1. **Where a statute has been passed and is to be corrected, which is admissible in exceptional cases, it is necessary for the statute to be plainly incorrect. The incorrectness may be shown not only by the text of the statute, but in particular also by taking into account its meaning in context and the parliamentary background materials of the statute.**
2. **If the Federal Government or the Bundestag (lower house of the German parliament) divides a subject-matter between a number of statutes in order to prevent the Bundesrat (upper house of the German parliament) from preventing provisions that in themselves are not subject to its consent, this is constitutionally unobjectionable.**
3. **The introduction of the legal institution of the registered civil partnership for same-sex couples does not infringe Article 6.1 of the Basic Law. The particular protection of marriage in Article 6.1 of the Basic Law does not prevent the legislature from providing rights and duties for the same-sex civil partnership that are equal or similar to those of marriage. The institution of marriage is not threatened by any risk from an institution that is directed at persons who cannot be married to each other.**
4. **It does not infringe Article 3.1 of the Basic Law that persons of different sex cohabiting with each other and groups of people related to each other and living together have no possibility of becoming registered civil partnerships.**

Judgment of the First Senate of 17 July 2002
on the basis of the oral hearing of 9 April 2002
– 1 BvF 1/01 –
– 1 BvF 2/01 –

in the proceedings on the constitutional review of the Act on the Termination of the Discrimination of Same-Sex Couples: Civil Partnerships (*Gesetz zur Beendigung der Diskriminierung gleichgeschlechtlicher Gemeinschaften: Lebenspartnerschaften*) of 16 February 2001 (Federal Law Gazette, *Bundesgesetzblatt,* BGBl I, p. 266), amended by Article 25 of the Code of Social Law – Ninth Book – (*Sozialgesetzbuch* IX, SGB IX) Rehabilitation and participation in society of disabled persons of 19 June 2001 (Federal Law Gazette I p. 1046), by Article 10 number 7 of the Act on the Reorganisation, Simplification and Reform of Landlord and Tenant Law (*Gesetz zur Neugliederung, Vereinfachung und Reform des Mietrechts*) of 19 June 2001 (Federal Law Gazette I p. 1149) and by Article 11 of the Act on the Improvement of Civil-Court Protection in the case of Violence and Stalking and to Facilitate the Transfer of the Matrimonial Home in case of Separation (*Gesetz zur Verbesserung des zivilgerichtlichen Schutzes bei Gewalttaten und Nachstellungen sowie zur Erleichterung der Überlassung der Ehewohnung bei Trennung*) of 11 December 2001 (Federal Law Gazette I p. 3513),

First Applicants:

1. Land government of Saxony, represented by the Minister-President ...,

2. Land government of the Free State of Thuringia, represented by the Minister-President ...,

- 1. Professor Dr. Thomas Würtenberger ...,
2. Professor Dr. Johann Braun ...

– 1 BVF 1/01 –,

Second Applicant: Bavarian Land government, represented by the Minister-President ...,

- Professor Dr. Peter Badura ...

– 1 BVF 2/01 –

RULING:

The Act on the Termination of the Discrimination of Same-Sex Couples: Civil Partnerships (Gesetz zur Beendigung der Diskriminierung gleichgeschlechtlicher Gemeinschaften: Lebenspartnerschaften) of 16 February 2001 (Federal Law Gazette I p. 266) as amended by the Act of 11 December 2001 (Federal Law Gazette I p. 3513) is compatible with the Basic Law (Grundgesetz – GG).

EXTRACT FROM GROUNDS:

A.

The applications for judicial review relate to the compatibility of the Act on the Termination of the Discrimination of Same-Sex Couples: Civil Partnerships of 16 February 2001 (Federal Law Gazette I p. 266; hereinafter: Civil Partnerships Act, LPartDisBG), which entered into force on 1 August 2001, with the Basic Law. 1

I.

The aim of the Act is to reduce discrimination against same-sex couples and to give them the opportunity to give their partnerships a legal framework. For this purpose, the registered civil partnership has been created as a family-law institution for a long-term same-sex partnership, with a large number of legal consequences. 2

1. In the year 2000, at least 47,000 same-sex couples were cohabiting in the Federal Republic of Germany (see Eggen, *Gleichgeschlechtliche Lebensgemeinschaften*, 2nd part, in: *Baden-Württemberg in Wort und Zahl* 12/2001, pp. 579 ff.). According to a study commissioned by the German Federal Ministry of Justice and carried out by Buba and Vaskovics in the year 2000, same-sex couples do not essentially differ from different-sex couples in their expectations of the partnership, its permanence, their mutual readiness to support each other and assumption of responsibility for each other. More than half of the interviewees living in same-sex partnerships expressed the desire to live in a legally binding partnership (Buba/Vaskovics, *Benachteiligung gleichgeschlechtlich orientierter Personen und Paare*, study commissioned by the German Federal Ministry of Justice, 2000, pp. 75 ff.*,* 117 ff.*)*. Same-sex couples are prohibited from marrying. 3

2. The first parliamentary initiatives for legislation for homosexual partnerships in the Federal Republic of Germany date back to the 11th parliamentary term of the German *Bundestag* (the lower house of the German parliament; cf. the resolution proposal of the parliamentary party of the Green Party of 18 May 1990, *Bundestag* document, *Bundestagsdrucksache* – BTDrucks 11/7197). In 1994, in a resolution, the European Parliament called on the member states of the European Union to avoid unequal treatment of persons of same-sex orientation in their individual legal and administrative provisions, and appealed to the Commission to grant homosexuals access to marriage or to corresponding legal institutions (cf. Official Journal of the European Communities C 61 of 28 February 1994, 40-41; *Bundestag* document 12/7069, p. 4). There now exist provisions on same-sex partnerships in several European countries (cf. the study of the *Max-Planck-Institut für ausländisches und internationales Privatrecht*, ed. von Basedow *et al. Die Rechtsstellung gleichgeschlechtlicher Lebensgemeinschaften*, 2000). They extend from partnerships in the Scandinavian countries that are treated as equal to marriage in their effects to the *pacte civil de solidarité* (PACS) in France with its possibility of the registration of same-sex and different-sex partnerships, which has fewer legal effects than marriage and can be 4

dissolved more easily. In the Netherlands, same-sex couples may now be married.

In July 2000, the parliamentary parties of the SPD (*Sozialdemokratische Partei Deutschlands*) and BÜNDNIS 90/DIE GRÜNEN introduced a bill for an Act on the Termination of the Discrimination of Same-Sex Couples: Civil Partnerships to the legislative procedure (*Bundestag* document 14/3751). The FDP (*Freie Demokratische Partei*) parliamentary party also tabled a bill (*Bundestag* document 14/1259). After the first readings of both bills, referral to the committee stage and the examination of expert witnesses, the Committee on Legal Affairs of the *Bundestag*, which had overall responsibility, on 8 November 2000 recommended that the FDP bill should be rejected and the bill of the governing parliamentary parties should be accepted, but in a version divided into two statutes: firstly, as the Act on the Termination of the Discrimination of Same-Sex Couples: Civil Partnerships with the provisions on registered civil partnerships and on the essential legal consequences associated with them (Civil Partnerships Act, LPartDisBG), and secondly as the Act to Supplement the Civil Partnerships Act and other Acts (*Gesetz zur Ergänzung des Lebenspartnerschaftsgesetzes und anderer Gesetze, Lebenspartnerschaftsgesetzergänzungsgesetz,* Civil Partnerships Act Supplementary Act, LPartGErgG) with in particular procedural-law implementing regulations (*Bundestag* document 14/4545 with annexes). The reason for this was the intention of the governing parliamentary parties to divide the original bill into a bill not requiring the approval of the *Bundesrat* (the upper house of the German parliament) and a bill requiring the approval of the *Bundesrat*. Consequently, the bill of the Civil Partnerships Act was not to name an authority responsible for registering the civil partnership (Committee document (*Ausschuss-Drucksache*) 14/508 [Committee on Family Affairs, Senior Citizens, Women and Youth (*Ausschuss für Familie, Senioren, Frauen und Jugend*)] and 14/944 [Committee on Labour and Social Affairs (*Ausschuss für Arbeit und Sozialordnung*)]). This was approved by the majorities in the consulting committees and was also expressed in the report of the Committee on Legal Affairs of 9 November 2000 (*Bundestag* document 14/4550). However, in the text attached to the resolution recommended by the Committee on Legal Affairs of the draft of a Civil Partnerships Act, not all the provisions had been amended in line with this. The Civil Partnerships Act was accepted by the *Bundestag* in this wording (Minutes of plenary proceedings (*Plenarprotokoll*) 14/131, p. 12629 D) and was passed by the *Bundesrat* unaltered; the *Bundesrat* did not make an application to the Mediation Committee (*Vermittlungsausschuss*) and did not establish that this statute was subject to approval (*Bundesrat*, Minutes of plenary proceedings, 757th session, p. 551 C, D). 5

When the Federal Ministry of Justice pointed out two obvious errors, in its opinion, in subsections 3 and 4 of Article 1 § 3 of the Civil Partnerships Act, the Presidents of the *Bundestag* and the *Bundesrat* agreed to a correction of the provisions objected to as incorrect. The signing and promulgation of the Act on 16 February 2001 (Federal Law Gazette I p. 266) then followed in the corrected version. The applications for an interim injunction against the entry into force of the Act, made by the *Land* governments of 6

the *Land* (*Freistaat*) Bavaria and the *Land* (*Freistaat*) Saxony were unsuccessful before the Federal Constitutional Court (*Bundesverfassungsgericht*; cf. judgment of 18 July 2001 - 1 BvQ 23/01 and 1 BvQ 26/01 -, *Neue Juristische Wochenschrift* 2001, 2457).

Now there are implementation regulations for the Civil Partnerships Act in all *Länder* (states), establishing jurisdiction in civil partnership matters and associated procedural rules. 7

The Civil Partnerships Act Supplementary Act, on the other hand, was approved by the *Bundestag* but has not yet been approved by the *Bundesrat* (*Bundestag* document 14/4875). The Mediation Committee applied to by the *Bundestag* (*Bundestag* document 14/4878) has as yet made no resolution thereon. 8

3. The Act challenged in the applications for judicial review governs the creation and dissolution of a registered civil partnership for same-sex couples. The civil partnership is created by a contract between two persons of the same sex; the statements necessary for this purpose must be made before the competent authority (Article 1 § 1.1). A further requirement for entering into a civil partnership is that both partners make a declaration as to their property status (Article 1 § 1.1 sentence 4). On the application of one or both partners, the civil partnership is terminated by a decree of annulment (Article 1 § 15). 9

The partners are bound to each other in care and support and committed to plan their lives together. They are responsible for each other (Article 1 § 2). The statute does not require sexual intercourse. The legal consequences of the registered partnership are in part based on the legal consequences of marriage, but they also diverge from the latter. Thus, the partners owe each other support. This applies to a modified extent also to persons living apart and after the termination of the partnership (Article 1 §§ 5, 12 and 16). The partners must make a statement on their financial status; they may choose between a property regime of equalisation of surplus and a contract governing their financial relations (Article 1 §§ 6 und 7). They may choose a joint name (Article 1 § 3). The civil partner or former partner of a parent who has lived for a long period in a domestic community with the child has a right of access (Article 2 number 12, § 1685.2 of the German Civil Code). A partner is deemed to be a member of the other's family (Article 1 § 11). A right of intestate succession of the civil partner corresponding to that of the spouse has been introduced (Article 1 § 10). In social security law too, entering into the civil partnership has legal consequences (Article 3 §§ 52, 54 und 56). Thus, for example, in the statutory health insurance scheme civil partners are covered by the family insurance (Article 3 § 52 number 4). In the law concerning foreign nationals, the provisions relating to the right of entry of foreign families that apply to marital relationships are correspondingly extended to same-sex partnerships (Article 3 § 11). In addition the Civil Partnerships Act grants the partner of a parent with sole custody, with the consent of the latter, the authority to make joint decisions in matters of the child's everyday life, known as "lim- 10

ited custody" (Article 1 § 9).

The statute challenged and the supplementary statute that has not yet come into existence provide no adjustment of old-age pension rights between the civil partners if their partnership is annulled, and no rules on pensions in case of death. Similarly, joint adoption of minors is excluded. The supplementary statute contains provisions on tax law and state welfare law, but the Civil Partnerships Act does not. 11

II.

In their applications for judicial review, the applicants challenge the Act as a whole and individual provisions thereof as incompatible with the Basic Law. 12

1. They submit that the Act is unconstitutional, firstly, for procedural reasons. 13

a) The arbitrary division of the original bill into two bills, according to the applicants, circumvented the right of approval of the *Bundesrat*. The division makes the Act a torso and results in its being impossible to implement. Provisions of substantive law that belong together have been abusively torn apart. This is true of the maintenance obligation of partners, which is contained in Article 1 § 5 of the Civil Partnerships Act; because of the division, there is no tax relief provided for this. The two areas of legislation necessarily belong together, and as a result, this provision is not only unconstitutional, but also subject to approval. In addition, the substantive provisions cannot be separated from the procedural provisions. The Civil Partnerships Act needs to be put in effect by the registrar of births, deaths and marriages, for its substantive-law provisions aim at a quite specific organisation of procedure. Thus the *Länder* are largely fettered when they organise procedural law. On the other hand, Article 74.1 number 2 of the Basic Law prevents them from passing their own implementing statutes. Apart from the fact that the Civil Status Act (*Personenstandsgesetz*) governs the law of civil status definitively, the Civil Partnerships Act contains no express opening for *Land* legislation. In addition, the Civil Partnerships Act Supplementary Act makes it clear that under Article 72.2 of the Basic Law uniform legislation for the whole of Germany is required. If, contrary to the opinion of the applicants, one is of the opinion that the *Länder* are competent to pass legislation containing implementation provisions, the Act also violates Article 84.1 of the Basic Law because by reason of its substantive-law provisions it requires the *Länder* to create unified procedural law, although under the Constitution this cannot be required of them. 14

Dividing a statute into one part that requires approval and another part that does not require approval means that the requirement of approval for statutes becomes meaningless. In the Federal Constitutional Court's further development of case-law, a federal statute requires approval if, although it is restricted to provisions on questions of substantive law, these provisions are so determinative that they leave the *Länder* no scope for legislating on administrative procedure on their own responsibility. This is the case in the statute challenged. 15

b) In addition, the applicants argue, the Act still contains provisions that should have been approved by the *Bundesrat*. This refers to the revision of Article 17a of the Introductory Act to the German Civil Code (*Einführungsgesetz zum Bürgerlichen Gesetzbuch,* EGBGB*;* from 1 January 2002 Article 17b of the Introductory Act to the German Civil Code, amended by Article 10 of the Basic Law of 11 December 2001, Federal Law Gazette I p. 3513), whose reference to Article 10.2 of the Introductory Act to the German Civil Code establishes a jurisdiction of the registrar of births, deaths and marriages and therefore requires approval, because it allocates to the registrar a legally and qualitatively new administrative activity. The new provisions in the Aliens Act (*Ausländergesetz*) on the subsequent immigration of civil partners now give the provisions of procedure a substantially changed meaning and scope, even if they have not expressly been altered, and lead to qualitatively different activity on the part of the aliens authorities. Whereas previously, when issuing residence permits, these authorities had to take account of Article 6 of the Basic Law in the weighing of proportionality, all that is important in the case of applications of civil partners is the protection of personality, guaranteed by Article 2.1 in conjunction with Article 1.1 of the Basic Law. 16

c) Finally, the applicants submit, the statute should not have been corrected after the resolutions passed in the *Bundestag* and the *Bundesrat*. It was not a drafting error that Article 1 §3.3 and 3.4 of the Civil Partnerships Act in the version adopted by the *Bundestag* provide that the registrar of births, deaths and marriages has jurisdiction to accept declarations on the partnership name. The report of the Committee on Legal Affairs reveals that the statute should merely not name the authority that was competent for registering the civil partnership. But Article 1 §3.3 and 3.4 of the Civil Partnerships Act relate neither to the registration of a civil partnership nor to the stipulation of a name, but to dealing with civil partnerships that have been dissolved. It is appropriate for this purpose to make the declarations before the registrar of births, deaths and marriages, because after the dissolution of the civil partnership the federal Civil Status Act applies again. The provision was the subject of the debate and it became part of the legislature's intention. It was therefore unconstitutional and void to correct the provision. The correction procedure infringes the principle of democracy. The version of the statute pronounced does not correspond to the version adopted. As a result, because the correction is nugatory, the legal provision that was not pronounced, whose allocation of jurisdiction to the registrar made the statute subject to approval, becomes the subject of proceedings concerning the review of a statute. 17

2. The applicants submit that the statute is also unconstitutional for substantive reasons. 18

a) In particular, it is not consistent with the protection of marriage and the family required by Article 6.1 of the Basic Law. It does not comply with the requirement, contained in this fundamental right, of keeping a distance from marriage (*Abstandsgebot*), which is derived in particular from the guarantee of the institution of marriage in Article 6.1 of the Basic Law and from the protection of marriage and the family as a 19

fundamental principle on which values are based. The very name of the statute makes it clear that it is intended to give the civil partnership equality of treatment with marriage. The Civil Partnerships Act introduces a family-law institution for same-sex couples largely furnished with the effects of marriage, and in doing so it infringes Article 6.1 of the Basic Law, which prevents the legislature from substantially restructuring the relationships in marriage and the family from the point of view of the law of persons, and which prohibits basing family law in equal measure on marriage and a same-sex civil partnership.

Marriage enjoys special protection as an essential element of state order to guarantee the conditions for the care and upbringing of children in the interest of parents and children, but also of the state community. If parallel institutions are created for other forms of partnership that would be equal to marriage, this levelling out robs marriage of its special protection. Article 6.1 of the Basic Law provides that the relationships between the sexes under the law of persons and family law ought to be organised by the standards of marriage where these are long-term partnerships. The constitutional directive requires that the unity and personal responsibility of marriage are respected and promoted. This has a directive effect for the whole area of public and private law. In this context, Article 6.1 of the Basic Law prohibits not only making marriage available to same-sex partnerships, but also creating beside marriage an institution incorporating structural elements of marriage without objective necessity, since this would amount to a circumvention of the prohibition. The special requirement of protection contained in Article 6.1 of the Basic Law demands a clear distance between the legal form of marriage and that of a civil partnership. Marriage enjoys protection of its exclusivity. The Basic Law grants other partnerships only general protection, but not special protection as institutions. On the basis of this distinction, there is a requirement to differentiate and a prohibition on the reproduction of the legal structure of marriage by other partnerships. They may not be structured on the model of marriage, create a faithful reproduction of marriage or incorporate provisions that shape the core of marriage law. If the registered civil partnership is to a large extent brought into line with marriage, there is an infringement of this requirement. Apparent deviations from marriage law contained in the statute transpired, when examined more closely, to be the same as features of marriage. In contrast, some real differences from marriage contained in the statute did not demonstrate an independent concept. The legislature's intention of copying marriage in the Civil Partnerships Act becomes even clearer as a result of the provisions to be included in the Civil Partnerships Supplementary Act. This applies in particular to the tax-law provisions, whose effect is equivalent to that of a limited joint assessment of spouses. 20

b) Article 6.1 of the Basic Law is also infringed, according to the applicants, in that the civil partnership is not an impediment to marriage because it is not defined as such in the Civil Partnerships Act. Thus the Act permits a registered civil partnership to exist side-by-side with marriage although the obligations in the registered partnership are incompatible with those of marriage. This constitutes a serious encroach- 21

ment upon marriage.

c) In addition, in introducing the limited custody in Article 1 § 9, the Act encroaches upon the parental rights of the parent without custody. It infringes Article 14.1 of the Basic Law because without a sufficiently weighty reason it encroaches upon the testamentary freedom of the partners by giving a compulsory share to the surviving partner, which cannot be justified merely by the need to give financial protection to the surviving partner. In addition, the statute violates Article 3.1 of the Basic Law. Although there are good reasons for providing a comparable legal framework to other long-term relationships based on permanence and mutual support, these other partnerships worthy of protection are not taken into account in the Act. Finally, the Act contains no tax-law provisions, although the duty of maintenance created in the Act is inseparably linked to the need for tax relief. 22

III.

Opportunity to comment on the proceedings was given to the German *Bundestag*, the *Bundesrat*, the Federal Government, the *Länder* governments, the *Wissenschaftliche Vereinigung für Familienrecht e.V.*, the *Lesben- und Schwulenverband in Deutschland*, the *Deutscher Familienverband* and the *Ökumenische Arbeitsgruppe Homosexuelle und Kirche e.V.* Of these bodies, the *Bundestag*, the Federal Government, the Senate of the Free and Hanseatic City of Hamburg, the government of Schleswig-Holstein, the *Lesben- und Schwulenverband* and the *Ökumenische Arbeitsgruppe* made use of this opportunity, and with the exception of the Senate of the Free and Hanseatic City of Hamburg and the *Ökumenische Arbeitsgruppe* they added to and consolidated their submissions in the oral hearing. 23

1. The Federal Government is of the opinion that the Civil Partnerships Act is compatible with the Basic Law. According to the Federal Government, in order to counter social and political discrimination against same-sex couples, which still exists, the Act creates legal structures that are derived from the gender-independent needs of intensely lived two-person relationships on a partnership basis and the necessity to protect the weaker partner. In doing this, it does not copy marriage, but draws a consequence from everyday life experience as it is found. Parallels to marriage law end where married circumstances have no equivalent in same-sex relationships, in particular with regard to children of both spouses. The registered civil partnership does not exert pressure on people to change their sexuality. According to confirmed knowledge of sexual medicine, it is not possible to make people homosexual either by upbringing or by seduction; instead, homosexuality is the result of a strong biological predisposition. 24

a) The Civil Partnerships Act does not define administrative enforcement beyond the degree constitutionally permitted, as is shown by the variety of the implementation provisions that have now been issued by the *Länder*. It was permissible to divide the bill in two. As long as the case-law of the Federal Constitutional Court continues in effect, which holds that when only one provision is subject to approval the whole Act 25

is subject to approval, the legislature is urged to divide bills in order to comply with the constitutionally specified division of competence between *Bundestag* and *Bundesrat*. Failing this, the *Bundesrat*'s right of approval would *de facto* be extended to all bills. The division was neither abusive nor arbitrary. Only after the failure of the attempt to gain a broad consensus for the total reform package was the division made. The legislature is virtually obliged to consider relevant political developments during the legislative procedure. There is no obligation to deal in the same statute with maintenance claims and the tax relief of the person liable to pay maintenance.

Nor did individual provisions of the statute make it subject to approval. Thus, for example, Article 3 § 16 number 10 of the Civil Partnerships Act merely governs the jurisdiction of German courts. Article 3 § 25 of the Civil Partnerships Act does not create a jurisdiction of the registrar of births, deaths and marriages; it refers to the competent authority, using a standard technique of reference. Article 3 § 6 of the Civil Partnerships Act merely extends an existing jurisdiction of the registry office to the cases of civil partnership and therefore results in a purely quantitative change of competencies that already existed. The provisions of aliens law in the Act similarly do not impose on the *Länder* any new duties that deviate qualitatively from the previous ones. A weighing of interests under Article 2.1 and Article 1.1 of the Basic Law has previously been necessary in aliens law too. 26

Article 1 § 3.3 and 3.4 of the Civil Partnerships Act was open to the correction procedure. The incorrect implementation of the resolution of the *Bundestag* Committee on Legal Affairs led to this provision being passed with the registrar of births, deaths and marriages being specifically named, although the members had assumed that the responsible authority would be designated only in the supplementary Act. Furthermore, only in the case of evident errors are errors in the legislative procedure capable of making the statute void. But there are no such errors in this statute. 27

The Act is also enforceable. The *Länder* have the necessary competence to legislate on matters of civil status and are *de facto* in the position to create appropriate procedural rules, as the *Länder* regulations that have now been passed demonstrate. The Civil Partnerships Act creates a new, previously unknown area of matters of civil status, for which the Federal Government has not yet made use of its concurrent jurisdiction under Article 74.1 number 2 of the Basic Law. Article 72.2 of the Basic Law contains no obligation to enact federal law, but on the contrary sets a limit to this. 28

b) The statute is also constitutional from a substantive point of view, according to the Federal Government. It is consistent with Article 2.1 and Article 1.1 of the Basic Law and is aimed at strengthening mutual responsibility and predictable conditions for the conduct of life for same-sex couples. It is natural for similarities to marriage-law provisions to follow from an intense two-person relationship intended to last for life. 29

The statute does not violate Article 6.1 of the Basic Law, which permits other institutions in order to increase responsibility and contains no requirement to discriminate against persons who are not able to be married by reason of their sexual orientation. 30

It is in the spirit of the basic concern of Article 6.1 of the Basic Law, legally securing basic human needs for closeness and reliability, to create appropriate provisions for homosexual partners too that make it possible for them to give their relationships a legal basis. The Civil Partnerships Act respects the social and legal value of marriage and the family. The uninterrupted respect for marriage and family is expressed in the very desire of homosexual partners affected for a comparable legal institution. Insofar as marriage-law provisions can from their fundamental intention be transferred to homosexual partnerships, marriage is certainly a social model. This does not adversely affect the overall image of marriage and the family.

It may remain undecided whether Article 6.1 of the Basic Law contains a prohibition on differentiation or a requirement of distance. Individual correspondences or parallels to marriage, at all events, do not breach such a requirement. The structuring of the civil partnership in the statute is essentially different from that of marriage. Thus, an existing civil partnership does not prevent marriage; the correct understanding is that marriage results by operation of law in the dissolution of the civil partnership. Defects in the creation of the civil partnership make it void. The registered civil partnership requires that the parties make statements as to their financial status. The Act contains no provisions on the housekeeping of civil partners and does not impose on them an obligation to show consideration for each other when they choose and exercise a gainful occupation. Civil partners are merely permitted to decide on a common name. Civil partners are not permitted to make a joint adoption or to adopt a stepchild. Under maintenance law, each partner is in principle referred to his or her own gainful employment. This and other differences show that the registered civil partnership is not a duplication of marriage. 31

The fact that the registered civil partnership is reserved to persons of the same sex is not a violation of Article 3.3 of the Basic Law, since it is based not on gender, but on the choice of partner. Article 3.1 of the Basic Law is not violated, because marriage is open to heterosexual partnerships. Long-term partnerships of a different nature differ significantly from registered civil partnerships in the way they structure the partners' lives. 32

The Act preserves justice in taxation. The maintenance events defined in the Act may be set off against income tax as extraordinary financial burdens. Finally, the right of succession granted the partners is also consistent with Article 14.1 of the Basic Law. The right to a compulsory portion is today justified by the social obligation to safeguard the maintenance of the person in question beyond death. The legislature is authorised to guarantee to the next of kin a reasonable minimum share in the estate. 33

2. a) In the opinion of the German *Bundestag*, the applications for judicial review are unfounded. 34

aa) Its arguments on procedural constitutionality substantially coincide with those of the Federal Government. It states that the division of the statute into two parts was not arbitrary. The Act is enforceable. It contains no provisions that are subject to ap- 35

proval under Article 84 of the Basic Law.

As for the substantive constitutionality with regard to Article 3.1 and 3.3 of the Basic Law and Article 14.1 of the Basic Law too, the arguments coincide with those of the Federal Government. 36

bb) On the constitutionality of the Act with regard to Article 6.1 of the Basic Law, the *Bundestag* submits that there is nothing in the case-law of the Federal Constitutional Court to support an infringement of a requirement of differentiation or distance derived from the special requirement of protection in Article 6.1 of the Basic Law. The protective function of Article 6.1 of the Basic Law plays no role in the assessment of the constitutionality, since the Statute does not affect marriage, does not encroach upon freedom to marry, does not influence marital cohabitation and also creates no new impediments to marriage. The institutional guarantee is also not affected. The doctrine of institutional guarantees is a fundamental rights theory that has either no function or only a very limited function under the Basic Law, which establishes a comprehensive legal framework for political control. When a constitutional norm is considered as an institutional guarantee, the emphasis is always on the legislative area it governs, not on other facts that are outside its normative programme. The constitutional norm is therefore neutral with regard to the establishment of other institutions, provided that they do not impinge on the institution that is protected by a fundamental right. This also applies to Article 6.1 of the Basic Law, which merely contains an obligation for the legislature to guarantee that marriage is fundamentally supported by law, in order to make it possible to rely on the fundamental right. Article 6.1 of the Basic Law protects marriage, but not the exclusivity of marriage. Since the Civil Partnerships Act leaves the law relating to marriage untouched, this does not affect the institution of marriage. 37

In its function as a fundamental principle on which values are based, Article 6.1 of the Basic Law is also not affected by the Civil Partnerships Act. The statutory provisions do not discriminate against marriage. There is no infringement of the requirement to promote marriage. It cannot be concluded from the special protection under Article 6.1 of the Basic Law that marriage is fundamentally and always to be treated differently from other long-term relationships. It merely prohibits transferring the specifically marriage-law framework to other partnerships, but not, in contrast, harmonising provisions that are developed for actual circumstances such as cohabitation or emotional affinity, that aim to protect third parties in business life or that extend to civil partnerships burdens that till now have been restricted to marriage, as happened in the case of the Civil Partnerships Act in a manner that was constitutionally unobjectionable. 38

b) In the oral hearing, the *Bundestag* members von Renesse (SPD), Geis (CDU/CSU), Beck (BÜNDNIS 90/DIE GRÜNEN) and Braun (FDP) expressed an opinion. Here, the member Geis advocated a different position from the opinion of the *Bundestag*. 39

3. The Free and Hanseatic City of Hamburg, to substantiate its opinion that the applications for judicial review are unfounded, refers to the submissions of the Federal Government. The fact that the Civil Partnerships Act to a certain extent follows legal elements of marriage, it argues, does not mean that the civil partnership is treated equally to marriage, but is merely a means to an end in drafting technique. In assuming that there is a requirement of distance, the applicants take Article 6.1 of the Basic Law beyond its protective effect and turn it into a defensive right against different life plans, completely overlooking the fundamental rights of homosexuals. Article 6.1 of the Basic Law, however, contains no requirement that cohabitation by unmarried persons be disadvantaged as against marriage. Even if the fundamental right grants to marriage, as a form of living together on a partnership basis, as great an exclusivity as possible, in order to make it difficult to escape to other ways of life, this leads to no conclusions affecting legislation for same-sex partnerships. People with same-sex orientation cannot marry the partners they wish to. 40

4. The government of the *Land* Schleswig-Holstein also endorses the opinion of the Federal Government. In particular, it submits, no violation of Article 6.1 of the Basic Law is evident. The essential characteristic of institutional guarantees is that on the one hand they take up existing structures, but on the other hand they are also open to new developments, because the subject of their legislative programme is real life. The way in which the property-regime relationships between partners are structured scarcely relates to the organisational core of the institutional guarantee of marriage, but rather the way it is specifically defined in the given historical context. It is within the legislative discretion of parliament to change legislative models or no longer to reserve them for marriage alone. It is impossible to derive from Article 6.1 of the Basic Law a prohibition on duplication; in the last instance such a prohibition would mean that even if the interests involved are the same or comparable in nature, real-world fact situations for which legislation needs to be passed are given a different and therefore possibly inappropriate structure by law because the legislative concept that in itself would be suitable has already been realised in marriage and family law; and this could lead to the danger of inappropriate results. 41

5. The *Lesben- und Schwulenverband* is of the opinion that the Act was passed in conformity with the Basic Law both procedurally and substantively. Same-sex partnerships, they submit, have a constitutional right to be guaranteed legal certainty under Article 2.1 and Article 3.1 of the Basic Law. It is unconstitutional that there has been no institutional protection for them until now. The new legal institution makes it possible for the first time for same-sex partnerships to achieve legal certainty. The new institution does not encroach upon Article 6.1 of the Basic Law. 42

However, the *Lesben- und Schwulenverband* does not share the opinion that a civil partnership becomes ineffective if one of the parties marries. It is inequitable to give priority to one partner's freedom to marry over the other partner's reliance on a permanent relationship. Instead, the creation of a civil partnership is to be seen as the waiver of the fundamental right of freedom to marry. The wording of Article 6.1 of the 43

Basic Law, as a fundamental principle on which values are based, does not call for unequal treatment of same-sex partnerships. If marriage is regarded as the nucleus of the state, this cannot justify it being mandatorily given preferential treatment. Childless marriages also enjoy the protection of Article 6.1 of the Basic Law. Insofar as this fundamental right protects marriage as a community of support and responsibility that relieves the burden on society and has a stabilising effect on the partners, this point of view applies equally to same-sex partnerships. State activities to support families are not restricted by the institution of the registered civil partnership. A requirement to combat other social phenomena cannot be derived from Article 6.1 of the Basic Law. Serious changes are not to be expected as a result of the Civil Partnerships Act, which leaves the provisions of marriage law unaffected. Moreover, the legal structure of the civil partnership differs from that of marriage law in many respects. Nor are any other violations of fundamental rights evident.

6. The *Ökumenische Arbeitsgruppe Homosexuelle und Kirche* refers to the submissions of the *Lesben- und Schwulenverband*. It submits that there has been a conspicuous change in the churches' evaluation of homosexual tendencies. In the Protestant churches of some *Länder*, blessing same-sex couples is already permitted as an ecclesiastical act. The official opinions of the Roman Catholic church are contradictory. On the one hand it is stated that homosexual people should be given respect; on the other hand, the same-sex partnerships are rejected from both a state and a church point of view. However, the results of unbiased research in the human sciences have led to a new view of homosexuality in the Catholic church. But to date, only the Catholic lay organisations have drawn conclusions from this; in these, the recognition of same-sex partnerships is no longer regarded as a violation of the Christian western value system; instead, these organisations base the necessity of recognising such partnerships on that value system. 44

B.

The applications are unfounded. The Civil Partnerships Act is compatible with the Basic Law. 45

I.

The Civil Partnerships Act was passed in conformity with the Basic Law. It was not subject to the approval of the *Bundesrat*. 46

1. The Act contains no provisions that require approval under Article 84.1 of the Basic Law. 47

a) The requirement of approval in Article 84.1 of the Basic Law is intended to protect the Constitution's fundamental decision, with regard to the jurisdiction of the *Länder* in administrative matters, to protect the federal structure of the state and prevent alterations to the federal structure being introduced by way of legislation below the constitutional level bypassing the objections of the *Bundesrat* (cf. BVerfGE 37, 363, (379 ff.); 55, 274 (319); 75, 108 (150)). On the basis of this purpose of Article 84.1 of 48

the Basic Law, a statute does not require approval merely because it affects the jurisdiction of the *Länder* to implement it by causing the *Länder* to act or cease to act administratively in a particular sphere. Instead, the requirement of approval by the *Bundesrat* follows from a provision of federal law establishing *Land* authorities or governing their procedure (cf. BVerfGE 75, 108 (150)). A provision establishing new *Land* authorities does not refer solely to a federal statute providing for new *Land* authorities, but also to a federal statute laying down the duties of a *Land* authority in detail. In contrast, the statute governs the procedure of the *Land* authorities if it bindingly determines the manner and form in which a federal statute is implemented. This includes the case where substantive legal provisions of the statute not merely require the administrative authorities to act, but at the same time prescribe a specific procedural manner of acting in administrative matters (cf. BVerfGE 55, 274 (321); 75, 108 (152)).

b) Measured against this, the provisions of the Civil Partnerships Act cited by the applicants contain no rules of administrative procedure in the meaning of Article 84.1 of the Basic Law. 49

aa) Article 1 § 1.1 of the Civil Partnerships Act governs only the substantive-law requirements for the creation of a registered civil partnership. The Act does not contain a federal-law provision governing the administrative procedure when civil partnerships are registered. It does require that the declarations necessary to create a civil partnership must be made to an authority, but it leaves open which authority is competent to receive the declarations. Nor does it make provisions for the procedure when the parties make mutual declarations. It neither specifies a particular registration procedure nor lays down what form the cooperation of the competent authority is to take when a civil partnership is created. Formal requirements on private individuals making declarations of intention such as are contained, for example, in Article 1 § 1.1 sentence 1 of the Civil Partnerships Act, are not provisions governing administrative procedure in the meaning of Article 84.1 of the Basic Law. The *Länder* used the scope they were given and in the implementation provisions passed by them have now created varying jurisdictions of *Land* authorities who have to exercise their administrative activity in registering civil partnerships under the relevant *Land*-law rules. 50

bb) Article 3 § 25 of the Civil Partnerships Act does not create the jurisdiction of a *Land* authority. Admittedly, Article 17a of the Introductory Act to the German Civil Code (now Article 17b of the Introductory Act to the German Civil Code), which was newly introduced by this statute and which determines the application of the relevant law for registered civil partnerships, in Article 17a.2 sentence 1, provides that the rule in Article 10.2 of the Introductory Act to the German Civil Code applies with the necessary changes. Under sentence 1 thereof, on or after marriage spouses may choose their future name by declaration to the registrar of births, deaths and marriages. However, this reference does not mean that the registrar has mandatory jurisdiction to receive civil partners' declarations as to their name too. Against the background that the Civil Partnerships Act itself has left it open which authority is to have jurisdiction over 51

the creation of registered civil partnerships, the provision that Article 10.2 of the Introductory Act to the German Civil Code is to apply merely with the necessary changes is to be understood to mean that the reference is to the substantive-law content of Article 10.2 sentence 1 of the Introductory Act to the German Civil Code, but not that a provision as to jurisdiction was made in this way.

cc) Equally, Article 3 § 6 of the Civil Partnerships Act does not give new jurisdiction to the registry offices, but applies their existing jurisdiction to another group of persons when, supplementing § 2 sentence 1 of the Minorities Name Alteration Act (*Minderheiten-Namensänderungsgesetz*), it extends the alteration of the birth name of a person subject to the conditions of § 1 of the Act, that is, by declaration to the registrar of births, deaths and marriages, not only, in the case of a declaration of the spouse to this effect, to the family name, but also to the partnership name, provided the civil partner agrees to the change of name by declaration to the registrar. This does not entail a change of the content of the registrar's duties (cf. BVerfGE 75, 108 (151)). 52

dd) The fact that the aliens' authorities under Article 3 § 11 of the Civil Partnerships Act, which relates to §§ 27a, 29.4 and 31.1 of the Aliens Act (*Ausländergesetz*), may now also issue a basic residence permit (*Aufenthaltserlaubnis*), residence permit for specific purposes (*Aufenthaltsbewilligung*) or residence permit for exceptional purposes (*Aufenthaltsbefugnis*) to foreign civil partners of a foreigner in order to establish and maintain the civil partnership merely extends the factual circumstances subject to which a residence status may be established. As a result of this, the duty of the aliens' authorities is quantitatively increased, but its content is not changed. A requirement for approval can certainly not be derived from the fact that the aliens' authorities are now obliged to base their considerations when exercising their discretion in the case of civil partnerships on Article 2.1 in conjunction with Article 1.1 of the Basic Law, not, as in the case of marriages, on Article 6.1 of the Basic Law. In exercising the discretion granted them, authorities must always taken into account the fundamental rights of those affected, no matter on what fundamental right they may rely. 53

ee) Finally, Article 3 § 16 number 10 of the Civil Partnerships Act also does not make the Act subject to approval under Article 84.1 of the Basic Law. As a result of the revision of § 661.3 number 1 letter b of the Code of Civil Procedure (*Zivilprozessordnung*), the international jurisdiction of German courts under § 606a of the Code of Civil Procedure now includes the case where a civil partnership is created before a German registrar of births, deaths and marriages. This provision does not impose a duty on the registrar, but by its wording links the jurisdiction of German courts in civil partnership matters to the requirement that a German registrar of births, deaths and marriages was involved when the civil partnership was created. It governs the judicial proceedings, for which Article 84.1 of the Basic Law is not applicable (cf. BVerfGE 14, 197 (219)). It is conceivable that there could be an objectively unjustified unequal treatment of civil partners whose partnership, by reason of the differing jurisdiction provisions of the *Länder*, was created not before a registrar of births, deaths and mar- 54

riages but before another competent authority; but this result could be avoided by interpreting § 661.3 number 1 letter b of the Code of Civil Procedure in conformity with the Basic Law.

2. Nor does the fact that in Article 1 § 3.3 and § 3.4 competencies of the registrar of births, deaths and marriages were named before the Civil Partnerships Act was finally consented to and pronounced lead to the statute being subject to approval. This version of the statute was corrected in a manner that is constitutionally unobjectionable. 55

a) Even if the Basic Law contains no provisions on the correction of adopted bills, the requirements of a functioning legislature, justify, following the traditional government practice, being able to correct printer's errors and other evident errors in the bill without again involving the legislative bodies, as is provided in § 61 of the Joint Rules of Procedure of the federal Ministries (*Gemeinsame Geschäftsordnung der Bundesministerien,* GGO) and in § 122.3 of the Rules of Procedure of the *Bundestag* (*Geschäftsordnung des Bundestages*; cf. BVerfGE 48, 1 (18)). 56

Admittedly, the correction of adopted bills is admissible only within very narrow limits outside the resolution procedure in Article 76 ff. of the Basic Law, because of the right of the legislative bodies to respect and to the preservation of their exclusive competence to decide the content of legislation. The criterion for defining such limits in detail and for the admission, in exceptional circumstances of the correction of an adopted bill, is that it is obviously incorrect. An obvious incorrectness may be shown not only in the text of the statute, but in particular also by taking into account its meaning in context and the parliamentary background materials of the statute. The decisive factor is that the correction does not affect the legally significant substantive content of the statute and with it the identity of the statute (cf. BVerfGE 48, 1 (18-19)). 57

b) On the basis of these criteria, the correction carried out of Article 1 § 3.3 and 3.4 of the Civil Partnerships Act did not exceed the limits of what is constitutionally admissible. 58

aa) The obvious incorrectness of the version of Article 1 § 3.3 and 3.4 of the Civil Partnerships Act passed by the legislative bodies consists in the clear contradiction between on the one hand the text of the statute, which by reason of the recommendation as a resolution by the Committee on Legal Affairs of 8 November 2000 (*Bundestag* document 14/4545) was before the *Bundestag* when it passed resolutions on the second and third reading of the bill and on which the proceedings in the *Bundesrat* were based, and on the other hand the reasons for justification of this statute given by the Committee on Legal Affairs in its report of 9 November 2000 (*Bundestag* document 14/4550), which both equally constitute the basis for the consultation and enactment of the legislative bodies. 59

At the beginning of November 2000, the SPD and BÜNDNIS 90/DIE GRÜNEN parliamentary parties introduced in the Committee on Legal Affairs responsible and in 60

the committees on Family Affairs, Senior Citizens, Women and Youth, (Committee document, *AusschussDrucks* 14/508) and on Labour and Social Affairs (Committee document 14/944), which were co-consulting, a motion for alteration of the bill, which, just as for other provisions, in particular Article 1 § 1 of the bill, for all paragraphs of Article 1 § 3 also provided that the registrar of births, death and marriages should be deleted as the authority competent to receive declarations and the effectiveness of declarations on the partnership name should be made subject to making the declarations before the authority responsible. This motion was the basis of the resolution of the committees and received a majority in favour there. The recommendation for a resolution forwarded to the *Bundestag* by the Committee on Legal Affairs then, however, contained alterations to this effect only of paragraphs 1 and 2 of Article 1 § 3 of the bill, while it was recommended for paragraphs 3 and 4 that the unchanged previous versions should be accepted, still containing the reference to the registrar of births, deaths and marriages. In the report of the Committee on Legal Affairs, which was also forwarded to the *Bundestag*, to which the recommended resolution referred, in contrast, it was stated with regard to the whole of Article 1 § 3 that the changes recommended here were provisions consequent on the alteration of Article 1 § 1.1 of the Civil Partnerships Act. There was express reference to its reasoning. This included the statement that the bill did not name an authority that is to be responsible for registering the civil partnership.

This reasoning of Article 1 § 3 of the Civil Partnerships Act contradicts the text version of its paragraphs 3 and 4, and when taken into account together with the account of how it originated it shows that the wording of these paragraphs was incorrect. The contradiction between the text and the reasoning also entered the bills approved by the *Bundestag* and the *Bundesrat*. Both of them , on the basis of the resolution recommended by the Committee on Legal Affairs of the *Bundestag*, based their resolutions on the unchanged text of Article 1 § 3.3 and 3.4 of the Civil Partnerships Act. But the resolution was passed subject to the premise that had resulted in the amendment of Article 1 § 1 of the bill; it was intended that there should be no naming whatsoever of a competent authority in the bill. 61

bb) The version of Article 1 § 3.3 and 3.4 of the Civil Partnerships Act corrected in the proceedings under § 61.2 of the Joint Rules of Procedure of the Federal Ministries and pronounced in this form conforms with the intention of the legislature expressed in the statute. 62

If Article 1 § 1 of the Civil Partnerships Act, which creates the institution of the registered civil partnership and governs the essential requirements for the creation of this community of persons, in its wording and reasoning does not lay down the authority that is to be responsible for registering the registered civil partnership, and if this failure to mention the authority is consistently repeated not only in the further following statutory provisions but also in the two first paragraphs of Article 1 § 3 of the Civil Partnerships Act, in that references are only to the authority responsible, then this makes it clear that the legislature wishes to leave it to the *Länder* to decide which au- 63

thority they will determine as responsible for civil partnership matters. It is consistent with this if in the corrected and pronounced version of Article 1 § 3.3 and 3.4 of the Civil Partnerships Act now, taking over the text on which the resolution adopted by the Committee on Legal Affairs was based, there is no attempt whatsoever to make a statement as to the authority to which the civil partners' declarations on names law are to be made.

cc) Furthermore, this is confirmed by the opinions on the correction proceedings. These opinions unanimously state that the statute was not intended to make a decision on the jurisdiction of a particular authority in civil partnership matters. The suggestion of correcting Article 1 § 3.3 and 3.4 of the Civil Partnerships Act came from the office of the Committee on Legal Affairs, with reference to a copying error to this effect made when the recommended resolution was drafted. Thereupon, the Federal Ministry of Justice informed both the President of the *Bundestag* and the President of the *Bundesrat* on the error in copying the resolutions drafted in the Committee on Legal Affairs to the recommended resolution, defined this as an obvious error and commenced the correction procedure under § 61.2 of the Joint Rules of Procedure of the Federal Ministries. In the course of this procedure, the representatives of the parliamentary parties in the Committee on Legal Affairs were involved in the matter. In the oral hearing, the *Bundestag* member Beck (BÜNDNIS 90/DIE GRÜNEN), without contradiction from the members present von Renesse (SPD), Geis (CDU/CSU) and Braun (FDP), submitted that the representatives of all parliamentary parties had agreed to the correction. In letters of 7 and 12 December 2000, the Presidents of the *Bundestag* and the *Bundesrat* approved the correction. 64

3. The government parliamentary parties first introduced a Bill to End the Discrimination of Same-Sex Partnerships: Civil Partnerships (*Gesetzentwurf zur Beendigung der Diskriminierung gleichgeschlechtlicher Gemeinschaften: Lebenspartnerschaften, Bundestag* document 14/3751); in the course of the legislative procedure, at the recommendation of the *Bundestag* Committee on Legal Affairs, this bill was divided into the Act of the same name that is to be reviewed in the present proceedings, with its substantive provisions on the registered civil partnership, and a bill with predominantly procedural implementation regulations (*Bundestag* documents 14/4545 and 14/4550 with annexes); this division does not violate the Constitution. Above all, the division that was carried out does not make the Civil Partnerships Act subject to approval. 65

a) The *Bundestag* is not constitutionally prevented from dealing with a legislative project in several statutes, in the exercise of its legislative freedom. In doing this, as in the present case, even in the course of the legislative procedure, it may collect the substantive provisions it intends in one statute against which the *Bundesrat* has only a right of objection, and for the provisions intended to govern the administrative procedure of the *Länder* it may design another statute, which requires approval; in practice, this happens quite frequently (cf. BVerfGE 34, 9 (28); 37, 363 (382)). 66

The *Bundestag*'s possibility, by dividing the contents of a statute into two or more statutes, of restricting the *Bundesrat*'s right of approval to one part of the intended legislation follows from the *Bundestag*'s right to legislate. Such a division does not inadmissibly restrict the right of the *Länder* to cooperate in the legislation of the Federal Government, nor is there a shift of the constitutionally allocated weights of the *Bundestag* and the *Bundesrat* in legislation (cf. BVerfGE 37, 363 (379-80); 55, 274 (319); 75, 108 (150)). 67

aa) In the area of concurrent legislative powers, which under Article 74.1 number 2 of the Basic Law also includes matters of civil status and thus the introduction of the registered civil partnership as a new civil status, the *Länder*, under Article 72.1 of the Basic Law, have power to legislate as long as and to the extent that the Federal Government has not made use of its legislative power by statute. This guarantees the original legislative power of the *Länder* to legislate quantitatively and qualitatively wherever the federal legislature has not yet passed legislation. But if the federal legislature, under the conditions of Article 72.2 of the Basic Law, makes use of its legislative power, the *Bundesrat* merely cooperates in federal legislation under Article 50 of the Basic Law. Here, the requirement that the *Bundesrat* approves a statute under the Basic Law is the exception to the rule (cf. BVerfGE 37, 363 (381)). *Inter alia*, this requirement exists under Article 84.1 of the Basic Law if the statute exclusively or together with other legislation contains provisions on the establishment of authorities or on administrative procedures and thus encroaches on the competence of the *Länder* under Article 83 of the Basic Law to implement federal statutes as matters of their own concern their own and to pass the necessary *Land* law provisions for this purpose. The *Bundesrat*'s approval of such a statute is intended to ensure that the *Länder* are not deprived of their legislative competence in the administrative procedure by a federal statute below the constitutional level against the will of the majority of the *Bundesrat*. This blocking effect guarantees that they have influence on the contents of the federal statute as a whole. For the requirement of the approval of the *Bundesrat*, by the case-law of the Federal Constitutional Court, extends to the whole statute as a legislative unit, that is, also to the provisions that in themselves do not require approval (cf. BVerfGE 8, 274 (294); 37, 363 (381); 55, 274 (319)). In the present case it is not necessary to decide whether, in view of the criticism in the literature (cf., for example, Lücke in: Sachs, *Grundgesetz*, *Kommentar*, 2nd ed. 1999, Article 77 marginal number 15; Maurer, *Staatsrecht I*, 2nd ed. 2001, § 17 marginal numbers 74 ff.) this case-law should continue to be followed, for in the present case the legislature did not choose this approach. 68

If the federal legislature, in contrast, omits provisions relating to administrative procedure in a statute, this corresponds to the model of the constitutional allocation of competence between the Federal Government and the *Länder* under Article 83 and Article 84 of the Basic Law. The *Bundesrat*, under Article 77.3 of the Basic Law, has merely a right of objection to such a statute; under Article 77.4 of the Basic Law, an objection may be rejected by the *Bundestag*. 69

bb) The same applies to the case where the federal legislature does intend to pass not only legislation under substantive law but also regulations for its implementation in the administrative procedure of the *Länder*, and instead of including both sets of provisions in one statute, it puts each in a separate statute. If, as a result, the requirement of the *Bundesrat*'s approval relates only to the statute that contains the procedural part, this does not constitute a shift detrimental to the *Länder* of the competencies laid down in the Basic Law. For the *Bundesrat* has a right of approval of substantive-law federal legislation – except in the special cases laid down in the Basic Law – only where the federal legislature encroaches upon the area of competence of the *Länder* under Article 83 *et. seq*. of the Basic Law. But such an encroachment is effected only by the procedural statute, which is separated from the substantive-law content of the legislation. 70

The division prevents the *Bundesrat* acquiring a right of approval with regard to the substantive-law provisions too, as a result of dealing with substantive-law and procedural-law provision together. At the same time it ensures that the *Bundestag* can legislate on the matters allocated to it that do not require approval without being dependent on the approval of the *Bundesrat*. If the *Bundestag* chooses to proceed in this way, it bases the structure of its legislation precisely on the constitutional division of competence between the Federal Government and the *Land* governments. The *Länder*, as the present case shows, suffer no loss of competence as a result of this. They have now themselves on their own responsibility passed the necessary procedural regulations for the implementation of the Civil Partnerships Act. 71

b) Whether the *Bundestag*'s right of disposal with regard to the division of legal material into several statutes is subject to constitutional limits in the individual case, and when such limits, if they exist, are overstepped, need not be decided here either (cf. BVerfGE 24, 184 (199-200); 77, 84 (103)). The decision of the federal legislature to collect the provisions not requiring approval on the new institution of the registered civil partnership in one statute and to make the provisions thereof that are subject to approval the content of a separate state is free of arbitrariness. 72

aa) If the *Bundestag* is presumed to have had a motive in dividing the material of the statute between two statutes only in order in this way to deprive the *Bundesrat* of the possibility of preventing the intended substantive-law provisions together with the procedural provisions by refusing its approval, this manner of proceeding does not appear to be arbitrary. Under the assumption made till now until now that a whole statute becomes subject to approval if it contains only one provision that is subject to approval (cf. BVerfGE 8, 274 (294); 55, 274 (319)), such a division is a legitimate way to prevent a process of extension of the requirement of approval of statutes and to make it possible for parliament to realise its enactment. To conclude from such a motive on the part of the legislature that its procedure was abusive would in the last instance lead to imposing a duty on the *Bundestag* always to pass procedural regulations itself and together with the substantive law. On the one hand this would make it possible for the *Bundesrat* to exercise its influence more strongly on substantive law 73

too, but on the other side it would gradually deprive the *Länder* of legislative competencies where they have original jurisdiction under the Constitution. Such an approach might lead to a general shift of constitutional competencies, which is precisely what Article 84.1 of the Basic Law is intended to prevent, but in contrast, dividing the legal material into two statutes could not have this result.

bb) Nor are the substantive-law provisions contained in the Civil Partnerships Act, contrary to the applicants' opinion, a "torso of a statute". They are comprehensible in themselves and sufficiently definite. They structure the legal position in such a way that the persons affected can allow their conduct to be guided by them. There was in particular no necessity for the legislature to legislate on the right of maintenance for civil partners and the tax treatment of maintenance payments based on this in one and the same statute. The maintenance rights of spouses have also always been defined separately from their tax treatment by the legislature in the taxation statutes. 74

Finally, the Act is also enforceable. This is unequivocally confirmed by the various implementation regulations of the *Länder*. 75

II.

The Civil Partnerships Act is also constitutional from a substantive point of view. 76

1. It is compatible with Article 6.1 of the Basic Law. The introduction of the new institution of the registered civil partnership for same-sex couples and its legal structure infringe neither the freedom of marriage guaranteed in Article 6.1 of the Basic Law nor the institutional guarantee laid down there. The registered civil partnership is also compatible with Article 6.1 of the Basic Law in its character as a fundamental principle on which values are based. 77

a) As a fundamental right, Article 6.1 of the Basic Law protects the freedom to enter into a marriage with a partner one has chosen oneself (cf. BVerfGE 31, 58 (67); 76, 1 (42)). This right to unhindered access to marriage is not affected by the Civil Partnerships Act. 78

aa) Even after the introduction of the registered civil partnership by the Civil Partnerships Act, the path to marriage is still open to every person who has the capacity to marry. However, marriage is only possible to a partner of the other sex, since the fact that the spouses are of different sexes is an inherent characteristic of marriage (cf. BVerfGE 10, 59 (66)) and the right of freedom to marry relates only to this. Even after the Civil Partnerships Act, same-sex couples are still unable to marry. The only legal institution open to them for a long-term commitment is the registered civil partnership. 79

Similarly, the Act neither directly nor indirectly affects the freedom of heterosexual couples to marry. Since they cannot enter into a registered civil partnership, this institution cannot prevent them from marrying. 80

bb) Access to marriage is not restricted by the Civil Partnerships Act. Under the statute, a civil partnership that has already been entered into does not prevent mar- 81

riage. The Civil Partnerships Act does not create an express impediment to marriage in this case. However, in the case of such a constellation, the registrar of births, deaths and marriages must examine whether, as a requirement of marriage, the partners have a serious intention to be married, and the registrar must refuse to participate in the wedding if such an intention is missing (§1310.1 sentence 2 in conjunction with § 1314.2 number 5 of the German Civil Code).

82 However, the legislature left it open whether a marriage entered into when a registered civil partnership already existed has legal consequences for the continuing existence of the civil partnership and if so, what these would be. The answer to these questions is thus in the last instance left to case-law.

83 This gap in the statute can be closed constitutionally only if consideration is paid to the protection owed to marriage under Article 6.1 of the Basic Law. Here it is important to take into account that marriage as the form of a close two-person relationship between a man and a woman is characterised by personal exclusivity. Marriage might lose this characteristic if one or both of the spouses remained permitted to keep their civil partnership with another partner, which is also intended to be permanent. The protection of marriage under Article 6.1 of the Basic Law requires that alongside marriage no other legally binding partnership of a spouse should be permitted, and in Article 1 § 1.2 of the Civil Partnerships Act the legislature itself proceeded on this assumption.

84 For this reason, it is suggested in the literature of legal scholarship that the possibility that the Civil Partnerships Act does not exclude, of entering into a marriage when a civil partnership exists, is linked to the legal consequence that the marriage dissolves the civil partnership by operation of law, so that it no longer legally exists (cf. Schwab, *Zeitschrift für das gesamte Familienrecht* 2001, p. 385 (389)). This would be a way to close the existing statutory gap in a way that did justice to Article 6.1 of the Basic Law. Admittedly, this solution has a more unfavourable effect on the other partner than an annulment under Article 1 § 15 of the Civil Partnerships Act, but in view of the guarantee in Article 6.1 of the Basic Law it is acceptable.

85 The requirement of protecting marriage as a way of life between a man and a woman, however, could also be done justice to if entering into a marriage were made subject to the requirements that there is no civil partnership or is no longer a civil partnership. Such an impediment to marriage could not inadmissibly restrict the guarantee of freedom in Article 6.1 of the Basic Law, because its factual reason would lie precisely in the nature and in the form of marriage (cf. BVerfGE 36, 146 (163)). Just as an existing marriage prevents a new marriage from being entered into (§1306 of the Civil Code), in order not to endanger the two-person relationship of marriage, it conforms to the protection of marriage to open it only to those who have not already bound themselves legally in another partnership. This possibility of giving marriage the required protection would, in addition, offer the protection of confidence to those who, in the registered civil partnership, have chosen a way of life that the legislature

has now made available to them as a legally binding community of responsibility of a permanent nature. It would be guaranteed for them that their partnership could not be dissolved merely by the unilateral decision to marry of the other partner. It is true that a prohibition on entering into marriage while the civil partnership existed would as a general rule be objectively justified. However, it would restrict the freedom to marry. It need not be decided here whether the present statute also makes it possible for the gap to be filled by case-law in this respect. If one takes into account the far-reaching consequences of the termination or dissolution of a registered civil partnership for the personal life and the financial situation of the individual persons affected, which, depending on what legal construction is chosen in order to exclude marriage and civil partnership existing side-by-side, may be very different in nature, it would seem appropriate for the legislature itself to determine whether an existing civil partnership prevents a marriage taking place or a marriage leads to the dissolution of an existing civil partnership.

b) When the legislature introduced the registered civil partnership in the Civil Partnerships Act, it did not violate the constitutional requirement of Article 6.1 of the Basic Law to offer and protect marriage as a way of life (institutional guarantee, cf. BVerfGE 10, 59 (66-67); 31, 58 (69-70); 80, 81 (92)). The object of legislation of the Act is not marriage. 86

aa) The Basic Law itself contains no definition of marriage, but presupposes it as a special form of human cohabitation. The realisation of the constitutional protection of marriage therefore needs a legal provision that structures and restricts what form of partnership enjoys the protection of the Constitution. Here, the legislature has considerable freedom of drafting in determining the form and content of marriage (cf. BVerfGE 31, 58 (70); 36, 146 (162); 81, 1 (6-7)). The Basic Law guarantees the institution of marriage not in the abstract, but in the form that corresponds to current prevailing opinions, which are expressed definitively in the statutory provisions (cf. BVerfGE 31, 58 (82-83). However, in shaping marriage, the legislature must take into account the essential structural principles that follow from the application of Article 6.1 of the Basic Law to marriage as it is actually encountered in connection with the nature of the fundamental right guaranteed as a freedom and in connection with other constitutional norms (cf. BVerfGE 31, 58 (69)). Part of the content of marriage, as it has stood the test of time despite social change and the concomitant changes of its legal structure and been shaped by the Basic Law, is that it is the union of one man with one woman to form a permanent partnership, based on a free decision and with the support of the state (cf. BVerfGE 10, 59 (66); 29, 166 (176); 62, 323 (330)), in which man and woman are in an equal partnership with one another (cf. BVerfGE 37, 217 (249 ff.); 103, 89 (101)) and may decide freely on the organisation of their cohabitation (cf. BVerfGE 39, 169 (183); 48, 327 (338); 66, 84 (94)). 87

bb) This protection does not cover the institution of the registered civil partnership. The fact that the partners are of the same sex distinguishes it from marriage and at the same time constitutes it. The registered civil partnership is not marriage within the 88

meaning of Article 6.1 of the Basic Law. It grants rights to same-sex couples. In this way, the legislature takes account of Article 2.1 and Article 3.1 and 3.3 of the Basic Law, by helping these persons to better develop their personalities and by reducing discrimination.

cc) Marriage as an institution is not affected by the Civil Partnerships Act itself in its constitutional structural principles and its organisation by the legislature. There has been no change to its legal foundation. All the provisions that give marriage a legal framework and furnish the institution with legal consequences continue to exist (cf. Federal Constitutional Court, judgment of 18 July 2001 - 1 BvQ 23/01 and 1 BvQ 26/01 -, *Neue Juristische Wochenschrift* 2001, 2457-2458). No prohibition on giving same-sex partners the possibility of a legally similarly structured partnership can be derived from the institutional guarantee, precisely because it relates only to marriage. 89

c) Article 6.1 of the Basic Law does not merely guarantee marriage in its essential structure, but also, as a binding value decision, requires special protection by the state order for the whole area of private and public law relating to marriage and the family (cf. BVerfGE 6, 55 (72); 55, 114 (126)). In order to satisfy the requirement of protection, it is in particular the duty of the state on the one hand to refrain from everything that damages or otherwise adversely affects marriage, and on the other hand to promote marriage by suitable measures (cf. BVerfGE 6, 55 (76); 28, 104 (113); 53, 224 (248); 76, 1 (41); 80, 81 (92-93); 99, 216 (231-232)). The legislature did not violate this in the Civil Partnerships Act. 90

aa) Marriage is neither damaged nor adversely affected in another way by the Civil Partnerships Act. 91

The particular protection accorded to marriage under Article 6.1 of the Basic Law prohibits treating it less favourably than other ways of life (cf. BVerfGE 6, 55 (76); 13, 290 (298-299); 28, 324 (356); 67, 186 (195-196); 87, 234 (256 ff.); 99, 216 (232-233)). 92

(1) There is no such unfavourable treatment if the Civil Partnerships Act gives same-sex couples the possibility of entering into a registered civil partnership with rights and duties that are close to those of marriage. 93

It is true that in large areas the legislature has modelled the legal consequences of the new institution of the registered civil partnership on provisions of marriage law. But in this way, marriage or spouses are not treated less favourably that previously and not disadvantaged in relation to the civil partnership or civil partners. The institution of marriage is not threatened by any risk from an institution that is directed at persons who cannot be married to each other. 94

(2) Nor does the Civil Partnerships Act violate the prohibition of discrimination in that the legislature refrained in this Act from at the same time adding to the Federal State Welfare Act (*Bundessozialhilfegesetz*) provisions that the income and property of both partners should be taken into account in the case of civil partners too in the 95

means test that is a requirement for the grant of state welfare benefits.

As a result, at present, in state welfare law, married couples are treated as a financial unit, but civil partners are not expressly also so treated. In the case of spouses, because of the aggregation of income that has to be made, this may lead to the reduction or elimination of the right to state welfare benefits, whereas civil partners without aggregation of income might receive unreduced state welfare benefits. However, any unfavourable treatment of married persons in this procedure was the result not of the Civil Partnerships Act, but of a lack of provisions to remedy this in the Federal State Welfare Act. The Civil Partnerships Act specifically does not privilege civil partners as against spouses with regard to the obligation to maintain each other. If the proper legal conclusions are not drawn from this in state welfare law, there may be a violation there of the prohibition on discrimination under Article 6.1 of the Basic Law, but not as a result of the provisions of the Civil Partnerships Act, which alone are the subject of these proceedings for the abstract review of a statute. 96

bb) In introducing the new institution of the registered civil partnership, the legislature also did not violate the requirement of promoting marriage as a way of life. The Act does not divest marriage of any promotion that it previously enjoyed. It merely gives legal protection to another partnership and gives it rights and duties. 97

cc) On account of the constitutional protection of marriage under Article 6.1 of the Basic Law, the legislature is not barred from treating marriage more favourably than other ways of life (cf. BVerfGE 6, 55 (76)). But the admissibility of giving favourable treatment to marriage over other ways of life in fulfilling and structuring the requirement to promote it does not give rise to a requirement contained in Article 6.1 of the Basic Law to disadvantage other ways of life in comparison to marriage. Judge Haas in her dissenting opinion fails to realise this when she understands the requirement to promote marriage in Article 6.1 of the Basic Law as a requirement to disadvantage ways of life other than marriage. Article 6.1 of the Basic Law gives favourable treatment to marriage in a constitutional protection granted only to marriage and imposes on the legislature a duty to promote it with the means appropriate to it. But a requirement to treat other ways of life unfavourably cannot be derived from this. The extent of the legal protection and promotion of marriage is in no way decreased if the legal system also recognises other ways of life that cannot enter into competition with marriage as a community of heterosexual partners. Nor can it be justified constitutionally to derive from the special protection of marriage a rule that such partnerships are to be structured in a way distant from marriage and to be given lesser rights. However, the legislature's duty to protect and promote marriage does require it to ensure that marriage can fulfil the function accorded it by the Constitution. 98

(1) If Article 6.1 of the Basic Law subjects marriage to special protection, the special element is the fact that marriage alone, in addition to the family, enjoys this constitutional protection as an institution, but no other way of life enjoys it. Marriage cannot be abolished nor can its essential structural principles be altered without an amendment 99

of the Constitution (this has already been stated by von Mangoldt in the Committee for Fundamental Questions of the Parliamentary Council, *Ausschuss für Grundsatzfragen des Parlamentarischen Rates*, in: *Der Parlamentarische Rat 1948-1949*, *Akten und Protokolle*, vol. 5/II, 1993, edited by Pikart/Werner, p. 826). A constitutional duty of promotion exists for marriage alone. To attach to the special nature of the protection a meaning above and beyond this to the effect that marriage must always be protected more than other partnerships, even in its extent (this is the result reached by Badura, in: Maunz/Dürig, *Grundgesetz*, Article 6.1 marginal number 56 (date: August 2000); Burgi, in: *Der Staat*, vol. 39, 2000, pp. 487 ff.; Krings, *Zeitschrift für Rechtspolitik* 2000, pp. 409 ff.*;* Pauly, *Neue Juristische Wochenschrift* 1997, pp. 1955-1956; Scholz/Uhle, *Neue Juristische Wochenschrift* 2001, pp. 393-394; Tettinger, in: *Essener Gespräche zum Thema Staat und Kirche*, vol. 35, 2001, p. 140) has no basis either in the wording of the fundamental right or in its genesis.

100 In the course of the deliberations in the Parliamentary Council, Article 6.1 of the Basic Law underwent a large number of amendments to the text, and here, the wording often alternated between a protection of marriage and a special protection of marriage (cf. *Parlamentarischer Rat, Hauptausschuss, 21. Sitzung, Protokoll*, p. 239; *Protokoll der 32. Sitzung des Grundsatzausschusses*, in: *Der Parlamentarische Rat 1948-1949*, *loc. cit.*, vol. 5/II, 1993, p. 910 (935); *Protokoll der 43. Sitzung des Hauptausschusses*, p. 545 (554-555); *Stellungnahme des Allgemeinen Redaktionsausschusses zur Fassung der 2. Lesung des Hauptausschusses*, p. 121; *Parlamentarischer Rat, Hauptausschuss, Protokoll der 57. Sitzung*, pp. 743-744). It cannot be inferred from these debates that these changes to the wording were made because marriage and the family were to have greater or lesser protection. Instead, there are clear indications that these changes arose solely from the feeling for language of the persons in question. For example, when the *Deutscher Sprachverein* suggested deleting the word "special" ("*besonderen*") and choosing the wording "Marriage and the family ... are under the protection of the Constitution" ("*Ehe und Familie ... stehen unter dem Schutze der Verfassung*"), von Mangoldt said that this was exactly the same in content, but worded better (*Der Parlamentarische Rat 1948-1949*, vol. 5/II, *loc. cit.*).

101 In the debates on Article 6.1 of the Basic Law, the question of the protection of new ways of life also played a substantial role (on this, cf. the contributions of Helene Weber, in: *Protokoll der 21. Sitzung des Hauptausschusses*, p. 240, and Elisabeth Selbert, in: *Protokoll der 43. Sitzung des Hauptausschusses*, pp. 552-553). Here, in particular the argument that the special protection of the family excluded the equal treatment of illegitimate children in Article. 6.5 of the Basic Law (cf. Weber and Süsterhenn in: *Protokoll der 21. Sitzung des Hauptausschusses*, 242-243) was unsuccessful. If Mangoldt, as rapporteur, in his Written Report on Article 6.1 of the Basic Law finally noted that this fundamental right was scarcely more than a declaration in the case of which it was not really evident what effect it had as directly applicable law (*Anlage zum stenographischen Bericht der 9. Sitzung des Parlamentarischen Rates*,

p. 6), then this reflects that although there was agreement on subjecting marriage and the family to constitutional protection, there was no clarification as to what this means in detail for its relationship to other ways of life. At all events, a requirement of distance cannot be based on this.

(2) Article 6.1 of the Basic Law protects marriage as it is structured by the legislature from time to time, preserving its essential fundamental principles (cf. BVerfGE 31, 58 (82-83)). As a partnership lived by human beings it is both a sphere of freedom and at the same time part of society, from whose changes it is not excluded. The legislature can react to these and adapt the structure of marriage to changed needs. In this way, the relationship of marriage to other forms of human cohabitation also changes. The same applies if the legislature does not restructure marriage by statute but provides for other partnerships. Therefore ways of life do not stand at a fixed distance from each other, but in a relative relation. At the same time, they may differ from or resemble each other by reason of their given structure not only in the rights and duties allocated to them, but also in their function and with regard to the group of persons who find access to them. Thus the protection of marriage as an institution cannot be separated from the persons who are addressed by the provision, for whom marriage it to be made available as a protected way of life. 102

(3) The duty of the state to promote marriage must orient itself towards the protective purpose of Article 6.1 of the Basic Law. If the legislature itself, in creating norms, contributed to marriage losing its function, it would violate the requirement of promotion under Article 6.1 of the Basic Law. Such a danger might exist if the legislature created another institution in competition with marriage, with the same function, and, for example, gave it the same rights and lesser duties, so that the two institutions were interchangeable. Such an interchangeability, however, is not associated with the registered civil partnership. It cannot enter into competition with marriage, if for no other reason that that the group of persons for whom the institution is intended does not overlap with the group of married persons. The registered civil partnership, because of this difference, is also not marriage with a wrong label, as is assumed in the two minority votes, but something different from marriage. Its different nature does not result from its name, but from the circumstance that not man and woman, but two persons of the same sex can create a union in the registered civil partnership. In their totality, the structural principles that characterise marriage give it the form and exclusivity in which it enjoys constitutional protection as an institution. Article 6.1 of the Basic Law, however, does not reserve individual structural elements of this group for marriage alone. It does not prohibit the legislature from offering legal forms for a permanent cohabitation to other constellations of persons than the union of man and woman. The characteristic of permanence does not make such legal relationships marriage. Nor is it discernible in any other way that they could harm the structure of this institution. 103

2. The Civil Partnerships Act violates neither the special prohibition of discrimination of Article 3.3 sentence 1 of the Basic Law nor the general principle of equality in Arti- 104

cle 3.1 of the Basic Law.

a) The fact that the statute opens the registered civil partnership only to same-sex couples (Article 1 § 1.1 of the Civil Partnerships Act) embodies no unfavourable treatment of heterosexual couples on account of their sex under Article 3.3 sentence 1 of the Basic Law. 105

The Act does not associate rights and duties not with the sex of a person, but takes as its starting point the combination of sexes of a community of persons, and to this community of persons it offers access to the registered partnership. It then allocates rights and duties to the persons in this community. Just as marriage, with its restriction to a two-person relationship between man and woman, does not discrimination against same-sex couples on account of their gender, the civil partnership does not discriminate against heterosexual couples on account of their gender. Men and women are always treated equally. They may enter into marriage with a person of the opposite sex, but not with one of their own sex. They may enter into a civil partnership with a person of their own sex, but not with one of the other sex. 106

b) It does not infringe Article 3.1 of the Basic Law that persons of different sex cohabiting with each other and groups of people related to each other and living together have no possibility of becoming registered civil partnerships. 107

Article 3.1 of the Basic Law prohibits treating a group of persons who are addressed by a statute differently from other persons addressed by the statute although there are no differences between the two groups of such a nature and such weight that they could justify the unequal treatment (cf. BVerfGE 55, 72 (88); 84, 348 (359); 101, 239 (269); established case-law). However, such differences do exist between same-sex couples and the other social communities of persons. 108

aa) The registered civil partnership makes it possible for same-sex couples to put their partnership on a legally recognised basis and to bind themselves permanently and responsibly together, which has previously been impossible for them because they may not marry. In contrast, the desire of heterosexual couples to join themselves bindingly and permanently is, in the estimation of those concerned, just as important to them as that of same-sex couples is to them, and essentially also similar (cf. Buba/Vaskovics, *loc. cit.*, 16, 245 ff.). But in contrast to same-sex couples, they have access to the institution of marriage for this purpose. The difference, that children of both spouses can be born to a permanent two-person relationship between man and woman, but not to a same-sex partnership, justifies directing heterosexual couples to marriage if they wish to give their relationship a permanent legally binding form. They are not disadvantaged by this. 109

bb) There are also differences in the relation of the same-sex partnerships to the communities of mutual support between siblings or other relatives, and these differences justify different treatment. This relates even to the exclusivity of the registered civil partnership, which admits no further relationship of the same kind beside itself, 110

whereas communities of mutual support between siblings and other relations are often part of further comparable relationships and also exist side-by-side with another relationship by marriage or partnership. Communities of mutual support between relations, in addition, are given a certain support even under existing law, a support that was first granted to same-sex couples in the form of the civil partnership. Thus, in connection with relations, there are rights to refuse to give evidence, rights of succession and in part also rights to a compulsory portion and for it to be given favourable tax treatment.

cc) Admittedly, the legislature is not generally prevented from opening new possibilities for heterosexual couples or for other communities of mutual support to put their relationship in a legal form if this can be done without the given legal structure being interchangeable with marriage. However, there is no constitutional requirement to create such possibilities. 111

3. Nor are the provisions in the statute on the rights to custody and succession of civil partners and on maintenance law objectionable from a constitutional point of view. 112

a) aa) Under Article 1 § 9 of the Civil Partnerships Act, the civil partner of a parent with sole custody, with the agreement of the latter, has been given the power to share in decisions on matters relating to the child's everyday life if he or she lives together with the parent. At the same time, he or she has been given emergency custody for the situation where there is imminent danger and it is necessary to act for the wellbeing of the child. The same now applies to the spouse of a parent with custody who himself or herself is not a parent (Article 2 number 13 of the Civil Partnerships Act: § 1687 b of the German Civil Code). In creating this "limited custody" for the civil partner, the legislature does not encroach on the parental rights of the parent without custody under Article 6.2 of the Basic Law. 113

Article 6.2 sentence 1 of the Basic Law protects the care and upbringing of the children as a natural right of the parents and a duty incumbent in the first instance on them. The scope of protection of the parental right here fundamentally also includes the decision as to who has contact with the child and who is permitted to influence the child's education as a result of the transfer of the power to take decisions. Admittedly, the parental right needs to be further refined by the legislature (cf. BVerfGE 84, 168 (180)). It is incumbent on the legislature to allocate to each parent particular rights and duties if the conditions for a joint exercise of parental responsibility are lacking (cf. BVerfGE 92, 158 (178-179)), or to refer to the courts the decision as to the parent to whom parent parental custody is to be transferred to in the individual case. 114

Article 1 § 9 of the Civil Partnerships Act takes up such a constellation where one parent has sole custody. It is not the "limited custody", which is based on the sole custody of the parent living in a civil partnership, that deprives the parent without custody of that custody, but the family-law provisions that give the parent no custody, or the family-court decisions that award sole custody not to this parent, but to the other par- 115

ent. A parent's rights cannot be affected, if he or she has no custody in any case, if third parties who live together with the child, in agreement with the parent with sole custody, have some joint parental responsibility.

bb) In "limited custody", the legislature has created a new power of custody for spouses and civil partners of a parent with custody who themselves are not parents of the child as part of a permanent legally binding partnership such as marriage or registered civil partnership; this does not constitute a violation of the principle of equality before the law of Article 3.1 of the Basic Law. The provision does not unfairly disadvantage parents without custody who do not live together with the parent with custody in a legally confirmed community. They are granted other legal possibilities of obtaining custody for their child alone or together with the other parent. Whether parents without custody should be given "limited custody" for other reasons need not be decided here. 116

b) aa) Article 1 § 10.6 of the Civil Partnerships Act, which awards the surviving partner a compulsory portion, does not violate the testamentary freedom protected by Article 14.1 of the Basic Law. 117

Testamentary freedom is the testator's right in his or her lifetime to provide for his or her property to pass in a different way than it would under the rules of intestate succession (cf. BVerfGE 58, 377 (398); 99, 341 (350-351). Here the legislature is at liberty to determine the contents and limits of the right of succession. In drafting this statute in detail, the legislature must safeguard the basic content of the constitutional guarantee of Article 14.1 of the Basic Law, act in harmony with all other constitutional norms and in particular the principle of proportionality and the principle of equality before the law (cf. BVerfGE 67, 329 (340)). It is not evident that the statutory provision on the surviving partner's right to a compulsory share oversteps this limit, notwithstanding a general clarification as to which constitutional barriers the right to a compulsory share is subject to. 118

The civil partner's right to succeed and right to a compulsory portion are part of the legal institution of the registered civil partnership, which gives the partners mutual rights and duties in a lifelong commitment. In their declaration that they intend to enter into the civil partnership the civil partners commit themselves to mutual care and support and to giving maintenance. This obligation to comprehensive mutual care justifies, just as in the case of spouses, providing a financial basis for the partner even after death by the right to a compulsory portion from the property of the deceased partner. 119

bb) Nor is Article 14.1 of the Basic Law violated because the inheritance of other persons entitled to inherit is reduced by the partner's statutory right of succession and right to a compulsory portion. Even if Article 6.1 of the Basic Law contained a constitutional prohibition on granting the next of kin a reasonable financial minimum share of the estate, and if in this respect the family member favoured in this way were constitutionally protected as an heir under Article 14.1 of the Basic Law, which may be 120

left open here (cf. BVerfGE 91, 346 (359-360)), this indicates nothing about the amount or the share owed to the heir from the estate. This is determined solely by the statutory allocation provision, which, in order to be in harmony with the guarantee of a right of succession, must be appropriately structured (cf. BVerfGE 91, 346 (360, 362)).

The surviving civil partner's right of succession and right to a compulsory portion do not deprive that other relations of the deceased civil partner, who were already entitled to succeed. Another person entitled to inherit merely joins the group of persons entitled to inherit that are to be taken into account when the estate is distributed. In this way, the situation for the relations of the deceased who have rights of succession is no different than it would be if the testator were survived by a spouse or husband and not a civil partner. This structure does not constitute inappropriate treatment of the other persons entitled to inherit. 121

c) It was intended that the maintenance burdens for civil partners created by Article 1 §§ 5, 12 and 16 of the Civil Partnerships Act should be taken into account in income tax law, but because this provision is part of the draft of the Civil Partnerships Act Supplementary Act, which has not yet been passed, this cannot be done; this does not makes the maintenance provisions of the Civil Partnerships Act unconstitutional. 122

Admittedly, the financial burden resulting from maintenance duties is a special and unavoidable burden for the taxpayer, and it is a circumstance that reduces the taxpayer's financial capacity and the failure to take it into account may infringe Article 3.1 of the Basic Law (cf. BVerfGE 68, 143 (152-153); 82, 60 (86-87)). But the introduction of the maintenance duties for civil partners did not create a legal situation that ignores this burden from an income-tax point of view. Under § 33a of the Income Tax Act (*Einkommensteuergesetz*), on application income tax is reduced by the deduction from a taxpayer's total income of expenses incurred by that taxpayer for the maintenance of a person with a statutory right to support from the taxpayer, in the amount of a sum assessed for the calendar year in question. Since a civil partner's right to maintenance is laid down by statute, it is to be taken into account under § 33a of the Income Tax Act as an extraordinary expense. Whether this form of consideration is adequate in comparison to the tax treatment of spouses is not a question that relates to the Civil Partnerships Act. It would have to be clarified by a constitutional review of the income-tax provisions; the applications for judicial review do not comprise these. 123

C.

With regard to the compatibility of the Civil Partnerships Act with Article 6.1 of the Basic Law, this decision was passed by five votes to three; with regard to its compatibility with Article 3.1 of the Basic Law, it was passed by seven votes to one; in other respects it was passed unanimously. 124

(signed) Papier	Jaeger	Haas
Hömig	Steiner	Hohmann-Dennhardt
Hoffmann-Riem		Bryde

Dissenting opinion of Judge Papier on the judgment of the First Senate of 17 July 2002 – 1 BvF 1/01 – – 1 BvF 2/01 –

I am unable to agree with the argument of the majority of the Senate, in particular on the institutional guarantee of marriage laid down in Article 6.1 of the Basic Law and the conclusions following from this. 125

Article 6.1 of the Basic Law places marriage under the special protection of the state order. Under the established case-law of the Federal Constitutional Court, this constitutional provision – as the majority of the Senate also assume – contains both a fundamental right to protection from encroachments by the state and also an institutional guarantee and a fundamental principle on which values are based (cf. BVerfGE 31, 58 (67); 62, 323 (329)). If marriage, as a partnership between man and woman, needs legislation under ordinary law, this by no means gives the nonconstitutional legislature the unrestricted authority to structure marriage in accordance with the opinions currently, either in reality or in supposition, predominant in society (cf. BVerfGE 6, 55 (82); 9, 237 (242-243); 15, 328 (332)). Instead, the provisions of ordinary law, notwithstanding the need to recognise a scope of drafting needed by the legislature, must be measured against Article 6.1 of the Basic Law as an overriding guiding norm that itself contains the fundamental principles (cf. BVerfGE 10, 59 (66); 24, 104 (109); 31, 58 (69-70)). Under this Article, every provision of ordinary law must observe the essential principles that define the institution of marriage (cf. BVerfGE 31, 58 (69)). These structural principles guaranteed by Article 6.1 of the Basic Law, which are removed from the power of disposal of the legislature, include the principle that marriage is the union of one man and one woman in a comprehensive, essentially indissoluble partnership (cf. BVerfGE 62, 323 (330)). This is also acknowledged by the majority of the Senate, who regard the heterosexuality of the spouses as one of the constitutive characteristics of marriage, so that as a result the legislature would be prevented from including the partnership of two persons of the same sex as a form of marriage by nonconstitutional law. But against this background, it is not comprehensible that a mere different name for the newly created legal form of civil partnership 126

should be able to justify regarding the institutional guarantee in Article 6.1 of the Basic Law as not applicable. For the institution of marriage guaranteed in Article 6.1 of the Basic Law is protected not only by name but also in its structural characteristics against arbitrary dispositions by the legislature. If the legislature, albeit under another name, creates a legally defined partnership between two persons of the same sex that in other respects corresponds to the rights and duties of marriage, the legislature in doing this disregards an essential structural principle laid down by Article 6.1 of the Basic Law. It is a false conclusion to assume that precisely because of deviation from an essential structural principle the constitutional institutional guarantee ceases to apply as a standard. When this constitutional standard was applied, the judgment should have set out in detail that the constitutionally enshrined institutional guarantee was not affected in its essential structural principles by the Civil Partnerships Act that was presented for review.

To the extent that the judgment proceeds on the assumption that the institutional guarantee is not affected for the mere reason that the provisions governing marriage are not altered by the Civil Partnerships Act, this assumption is based on a misunderstanding of the nature of an institutional guarantee. This guarantee is not in the first instance intended to ward off unjustified encroachments that disadvantage marriage – in this respect, the defensive function of Article 6.1 of the Basic Law has priority –; instead, the purpose of the institutional guarantee is to oblige the legislature when legislating on marriage to follow certain structural principles, which include the fact that the partners are of different sexes. The legislature is therefore prevented from introducing an institution under another name for same-sex couples that in other respects resembles marriage. Whether the Civil Partnerships Act did this or not the majority of the Senate who support the judgment do not state, precisely because they leave out of account the specifically constitutional effects of the institutional guarantee of Article 6.1 of the Basic Law. On the contrary, it creates no barriers to a substantially equal treatment to marriage. 127

(signed) Papier

Dissenting opinion of Judge Haas
on the judgment of the First Senate of 17 July 2002
– 1 BvF 1/01 –
– 1 BvF 2/01 –

1. I agree with the majority of the Senate that there are fundamentally no constitutional objections to introducing a legal form of registered civil partnership for same-sex couples. In this way, everyone (with some exceptions governed by statute) may have his or her partnership with a partner of the same sex registered without a homosexual relationship existing or being intended between these two persons. However, the introduction of the legal form of the registered civil partnership was not constitutionally required. 128

2. The grounds given by the majority of the Senate on the constitutionality of the concrete legislation on the legal form of the registered civil partnership do not, however, make it possible for me to agree with the decision in the essential elements of its grounds. 129

a) In particular, the decision does not do justice to the meaning of the institutional guarantee of Article 6.1 of the Basic Law. 130

It does not take into account in the required degree the significance and effect of the institutional guarantee of marriage. When considering this, the majority of the Senate should have considered whether the legal form of the registered civil partnership was designed by the legislature to be comparable to marriage and why, in the light of the constitutional guarantee, this does not meet with any constitutional objections. 131

Article 6.1 of the Basic Law places marriage under the special protection of the state order. Under the established case-law of the Federal Constitutional Court, this constitutional provision – as the majority of the Senate also assume – contains an institutional guarantee, a fundamental principle on which values are based, and also a fundamental right to protection from encroachments by the state (cf. BVerfGE 31, 58 (67); 62, 323 (329)). 132

Article 6.1 of the Basic Law, as an institutional guarantee, guarantees the existence of the private-law institution of marriage and the family; it provides the legal framework of a way of life (BVerfGE 6, 55 (72)) in which man and woman find themselves in the partnership of marriage and which they can develop further into a family community. Because of this parenthood, which is potentially created in marriage and which promises stability to the community of parents and child, the legislature creating the constitution subjected marriage and the family to the protection of the Constitution. For the sake of the importance of marriage for family and society, Article 6.1 of the Basic Law in its quality of a fundamental principle on which values are based in addition contains a requirement to promote marriage directed to the state (BVerfGE 6, 55 (76); established case-law), which has influenced the legislature's design and further development of marriage. Contrary to the opinion of the majority of the Senate, the constitutionally required promotion means more than only preventing marriage from being discriminated against. Promotion means positive consideration beyond the normal degree, and therefore giving marriage privileged treatment. It is therefore not possible to satisfy the requirement of promotion of Article 6.1 of the Basic Law by merely disadvantaging other partnerships either; the requirement to promote marriage is specifically not a requirement to disadvantage third parties. 133

As an institutional guarantee, Article 6.1 of the Basic Law binds the legislature – beyond the defensive rights of subjects of fundamental rights – in structuring provisions of non-constitutional law. The legislature is required to observe the essential structural principles that determine the institution of marriage (cf. BVerfGE 31, 58 (69)). The essential structural principles of marriage include the fact that the partners are of different sexes. 134

Whether the institution of marriage enjoys the protection, or as the Constitution words it the "special" protection, of the state order is virtually immaterial in this context. The express requirement of protection alone, which is found elsewhere in the Constitution in comparable form only in Article 1.1 sentence 2 of the Basic Law with reference to human dignity, indicates the high value that the legislature creating the Constitution placed on marriage and the family. No other legal community, no association of persons, even if it is designed to provide long-term mutual support, is therefore constitutionally protected as an institution in a comparable way. 135

The majority of the Senate do not do justice to the significance of the institutional guarantee when it refers only to the fact that marriage is not damaged by the creation of a registered civil partnership. The institutional guarantee is not in the first instance intended to ward off unjustified encroachments that disadvantage marriage – in this respect, the defensive function of Article 6.1 of the Basic Law has priority –; instead, the purpose of the institutional guarantee is to oblige the legislature when legislating on marriage to follow certain fundamental structural principles, which also, in the opinion of the majority of the Senate, include the fact that the partners are of different sexes. There is a contravention of the constitutional requirement that only partners of different sexes may enter into a marriage if in addition to marriage an institution for couples of the same sex is created, the structure of which corresponds to the forms found for marriage in implementation of the constitutional requirement of promotion. The name is not relevant. For the institution of marriage guaranteed in Article 6.1 of the Basic Law is protected not only by name but also in its structuring characteristics against arbitrary dispositions by the legislature. The legislature cannot escape the requirements of Article 6.1 of the Basic Law by avoiding the designation "marriage". If the legislature, without being supported by the grounds justifying the institution of marriage, creates the legal form of a partnership between persons of the same sex, which apart from this in its rights and duties corresponds to those of marriage, the legislature in doing this disregards an essential structural principle, laid down by Article 6.1 of the Basic Law. The majority of the Senate fail to recognise this when they state that the constitutional institutional guarantee does not apply as a standard precisely because of the deviation from an essential structural principle. 136

The majority of the Senate should therefore have examined whether the legal form of the registered civil partnership has a content that is comparable to that of the institution of marriage. This would be incompatible with Article 6.1 of the Basic Law, since the civil partnership lacks the elements that characterise marriage, restrict its exclusivity to the joining of man and woman, and justify its special promotion. For it is not intended for the partners to have a child of their own, does not create parental responsibilities and therefore makes no contribution to the future viability of state and society. 137

b) The opinion of the majority of the Senate that Article 3.3 of the Basic Law has not been violated because the decisive factor is the commitment of two persons and not their gender is not very convincing. For the prerequisite for entering into a registered 138

civil partnership with a particular partner is having the same gender as that partner. Thus, to qualify for registration of the two-person relationship, the main factor is naturally gender. It would therefore have been desirable for the Senate to have made further argument apart from the concise grounds given.

c) The remarks of the majority of the Senate on the constitutionality of excluding siblings and lineal relations entering into the registered civil partnership (Article 1 § 1.2 numbers 2 and 3 of the Civil Partnerships Act) are so general that they are not capable of substantiating the opinion of the majority of the Senate that Article 3.1 of the Basic Law is not violated. 139

(1) Even the standard applied by the Senate is imprecise. In the review of the unequal treatment of groups of persons, the legislature, according to established case-law, is subject to a strict commitment (cf. BVerfGE 55, 72 (88); 88, 87 (96)) that is all the stricter the more the personal characteristics approach those set out in Article 3.3 of the Basic Law and the more strongly the negative effect the unequal treatment of the persons may have on the exercise of liberties protected by fundamental rights (cf. BVerfGE 60, 123 (134); 82, 126 (146); 88, 87 (96)). Just as the majority opinion does not fully describe the standard, there is also no description of the groups with which comparison is made; a defect that has an effect on the review. 140

(2) Just as the standard is not described in full, the argument of the majority of the Senate is shortened. It is not discernible on the basis of this argument what differences exist between the partners of a registered civil partnership and one between siblings or relations that are of such weight that they could justify the different treatment of the groups of persons. 141

Thus, to justify the exclusion of relations from entering into a registered civil partnership, weight is attached to the exclusivity of the registered civil partnership; but this "exclusivity" is neither justified nor described in detail. Nor can this be derived from the provision on entering into the registered civil partnership or from the overall context of the statute. 142

But the facts that relatives are "often" already part of another partnership in the form of a marriage or a civil partnership, which the majority of the Senate refer to, is immaterial in this context, for this is already taken into account in the impediments to creating a partnership in Article 1 § 1.2 number 1 or 4 of the Civil Partnerships Act. 143

Consequently, the grounds of the judgment do not reveal why unmarried lineal relations and siblings who are not bound by another partnership could not satisfy the principle of "exclusivity" postulated by the majority of the Senate. 144

In their line of argument, which remains abstract, the majority of the Senate avoid dealing with the comparable group that is genuinely relevant. This comprises siblings and lineal relatives who live together in such a way that their need to be governed by statutory provisions is comparable to that of other partnerships to whom the legal form of the registered civil partnership is now open, because they have a joint house- 145

hold, support each other in emergencies, act together in legal relations or act for each other and emotionally relate primarily to each other, with the same reliability as other relationships intended to be permanent.

146 Insofar as it is sufficient for the majority of the Senate to point out that communities of mutual support between relatives even under existing law "in a certain respect contain a guarantee that was opened to same-sex couples only when the civil partnership was created," this formulation in itself, which remains absolutely vague and approximate, shows that the majority of the Senate lack a concrete standard to review equality. It remains unclear what circumstances are to be regarded as relevant to the comparison and what degree of difference is required to justify the unequal treatment of partnerships between relatives and between non-relatives. The concept of "securing" (*Absicherung*) introduced at this point is also not defined in detail. The reference that then follows to the "rights to refuse to give evidence, rights of succession and in part also rights to a compulsory portion and for it to be given tax relief" that exist in the relationship between relatives is incorrect and also incomplete in this lack of differentiation. This is shown, for example, in the following: siblings have a right to refuse to give evidence, for example under § 52.1 number 3 of the Code of Criminal Procedure (*Strafprozessordnung*). But siblings have only a restricted right of intestate succession (children and parents have priority, § 1924.1, § 1930.1 of the Civil Code and § 1925.1 and 2 of the Civil Code and § 1925.1 and 1925.2 of the Civil Code) and have no right to a compulsory portion whatsoever (§ 2303.1 and 1925.2 of the Civil Code). Above all, the legal effects of the civil partnership are not restricted to the law of succession and legislation for rights to refuse to give evidence, but affect a large number of areas of law. A fundamental characteristic of the civil partnership, for example, is the obligation to pay maintenance, which does not exist between siblings (§ 1601 of the Civil Code). Siblings are also not included in family insurance (§ 10.1 of the Fifth Books of the Code of Social Law); in addition, they cannot adjust their net asset position (Article 1 § 6 of the Civil Partnerships Act) and they are given no "limited custody" as in Article 1 § 9 of the Civil Partnerships Act.

147 The majority of the Senate, on account of the restricted review carried out by them, were able to assess the facts adequately in the light of Article 3.1 of the Basic Law. It therefore did not become evident that between communities of mutual support of siblings and relatives in each case of the same sex, and other partnerships which have access to the legal form of the registered civil partnership, there are differences of such weight that it is justified to hold that for the two first-mentioned groups of persons there is no comparable need to provide for their relations and to refuse to permit them to enter into a registered civil partnership.

(signed) Haas

Bundesverfassungsgericht, Urteil des Ersten Senats vom 17. Juli 2002 - 1 BvF 1/01

Zitiervorschlag BVerfG, Urteil des Ersten Senats vom 17. Juli 2002 - 1 BvF 1/01 - Rn. (1 - 147), http://www.bverfg.de/e/fs20020717_1bvf000101en.html

ECLI ECLI:DE:BVerfG:2002:fs20020717.1bvf000101