NEW LEGISLATION IN GERMANY CONCERNING
SAME-SEX UNIONS

Stephen Ross Levitt*

Freudvoll und leidvoll, gedankenvoll sein,
langen und bangen in schwebender Pein;
himmelhoch jauchzend, zum Tode betrübt-
glücklich allein ist die Seele, die liebt."**

Johann Wolfgang Von Goethe

I. INTRODUCTION ....................................... 470
II. THE HISTORICAL BACKGROUND .......................... 471
III. POLITICAL BACKGROUND OF THE LAST TEN YEARS .......... 473
IV. THE "HAMBURG MARRIAGE" LEGISLATION AND THE
RESOLUTION FROM THE EUROPEAN PARLIAMENT ............. 474
V. THE LEGISLATION PROPOSED BY THE FDP ................ 475
VI. THE DRAFT LEGISLATION FROM JULY 4TH, 2000 .......... 477
VII. THE BUNDESRAT AND THE SAME-SEX PARTNERSHIP
LEGISLATION ........................................ 479
VIII. THE LEGISLATION GOVERNING SAME-SEX PARTNERSHIPS .... 481
IX. CONSTITUTIONAL CHALLENGES .......................... 488
X. CONCLUSION ........................................ 493

* Assistant Professor of Legal Studies in the Liberal Arts Department, Farquhar Center for
Undergraduate Studies, Nova Southeastern University; B.A., York University (Canada), 1985; LL.B.,
Osgoode Hall Law School, (Toronto, Canada) 1985; LL.M., University of London (L.S.E.) 1986. Translations
from German into English are the author's unless otherwise noted.

The author would like to thank the following for their assistance with this article: Ms. Brenda Cox-
Graham, Barrister and Solicitor, (Hamilton, Canada); Mr. Marco Dattini, Attorney (Fort Lauderdale, Florida);
Dr. Lester Lindley (Libertyville, Illinois); Dr. David McNaron, Associate Professor at Nova Southeastern
University (Fort Lauderdale, Florida); Mr. Ulrich Sondersmann, Attorney, Ministry of the Interior (Berlin,
Germany); Mr. Wolfgang Steiner, Attorney, City of Stralsund (Stralsund, Germany); and Mr. Ulrich Thölke,
Lecturer, Department of Law, Viadrina University, (Frankfurt-Oder, Germany).

** "Joyful and rueful, Far off in a thought; Yearning And burning, With sorrow distraught; Sky-
high exulting, To death burdened down; Happiness lives In the lover alone." JOHANN WOLFGANG VON
GOETHE, EGمونT: A TRAGEDY IN FIVE ACTS 59 (Charles E. Passage trans., Frederick Ungar Publishing Co.
1984).
I. INTRODUCTION

Various forms of legal recognition have been given to same-sex spousal relations in many nations of the European Union. At present Holland, Denmark, Sweden and France have implemented laws that Americans would find similar to the legislation concerning civil unions which came into force in Vermont in July of 2000. In the current year, following the lead of its Nordic neighbors, Norway and Sweden, Finland will likely implement legislation providing recognition in law to partnerships between two men or two women. This trend towards greater integration of Gays into Western European society, granting spousal rights, has been followed to a less dramatic extent even by nations that might be considered less socially liberal.

Last year, the United Kingdom removed one more legal obstacle that stigmatized Gays. Despite strong opposition from the House of Lords, the Blair government lowered the age of consent for homosexual relations to that of heterosexual relations. In October 2000, the Liberal Democratic Party adopted civil partnerships as part of its political platform. In Belgium, the government enacted a partnership registration law, though with fewer significant legal rights flowing to the "spouses."
Within this framework of a Western European movement towards fuller emancipation of homosexuals culminating in recognized spousal rights, recent German developments are most significant. This article will discuss the colorful legislative history of the German same-sex partnership law. It will look at the key features of the legislation and explain the constitutional challenges that might prevent implementation on August 1, 2001. While it is true that the topic of this article narrowly construed involves same-sex spousal rights, the reader may find its scope to be broader. An examination of the legislative process related to this strikingly progressive bill brings into sharper focus significant aspects of the political and constitutional structuring of Germany.

II. THE HISTORICAL BACKGROUND

The coming of same-sex partnership legislation to Germany has been long and somewhat arduous. During the twentieth century, the German record on Gay rights has been a mixture of both progress and persecution. At the turn of the last century, the German Reich's capital was Berlin, a city in which Magnus Hirschfeld lived, worked, established an institute, and developed and published his theories about the "third sex." The Reich capital was also the city where government officials promulgated Paragraph 175 of the Criminal Code, which subjected homosexuals in all German states to prosecution for sodomy. In the time of the National Socialists, officials working for the Reich Ministry of Justice in Berlin made Paragraph 175 more draconian; homosexual activity, contemplated as well as consummated, became subject to prosecution. It is estimated that during the period of the Nazis, more than sixty thousand German homosexuals were prosecuted under Paragraph 175. Of this number, between

11. RICHARD PLANT, THE PINK TRIANGLE 29 (Henry Holt and Company 1988). Plant states: Hirschfeld, a Jew, a homosexual, and a physician, was a man possessed of enormous energy, imagination, and ambition. He became a leader of several psychological and medical organizations, the founder of a unique institute for sexual research, and the organizer of numerous international congresses dedicated to research on sexual matters and to the promotion of policies that would lead to an acceptance of homosexuals by society.  

Id. Plant further states:  
For a long time Hirschfeld had believed that homosexuals formed a third sex. (He would abandon this notion in 1910) . . . . He was convinced that homosexuals constituted a biologically distinct gender - a human being between male and female. He devoted much thought to establishing fine differentiations within this third sex.  

Id. at 30.

12. Id. at 110. Plant states: "In December of 1934 the Ministry of Justice issued new guidelines stating that homosexual offences did not have actually to be committed to be punishable; intent was what mattered." Id. at 112. Plant further states: "Later, courts decided that a lewd glance form one man to another was sufficient grounds for persecution." Id. at 113.

13. Id. at 148.
5,000 and 15,000 "perished behind barbed-wire fences."  At the close of World War II when the Allies liberated Czechs, French, Jews, Poles, Roma and Sinti, and Russians from concentration camps, Gay inmates were freed from their Nazi captors, sometimes only to serve out the remainder of their sentences in "democratic" prisons. In 1957, the German Constitutional Court upheld anti-sodomy laws and commented that "homosexual activities violate the moral laws of society." A resolution brought by the Party of Democratic Socialism before the German Parliament revealed that prosecutors opened over 100,000 cases and courts convicted 59,316 homosexuals under Paragraph 175 of the Criminal Code in the period between 1950 and October 1969. After 1969, the Federal Republic of Germany decriminalized sexual relations between two consenting adult males.

In regard to Gay rights, both Germanies rapidly moved forward since 1969. In the twenty-year period prior to unification on October 3rd, 1990, the Democratic Republic and the Federal Republic both promulgated laws that gradually eliminated legal burdens previously imposed upon homosexuals. Gays became more integrated into society in both the East and the West. After unification, it was hoped in the early 1990s that the tide of freedom sweeping across Eastern Europe and Eastern Germany would ultimately bring with it

---

14. Id. at 154.
16. Homosexuelle, BverfGE 6, 389. At page 394 of the judgment, a most interesting commentary is provided. The court explains that there was a change in the attitude of the National Socialists after the murder of Ernst Rohn and those groups supporting him, which included a large number of homosexuals. According to the court, this led to the law of 28 June 1935 that sharpened the provisions of para. 175 of the Criminal Code. Plant confirms this opinion and states: Inner-party rivalry grew more heated and bitter. Himmler, together with Heydrich and Göring, used every opportunity and means to drive a wedge between Hitler and Roehm, even going so far as to accuse Roehm, as Hitler's only serious political rival, of planning a coup against the Fuhrer . . . Hitler was forced to conclude that the SA, unruly and undisciplined, headed by a man whose objectives threatened his own, simply had to go.
17. BT-Drs. (Bundestag-Drucksache) [Printed matter of the lower house of the German Parliament] 14/2620 from Jan. 27, 2000, p. 2, "Rehabilitierung und Entschädigung für die strafrechtliche Verfolgung einvernehmlicher gleichgeschlechtlicher sexueller Handlungen zwischen Erwachsenen in der Bundesrepublik Deutschland und der Deutschen Demokratischen Republik." [Vindication and apology for the penal prosecution of consensual sexual relations between same-sex adults in the Federal Republic of Germany and the German Democratic Republic] [hereinafter BT-Drs. 14/2620]. The printed matter of the Bundestag can be found at http://dip. bundestag.de/parfors/parmain.htm.
greater emancipation for Gays, a more earnest *Wiedergutmachung*, as well as complete and final rehabilitation.

III. POLITICAL BACKGROUND OF THE LAST TEN YEARS

Chancellor Kohl's government, which brought about German unity, concentrated on the very compelling and immediate economic problems that presented themselves in the early 1990s. The eastern part of the nation lacked adequate housing, employment, and infrastructure. Consequently, liberal social issues were sometimes left on the back burner. However, to characterize the last two Kohl administrations as a time of little progress on social issues would be unfair. In 1994, legislators finally struck Paragraph 175 from the German Criminal Code. Nonetheless, Chancellor Kohl and his Christian Democratic Party relied upon a base of support that included religious Catholics and Lutherans, as well as older persons and social conservatives. Pursuant to their more conservative *Weltanschauungen*, most Christian Democrats were prepared to grant toleration to Gays, to give them protection against physical assault or verbal degradation, but not to fashion a law giving legal recognition and legitimization to a spousal relationship between two men or two women.

In the 1998 election, an entirely new political landscape emerged. For the first time in more than sixteen years the Social Democratic Party, forming a coalition with the Green Party, won control of the government. With this completely new political constellation in place the situation looked hopeful for significant movement on the issue of recognizing and legalizing same-sex partnerships.

---


19. Kohl's coalition partners were in some respects strange bedfellows. Today, the Free Democratic Party supports same-sex partnerships and a liberal social agenda. The Christian Social Union (CSU) exists in Bavaria only and is allied at the national level with the Christian Democrats (CDU). The CSU is socially conservative and opposes legally recognizing same-sex partnerships.


23. The SPD's decision to choose the Green Party as its coalition partner constituted a new twist to German politics. Since 1969, all previous governments had chosen the Free Democratic Party (FDP) as the coalition partner. The FDP was in a coalition government with Chancellor Kohl's Christian Democrats from 1982 to 1998. The FDP was previously in a coalition government with the Social Democrats in the Schmidt government from 1974 to 1982, and before that with the Brandt government from 1969 to 1974.
IV. THE “HAMBURG MARRIAGE” LEGISLATION AND THE Resolution FROM THE EUROPEAN PARLIAMENT

A same-sex partnership law was ultimately brought to Germany on account of changing political tides and a complicated “tango” involving four levels of government: local, state, national, and European.

It has been argued that the now well-known “Hamburg Marriage” legislation of April 1999 brought this issue to the fore. However, this view is not historically accurate. Across northern Europe in the early 1990s, nations liberalized their laws on Gay issues. For years, members of the Green Party, Schroeder’s coalition partners, had actively fought for Gay Rights on various European political planes. In 1994, a representative of the Green Party from Germany brought forth in Strasbourg before the European Parliament a non-binding, but morally significant, resolution. This resolution called upon governments in the European Union to recognize the rights of Gays and Lesbians to dignity and equality. The majority of European Parliament members who supported the resolution called upon nations in the Union to treat in law the sexual conduct of homosexuals in the same manner as heterosexual relations. They contended that just as heterosexual persons benefited from the institution of marriage, equality under law should accord same-sex partnerships similar advantages and protections.

Despite an outpouring of criticism including strong words from the Pope, the 1994 Resolution influenced liberals in Germany. Even before Schroeder was elected, three states, Hamburg, Schleswig-Holstein and Lower Saxony, brought before the Bundesrat (the upper house of the German legislature) a resolution calling on the Kohl government to take action toward implementing a same-sex partnership law.

The city-state of Hamburg decided not to wait until the national government moved on the issue of legislation recognizing same-sex partnerships. Its lower and upper houses of the legislature enacted a domestic

27. Hamburg constitutes one of the sixteen state governments. However, the impact of Hamburg’s decision to legislate same-sex partnership registration must be less than that of Vermont in the United States constitutional system. In Germany, the Code of Civil Law, enacted in 1900, governs family law relationships, as well as inheritance rights, contract law, and torts. The purpose of the Civil Code of 1900 was to supplant state laws with a unitary nation-wide statutory code. Without amendments to the Civil Code that would have had to be enacted by the federal government, Hamburg’s new partnership law had to remain, to a large extent, symbolic.
partnership law authorizing same-sex couples to register their relationships with the city-state officials.\textsuperscript{28} Despite the fact that the legislation stated that the partners' standing in law would not change through this registration, some rights ultimately were extended to registered partners.\textsuperscript{29} In March 2000, the legislature extended a right to registered partners to deal with hospital officials in the city-state of Hamburg.\textsuperscript{30} In June 2000, a major insurance company, the Volksf"ursorge, decided to grant benefits previously extended only to married employees to same-sex employees who submitted proof to the company of the registration of their relationship.\textsuperscript{31} Even if the "Hamburg Marriage" was mostly of symbolic importance, this legislation sparked national debate.

V. THE LEGISLATION PROPOSED BY THE FDP

The "Hamburg Marriage" legislation led within three months to action in the Bundestag. For many years, the platform of the Free Democratic Party, despite the long-standing political coalition with the Kohl government, called for legal recognition of same-sex partnerships.\textsuperscript{32} In June 1999, members of this party, now sitting on the opposition benches, challenged the Social Democrats and Greens to make good on their election promises to the Gay and Lesbian community. The Free Democratic Party tendered a draft of legislation to the lower house of Parliament (Bundestag) establishing a regime of life partnership between two persons of the same sex.

The draft legislation, "On the Regulation of the Legal Relations of Registered Life Partners," contained fifteen articles, an introduction, and a

\begin{itemize}
\item \textsuperscript{28} Hamburgisches Gesetz und Verordnungsblatt, (1999) Number 10, pp. 69-70 (GVBl. Hamburg), "Gesetz "ber die Eintragung gleichgeschlechtlicher Partnerschaften" [Law Concerning the Registration of Same-Sex Partnerships].
\item \textsuperscript{29} Id. at para. 1.
\item \textsuperscript{30} Hamburgisches Gesetz und Verordnungsblatt, (2000) Number 10, p. 67 (GVBl. Hamburg).
\item \textsuperscript{32} Plenarprotokoll 14/67, Deutscher Bundestag, Stenographischer Bericht, 67. Sitzung, Berlin, Freitag, den 5 Nov. 1999, [German Parliament (lower house) Stenographic Report, 67th sitting, Berlin, Friday 5, Nov., 1999] at 6027A [hereinafter Stenographic Report Nov. 5, 1999]. This is a speech by Guido Westerwelle, member of the FDP. He states: My party, concerning this question, has a long tradition. We are convinced on account of our liberal convictions that minorities may not be discriminated against, that the state should not be the censor of various forms of living arrangements, that what is allowed, should be what makes the individual happy provided that this does not harm others.
\end{itemize}
commentary on the effect and purpose of the bill.\textsuperscript{33} The introduction stated that with more than 2.5 million persons living in same-sex partnerships, there was a need for a new legal construct. On the one hand, this new legal construct would be used to end discrimination and unequal treatment of same-sex couples. On the other hand, this construct could not extend so far that it would violate constitutional norms protecting marriage and family.\textsuperscript{34}

To gain this balance, the draft legislation envisioned a series of amendments to various federal statutes and paragraphs of the Civil Code affecting property, inheritance, income tax, and residential tenancy laws.\textsuperscript{35} It set out requirements for entering a registered life partnership and provided a mechanism for dissolution.\textsuperscript{36} The bill envisioned by the FDP would have changed a number of penal and civil procedural rules.\textsuperscript{37} One of these changes set out that partners, like wives or husbands, would not be compelled to testify against one another.\textsuperscript{38} Upon the death of one of the partners, the "matrimonial" home could pass tax free to the other and a preferential share in the estate would be guaranteed to the surviving partner.\textsuperscript{39} Also, the bill would authorize doctors and other professionals, as well as government officials, to treat a same-sex partner in a manner similar to family members \textit{vis-à-vis} information and decision-making.\textsuperscript{40}

\begin{thebibliography}{99}
\bibitem{GRUNDGESETZ} Id. at p. 1. \textit{See also} GRUNDEGESETZ [Constitution] [GG] art. 6(1) [F.R.G.], which states: "Marriage and family enjoy the special protection of the state."
\bibitem{FDP Draft} Id. at pp. 3, 4, 6.
\bibitem{Paragraph 1588A} Id. at pp. 3-4. According to the bill, Paragraph 1588A would have been added to the Civil Code. This sets forth that if two persons of the same sex declare in the presence of a notary that they wish to enter a life partnership, and if they fulfill the prerequisites set out in subparagraphs 1, 2, 3, and 4, the Status Registry Office will enter the registered life partnership in the registry book concerning family matters. Dissolution was envisioned to occur after a one-year period of separation.
\bibitem{Article 3} Id. at pp. 5-6. Article 3 of the draft concerns changes to the rules of civil procedure. Article 4 concerns changes to the Criminal Code. Article 5 concerns changes to the Code of Criminal Procedure.
\bibitem{Article 5, subparagraph 1} FDP Draft of the Registered Life Partners Act, \textit{supra} note 33, at p. 6. Article 5, subparagraph 1, speaks of changes to Paragraph 52 of the Code of Criminal Procedure.
\bibitem{Article 1, Subparagraph 8} Id. at pp. 3, 5, 6. Article 1, Subparagraph 8 speaks about amendments to the statute concerning the compulsory share that must be awarded to a surviving spouse. It amends Paragraph 1931 of the Civil Code and adds the words, "or life partner." The effect of this will be that the life partner, unless explicitly excluded from the estate according to the terms of a "pre-nuptial" partnership contract, will have the rights \textit{vis-à-vis} the estate as if he or she were a married spouse. For a translation of Paragraph 1931 in English, as it was written before any of these amendments were proposed, see \textsc{Simon L. Goren, The German Civil Code 350} (Fred B. Rothman & Co.1994).
\bibitem{Article 2} Id. at p. 5. Article 2 of the bill concerns changes to the Law Concerning Personal Status. According to the amendments proposed, the registered life partner would be treated as a family member in
\end{thebibliography}
The debate after the introduction of this bill followed party lines. For members of the Green Party, Social Democrats and some members of the Party of Democratic Socialism (hereinafter "PDS"), the draft introduced by the FDP did not go far enough. Specifically, the Social Democrats and Greens criticized the draft legislation on account of its failure to provide sufficient support provisions for each partner during the period of separation and subsequent dissolution of the relationship. For these Bundestag representatives of the Green Party and the SPD, the draft of the Free Democrats was too malleable. It provided too few financial obligations between the partners, and in their view, the proposed law permitted dissolution too easily. One of the members commented that this is like trying to get washed without getting wet.

For the Christian Democrats this draft legislation went too far. A same-sex partnership law would undermine the special protections, which they viewed as exclusive in nature, granted to traditional marriage and family life set out in Article 6 of the German Constitution. At the end of the day, the draft legislation of the FDP, put before the Bundestag in June 1999, constituted an important step in furthering the debate on this issue and it compelled the new government to move forward with its own draft legislation.

VI. THE DRAFT LEGISLATION FROM JULY 4TH, 2000

On July 4th, 2000, members of the Social Democratic Party and the Green Party produced a draft of a law entitled: "The Law to End Discrimination against Same-Sex Unions: Life Partnerships [the Life Partnership Act]." Like its name, this draft legislation to the American mind might appear cumbersome and complicated. Possibly the complexity and length of this legislation reflect characteristic elements of German law making. Alternatively, the complexity

---

41. Stenographic Report Nov. 5, 1999, supra note 32, at 6028 A, B, speech made by Margot von Renesse (SPD); see also statements made by Volker Beck (Green Party) at 6035 D and 6036 A, B, C, D.
42. Id. at 6028 C, D, 6029 B.
43. Id. at 6028 D. Margot von Renesse says in German, "Wasch mir den Pelz, aber mach mich nicht naß." Id.
44. Id. at 6032 D (Norbert Geis of the Christian Democratic Party speaking before the Bundestag).
revolves around the political and constitutional hurdles that needed to be cleared.46

European governments took different approaches to implementing same-sex partnerships. Nordic legislation extended spousal rights to two men or two women. However, from the bundle of rights and responsibilities that flowed to married couples, adoption rights were removed for same-sex partners.47 In France, due to political considerations, the government had to create a new legal institution. The *Pacte Civile de Solidarité* had its own set of rules and duties. This law was not limited to same-sex partners; it also provided a new legal construct for partners of the opposite sex who did not wish to exercise the option of marriage.48

Article 6 of the Constitution made it impossible for German drafters to follow the established path of either the French or Nordic legislation. These civil servants had to illustrate a sure-footedness similar to that of mountain goats negotiating a precarious pass. The writers of this bill wanted to provide as many rights of marriage to same-sex partners as was possible; however, they

46. Compared with Nordic Legislation, which runs three or four pages, this draft law seems mammoth, with more than thirty-two pages and five major articles. Article 3 is the longest, containing 112 subparagraphs amending various federal laws. The justification for the law and other explanations are attached; these are thirty-nine pages in length.

47. Pedersen, *supra* note 2, at 290. Another limitation affects foreigners. "However, while two foreigners who are in the country for only a short period of time can enter into a marriage, at least one of the parties must be a Danish citizen to obtain a partnership registration." *Id.* "In contrast to marriage, partnership registration requires that at least one of the partners be a citizen of Norway, domiciled there." Roth, *supra* note 6, at 468. "According to Section 3 of the Partnership Act, registration of homosexual partnership had the same legal consequences as entering into marriage, with the exception of the right to adopt children as a couple." *Id.* at 469. *See also* Government’s First Draft of the Life Partnership Law, *supra* note 45, at p. 33. The discussion attached to the Law to End Discrimination against Same-Sex Unions deals explicitly with this issue. It mentions that in many nations of Europe, there is already legislation in place concerning couples. In some European nations (namely Belgium, France, Holland, and some regions of Spain), it is explained there are three possibilities for heterosexual couples: they can marry, enter into a life partnership, which is registered and has legal consequences, or they can avoid entirely any formalization of the relationship. Gays and Lesbians can enter into a life partnership or avoid legal formalization. It is stated further that in other nations of Europe (namely Denmark, Norway, and Sweden), partnership laws are open only to same-sex couples, and similar legal consequences flow to same-sex couples as married couples with the exception of adoption. Also, in these Nordic nations, there are limitations imposed upon foreigners who come into the jurisdiction solely to conclude a same-sex marriage which might not be recognized where the couple is domiciled. Further, the Lebenspartnerschaftsgesetz states that because of the constitution in Germany, which provides marriage special protection, a new legal institute had to be constructed. This new construct could not make marriage and partnership rights identical. However, it could be designed to combat discrimination against same-sex couples and it could provide for rights and duties between the partners. What is the significance of the name given to the legislation? The legislation in Germany was framed not only as a partnership act, but a law to combat discrimination against same-sex partners.

48. Law No. 99-944 of Nov. 15, 1999, J.O., at p. 16959. Article 515-1 of this French legislation states (author’s translation): “*A pacte civil de solidarité* is a contract concluded between two persons who are of the age of majority, of different sexes, or the same sex, to arrange their life together.”
could not use the word "marriage." They could not design a French-styled compromise for both same-sex and opposite-sex unions, as legislation fashioning a quasi-marriage or "marriage light" would likely violate Article 6. Last but not least, if all the indicia of marriage were found to be present in same-sex partnerships, the constitutional norm protecting marriage and family life might be violated; hence, the Federal Constitutional Court might strike down the legislation.  

A final hurdle involved the sixteen German states and how they would react to this draft.

VII. THE BUNDESRAT AND THE SAME-SEX PARTNERSHIP LEGISLATION

Germany, like the United States, is a federal state. There is a bicameral federal legislature in Berlin and state legislatures in each of the sixteen states. However, there are some significant differences concerning the passage of federal legislation, particularly in regard to the role of the upper house. This constitutional framework would come into play in the passage of same-sex partnership legislation.

In Germany today, similar to the situation in the United States prior to the passage of the XVII amendment, representatives of the upper house of the German federal legislature (Bundesrat) are chosen by the state governments. At present there are sixty-nine votes in the Bundesrat; each of the sixteen states has three, four, five, or six votes depending on its population. Unlike the rules that govern the U.S. Senate, each German state must cast all its votes in one block.  

In the United States, there is a standard path for the passage of legislation. A bill must pass both the House and the Senate and the President must sign it into law. In the case of a presidential veto, legislation supported by a two-third's majority in both houses becomes law. In Germany, the President also must sign a bill into law, and under many situations a bill becomes law after a majority vote in both the lower and upper houses, the Bundestag and the Bundesrat. However, there are variations on this theme involving the role of the upper house in enacting legislation.

If a bill affects the rights or interests of states, it needs to win the consent of a simple majority of votes in both the Bundestag and the Bundesrat. However, if legislation is considered within the competency of the federal government, a lack of consent by the upper chamber does not automatically defeat the bill. The Bundesrat has to make a decision whether it wishes to lodge


50. See GG art. 51 (3), which states, "Each Land [state] may delegate as many members as it has votes. The votes of each Land may be cast only as a block vote and only by Members present or their alternatives." See also KURT SONTHEIMER, GRUNDZÜGE DES POLITISCHEN SYSTEMS DER NEUEN BUNDESPREBULIK DEUTSCHLAND 290 (Piper 16th ed. 1995). See also ALFRED KATZ, STAATSRECHT: GRUNDKURS IM ÖFFENTLICHEN RECHT 181-2 (Luchterhand 12th ed. 1994).

51. A constitutional amendment needs the consent of two-thirds of the members of the Bundesrat.
an objection. If the Bundesrat lodged an objection to a bill within the competency of the federal government by a margin of two-thirds, this will require a new vote in the Bundestag with a two-third’s majority in order to override the “veto.” If the Bundesrat lodges an objection to a bill by a simple majority, this will require a simple majority in the Bundestag in a new vote to override the “veto” and place this legislation before the President for signature into law.  

A final option open to members of the Bundesrat is to vote for a committee to be constituted with members of both the Bundestag and the Bundesrat to negotiate compromise legislation.

When the question of same-sex partnership arose, it was estimated that there were twenty-six votes in the Bundesrat that were favorable to this legislation, and twenty-eight votes which would be cast against it. The question of passage came to concern the three coalition CSU/SPD states and the Rhineland that together possessed a total of fifteen “swing” votes.

For the Schroeder government, it became evident that there would not be a majority in favor of the partnership legislation in the Bundesrat. In late fall of 2000, the government decided to take the following measure. It split the legislation into two: the first impacted upon state governments and required a majority vote in favor in the Bundesrat, while the second bill was within the competency of the federal government as defined by the Constitution. The part that was within federal competency was named the “Law to End Discrimination against Same-Sex Unions: Life Partnerships,” while the second bill was named the “Law to Supplement the Life Partnership Act and other Laws [The Life Partnership Supplementary Law].”

---

52. Article 77 (4) of the German Constitution states:

If the objection was adopted with a majority of the votes of the Bundesrat it may be rejected by a decision of the majority of the Members of the Bundestag. If the Bundesrat adopted the objection with a majority of at least two thirds of its votes its rejection by the Bundestag shall require a majority of two thirds of the votes.

53. When this legislation was considered, the SPD controlled two state governments, was in alliance with the Green Party in three states, and was in alliance with the Party of Democratic Socialism in the State of Mecklenburg-Pomerania. The conservatives (CDU or CSU) controlled four state governments and were in coalition governments with the Free Democrats in two. The CDU was also in coalition governments with Social Democrats in three states, and there was an alliance between the SPD and the FDP in the Rhineland.

54. BR-Drs. (Bundesrat-Drucksache) [Printed matter of the upper house of the German Parliament] 738/00 from Nov. 10, 2000 “Gesetz zur Beendigung der Diskriminierung gleichgeschlechtlicher Gemeinschaften: Lebenspartnerschaften” [An Act to End the Discrimination against Same-Sex Unions: Life Partnerships] [hereinafter Law to End Discrimination].

55. BR-Drs. (Bundesrat-Drucksache) [Printed matter of the upper house of the German Parliament] 739/00 from Nov. 10, 2000 “Gesetz zur Ergänzung des Lebenspartnerschaftsgesetzes und anderer Gesetze (Lebenspartnerschaftsgesetzeergänzungsgesetz LPartGergG)” [An Act to Supplement the Life Partnership Law and other Laws, the Life Partnership Supplementary Law] [hereinafter Law to Supplement the Life Partnership Law]. See also Katz, supra note 50, at 209. Katz states that in the 1950's, around ten percent of the legislation was considered to affect states’ rights. Today, about sixty percent of the legislation requires a
This division of the July 4, 2000 draft legislation into two separate bills led to the following results on December 1, 2000 when the members of the Bundesrat met and voted. They discussed the first bill, the Law to End Discrimination against Same-Sex Unions, and took two separate votes. The first count of hands sought to determine whether a majority of the Bundesrat thought that there needed to be a joint committee established between members of the Bundestag and Bundesrat to negotiate a compromise concerning the legislation. Only a minority voted in favor of this. A second vote was taken to determine whether a majority believed that the Law to End Discrimination affected state interests such that this legislation was not in the competency of the federal government. Again, only a minority voted in favor of this. These two votes, framed in negative questions, meant that the upper house would not lodge an objection to the first bill, and it could go to the president for signature. Concerning the second bill, there was no desire by a majority of the Bundesrat to form a committee to negotiate an acceptable version that later might be passed in the upper house. This second bill, because it affected states’ rights, needed to win a majority of votes in the upper house, and there was no majority in favor of it. The Law to Supplement the Life Partnership Act was defeated.

VIII. THE LEGISLATION GOVERNING SAME-SEX PARTNERSHIPS

The Law to End Discrimination against Same-Sex Unions: Life Partnerships, which was signed into law on February 16, 2001 by the President of the Federal Republic of Germany, is divided into five main articles. Each article is divided into paragraphs and subparagraphs. Article 1 is the most significant as it sets out the main features of a life partnership. Article 2 lists

---


57. Id. at p. 551D. Rau unterzeichnet Partnerschaftsgesetz, FRANKFURTER ALLGEMEINE ZEITUNG, Feb. 17, 2001, at 7. The Bundestag asked for a committee to be formed comprised of Bundestag and Bundesrat members in order to consider whether the Life Partnership Supplementary Law, that was defeated in December, 2000, might be amended so that it would become acceptable to a majority in the Bundesrat. As of February 20, 2001, there has been no compromise reached.

58. Rau unterzeichnet Partnerschaftsgesetz, supra note 57, at 7. It is stated that President Rau has signed the Life Partnership bill into law on February 16, 2001. Its provisions will come into force on August 1, 2001. The law has been published, on February 22, 2001, in the Bundesgesetzblatt. (2001 BGBl. I s. 266).

59. Law to End Discrimination, supra note 54. Ulrich Thoelke of Viadrina University explains that when German legislation regulates a new subject matter, the most important substantive and/or procedural provisions are found in the first article. The name of the new legislation is also found in the first article. In the present case, although all five articles together are called “The Law to End Discrimination against Same-Sex Couples, the Life Partnership Act,” this legislation will ultimately come to be known by its shorter title
a series of amendments to the Code of Civil Law which give force and effect to
the partnership arrangements set out in Article 1, primarily, but not exclusively,
in respect to residential tenancy and inheritance laws. Article 3, in a similar
vein, sets out other amendments to various federal statutes, relating both to
 procedural and substantive rules, impacted by the creation of a life partnership.
 Article 4 sets out that those regulations amended by this legislation continue in
force as regulations and do not take on the characteristics of statutory law.
 Article 5 establishes a mechanism for determining the date when the partnership
legislation will come into force.

A partnership between two men or two women comes into being when
"they both declare at the same time that they wish to establish a partnership with
each other for the course of their lives." At the time they make their
declaration, each party must accept certain rights and responsibilities. Prior to
the establishment of the domestic partnership, a decision must be made
concerning the regime of "spousal" finances. Either the partners have already
negotiated a contract setting out a division of assets upon dissolution, or they
must accept the statutory regime set out in Paragraphs 1371 to 1390 of the Civil
Code.

mentioned in Article 1: the Life Partnership Law (Das Lebenspartnerschaftsgesetz). Telephone Interview
with Ulrich Thoelke, Lecturer in the Department of Law, Viadrina University, Frankfurt-Oder, Germany (Feb.
19, 2001).

60. Id. at art. 2.
61. Id. at art. 3.
62. Id. at art. 4.
63. Id. at art. 5.
64. Law to End Discrimination, supra note 54, at art. 1, para. 1.
65. Id. at art. 1, para 1, Subparagraph 1.
66. Id. at art. 1, para. 6 (2). Paragraphs 1371 to 1390 provide a mechanism for the division of assets
between spouses upon dissolution of the marriage or death. For the purposes of this discussion reference
should be made to two paragraphs. Paragraph 1372 of the Civil Code states: "If the matrimonial regime is
terminated otherwise than by the death of a spouse, the accrued gains shall be equalized according to the
provisions of §§ 1373 to 1390." Goren, supra note 39, at 240. Paragraph 1378 (1) states: "If the accrued
gains of one spouse exceed the accrued gains of the other, the other is entitled to half of the surplus as an
equalization claim." Goren, supra note 39, at 241. Claudia Wendrich describes this regime in her article. She
states:

In both jurisdictions [Manitoba and Germany] there is a so-called deferred community
property regime. Its main feature is that there is no property which belongs to the
community. The spouses remain owners of their separate properties, which each of
them can freely dispose of and control, with few exceptions. At the end of the
marriage there is only a monetary compensation. The amount of money that must be
paid will depend both on the assets included in the calculation and on their fate during
the marriage. The purpose of an equalization payment upon marriage breakdown is to
share the economic achievements of the marriage and, by doing so, to implement the
idea of marriage as an economic partnership. The individual contributions of each
spouse are not decisive.
The freedom to contract a regime of "spousal" property and financial relations, similar to a pre-nuptial agreement in American law, is not unlimited. According to Paragraph 1, subparagraph 4, clause 4, "a partnership cannot be concluded if the life partners are not prepared to assume any of the obligations [of maintenance and support] set out in paragraph 2 of this act." At the time that the parties enter a life partnership, like persons entering a marriage in Germany, they have to consider the issue of a surname. A party can keep his or her own surname or take on the surname of his or her partner.

Paragraph 5 stipulates that the parties have duties to each other. This paragraph speaks about a duty of care and makes reference to the Code of Civil Law. It mandates that a partner must support the other during the course of the relationship in a manner similar to the obligations between a husband and a wife. This right of support, according to the new legislation, is not extinguished in its entirety by either separation or the dissolution of the partnership.

Pursuant to Paragraph 12, during a period of separation, one partner can claim support from the other. According to Paragraph 16, there may exist a duty of support between partners even after the relationship is dissolved. Subparagraph 1, for instance, states that "after the dissolution of the partnership if one of the parties cannot support himself, the other may be obliged to do so." Paragraph 16 is also noteworthy because one sees in it a hierarchy of relationships established, at least in terms of maintenance subsequent to the dissolution of the same-sex relationship. In the event of dissolution, a court is advised first to look to blood relatives to support the former partner, and then if this group of persons cannot support the relative or does not exist, the former partner's ability to support will be considered.


67. Id. at art. 1, para. 1, subparagraph 4, cl. 4.

68. Id. at art. 1, para. 3 (1). If one party takes on the surname of his or her partner, s/he can fashion a hyphenated surname which contains the "maiden" name along with the partner's name. For example, if Smith enters into a life partnership with Jones, and s/he wishes to take on the surname Jones, this partner can legally be known as Jones, Jones-Smith, or Smith-Jones.

69. Law to End Discrimination, supra note 54, at art. 1, para. 5. There is a reference to Paragraphs 1360a and 1360b of the Civil Code. 1360a has four subparagraphs. 1360a(1) states: "The adequate financial support of the family includes all that is required, according to the circumstances of the spouses, to meet the household expenses and to provide for the personal needs of the spouses and the necessities of life for those of their children who are entitled to support." Goren, supra note 39, at 236. 1360b states: "If a spouse contributes more to the support of the family than he is obliged to give, the presumption is, in case of doubt, that he does not intend to demand restitution from the other spouse." Id.

70. Id. at art. 1, para. 12.

71. Id. at art. 1, para. 16 (1).

72. Id. at art. 1 para. 16 (3). This approach is interesting because the rule is different from the provisions governing support after the dissolution of marriages. In the case of husband and wife after divorce, the court will consider first the husband's or wife's ability to pay support before burdening relatives.
Prior to the passage of the Law to End Discrimination against Same-Sex Unions, the law as it stood generated certain results, which some members of both houses of the German legislature came to view as unconscionable. The AIDS pandemic exacerbated these problems. If a same-sex relationship ended through illness leading to death, the healthy partner during the illness, and after the death, was left in a very precarious position. There was a question concerning how hospitals were to handle relations between the same-sex partner and the parents of the patient. Who was to be informed of the medical condition of the patient and which party had the legal authority to authorize treatment? As well, complications arose concerning whether the same-sex partner was entitled to receive leave from work to assist the ailing partner and bereavement time in the event of death. Upon the death of the partner some very unusual results occurred. If a same-sex partner died intestate, pursuant to statutory provisions courts divided up his or her property between parents, and if they did not survive, among grandparents or siblings. Upon death, a residential tenancy in the name of the deceased would terminate. Hence, after caring for a sick partner, the same-sex partner might find himself or herself facing eviction from the apartment, fighting with the blood relatives over furniture, pots and pans, and excluded from receiving any money from the estate. He or she might even be excluded from participating during the funeral service or carrying out the partner's last wishes.

The Law to End Discrimination against Same-Sex Unions attempts to remedy the above-described situations through a number of key provisions. Paragraph 10 sets out a right of inheritance for the partner. In the event that the parents or children of a deceased partner survive, and there is no will, the life partner is entitled to a quarter of the estate. A surviving life partner is entitled also to the household effects and gifts, which he or she received in anticipation of the establishment of the relationship. If a partner dies intestate, and there are no relatives of the first degree alive, nor grandparents, the surviving life partner will receive the entire estate.

In Germany, total freedom of testation does not exist. According to law, child/parent and husband/wife relations, in terms of support and inheritance, are never fully extinguished. A parent must provide for his or her child during that child's minority, and even after the child becomes an adult, the parent must give that child a share of the estate unless a compelling reason exists for disinherance. A husband cannot exclude his wife from inheritance unless there

73. Bundesrat Resolution on a Legal Framework, supra note 26. See also Stenographic Report Nov. 5, 1999, supra note 32, at 6034 A/B, Statement by Volker Beck. He asks: "I would like to know whether there is one known case of a hospital ordinance which would prevent a husband or wife from going to the hospital room of his or her spouse. I know of many cases in which same-sex couples had this problem."

74. Bundesrat Resolution on a Legal Framework, supra note 26, at Anlage I [attachment #1].

75. Law to End Discrimination, supra note 54, at art. 1 paras. 10 (1), 10 (2).
is a compelling reason.\textsuperscript{76} Paragraph 6 of the Life Partnership Law establishes a regime of support, inheritance, and obligation between the partners. A partner is \textit{prima facie} entitled to a share of the inheritance that can never be entirely extinguished. Subparagraph 6 of Paragraph 10 states:

\begin{quote}
If the deceased through his testamentary disposition of assets has excluded the life partner from the estate, the partner is entitled to bring a suit for his compulsory portion, which can constitute up to half the value of the estate. The provisions of the Civil Code setting out the compulsory portion of an estate are to be applied in such a manner that the life partner is treated \textit{[in law for the purposes of this section]} as if he were a \textit{[married]} spouse.\textsuperscript{77}
\end{quote}

The issue concerning unexpected termination of a residential tenancy is dealt with by the first paragraph of Article 2, which sets out amendments to Paragraph 569 of the Code of Civil Law. Paragraph 569 of the Code of Civil Law will now state: "upon the death of the lessee, the spouse, who had a common household with the deceased can assume the tenancy. The same will apply for life partners."\textsuperscript{78}

If the partnership does not end by death, the provisions of Paragraph 15 set out three paths leading to dissolution. If both the partners agree that the relationship has come to an end, and they separate for one year, a court may grant dissolution. If only one of the partners wishes to leave the relationship, he or she will have to wait three years from the time that he or she separates and serves written notice upon the other party. If an unacceptable hardship would result from not granting dissolution more quickly, and this relates entirely to the conduct of the non-petitioning partner, the court, in its discretion, may grant dissolution prior to the expiration of three years' time.\textsuperscript{79}

During the period of separation envisioned by Paragraph 15, issues of support, division of property and living arrangements will arise. Upon the separation of the parties, Paragraphs 12 and 13 of the legislation authorize the court, in the absence of an agreement between the parties, to decide upon a regime for the division of household goods and put into place rules concerning living arrangements.\textsuperscript{80} Upon final dissolution, Paragraphs 18 and 19 come into

\textsuperscript{76} Goren, \textit{supra} note 39, at 286, translating § 2 para. 1601 BGB (Bürgerliches Gesetzbuch (Civil Code)): "Relatives in direct line are obliged to furnish maintenance to each other." \textit{See also} Paragraph 2333 at p. 417 that sets out conditions when a testator may deprive a descendant of his compulsory portion. \textit{See also} Paragraph 2335 at p. 418 that sets out conditions when a testator may deprive a spouse of the compulsory portion.

\textsuperscript{77} \textit{Law to End Discrimination}, \textit{supra} note 54, at art. 1, para. 10(6).

\textsuperscript{78} \textit{Id.} at art. 2, subparagraph 2.

\textsuperscript{79} \textit{Id.} at art. 1, para. 15, subparagraph 2, cls. 1, 2, 3.

\textsuperscript{80} \textit{Id.} at art. 1, paras. 12, 13.
play and the court is authorized to make a final decision regarding living arrangements and the assignment of household effects. It is interesting to note that Paragraph 19, involving division of household effects between same-sex partners, refers the court to the laws dealing with the division of effects between married couples.  

The question arose concerning what would occur if a formerly married person with children entered a same-sex partnership or a child were born to a same-sex partner. Despite liberal laws across Europe on the issue of the establishment of same-sex partnerships, adoption and raising children seems to be the point where the boundary of permissiveness is reached. The German law does not envision same-sex couples adopting children. It does, however, provide for the situation when a partner has custody over a child. Although there are no provisions for adoption, Paragraph 9 sets out that "with the consent of the custodial parent . . . a partner will . . . have the right to help make decisions regarding the day-to-day life of the child." Interestingly enough, subparagraph 3 spells out clearly that "if this is in the best interests of the child," the family court can limit or exclude the participation, enumerated in subparagraph 1. Also, it is interesting to note that upon dissolution a partner is deemed to keep the partnership name and relations with the relatives of his or her former spouse. However, "the right to participate in raising a child . . . will not survive the separation of the partners."  

It is beyond the scope of this article to discuss each of the more than sixty amendments to federal legislation envisioned in Article 3. However, three paragraphs or subparagraphs illustrate both the attention to detail and extensive scope that characterize this new same-sex partnership law. Changes to the Code of Criminal Procedure will be examined. The new rules enunciated in regard to foreign residents who wish to bring a same-sex partner to sojourn in Germany are also worthy of discussion. Finally, to illustrate how the new law impacts upon a very wide range of federal laws, the provisions concerning security clearances will be examined.  

Paragraph 56 of Article 3 sets out a series of amendments to the Code of Criminal Procedure. According to subparagraph 1, a judge will be required to recuse himself or herself from a case if his or her life partner is a defendant or a victim of the crime. Pursuant to subparagraph 2, the German Code of Criminal Procedure will be amended so that a witness in a criminal trial can no  

---  

81. Id. at art. 1, paras. 18, 19.  
82. Law to End Discrimination, supra note 54, at art. 1, para. 9 (1).  
83. Id. at art. 1, para. 9 (3).  
84. Id. at art. 1, para. 9 (4). See also art. 1, para. 3(3) in relation names, and art. 1, para. 11(1) and (2) (concerning family ties).
longer be compelled to testify against his or her life partner or former life partner.\textsuperscript{85}

The life partner of a defendant will gain the right to attend the trial. The legislation permits the life partner of a victim of a crime to be present at the trial and to make representations to the court. In the event that a victim dies, his or her life partner, like a husband or wife, under Paragraph 361 of the Code of Criminal Procedure, can petition the court to reopen the case. If the victim of the crime dies, his or her life partner can become a \textit{Nebenklager}.\textsuperscript{86}

Paragraph 47 of Article 3 makes four main amendments to the Law Concerning the Entry and Sojourn of Foreigners in the Federal Republic. Paragraphs 17, 18, and 31 of this statute currently create a right for minor children and a married spouse to apply for an entry and residence permit for the duration of the period while the foreign husband or wife legally resides in Germany.\textsuperscript{87} When the Life Partnership Act comes into force, a same-sex partner will be able to apply also for an entry permit to be reunited with his or her partner and establish a common residence on German soil.\textsuperscript{88}

Paragraph 4a of Article 3 provides for a series of amendments to the Law Concerning Security Clearances. When a security clearance is authorized, the life partner of the applicant will be included in any background check. The Law Concerning Security Clearances provides that if a man or woman enters into a marriage during the period while clearance is still being investigated, the new spouse will be included in the background check. When the Life Partnership Law comes into force, if a life partnership is concluded before the clearance is finished, the new partner will, like a new spouse, be included in the background check.\textsuperscript{89}

Section VII of this essay explained that because of opposition in the upper house, the original draft of this legislation was split into two parts. One part needed the consent of the Bundesrat, and the other did not because it was within the competence of the federal government. The Law to Supplement the Life Partnership Act was defeated on December 1, 2000 in a vote of the Bundesrat.\textsuperscript{90}

\textsuperscript{85} Id. at art. 3, para. 56. This paragraph makes amendments to paragraphs 22, 52, 149, 361, 395, and 404 of the Code of Criminal Procedure.

\textsuperscript{86} JOHN LANGBEIN, COMPARATIVE CRIMINAL PROCEDURE GERMANY 154 (West Publishing 1977), "\textit{Nebenklager}, literally one who complains alongside, in the sense of alongside the public prosecutor; the victim or near kin of a victim of a crime who is allowed to intervene and to have right of audience in criminal trials under certain circumstances."


\textsuperscript{88} Law to End Discrimination, supra note 54, at art. 3, para. 47.

\textsuperscript{89} Id. at art. 3, para. 4a.

\textsuperscript{90} Stenographic Report, Bundesrat, Dec. 1, 2000, supra note 56, at p. 551D.
Put in a nutshell, there are at least four main features of the original draft from July 4, 2000, which will not come into force in August of 2001.

The first feature concerns the solemnization and registration of the partnership. In Germany today, there is a registry office in each town and city that records in separate registry books births, deaths, marriages, and family relationships. The first draft of the legislation envisioned the participation of these offices in each state in the registration and solemnization of same-sex partnerships. As well, the Supplementary Law that the Bundesrat defeated had envisioned the addition of a fifth book to the list, a same-sex partnership registry. When it became clear that the states would not consent, the government changed the legislation to remove references to these state offices. At present a question remains concerning exactly where the registration will take place and which government agency will be responsible for record keeping.91

Second, the government had hoped to award to same-sex couples a number of tax benefits that accrue to married couples.92 This has been defeated through the refusal of the Bundesrat to pass the supplementary legislation. Third, the government had hoped to amend inheritance and tax laws to permit assets to transfer between the partners at death without tax liability accruing, and this will not be possible at present.93 Fourth, the government had hoped to change embassy and consular law such that partnerships could be registered abroad and German consular officials would be better instructed how to assist German same-sex partners.94

IX. CONSTITUTIONAL CHALLENGES

Even before the first partnership is established, there is a strong possibility that this legislation will face a challenge before the Federal Constitutional Court. Unlike the United States, where judicial review will occur only if a case and controversy exists, Germany provides for abstract review of the constitutionality of legislation. The provisions of Article 93(1)(2) of the Constitution of the Federal Republic of Germany provide two avenues whereby the Federal Constitutional Court will be required to review legislation after it is enacted, and sometimes before it comes into force.95

A review before the Federal Constitutional Court can be triggered by the lodging of a formal complaint by any one of the sixteen state governments.

91. Law to Supplement the Life Partnership Law, supra note 55, at art. I subparagraphs 1, 2, 3, 4.
92. Id. at art. 2, para. 55.
93. Id. at art. 2, para. 56.
94. Id. at art. 2, para. 48.
95. See Rosemarie Will, German Unification and the Reform of Abortion Law, 3 CARDOZO WOMEN'S L.J. 399, 401 n. 10 (1996).
alleging that a federal law violates any fundamental principle set out in the constitution. Abstract judicial review by the Federal Constitutional Court can also be compelled if one-third of the members of the Bundestag sign a petition challenging the constitutionality of a recently enacted federal law in part or in its entirety.96

The provisions of Article 93 permit results which would be unexpected by American jurists. An American jurist might say that constitutional review, as permitted in Germany, may actually limit or circumscribe rights that have been granted or extended by the federal legislature. Unlike the Bill of Rights, which establishes limits upon the power of the federal government, the Constitution of Germany extends governmental duties further. It is incumbent upon the German government not only to refrain from implementing policies that limit or infringe rights, but also actively to protect and ensure rights.97

A constitutional challenge to the Life Partnership Act might well adopt the following argument. Article 6 of the German Constitution clearly states that marriage and family are subject to special protection by the state. The new same-sex partnership legislation creates a paradigm which undermines the legitimacy and sanctity of marriage between a man and a woman and traditional family life.98

To understand a constitutional challenge along these lines one might consider the German Abortion Case of 1975. The Abortion Case concerned legislation of the Bundestag that liberalized abortion rules in Germany. For all intents and purposes, abortion was permitted in the first twelve weeks with relatively few limitations. In 1974, the Christian Democrats objected to liberal legislation brought forward by Social Democrats and argued that the law

96. GG art. 93 (1) (2) states that the Federal Constitutional Court shall rule “in case of a disagreement or doubt as to the formal and material compatibility of federal or land legislation with this Basic Law or as to the compatibility of land legislation with other federal legislation at the request of one third of the Members of the Bundestag.” “Land” in Article 93 means a state of Germany.

97. See Donald P. Kommers, German Constitutionalism: A Prolegomenon, 40 EMORY L. J. 837 at 861 (1991), which states:

German constitutional theory posits the dual character of basic rights. These rights are both negative and positive. A negative right is a subjective right to liberty. It protects the individual against the state, vindicating his right to freedom and personal autonomy. A positive right, on the other hand, represents a claim that the individual has on the state.

See also Martin Rhonheimer, Fundamental Rights, Moral Law, and the Legal Defense of Life in a Constitutional Democracy, 43 AM. J. JURIS 135, 150, which states: “Fundamental rights not only represent the freedoms of the individual in relation to the state but also express an order of values to be realized by the political community; they constitute the aims that define state functions and tasks.”

violated constitutional norms, the right to life under Article 2 (2) and the right to dignity under Article 1.99

Despite arguments concerning a woman’s right to the free development of her personality, guaranteed by Article 2 (1), the Federal Constitutional Court struck down the legislation and required the federal government of Germany to re-institute criminal sanctions for abortions. The Court determined that the right to life under Article 2 of the Constitution extended to fetuses fourteen days after conception. Any interference with pregnancy, after the fourteen days had passed, would be a prima facie deprivation of a constitutionally protected right to life. The Court carved out from the general prohibition against abortion four specific exceptions. These included pregnancies that threaten the life of the mother, cases of rape or incest, gross deformation of the fetus, and social hardship.100

The approach of the Court in the Abortion Case is significant. In that case, legislation, which liberalized law and extended rights to women, was held to be unconstitutional. The Court found that the government could not extend these rights to women without violating the constitutional protection of life. Analogously, German conservatives have already made the argument that the state has a positive obligation to protect and promote the institution of marriage, and that this protection must be exclusive.101 They further argue that any legislation that legitimizes or recognizes any other form of union between two persons undermines that exclusivity.

For several reasons it is not certain that the Life Partnership Act will be struck down. German, like American, constitutional law is often animated by the past. When a court makes a decision in an American constitutional case concerning equal protection or due process, the legacy of slavery and segregation seldom remains far from the judge’s thoughts.102 Similarly,


100. Id. at 642. The Court says: “The obligation of the state to take the life developing itself under protection exists, as a matter of principle, even against the mother.” See also id. at 648.

101. Stenographic Report, Bundestag, Nov. 10, 2000, supra note 98, at p. 12614D, (speech by Norbert Geis of the Christian Democratic Party). He states marriage and family enjoy a constitutional protection that is exclusive. Although the opinion of Bundestag Representative Geis is not decisive on this matter, it is important to note that the Federal Constitutional Court has interpreted marriage under Article 6 to mean a union between a man and a woman. See Stenographic Report, Nov. 5, 1999, supra note 32, at p. 6035C, statement by Volker Beck of the Green Party.

102. See Runyon Et Ux., DBA Bobbe’s School v. McCrary et. al., 427 U.S. 160 (1976). See also Heart of Atlanta Motel Inc. v. United States, 379 U.S. 241 (1964). See also Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968). See also Regents of the University of California v. Bakke, 438 U.S. 265 (1978). In Bakke, Justice Marshall said, “Three hundred and fifty years ago, the Negro was dragged to this country in chains to be sold into slavery. Uprooted from his homeland and thrust into bondage for forced labor, the slave was deprived of all legal rights.” Id. at 387. Further, Justice Marshall stated:

In light of the sorry history of discrimination and its devastating impact on the lives of
constitutional judges in Germany are concerned with the past, including the Third Reich, and its negative legacies which must be overcome.

The majority of the Federal Constitutional Court in 1975 in the Abortion Case wrote in relation to negative legacies that: "Underlying the Basic Law are principles for the structuring of the state that may be understood only in light of the historical experience and the spiritual-moral confrontation with the previous system of National Socialism."103

Recently, there has been a spiritual-moral confrontation with the past in regard to National Socialist treatment of homosexuals. On January 27, 2000, on the fifty-fifth anniversary of the liberation of Auschwitz concentration camp, the members of the Party of Democratic Socialism brought a motion before the Bundestag that called upon the government to declare that all prosecutions by the Nazis under Paragraph 175 and 175a were illegal.104 Secondly, it called upon the government to offer compensation to the victims and to establish a Dr. Magnus Hirschfeld institute, which would be supported by both state and federal money, to document the persecution of Gays in Germany during the Third Reich. A second motion brought forth on the same day noted that in both the Federal Republic of Germany and the German Democratic Republic consensual sexual relations between same-sex adults were punishable with prison sentences. It called for the vindication of Gays and an official apology by the German government for these prosecutions, and striking from the federal registry of criminals the names of all persons convicted under Paragraph 175.105

Negroes, bringing the Negro into the mainstream of American life should be a state interest of the highest order. To fail to do so is to ensure that America will forever remain a divided society.

Id. at 396. The Abortion Case, supra note 99, at 662.

103. BT-Drs. (Bundestag-Drucksache) [Printed matter of the lower house of the German Parliament] 14/2619 from Jan. 27, 2000, "Unrechtserklärung der nationalsozialistischen §§ 175 und 175a Nr. 4 Reichstrafgesetzbuch sowie Rehabilitierung und Entschädigung für die schwulen und lesbischen Opfer des NS-Regimes," [Declaration that Paragraphs 175 and 175a No. 4 of the Criminal Code during the Nazi period were unjust and a call for the vindication of, and apology to, Gay and Lesbian victims of the Nazi Regime]. See also a motion brought by the Social Democrats and the Green Party: BT-Drs. (Bundestag-Drucksache) [Printed matter of the lower house of the German Parliament] 14/2984 from Mar. 21, 2000, "Rehabilitierung der im Nationalsozialismus verfolgten Homosexuellen," [Vindication of Homosexuals persecuted during the National Socialist regime]. These two motions have been given consideration by the legal committee of the Bundestag and the report and recommendations can be found in the following document: BT-Drs. (Bundestag-Drucksache) [Printed matter of the lower house of the German Parliament] 14/4894 from Nov. 29, 2000. A resolution apologizing to Gays for persecution during the Third Reich was passed unanimously by the Bundestag on December 7, 2000. See Plenarprotokoll 14/140, Deutscher Bundestag, Stenographischer Bericht, 140. Sitzung, Berlin, Donnerstag, den 7. Dezember, 2000 [German Parliament (lower house) Stenographic Report, 140th sitting, Berlin, Thursday 7 Dec., 2000] at 13745 A, B [hereinafter Stenographic Report Dec. 7, 2000].

105. BT-Drs. 14/2620, supra note 17.
The recent domestic partnership legislation can be viewed as the culmination of the integration of homosexuals into German society and a somewhat late Wiedergutmachung (reparation) for past wrongs committed by previous regimes, including, but not exclusively, the Nazis. Today, human dignity is the highest value of the German constitutional order. As well, under Article 2, each citizen has the right to the "free development of his personality."

Article 3 states that "all people are equal before the law." Politicians have argued that a same-sex partnership law helps make Gays and Lesbians equal before the law because it eliminates to a large extent the intended and unintended discrimination against same-sex relationships that arises from a system of laws made by the majority for the majority. A law which makes living as man and man or woman and woman less socially awkward could be viewed as providing two and one-half million persons with the freedom to develop their personalities and a right of dignified living.

The Federal Constitutional Court also might hold that marriage rights under Article 6 are not injured to any extent by giving homosexuals the right to legitimize their relationships. This group of persons, by definition, is excluded from taking advantage of marriage rights, which are extended only to heterosexuals. The Court could find that despite the introduction of a same-sex partnership law, marriage rights can be upheld fully as they always have been. The chance to right past wrongs, to protect groups victimized by the Nazis, to defend dignity, to protect the right of the free development of personality, and to ensure that "all people are equal before the law" are compelling motives for the Federal Constitutional Court to view the legal recognition of same-sex partnerships as neither detrimental to nor competitive with the institution of marriage.

106. Bundestag Representative Hanna Wolf (Munich) of the Social Democratic Party states that what the legislation concerns may be found in its title: The Law to End Discrimination against Same-Sex Couples. She further states that "after one century of discrimination, this is a long overdue reparation ["Wiedergutmachung"] to Lesbians and Gays." See Stenographic Report, Bundestag, Nov. 10, 2000, supra note 98, at 12620 D.

107. Id. at 12624 A, (speech by Volker Beck, Green Party). He makes reference to Article 2 (1) in his discussion concerning the reasons why the same-sex partnership legislation is constitutional.

108. Id. at 12628 B, C, speech by Alfred Hartenbach, Social Democratic Party. He says that rather than violating constitutional norms, the Partnership Law fulfills the requirements of Article 3 of the Constitution.

109. Of course, there remains a possibility that the Federal Constitutional Court will interpret Article 6 to be exclusive in nature thus making competitive forms of "spousal" arrangements unconstitutional. There also might arise questions concerning the government's division of the original legislation into two bills in order to circumvent opposition in the Bundesrat.
X. CONCLUSION

Granting legitimization to same-sex spousal relations started in Denmark and spread to other Nordic nations. This trend toward liberalization ultimately influenced the European Union, with its focus on human rights. From the European Parliament came a resolution that spurred on discussion about the legal treatment of Gays and Lesbians. In the 1990s, even socially conservative nations began to reevaluate their positions on these issues, and at the very least, they took action to end those practices that were most discriminatory.

Located at the heart of Europe, Germany watched as its neighbors, France, Belgium, and Holland experimented with laws making spousal rights more flexible, either by the institution of "quasi-marriage" or extending to homosexuals the possibility of a recognized legal framework for their relationships. Pressure mounted upon the Kohl government to move forward on the issue of same-sex partnerships. Ultimately with a new political constellation in place in September 1998, it became possible for legislation to be drafted that would change German society fundamentally.

Since 1945, Germans have struggled to bring democracy and human rights to Central Europe. Against an historical backdrop of totalitarianism, the German Constitution of 1949 defends democracy and places the protection of the dignity and worth of the individual as the highest societal good. In 2001, on account of this partnership legislation, the German government will grant dignity and vindication to a group in society that had been victimized by the Nazis. This legislation will overcome many defects of past legal structures, and Gays and Lesbians will become more fully integrated into German society.

On account of the fact that Germany is the most wealthy and populous nation in the European Union, its example will be significant. The German legislation, combined with initiatives in Belgium, Denmark, France, Holland, Sweden, and regions of Spain, has turned the tide in terms of favoring legitimization of same-sex relationships in the European Union. One can anticipate that because of this recent initiative taken in Berlin, same-sex partnership laws will become in the next decade an entrenched norm of the European Union and an established practice all across the European continent.*

*** This article was completed in May of 2001, and it represents the legal situation as of that date. On August 1, 2001, the partnership legislation went into effect.