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**Definition of Marriage and Parenthood in the Legal System of the Federal Republic of Germany
(expert opinion)**

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Introductory remarks

There are three German laws that regulate the institution of marriage. These are: The Basic Law of the Federal Republic of Germany of May 23, 1949² and the German Civil Code – Bürgerliches Gesetzbuch of January 1, 1900, as last amended on November 7, 2022.³ In the German Civil Code, Book 4 of the Code – Family Law – regulates the ability to marry, the duties of spouses and the relationship between them⁴. Another is the Law on the Introduction of the Right to Same-Sex Marriage, which entered into force on October 1, 2017⁵. The last one de facto amends the Book 4 of the Code – Family Law.

Basic Law on marriage and parenthood

The Basic Law of the Federal Republic of Germany contains provisions on the institution of marriage only in Article 6. It states that: “Marriage and the family shall enjoy the special protection of the state”⁶. However, there are no provisions regarding the gender and age of the spouses.

The following provisions of Article 6 of the Basic Law contain the rights and duties of parents. The care and upbringing of children is a natural right and above all a duty of parents. In the performance of this duty, the State shall supervise them⁷. According to paragraph 3, children may be taken from their parents only on the basis of statutory provisions and only if they are seriously neglected⁸. The rights of the mother are particularly emphasized: “Every mother shall be entitled to the protection and care of the community”⁹.

² Grundgesetz für die Bundesrepublik Deutschland in der im Bundesgesetzblatt Teil III, Gliederungsnummer 100-1, veröffentlichten bereinigten Fassung, das zuletzt durch Artikel 1 des Gesetzes vom 19. Dezember 2022 (BGBl. I S. 2478) geändert worden ist, <https://www.gesetze-im-internet.de/gg/BJNR000010949.html> [accessed: 28.02.2023]; Basic Law for the Federal Republic of Germany, <https://polen.diplo.de/blob/483272/aee02a3f97bfda627dcd0462030e5890/grundgesetz-dl-pl-data.pdf> [accessed: 28.02.2023].

³ Bürgerliches Gesetzbuch (BGB), last amended on November 7, 2022, BGBl. I S. 1982.

⁴ Bürgerliches Gesetzbuch (BGB), <https://www.gesetze-im-internet.de/bgb/BJNR001950896.html#BJNR001950896BJNG011002377> [accessed: 28.02.2023].

⁵ Gesetz zur Einführung des Rechts auf Eheschließung für Personen gleichen Geschlechts, https://www.bgbl.de/xaver/bgbl/start.xav?startbk=Bundesanzeiger_BGBl&start=//:*%5B@attr_id=bgbl117s2787.pdf%5D [accessed: 28.02.2023].

⁶ Basic Law for the Federal Republic of Germany, German Bundestag, Public Information Desk, Berlin 2006, www.bundestag.de [accessed: 28.02.2023]; Basic Law for the Federal Republic of Germany...; „(1) Ehe und Familie stehen unter dem besonderen Schutze der staatlichen Ordnung“.

⁷ „(2) Pflege und Erziehung der Kinder sind das natürliche Recht der Eltern und die zuvörderst ihnen obliegende Pflicht. Über ihre Betätigung wacht die staatliche Gemeinschaft“, Grundgesetz für die Bundesrepublik Deutschland, <https://www.gesetze-im-internet.de/gg/BJNR000010949.html> [accessed: 28.02.2023].

⁸ „(3) Gegen den Willen der Erziehungsberechtigten dürfen Kinder nur auf Grund eines Gesetzes von der Familie getrennt werden, wenn die Erziehungsberechtigten versagen oder wenn die Kinder aus anderen Gründen zu verwahrlosen drohen“, Ibidem.

⁹ „(4) Jede Mutter hat Anspruch auf den Schutz und die Fürsorge der Gemeinschaft“, Ibidem.



The provision in Article 6 (5) of the Basic Law emphasizing the rights of children born outside of marriage is noteworthy. Children born outside of marriage shall be provided by legislation with the same opportunities for physical and mental development and for their position in society as are enjoyed by those born within marriage¹⁰. It is important to explain here why such a provision in a law with the force of a constitution – the equality of illegitimate and legitimate children in German law only came into being at the end of the 20th century, as will be discussed below. Until the 1970s, legitimate and illegitimate children did not have the same rights.

Article 3 (2) of the Basic Law provides for the equality of men and women¹¹. The equality of men and women in marriage, the equality of the rights of the spouses, does not derive from the provision of Article 6 of the Basic Law, which concerns marriage, but from the provision of Article 3 of the Basic Law, which contains the principle of equality¹².

Marriage regulation in the Civil Code and Family Law – rights and duties of spouses

Detailed regulations on the relationship between spouses and persons who have previously entered into a civil partnership are found in Book 4 of the Civil Code, entitled Family Law. Provision of Section 1303 stipulates that marriage may be contracted between persons who have reached the age of 18, and that no marriage may be validly contracted with a person who has not reached the age of 16¹³. According to the provision of Section 1304 of the Civil Code, a marriage cannot be contracted by an incapacitated person¹⁴. According to sections 1310 and 1311, a marriage is concluded when the future spouses, in the presence of each other, make a personal declaration before the head of the registry office that they are entering into marriage. This declaration may not be made subject to any condition or time limit¹⁵. The marriage may be contracted in the presence of two witnesses, but this is not a necessary condition, as the

¹⁰ „(5) Den unehelichen Kindern sind durch die Gesetzgebung die gleichen Bedingungen für ihre leibliche und seelische Entwicklung und ihre Stellung in der Gesellschaft zu schaffen wie den ehelichen Kindern“, <https://www.gesetze-im-internet.de/gg/BJNR000010949.html> [accessed: 28.02.2023].

¹¹ „(2) Männer und Frauen sind gleichberechtigt. Der Staat fördert die tatsächliche Durchsetzung der Gleichberechtigung von Frauen und Männern und wirkt auf die Beseitigung bestehender Nachteile hin“, <https://www.gesetze-im-internet.de/gg/BJNR000010949.html>, [accessed: 28.02.2023].

¹² Mangoldt, Klein, Starck, *GG Bonner Grundgesetz, Präambel, Art. 1–19, Kommentar*, p. 339 ff. and p. 765 ff.

¹³ „Eine Ehe darf nicht vor Eintritt der Volljährigkeit eingegangen werden. Mit einer Person, die das 16. Lebensjahr nicht vollendet hat, kann eine Ehe nicht wirksam eingegangen werden“, https://www.gesetze-im-internet.de/bgb/_1303.html [accessed: 23.03.2023].

¹⁴ „Wer geschäftsunfähig ist, kann eine Ehe nicht eingehen“.

¹⁵ § 1311 sentence 2 of the German Civil Code.



presence of the clerk is sufficient¹⁶.

On the other hand, a marriage can only be annulled by a court decision at the request of one of the spouses¹⁷. Such court order shall become final upon entry of judgment¹⁸. The annulment of a marriage takes place in strictly enumerated cases, such as when one of the spouses was misled at the time of the marriage, did not realize that the marriage was about to be concluded, was in a state that prevented conscious decision-making, or the marriage was concluded under duress, etc.¹⁹.

At the request of one of the spouses, divorce may be granted only by a court decision. The principle of spousal breakdown is applied – this means that the court never tries to determine who is to blame for this process²⁰. This has certain consequences: the existing spouses must prove that their marriage has permanently disintegrated – they make consensual declarations that they have been running separate households for at least one year. The provision of § 1366 states that the court will presume that the marriage has permanently broken down if the spouses have been separated for one year, one of them has filed for divorce and the other consents to it. If the spouses have been separated for three years, there is a presumption that the marriage has permanently broken down²¹. It should be emphasized that the court may also presume that the spouses are living separately if they are still living in the same apartment²², but have separate household expenses²³.

In addition, there are other consequences of the principle of marital breakdown: it is no longer necessary for the court to decide on alimony. The principle that each spouse is responsible for himself or herself after a divorce is accepted²⁴. The court divides joint property (if any) and decides on child support. It makes a binding decision on the equalization of pension claims. This is an interesting procedure – during the marriage, the spouses acquired certain pension rights, which are calculated on a point system for each year of work, and the number of points depends on the amount of income. The court that rules on the divorce takes into account a certain amount of future pension rights calculated on the above-mentioned points in order to equalize the pension expectations of both spouses.

Parents and children are obligated to work together to the best of their ability for the good of the

¹⁶ § 1312 of the German Civil Code.

¹⁷ § 1313 of the German Civil Code.

¹⁸ § 1313 sentence 2 of the German Civil Code.

¹⁹ § 1314 of the German Civil Code.

²⁰ § 1565(1) of the German Civil Code.

²¹ § 1565(2) of the German Civil Code.

²² § 1567(1) of the German Civil Code.

²³ Ibidem.

²⁴ § 1569 (1) German Civil Code: "Nach der Scheidung obliegt es jedem Ehegatten, selbst für seinen Unterhalt zu sorgen".



family²⁵. According to section 1626 of the Civil Code: “Parents have the duty and right to care for a minor child (parental authority). The parental custody includes the care for the person of the child (care for the person of the child) and the property of the child (care for the property of the child)”²⁶.

It should be noted that § 1588 of the Civil Code states that its provisions do not affect the duties of the Church with respect to marriage²⁷. Marriage in the German legal system is a civil institution and does not apply to church institutions or religious associations.

According to § 1355 of the German Civil Code: “The spouses should determine a common family name (family name). The spouses have the family name determined by them. If the spouses do not determine a family name, they keep the names they use when the marriage is entered into after the marriage too”²⁸. On the other hand, if they have not chosen it, they will keep the existing one. Since the law does not set a time limit for the adoption of a common surname, the spouses may decide later²⁹. It is becoming more and more common to keep the family name.

Development of marital rights and rights resulting from marriage – changes and historical notes

Social change in the Federal Republic of Germany was evolutionary. Some German laws did not provide for equal rights for spouses – despite declarations of equal rights for spouses and married and illegitimate children. For example, until 1998, the German Criminal Code (StGB) applied the crime of infanticide only to children born out of wedlock. In contrast to the Polish legal system, the crime of infanticide was not defined as a result of mental shock “in labour, while under the influence of the course of delivery”³⁰, but according to this provision a mother who “kills her extramarital child during or immediately after childbirth” was punishable³¹. Such a provision was derived from the Prussian legislation – the Preussisches Strafgesetzbuch of 1851³².

It should be noted that the principle of equality between men and women was also interpreted differently in German law. It was not until 1977 that equality between spouses was established with

²⁵ § 1618a and § 1619 of the German Civil Code.

²⁶ Eve Tuora-Schwierskott, *Niemiecki kodeks cywilny. Księga 4. Prawo rodzinne*, Berlin 2021, p. 182.

²⁷ *Ibidem*, p. 152.

²⁸ *Ibidem*, p. 58.

²⁹ Heidelberg Registry Office, <https://www.heidelberg.de/hd/-/Verfahrensbeschreibung/ehenamen-bestimmen/vbid178> [accessed: 23.03.2023].

³⁰ Article 149 of the Act of June 6, 1997, Penal Code, Journal of Laws. 2022.0.1138, <https://arslege.pl/kodeks-karny/k1/s197/> [accessed: 23.03.2023].

³¹ K. Michalik, *Vom "Kindsmord" zur Kindstötung, Hintergründe der Entwicklung des Sondertatbestandes der Kindstötung (§217) im 18. und 19. Jahrhundert* “Feministische Studien” 1994, Vol. 12, No. 1, p. 1.

³² *Ibidem*, p. 2–3.



regard to the right to engage in gainful employment – at that time section 1354 BGB was deleted. According to which a wife had to obtain the written consent of her husband in order to work, has been abolished³³. In the 1950s, based on the wording of the Preamble to the Basic Law: “Conscious of their responsibility before God and man[...] have adopted this Basic Law” a Christian patriarchal order prevailed in the state. This meant that in addition to making decisions about her employment (he could terminate her contract for her up to 1958), the husband made all decisions about their children and her bank account³⁴.

Civil partnerships and marriage – changes in case law and regulations

There is no provision in the Basic Law of the Federal Republic of Germany that defines marriage as a union between a man and a woman. It should be noted, however, that this was the interpretation of the Federal Constitutional Court until the Civil Partnership Act came into force on August 1, 2001³⁵.

As recently as 2002, the FTK took the position that: “According to Article 6 (1) of the Basic Law, marriage is the union of a man and a woman³⁶. The right to marry a partner of the same sex cannot be derived from the provisions of Article 6 (1) of the Basic Law”³⁷.

The Federal Constitutional Court has ruled on several occasions that partnerships must be treated equally to married couples. In particular, this equal treatment has concerned pension benefits for surviving partners and dependents³⁸, inheritance and gift tax³⁹, family benefits⁴⁰, real estate transfer tax⁴¹, the division of assets of life partners and spouses⁴², and the adoption of a child⁴³.

The Federal Constitutional Court has based its rulings on the aforementioned issues on the provision of Article 3 of the Basic Law of the Federal Republic of Germany, which derives these rights

³³ § 1354 – Bürgerliches Gesetzbuch (BGB), https://www.buzer.de/1354_BGB.htm [accessed: 28.02.2023].

³⁴ Drucksache 224 of January 29, 1954, <https://dserver.bundestag.de/btd/02/002/0200224.pdf> [accessed: 28.02.2023]; Vor 65 Jahren: Bundestag beschließt Gleichberechtigungsgesetz, <https://www.bundestag.de/dokumente/textarchiv/2022/kw17-kalenderblatt-gleichberechtigungsgesetz-504286> [accessed: 28.02.2023].

³⁵ Gesetz über die Eingetragene Lebenspartnerschaft (Lebenspartnerschaftsgesetz – LPartG) BGBI. I S. 266.

³⁶ Cf. Federal Constitutional Court rulings: BVerfGE 10, 59 [66]; BVerfGE 49, 286 [300]; BVerfGE 53, 224 [245]; BVerfGE 62, 323 [330]; BVerfGE 87, 234 [264].

³⁷ Deutscher Bundestag, Wissenschaftliche Dienste, Der Begriff der Ehe im Grundgesetz und anderen Verfassungen, 2017, WD 3 – 3000 – 142/17, <https://www.bundestag.de/resource/blob/526424/.../wd-3-142-17-pdf-data.pdf> [accessed: 28.02.2023].

³⁸ FTK Verdict BVerfGE 124, 199.

³⁹ Ibidem, 126, 400.

⁴⁰ Ibidem, 131, 239.

⁴¹ Ibidem, 132, 179.

⁴² Ibidem, 133, 377.

⁴³ Ibidem, 133, 59.



from the principle of equality, and not on Article 6 of the Basic Law, which mentions marriage.

It should be noted that the jurisprudence of the Federal Constitutional Court has steadily evolved, increasingly recognizing partnerships as equivalent to marriage. In one ruling, the FTK claimed: “The introduction of the legal institution of a registered partnership for a couple of persons of the same sex does not violate Article 6 (1) of the Basic Law. The special protection of marriage contained in Article 6(1) of the Basic Law does not prevent the legislature from legislating for same-sex couples. A civil partnership provides rights and obligations that are to be treated as identical to those of spouses⁴⁴. The institution of marriage is not threatened by any loss from the institution of civil unions, it is addressed to persons who cannot marry as spouses”⁴⁵.

Lower courts have ruled similarly. In two identical rulings⁴⁶ on October 29, 2010, judges ruled that civil servants in civil unions are entitled to family allowances under Section 40(1) of the Social Security for Civil Servants Act, and that this right should also be applied retroactively from July 2009⁴⁷. Directive 2000/78/EC requires equal treatment of workers if they are in a comparable situation, a determination that is a matter for national courts and was introduced in the Federal Republic of Germany by a Federal Constitutional Court decision in July 2009. According to this decision, the mere reference to the value of marriage (Article 6 (1) of the Basic Law) does not justify the privileging of the institution of marriage to the extent that it is accompanied by a loss of rights for a civil partnership. In accordance with this decision⁴⁸, the Federal Constitutional Court had already granted civil servants living in a registered partnership the right to an increased family allowance pursuant to § 53 (2) of the Social Security for Civil Servants Act in several identical decisions on October 28.

In a subsequent decision on October 28, 2010, the Federal Constitutional Court ruled that civil partners are entitled to a survivor's pension in accordance with the provisions for married civil servants. The provisions of the Law on Pensions Resulting from an Official Relationship are to be applied accordingly. Thus, the Federal Constitutional Court has essentially confirmed the legal position on equal

⁴⁴ Judgment FTK BVerfGE 105, 313, Deutscher Bundestag, Wissenschaftliche Dienste, Der Begriff der Ehe im Grundgesetz und anderen Verfassungen, 2017, WD 3 – 3000 – 142/17, <https://www.bundestag.de/resource/blob/526424/.../wd-3-142-17-pdf-data.pdf> [accessed: 28.02.2023].

⁴⁵ Ibidem.

⁴⁶ Case file no. Az. 2 C 10.09/2 C 21.09.

⁴⁷ Bundesbesoldungsgesetz (BGBl. I S. 3932), <https://www.gesetze-im-internet.de/bbesg/BJNR011740975.html>, [accessed: 28.02.2023].

⁴⁸ Case file Az. 2 C 56.09/2 C 52.09.



treatment of civil servants living in a registered partnership⁴⁹.

On October 1, 2017, the Law on the Implementation of the Right to Same-Sex Marriage entered into force⁵⁰. It amended the wording of Section 1353 (1) of the Civil Code was amended. (BGB), which states: “Marriage is entered into for life by two persons of the same or different sex”⁵¹. In addition, the law states that: “The spouses have a mutual duty of conjugal community; they are responsible for each other”. The equality of the spouses is stated in paragraph 2: “A spouse is not obliged to comply with the demand of the other spouse to create the community if the demand shows itself as an abuse of his right or if the marriage has broken down”⁵².

German legislation no longer provides for civil partnerships – they can no longer be entered into under Section 1 of the Civil Partnership Act⁵³. Partnerships entered into before this date can be converted into marriages – at the same time, the current partners can unanimously declare before a registrar that their partnership has been converted into a permanent marriage⁵⁴. The civil registrar will issue the corresponding official document (civil status record in the form of a certificate)⁵⁵. Since the Act implementing the right to same-sex marriage came into force, they can only get married.

Concluding remarks

The institution of marriage is governed by Article 6(1) of the German Basic Law and Section 1353 of the German Civil Code (BGB). The Basic Law contains only general provisions stating that marriage and the family are under the special protection of the state and that spouses are equal. Other provisions deal with the care and upbringing of children, which is a natural right of parents. However, there are no provisions regarding the gender and age of the spouses.

⁴⁹ Deutscher Bundestag, Wissenschaftliche Dienste, Der Begriff der Ehe im Grundgesetz und anderen Verfassungen, 2017, WD 3 – 3000 – 142/17, <https://www.bundestag.de/resource/blob/526424/.../wd-3-142-17-pdf-data.pdf> [accessed: 28.02.2023].

⁵⁰ Gesetz zur Einführung des Rechts auf Eheschließung für Personen gleichen Geschlechts, https://www.bgbl.de/xaver/bgbl/start.xav?startbk=Bundesanzeiger_BGBI&start=//:*%5B@attr_id=bgbl117s2787.pdf%5D [accessed: 28.02.2023].

⁵¹ BGB Family Law, https://www.gesetze-im-internet.de/bgb/_1353.html [accessed: 28.02.2023].

⁵² Bürgerliches Gesetzbuch (BGB) § 1353 Eheleiche Lebensgemeinschaft, https://www.gesetze-im-internet.de/bgb/_1353.html [accessed: 28.02.2023].

⁵³ § 1 of the Law on Civil Partnerships: “Nach dem 30. September 2017 können Lebenspartnerschaften zwischen zwei Personen gleichen Geschlechts nicht mehr begründet werden“.

⁵⁴ Law on the Introduction of the Right to Same-Sex Marriage, Gesetz zur Einführung des Rechts auf Eheschließung für Personen gleichen Geschlechts, in connection with the amendment of § 20a of the Civil Unions Act, https://www.bgbl.de/xaver/bgbl/start.xav?startbk=Bundesanzeiger_BGBI&start=//:*%5B@attr_id=bgbl117s2787.pdf%5D [accessed: 28.02.2023].

⁵⁵ Law on the implementation of the right to same-sex marriage in connection with the amendment of Section 17a of the Civil Status Records Law.



Detailed provisions are found in the Civil Code in Book 4 of the Family Code. There are provisions on marriage and dissolution, the age of future spouses, divorce, child custody, and the obligations of spouses and children. Noteworthy are the principle of marital dissolution upon divorce and the provisions on joint surnames.

From 2001 to 2017, the Civil Partnership Act was in force, under which same-sex couples entered into civil partnerships. In October 2017, legislative changes were made – according to the Law on the Implementation of the Right to Same-Sex Marriage, a civil union is a union between two people of the same or different sex.

It is important to emphasize the tremendous evolution of the understanding of spousal rights and marriage in German legislation over the past 70 years. Whereas until the 1970s the prevailing social model was patriarchal and a woman did not have the right to work without her spouse's consent, today spouses have equal rights regardless of whether they are of the same or different sex.



Summary

The provisions on marriage in the German legal system are contained in the Basic Law of the Federal Republic of Germany and the Civil Code. These provisions have evolved significantly in recent years, from a system based on a patriarchal worldview and the predominance of men's rights in marriage and the lack of equality of legitimate and illegitimate children, to a family model based on equal rights and responsibilities. In the German legal system, marriage is the union of two people, including those of the same sex. It should be noted that this has been a slow evolution due to social changes.

Keywords: marriage, civil partnership, same-sex union, spousal equality.

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