

Constitutional Court Upholds Lifetime Partnership Act

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A. Introduction

[1] On 17 July 2002, the First Senate of the *Bundesverfassungsgericht* (Federal Constitutional Court) upheld the recently enacted *Lebenspartnerschaftsgesetz* (Lifetime Partnership Act).⁽¹⁾ The Court found, unanimously, that the process leading to the law's enactment was constitutional. The Court further found, over three dissenting votes, that the substance of the law conforms to the *Grundgesetz* (GG – Basic Law).

[2] As previously reported in *German Law Journal*,⁽²⁾ the Lifetime Partnership Act entered into force on 1 August 2001. The Act gives same-sex couples the opportunity to avail themselves, by forming a Lifetime Partnership, of many of the advantages enjoyed by married, heterosexual couples. The Act's recognition of homosexual partnerships has triggered social controversy and political dissent, which has accompanied the Act, popularly known as the "Homo-Ehe" ("Gay-Marriage") law.⁽³⁾

[3] The Act, with a limited number of exceptions,⁽⁴⁾ "copies the part of the German Civil Code that governs marriage between members of the opposite sex (husbands and wives)."⁽⁵⁾ Specifically, among other rights and obligations, Lifetime Partners:

- Are obligated to support and care for one another.⁽⁶⁾
- May share property. ⁽⁷⁾
- May choose one name.⁽⁸⁾
- Possess visitation rights to children raised in the Partners' home. ⁽⁹⁾
- Have standing with respect to the estate of a deceased Partner.⁽¹⁰⁾
- Have access to a Partner's social welfare benefits.⁽¹¹⁾
- Enjoy a unique immigration status, as opposed to unmarried or non-partnered foreigners.⁽¹²⁾

[4] The opposition to the Lifetime Partnership Act posed by the center-right Christian Democratic Union and Christian Social Union, having lost the legislative struggle in the *Bundestag* (Federal Parliament), first took the form of a motion before the Federal Constitutional Court which sought to temporarily enjoin the Act's entry into force pending the resolution of the substantive constitutional challenge those parties had filed with the Court.⁽¹³⁾ The Court did not enjoin the Act's entry into force.⁽¹⁴⁾ Since 1 August 2001, approximately 4,400 same-sex couples have registered under the Lifetime Partnership Act.⁽¹⁵⁾

[5] The challenge of the center-right parties to the Lifetime Partnership Act had two components: (a) that the process by which the legislation was enacted violated Articles 72, 74 and 84 of the Basic Law (the procedural challenge); and (b) that the substance of the Lifetime Partnership Act itself constituted a violation of Article 6 of the Basic Law (the substantive challenge). The Court's treatment of these distinct challenges is briefly reviewed in the following sections.

B. The Procedural Challenge

[6] The governments of the Federal States of Bavaria and Saxony argued that the procedure used to enact the Lifetime Partnership Act violated a number of the federalism provisions of the Basic Law. Among other procedural claims,⁽¹⁶⁾ the state governments argued that the process was unconstitutional because regulatory portions of the original legislative proposal that would have subjected the entire bill to the consent of the *Bundesrat* (Council of the Federal States) after passage by the *Bundestag* (Federal Parliament) were extracted from the Lifetime Partnership Act.⁽¹⁷⁾ The regulatory provisions of the original legislative proposal (including the grant of tax, pension and social-welfare benefits to same-sex couples) were instead fashioned into a separate but parallel bill known as the *Gesetz zur Ergänzung des Lebenspartnerschaftsgesetzes und anderer Gesetze* (Act for the Supplementation of the Lifetime Partnership Act and other Laws). The *Bundestag* has not yet acted on this parallel bill.⁽¹⁸⁾ The revised Lifetime Partnership Act, absent these provisions, was, however, passed into law by the *Bundestag* alone.⁽¹⁹⁾ This maneuver allowed the center-left Federal Government (a coalition between the Social Democratic Party and the Greens) to secure passage of a considerable portion of the Lifetime Partnership Act by relying on its legislative majority in the *Bundestag* without having to confront the center-right majority in the *Bundesrat*. The Bavarian and Saxon state governments argued that this strategic move, accomplished through impermissible means, rendered the Lifetime Partnership Act an incomplete, and therefore unenforceable, piece of legislation. More importantly (from the

procedural, constitutional perspective), the complaining state governments argued that splitting the legislation thwarted the constitution's federalism requirements for the issues raised by the Lifetime Partnership Act, especially the concurrent legislative authority the *Länder* possess over matters involving the registration of births, deaths and marriages,(20) and the requirement that the *Bundesrat* consent to the issuance of all administrative rules.(21)

[7] The First Senate unanimously affirmed the *Bundestag's* privilege to fashion legislation in as many independent bills as it desires, even when, as in the present case, doing so leads to the division of a bill addressing a single subject matter and the concentration of those portions of a bill requiring the consent of the *Bundesrat* (the administrative portions, which fall under the authority of the federal states) in a narrowly tailored, parallel bill. The Court noted that the *Bundestag* frequently divides material definitions and administrative regulations into separate bills.(22) The Court, in basing this freedom on the *Bundestag's* unhampered authority to legislate, impliedly asserted a separation-of-powers justification for its decision.(23) The Court found that the division of the Lifetime Partnership Act had not been accomplished by impermissible procedural methods and that its division was not based on arbitrary motives.(24) The Court also concluded that, contrary to the claims of the complaining state governments, the division of the legislation pursued by the *Bundestag* did not disadvantage the *Länder*. Instead, the Court explained, the division accentuated the important role the *Länder* play, through the *Bundesrat*, in the federal legislative process.(25)

C. The Substantive Challenge

[8] The Act was also found to be substantively in conformity with the constitution. The Court verified the Act's constitutionality with respect to Article 6, Article 3 Section 1 and Article 3 Section 3 of the Basic Law.

[9] With respect to Article 6, the Court examined the three different dimensions of the constitutional guarantee, i.e. the individual freedom to marry, the institution of marriage as such and the fundamental value that it enshrines. It found no violation of any of these normative functions of Article 6.

[10] The majority had no problem finding that the freedom to marry was not affected by the Act. As a constitutional guarantee, Article 6 protects the right to freely choose one's spouse. The Lifetime Partnership was not a hindrance to entering into a marriage, even though the *Standesbeamte* (civil official) has to examine the seriousness of the heterosexual couple's wish to marry. The Court conceded that the Act leaves open the consequences that arise when a person wishes to marry having previously concluded lifetime partnership. In the eyes of the majority, closing this lacuna could be left to the courts which, however, in doing so have to respect Article 6. Providing guidance to the lower courts, the majority sets out two options: The very act of marrying *ipso iure* voids the lifetime partnership. Or, the existing lifetime partnership needs to be formally dissolved. In that case, the existing lifetime partnership constitutes an obstacle to marriage much the same as a previously concluded marriage.

[11] Nor did the Act violate the institutional guarantee for marriage contained in Article 6. Thus reaching the core of the case, the majority first set out that the constitution does not contain a definition of marriage but presupposes it as a specific form of two people living their lives together. The legislator has to protect this form. While enjoying considerable discretion, the legislator has to respect certain fundamental principles. Marriage, then, is the union of a man with a woman in a permanent life partnership, based on their free decision, with the assistance of the state (*die Vereinigung eines Mannes mit einer Frau zu einer auf Dauer angelegten Lebensgemeinschaft, begründet auf freiem Entschluss unter Mitwirkung des Staates*). The majority saw no problem with the institutional guarantee of Article 6 thus defined since the Act was not concerned with marriage: it dealt rather with homosexual couples. No changes to the institution of marriage as set forth in the Civil Code occurred through the Act.

[12] The fundamental constitutional value of marriage enshrined in Article 6 was not violated by the Act. The constitution's value judgment in favor of special protection of marriage and family forbade any measure negatively affecting marriages and required appropriate protective action. There were no negative consequences for marriage since the Act was addressed to persons that can not marry. The obligation to support marriage did not contain a prohibition on also legally protecting other forms of personal existence. According to the majority, the constitution's text "special protection" (*besonderer Schutz*) did not stand in the way of this interpretation since only the institution of marriage remained constitutionally protected against being abolished by the legislator.

[13] The majority saw no violation of the guarantee of legal equality, Article 3 Section 1, since there were sufficient differences between homosexual couples and other forms of common life. With respect to heterosexual couples, this followed from the fact that homosexuals could not marry. With respect to other social groups, in particular family, the majority pointed out that such persons often have the same privileges as those provided under the Act.

[14] President Papier and Judge Haas dissented filing each an opinion. (Without filing a separate opinion, Judge Steiner also dissented.) President Papier argued that the institutional guarantee of Article 6 for marriage was exclusive, precluding the legislator from extending much of its substantive protection to other forms of social

community. Judge Haas pointed out that the Constitution specially protected marriages as the basis for families. She also said that there was indeed inequality in conferring legal benefits on certain groups but not on others where people undertook mutual responsibility for each other.(26)

(1) BVerfG, 1 BvF 1/01 from 17 July 2002, <http://www.bverfg.de>.

(2) See, Andreas Maurer, *Federal Constitutional Court to Decide Whether to Issue a Temporary Injunction Against Germany's New Lifetime Partnerships Law for Homosexual Couples*, 2 GERM. LAW JOURNAL 12 (16 July 2001) http://www.germanlawjournal.com/past_issues.php?id=42; Andreas Maurer, *Federal Constitutional Court Does Not Issue Temporary Injunction to Block the Entry Into Force of the Lifetime Partnership Law*, 2 GERM. LAW JOURNAL 13 (1 August 2001) http://www.germanlawjournal.com/past_issues.php?id=73.

(3) See, e.g., Stephan Hütig, *Homo-Ehe vor Gericht*, FAZ.NET (visited 17 July 2002) <<http://faz.net>>; Thomas Reinhold, *Homo-Ehe: Das ist gut so*, FAZ.NET (visited 17 July 2002) <<http://faz.net>>.

(4) Most notably, the exclusion of the right to adopt. See, BverfG, 1 BvF 1/01 from 17 July 2002, 11, <http://www.bverfg.de>; Andreas Maurer, *Federal Constitutional Court to Decide Whether to Issue a Temporary Injunction Against Germany's New Lifetime Partnerships Law for Homosexual Couples*, 2 GERM. LAW JOURNAL 12, 10 (16 July 2001) http://www.germanlawjournal.com/past_issues.php?id=42.

(5) Andreas Maurer, *Federal Constitutional Court to Decide Whether to Issue a Temporary Injunction Against Germany's New Lifetime Partnerships Law for Homosexual Couples*, 2 GERM. LAW JOURNAL 12, 4 (16 July 2001) http://www.germanlawjournal.com/past_issues.php?id=42.

(6) BVerfG, 1 BvF 1/01 from 17 July 2002, 9-10, <http://www.bverfg.de>. See, Art. 1 § 2 (2001 BGBl. I, p. 265, <http://217.160.60.235/BGBl/bgbl1f/b101009f.pdf>).

(7) BVerfG, 1 BvF 1/01 from 17 July 2002, 9-10, <http://www.bverfg.de>. See, Art. 1 § 6 (2001 BGBl. I, p. 265, <http://217.160.60.235/BGBl/bgbl1f/b101009f.pdf>).

(8) BVerfG, 1 BvF 1/01 from 17 July 2002, 9-10, <http://www.bverfg.de>. See, Art. 1 § 3 (2001 BGBl. I, p. 265, <http://217.160.60.235/BGBl/bgbl1f/b101009f.pdf>).

(9) BVerfG, 1 BvF 1/01 from 17 July 2002, 9-10, <http://www.bverfg.de>. See, Art. 2 Nr. 12 (2001 BGBl. I, p. 265, <http://217.160.60.235/BGBl/bgbl1f/b101009f.pdf>).

(10) BVerfG, 1 BvF 1/01 from 17 July 2002, 9-10, <http://www.bverfg.de>. See, Art. 1 § 10 (2001 BGBl. I, p. 265, <http://217.160.60.235/BGBl/bgbl1f/b101009f.pdf>).

(11) BVerfG, 1 BvF 1/01 from 17 July 2002, 9-10, <http://www.bverfg.de>. See, Art. 3 §§ 52, 54 and 56 (2001 BGBl. I, p. 265, <http://217.160.60.235/BGBl/bgbl1f/b101009f.pdf>).

(12) BVerfG, 1 BvF 1/01 from 17 July 2002, 9-10, <http://www.bverfg.de>. See, Art. 3 § 11 (2001 BGBl. I, p. 265, <http://217.160.60.235/BGBl/bgbl1f/b101009f.pdf>).

(13) The center-right parties brought their challenge to the formal and material constitutionality of the new law by way of a *Normenkontrollanträge* (Abstract Judicial Review), which permits *Länder* (Federal State) governments to engage the Court "in the event of disagreements or doubts respecting the formal or substantive compatibility of federal law or *Land* law with this Basic Law, . . ." Art. 93.1(2) GG. In this case the center-right parties acted through the state governments of Bavaria and Saxony, which they control.

(14) BverfG, 1 BvQ 23/01 from 18 July 2001, <<http://www.bverfg.de>>. See, Andreas Maurer, *Federal Constitutional Court Does Not Issue Temporary Injunction to Block the Entry Into Force of the Lifetime Partnership Law*, 2 GERM. LAW JOURNAL 13 (1 August 2001) http://www.germanlawjournal.com/past_issues.php?id=73.

(15) Jonnie Skye Clifford, *High Court Okays Gay-Marriage Bill*, F.A.Z. WEEKLY (visited 19 July 2002) <<http://www.faz.com>>.

(16) The state governments argued that their right to "regulate the establishment of the authorities and their administrative procedure," where they are responsible for the execution of federal laws, had been violated (Art. 84.1

GG). The state governments also argued that a proposed version of the legislation, which had required the involvement of the *Standesbeamten* (Registration Offices) in the execution of the Lifetime Partnerships, had been unconstitutionally amended. The Registration Offices are administered by the state governments and this interest would have necessitated the Bundesrat's consent to the proposed legislation.

(17) Germany's federal structure grants the *Länder* (Federal States) the authority to legislate all matters, except those areas explicitly conferred on the legislative power of the *Bundes* (Federal Authorities) by the Basic Law (Art. 70.1 GG). In another broad range of areas explicitly identified by the Basic Law, the *Bundes* and the *Länder* enjoy concurrent legislative authority. With respect to concurrent legislative authority, the Federal Government has legislative priority where "the establishment of equal living conditions throughout the federal territory or the maintenance of legal or economic unity renders federal regulation necessary in the national interest" (Art. 72.2 GG). German federalism has a final mechanism, along side this careful, "vertical" division of subject area au The Lifetime Partnership Act touches upon this scheme because the "registration of births, deaths, and marriages," belongs to the concurrent legislative authority of the *Bundes* and the *Länder* (Art. 74.2 GG). It was this final element of federalism, known as the *Zustimmungsgesetzpflicht* (Acts Requiring Consent) that was at stake in the Lifetime Partnership Act.

(18) Jonnie Skye Clifford, *High Court Okays Gay-Marriage Bill*, F.A.Z. WEEKLY (visited 19 July 2002) <<http://www.faz.com>>.

(19) See, 2001 BGBl. I, p. 3513, <http://217.160.60.235/BGBl/bgbl1f/b101067f.pdf>.

(20) Art. 74.1 para. 2 GG.

(21) Art. 84.2 GG.

(22) BVerfG, 1 BvF 1/01 from 17 July 2002, 66, <http://www.bverfg.de> (citing BVerfGE 34, 9 (p. 28); BVerfGE 37, 363 (p. 382)).

(23) BVerfG, 1 BvF 1/01 from 17 July 2002, 67, <http://www.bverfg.de> ("Die Möglichkeit des Bundestages, mit der Aufteilung einer Gesezesmaterie auf zwei oder mehrere Gesetze das Zustimmungsrecht des Bundesrates auf einen Teil der beabsichtigten Regelung zu begrenzen, folgt aus seinem Recht zur Gesetzgebung.").

(24) BVerfG, 1 BvF 1/01 from 17 July 2002, 67-74, <http://www.bverfg.de>.

(25) BVerfG, 1 BvF 1/01 from 17 July 2002, 73, <http://www.bverfg.de> ("Dies ermöglichte zwar einerseits dem Bundesrat, seinen Einfluss stärker auch auf das materielle Recht auszuüben, entzöge andererseits aber den Ländern schleichend Gesetzgebungskompetenz dort, wo für sie originäre Zuständigkeiten von Verfassungen wegen bestehen.").

(26) See, also Hans-Jürgen Papier, *Ehe und Familie in der neueren Rechtsprechung des Bundesverfassungsgerichts*, in: 55 NEUE JURISTISCHE WOCHENSCHRIFT 2129 (2002).