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2017: AN EVENTFUL YEAR IN GERMAN FAMILY LAW

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In German family law, 2017 was a year of both commemoration and change. It marked the 40th anniversary of Germany's first major family law reform since the foundation of the Federal Republic in 1949: the Gesetz zur Reform des Ehe- und Familienrechts¹—or First Marriage Law Reform Act of July 1, 1977. 2017 also witnessed a small revolution in its own right: the introduction of same-sex marriage by the Gesetz zur Einführung des Rechts auf Eheschließung für Personen gleichen Geschlechts (the “Act”²) of June 20. Although separated by four decades, both statutes are watershed moments that have changed the face of German family law.

The First Marriage Law Reform Act of 1977 was several years in the making,³ and was attended by a significant legal-ethical and policy debate. The Act proposed reforming the German divorce grounds (and the financial consequences of marriage dissolution) along the lines of pure no-fault. However, the projected reform engendered strong fears on both sides: some groups were concerned that it might lead to wives being rejected by husbands who were more economically powerful. Others, on the contrary, feared, that wives might leave their husbands without cause and be “rewarded”

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1. Erstes Gesetz zur Reform des Ehe- und Familienrechts [1. EheRG] [First Marriage Law Reform Act], July 1, 1977, BGBL. I at 1421.

2. Gesetz zur Einführung des Rechts auf Eheschließung für Personen gleichen Geschlechts [Same-Sex Marriage Law], July 20, 2017, BGBL. I at 2878. The Act entered into force on Oct. 1, 2017.

3. The first parliamentary bill was introduced in 1972. It was based on the preparatory work of a reform commission convened by the Ministry of Justice.

for their infidelity with alimony payments and property claims. These fears explain why the no-fault principle, as eventually enacted, was tempered by marriage-stabilizing elements (a minimum separation period of one year⁴ and a hardship clause for spouses with a legitimate interest in continuing the marriage⁵). The Act passed with robust cross-party and cross-coalition support, reflecting the strong modernizing impetus driving it forward.⁶ Its innovations have proved durable. The divorce grounds themselves have remained virtually unchanged to this day. And, while the law of post-divorce maintenance has undergone some revisions,⁷ subsequent changes have by and large followed the path set by the First Marriage Law Reform Act—to make divorce and a “clean break” between spouses easier.

Like no-fault divorce, same-sex marriage had been on the German legal reform agenda for several years before its introduction. A coalition government of Social Democrats and the Green Party took the first step in 2001 with the creation of registered partnerships (*eingetragene Lebenspartnerschaften*) for same-sex unions.⁸ The 2001 Act aimed to put registered partnerships on an equal footing with marriage, but it stopped just short of doing so because the government feared to come into conflict with Article 6 of the Grundgesetz,⁹ the provision in the German Constitution placing marriage and the family under the “special protection” of the state. Successive piecemeal reforms,¹⁰ which were occasionally

4. BÜRGERLICHES GESETZBUCH [BGB] [Civil Code], section 1564, para. 2.

5. BGB, section 1568.

6. Dieter Schwab, *2017 – ein Jubiläumsjahr für das Familienrecht*, FAMRZ 2017, 1.

7. *Cf.*, in particular, Gesetz zur Änderung unterhaltsrechtlicher, verfahrensrechtlicher und anderer Vorschriften [UÄndG], Feb. 20, 1986, BGBL. I at 301, and Gesetz zur Änderung des Unterhaltsrechts, Dec. 21, 2007, BGBL. I at 3189.

8. Gesetz zur Beendigung der Diskriminierung gleichgeschlechtlicher Gemeinschaften, Feb. 16, 2001, BGBL. I at 266.

9. GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GG] [Basic Law], article 6.

10. *See, e.g.*, Gesetz zur Überarbeitung des Lebenspartnerschaftsrechts, Dec. 15, 2004, BGBL. I at 3396.

prompted by the German Constitutional Court,¹¹ chipped away at the remaining legal differences between registered and married partners to the point where registered partnerships and marriages became separate, but substantially equal institutions. As of 2013, the only significant remaining difference concerned joint adoptions (outside of stepparent adoptions), which were legally allowed for married couples but not for registered partners.

Between fall 2013 and fall 2015, the Left Party, the Green Party, and the Bundesrat (the house representing the German states) each introduced substantially identical bills proposing to legalize same-sex marriage.¹² These bills, however, languished in the relevant Bundestag Committee,¹³ and when the Constitutional Court refused to step in on behalf of the bills' proponents,¹⁴ there seemed little hope of any bill passing before the end of the legislative period. It was then, however, that a now-famous magazine interview with Chancellor Merkel changed the likely course of events. In the interview, Merkel described the question of whether same-sex marriage should be legalized as "a matter of conscience." This galvanized the Bundestag into action, and the same-sex marriage bill passed both the Bundestag and the Bundesrat in record time.¹⁵

The Act brought minimal change to the text of the German Civil Code. Instead of reading "marriage is entered into for life," section 1353 para. 1 BGB now reads "marriage is entered into for life by two persons of the opposite or same sex." Symbolically, however, the change implicated was great. Like the 1977 Act before it, the

11. See ENTSCHIEDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] [Federal Constitutional Court case report] 124, 199, FAMRZ 2009, 1977 (on survivor's benefits); BVERFGE 126, 400, FAMRZ 2010, 1525 (on inheritance and gift tax); BVERFGE 133, 59, FAMRZ 2013, 521 (on stepparent adoptions).

12. DEUTSCHER BUNDESTAG: DRUCKSACHEN UND PROTOKOLLE [BT] 18/8, Oct. 23, 2013; DEUTSCHER BUNDESTAG: DRUCKSACHEN UND PROTOKOLLE [BT] 18/5098, June 10, 2015; and DEUTSCHER BUNDESTAG: DRUCKSACHEN UND PROTOKOLLE [BT] 18/6665, Nov. 11, 2015.

13. The *Bundestag* is the lower house of the federal parliament.

14. 2 BvQ 29/17, FAMRZ 2017, 1209.

15. Dieter Schwab, *Eheschließung für Personen gleichen Geschlechts*, FAMRZ 2017, 1284, 1285.

2017 Act changed, yet again, the face of German family law. As a result, civil marriage has lost its traditional two-sex nature and heterosexual couples have lost their exclusive right to the institution. As with any momentous piece of legislation, the Act has sparked lively discussions about its cultural implications as well as its constitutionality. The latter remains to be tested in the Constitutional Court. However, it is considered unlikely that the Court would find a violation of Article 6 GG¹⁶ since the Court has ruled in the past that the special constitutional protection for marriage neither requires nor legitimates legislation that discriminates against non-marital partnerships.¹⁷ It is worth pointing out, however, that while the civil law definition of marriage has changed (and probably for good), the constitutional definition of marriage has not. The “special protection” referred to in Article 6 GG continues to be limited to marriages between a man and a woman.¹⁸

2017 was, of course, the year of yet another great jubilee: the 500-year anniversary of the start of the Protestant Reformation. On October 31, 1517, a German monk named Martin Luther nailed 95 theses to the door of the Castle Church in Wittenberg, precipitating the reform of medieval Christianity. The Protestant movement also had far-reaching implications for the law of marriage. It replaced Catholic sacramental theology with a new conception of marriage as an external, worldly matter and opened the road to divorce, albeit at first only for the limited grounds of adultery and desertion. With its secular conception of marriage and family life, the Reformation stands at the cradle of today’s state-authored systems of family law, which themselves depart, often in quite radical ways, from the former canon law of marriage of the Catholic Church. It is fitting that the two significant marriage legal reforms in recent German history should celebrate their birth and their anniversary, respectively, in that jubilee year.

16. Cf., e.g., Dagmar Kaiser, *Gleichgeschlechtliche Ehe – nicht ganz gleich und nicht für alle*, FAMRZ 2017, 1889, 1890 *et seq.*

17. Bundesverfassungsgericht [BVERFG] [Federal Constitutional Court] July 7, 2009, NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 1439 (1442), 2010.

18. BVERFG July 17, 2002, FAMRZ 2002, 1169; and BVERFG May 7, 2013, FAMRZ 2013, 1103.