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## National Report: Germany

Jens M. Scherpe

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# NATIONAL REPORT: GERMANY

DR JENS M. SCHERPE\*

**1. Legal framework: Please briefly explain the legal system used in your country. Include information about the type of Constitution (written; unwritten; modifiable by a Constitutional Tribunal, by Supreme Court decisions, by Congress only; etc.) Please do not use more than one page to provide your legal framework.**

Germany is a civil law country and has a written constitution, the *Grundgesetz* (GG; Basic Law). The GG enshrines the principles of a federal, democratic, and constitutional state and contains strong *Grundrechte* (basic rights) in arts. 1-19 and 38 which are protected by the state. According to art. 79 GG, a change/amendment of the GG requires a 2/3 majority in both the *Bundestag* and *Bundesrat* (Upper and Lower House of Parliament, see below). But some provisions cannot be changed (cf. art. 79(3) GG); namely those relating to Germany's status as a federal and democratic state, the inviolability of human dignity (art. 1 GG) and the separation of powers (art. 20 GG).

Each of the German *Länder* (states) has its own constitution, government, Parliament, administration, and judiciary. The legislative power and division of power for different matters are regulated in art. 70 ff. GG. In some matters the federation, in others the states, have exclusive legislative power, but for some there is concurrent legislative power. Federal law takes precedence over state law (art. 31 GG).

The *Bundestag* (Upper House) is the federal Parliament. The electoral system is a combination of personal and proportional representation, but the latter determines the actual composition of the *Bundestag*. The *Bundesrat* (Upper House) consists of the representatives of the state governments, which means that its composition can change with each state election (which are normally at a different time from the general federal elections).

Federal Bills can fall into one of two groups. The first are the so-called *Zustimmungsgesetze* ("consent Bills") for which the assent of the *Bundesrat* is required. *Zustimmungsgesetze* fall into three categories: Bills

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\* University of Cambridge/United Kingdom

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that amend the GG; Bills that affect the states' revenue/taxes; and Bills that affect the administrative jurisdiction of the states.

The second group of federal Bills is the *Einspruchsgesetze* ("objection Bills") where the *Bundestag* can vote to override the objection of the *Bundesrat*; for this, the same majority is required as was established in the *Bundesrat* when rejecting the Bill.

Germany has a constitutional court, the *Bundesverfassungsgericht* (BVerfG), consisting of two chambers (*Senate*) with 8 judges each. Its task is to ensure that all state institutions (both federal and *Länder*) comply with the GG, thus securing the free democratic order of the Federal Republic of Germany. The decisions of the BVerfG are final, and all institutions are bound by those decisions. The most important proceedings that allow the jurisdiction of the BVerfG to be invoked are:

*Verfassungsstreit* (constitutional dispute): the BVerfG also has jurisdiction to decide disputes between federal government bodies (*Organstreit*) and between the federation and the states (*Bund-Länder-Streit*); the latter often concern questions of legislative powers.

*Verfassungsbeschwerde* (constitutional complaint): anyone who feels that his or her constitutional rights have been violated is entitled to bring a complaint to the BVerfG, provided that all other legal remedies (within reason) have been exhausted and that it is admissible. The BVerfG itself decides on the admissibility of a complaint.

*Normenkontrolle* (proceedings on constitutionality of statutes): only the BVerfG may find that a statute is incompatible with the GG. If another court considers a statute to be incompatible, it must initiate proceedings to the BVerfG for a decision (*konkrete Normenkontrolle*). The federal government, a state government or 1/3 of the members of the *Bundestag* can also initiate proceedings for a constitutional review of a statute (*abstrakte Normenkontrolle*).

The latter two proceedings are the most relevant for this national report.

**2. Constitutional regulations applicable to same-sex partnerships. Please be specific about the constitutional guarantees in your country that conflict/support same-sex marriage and those that can conflict/support same-sex unions in a format different than marriage. Explain each case.**

The constitutional norm most relevant (and controversial) for same-sex relationships in general (see 2.2. below) and same-sex marriage in particular (see 2.1. below) is art. 6 GG.

Art. 6(1) GG reads as follows:

Marriage and the family shall enjoy the special protection of the state.<sup>1</sup>

### 2.1. Marriage as a union of one man and one woman

The BVerfG has consistently held that art. 6(1) GG is an *Institutsgarantie* (guarantee of the institution of marriage) and also a *wertentscheidende Grundsatznorm* (a norm embodying fundamental values/value-determining basic norm).<sup>2</sup> Art. 6(1) GG encompasses marriage and family and protects them as a sphere of private autonomy against state intervention.<sup>3</sup> The concept of “marriage” in art. 6 GG is based on a secular and legal conception of marriage,<sup>4</sup> and the BVerfG has consistently held that marriage as understood by the GG is a union of one man and one woman.<sup>5</sup>

In the last decision concerning same-sex marriages, the BVerfG on 4 October 1993 rejected a *Verfassungsbeschwerde* (constitutional complaint) that art. 6 demanded that marriage should be open to same-sex couples.<sup>6</sup> The decision is very brief, as the *Verfassungsbeschwerde* was found to be inadmissible because of the previous and unambiguous case law on the matter. BVerfG held that there had not been any significant societal changes that indicated that the definition of marriage had to be understood to include same-sex couples. Hence same-sex relationships and all other forms of non-marital cohabitation are not protected by art. 6 but rather by the (much broader) art. 2(1), which protects the right to free development of one’s personality.<sup>7</sup> It was open to the legislature to protect unions other than marriage under this provision, which was sufficient to safeguard the rights of the individuals.<sup>8</sup>

1. On art. 6 generally see Bleibtreu/Klein-Hofmann, Art. 6, n. 1 ff.; Jarass/Pieroth-Pieroth, Art. 6, n. 1 ff.; Friauf/Höfling-Burgi, Art. 6 n. 1 ff.; Maunz/Dürig-Badura, Art. 6, n. 1 ff.; Leibholz/Rinck, Art. 6, n. 1 ff.; all with further references.

2. BVerfGE 10, 59 (66) = NJW 1959, 1483; BVerfGE 49, 286 (300) = NJW 1979, 595; BVerfGE 53, 224 (245) = NJW 1980, 689; BVerfGE 62, 323 (329 f.) = NJW 1983, 511; BVerfGE 87, 234 (264) = NJW 1993, 643; BVerfGE 105, 313 (342). See also BVerfGE 49, 286 (300) = NJW 1979, 595. See also Bleibtreu/Klein-Hofmann, Art. 6, n. 3.

3. Cf. BVerwGE 91, 130 (134); BVerfGE 6, 388; Leibholz/Rinck, Art. 6, n. 2; Bleibtreu/Klein-Hofmann, Art. 6, n. 3.

4. BVerfGE 31, 58 (82)f.; BVerfGE 53, 223 (245).

5. BVerfGE 10, 59 (66) = NJW 1959, 1483; BVerfGE 49, 286 (300) = NJW 1979, 595; BVerfGE 53, 224 (245) = NJW 1980, 689; BVerfGE 62, 323 (330) = NJW 1983, 511; BVerfGE 87, 234 (264) = NJW 1993, 643; BVerfGE 105, 313 (345 f.); BVerwGE 100, 287 (294); Jarass/Pieroth-Pieroth, Art. 6, n. 2; Friauf/Höfling-Burgi, Art. 5, n. 18; Maunz/Dürig-Badura, Art. 6, n. 42, 58; Leibholz/Rinck, Art. 6, n. 46; Bleibtreu/Klein-Hofmann, Art. 6, n. 5.

6. BVerfG NJW 1993, 3058. On this, see also answer to Question 5 below, esp. 5.1.2.

7. Maunz/Dürig-Badura, Art. 6, n. 55; BVerfG NJW 1993, 3058.

8. BVerfG NJW 1993, 3058. See also Maunz/Dürig-Badura, Art. 6, n. 35.

## 2.2. Constitutionality of the *Eingetragene Lebenspartnerschaft*

In 2001 Germany introduced the *Eingetragene Lebenspartnerschaft* (ELp, life partnership)<sup>9</sup> through the the *Lebenspartnerschaftsgesetz* (LPartG; Act on life partnerships) which, in turn, was introduced by the *Gesetz zur Beendigung der Diskriminierung gleichgeschlechtlicher Lebensgemeinschaften: Lebenspartnerschaften* (LPartDisBG).<sup>10</sup> The ELp is (or at least is supposed to be) the functional equivalent<sup>11</sup> of marriage for same-sex couples. Unlike some registered partnership/civil union regimes in other jurisdictions, the ELp is not open to opposite-sex couples. For details on the ELp and the development leading up to it, see answer to Question 5 below.

The introduction of the ELp was controversial, both in substance and procedure, and was met with fierce resistance particularly from the conservative parties (see answer to Question 5 below, esp. 5.1.4.). It was argued by many that the ELp violated the protection of marriage in art. 6(1) GG, as marriage was afforded special protection, and no other family law regime could therefore be given equal (or almost equal) status and protection (so-called *Abstandsgebot*).<sup>12</sup> Others argued that no such *Abstandsgebot* existed and that the LPartG ELp did not infringe upon the rights protected by art. 6 GG in any event, as it was a different legal regime and targeting a different group of people.<sup>13</sup>

After the Bundestag had passed the LPartDisBG, the conservative governments of the German states of Bavaria, Thuringia and Saxony challenged its constitutionality (and thus that of the LPartG) in an *abstrakte Normenkontrolle* and also asked for an interim order to prevent the LPartG from entering into force.<sup>14</sup>

On 18 July 2001, the BVerfG dismissed the application for the interim order against the LpartDisBG.<sup>15</sup> The court was not convinced that marriage

9. Sometimes also referred to as civil partnership or registered partnership. However, these terms derive from other jurisdictions and, therefore, denominate different legal constructs. In the following the term “life partnership” will be used.

10. Of 16.2.2001, BGBl. I 2001, pp.266 ff.

11. This term is used by *Kötz/Dopffel/Scherpe*, *Rechtsvergleichende Gesamtwürdigung und Empfehlungen*, in: Basedow/Hopt/Kötz/Dopffel (eds.), *Die Rechtsstellung gleichgeschlechtlicher Lebensgemeinschaften*, pp. 391-423.

12. See e.g. Maunz/Dürig-Badura, Art. 6, n. 58 and 58c; *Scholz/Uhle*, NJW 2001, 393; cf. also *Pauly*, NJW 1997, 1955. See Hk-LPartG-*Stüber*, Einleitung, n.50 for further references.

13. See e.g. *Beck*, NJW 2001, 1894; *Freitag*, DÖV 2002, 445; *Robbers*, JZ 2001, 779; *Sachs*, JR 2002, 45; Hk-LPartG-*Stüber*, Einleitung, n.41 ff., with further references.

14. On this see the answer to Question 1 above.

15. BVerfGE 104, 51 = NJW 2001, 2457, judges Papier, Haas and Steiner dissenting. On this see e.g. *Muscheler*, *Das Recht der Eingetragenen Lebenspartnerschaft*, pp. 64 ff.

as an institution would suffer irreversible harm through couples being able to conclude ELP, irrespective of whether the LPartG was later found to violate the GG in the main proceedings. The legal rules applying to marriage remained unchanged; hence, the legal foundation of marriage was likewise unchanged. Should the LPartG be found to be unconstitutional, ELP which were entered into would be void with retrospective effect. However, the BVerfG did not find that the detriment suffered by the persons concerned outweighed the detriment they would suffer should the introduction LPartG be suspended until the main proceedings. For example, without the ELP, the partners would not have the same inheritance rights or the right to refuse to give evidence in a court of law.

On 17 July 2002 the BVerfG held that the LPartDisBG (and thus the LPartG) was constitutional and, in particular, did not violate art. 6(1) GG.<sup>16</sup> The special protection of marriage merely obliged the state not to create a legal regime that was treated more favourably than marriage; this did not prevent the state from creating a legal regime for same-sex couples that has similar legal consequences. While the state could treat marriage more favourably than other forms of family unions, there was no obligation to do so. In other words: the BVerfG held that the *Abstandsgebot*<sup>17</sup> did not exist.<sup>18</sup> Marriage as an institution did not suffer any detriment if another legal regime was made available to same-sex couples who, after all, as individuals would not consider an opposite-sex marriage anyway. The position of opposite-sex couples (and indeed the institution of marriage) remained unchanged by the LPartG; they could still enter into marriage, and as the ELP was not open to them it was no alternative to marriage.<sup>19</sup> Furthermore, the special status of marriage was safeguarded through the constitutional protection in art. 6(1) GG which was not afforded to ELP.<sup>20</sup>

After this decision the LPartG as such was no longer in dispute, and ELP became part of German family law and accepted by the majority of academics, practitioners and the public. However, some of the details of the legal rules remained controversial. The ELP was not quite the functional equivalent of marriage yet, as some important differences remained. In the wake of the 2002 BVerfG decision, the *Gesetz zur Überarbeitung des*

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16. BVerfG 105, 313 = NJW 2002, 2543, judges Papier and Haas dissenting. On this see e.g. *Muscheler*, Das Recht der Eingetragenen Lebenspartnerschaft, pp. 66 ff.

17. See above at n. 12 and 13.

18. The BVerfG here specifically stated that the opinions expressed by the authors in n. 12 are wrong. See also *Bleibtreu/Klein-Hofmann*, Art. 6, n. 17. That there is no *Abstandsgebot* in the GG was confirmed expressly by the BVerfG in 2009, BVerfG FamRZ 2009, 1977 = FamRB 2009, 379 (discussed below).

19. See also *Bleibtreu/Klein-Hofmann*, Art. 6, n. 16 f.

20. *Ibid.*, n. 17.

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*Lebenspartnerschaftsrechts* (Act revising the LPartG)<sup>21</sup> removed many of these differences. Still, some differences still remain (on this see answer to Question 5 below), and there have been attempts to make ELp and marriage more alike through the courts system (see below). At the same time there was continued resistance against the ELp which also led to some further court decisions.

For reasons explained in the answer to Question 5, some of the key differences between marriage and ELp concerned pensions and other state benefits. Many of those fall within the legislative power of the German states, and, hence, to a certain extent there are differences between the rules applicable (see also answer to Question 5 below). In two decisions in 2007 and 2008 the BVerfG held that the state was not obliged to provide the same benefits to ELp as to married couples.<sup>22</sup> However, on 7 July 2009 the BVerfG allowed an appeal against a 2007 decision by the *Bundesgerichtshof* (BGH, Federal Court of Justice, the German Supreme Court)<sup>23</sup> concerning differential treatment of married couples and ELp with regard to certain state provisions for surviving dependants. The wording of the relevant provisions mentioned only marriage and widows/widowers and had not been amended to include ELp. BGH had denied that the provisions should be applied analogously to ELp, and also found that the differential treatment was justifiable and, therefore, not violating art. 3(1) GG (“All persons shall be equal before the law.”). The BGH, relying on the previous BVerfG case law, argued that while there was no duty to treat marriage more favourably than other forms of family relationships, art. 6(1) GG principally allowed privileging marriage.<sup>24</sup> The differential treatment therefore was not discriminating on the basis of sex or sexual orientation but on family status, which was justifiable. The BVerfG disagreed and allowed the appeal on the basis that art. 3(1) GG had been violated because the differential treatment could not be justified.<sup>25</sup> A justification requires an objective reason to differentiate, and the BVerfG reiterated that any differential treatment because of sexual orientation required particularly

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21. BGBl. I 2004, 3396 ff.

22. BVerfG 20 September 2007, NJW 2008, 209 = FamRZ 2007, 1869 and BVerfG 6 May 2008, +++NJW 2008, 2325 = FamRZ 2008, 1321 (the latter decided after the ECJ decision in *Tadao Maruko v Versorgungsanstalt der deutschen Bühnen* (Case C-267/06), see 2.3. below). The decisions by German federal supreme courts basically followed that line, see *Bundesarbeitsgericht* (Federal Labour Court) BAGE 110, 277 = FamRZ 2004, 1869 (but see BAGE 120, 55); *Bundesfinanzhof* (Federal Fiscal Court) BFHE 217, 183 = FamRZ 2007, 1651; *Bundesverwaltungsgericht* (Federal Administrative Court) BVerwGE 129, 129.

23. BGH FamRZ 2007, 805; appeal from OLG Karlsruhe, FamRZ 2005, 1566.

24. See for example BVerfG 117, 316 (328 f.) = FamRZ 2007, 529.

25. BVerfG FamRZ 2009, 1977 = FamRB 2009, 379.

serious reasons.<sup>26</sup> Art. 6(1) GG merely demanded protection for the institution of marriage. The reasons for the state provisions for surviving dependants was the social and legal commitment undertaken and the legal responsibility assumed for another person; in this there was no difference between marriage and ELp. Therefore, if there was differential treatment, it was solely based on sexual orientation,<sup>27</sup> and the BVerfG did not find that there were sufficient reasons to justify this.

Finally, in a second decision on 10 August 2009 the BVerfG declared inadmissible a *konkrete Normenkontrolle*<sup>28</sup> against the provision allowing step-child adoption.<sup>29</sup> The Bavarian government, consisting solely of members of the Christian Social Union (CSU),<sup>30</sup> had also raised an *abstrakte Normenkontrolle*<sup>31</sup> in the same matter but withdrew it<sup>32</sup> after a long-term study on same-sex parenting commissioned by the German Ministry of Justice had been released and published.<sup>33</sup> For a more detailed account, see answer to Question 5 below, especially 5.2.3.4.

### 2.3. *The European Court of Justice and the Eingetragene Lebenspartnerschaft*

The European Court of Justice (ECJ) also had to decide a case concerning the German ELp. On 1 April 2008, the ECJ for the first time since *D and Kingdom of Sweden v. Council of the European Union*<sup>34</sup> had the opportunity to address the relationship of marriage and (same-sex) registered partnerships in *Tadao Maruko v. Versorgungsanstalt der deutschen Bühnen* (Case C-267/06).<sup>35</sup> The case concerned survivors' benefits under a compulsory occupational pensions scheme which Maruko

26. Here the BVerfG expressly referred to the decision of the European Court of Human Rights (ECHR) in *Karner v Austria* (Application no. 40016/98), para. 37. See also the ECHR decisions in *Dudgeon v. United Kingdom* (Application no. 7525/76), para. 52; *Smith and Grady v. United Kingdom* (Applications nos. 33985/96 and 33986/96), para. 89 f.; *S.L. v. Austria* (Application 45330/99), para. 37; *Fretté v. France* (Application no. 36515/97), para. 35; *Lustig-Prean and Beckett v. United Kingdom*, nos. 31417/96 and 32377/96.

27. Here the BVerfG referred to *Tadao Maruko v. Versorgungsanstalt der deutschen Bühnen* (Case C-267/06), see 2.3. below.

28. See answer to Question 1 above.

29. BVerfG FamRZ 2009, 1653 = FamRB 2009, 378.

30. The conservative party in Bavaria.

31. No. 1 BvF 3/05.

32. See press release by the BVerfG no. 94/2009 of 11 August 2009, available at <http://www.bverfg.de/pressemitteilungen/bvg09-094.html>. Also mentioned at FamRZ 2009, 1654.

33. Published as Rupp (ed.), *Die Lebenssituation von Kindern in gleichgeschlechtlichen Lebenspartnerschaften*.

34. Joined Cases C-122/99 P and C-125/99 P.

35. ECJ FamRZ 2008, 957.

had been denied as he lived in an ELp rather than a marriage. He complained that he was being discriminated against because of his sexual orientation. While Paragraph 46 of Book VI of the Social Security Code (*Sozialgesetzbuch VI—Gesetzliche Rentenversicherung*) had been amended to include ELp, the relevant provisions of the compulsory occupational pension scheme had not and referred only to “marriage” and “widow.” The legal question was whether the pension scheme fell within the scope of Directive 2000/78<sup>36</sup> for equal treatment in employment and occupation. Article 1 of the directive provides:

The purpose of this Directive is to lay down a general framework for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation as regards employment and occupation, with a view to putting into effect in the Member States the principle of equal treatment.

Mr. Maruko argued that the denial of survivor’s benefits on the same conditions as a surviving spouse to a person whose life partner has died amounted to discrimination on the grounds of that person’s sexual orientation. Life partners are treated less favourably than spouses, even though, like spouses, they must support and care for one another, they are mutually committed to a lifetime union and they each accept responsibilities with regard to the other.<sup>37</sup>

The ECJ held:

59. . . . [C]ivil status and the benefits flowing therefrom are matters which fall within the competence of the Member States and Community law does not detract from that competence. However, it must be recalled that in the exercise of that competence the Member States must comply with Community law and, in particular, with the provisions relating to the principle of non-discrimination . . . .

65. In accordance with Article 1 thereof, the purpose of Directive 2000/78 is to combat, as regards employment and occupation, certain forms of discrimination including that on grounds of sexual orientation, with a view to putting into effect in the Member States the principle of equal treatment. . . .

67. It is clear from the information provided in the order of reference that, from 2001—the year when the LPartG, in its initial version, entered into force—the Federal Republic of Germany altered its legal system to allow persons of the same sex to live in a union of mutual support and assistance which is formally constituted for life. Having chosen not to permit those persons to enter into marriage, which remains reserved solely to persons of different sex, that Member State created for persons

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36. Of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, OJ 2000 L 303, p. 16.

37. Para 23 and 63.

of the same sex a separate regime, the life partnership, the conditions of which have been gradually made equivalent to those applicable to marriage.

68. The referring court observes that the Law of 15 December 2004 [by amending the LPartG] contributed to the gradual harmonisation of the regime put in place for the life partnership with that applicable to marriage. By that law, the German legislature introduced amendments to Book VI of the Social Security Code—statutory old age pension scheme, by adding *inter alia* a fourth paragraph to Paragraph 46 of that Book, from which it is clear that life partnership is to be treated as equivalent to marriage as regards the widow's or widower's pension referred to in that provision. Analogous amendments were made to other provisions of Book VI.

69. The referring court considers that, in view of the harmonisation between marriage and life partnership, which it regards as a gradual movement towards recognising equivalence, as a consequence of the rules introduced by the LPartG and, in particular, of the amendments made by the Law of 15 December 2004, a life partnership, while not identical to marriage, places persons of the same sex in a situation comparable to that of spouses so far as concerns the survivor's benefit at issue in the main proceedings. . . .

72. If the referring court decides that surviving spouses and surviving life partners are in a comparable situation so far as concerns that survivor's benefit, legislation such as that at issue in the main proceedings must, as a consequence, be considered to constitute direct discrimination on grounds of sexual orientation, within the meaning of Articles 1 and 2(2)(a) of Directive 2000/78.

73. It follows from the foregoing that (. . .) the combined provisions of Articles 1 and 2 of Directive 2000/78 preclude legislation such as that at issue in the main proceedings under which, after the death of his life partner, the surviving partner does not receive a survivor's benefit equivalent to that granted to a surviving spouse, even though, under national law, life partnership places persons of the same sex in a situation comparable to that of spouses so far as concerns that survivor's benefit.<sup>38</sup>

The case makes clear that a differential treatment of same-sex and opposite-sex couples cannot be justified for the purposes of the Directive 2000/78 if the couple is in a comparable situation—which the ECJ left to the national court to determine. The burden is thus on the national courts and legislators to justify differential treatment.<sup>39</sup> Hence the starting point is that Directive 2000/78 requires that marriage and (same-sex) registered/civil partnerships (in Germany's case ELp) principally are

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38. ECJ FamRZ 2008, 957.

39. Cf. the 2009 BVerfG decision discussed above at 2.2.

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treated equally. The same is undoubtedly true for the increasing number of European Community instruments whose purpose it is to combat discrimination because of sexual orientation and it appears that a general principle is evolving.

**3. Legal statutes: Does your country have a specific law allowing same-sex marriage? If yes, please give exact information about such law, its place among the authoritative sources of law and relevant information about its history.**

There is no specific law allowing same-sex marriage.

**4. If your country regulates same sex marriage, is there any formal difference in the treatment between different sex and same-sex marriages? In other words, does the law that regulates same-sex marriage provide grounds for any differential treatment? What are those formal differences?**

There is no specific law allowing same-sex marriage.

**5. If your country does not have a same-sex marriage regulation. Please specify if your country has some sort of civil union regulation. If so, please specify the statute, its place among the authoritative sources of law, and the conditions for entering into a civil union.**

On 1 August 2001, the *Gesetz zur Beendigung der Diskriminierung gleichgeschlechtlicher Lebensgemeinschaften: Lebenspartnerschaften*<sup>40</sup> (Act to end the discrimination of same-sex relationships: life partnerships) entered into force, and with it the *Lebenspartnerschaftsgesetz* (LPartG; Act on life partnerships) which introduced the *Eingetragene Lebenspartnerschaft* (ELp, life partnership). As already stated above (see answer to Question 2) the ELp is (or at least is supposed to be) the functional equivalent of marriage for same-sex couples. Therefore, it is not open to opposite-sex couples.

Before the details of the ELp are described, it is necessary to describe the development that lead to its introduction in German law.

### 5.1. Historical development

#### 5.1.1. Decriminalisation of homosexual activity<sup>41</sup>

It was only in 1969 that the general criminalisation of homosexual acts

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40. Of 16.2.2001, BGBl. I 2001, pp.266 ff.

41. For a brief description of this development, see e.g. *Muscheler*, Das Recht der Eingetragenen Lebenspartnerschaft, pp. 21 ff.

between men was abolished in the Federal Republic of Germany<sup>42</sup> and replaced with what was perceived a norm “to protect young men.” The new § 175 *Strafgesetzbuch* (Criminal Code) stated that *Unzucht* (sodomy) between male adults were punishable provided that one of the parties was under 21 years of age. In 1974, the age limit was reduced to 18 and the wording changed from *Unzucht* to *sexuelle Handlungen* (sexual acts), and in 1994 finally all differential treatment based on homosexuality was abolished in the Criminal Code.<sup>43</sup>

### 5.1.2. Unsuccessful attempts to introduce same-sex marriage through judicial decision

In the so-called “*Aktion Standesamt*” several same-sex couples attempted to enter into a marriage, and—where this failed—to apply for a court decision that allowed them to do so.<sup>44</sup> Despite some initial successes in some lower courts<sup>45</sup> and failure in others,<sup>46</sup> this initiative was brought to a definite halt with the decision by the BVerfG in 1993<sup>47</sup> which once again<sup>48</sup> confirmed that marriage in Art. 6 I GG is the union of a man and a woman (see also above Question 2).

### 5.1.3. Unsuccessful attempts to legislate

Germany has seen numerous parliamentary initiatives to introduce a legal framework for same-sex couples:<sup>49</sup>

*Entwurf eines Gesetzes zur Einführung des Rechts auf Eheschließung für Personen gleichen Geschlechts der Fraktion BÜNDNIS 90/DIE GRÜNEN*;<sup>50</sup> this Bill proposed opening up marriage to same-sex couples;

42. In the German Democratic Republic (GDR), the equivalent norm was abolished in 1968.

43. In the GDR, this happened in 1988.

44. Cf. Hk-LPartG-Stüber, Einleitung, n.1 ff.; *Muscheler*, Das Recht der Eingetragenen Lebenspartnerschaft, pp. 30 f.

45. See e.g. AG Frankfurt/Main, NJW 1993, 940 = FamRZ 1993, 557, overturned by LG Frankfurt/Main, NJW 1993, 1998.

46. See e.g. OLG Köln, NJW 1993, 1997 = FamRZ 1993, 1081; LG Gießen, NJW 1992, 942; BayObLG NJW 1993, 1996.

47. BVerfG NJW 1993, 3058. See answer to Question 2 above for a more detailed account.

48. BVerfGE 10, 59 (66) = NJW 1959, 1483; BVerfGE 49, 286 (300) = NJW 1979, 595; BVerfGE 53, 224 (245) = NJW 1980, 689; BVerfGE 62, 323 (330) = NJW 1983, 511; BVerfGE 87, 234 (264) = NJW 1993, 643.

49. For a detailed description see *Meyer/Mittelstädt*, Das Lebenspartnerschaftsgesetz, Kommentierende Darstellung anhand der Materialien, pp. 19 ff., on which the following paragraphs are based. See also *Muscheler*, Das Recht der Eingetragenen Lebenspartnerschaft, pp. 38 ff.; Hk-LPartG-Stüber, Einleitung, n.1 ff.; and Maunz/Dürig-Badura, Art. 6, n. 58a ff.

50. BT-Drs. 12/7885 and 25.10.1995, BT-Drs. 13/2728.

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*Entwurf eines Gesetzes zur Regelung der Rechtsverhältnisse nichtehelicher Lebensgemeinschaften der Fraktion BÜNDNIS 90/DIE GRÜNEN*;<sup>51</sup> a Bill proposing a legal framework for non-marital cohabitation;

*Entwurf eines Gesetzes zur Durchsetzung des Gleichbehandlungsgebots des Artikels 3 Grundgesetz der SPD<sup>52</sup>-Fraktion*;<sup>53</sup> proposing a life partnership;

*Entwurf eines Gesetzes zur Regelung der Rechtsverhältnisse eingetragener Lebenspartnerschaften der FDP<sup>54</sup>-Fraktion*;<sup>55</sup> also proposing a (minor) form of life partnership.

Thus, all political parties in Parliament at the time, apart from the two conservative parties<sup>56</sup> and the socialist party, had at some point proposed introducing a legal framework for same-sex relationships. However, none of these Bills became law.

Nevertheless, the political pressure rose. In 1994, the European Parliament in a Resolution called on the European Commission to recommend that Member States remedy the fact that homosexual couples could not marry or enter into a comparable legal regime.<sup>57</sup> Further, the Parliamentary Assembly of the Council of Europe passed a recommendation on 26 September 2000, calling on the Member States to create a legal regime for same-sex relationships.<sup>58</sup>

In Germany, the Parliamentary *Rechtsausschuss* (Committee on legal affairs/judicial committee) discussed the European Parliament's resolution on 27 April and 27 September 1995 and asked the German Ministry of Justice for a report on the situation of homosexual persons in Germany. In due course, the Ministry of Justice commissioned and received several reports/studies:

*Bericht des Bundesministeriums der Justiz für den Rechtsausschuss des Bundestages zur Lage von Menschen mit gleichgeschlechtlicher Orientierung in Deutschland – Rechtslage in Deutschland*;<sup>59</sup>

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51. 14.3.1997, BT-Drs. 13/7228.

52. Social-democratic Party.

53. 9.3.1998, BT-Drs. 13/10081, esp. Art. 8 of the bill.

54. Free Democratic Party (liberal).

55. 23.6.1999, BT-Drs.14/12159.

56. Christian Democratic Union (CDU, in all German states except Bavaria) and Christian Social Union (CSU, Bavaria only).

57. Resolution on equal rights for homosexuals and lesbians in the EC OJ C 61, 8 February 1994, p. 40, no. 14.

58. Parliamentary Assembly Recommendation 1474 (2000) on the situation of lesbians and gays in Council of Europe member states. See *Muscheler*, *Das Recht der Eingetragenen Lebenspartnerschaft*, pp. 32 f.

59. Published as *Ausschussdrucksache* 13/312 of 11 February 1998 of the

A comparative law expert opinion by the Max Planck Institute for Comparative and International Private Law;<sup>60</sup>

A study by the Sozialwissenschaftliche Forschungsstelle der Otto-Friedrich-Universität Bamberg.<sup>61</sup>

Following these, the *Bundesrat* (Upper House) asked the German Government to introduce a legal regime of *Eingetragene Lebenspartnerschaft* for same-sex couples.<sup>62</sup> The Parliamentary factions of the government parties, SPD and BÜNDNIS 90/DIE GRÜNEN then presented a Bill on 4 July 2000, the *Entwurf eines Gesetzes Gesetz zur Beendigung der Diskriminierung gleichgeschlechtlicher Lebensgemeinschaften: Lebenspartnerschaften (Lebenspartnerschaftsgesetz—LPartG)*.<sup>63</sup>

#### 5.1.4. The Parliamentary debates<sup>64</sup>

The proposed Bill faced certain difficulties, as in its original form it needed to be passed by the *Bundesrat* (Upper House) as well (see answer to Question 1 above). Given the strong opposition by the two conservative parties, this was very unlikely. Hence, the original Bill was split into two, only the first of which needed to be passed by the *Bundesrat*:

*Entwurf eines Gesetzes zur Beendigung der Diskriminierung gleichgeschlechtlicher Lebensgemeinschaften: Lebenspartnerschaften (LPartDisBG)*;<sup>65</sup> and

*Entwurf eines Gesetzes zur Ergänzung des Lebenspartnerschaftsgesetzes und anderer Gesetze (Lebenspartnerschaftsergänzungsgesetz (LPartGErgG))*.<sup>66</sup>

The second Bill was supplementary to the first one and contained all the

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Ausschuss für Familien Senioren, Frauen und Jugend.

60. Published as *Basedow/Hopt/Kötz/Dopffel* (eds.), *Die Rechtsstellung gleichgeschlechtlicher Lebensgemeinschaften*, 2000.

61. Published as *Buba/Vaskovics* (eds.), *Benachteiligung gleichgeschlechtlich orientierter Personen und Paare*, 2001.

62. 10.7.1998, BR-Drs. 544/98.

63. BT-Drs. 14/3751, reprinted in *Meyer/Mittelstädt*, *Das Lebenspartnerschaftsgesetz*, Kommentierende Darstellung anhand der Materialien, pp. 255 ff. See also Maunz/Dürig-Badura, Art. 6, n. 58b.

64. For a more detailed account see *Meyer/Mittelstädt*, *Das Lebenspartnerschaftsgesetz*, Kommentierende Darstellung anhand der Materialien, pp. 20 ff.; Hk-LPartG-*Stüber*, Einleitung, n.12 ff.; *Muscheler*, *Das Recht der Eingetragenen Lebenspartnerschaft*, pp. 30 ff.

65. Beschlussempfehlung des Rechtsausschusses, 8.11.2000, BT-Drs. 14/4545, Anlage 1.

66. Beschlussempfehlung des Rechtsausschusses, 8.11.2000, BT-Drs. 14/4545, Anlage 2; see also BR-Drs. 739/00, reprinted in *Meyer/Mittelstädt*, *Das Lebenspartnerschaftsgesetz*, Kommentierende Darstellung anhand der Materialien, pp. 269 ff.

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provisions for which the assent of the *Bundesrat* (Upper House) was required. The *Bundestag* (Lower House) passed both Bills on 10 November 2000.<sup>67</sup> The *Bundesrat*, as expected, did not pass the second Bill.<sup>68</sup> Needless to say, splitting up the Bills was quite controversial, politically and legally,<sup>69</sup> and was criticised heavily by the opposition. However, in the end, the BVerfG held that this approach did not violate the GG.<sup>70</sup>

On 1 August 2001 the *Gesetz zur Beendigung der Diskriminierung gleichgeschlechtlicher Lebensgemeinschaften: Lebenspartnerschaften* entered into force, creating the *Eingetragene Lebenspartnerschaft* for same-sex couples in Germany as a functional equivalent<sup>71</sup> of marriage.

### 5.2. Legal framework of the *Eingetragene Lebenspartnerschaft*<sup>72</sup>

There are two possible technical options for creating a legal regime that is the functional equivalent of marriage. The first is the one used in the Nordic countries (often referred to as the “Nordic model”),<sup>73</sup> and it is a very

67. 10.11.2001, see Plenarprotokoll 14/131, pp. 12606D-12630A and BR-Drs. 738/00.

68. See Beschluss des Bundesrates of 1.12.2000, BR-DRs. 738/00 (corrected on 6.12.2000); see also BR-Plenarprotokoll 757, pp. 544D-551D and Anlage 571B-572B.

69. On this see *Scholz/Uhle*, NJW 2001, 393 and *Beck*, NJW 2001, 1894.

70. BVerfGE 105, 313 (340 f.). For a more detailed account see answer to Question 2 above.

71. See n. 11.

72. On the legal framework of the ELP see *Dethloff*, The Registered Partnership Act of 2001, in: Bainham, Andrew (ed.), *The International Survey of Family Law 2002*, pp. 171-180; *Wellenhofer-Klein*, Die eingetragene Lebenspartnerschaft; *Muscheler*, Das Recht der Eingetragenen Lebenspartnerschaft; *Bruns/Kemper*, LPartG—Handkommentar; *Meyer/Mittelstädt*, Das Lebenspartnerschaftsgesetz, Kommentierende Darstellung anhand der Materialien; *Walter/Schwab*, Die eingetragene Lebenspartnerschaft. Text, Amtliche Materialien, Abhandlungen; *Dethloff*, NJW 2001, 2598 ff.; *Kaiser*, JZ 2001, 617 ff.; *Schwab*, FamRZ 2001, 385 ff.; *Löhning*, Das neue Lebenspartnerschaftsgesetz – Eine Einführung, JA 2001, 650 ff.; *Muscheler*, Die Eingetragene Lebenspartnerschaft nach deutschem Recht, Jura 2004, 217 ff.

73. On this see *Dopffel/Scherpe* Gleichgeschlechtliche Lebensgemeinschaften im Recht der nordischen Länder, in: Basedow/Hopt/Kötz/Dopffel (eds.), *Die Rechtsstellung gleichgeschlechtlicher Lebensgemeinschaften*, pp. 7-49; *Grib*, Die gleichgeschlechtliche Partnerschaft im nordischen und deutschen Recht; *Lund-Andersen*, Cohabitation and Registered Partnership in Scandinavia: The Legal Position of Homosexuals, in: Eekelaar/Nhlapo (eds.), *The Changing Family (1998)*, pp. 397 ff.; *Lødrup*, Registered Partnership in Norway, in: Bainham (ed.), *The International Survey of Family Law 1994*, pp. 387 ff.; Nielsen, *Int.J.L. & Fam.* 4 (1990) 297-307; *Scherpe*, Deutsches und Europäisches Familienrecht (DEuFamR) 2000, 32-37; *Scherpe*, Familie Partnerschaft Recht (FPR) 2001, 439-441. Some authors suggested such an approach for Germany as well, see e.g. *Kötz/Dopffel/Scherpe*, Rechtsvergleichende Gesamtwürdigung und Empfehlungen, in: Basedow/Hopt/Kötz/Dopffel (eds.), *Die Rechtsstellung gleichgeschlechtlicher Lebensgemeinschaften*, pp. 391 ff.; *Kötz*, Protokoll 14/59 des Rechtsausschusses, pp. 22 ff., 25; *Muscheler*, Das Recht der Eingetragenen Lebenspartnerschaft, pp. 46 ff.

simple and straightforward one: create a new Act which defines the new legal regime, in which a basic reference to the legal rules applying to marriage is contained—and then, where this is deemed necessary, define certain exceptions. Of course, an Act following the Nordic model would have required both *Bundestag* and *Bundesrat* to pass the Act. The second option is to create a legal regime from scratch, spelling out the rights and duties and legal consequences in detail.

The German government parties opted for the second approach in order to make abundantly clear, for political and constitutional reasons, that the ELP was a legal regime different from marriage. This approach, of course, necessitated a very thorough (and not always successful)<sup>74</sup> analysis of the existing law governing marriage to see whether equivalent norms should be introduced for ELP or whether the existing statutes needed to be amended to include ELP. The LPartG has been amended a number of times already, particularly by the *Gesetz zur Überarbeitung des Lebenspartnerschaftsrechts* (Act revising the LPartG)<sup>75</sup> in 2004 after the BVerfG had found the LPartG did not violate the GG.<sup>76</sup> Unless stated otherwise, the text in the following refers to the amended statute. Generally it can be said that, increasingly, the original differences between marriage and ELP have been reduced, bringing the legal effects of ELP close to that of marriage (which, indeed, was the express aim of the 2004 Act<sup>77</sup>).

### 5.2.1. Entering into an *Eingetragene Lebenspartnerschaft*

Section 1 LPartG (Conclusion of the life partnership) originally read as follows:<sup>78</sup>

- (1) Two persons of the same sex conclude a life partnership by declaring reciprocally, personally, and in the presence of the other partner their will to enter into a partnership for life (life partners). The declaration cannot be subject to any condition or time limitation. The declaration becomes effective when made before the competent authority. . . .<sup>79</sup>
- (2) A valid life partnership cannot be concluded
  1. with a minor, a married person or a person who is already in

74. Cf. only *Muscheler*, *Das Recht der Eingetragenen Lebenspartnerschaft*, pp. 44.

75. BGBl. I 2004, 3396 ff.

76. BVerfGE 105, 313. See answer to Question 2 above.

77. See BT-Drs. 15/3445, esp. p. 14.

78. All translations of the LPartG in this report are a revised version of the translation provided by The Lesbian and Gay Federation in Germany (Lesben- und Schwulverband Deutschland—LSVD), available at [www.lsvd.de](http://www.lsvd.de).

79. The original LPartG contained a provision referring to the mandatory declaration about the partnership property regime. This was repealed by the *Gesetz zur Überarbeitung des Lebenspartnerschaftsrechts*, BGBl. I 2004, 3396 ff., see BT-Drs. 15/3445, esp. pp. 14 ff. On the property consequences of an ELP after said amendment see 5.2.3. below.

- another life partnership;
- 2. by persons who are descendents in the direct line;
- 3. by full or half siblings;
- 4. if the life partners, at the time the life partnership is entered into, agree that they do not want to enter any obligation according to section 2.

Hence two persons of the same sex could enter into an ELP which was “for life”—clearly emulating the Christian ideal of indissolubility of marriage. Also, the conditions under which an ELP could *not* be concluded followed those of marriage, with one difference: marriages concluded contrary to certain provisions can be *aufgehoben* (annulled, section 1313 German Civil Code), whereas ELP are *unwirksam* (invalid/void) *ab initio*.

There were two particularly controversial points concerning the conclusion of an ELP. The first was that while a person could not enter into an ELP if he or she was already married, there originally was no equivalent for marriage, i.e., it was possible to enter a marriage if already in an ELP.<sup>80</sup> However, it was assumed that an ELP will automatically be dissolved if a marriage is entered into by one of the partners, as marriage enjoyed constitutional protection in Art. 6 GG (see also answer to Question 2 above).<sup>81</sup> Section 1306 German Civil Code has now been amended, and now an existing ELP is a bar for marriage and *vice versa*.<sup>82</sup>

The second point was that the competent authority was not named. This was due to the fact that before the latest constitutional reform it was up to the German states, and not the federal legislator, to name the competent authorities, and, therefore, this was left out in the LPartDisBG so that it could be passed by the *Bundestag* (Lower House) without requiring assent by the *Bundesrat* (Upper House).<sup>83</sup> Needless to say, this led to some confusion;<sup>84</sup> generally speaking, most states named the *Standesbeamter* (civil registrar) as the competent authority, and thus the same authority that also registers marriages. Some states governed by the conservative parties for political reasons decided to make other legal arrangements, e.g. make the local authorities or public notaries the competent authority, in order to

80. See *Schwab*, FamRZ 2001, 385 (389); *Sachs*, JR 2001, 45 (50); *Scholz/Uhle*, NJW 2001, 393 (398).

81. *Schwab*, FamRZ 2001, 385 (389); *Meyer/Mittelstädt*, Das Lebenspartnerschaftsgesetz, Kommentierende Darstellung anhand der Materialien, pp. 36 f.

82. Art. 2 of the Gesetz zur Überarbeitung des Lebenspartnerschaftsrechts, BGBl. I 2004, 3396 ff. Cf. BVerfGE 105, 313 (343 f.) and BT-Drs. 15/3445, esp. p. 17.

83. *Meyer/Mittelstädt*, Das Lebenspartnerschaftsgesetz, Kommentierende Darstellung anhand der Materialien, p. 34.

84. Cf. *Meyer/Mittelstädt*, Das Lebenspartnerschaftsgesetz, Kommentierende Darstellung anhand der Materialien, pp. 300 ff. and the reply of the government to a Parliamentary question by the liberal Party (FDP), BT-DRs. 16/7265 (23.11.2007).

make clear that the ELP was not the same or equivalent of marriage in the eyes of the state legislator. Hilariously, this had a rather unexpected effect, as civil registry offices tend to have specific and limited opening hours and generally are not regarded as very romantic places; public notaries, however, in principle are free to do business where they want and, thus, having an ELP ceremony at romantic places of the couples' choosing (in Bavarian castles, on boats on a river, etc.) became rather popular, leading to ELP-tourism to those German states where the government was rather opposed to the idea of ELP in the first place!

After recent reforms of the German federal structure, the federation now principally has the legislative power to name the relevant authority, but the states can name a different one if they so desire.<sup>85</sup> Thus from 1 January 2009<sup>86</sup> section 1 of the LPartG reads as follows:

- (1) Two persons of the same sex declaring personally, and in the presence of the other partner before a registrar (*Standesbeamter*) their will to enter into a partnership for life (life partners), enter into a life partnership. The declaration cannot be subject to any condition or time limitation.
- (2) The registrar shall ask the life partners individually if they want to enter into a life partnership. If the life partners affirm, the registrar shall that life partnership has been concluded. The conclusion of the life partnership can take place in the presence of up to two witnesses.
- (3) A valid life partnership cannot be concluded (*kann nicht wirksam begründet werden*)
  1. with a minor, a married person or a person who is already in another life partnership;
  2. by persons who are descendents in the direct line;
  3. by full or half siblings;
  4. if the life partners, at the time the life partnership is entered into, agree that they do not want to enter any obligation according to

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85. Cf. Section 23 LPartG. Currently only three states have done so: Bavaria (Gesetz zur Ausführung des Lebenspartnerschaftsgesetzes of 7.7.2009, Bayerisches Gesetz- und Verordnungsblatt 12/2009, pp. 261 f.), Baden-Württemberg (Gesetz zur Ausführung des Lebenspartnerschaftsgesetzes of 2.6.2002, GVBl. 2002, p. 205, as amended on 23.6.2009, GVBl. 2009, p. 245) and Thuringia (Thüringer Ausführungsgesetz zum Lebenspartnerschaftsgesetz of 4.9.2002, GVOBl. 2002, p. 301 as amended on 18.9.2008, GVBl. 2008, pp. 313 f.). In Bavaria now *Standesbeamter* (civil registrars) generally are the competent authority, but public notaries are competent to register ELP in addition to the *Standesbeamter*. Baden-Württemberg and Thuringia decided to continue their previous practice and refuse registration of an ELP at the *Standesebeamte* and have named the local authorities as the competent authority to do so. After a change of government in Thuringia there apparently are plans to change the current law and name the *Standesbeamte* as competent authority. Baden-Württemberg would then be the only state in Germany where an ELP cannot be registered at a *Standesbeamte*.

86. See Art. 2 (18) of Gesetz zur Reform des Personenstandsgesetzes of 19.2.2007, BGBl. I 2007, pp. 122 ff.

section 2.

(4) The conclusion of a life partnership cannot be sued for on the ground of breach of promise to enter into such a partnership. Section 1297 paragraph 2 and sections 1298 to 1302 German Civil Code shall apply accordingly.<sup>87</sup>

Thus the ELP has become more like marriage in that respect, and a difference between marriage and ELP has (at least potentially) been removed.

Both the old and the new version of section 1 LPartG refer to section 2 and also state the ELP must in principle be “for life.” Section 2 LPartG reads as follows:

“Life partners are obliged to care for and support (*Fürsorge und Unterstützung*) the other life partner as well as make a life in common (*gemeinschaftliche Lebensgestaltung*). The life partners bear mutual responsibility for each other.”

The wording here is somewhat different from the equivalent provision of marriage,<sup>88</sup> but the differences in practice appear negligible.<sup>89</sup>

A difference, however, remains (albeit a not very relevant one in practice): minors in Germany can marry at the age of 16 under certain conditions (see section 1303 German Civil Code) whereas minors cannot enter into an ELP.

### 5.2.2. Termination/dissolution of an *Eingetragene Lebenspartnerschaft*

The original version of section 15 required only a declaration from the partners that they did not want to continue their ELP but not (as always was the case for marriage and now to be found in section 15(2)(1b) LPartG) that the partnership has broken down irretrievably/cannot be expected to be re-established.<sup>90</sup> Section 15 is now quite similar to the equivalent rules for divorce of a marriage and reads as follows:

(1) The life partnership can be terminated (*aufgehoben*) by Court order

87. Subsection 3 was inserted by the Gesetz zur Überarbeitung des Lebenspartnerschaftsrechts, BGBl. I 2004, 3396 ff. and now regulates the ‘engagement’ to form an ELP along the same line as an engagement to be married; see also BT-Drs. 15/3445, pp. 14 f. Such an engagement has very few legal consequences, the most important one probably being the right not having to testify against the fiancée in a court of law (cf. section 52 StPO). Cf. *Grziwotz*, Die Lebenspartnerschaft zweier Personen gleichen Geschlechts, DNotZ, 2001, 284; *Meyer/Mittelstädt*, Das Lebenspartnerschaftsgesetz, Kommentierende Darstellung anhand der Materialien, p. 24.

88. Section 1353 German Civil Code imposes a duty of ‘eheliche Lebensgemeinschaft’ (matrimonial community/consortium).

89. *Meyer/Mittelstädt*, Das Lebenspartnerschaftsgesetz, Kommentierende Darstellung anhand der Materialien, pp. 38 ff.

90. See BT-Drs. 15/3445, pp. 15 f.

on demand of one or both life partners.

(2) The Court terminates the life partnership if

1. the life partners have lived separately for 1 year, and
  - a) both life partners have applied for the termination of the life partnership (*Aufhebung beantragen*) or the respondent accepts the application of the other life partner to terminate the life partnership, or
  - b) it cannot be expected that the community of the life partners (*partnerschaftliche Lebensgemeinschaft*) can be re-established.
2. one life partner has applied for the termination of the life partnership and the life partners have lived separately for three years;
3. the continuation of the life partnership for reasons attributable to the person of the other partner would constitute unreasonable hardship to the applicant.

The Court also terminates the life partnership if one of the life partners showed a lack of will (*Willensmangel*) as described in section 1314 paragraph 2 No. 1-4 German Civil Code; section 1316 paragraph 1 No. 2 German Civil Code shall apply accordingly.

(3) The life partnership shall not be terminated according to paragraph 2 sentence 1 although the life partners have lived separately for more than 3 years, if and as long as the termination of the life partnership because of exceptional circumstances would constitute such a grave hardship to respondent that the continuation of the life partnership, by way of an exception, seems necessary even when considering the interests of the claimant.

(4) The termination in accordance with paragraph 2 sentence 2 is not possible if the life partnership is confirmed (*Bestätigung*); section 1315 paragraph 1 No. 3 and 4 and section 1317 German Civil Code shall apply accordingly.

(5) Life partners live separately if they do not live in a domestic partnership and one of the life partners recognisably (*erkennbar*) does not want to cohabit because he or she<sup>91</sup> rejects the life partnership. Section 1567 paragraph 1 sentence 2 and paragraph 2 German Civil Code shall apply accordingly.

### 5.2.3. *Legal consequences of an Eingetragene Lebenspartnerschaft*

As already mentioned above, the ELP is meant to be the functional equivalent of marriage. However, for political reasons (and because it was uncertain whether the LPartG would withstand the scrutiny of the BVerfG, as some argued that the introduction of a family law regime for same-sex couples would violate Art. 6 GG; see answer to Question 2 above) the original act at some points deliberately deviated from the rules applicable

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91. The German version uses 'he' only, but for the sake of clarity 'he or she' will be used in the following when life partners are referred to.

to marriage. After the BVerfG held that the LPartG did not violate the GG<sup>92</sup> and also many other fears concerning the ELp did not materialise, the LPartG<sup>93</sup> and the laws of the individual states have been amended, making the legal rules applicable to ELp more similar to those applicable to marriage. Some states, namely those in middle/southern Germany where a conservative party is in power, have been more hesitant to do so, and in those states the differences between marriage and ELp are still somewhat greater, for example with regard to certain payments to civil servants and pensions (see also answer to Question 2 above).

### 5.2.3.1. Partnership property and maintenance

When the LPartG entered into force in 2001, the financial and property consequences as well as the duty to maintain<sup>94</sup> the other partner were regulated very differently from marriage.<sup>95</sup> First of all the partners had to make a mandatory declaration as to their partnership property regime, as there was no default regime. The duty to maintain during and after the ELp was also different and more restrictive than marriage, and a *Versorgungsausgleich* (pension rights adjustment) was not possible. With the *Gesetz zur Überarbeitung des Lebenspartnerschaftsrechts*<sup>96</sup> this has been changed and more or less equated with the rules applicable to marriage. The *Zugewinnngemeinschaft* (community of accrued gains) now is the default partnership property regime (section 6), a *Versorgungsausgleich* (pension rights adjustment) is possible (section 20) and the provisions and maintenance (sections 12 and 16) now are very similar to those of marriage.<sup>97</sup> The relevant provisions now read as follows:

#### Section 5. Obligation of maintenance

The life partners are both obliged to provide adequate maintenance for the life partnership through their work and their assets. Section 1360 sentence 2, sections 1360a and 1360b and section 1609 German Civil Code shall apply accordingly.

#### Section 6. Property regime

The property regime concluded by the life partners is a community of accrued gains (*Zugewinnngemeinschaft*), unless the life partners

92. BVerfG 105, 313.

93. Particularly by *Gesetz zur Überarbeitung des Lebenspartnerschaftsrechts*, BGBI. I 2004, 3396 ff. On this see See BT-Drs. 15/3445, esp. pp. 15 f.

94. Like most civil law countries, German law in principle separates the issues of matrimonial/partnership property and maintenance (and pension rights). Cf. *Scherpe, Matrimonial Causes for Concern?—A Comparative Analysis of Miller v. Miller; McFarlane v. McFarlane*, (2007) 18 King's Law Journal 348-360.

95. On the original provisions see *Meyer/Mittelstädt, Das Lebenspartnerschaftsgesetz, Kommentierende Darstellung anhand der Materialien*.

96. BGBI. I 2004, 3396 ff.

97. See BT-Drs. 15/3445, pp. 14 ff.

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stipulate otherwise by life partnership contract (section 7). Section 1363 paragraph 2 and sections 1364 to 1390 German Civil Code shall apply accordingly.

Section 7. Life partnership contract<sup>98</sup>

Life partners can regulate their property regime by contract (life partnership contract). Sections 1409 to 1563 German Civil Code shall apply accordingly.

Section 8. Other legal effects concerning property<sup>99</sup>

For the benefit of the creditor of one of the life partners, it shall be presumed that movables in possession of one or both of the life partners belong to the debtor. For the rest, section 1362 paragraph 1 sentence 2 and 3, and paragraph 2 German Civil Code shall apply accordingly.

Section 1357 German Civil Code shall apply accordingly . . . .

Section 12. Maintenance in case of separation

If the life partners are living separately, then a life partner can claim adequate maintenance from the other based on the standard of living and the income and financial circumstances of the life partners. Sections 1361 and 1609 German Civil Code shall apply accordingly.

Section 13. Division of household goods

1) If the life partners are living separately, then each of them can demand from the other life partner that the household goods owned by him or her are to be returned. However, he or she is obliged to allow the other life partner to use them (*zum Gebrauch überlassen*) if this is necessary for him or her in order to maintain a separate household and if this is equitable under the circumstances.

2) Household goods which belong to both life partners are divided equitably among them. The Court can prescribe a reasonable compensation for the usage of the household goods.

3) The legal position concerning ownership (*Eigentum*)<sup>100</sup> of these goods remains unaffected by the division unless the life partners agree otherwise . . . .

Section 16. Maintenance after termination of the life partnership

After termination of the life partnership each life partner has to maintain himself or herself. If he or she is not able to do so, he or she can demand maintenance from the other life partner only according to sections 1570 to 1586b and 1609 German Civil Code.

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98. Marital agreements in Germany generally are binding and enforceable, subject to certain limitations. On this see Dutta, Marital Agreements and Private Autonomy in Germany, in: Scherpe (ed.), Marital Agreements and Private Autonomy in Comparative Perspective, forthcoming in 2010.

99. This provision makes sure that creditors can enforce their claims against partners and is similar to that applying to marriages. The underlying idea is to prevent that a partner/spouse simply declares that certain assets belong to the other partner/spouse and essentially reverses the burden of proof.

100. German law does not distinguish between legal and beneficial/equitable ownership.

Section 20. Pension rights adjustment

1) After termination of the life partnership, a pension rights adjustment, applying, *mutatis mutandis*, the *Versorgungsausgleichgesetz*, of all pension rights acquired in this jurisdiction or abroad (*im In- oder Ausland*) is to take place (section 2 para 1 *Versorgungsausgleichgesetz*) if the entitlement was acquired or maintained during the life partnership.

2) The duration of a life partnership is deemed to be the time from the beginning of the month within which the life partnership was entered into until the end of the month preceding the pendency of the proceedings for termination of the life partnership.

3) If the life partners exclude the pension rights adjustment by express agreement in the life partnership contract (section 7), then the sections 6 to 8 of the *Versorgungsausgleichgesetz* are to be applied accordingly . . . .

All in all the legal rules applicable to marriage and ELP now are rather similar, and indeed the LPartG frequently refers to the BGB and the rules for marriage.

5.2.3.2. *Allocation of the dwelling in case of separation*

Whenever couples break up, the right to remain in the current dwelling can be a difficult and contentious issue. For ELP, this is regulated in s. 14 LPartG, very much along the same lines as for married couples.

5.2.3.3. *Name*

Names are subject to extensive legislation in Germany, unlike in some (particularly common law) jurisdictions. Nevertheless, life partners were always allowed to choose a common surname according to section 3 LPartG. The provision was amended by Art. 3 of the *Gesetz zur Änderung des Ehe- und Lebenspartnerschaftsnamensrechts*<sup>101</sup> to bring in line the name law for married couples and ELP. It now reads:

- 1) Life partners can choose a common surname (life partnership surname). By making a declaration at the registry office (*Standesamt*) the life partners can choose the surname at birth of one of the partners, or the surname he or she has before the declaration. The declaration of the choice of the life partnership surname should be made when entering into the life partnership. If the declaration is made later then the declaration is to be publicly recorded (*öffentlich beglaubigt*).
- 2) The life partner whose surname at birth has not been chosen as the life partnership surname can by declaration at the registry office add his or her surname at birth or the surname he or she has at the time of

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101. Of 6.2.2005, BGBI. I 2005, 203.

the declaration of the life partnership surname before or after the chosen life partnership surname<sup>102</sup>. This is not possible if the life partnership surname consists of more than one surname. If the surname of one life partner consists of more than one surname, only one of these surnames can be added before or after the life partnership surname. The declaration can be revoked at the registry office; in this case a further declaration as described in sentence/clause 1 is not permitted. The declaration and the revocation must be publicly recorded.

- 3) A life partner keeps the life partnership surname even after termination of the life partnership. He or she can choose to resume his or her surname at birth or the surname he or she had before the declaration of the life partnership surname, or he or she can choose to add his or her surname at birth before or after the life partnership surname. Paragraph 2 shall apply accordingly.
- 4) The surname at birth is the surname that appears on the birth certificate of one of the life partners at the time of the declaration at the registry office . . . .

#### 5.2.3.4. *Eingetragene Lebenspartnerschaft and children*

As in many jurisdictions where a legal regime for same-sex relationships was introduced,<sup>103</sup> the German legislator was initially hesitant to extend the legal rules for children and married couples to ELP. However, at least if the child of one life partner (who has sole custody of the child) lived with the life partners, then the other life partner could have a *Kleines Sorgerecht* (“small parental custody”). But joint adoption and step-child adoption (i.e. adoption of the other partner’s child) were not possible for life partners initially. Single persons, however, could always adopt in Germany according to section 1741(2) German Civil Code,<sup>104</sup> but of course then only one of the partners became the legal parent of a child. Furthermore, same-sex couples do not have (joint) access to artificial reproduction technology in Germany, and surrogacy is not permitted.

As in other countries<sup>105</sup> it was soon realised that there was a significant number of children living with same-sex couples, either through adoption or from previous heterosexual relationships, and that the *Kleine Sorgerecht* in cases of sole custody of the other life partner was not sufficient. The inability to form a legal relationship with the parent’s partner could

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102. Hence he or she would then have a double-barreled name, e.g. Müller-Schmidt.

103. For example Denmark, see the references in n. 73.

104. This provision also stipulate that married persons can only adopt jointly.

105. See previous n. and esp. *Scherpe*, *Familie Partnerschaft Recht (FPR)* 2001, 439-441.

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potentially disadvantage the child severely, for example in the areas of succession or maintenance. Also, should the only legal parent die, the child would not have a legal relationship with the other partner, who might have been taking care of the child for years, and therefore would not legally be allowed to stay with the surviving partner (and social parent). The *Gesetz zur Überarbeitung des Lebenspartnerschaftsrechts*<sup>106</sup> introduced the right to step-child adoption for ELp, so that section 9 LPartG now reads:

- 1) If a parent in a life partnership has the sole custody (*alleinige elterliche Sorge*), then his or her life partner can with the agreement of the life partner having sole custody have the competence to co-decide (*Befugnis zur Mitentscheidung*) in matters of the child's daily life. Section 1692 paragraph 2 sentence 1 German Civil Code shall apply accordingly.
- 2) In cases of clear and present danger the life partner has the right to take all relevant legal decisions that are necessary for the child's best interest/welfare (*Wohl des Kindes*); the life partner who has the sole custody of the child is to be informed without delay.
- 3) The Family Court can restrict or exclude the rights as described in paragraph 1 if this is necessary for the child's best interest/welfare.
- 4) The rights as described in paragraph 1 are excluded if the life partners are living separately permanently (*nicht nur vorübergehend*).
- 5) The parent who has the custody of his or her unmarried child solely or together with the other parent and his or her life partner can give their life partnership surname to the child living in their joint household by declaration at the registry office. Section 1618 sentences 2 to 6 German Civil Law shall apply accordingly.
- 6) If one life partner adopts a child solely, the consent of the other life partner is necessary. Section 1749 paragraph 1 sentences 2 and 3 and paragraph 3 German Civil Code shall apply accordingly.
- 7) A life partner may adopt a child of his or her life partner solely. In this case sections 1743 sentence 1, 1751 paragraphs 2 and 4 sentence 2, 1754 paragraphs 1 and 3, 1755 paragraph 2, 1756 paragraph 2, 1757 paragraph 2 sentence 1 and 1772 paragraph 1 sentence 1 letter c German Civil Code shall apply accordingly.

A *konkrete Normenkontrolle* (see answer to Question 1 above), initiated by the AG Schweinfurt in Bavaria, against the provision allowing step-child adoption was held to be inadmissible by the BVerfG.<sup>107</sup> The Bavarian government, dominated by members of the Christian Social Union (CSU),<sup>108</sup> had also raised an *abstrakte Normenkontrolle*<sup>109</sup> but withdrew

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106. BGBl. I 2004, 3396 ff.

107. BVerfG FamRZ 2009, 1653 = FamRB 2009, 378. See also answer to Question 2 above.

108. Christian Social Union, the conservative party in Bavaria.

109. No. 1 BvF 3/05.

it<sup>110</sup> after a long-term study on same-sex parenting commissioned by the German Ministry of Justice had been released and published.<sup>111</sup>

The German Ministry of Justice had commissioned this study presented by the *Institut für Familienforschung* (Institute for Family Research) of the University of Bamberg in co-operation with the *Staatsinstitut für Frühpädagogik* (State Institute for Early Education Science) in Munich as a first significant research on children in ‘rainbow-families’<sup>112</sup> in Germany. In a press release,<sup>113</sup> the Minister of Justice at the time, Brigitte Zypries, stated the following:<sup>114</sup>

Today is a good day for all those who rely on facts rather than prejudice—especially on ideological matters such as these. The research has confirmed: Where children are loved, they grow up well. A good relationship between child and parents is the decisive factor, and not the parents’ sexual orientation. According to the results of the study, the welfare of the child is preserved in rainbow-families in the same way as it is in other [more conventional] families. Homosexual parents are in no way worse than other parents, children with two mothers or two fathers develop just as well as in other [more conventional] families. The research study presented today is comprehensive and representative. The study proves in a scientifically well-founded way that family is where children are. The results of this study are an important step towards full social and legal recognition of homosexual couples. Life partners accordingly are suited as adoptive parents just like everyone else. Therefore we should not stop here but continue and implement joint adoption by *Lebenspartner*.

However, given the recent change of government in Germany it is generally assumed to be unlikely that joint adoption for ELP will be introduced in the foreseeable future.

#### 5.2.3.5. Succession

In succession law life partners are now in a similar position to spouses:

##### Section 10. Law of succession

- 1) The surviving life partner of the deceased is legal heir to a quarter of the estate alongside the relatives of first degree, and to a half of the estate beside the relatives of second degree and grandparents. If

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110. See press release by the BVerfG no. 94/2009 of 11 August 2009, available at <http://www.bverfg.de/pressemitteilungen/bvg09-094.html>. Also mentioned at FamRZ 2009, 1654.

111. Published as Rupp (ed.), *Die Lebenssituation von Kindern in gleichgeschlechtlichen Lebenspartnerschaften*.

112. I.e. children living with parents in a same-sex relationship.

113. Press release German Ministry of Justice, 23 July 2009 (available at <http://www.bmj.bund.de/>).

114. Translation by the author.

there are grandparents and descendants of grandparents the life partner receives also the part of the other half which in accordance with section 1926 German Civil Code would have fallen to the descendants. In addition to that, he or she has the right to keep as a preference legacy (*Voraus*) the objects belonging to the life partnership household, unless they are appurtenances (*Zubehör*) to real property, and gifts received when concluding the life partnership. If the surviving life partner is legal heir alongside relatives of first degree, he or she has the right to keep the advance only to the extent required to maintain an adequate household. The rules on legacy are applicable on the advance. If the surviving life partner is among the relatives entitled to inherit, he or she also inherits as a relative. The portion of the inheritance (*Erbteil*) gained due to being a relative is to be considered a special portion of inheritance.

2) If the deceased neither had relatives of first or second degree nor grandparents, the surviving life partner inherits the estate in full. If at the time of death the life partners maintained a property regime of separation of property, and if alongside the surviving life partner one or two children of the deceased are legal heirs, the surviving life partner and each child inherit equal shares; section 1924 paragraph 3 German Civil Code shall apply also in this case.

3) The surviving life partner has no right to inherit anything if at the time of death of the deceased

- a. the conditions for the termination of the life partnership as described in section 15 paragraph 2 No. 1 or No. 2 were fulfilled and the testator had demanded or agreed with the termination, or,
- b. the testator had made a demand as described in section 15 paragraph 2 No. 3 and this demand was reasonable.

4) In these cases section 16 shall apply accordingly.

5) Life partners have the right to establish a common will (*gemeinschaftliches Testament*). Sections 2266 to 2273 German Civil Code shall apply accordingly.

6) Section 2077 German Civil Code shall apply accordingly to any testamentary disposition (*letztwillige Verfügung*) benefiting the life partner.

7) In case the deceased excluded the life partner from inheritance by way of testamentary disposition, the life partner can demand half of the estate's value from the legal heirs as legal portion/statutory share (*Pflichtteil*). The provisions of the German Civil Code about the legal portion/statutory share shall apply accordingly, treating the life partner as a spouse.

8) The dispositions of the German Civil Code on the renunciation of the inheritance (*Erbverzicht*) shall apply accordingly.

### 5.2.3.6. *Familial Relationship*

In a number of situations it can be important to be in a familial relationship with family members of one's life partner, for example, concerning visitation rights in hospital or in prison, the right to attend a funeral or the right to refuse to give evidence in a court of law. Section 11 LPartG clarifies that an ELP establishes such familial relationships in law:

- 1) One life partner is deemed to be a member of the family of the other life partner unless there are legal provisions to the contrary.
- 2) The relatives of one life partner are deemed to be in-laws of the other life partner. The line and degree of the affinity (*Schwägerschaft*) is to be determined by the line and degree of the relation that links them. This affinity continues even if the life partnership on which it was based has been terminated.

### 5.4. *Some data*

The ELP now is firmly established in Germany, and same-sex relationships generally are accepted. The mayors of the two biggest German cities, Berlin (Social-Democrat) and Hamburg (Conservative), are openly gay, as is the current German *Bundesminister des Auswärtigen* (Foreign Secretary; Liberal Party). It is generally felt that the introduction of the ELP has contributed to the acceptance of same-sex relationships and has greatly reduced the discrimination of homosexuals in general.<sup>115</sup>

According to official statistics in 2007,<sup>116</sup> there were some 68,000 stable same-sex relationships in Germany, some 44,000 of which were unions of two men, and 24,000 of two women.

Of those, the age of the oldest partner was as follows:

- ❖ 25 years or less<sup>117</sup>
- ❖ 25-35 years ca. 15,000
- ❖ 35-45 years ca. 22,000
- ❖ 45-55 years ca. 15,000
- ❖ 55-65 years ca. 8,000

115. See *Muscheler*, Das Recht der Eingetragenen Lebenspartnerschaft, pp. 70 ff. For a similar effect of the 'normalisation' of same-sex relationships by introducing a legal regime in Denmark see *Dopffel/Scherpe* Gleichgeschlechtliche Lebensgemeinschaften im Recht der nordischen Länder, in: Basedow/Hopt/Kötz/Dopffel (eds.), Die Rechtsstellung gleichgeschlechtlicher Lebensgemeinschaften, pp. 12 f.

116. All data taken from Statistisches Bundesamt, Mikrozensus 2007. The author would like to thank Johannes Schwarz and Simone Balzer of the Statistische Bundesamt for providing the relevant data. For further data, based on the 2006 Mikrozensus, see *Rupp*, Die Lebenssituation von Kindern in gleichgeschlechtlichen Lebenspartnerschaften, esp. pp. 11 ff. and the graph on p. 14. See also *Muscheler*, Das Recht der Eingetragenen Lebenspartnerschaft, pp. 74 ff.

117. No data was given as numbers were too uncertain.

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❖ 65 or older ca. 6,000

Of those some 15,000 (ca. 22%) are currently living in an ELP, and currently some 8,000 children are living with same-sex parents.

### 5.5. Summary

For most intents and purposes, ELP and marriage in Germany now have a very similar legal framework. Many of the initial and deliberate distinctions have now been removed, for political, but also for practical reasons. However, some differences remain, often because the matter falls within the legislative power of the states rather than the federation and the more conservative states are unwilling to extend the legal consequences of marriage to ELP. The major remaining differences are the following:

- ❖ The competent authority to register the ELP still is different from the one for marriage in some German states (but see 5.2.1. above).
- ❖ Life partners cannot adopt jointly and do not have access to artificial reproduction techniques (see 5.2.3.4. above).
- ❖ Life partners are treated differently from married couples in some areas of tax law.
- ❖ In some areas of social insurance life partners are not in the same legal position as spouses.

Apart from those major and a few minor exceptions, ELP in Germany is like marriage “in anything but name.”

### **6. If your country has a civil union regulation, please specify if this is open to heterosexual couples or only to same-sex couples.**

The *Eingetragene Lebenspartnerschaft* is supposed to be the functional equivalent of marriage for same-sex couples only, and not an alternative to marriage for opposite-sex couples as well. It therefore is not open to opposite-sex couples.

### **7. If the civil union statute is open to heterosexual and same-sex couples, please specify if there is any formal differential treatment between both types of couples within such legal framework.**

The *Eingetragene Lebenspartnerschaft* is not open to opposite-sex couples.

### **8. If your country does not have a specific regulation on same-sex partnerships, please indicate if there are other legal statutes that specifically recognize same sex partners for specific purposes, i.e.: domestic violence act, inheritance rights act, adoption laws, etc.**

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Germany has a specific regulation on same-sex partnerships. See answer to Question 5.

**9. Is your country discussing future regulation on same-sex marriage? If so, please explain the type of regulation being proposed, at what level (constitutional, legislative, administrative, etc.), in what stage the discussion is at present, what are the chances of being passed and when.**

After the ELP was introduced and had withstood challenges in the Constitutional Court (see answer to Question 2 above), there has been almost no debate on whether marriage should be opened up for same-sex couples as well. This is quite different from, for example, Norway and Sweden, where several years after the registered partnership (which was open to same-sex couples only) was introduced, marriage was opened up to same-sex couples—and the registered partnership abolished, or England and Wales, where in the case *Wilkinson v. Kitzinger and others*<sup>118</sup> the exclusion from marriage was challenged unsuccessfully.

The reasons for the absence of a debate are two-fold. Firstly, the introduction of the ELP was considered a major achievement, as it for the first time in Germany created something close to a functional equivalent of marriage for same-sex couples. There was some doubt as to whether a constitutional challenge against the introduction of the ELP would succeed, and the focus at first was very much on the constitutional challenge. Once the BVerfG had decided that the introduction of the ELP did not violate the German constitution (see answer to Question 2 above), the focus of the activity shifted to removing the remaining differences between marriage and ELP (see answer to Question 5 above).

Secondly, the BVerfG has made clear in several decisions (see answer to Question 2 above) that marriage is constitutionally understood as the union of a man and a woman, and that any change would require more than a mere simple majority in Parliament, namely a constitutional amendment. This requires a 2/3 majority in both *Bundestag* and *Bundesrat* (Upper and Lower House) according to Art. 79 GG (see answer to Question 1 above). In the light of the opposition of the conservative parties against the ELP, there is no realistic chance for such an amendment.<sup>119</sup> Therefore, any attempt to seek such an amendment presumably is seen as futile, and perhaps even counterproductive, for further attempts to fully equalise the

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118. [2006] EWHC 2022 (Fam), comment by *Bamforth*, 'The benefits of marriage in all but name'? Same-sex couples and the Civil Partnership Act 2004, [2007] Child and Family Law Quarterly 133 and *Scherpe*, Equal but different?, [2007] Cambridge Law Journal 32.

119. Conservative parties have held more than 1/3 of the seats in Parliament in all legislative periods and thus have been in a position to block constitutional amendments.

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legal consequences of marriage and ELp.

**10. Is your country discussing future regulation on same-sex unions in a format different than marriage? If so, please explain the type of regulation being proposed, at what level (constitutional, legislative, administrative, etc.), in what stage the discussion is at, what are the chances of being passed, and when.**

No. See answers to Questions 5-9.

**11. Non-legislative regulations: does your country provide specific benefits/rights to same-sex couples via administrative acts? i.e.: death pension for the surviving partner; hospital visitations or the right to make decisions when one of the partners is incapacitated to make them. Please provide details.**

See answers to Questions 5-9

**12. Judicial construction of the law: Are there any relevant decisions in your country that had or may have future impact in the legal construction of same-sex marriage or in the legal recognition of same-sex unions/partnerships? Please provide the date and name of the case, and briefly explain the case and its relevancy for this topic.**

In Germany, the change of legal gender since 1980 has been regulated by the *Gesetz über die Änderung der Vornamen und die Feststellung der Geschlechtszugehörigkeit in besonderen Fällen (Transsexuellengesetz—TSG; Act on the change of first name and determination of gender in certain cases)*.<sup>120</sup> The TSG has been the subject of numerous proceedings before the BVerfG,<sup>121</sup> all of which essentially resulted in broadening the scope of its application or reducing the legal requirements to obtain a change of legal gender respectively.<sup>122</sup>

In its most recent decision (dated 27 May 2008) on the TSG the BVerfG held that it was a violation of art. 2(1)<sup>123</sup> and art. 6(1) GG to make a divorce a precondition for a legal change of gender in case of a person who is

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120. BGBl. I 1980, p. 1654.

121. Cf. e.g. BVerfGE 60, 123; BVerfG NJNW 1997, 1632; BVerfGE 88, 87 = BGBl. I 1993, p. 326; BVerfGE 115, 1 = FamRZ 2006, 182; BVerfGE 116, 243 = NJW 2007, 271 = FamRZ 2006, 1818. For an overview and the position under the ECtHR see also see ECtHR *Christine Goodwin v. United Kingdom* (application no. 28957/95) and *I. v. United Kingdom* (application no. 25680/94), reported at (2002) 35 European Human Rights Reports (EHRR) 447 and NJW-RR 2004, 289.

122. For an overview see *Basedow/Scherpe*, Transsexualität, Staatsangehörigkeit und internationales Privatrecht.

123. The right to free development of one's personality.

married (to a person of the opposite sex).<sup>124</sup> This placed the applicant in a position to choose between his or her marriage and the change of legal gender.<sup>125</sup> If he or she chooses the former then he or she is forced to live in a legal gender that does not conform to his or her sexual identity. The BVerfG held that this infringement of the applicant's rights was disproportionate. A change of legal gender would, if the marriage were upheld, lead to a marriage of two persons of the same sex, and it was a legitimate interest of the state to protect marriage as an institution as a form or legally secured cohabitation of two persons of the opposite sex. However, forcing a person to dissolve his or her existing marriage was denying him or her the rights already acquired and protected by art. 6(1) GG. While the legislature was not bound to open up marriage to same-sex couples, neither could the state ignore the rights of the married couple to maintain their existing marriage. The legislature, therefore, had to decide in which way to address this issue. It could allow couples to remain in a marriage under these circumstances, thereby allowing same-sex marriage for (presumably) a very limited number of couples. Alternatively, the legislature must find a way to ensure that the marriage of the transsexual person and his or her spouse can be continued as a legally secured community of responsibility; for this there were two options: firstly, to create a special legal regime for this cases only; secondly, to transfer it into life partnership in which the right and duties of marriage remained unchanged.

This decision of the BVerfG directly concerns only very few people, namely married couples where one of the spouses wants to have a legal change of gender. However, the case could potentially have wide repercussions for marriage and life partnerships. Although this seems unlikely, one of the options available to the legislature is to open up marriage to same-sex couples either fully or for couples in that specific situation only. The other is that a legal regime must be made available that has the very same legal consequences as marriage. While ELP in many ways is the functional equivalent of marriage (see answer to Question 5 above), some differences remain, and, thus, marriage and ELP are not exactly the same. Hence one of the alternatives to opening up marriage is for the legislature to make ELP truly equal to marriage for all intents and purposes. Should the latter also not be done, the mandate of the BVerfG is clear: another legal regime must be created for what then effectively and

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124. BVerfGE 121, 175 = NJW 2008, 3117 = FamRZ 2008, 1593 = BGBI. I 2008, p. 1650. English press release at <http://www.bundesverfassungsgericht.de/pressemitteilungen/bvg08-077en.html>.

125. It should be noted that a change of legal gender according to the TSG i.a. requires undergoing surgical adjustment of the external sexual characteristics to the other gender.

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legally are same-sex couples (admittedly a very small group) with the exact same rights and duties of marriage.

**13. Additional comments: Please feel free to include additional comments on the topic that you consider relevant to the specific situation of your country.**

No additional comments.

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LIST OF ABBREVIATIONS

AG Amtsgericht  
BAGE Entscheidungen des Bundesarbeitsgerichts  
BayObLG Bayerisches Oberstes Landesgericht  
BFHE Entscheidungen des Bundesfinanzhofs  
BGB Bürgerliches Gesetzbuch (German Civil Code)  
BGBl. Bundesgesetzblatt  
BGH Bundesgerichtshof  
BR-Drs. Bundesrats-Drucksache  
BT-Drs. Bundestags-Drucksache  
BVerfG Bundesverfassungsgericht  
BVerf GE Entscheidungen des Bundesverfassungsgerichtes.  
BVerw GE Entscheidungen des Bundesverwaltungsgerichtes  
DÖV Die Öffentliche Verwaltung (journal)  
ECHR European Court of Human Rights  
ECJ European Court of Justice  
ELp Eingetragene Lebenspartnerschaft  
FamRZ Zeitschrift für das gesamte Familienrecht  
GVBl. Gesetzes- und Verordnungsblatt  
GDR German Democratic Republic  
GG Grundgesetz (Basic Law, the German constitution)  
GVOBl. Gesetz- und Verordnungsblatt  
JR Juristische Rundschau  
LG Landesgericht  
LpartG Lebenspartnerschaftsgesetz (Act on life partnerships)  
LPartDisBG Gesetz zur Beendigung der Diskriminierung  
gleichgeschlechtlicher Lebensgemeinschaften: Lebenspartnerschaften  
LPartGErgG Entwurf eines Gesetzes zur Ergänzung des  
Lebenspartnerschaftsgesetzes und  
anderer Gesetze (Lebenspartnerschaftsergänzungsgesetz)  
OLG Oberlandesgericht (Court of Appeal)  
StPO Strafprozessordnung (Criminal Procedure Code)  
TSG Gesetz über die Änderung der Vornamen und die Feststellung der  
Geschlechtszugehörigkeit in besonderen Fällen (Transsexuellengesetz)