Articles

Marriage, Same-Sex Partnership, and the German Constitution

By Anne Sanders[*]

A. Introduction

Marriage today does not only involve private interests; it is also an important legal and political issue. The question of what marriage means today and whether it should be open to same-sex unions is under debate all over the world. In many countries, for example in Germany and the United States, such questions are not only debated in the political arena, but also in relation to constitutional law. This Article will trace the development of how marriage has been understood in relation to German constitutional law and critically discuss the law's approach to same-sex marriage.

The Federal Constitutional Court of Germany (*Bundesverfassungsgericht,* FCC) celebrated its 60th anniversary in September of 2011. Since 1951, the court has not only had a considerable influence on administrative and criminal law, but on family law as well. This might be surprising to a non-German reader as not all constitutions include rights concerning marriage and family as guaranteed human rights. The Basic Law, however, protects these rights in Article 6.

This article begins by applying a descriptive approach. First is an introduction to the history of Germany's constitutional protection of marriage and the drafting of Article 6. Next, this article introduces the reader to the German constitutional understanding of marriage as developed in the case law of the German Federal Constitutional Court. After supplementing this with a brief discussion of the court's approach to divorce, the article then stresses the importance of gender equality to the constitutional understanding of marriage and discusses the case law related to unmarried cohabitation and same-sex partnerships.

Next, this Article assumes a more critical approach in evaluating the reasons given by the FCC and academic commentators for denying same-sex partners Article 6 protection.

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Building on the case law of the FCC, this Article argues that marriage cannot be reduced to a heterosexual union with the purpose of producing children. Rather, marriage must be understood as a formally concluded partnership of mutual responsibility and support that is just as applicable to same-sex couples as it is opposite-sex couples.

B. The Origins of the Constitutional Protection of Marriage

The constitutional protection of marriage has not had a long tradition. Neither *marriage* nor *family* were mentioned in the classic constitutions of the United States or France; nor were they present in the German Constitution of 1849 (*Paulskirchenverfassung*), which never came into force, or the Prussian Constitution of 1850. The first constitutions to cautiously mention marriage appeared at the end of the 19th century.[1]

In Germany, the fear that traditional marriage might be lost in the turmoil of the First Republic led to its constitutional protection. The constitutional history of the protection of marriage started in Germany with Article 119 of the Constitution of the Weimar Republic of 1919 (*Weimarer Reichsverfassung*). The second part of this constitution included a section called "Basic Rights and Basic Duties of All Germans" ("*Grundrechte und Grundpflichten der Deutschen*").[2] The first chapter of this part, Articles 109–118, included under the heading "The Person" ("*Die Einzelperson*") rights such as freedom of speech, freedom of movement, and privacy of the home. The second chapter had the heading "Community Life" ("*Das Gemeinschaftsleben*") and listed freedom of assembly, the right of communities to self-governance, the right to vote, and laws concerning the education and protection of the young. This second chapter began, however, with Article 119, which concerned the protection of marriage and family. It read:

> (1) Marriage is protected especially by the constitution as the basis of family life and of the reproduction and preservation of the nation. It is based on the equality of the sexes.
> (2) To protect and enhance the purity, recovery, and social advancement of the family is a duty of the state. Families with many children can demand compensating public welfare.
> (3) Motherhood requires the protection and care of the state.[3]

[1] Dieter Schwab, *Zur Geschichte des verfassungsrechtlichen Schutzes von Ehe und Familie*, *in* FESTSCHRIFT FÜR FRIEDRICH WILHELM BOSCH, 893 (Hans Gaul, Walther Habscheid & Paul Mikat eds., 1976).

[2] *See* Friedhelm Köster, ENTSTEHUNGSGESCHICHTE DER GRUNDRECHTSBESTIMMUNGEN DES ZWEITEN HAUPTTEILS DER WEIMARER REICHSVERFASSUNG IN DEN VORARBEITEN DER REICHSREGIERUNG UND DEN BERATUNGEN DER NATIONALVERSAMMLUNG (2003).

[3] WEIMARER REICHSVERFASSUNG [WVR] [CONSTITUTION OF THE WEIMAR REPUBLIC], Aug. 11, 1919, art. 119 (Ger.).

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The drafting process of this article could not be properly replicated today. Apparently it was inspired by conservative parliamentarians who feared that communist politicians, who had had a strong influence after the revolution of 1918, might endanger the institution of marriage and the traditional middle class family.[4] During the National Convention, however, the protection of marriage discussion was not contentious. The only question raised was whether reforms of marital property law would require a constitutional amendment in the future. Apart from that, however, parliamentarians agreed on the value of marriage as the basis of society.[5] The protection of motherhood, even for children born out of wedlock, in Article 119(3) and the equality of both sexes in Article 119(1) became the basis for future modernizations of family law.[6] These inclusions were the work of both Social Democrats and politicians from the German Democratic Party (DDP), and ensured that the protection of marriage had a conservative as well as a progressive purpose.

Today, in the Basic Law of 1949, marriage and family are protected by Article 6(1).[7] Article 6 states:

> (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

[4] Schwab, *supra* note 1, at 895.

[5] *Id.* at 895–98.

[6] *Id.* at 904–06.

[7] For a discussion of the origin of the provision, see Peter Badura, *in* GRUNDGESETZ-KOMMENTAR, ¶¶ 40–43 (Theodor Maunz & Günther Dürig eds., 44th ed. 2005).

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> and mental development and for their position in society as are enjoyed by those born within marriage.[8]

There are obvious similarities in the wording of Article 6 of the Basic Law and Article 119 of the Weimar Constitution. Article 6, however, was drafted with less ostentatious language, probably because the wording of Article 119, which embraced the "preservation of the nation," sounded problematic after the end of the Third Reich.

Like many of the provisions in the constitution, Article 6 was influenced by the horrible experiences in the Third Reich. Under the dictatorship of the Third Reich, it was not religious ideals that profoundly influenced the government's approach to marriage; rather, it was National Socialist ideology. Marriage was supposed to provide a legal framework for families with many "racially healthy" children who were intended for Hitler's armies and the colonization of occupied territories.[9] Marriage and sexual intercourse between Jews and Aryans were forbidden by the 1938 Nuremberg legislation "for the protection of German blood and honor."[10] Divorce was made easier in order to allow husband and wife to remarry and produce more children.[11] The legislature viewed a childless marriage as useless for the state and, thus, they wanted to make it as easy as possible to end such a marriage.[12] During the war, pregnant girls were married to the absent or even dead fathers of their children, while a helmet took the groom's place in the civil ceremony. To replace soldiers killed in action, the introduction of polygamy after the war was seriously discussed.[13]

After the war, Article 6 aimed to protect the private sphere of marriage and family against public intervention. Subsequent to the painful experience of an all-powerful state during

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[8] GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GRUNDGESETZ] [GG] [BASIC LAW], May 23, 1949, BGBl. I, art. 6 (Ger.).

[9] *See* Edouard Conte & Cornelia Essner, *Fernehe, Leichentrauung und Totenscheidung: Metamorphosen des Eherechts im Dritten Reich*, *in* 44 VIERTELJAHRSHEFTE FÜR ZEITGESCHICHTE 201, 201 (1996); Stephan Meder, *Der Unterhaltsverzicht im Spannungsfeld von Privatautnomie und öffentlichem Interesse*, *in* FAMILIE UND RECHT 12, 14–15 (1993).

[10] Gesetz zum Schutz des deutschen Blutes und der deutschen Ehre [Law on the Protection of German Blood and German Honor], Sept. 15, 1935, RGBL. I at p. 1146 (Ger.).

[11] Gesetz zur Vereinheitlichung des Rechts der Eheschließung und der Ehescheidung im Lande Österreich und im übrigen Reichsgebiet [Law to unify the laws of marriage and the. divorce in the land of Austria and the rest of the country], July 6, 1938, RGBL. I p. 807; Meder, *supra* note 9.

[12] *See* Mirja Schmidt, Abschluss-und Inhaltskontrolle von Scheidungsfolgenvereinbarungen 53 (Apr. 27, 2010) (Inaugural Dissertation, Westphalian Wilhelms University of Münster), *available at* http://miami.uni-muenster.de/servlets/DerivateServlet/Derivate-5562/diss_schmidt_mirja_buchblock.pdf; *see also* Meder, *supra* note 9.

[13] Conte & Essner, *supra* note 9.

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the Third Reich, Article 6 stressed the importance of the responsible, self-determined individual.[14]

However, Article 6 could also be seen as the fruit of a universal longing to return to the safety of an idealized family after the war.[15] Post-war German politicians agreed that the family was in a deep crisis. Soldiers had died in the war, leaving widows, and children without parents. Some wives had been raped and others had found a new independence during the war by taking up a profession. But even those couples who were willing to make a new start faced great difficulties: Most had been separated for years, each having had extremely different and often horrible and shameful experiences during the war.[16] Perhaps in an attempt to fight the rocketing demands for divorce and preserve a bit of stability, a more traditional, religious notion of marriage reemerged.[17] For example, in 1951, the German Federal Supreme Court (*Bundesgerichtshof*), the highest authority for civil law cases, reinterpreted the divorce law drafted in 1938, which had allowed divorce after a separation of three years even if an adulterer demanded it.[18] Marriage, the Court held, was the most intimate human union and required that the couple stay together for life. Only in rare cases could a divorce, desired by a guilty party, be morally justified even if the letter of the law allowed it.[19] In this climate, Article 6 was drafted in 1949.

C. Marriage Case Law

Now that the development of the German constitutional protection of marriage has been explained, the case law of the FCC shall be discussed.

I. Defining and Protecting Marriage

According to the established case law of the FCC, marriage under Article 6 is the union of a man and a woman to an *all-embracing* and, in principle, indissoluble companionship for

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[14] Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 1 BvL 4/54, Jan. 17, 1957, 6 BVERFGE 55, 71 (Ger.).

[15] Rolf Gröschner, *Ehe und Familie, Elternrecht, Mutterschutz, uneheliche Kinder (Art. 6)*, *in* 1 GRUNDGESETZ-KOMMENTAR n.16–19 (Horst Dreier ed., 2d ed. 2004).

[16] *See* MARGARETE DÖRR, "WER DIE ZEIT NICHT MITERLEBT HAT. . . ." FRAUENERFAHRUNGEN IM ZWEITEN WELTKRIEG UND IN DEN JAHREN DANACH 32–45 (1998); Kirsten Plötz, *Heimkehrer, die natürliche Ordnung und vollständige Familien*, *in* VATERSCHAFT IM WANDEL: MULTIDISZIPLINÄRE ANALYSEN UND PERSPEKTIVEN AUS GESCHLECHTERTHEORETISCHER SICHT 57, 57–60 (Mechthild Bereswill, Kirsten Scheiwe & Anja Wolde eds., 2006).

[17] Schmidt, *supra* note 12, at 53–54.

[18] Bundesgerichtshof [BGH - Federal Supreme Court], Case No. 4 ZR 73/50, Jan. 22, 1951, 1 BGHZ 87 (Ger.).

[19] *Id.* at 90–93.

life.[20] Family is defined as the *all-embracing* community of parents and children in which the parents have the right and duty to care for and educate their children.[21] The term "all embracing" (*allumfassend*) has not been explained by the FCC, but seems to mean that in constitutional law, marriage and family life concern all aspects of human existence and are thus of central importance.

The FCC distinguished early on between different aspects of the constitutional protection of marriage. To understand this, a short explanation of the doctrinal approach of German constitutional rights may be helpful.

First, German constitutional rights, like constitutional rights in other countries, protect citizens against unlawful actions of the government and the legislature. In this regard, constitutional rights guarantee, for example, the freedom to express one's opinion as in Article 5 and to exercise one's religion as in Article 4 of the Basic Law. This protection of individual liberties is the classic function of human rights.[22] The protection of marriage under Article 6 also functions as a classic individual human right and grants protection to the individual person against the legislature and the government.[23] According to the case law of the Federal Constitutional Court, Article 6(1) protects the freedom to conclude marriage with the partner of one's choice.[24] Thus, a law that forbids certain persons to marry, as for example the legislation during the Third Reich that forbade Jews to marry *Aryans*, would be unconstitutional.

Moreover, the Constitution guarantees that two people can live as a married couple protected from public influence and freely choose, for example, whether they want to have children, or whether to live together.[25] The couple is free to live a traditional

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[20] *See* Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 1 BvR 205/58, July 29, 1959, 10 BVERFGE 59, 66 (Ger.); Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 1 BvL 136/78, Feb. 28, 1980, 53 BVERFGE 224, 245 (Ger.).

[21] *See* Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 1 BvR 205/58, July 29, 1959, 10 BVERFGE 59, 66 (Ger.); Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 1 BvL 136/78, Feb. 28, 1980, 53 BVERFGE 224, 245 (Ger.).

[22] Bernhard Schlink, *Freiheit durch Eingriffsabwehr—Rekonstruktion der klassischen Grundrechtsfunktion*, 11 EUROPÄISCHE GRUNDRECHTE-ZEITSCHRIFT 457 (1984).

[23] *See* Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 1 BvL 4/54, Jan. 17, 1957, 6 BVERFGE 55, 71 (Ger.); Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 1 BvR 636/68, May 4, 1971, 31 BVERFGE 58, 67 (Ger.).

[24] *See* Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 1 BvR 636/68, May 4, 1971, 31 BVERFGE 58, 67 (Ger.); Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 1 BvR 719/69, Nov. 14, 1973, 36 BVERFGE 146, 161–62 (Ger.).

[25] Gröschner, *supra* note 15, ¶¶ 63–66.

marriage with the husband as the breadwinner, or to assume a lifestyle where both partners earn money and contribute equally to the expenses of the family.[26]

Apart from the protection of individual rights, however, the FCC stated that German constitutional rights constituted *objective values* (*objective Wertentscheidungen* or *Grundsatznormen*).[27] Human rights not only influence the state-citizen relationship but also, by establishing a value system, influence other areas of law, for example the interpretation of private law rules effective between citizens.[28] According to the case law of the FCC, the protection of marriage is one such fundamental value.[29]

Moreover, the constitutional protection of marriage guarantees the institution of marriage as such. The legislature may not abandon marriage altogether and must provide a legal framework allowing people to marry and to organize their life as a couple.[30] In the German civil code, the legislature created a legal framework for married life. In order to comply with the constitutional duty to protect marriage, the state is not only required to refrain from doing anything that could harm or hinder the institution but must also promote it by suitable measures.[31] Part of the *special* protection the state owes marriage is the duty not to permit a married spouse to enter into another legally binding partnership.[32]

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[26] *See* Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 1 BvR 683/77, May 31, 1978, 3 48 BVERFGE 327, 338 (Ger.); Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 1 BvL 5/83, Jan. 10, 1984, 66 BVERFGE 84, 94 (Ger.); Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 1 BvR 105/95, Feb. 5, 2002, 105 BVERFGE 1, 11 (Ger.).

[27] The development started with the famous *Lüth* decision. *See* Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 1 BvR 400/51, Jan. 15, 1958, 7 BVERFGE 198, 205–07 (Ger.); *see also* Ernst-Wolfgang Böckenförde, *Grundrechte als Grundsatznormen*, 29 DER STAAT 1 (1990).

[28] For an English language introduction to this vast area, see Christian Starck, *Human Rights in Private Law in German Constitutional Development and in the Jurisdiction of the Federal Constitutional Court*, *in* HUMAN RIGHTS IN PRIVATE LAW 97–111 (Daniel Friedmann & Daphne Barak-Erez eds., 2003).

[29] *See* Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 1 BvL 4/54, Jan. 17, 1957, 6 BVERFGE 55, 71 (Ger.). See also Theodor Maunz, *Die verfassungsrechtliche Gewähr von Ehe und Familie (Art 6 GG)*, 1 ZEITSCHRIFT FÜR DAS GESAMTE FAMILIENRECHT (1956) (describing the right of marriage as multidimensional); *see also* Martin Burgi, *Schützt das Grundgesetz die Ehe vor der Konkurrenz anderer Lebensgemeinschaften?*, 39 DER STAAT 487, 495–97 (2000).

[30] *See* Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 1 BvR 636/68, May 4, 1971, 31 BVERFGE 58, 67 (Ger.); Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 1 BvR 719/69, Nov. 14, 1973, 36 BVERFGE 146, 161–62 (Ger.).

[31] *See* Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 1 BvL 4/54, Jan. 17, 1957, 6 BVERFGE 55, 76 (Ger.); Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 1 BvR 498/66 Mar. 18, 1970, 28 BVERFGE 104, 113; Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 1 BvL 136/78, Feb. 28, 1980, 53 BVERFGE 224, 248 (Ger.); Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Joined Cases 2 BvR 1226/83, 2 BvR 101/84, and 2 BvR 313/84, May 12, 1987, 76 BVERFGE 1, 41 (Ger.); Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 2 BvR 1057/91, 2 BvR

Moreover, Article 6 functions as a special equal protection law. Equal protection is regulated in Article 3 of the Basic Law. Article 3 contains a general equal protection right as well as special rules against discrimination:

> (1) All persons shall be equal before the law.
> (2) Men and women shall have equal rights. The state shall promote the actual implementation of equal rights for women and men and take steps to eliminate disadvantages that now exist.
> (3) No person shall be favoured or disfavoured because of sex, parentage, race, language, homeland and origin, faith, or religious or political opinions. No person shall be disfavored because of disability.[33]

According to the FCC, however, Article 6(1) prohibits discrimination against spouses, which means that Article 6(1) established an additional special rule of equal protection outside of Article 3.[34]

The constitutional protection of marriage faces unique problems. Other constitutionally protected values, such as life, physical integrity, opinions, and religion, have a fundamental basis outside of the legal system. While marriage may at times be viewed as a social or religious institution, it is, however, mainly a legal institution. Since the end of the 19th century, civil marriage has been the norm in Germany. A religious ceremony has no legal effect in Germany and in fact does not establish a marriage protected under Article 6.[35] Because marriage in Germany is so deeply connected to the legal system, constitutional interpretation of Article 6 requires a consideration of the law below the constitutional level. Moreover, the FCC has held that the constitutional concept of marriage should be developed in accordance with the predominant contemporary views as expressed in family

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1226/91, Nov. 10, 1998, 99 BVERFGE 216, 231–32 (Ger.); Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 1 BvR 1164/07, July 7, 2009, 124 BVERFGE 199, 225 (Ger.).

[32] Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 1 BvF 1/01, July 17, 2002, 105 BVERFGE 313, 343 (Ger.).

[33] GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GRUNDGESETZ] [GG] [BASIC LAW], art. 3 (Ger.).

[34] *See* Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Joined Cases 2 BvR 1226/83, 2 BvR 101/84, and 2 BvR 313/84, May 12, 1987, 76 BVERFGE 1, 72 (Ger.); Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 2 BvR 1057/91, Nov. 10, 1998, 99 BVERFGE 216, 232 (Ger.); *see also*, Burgi, *supra* note 29, at 497–98.

[35] *See* Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 1 BvL 136/78, Feb. 28, 1980, 53 BVERFGE 224, 245 (Ger.).

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law below the constitutional level.[36] Consequently, constitutional interpretation of marriage takes place in an intricate web of constitutional law, non-constitutional family law, and public opinion. In addition, the Federal Constitutional Court has stated that the legislature is also bound by Article 6 when formulating legislation concerning family law.[37] The danger of a circular reasoning[38] here is evident. A constitutional interpretation that is bound by the meaning of marriage as defined in family law would prevent constitutional law from exerting any meaningful influence on the law below it. In addition, if marriage is interpreted in this manner, this means that constitutional law would, in effect, impose no restrictions on the legislature.[39] Moreover, the courts and legislature are undoubtedly influencing public opinion on marriage, but in turn, public opinion itself is what influences legislation and, according to the FCC, the constitutional understanding of marriage.

II. Divorce

Section 1353(1) of the German Civil Code (*Bürgerliches Gesetzbuch*—BGB) states that marriage is closed for life, and the principle of the lifelong marriage has been accepted as a constitutional principle. Marriage, the FCC held, must be intended and promised by both partners as an enduring alliance, conceptualized to last a lifetime.[40] A marriage that is limited in time from the beginning would thus not be a marriage in the constitutional sense. However, according to the FCC, the Basic Law protects a secularized, legal conception of marriage, not a religious one.[41] Based on this secular notion of marriage, the FCC has concluded that spouses have a right to divorce and regain the freedom to remarry.[42] Moreover, the FCC permits divorce because forced perpetuation of a factually

[36] *See* Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 1 BvR 719/69, Nov. 14, 1973, 36 BVERFGE 146, 163 (Ger.); Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 1 BvF 1/01, July 17, 2002, 105 BVERFGE 313, 345 ¶ 87 (Ger.).

[37] *See* Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 1 BvR 636/68, May 4, 1971, 31 BVERFGE 58, 69–70 (Ger.); Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 1 BvL 78/86, Oct. 3, 1989, 81 BVERFGE 1, 6–7 (Ger.); Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 1 BvF 1/01, July 17, 2002, 105 BVERFGE 313, 345 ¶ 87 (Ger.); Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 1 BvL 10/05, May 27, 2008, 121 BVERFGE 175, 193 (Ger.).

[38] Gröschner, *supra* note 15, ¶ 36.

[39] *See* Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 1 BvR 719/69, Nov. 14, 1973, 36 BVERFGE 146, 161–62 (Ger.).

[40] *See* Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 1 BvL 136/78, Feb. 28, 1980, 53 BVERFGE 224, 245 (Ger.).

[41] *See Id.*; *see also* Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 1 BvR 636/68, May 4, 1971, 31 BVERFGE 58, 82–83 (Ger.).

[42] *See* Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 1 BvR 636/68, May 4, 1971, 31 BVERFGE 58, 82–83 (Ger.); Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 1 BvL 136/78, Feb. 28, 1980, 53 BVERFGE 224, 245 (Ger.).

dead relationship cannot be reconciled with the Court's opinion that marriage is a living partnership.[43] As a result, if a person divorces and remarries several times, each marriage would be of equal rank constitutionally.[44]

The discussion of a constitutional right to divorce leads to a discussion of the constitutional influence on divorce law. The FCC approached this subject in its decision of 21 October 1980 stating, "[t]he special protection of Article 6(1) is not limited to marriage in good order. Even when a marriage has failed, the legislature can be under a duty to provide divorce law that takes into account the ongoing mutual responsibilities of the partners and prevents unbearable hardship."[45] While acknowledging that the legislature has considerable discretion,[46] the FCC decided that Article 6(1) influences the right to spousal support[47] as well as the sharing of pension rights accumulated during marriage and matrimonial property law.[48] If spouses do not execute a nuptial agreement, they live in the marital property regime of the *Zugewinngemeinschaft.* The result is that during marriage, the property of the couple is kept separate, but at the time of divorce, profits accumulated by each spouse during marriage are compared and shared.[49]

III. Marriage and Gender Equality

The tension between traditional patriarchic marriage law and gender equality as a constitutional right under Article 3(2) has always been of considerable importance in the

[43] *See* Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 1 BvL 136/78, Feb. 28, 1980, 53 BVERFGE 224, 250 (Ger.).

[44] *See* Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 1 BvR 179/78, Oct. 21, 1980, 55 BVERFGE 114, 128–29 (Ger.); Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 1 BvL 5/83, Jan. 10, 1984, 66 BVERFGE 84, 93 (Ger.); Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 1 BvR 14/82, Nov. 14, 1984, 68 BVERFGE 256, 267–68 (Ger.); Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 1 BvR 246/93, Oct. 7, 2003, 108 BVERFGE 351, 364 (Ger.).

[45] Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 1 BvR 179/78, Oct. 21, 1980, 55 BVERFGE 114, 141–42 (Ger.).

[46] *Id.* at 141–43.

[47] *See* Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 1 BvL 136/78, Feb. 28, 1980, 53 BVERFGE 224, 250 (Ger.); Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 1 BvL 5/83, Jan. 10, 1984, 66 BVERFGE 84, 94 (Ger.).

[48] *See* Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 1 BvL 136/78, Feb. 28, 1980, 53 BVERFGE 224, 250; Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 1 BvR 1284/79, Oct. 21, 1980, 55 BVERFGE 134, 141–42 (Ger.).

[49] For a short introduction to German divorce law, see Anne Sanders, *Private Autonomy and Martial Property Agreements*, 59 INT'L & COMP. L.Q. 571, 575–77 (2010).

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case law of the FCC on Article 6. Particularly with its early decisions, the FCC influenced family law in a progressive way.[50]

The "mothers of the Basic law," Elisabeth Selbert, Friederike Nadig, Helene Weber and Helene Wessel, the four women who participated in the drafting of the Constitution, fought for constitutional gender equality.[51] Though the Constitution of the Weimar Republic declared gender equality to be the foundation of marriage, this rule never influenced family law.[52] Article 1(3) of the Basic Law, however, states that individual constitutional rights bind all three branches of government. When Article 6(1), Article 3(2), and Article 1(3) of the Basic Law came into effect, much of German family law, which had largely remained unchanged since 1900, had to be considered unconstitutional. The default matrimonial property regime at that time gave the husband the exclusive right to use and administer his wife's property, forbade a wife from seeking employment without her husband's consent, and gave the husband the decisive voice in all decisions concerning the couple's children. It was only under the political pressure exercised by the draftswomen, especially Elisabeth Selbert and Friederike Nadig, that their male counterparts agreed to introduce gender equality as a constitutional right under Article 3(2) of the Basic Law. The legislature, however, was awarded a "grace period" until 31 March 1953 in Article 117 of the Basic Law to revise family law.

When the time had passed without reform, the FCC had to decide on the legal effects in its decision of 18 December 1953.[53] Although decisions of the FCC are far less personal than decisions from courts in common law systems, for example the US Supreme Court, it is likely that Dr. Erna Scheffler, the first female justice, took a decisive role in the drafting of the Court's unanimous decision. Dr. Erna Scheffler was one of the most interesting justices at the newly founded Court. She was of Jewish decent and had spent the last months of the war hidden in a garden shed in Berlin. After the war, before becoming a Justice at the FCC, Dr. Scheffler became active in the reform of German family law. At the Deutsche

[50] For a discussion of gender equality and family law, see Christine Hohmann-Dennhardt, *Gleichberechtigung im Familienrecht*, 1 FORUM FAMILIENRECHT 15 (2006).

[51] For a short discussion of the legislative history in the *Parlamentarischer Rat,* see Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 1 BvR 205/58, July 29, 1959, 10 BVERFGE 59, 67 (Ger.). and Justice Jutta Limbach writing extrajudicially in Margarete Wohlan, DEMOKRATISCHE GESCHLECHTERVERHÄLTNISSE IM 21 JAHRHUNDERT 15 (Christine Kammerer ed., 1999). NEUE FORDERUNGEN—ALTE HERAUSFORDERUNGEN, ARBEITSHILFEN FÜR DIE POLITISCHE BILDUNG 15 (Bundeszentrale für politische Bildung ed., 1999).

[52] Individual constitutional rights had a very limited effect in the Weimar Republic and did not limit the power of the legislature. *See, e.g.*, Christoph Gusy, *Die Grundrechte in der Weimarer Republik*, 15 ZEITSCHRIFT FÜR NEUERE RECHTSGESCHICHTE 163 (1993); Michael Stolleis, *Weimarer Kultur und Bürgerrechte*, *in* WEIMAR UND DIE DEUTSCHE VERFASSUNG. ZUR GESCHICHTE UND AKTUALITÄT VON 1919, 89 (Andreas Rödder ed., 1999).

[53] Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 1 BvL 106/53, Dec. 18, 1953, 3 BVERFGE 225 (Ger.).

Juristentag, the Annual Conference of German Lawyers in 1950, she presented a paper on the necessary reforms.[54] At the FCC, Dr. Erna Scheffler became responsible for the preparation of constitutional cases concerning family law.

The FCC determined that after the time limit in Article 117 had passed, Article 3(2) of the Basic Law had to be applied as binding constitutional law.[55] The Constitution had accepted that unconstitutional law became void if the legislature did not act in time.[56] The FCC overruled the objection that gender equality and the protection of family and marriage were incompatible.[57] Rather, under the Basic Law, gender equality provided the very basis of marriage. The Court stated that biological, as well as functional differences, could justify different regulations, for example to protect mothers.[58] Such rules should not be considered obstacles to gender equality but rather as means of its implementation. The FCC has noted that "[w]ith the right approach to Article 3(2) and Article 6(1) of the Basic Law one article will not endanger, but will rather, as the constitutional legislature intended, fulfill the other."[59] Until the legislature reformed family law, the lower courts had to interpret pre-constitutional law in a way that prevented a violation of Article 3(2).[60] The lower courts acted accordingly, assuming separation of property as the new default matrimonial property regime, despite the law in the Civil Code.[61] In order to enable the wife to participate in wealth accumulated by the joint efforts of the spouses, courts held that couples had created implied partnerships.[62] Moreover, the lower courts constructed rights to spousal support for both parties[63] and gave parental responsibility to both parents.

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[54] Erna Scheffler, Verhandlungen des 38. Deutschen Juristentages 1950 B. 3 (1951).

[55] Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 1 BvL 106/53, Dec. 18, 1953, 3 BVERFGE 225, 239–40 (Ger.).

[56] *Id.*

[57] For the role FCC case law played in this development, see Renate Jaeger, *50 Jahre Artikel 3 Absatz 2 des Grundgesetzes: Die Rolle des Bundesverfassungsgerichts bei der Durchsetzung des Gleichberechtigungsgebotes*, *in* 50 JAHRE GRUNDGESETZ: MENSCHEN- UND BÜRGERRECHTE ALS FRAUENRECHTE 21 (Frauen & Geschichte Baden-Württemberg ed., 5th ed. 2000).

[58] Functional differences are not mentioned in the recent case law of the court.

[59] Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 1 BvL 106/53, Dec. 18, 1953, 3 BVERFGE 225, 242–43 (Ger.).

[60] *Id.* at 243.

[61] Bundesgerichtshof [BGH - Federal Court of Justice], Case No. 5 ZR 97/52, July 14, 1953, 10 BGHZ 266 (Ger.).

[62] Bundesgerichtshof [BGH - Federal Court of Justice], Case No. 2 ZR 44/52, Dec. 20, 1952, 8 BGHZ 249 (Ger.); THOMAS HERR, KRITIK DER KONKLUDENTEN EHEINNENGESELLSCHAFT 39–60 (2008).

[63] Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 1 BvL 106/53, Dec. 18, 1953, 3 BVERFGE 225, 242–43 (Ger.).

The constitutional principle of gender equality is still of great importance in FCC case law, especially with respect to the sharing of property and pension rights at the time of divorce, as illustrated by the following language in one of its cases:[64] "Pension rights accumulated during marriage have to be regarded as the joint achievement of the spouses. In the marital partnership, the husband's employment as well as the wife's homemaking are of equal rank and value."[65] In its 2001 decision on nuptial agreements, the FCC again stressed the importance of gender equality in marriage.[66] The Court held that the only constitutionally protected marriage was a partnership of equals.[67] A nuptial agreement that could in no way be regarded as an expression of such a partnership, but only as a reflection of the dominance of one partner over the other, did not deserve legal protection; rather, it necessitated court intervention for the protection of the weaker party.[68]

Thus, gender equality is a central element of the constitutional understanding of marriage. Gender equality must be respected by the legislature as well as by the lower courts.

IV. Marriage and Cohabitation

In Germany in 2010, 11.01% of couples cohabited without getting married or registering a civil partnership.[69] As in other European countries, for example France or the Scandinavian countries, cohabiting without being married is socially acceptable in Germany. The importance of the formal civil marriage ceremony must be discussed because the behavior of cohabitants does often not differ from married couples. The issue at hand is whether long-term cohabitation is enough to ensure the couple constitutional protection.

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[64] Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 1 BvR 105/95, Feb. 5, 2002, 105 BVERFGE 1, 11 (Ger.).

[65] Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 1 BvR 818/81, Nov. 30, 1982, 62 BVERFGE 323, 330 (Ger.).

[66] Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 1 BvR 12/92, Feb. 6, 2001, 103 BVERFGE 89, 101, 107 (Ger.).

[67] Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 1 BvR 105/95, Feb. 5, 2002, 105 BVERFGE 1, 11 (Ger.).

[68] Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 1 BvR 12/92, Feb. 6, 2001, 103 BVERFGE 89, 101 (Ger.).

[69] STATISTISCHES BUNDESAMT, STATISTISCHES JAHRBUCH tbl. 2.16 (2011) https://www.destatis.de/DE/Publikationen/StatistischesJahrbuch/Bevoelkerung.pdf?__blob=publicationFile (last visited July 30, 2012).

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As previously mentioned, according to FCC case law, Article 6(1) of the Basic Law protects a secularized notion of marriage as developed in the 19th century that demands a civil rather than a religious ceremony.[70] Official participation in the marriage ceremony is an essential part of this conception of marriage. Cohabitation without the marriage ceremony is not a marriage in the constitutional sense.[71] Gröschner considered it a paradoxical result that the constitutional freedom to conclude and organize one's marriage guaranteed that the government, the judiciary, and the legislature observe a respectful distance to the institution of marriage while a marriage cannot be concluded without a civil ceremony or dissolved without a court order.[72]

However, according to the FCC, Article 6(1) does not prevent the legislature from granting certain benefits to cohabiting couples.[73] Like any other human action that is not protected by a special constitutional right, cohabitation is protected under Article 2(1), which guarantees that freedom can only be restricted by means of a proportionate law.

The FCC has held that an official marriage ceremony executed by a civil servant ensured the absence of impediments to marriage as well as the publicity and transparency of legal relationships.[74] Moreover, the FCC's case law shows that rights to spousal support are a central aspect of marriage.[75] If these duties of mutual assistance are a central part of the constitutional understanding of marriage, and cannot be modified at will by the parties, a marriage cannot be created by an act of the parties alone, but only with the involvement of a governmental institution. This then also explains why a religious ceremony alone is not enough in Germany to ensure the protection of Article 6(1) GG.[76]

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[70] Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 1 BvR 636/68, May 4, 1971, 31 BVERFGE 58, 82–83 (Ger.); Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 1 BvL 136/78, Feb. 28, 1980, 53 BVERFGE 224, 245 (Ger.).

[71] Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 1 BvL 3/57, Dec. 16, 1958, 9 BVERFGE 20, 34–35 (Ger.); Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 1 BvR 409/67, Oct. 7, 1970, 29 BVERFGE 166, 166 (Ger.); Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 1 BvR 684/98, Nov. 11, 2004, 112 BVERFGE 50, 65 (Ger.); *see also* PETER BADURA, GRUNDGESETZ-KOMMENTAR Art. 6 Abs. 1, ¶ 56 (Theodor Maunz & Günther Dürig eds., 37th ed. 2000).

[72] Gröschner, *supra* note 15 at n.63.

[73] Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 1 BvR 1186/89, Apr. 3, 1990, 82 BVERFGE 6, 15 (Ger.).

[74] Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 1 BvR 409/67, Oct. 7, 1970, 29 BVERFGE 166, 176 (Ger.).

[75] Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 1 BvL 5/03, Feb. 28, 2007, 117 BVERFGE 316, 327 (Ger.).

[76] Bundesverwaltungsgericht [BVerwG - Federal Administrative Court], Case No. 1 C 17/03, Feb. 22, 2005, 2005 NEUE ZEITSCHRIFT FÜR VERWALTUNGSRECHT 1191, 1192 (Ger.).

This, however, raises the question of whether a marriage, as recognized under Article 6, could be created if the parties contractually agree that all marital duties and rights will bind them, but do not participate in a marriage ceremony. Even though there is no FCC decision on this, the Court would likely not hold in favor of such a union. Apart from the fact that monogamy would be more difficult to guarantee if such unions were accepted, the parties could terminate and modify their contract whenever they wanted. Only the required official and legal participation in the marriage ceremony and in divorce proceedings can ensure that certain rights and duties are created and resolved independently from the spouses' wishes.

V. Civil Partnership and Marriage

The *eingetragene Lebenspartnerschaft*, civil partnership,[77] is a legal institution within family law for permanent same-sex relationships.[78] Unlike cohabitants, civil partners legalize their union in a civil ceremony. Civil partnerships were introduced in 2001, when a coalition of the Social Democrats and the Green Party under Chancellor Gerhard Schröder was in office.

According to the traditional definition of marriage, which is the union of a man and a woman to a companionship for life, same-sex civil partnerships are not considered marriages within the meaning of Article 6(1), even if they are concluded in a civil ceremony.[79] Such an approach considers civil partnerships to be fundamentally different from marriages. Two possible constitutional interpretations could be drawn from this characterization: Civil partnerships could be considered constitutionally permissible but unprotected by Article 6, or they could be regarded as violating the institution of marriage and thus as unconstitutional.[80]

The constitutionality of the civil partnership was hotly debated when it was introduced in 2001. Those who argued that it was unconstitutional concentrated on the word *special* in Article 6(1). The theory was that if the constitution granted *special* protection to marriage, no other union should be even remotely granted protection and benefits like marriage.

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

[78] Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 1 BvR 1164/07, July 7, 2009, 124 BVERFGE 199, 206, ¶ 35 (Ger.).

[79] Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 1 BvR 640/93, Oct. 4, 1993, 1993 NEUE JURISTISCHE WOCHENSCHRIFT (NJW) 3058 (Ger.).

[80] *See, e.g.*, Badura, *supra* note 7, ¶ 58; Burgi, *supra* note 29 at 504–05; Roman Herzog, *Schutz von Ehe und Familie durch die Verfassung*, *in* BITBURGER GESPRÄCHE 15–16 (Gesellschaft für Rechtspolitik Trier ed., 1988).

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There should be a considerable distinction between marriage and other unions, "*Abstandsgebot*"[81] it was argued.[82] To combat such resistance and ensure the constitutionality of civil partnerships, the legislature established a couple of differences between marriage and civil partnership in its legislation. Among others, civil partners had no right to adopt children, they were treated as single with respect to inheritance and income tax law, and they had no right to a pension if their partner died. Moreover, the Federal legislature, who has legislative competence for family law, allowed the states (*Bundesländer*) to assign the partnership ceremony either to private notaries or to the public office responsible for marriage ceremonies (*Standesamt*). Since 1 January 2012, however, partnership ceremonies are performed in all German Federal states at the *Standesamt.* The southern state of Baden-Württemberg was the last to assign civil partnership and marriages to the same public institution.

The verdict of the FCC on the constitutionality of the civil partnership was keenly awaited. In its decision of 17 July 2002, the Court held that the civil partnership was constitutional because it was fundamentally different from marriage.[83] Thus, the Court assumed the first of the two approaches mentioned above. Marriage was the lifelong union of a man and woman. However, 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 that was not open to heterosexual couples.[84] Civil partnerships are thus not marriages but legal relationships that do not compete with marriage.[85] The Court rejected the claim that the wording of Article 6(1) demanded that there remain a significant distinction between marriage and other relationships.[86] Marriage should not be

[81] In literature, the terms *Privilegierungsgebot*, duty to privilege marriage, Detlef Merten, *Eheliche und nichteheliche Lebensgemeinschaften unter dem Grundgesetz*, *in* FREIHEIT UND EIGENTUM, FESTSCHRIFT FÜR WALTER LEISNER ZUM 70. Geburtstag 615, 619 (Josef Isensee & Helmut Lechler eds., 1999), and *Öffnungs- und Bezeichnungsverbot*, prohibition to open marriage to other unions or to call other unions marriage are used as well. Walter Pauly, *Sperrwirkungen des verfassungsrechtlichen Ehebegriffs,* 1997 NEUE JURISTISCHE WOCHENSCHRIFT 1955, 1956 (1997); Burgi, *supra* note 29, at 502–05.

[82] For a discussion of the Abstandsgebot, see Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 1 BvF 1/01 July 17, 2002, 105 BVERFGE 313, ¶¶ 19–20, (Ger.); *see also id.* at ¶¶ 125–27 (Papier, C.J., dissenting); *id.* at ¶¶ 128–47 (Haas, J., dissenting).

[83] Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 1 BvF 1/01, July 17, 2002, 105 BVERFGE 313, 345–46 (Ger.).

[84] *Id.* at 346–48, ¶ 97.

[85] *Id.* at 348, ¶ 97.

[86] *Id.* at 348, ¶ 98. For an argument that civil partnerships violate Art. 6 of the Basic Law, see Ruper Scholz & Arnd Uhle, *"Eingetragene Lebenspartnerschaft" und Grundgesetz*, 2001 NEUE JURISTISCHE WOCHENSCHRIFT 393, 396–400 (2001).

discriminated against, but the constitution did not require that other relationships be treated less favorably than marriage, the court held.[87]

Relieved by the decision, the legislature responded and reformed civil partnerships to remove some of the differences between marriage and civil partnerships. Civil partners may now adopt the children of their partners, but they still cannot adopt children as a couple.[88]

Since then, in recent cases, the FCC has stressed the similarities between marriages and civil partnerships:

> Like spouses, registered civil partners live in a long-term, legally recognized partnership (see BVerfGE 124, 199 (225)). While both are alive they share the assets of their registered civil partner and expect to be able to maintain their joint standard of living in the event of the death of one of the civil partners. Not unlike a spouse, a civil partner also acquires assets not only for himself, but also for his civil partner and, when applicable, for the children living with the partners.[89]

The Court stated that "[t]here are no longer any relevant differences between civil partnerships and marriage regarding their asset situation, long-term bond, and mutual care for one another."[90] In its decision of 6 December 2005, the FCC even went a step further and stated that every person has a constitutional right protected under Articles 2(1) and 1(1), of the Basic Law the right to one's personality, and under that freedom, the right to establish a relationship with a partner of his or her choice and to secure that partnership legally by establishing an institution—marriage or civil partnership.[91]

Even after the majority of the justices of the FCC decided the question of whether Article 6(1) necessitates a distinction between marriage and other partnerships, the dichotomy of marriage and civil partnership poses an equality issue that remains unresolved. Some

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[87] Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 1 BvF 1/01, July 17, 2002, 105 BVERFGE 313, 348–50 (Ger.).

[88] A case on this issue is pending at the moment.

[89] Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 1 BvR 611/07, July 21, 2010, 126 BVERFGE 400, 400 (Ger.).

[90] *Id.* At 423, ¶ 54.

[91] Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 1 BvL 3/03, Dec. 6, 2005, 115 BVERFGE 1, 24–25 (Ger.).

commentators assumed that the decision of 17 July 2002 meant that civil partners had no constitutional right to be treated like spouses.[92] The FCC rejected this notion in its decision of 7 July 2009.[93] The special protection of marriage in Article 6(1) was not enough to justify privileging a marriage over a civil partnership:

> If the privileged treatment of marriage is accompanied by unfavorable treatment of other ways of life, even where these are comparable to marriage with regard to the life situation provided for and the objectives pursued by the provisions, the mere reference to the requirement of protecting marriage does not justify such a differentiation.[94]

Even though the distinction between marriage and civil partnership was categorized according to gender and not sexual orientation, in practice, the decision to get married or establish a civil partnership has been inextricably linked to sexual orientation, the FCC stated.[95] Thus, the laws concerning the rights and duties of civil partners typically concerned homosexuals.[96] Since differentiations between marriage and civil partnership were thus based on sexual orientation, very substantial reasons were needed to justify them. In this decision, the FCC referred to the case law of the European Court of Human Rights (ECHR), which had already developed a high scrutiny test for distinctions based on sexual orientation.[97] The FCC argued that discrimination based on sexual orientation is comparable to discrimination based on gender, language, origin, or race, which are all forbidden by Article 3(3) of the Basic Law.[98] In all these cases, the victims of such discrimination have no opportunity to change the characteristic, even if they want to.

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[92] FRIEDHELM HUFEN, STAATSRECHT II 268 (2d ed. 2009).

[93] Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 1 BvR 1164/07, July 7, 2009, 124 BVERFGE 199 (Ger.).

[94] *Id.* at 226, ¶ 105.

[95] *Id.* at 221, ¶ 90.

[96] *Id.* at 222, ¶ 92.

[97] Karner v. Austria (No. 40016/98), 2003-IX Eur. Ct. H.R., July 24, 2003. 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 NJW 3537 (2010).

[98] Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 1 BvR 1164/07, July 7, 2009, 124 BVERFGE 199, 222, ¶ 87 (Ger.).

In 2009 and 2010, the FCC declared unequal treatment of marriage and civil partnerships in the contexts of survivors' pensions for employees in the civil service,[99] as well as inheritance taxes,[100] to be unconstitutional under the equal protection guarantee in Article 3(1). On 18 July 2012, the First Senate declared privileges for married couples in respect to taxes on purchase of real property unconstitutional.[101] The Second Senate held on 19 June 2012 that benefits for married civil servants must be given to civil partners as well.[102] A decision by the Second Senate of the Court concerning unequal treatment of spouses and civil partners under income tax law is still pending.

Michael[103] and Hillgruber[104] agree that this interpretation of Article 3(1) in effect extends the constitutional protection of Article 6 to civil partnerships. The court's approach, however, has been criticized: If the *special protection of marriage* that Article 6 requires was not enough to justify these privileges, nothing remained of marriage's special constitutional protection.[105]

Grünberger summarized the result of this case law concisely with the words that marriage and civil partnership were "separate but equal."[106] Marriage and civil partnership are regulated separately; however, FCC case law demands equal protection. When the U.S. Supreme Court decided the landmark case, *Brown v. Board of Education of Topeka*,[107]

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[99] Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 1 BvR 1164/07, July 7, 2009, 124 BVERFGE 199 (Ger.).

[100] Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Joined Cases No. 1 BvR 611/07 and 1 BvR 2464/07, July 21, 2010, 126 BVERFGE 400 (Ger.).

[101] Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 1 BvL 16/11, July 18, 2012 (Ger.).

[102] Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 2 BvR 1397/09, June 19, 2012 (Ger.).

[103] Michael, *supra* note 97, at 3539–42.

[104] Christian Hillgruber, *Anmerkung*, 65 JURISTENZEITUNG 41 (2010).

[105] *Id.* at 42. For more criticism, see Sebastian Hopfner, *Lebenspartnerschaft ist gleich* Ehe—Verfassungsinterpretation *oder Verfassungsänderung?*, BETRIEBLICHE ALTERSVERSORGUNG 772 (2009); CHRISTIAN VON COELLN, GRUNDGESETZ-KOMMENTAR ART. 6, ¶ 50 (Michael Sachs ed., 6th ed. 2011). For more approving treatment, see Michael, *supra* note 97, at 3537; Claus Dieter Classen, *Der besondere Schutz der Ehe—aufgehoben durch das BVerfG?*, 65 JURISTENZEITUNG 411, 412 (2010); Claus Dieter Classen, *Die Lebenspartnerschaft im Beamtenrecht*, FAMILIE PARTNERSCHAFT RECHT [FPR] 200 (2010); Tilman Hoppe, *Die Verfassungswidrigkeit der Ungleichbehandlung von Ehe und eingetragener Lebenspartnerschaft im Bereich der betrieblichen Hinterbliebenenrente (VBL)*, DVBl 1516 (2009).

[106] Michael Grünberger, *Die Gleichbehandlung von Ehe und eingetragener Lebenspartnerschaft im Zusammenspiel von Unionsrecht und nationalem Verfassungsrecht*, 5 FAMILIE PARTNERSCHAFT RECHT 203, 208 (2010).

[107] 347 U.S. 483 (1954).

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schools were still discriminating; similarly, it remains an open question in Germany as to how the constitutional relationship of civil partnership and marriage will develop. The rest of this Article will attempt to answer to this question.

D. Same-Sex Marriage

The issue of whether marriage should be opened to same-sex couples is hotly debated not only in Germany, but also in the United States. More and more countries allow same-sex couples to marry—*e.g.*, the Netherlands (2001), Belgium (2003), Canada (2005), Spain (2005), South Africa (2006), Norway (2009), Argentina (2010), Iceland (2010), and Portugal (2010).

The ECHR concluded in *Schalk and Kopf v. Austria*[108] that because less than half of the member states to the European Charter of Human Rights had opened marriage to same-sex couples, the member states still moved within their margin of appreciation in not allowing same-sex couples to get married. Article 12 of the Charter, the right to get married, did not protect same-sex unions.[109] The Court held, however, that homosexual partnerships were protected under Article 8 as *family life* in addition to the protections afforded to *private life*.[110] A majority of 4 to 3, Judges Rozakis, Spielmann, and Jebens dissenting, however, denied a duty to introduce a legal framework for homosexual couples.

The final part of this article will discuss German constitutional law and ask whether a separation between civil partnerships and marriage is necessary in order to avoid a violation of Article 6(1). This view might be accurate if marriage in the constitutional sense was indeed limited to couples of different sexes. If, however, marriage under Article 6 is not limited to people of different sexes, civil partnerships would not only not violate Article 6 but would in fact be constitutionally protected in a manner that is similar to marriage. If this view proves to be correct, the separate status of civil partnership could actually be construed as a violation of Article 6(1). Rather than providing a separate institution for same-sex couples, the Constitution may require that marriage, as it is regulated in the German Civil Code, be open to same-sex couples in order to avoid discrimination.

I. Constitutional Interpretation

If all the other constitutional rights in the Basic Law are taken into account, the concept of marriage in Article 6(1) should include civil partnerships. This is because all the other

[108] Schalk & Kopf v. Austria (No. 30141/04), 2010 Eur. Ct. H.R.

[109] *Id.* ¶¶ 54–64.

[110] *Id.* ¶¶ 94–95.

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articles of the Basic Law are interpreted in a way that guarantees the same rights regardless of a person's sexual orientation. An interpretation that excludes a group of people from a constitutionally protected right because of a characteristic, similar to those in Article 3(3), requires a very substantial reason. Despite this, the FCC has decided that because Article 6(1) is a special law for couples of mixed sex, it was constitutional to exclude homosexual couples from its protection.[111] This argument, however, begs the question of whether marriage in Article 6(1) really only means couples of mixed sex.[112]

It is true that if the interpretation of the German constitution was limited to its founders' original intentions, marriage in the constitutional sense would be limited to unions of men and women. However, the FCC decided early on that when interpreting laws below the constitutional level, the interpretation cannot be limited to the individual historical intentions of the legislature.[113] It would be strange if different rules of legal interpretation were to be used for constitutional law. More importantly, at the time of the drafting of the Basic Law, many of the laws that were in force would be considered unconstitutional today, which does not give much credibility to the founders' intentions. For example, until 1969, consensual homosexual acts between adult men were criminal offences according to § 175 of the Criminal Code.[114] The fact that the draftsmen and women of the Constitution could not imagine a world in which homosexual couples celebrated *tying the knot* like heterosexuals is not a basis for limiting homosexuals' constitutional protection.

Furthermore, the FCC has emphasized the importance that changes of social opinions have on the concept of marriage.[115] The FCC considers a change of society and consequently a change of the concept of marriage possible.[116] However, this approach is problematic. First, because constitutional rights are meant to protect against public opinion as

[111] Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 1 BvR 640/93, Oct. 4, 1993, 1993 NEUE JURISTISCHE WOCHENSCHRIFT (NJW) 3058 (Ger.).

[112] Kai Möller, *Der Ehebegriff des Grundgesetzes und die gleichgeschlechtliche Ehe*, Die öffentliche Verwaltung 64, 65 (2005).

[113] Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 2 BvH 2/52, May 21, 1952, 1 BVERFGE 299, 312 (Ger.); Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 1 BvR 898/79, Dec. 16, 1981, 59 BVERFGE 128, 153 (Ger.).

[114] After 1969, consensual male sodomy was only criminal when one partner was under 21 years old. In 1973, this was changed and it was a crime only if the partner was under 18. In 1994, special criminal rules for homosexual sex were completely abandoned.

[115] Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 1 BvR 719/69, Nov. 14, 1973, 36 BVERFGE 146, 163 (Ger.); Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 1 BvF 2/01, July 17, 2002, 105 BVERFGE 313, 345 ¶ 87 (Ger.).

[116] Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 1 BvR 640/93, Oct. 4, 1993, 1993 NEUE JURISTISCHE WOCHENSCHRIFT (NJW) 3058 (Ger.).

expressed for example in the decisions of the democratically appointed legislature. Second, it is difficult to ascertain when such a change has actually taken place. Practically, such a change will be concluded when the FCC determines in a decision that the change indeed has occurred, which shows how much power the court has assigned itself by this understanding of constitutional law.

Moreover, the argument that Article 6 should be interpreted as excluding civil partnerships because the German public understands marriage as only the union of a man and a woman is not convincing for two reasons. First, in Germany, a civil partnership is commonly referred to as "*Homo-Ehe*," or "Marriage for Homosexuals." In addition, when homosexual celebrities establish civil partnerships, tabloids usually report on their "getting married." This suggests a strong link between civil partnerships and marriage in the public understanding. Second, even if public opinion could be reliably ascertained as not including same-sex unions, marriage is a legal term. Legal terms like *contract*, *ownership*, or *murder* are not interpreted according to public opinion either.[117] Put another way, the public would also consider a religious wedding to create a marriage even though the FCC only considers a civil marriage concluded by a registrar to be a marriage under Article 6.

II. Marriage and Religion

The exclusion of homosexual couples from the protection of marriage would certainly mirror the Christian and Jewish traditions that have strongly influenced the development of the values expressed in the German constitution. Nevertheless, a Christian conception of marriage cannot be of decisive importance for constitutional interpretation.

Some may find this surprising considering the FCC tends to be more favorable regarding religious expression in the public sphere than the U.S. Supreme Court.[118] For example, according to Article 7(3), religion is a regular course in public schools and Christian symbols are permissible in schools so long as those of a different faith have the opportunity to demand removal anonymously.[119] School prayers are permissible during school hours so

[117] Möller, *supra* note 112, at 66.

[118] There is not enough room here to provide a thorough comparison of the U.S. and the German constitutional interpretation of religion in the public sphere. *See* CAROLA RATHKE, ÖFFENTLICHES SCHULWESEN UND RELIGIÖSE VIELFALT: ZUGLIECH EIN BEITRAG ZUR DOGMATIK VON ART. 4 ABS. 1 UND 2 GG, ART. 7 ABS. 1 GG UND DER STAATLICHEN PFLICHT ZUR WELTANSCHAULICH-RELIGIÖSER NEUTRALITÄT (2005); BENJAMIN VOLLRATH, RELIGIÖSE SYMBOLE: ZUR ZULÄSSIGKEIT RELIGIÖSER SYMBOLE IN STAATLICHEN EINRICHTUNGEN IN DER BUNDESREPUBLIK DEUTSCHLAND UND DEN USA (2006).

[119] This is the way the Bundesverwaltungsgericht has interpreted the famous crucifix-decision of the FCC. Bundesverwaltungsgericht [BVerwG - Federal Administrative Court], Case No. 6 C 18–98, Apr. 21, 1999, 1999 NEUE JURISTISCHE WOCHENSCHRIFT (NJW) 3063, 3064 (1999) (Ger.); *see also* Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 1 BvR 1087/91, May 16, 1995, 93 BVERFGE 1 (Ger.) (the crucifix decision).

long as a student or teacher has suggested them and everybody participates freely.[120] Additionally, churches that undergo a special public process have the right to direct fiscal authorities to collect certain taxes for them from people of their faith (*Kichensteuer*).

Nevertheless, the Constitution must be neutral and cannot identify with any religious creed.[121] To consider the Christian notion of marriage as decisive for constitutional interpretation would contradict the Constitution's guarantee of freedom of religion. According to FCC case law, the Basic Law embraces a secular notion of marriage.[122] If a Christian conceptualization of marriage were to be decisive, the constitutionality of divorce would be questionable, especially in regions in which the Catholic belief dominates. Moreover, marriages of non-Christian or non-Jewish couples would not be protected under the Constitution.

As was pointed out above, the importance of the public registration of the marriage ceremony is of decisive importance for the notion of marriage. Couples are free, however, to perform a religious ceremony and even to interpret their individual union in a way that excludes homosexual couples. This, however, does not shed light on the constitutionality of same-sex unions that have undergone a public legal ceremony similar to married couples.

III. Gender, Sex, and Marriage

At first glance, the distinction between sexes, which is at the heart of the traditional notion of marriage as a mixed sex union, seems natural. The FCC, however, has decided many cases concerning the legal position of transsexuals, thus acknowledging that the distinction between sexes is flexible.[123] The Court has held that gender is not necessarily a biological category fixed for life; rather, it can be changed. Transsexuals who feel they do not belong to the gender that law and society assigned them, have a constitutional right to change their legal gender and name.[124]

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[120] Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 1 BvR 647/70, 1 BvR 7/74, Oct. 16, 1979, 52 BVERFGE 223, 237, 239 (Ger.).

[121] Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 1 BvR 1087/91, May 16, 1995, 93 BVERFGE 1, 16–17 (Ger.).

[122] Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 1 BvL 136/78, Feb. 28, 1980, 53 BVERFGE 224, 245 (Ger.).

[123] See Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 1 BvR 16/72, Oct. 11, 1978, 49 BVERFGE 286 (Ger.); Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 1 BvL 3/03, Dec. 6, 2005, 115 BVERFGE 1 (Ger.); Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 1 BvL 10/05, May 27, 2008, 121 BVERFGE 175 (Ger.).

[124] Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 1 BvR 16/72, Oct. 11, 1978, 49 BVERFGE 286 (Ger.).

In a decision of 27 May 2008, the FCC had to decide a case concerning a transsexual who had been married to a woman for many years. [125] The transsexual person underwent the operation legally necessary at the time to obtain the legal status of a woman. However, the law required that this person get divorced before changing legal status from male to female in order to prevent a legally recognizable marriage between two people of the same gender. The transsexual in question argued that the couple's love had not died and that no force in the world could part them. The FCC objected to this de facto duty to divorce and held that even though the marriage was created as a union between a man and a woman, there was no need to continue the union as such simply to ensure ongoing constitutional protection.[126] Thus, same sex marriages are de facto possible already if one spouse is a transsexual.

In a decision of 11 January 2011, the FCC decided that the laws requiring a transsexual to undergo a severe and dangerous operation to change his or her genitals before he or she could obtain the right to change gender was unconstitutional.[127] This means that if two psychological experts agree that a person will remain convinced that he or she belongs to the other gender, a person with male genitalia may legally become a woman. This woman could then get married to a man or institute a civil partnership with another woman. This thus raises the question of whether a distinction, such as gender, that is so flexible and so much part of one's own individual conviction, can justify the constitutional protection of only a union of mixed sexes.

IV. Marriage and Procreation

In Greek and Roman tradition,[128] as well as in traditional Christian teachings, marriage served as the legal and social framework to create families and to raise children. Article 119 of the Weimar Constitution read: "Marriage is protected especially by the constitution as the basis of family life and of the reproduction and preservation of the nation." The Basic Law does not include a comparable sentence, probably for the previously mentioned reason that words such as "reproduction and preservation of the nation" sounded disturbing after 1945. Nevertheless, academics justifying a notion of marriage as the union of a man and a woman only, often refer to the ability of many heterosexual couples to have mutual children. According to Gröschner, the German legislature needs only to favor

[125] Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 1 BvL 10/05, May 27, 2008, 121 BVERFGE 175 (Ger.).

[126] *Id.* at 198–99.

[127] Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 1 BvR 3295/07, Jan. 11, 2011, 128 BVERFGE 109 (Ger.).

[128] Gröschner, *supra* note 15, ¶ 36.

and support this reproductive function in order to fulfill its constitutional obligations.[129] Marriage, von Coelln argues, is the legally protected pre-stage of the family.[130] This understanding views marriage as the basis of family life.

In its decision of 21 July 2010, the FCC stated cautiously that the reproductive abilities of a married couple may justify providing benefits for married couples that are not provided for civil partners.

> 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.[131]

Likewise, the FCC considered it constitutional that public health insurance covered the costs of in vitro fertilization only for married couples. The Court held that the "legally secured responsibility and stability of marriage" justified drawing a distinction between married and unmarried couples.[132]

However, *family* as protected in Article 6 of the Basic Law, not only protects married parents, but also unmarried parents and their children.[133] In recent years, several decisions of the FCC have converged the rights and duties of unmarried parents with those of married parents.[134] A homosexual couple living with the child of one of the partners is a

[129] *Id.* ¶ 50.

[130] Coelln, *supra* note 105, ¶ 50.

[131] Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 1 BvR 611/07, July 21, 2010, 126 BVERFGE 400 (Ger.).

[132] Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 1 BvL 5/03, Feb. 28, 2007, 117 BVERFGE 316, 328–29 (Ger.).

[133] Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 1 BvR 265/75, June 6, 1977, 45 BVERFGE 104, 123 (Ger.); Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Joined Cases 1 BvR 1493/96 and 1 BvR 1724/01, Apr. 9, 2003, 108 BVERFGE 82, 112 (Ger.); Michael, *supra* note 97, at 3538 ("[T]he constitutional family privilege is independent from the marriage privilege."

[134] Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 1 BvR 420/09, July 21, 2010, 127 BVERFGE 132 (Ger.); Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 1 BvL 9/04, Feb. 28, 2007, 118 BVERFGE 45 (Ger.).

family within the meaning of Article 6(1) as well.[135] If one accepts the FCC's analysis that marriage stabilizes the parent's relationship, which in turn ensures a healthy environment for the children, whether or not they are adopted,[136] one may conclude that a civil partnership would likewise stabilize a homosexual relationship and thus better aid child development than a homosexual couple who just cohabitates.[137]

Another argument against this focus on the reproductive function of marriage is that not all married couples want, or are able, to have children. The FCC has never held, and academics have never argued, that infertile married couples would not be protected by Article 6(1). Moreover, the constitutional right that allows the couple to live their marriage as the couple sees fit, [138] should protect against any pressure or duty to have children.

Yet, according to Gröschner and others, this does not diminish the notion of marriage as the union of a man and a woman for reproductive purposes. They argue that neither a person's individual capacity nor a couple's willingness to procreate should be considered in a discussion of the constitutional protection of marriage as an institution; it was the fact that children could be born into the union of a man and a woman that was relevant here.[139]

This position lacks merit.[140] Marriage does indeed provide a legal framework within which to create a family. It is doubtful, however, that this alone is enough to exclude homosexual couples from the protection of Article 6. First, for constitutional protection and support of marriage to be rationalized as encouraging reproduction of married couples, the birth of children to married couples would need to be considered a constitutional aim of some importance. This, however, is not necessarily the case, given that Article 6(5)[141] of the Basic law as cited above states that children born in and out of wedlock must have the same rights and opportunities in life.

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[135] Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 1 BvR 666/10, 2011 NEUE JURISTISCHE WOCHENSCHRIFT (NJW) 988 (July 2, 2010).

[136] Burgi, *supra* note 29, at 500.

[137] The Second Senate adopted this argument in Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 2 BvR 1397/09, June 19, 2012 (Ger.). This article does not discuss the development of children who grow up in a family with homosexual parents. This question has to be answered by qualified scientists.

[138] Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 1 BvR 683/77, May 31, 1978, 48 BVERFGE 327, 338 (Ger.); Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 1 BvL 5/83, Jan. 10, 1984, 66 BVERFGE 84, 94 (Ger.); Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 1 BvR 105/95, Feb. 5, 2002, 105 BVERFGE 1, 11 (Ger.).

[139] Gröschner, *supra* note 15, ¶ 44; Burgi, *supra* note 29, at 499.

[140] *See* Möller, *supra* note 112, at 69–70.

[141] GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GRUNDGESETZ] [GG] [BASIC LAW] art. 5 (Ger.).

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Moreover, if the reproductive function of married couples was at the core of the constitutional understanding of marriage, it would be constitutionally permissible to prevent anyone who does not want to or is unable to have children from getting married. In order to prevent all problems with data protection that governmental inquiries into a person's willingness or ability to procreate might cause, such a conception of marriage would allow the government to exclude women over sixty from getting married. Möller suggested sarcastically, such women could conclude an "old-age partnership" rather than a marriage.[142] Moreover, it should be constitutional to exclude people from marriage whose infertility is known or openly admit that they do not plan to have children.

However, according to the FCC case law, the ability to procreate is not a precondition to marry under Article 6(1).[143] Furthermore, despite the fact that the original intentions of the draftsmen and women of the Basic Law are difficult to ascertain today and should not be considered decisive, it is interesting to note that the drafting assembly (*Parlamentarischer Rat*) understood that adoptive parents and their children formed a family. Moreover, Theodor Heuss—who was eventually the first Federal President—emphasized that childless spouses deserved the same constitutional protection as married couples with children.[144] While the idea of a marriage between homosexual partners was inconceivable at the time, the idea that constitutional protection should not be limited to spouses with offspring was nothing new.

Additionally, if marriage is understood as the union of a man and a woman for reproductive purposes, the possibility to have a child through artificial insemination should not be enough. Gröschner, however, believes medically assisted childbirth is protected as part of the reproductive function of marriage in Article 6(1) of the Basic Law even when sperms and eggs of donors are used.[145] However, this approach is inconsistent. Under this theory, civil partnerships of lesbians must be understood as marriages given that both partners can have children with the help of a sperm donor; male homosexual partnerships, however, could not and could thus not get married. This result, allowing lesbian marriages but not gay marriages, surely cannot stand considering that Article 3(2) and 3 (3) forbid

[142] Möller, *supra* note 112, at 69–70.

[143] Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 1 BvR 16/72, Oct. 11, 1978, 49 BVERFGE 286, 300 (Ger.).

[144] 29. Sitzung Grundsatz-Ausschuss vom December 4, 1948 (Stenoprotokoll). On the discussions in the constitutional drafting proccess, see Eva Welskop-Deffaa, *Wahlverwandschaft und Verantwortungsgemeinschaft*, 55 HIRSCHBERG 525, 527–28 (2003).

[145] Gröschner, *supra* note 15, ¶ 66.

gender discrimination. If however, it was enough that a couple raise adopted children, marriage by homosexual couples should not be impossible.[146]

If marriage today is neither in fact nor in law the only place to raise children, the issue needs to be discussed as to how the concept of marriage should be interpreted. Because the sole basis for marriage is no longer the founding and raising of a family, our conception of marriage needs to focus on the relationship of the two partners.[147]

V. Marriage as a Partnership of Mutual Responsibility

If a reproductive notion of marriage is rejected, the concept of marriage must focus on the relationship of the couple. If, however, the reproductive function is considered as the sole or most important purpose of the institutional protection of marriage, the legislature would be free to abolish all duties of mutual support between the spouses during and after marriage as far as those duties have no connection to the birth or raising of mutual children. For example, the only form of spousal support that could not be abolished would be that for the time a divorced spouse takes care of the parties' children. However, the legislature could certainly abolish all claims to spousal support for ill or old divorced spouses who have not raised any children during their marriage. It is doubtful, however, if such a legislation would be constitutional. The FCC decided the legislature had to provide legislation that adequately took into account the personal responsibility of the spouses even after their divorce.[148] The compensation for any disadvantages caused by the raising of children was not mentioned in this context. As already mentioned, the internal organization of one's married life is the responsibility of the spouses alone. A duty to have children must thus be considered unconstitutional. Therefore, it is doubtful that the core of the constitutional understanding of marriage is based on a duty the legislature cannot enforce without violating Article 6 and other human rights. Other duties, however, which are considered to be at the heart of marriage, are enforced with public authority. Spouses can sue each other for spousal support. Not only spouses, even public authorities can sue a spouse for spousal support, if they had to provide social benefits because of the defendant's unwillingness to pay. In addition, the civil servant who performs the marriage ceremony can refuse to do so under Section 1310(1) of the German Civil Code in connection with Section 1314(2) if he or she is convinced that the couple does not intend to provide mutual support. There does not exist any right to refuse to perform the ceremony because the couple declares that they do not want any children.

[146] Under German law, civil partners may adopt their partner's children. This Article does not discuss the question of whether adoption should be possible for same-sex couples under the same prerequisites as for heterosexual couples. This question must be decided according to what is best for the children, which may very well mean open adoption for civil partners. A case concerning the question is pending at the moment at the FCC.

[147] Michael, *supra* note 97, at 3538.

[148] Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 1 BvL 136/78, Feb. 28, 1980, 53 BVERFGE 224, 250 (Ger.).

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The fact that such limitations of one's personal rights (a legal duty to pay spousal support is a restriction of the payer's freedom under Article 2 (1)) are justified because of Article 6 suggests that those duties of mutual support are at the core of the constitutional notion of marriage, and the reproduction of legally unified heterosexual couples is not. This understanding of marriage has the legally secured and enforceable mutual responsibility of the partners at its center. Such a conception puts marriage in between the constitutional rights that are exercised jointly by a group of people like the freedom to form co-operations and unions,[149] or the freedom of assembly,[150] and the individual constitutional rights like free speech[151] and freedom of religion[152] which essentially protect the free development of one's personality. Marriage under Article 6 of the Basic Law stands in the middle, protecting the development of the individual within a partnership of equals.

With their marriage vows, two people create a binding relationship of mutual assistance and encouragement that provides emotional and even limited financial support. This relationship can, however, be opened to others, for example when children are born or adopted, or when the couple offers help and support to relations or friends in difficulties. Marriages can thus create centers of solidarity, which have an effect on society. This function can be assumed irrespective of the partners' sexes.

Under this understanding of marriage, there are no convincing reasons to limit marriage's constitutional protections under Article 6(1) to mixed sex couples. The conceptualization of marriage suggested here encompasses the functions of both marriage and civil partnership. As a result, civil partners should be allowed to marry in order to avoid violations of Article 6(1).

E. Conclusion

Marriage, under Article 6(1) as it has been interpreted by the FCC, is created in the presence of public officials. It creates mutual duties of support. In certain situations, those duties surpass even divorce and cannot be fully abolished by nuptial agreements. The protected space of mutual solidarity that marriage creates does not only benefit the couple, but also third parties such as children, relatives, and friends. According to FCC case law, only couples of mixed sex can marry. However, this part of the FCC's concept of marriage is constitutionally doubtful. There are no convincing reasons against an understanding of marriage that includes same-sex as well as mixed sex couples. The FCC

[149] Grundgesetz für die Bundesrepublik Deutschland [Grundgesetz] [GG] [Basic Law] art. 9 (Ger.).

[150] *Id.* at art. 8.

[151] *Id.* at art. 5.

[152] *Id.* at art. 4.

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should recognize this understanding; doing so would not only solve problems of equal protection but also finalize the acceptance of homosexual relationships whose partners have, different from mere cohabitants, created legally binding duties of mutual support and responsibility.

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