nor a consequent obligation of the legislature to enable them to marry.

3. Arguments against

a. Marriage as the basis of family

During the deliberations on the amendment, however, arguments against it were also adduced, the first one claiming that marriage is protected as the basis of family. To support

70) *F. Brosius-Gersdorf*, l.c. (footnote 64), p. 3559. Concerning the influence of the European Convention on Human Rights on German Constitutional Law, see *B. Daiber*, Der Einfluß der EGMR-Rechtsprechung auf die Rechtsprechung des Bundesverfassungsgerichts, DÖV 2018, p. 957 et seqq.

71) Likewise *Th. Blome*, l.c. (footnote 44), p. 1662 et seq.; *Chr. v. Coelln*, l.c. (footnote 39), p. 5; *Chr. Görisch*, l.c. (footnote 41), p. 597; *K. Jestaedt*, statement given at the public hearing of experts by the committee on law and consumer protection of the German federal parliament on September 28, 2015 (available here: https://www.bundestag.de/resource/blob/388884/67f34f523a1f4aa10b707bd63babd999/jestaedt-data.pdf) , p. 10; *M. Ludwigs/D. Kuhn*, l.c. (footnote 56), p. 632; *S. Pschorr/St. Drechsler*, l.c. (footnote 44), p. 128.

72) Judgment of December 14, 2017, in the case 26431/12 et al. – Orlandi and others v. Italy, para. 192 with further references. The jurisprudence of the European Court of Human Rights is available here: https://hudoc.echr.coe.int.

73) Judgment of June 24, 2010, in the case 30141/04 – Schalk and Kopf v. Austria, para. 63; judgment of July 21, 2015, in the case 18766/11 et al. – Oliari and others v. Italy, para. 192. See also judgment of December 14, 2017, in the case 26431/12 et al. – Orlandi and others v. Italy, para. 192.

74) Judgment of June 24, 2010, in the case 30141/04 – Schalk and Kopf v. Austria, para. 61.

75) In this respect, see further *J. Froese*, l.c. (footnote 69), p. 1153; *G.D. Gade/Chr. Thiele*, l.c. (footnote 44), p. 143; *J. Ipsen*, Ehe für alle – verfassungswidrig?, NVwZ 2017, p. 1096, 1097; *D. Kaiser*, Gleichgeschlechtliche Ehe – nicht ganz gleich und nicht für alle, FamRZ 2017, p. 1889, 1891. Dissenting *M. Bäumerich*, l.c. (footnote 48), p. 1461 et seq.

that view, the wording of Article 6 Paragraph 1 of the GG was invoked, which connects marriage and family in the designation as objects of special protection by the state. As homosexual couples cannot become parents together without involvement of third persons, this opinion relied on this biological difference to oppose marriage as a framework for both heterosexual and homosexual couples.[76)]

Yet, marriage is not restricted to being the basis of family.[77)] Fertility is no precondition to marry and there is also no age limit.[78)] Article 6 Paragraph 1 of the GG shall rather also protect against forced divorce and/or obstacles to marry, as especially Jewish couples had to face during the National-Socialist Regime,[79)] with the avoidance of any recurrence of this regime being one of the main objectives of the constitution.

It is true that under the previous constitution, the Constitution of Weimar (Weimarer Reichsverfassung),[80)] marriage was protected as the basis of family life and the maintenance and reproduction of the nation (Die Ehe steht als Grundlage des Familienlebens und der Erhaltung und Vermehrung der Nation unter dem besonderen Schutz der Verfassung.).[81)] However, if the current constitution dropped this description of marriage, this difference should not be ignored by continuing to uphold the description.

b. Need for a constitutional amendment

Finally, it was claimed that the constitution needed to be amended first, and only if same-sex marriage were protected by the constitution could it be introduced.[82)] However, the legislature is not restricted to rights already contained in the constitution. It can also give (further) rights on the level of legislation[83)]—as long as there are no obstacles in the

76) For the whole aspect, see *Chr. v. Coelln*, l.c. (footnote 39), p. 4; *J. Ipsen*, l.c. (footnote 75), p. 1098 et seq.; *K. Jestaedt*, l.c. (footnote 71), p. 3. Sharing the same understanding of marriage *G.D. Gade/Chr. Thiele*, l.c. (footnote 44), p. 143 et seq.

77) Likewise *M. Bäumerich*, l.c. (footnote 48), p. 1461 et seq.*; Th. Blome*, l.c. (footnote 44), p. 1661 et seq.; *F. Brosius-Gersdorf*, l.c. (footnote 64), p. 3560 et seq.; *M. Ludwigs/D. Kuhn*, l.c. (footnote 56), p. 631 et seq.; *S. Pschorr/St. Drechsler*, l.c. (footnote 44), p. 127; *J. Wasmuth*, l.c. (footnote 43), p. 357, 360.

78) See §§ 1303 et seqq. of the Bürgerliches Gesetzbuch (BGB, the Civil Code) and *J. Wasmuth*, l.c. (footnote 43), p. 360.

79) *V. Beck*, Protocol of the 68th meeting of the committee on law and consumer protection of the German federal parliament on September 28, 2015, l.c. (footnote 42), p. 31.

80) RGBl. 1919, p. 1383 et seqq.

81) Art. 119 para. 1 sentence 1. On this, see also *F. Brosius-Gersdorf*, l.c. (footnote 64), p. 3559, 3560 et seq.; *Chr. v. Coelln*, l.c. (footnote 39), p. 2; *J. Ipsen*, l.c. (footnote 75), p. 1096; *M. Ludwigs/D. Kuhn*, l.c. (footnote 56), p. 632; *J. Wasmuth*, l.c. (footnote 43), p. 357.

82) *Chr. v. Coelln*, l.c. (footnote 39), p. 4, 7; *G.D. Gade/Chr. Thiele*, l.c. (footnote 44), p. 151; *Chr. Görisch*, l.c. (footnote 41), p. 592 et seq.

83) Likewise *C. Bäcker*, l.c. (footnote 54), p. 377; *C.D. Classen*, l.c. (footnote 53), p. 1090; *M. Ludwigs/D. Kuhn*, l.c. (footnote 56), p. 634. Differing *Chr. Schmidt*, l.c. (footnote 41), p. 2227. Contradictory *J.Ph. Schaefer*, Die „Ehe für alle“ und die Grenzen der Verfassungsfortbildung, AöR 143 (2018), p. 393, 405 et seq. on the one hand and 435 on the other. Not differentiating *G.D. Gade/Chr. Thiele*, l.c. (footnote 44), p. 145; *J. Ipsen*, l.c. (footnote 75), p. 1098.

constitution. If the legislature decides to do so, marriage in the Civil Code is also protected by Article 6 Paragraph 1 of the GG for two persons of different sexes, while the marriage of two persons of the same sex is (only) protected by the Civil Code. With the same kind of protection by the Civil Code, both kinds of marriage are to be considered as being essentially equal and, therefore, need to be treated equally. As a result same-sex marriages are also protected by the constitution—with their protection stemming from Article 3 Paragraph 1.

4. Constitutionality of the amendment

Everything, therefore, depends on the question of whether there are constitutional obstacles to introducing same-sex marriage into the Civil Code. Same-sex marriage must, thus, not run counter to the basic right, the value decision, or the institutional guarantee contained in Article 6 Paragraph 1 of the GG.[84)]

As far as the basic right is concerned, same-sex marriage—like the registered civil partnership[85)]—does not make anybody abstain from marriage. The basic right, therefore, is not touched.[86)]

When it comes to the value decision, same-sex marriage must not impair marriage of heterosexual couples and their protection must not be reduced. Like the introduction of the registered civil partnership, the introduction of same-sex marriage did not worsen the situation of married heterosexual couples and did not diminish the protection awarded to them.[87)] Same-sex marriage, therefore, does not run counter to the value decision, since this aspect of Article 6 Paragraph 1 of the GG does not oblige discrimination, as has been explained above.[88)]

This, however, is not uncontested. There are also those who state that the obligation to protect marriage implies an obligation to keep a distance (Abstandsgebot) between marriage and other institutions,[89)] meaning that other institutions cannot be protected in the same way or to the same degree. By doing so, they argue that if B follows from A, B must not be valid for the opposite of A ($\bar{A}$) as well, rather $\bar{A}$ must result in the opposite of B ($\bar{B}$). Additionally, they implicitly apply this argument to two distinct levels, the constitutional one and the lower one of legislation; in other words, they conclude first that $\bar{B}$ must not only be true at the constitutional level, but also valid at the lower level of legislation with the consequence that Article 6 Paragraph 1 of the GG, first, does not give the same protection to other institutions and, second, additionally prohibits the legislature to do so.

84) See above p. 56.
85) See above p. 56.
86) Likewise *M. Bäumerich*, l.c. (footnote 48), p. 1463; *S. Pschorr/St. Drechsler*, l.c. (footnote 44), p. 130; *J.Ph. Schaefer*, l.c. (footnote 83), p. 402.
87) Likewise *Chr. v. Coelln*, l.c. (footnote 39), p. 6.
88) For the whole paragraph see above p. 57.
89) *G.D. Gade/Chr. Thiele*, l.c. (footnote 44), p. 150.

While the first conclusion is understandable, the second one is not compelling: The constitution is not a comprehensive legal document; it is rather a framework for political process that leaves space for the different choices possible in a democratic order. A gap in the text of the constitution, therefore, does not need to be filled by drawing conclusions from the existing constitutional provisions. It can rather mean that the question is left to democratic decision-making. If Article 6 Paragraph 1 of the GG does not deal with same-sex couples ($\bar{A}$), a lack of equal protection ($\bar{B}$), thus does not have to result. It can also imply that the legislature is free to decide—and, without a counter-argument, it is preferable to imply that the democratic legislature is free. Hence, there is no need to keep a distance, and, resulting therefrom, the value decision is not affected by opening marriage to homosexual couples.

If one relies, finally, on the argumentation of the German Federal Constitutional Court that the addressees make the difference between marriage in the sense of Article 6 Paragraph 1 of the GG and other legal forms of partnerships,[90] the labelling cannot be crucial. As a consequence, it can also not be decisive that the denomination remains different.[91] Thus, even using the same word for the legal protection of both heterosexual and homosexual couples does not infringe on the institutional guarantee contained in Article 6 Paragraph 1 of the GG.

It has been countered, however, that this would undermine the fact that marriage in the sense of Article 6 Paragraph 1 of the GG implies two persons of different sexes.[92] Yet there are many provisions contained in legislation that give more rights than the limited ones protected at the constitutional level. For example, the right to assembly is extended to everybody by legislation.[93] Does this undermine the fact that Article 8 Paragraph 1 of the GG restricts it to Germans? Or is this just a normal exercise of the legislature's competences? The counter-argument of undermining the constitution is thus not convincing. The institutional guarantee is, therefore, also not violated, and, as an overall result, introducing same-sex marriage by law is in line with the constitution.

V. Summary

In summary, one can say that legal protection for homosexual couples in Germany was introduced by the legislature[94] in the form of a registered civil partnership in 2001. As the

90) BVerfGE 105, 313, 347. Yet relying on the differences between marriage and registered partnership *Chr. v. Coelln*, l.c. (footnote 39), p. 6.

91) Coming to the same result *St. Meyer*, Gleichgeschlechtliche Ehe unabhängig vom Ehebegriff des Art. 6 Abs. 1 GG verfassungsmäßig, FamRZ 2017, p. 1281, 1282 et seq.

92) *G.D. Gade/Chr. Thiele*, l.c. (footnote 44), p. 150; dissenting opinions of Judges Papier, BVerfGE 105, 313, 357, 358, and Haas, BVerfGE 105, 313, 359, 361 et seq.

93) Article 1 para. 1 of the Bayerisches Versammlungsgesetz (BayVersG, the Bavarian Assembly Act, available here: https://www.gesetze-bayern.de/Content/Document/BayVersG08-1).

94) Concerning the importance of the legislature, see also *A. Paulus*, VVDStRL 73 (2013), Berlin 2014, p. 309.

conclusion, the rights and obligations, and the dissolution of registered civil partnerships were essentially similar to marriage, the prohibition of discrimination under Article 3 Paragraph 1 of the constitution applied and made the German Federal Constitutional Court declare remaining differences unconstitutional. In a further step, the legislature finally opened marriage to homosexual couples as well in 2017.

Yet it is difficult to claim that marriage in the sense of Article 6 Paragraph 1 of the GG includes homosexual couples as well. It can also not be convincingly established that the legislature has leeway to define marriage in the sense of that paragraph. From that provision, thus, does neither result a protection of homosexual couples nor a consequent obligation of the legislature to enable them to marry.

On the other hand, Article 6 Paragraph 1 of the GG—not as a basic right, as an institutional guarantee, nor as a value decision—does not oppose the introduction of forms of legal protection of homosexual couples, including opening marriage to them.

This does not presuppose a constitutional amendment, as the legislature is not restricted to rights already contained in the constitution. Marriage in the Civil Code is then protected by Article 6 Paragraph 1 of the GG for two persons of different sexes and by the Civil Code in connection with Article 3 Paragraph 1 of the GG for two persons of the same sex.