Who Amends the German Basic Law? The EU's Influence on Equal Rights for Same-Sex Registered Civil Partners in German Jurisprudence

Tonio Klein

1 Introduction

It should be clear how to answer this question by looking at Art. 79 of the Basic Law (BL) that clearly and unequivocally stipulates that the Basic Law may only be amended by a law which explicitly does so and which is approved by two thirds of the Members of the *Bundestag* and two thirds of the votes of the *Bundesrat* (i. e. both Houses of the legislature). But if "amendment" is taken to include a substantive change of meaning rather than a mere change of the wording, the answer is less evident. However, it should be clear beyond reasonable doubt that one is not limited to the conception of the creators of the Basic Law, as adopted in 1949.[1] As *J. Limbach*, the former President of the Federal Constitutional Court (FCC), pointed out: "the legal order is nor without gap and contradiction, neither written in unambiguous language nor unaffected by social change. This applies especially to constitutional law which operates as a fundamental legal order not aiming at detailed regulation."[2] Thus, *Montesquieu*'s famous dictum that the judge is nothing but "the mouth that pronounces the words of the law"[3] has to be wrong.[4] This is known best by the person in whose honour this festschrift is conceived and written. *Albrecht Weber* has worked among other things with the classical sources of the General Theory of the State during his teaching at the University of Osnabrück. Moreover, before becoming a professor, he was an academic assistant to *E. Benda*, the former president of the FCC, in the 1970s – a time when the Court made many decisions that caused

[1] The more so as this BL is often ambiguous, heterogeneous and not easy to interpret – to take one example: whether the right to life in Art. 2.2 sentence 1 BL encompasses unborn life: Anderheiden 2006, p. 7; Gas 2012, p. 311 et seq.

[2] Limbach 1996, para 15: "weder ist die Rechtsordnung lückenlos, widerspruchsfrei, sprachlich eindeutig noch gegenüber dem sozialen Wandel erhaben. Das gilt in besonderem Maße für das Verfassungsrecht, das sich durch eine geringe Regelungsdichte auszeichnet und nicht den Anspruch auf Lückenlosigkeit erhebt" (my translation).

[3] Montesquieu 1758, p. 327.

[4] Hirsch 2004, II. 1.; Limbach 1996, para 15.

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tremendous controversy.[5] Social change may have its influence on the outcome of a judicial institution, as well as the personality of individual judges and both may bring about at least a de facto amendment of the Basic Law. Consider, for example, Justice *P. Kirchhof*'s "Halbteilungsgrundsatz" (which may be translated as "principle of equal shares", i. e. between the State and the individual, considering the fruit of one man's economic activity): According to Art. 14.2 BL, "Property entails obligations. Its use shall also serve the public good." *Kirchhof* gave the word "also" ("zugleich", i. e. "at the same time") the meaning of "in equal shares"[6]; which was clearly not intended by the founders of the BL.[7] A famous example considering European integration was given in the "Maastricht" judgment of the FCC. No one expected that Art. 38.1 BL ("Members of the German Bundestag shall be elected in general, direct, free, equal and secret elections") should not only confer the rights expressly stated, but also an individual and legally enforceable right that the *Bundestag* should prevent substantial competences from being transferred to the EU.[8]

Notwithstanding this example, the FCC is generally favourable to European integration, as is the Basic Law in its Art. 23.[9] Sometimes, the FCC's jurisprudence is even more influenced and inspired by EU law than some people would like. *A. Weber*, however, was always receptive to such tendencies and interested in them, for they are closely linked to the question of methods of interpreting the law, especially constitutional law. This has always evoked a positive response from him, not only from an EU law perspective, but also as a result of his interest in comparative constitutional law, which made him always ready to look beyond the conventional methods of interpreting the law and consider influences such as EU law, as well as foreign constitutional law, international law and European Human Rights Law in the broader sense of the term. Thus, one may note here the influence of EU fundamental rights on German Jurisprudence, in particular the doctrine of "interpretation

[5] Cf. Limbach 1996, para 3.

[6] German FCC, 2 BvL 37/91 (Order of 22 June 1995) para 52 – *Halbteilungsgrundsatz* (in BVerfGE 93, 121 et seqq.).

[7] Cf. Sacksofsky 2006, p. 661 et seq.; Sauer 2006. Consequently, in translations of the BL made for and published by the Government or the Bundestag, one may find the English term "also" and the French term "en même temps": Federal Ministry of Justice and Consumer Protection: Basic Law for the Federal Republic of Germany (2014), translation by Tomuschat and Currie, http://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html#p0079 (any direct BL quote in this text is taken from this translation); German Bundestag: Loi Fondamentale pour la République Fédérale d'Allemagne (2012), translation by Autexier et al., http://www.bundestag.de/blob/189762/f0568757877611b2e434039d29a1a822/loi_fondamentale-data.pdf

[8] German FCC, 2 BvR 2134, 2159/92 (Judgment of 12 October 1993) – *Maastricht* (in BVerfGE 89, 155 [171 et seq.]), criticised by numerous scholars, e. g. Gassner 1995, p. 429 et seqq.; Häde 1993, p. 2457 et seq.; Hobe and Wiegand 1994, p. 1 et seq.; Tomuschat 1993, p. 489 et seqq.

[9] E. g. German FCC, 2 BvE 2/08 et al. (Judgment of 30 June 2009) para 220 – *Lissabon-Vertrag* (in BVerfGE 123, 267 et seqq.): "The German constitution is directed towards opening the sovereign state order to peaceful cooperation of the nations and towards European integration"; cf. also para 240: "the principle of the BL's openness towards European Law (*Europarechtsfreundlichkeit*)".

in accordance with the directives" ("richtlinienkonforme Auslegung"[10]). This will lead to reflections on how far the "Europeanisation" of national constitutional law has already gone and if in fact the EU may, at least indirectly, amend the Basic Law.

A. Weber, in his farewell lecture, decisively opposed *R. Herzog*'s and *L. Gerkens*'s appeal to "stop" the European Court of Justice, specifically because of the court's assessing a (not yet enforced) prohibition of discrimination on the ground of age to be a "general principle of law".[11] Subsequently, he is credited with favouring the FCC in the context of further steps towards the implementation of a *written* EU clause (Art. 21 of the Charter of Fundamental Rights, EUCFR) in national constitutional law. Furthermore, his general interest in matters of actual social significance has been made clear in many discussions with both colleagues and his academic assistants; we have in particular discussed and held lectures on controversially received decisions of the FCC. Therefore, I hope that the treatment of the FCC's jurisprudence on same-sex registered couples raises his interest, for both of these aspects may be found in it. Last but not least, the FCC's convergence (almost a de facto equalisation) of registered civil partnership and marriage raises the fundamental question of the separation of powers, seen as a serious and real danger by *B. Rüthers*. If "marriage", as conceived in Art. 6.1 BL ("Marriage and the family shall enjoy the special protection of the state.") is to include same-sex marriages, contrary to what was intended at the time of the adoption of the BL, it should be the responsibility of the legislature and not of the judiciary to change it, and the legislature should explicitly amend the Basic Law in that sense.[12] Conversely, Art. 21.1 of the EUCFR contains a prohibition of discrimination based on "sexual orientation". Does this have a binding effect on the BL, directly or indirectly, or serve at least as an inspiration and influence on its interpretation?

2 The Starting Point: The National Legislator's Will and the Emergence of Art. 21.1 of the Charter of Fundamental Rights

2.1 The Relevance of the Negative Intention of the Constitution-Making Body: No Requirement of Interpretation in the Original Sense!

The FCC has consistently stated that "marriage" means a legal union or status of persons of different sexes.[13] But this interpretation is not necessarily valid forever,

[10] Kühling 2014, p. 481 et seqq.; Tonikidis 2013, p. 598 et seqq.
[11] Weber 2012, p. 307 et seqq.; cf. Herzog and Gerken 2008; cf. Case C-144/04, *Mangold* (ECJ 22 November 2005); Herrmann 2006, p. 69 et seq.
[12] Rüthers 2013.
[13] German FCC, 1 BvR 205/58 (Judgment of 29 July 1959) (in BVerfGE 10, 59 [66]); 1 BvR 636/68 (Decision of 4 May 1971) – *Spanier-Entscheidung* (in BVerfGE 31, 58 [82]); 1 BvR 16/72 (Order of 11 October 1978) – *Transsexueller* (in BVerfGE 49, 286 [300]);

bearing in mind that the FCC was never hostile to a dynamic approach in interpreting the BL, as *Limbach* in particular has emphasised.[14] One must bear in mind that "historical" interpretation is one method among others, but not the only method. *Rüthers* is, of course, right in assuming that in 1949, the question whether married couples may be of the same sex was simply not something the creators of the Basic Law had in mind. In other words, the question was not answered in the negative, it was not even imagined.[15] But this is as natural as we, in our time, do not know and cannot know the social issues of the year 2075. Social change is not only natural, but in most cases broadly accepted, if not ardently desired and later welcomed. Some examples may be given. Since its enactment in 1949, the Basic Law contains the following provisions: "Human dignity shall be inviolable" (Art. 1.1 BL), "All persons shall be equal before the law" (Art. 3.1 BL), "Marriage and the family shall enjoy the special protection of the state" (Art. 6.1 BL). But in that year, nobody had and could have possibly considered the human dignity of transsexuals or embryos *in vitro*, or indeed the status of same-sex married couples or any other form of equal treatment of homosexuals. In a broader sense, it was common knowledge that fundamental rights were of limited applicability and subject to various pre-conditions which nowadays are considered no longer relevant. In former times, it was a common assumption which did not have to be written in the Constitution that some people (such as pupils, minors, prisoners, soldiers and civil servants) were subject to a "special relationship of subordination" ("besonderes Gewaltverhältnis"), conferring on them what may be called second-class fundamental rights. The right to physical integrity (Art. 2.2 sentence 1 BL) did not apply to pupils and minors, their corporal punishment by teachers, parents and instructors being not only widely practised, but almost unquestioned. The right to privacy of correspondence (Art. 10.1 BL) did not apply to prisoners, until in 1972, a famous FCC order put an end to that.[16] Some fundamental rights did not fully apply to civil servants, formerly considered as mere executioners of the public authority's will[17] and thus as the State itself and not as individuals who may oppose their fundamental rights *against* the State. And even if this had been fundamentally contested more than half

1 BvL 136/78, 1 BvR 890/77, 1 BvR 1300/78, 1 BvR 1440/78, 1 BvR 32/79 (Judgment of 28 February 1980) – *Ehescheidung* (in BVerfGE 53, 224 [245]); 2 BvL 27/81 (Order of 8 March 1983) (in BVerfGE 63, 323 [330]); 1 BvF 1/01, 1 BvF 2/01 (Judgment of 17 July 2002) – *gleichgeschlechtliche Lebenspartnerschaft* (in BVerfGE 105, 313 [345]); 2 BvR 1397/09 (Order of 19 June 2012) – *Lebenspartnerschaft Beamter* (in BVerfGE 131, 239 [259]); 2 BvR 909/06 (Order of 7 May 2013) para 86 – *Ehegattensplitting* (in BVerfGE 133, 377 et seqq.).

[14] Limbach 1996, para 1 et seqq.

[15] Cf. Michael 2010, p. 3538 et seq.; Rüthers 2013.

[16] German FCC, 2 BvR 41/71 (Order of 14 March 1972) – *Strafgefangenenentscheidung* (in BVerfGE 33, 1 et seqq.).

[17] The image of a civil servant as being "just a cog in the State's clockwork" (Rad im Uhrwerke des Staates), originating from Gönner 1808, p. 208 et seq., was evoked as late as 1992 and maintained in 2005 by Depenheuer: Depenheuer 2005, para 19; Depenheuer 1992, p. 405; criticised by Leuze 1998, p. 188. A more general, critical approach to an alleged resurrection of the institution of "special relationship of subordination" ("besonderes Gewaltverhältnis") is given by Sachs 2004, p. 209 et seqq.

a century ago, who would possibly have foreseen that someday, a Muslim would apply to be appointed to the teaching profession at a public school (i. e. as a civil servant) and challenge the decision that her declared intention to wear, in the name of freedom of religion (Art. 4.1/2 BL), a headscarf at school and in lessons means that she is unsuited for the office?[18] It was not before 2001 that *E. W. Böckenförde* could state the following: "The idea that on entry into the status of a civil servant, one has to surrender his fundamental rights 'at the door', as was still accepted in 1949, is overcome without any question."[19]

According to *G. Dürig*, ladies' wrestling could not benefit from fundamental rights' protection for in 1958, he considered it to indicate a "tastelessness" which should cause one "to be ashamed of oneself".[20] Nowadays, by contrast, ladies' wrestling is an Olympic sport.

These examples give a vivid demonstration that anyone intending to interpret the Basic Law in the exact sense of its founders' will and in the context of formerly accepted moral values, should be ready to go back in time, since many of its underlying moral values have not only changed considerably, but with common consent. Social change is as inevitable as natural and therefore should not in general be dismissed. *Rüthers* is right in emphasising the importance of an "original intention of a provision".[21] But he turns into an insurmountable criterion of legal interpretation what is no more (but also no less) than a starting point.

In his interpretative approach, *Rüthers* approaches the US doctrine of "originalism", according to which the Constitution should be interpreted in accordance with its original meaning – that is, the meaning it had at the time of its enactment.[22] Even applied to Germany, this doctrine is, as we have seen, highly questionable, but it becomes much more indefensible and almost absurd when applied to States with much older constitutions. The Fourteenth Amendment of the U.S. Constitution (1868) granted all persons equal protection of the laws,[23] but this was far from requiring equal treatment of races, which, in the field of public education, was not

[18] Cf. German FCC, 2 BvR 1436/02 (Judgment of 3 June 2003) – *Kopftuchurteil* (in BVerfGE 108, 282 et seqq.).

[19] Böckenförde 2001,1 BvR 471/10 (order of 27 January 2015) – *Kopftuchbeschluss* (in: Die Öffentliche Verwaltung, 68, p. 471 et seqq.), p. 725: Die Rede von den Grundrechten, die "beim Eintritt ins Beamtenverhältnis, wie man noch nach 1949 meinte, an der Türe 'abgegeben' werden", sei eindeutig überwunden (my translation).

[20] Dürig, in Maunz and Dürig (1958), Art. 1 Abs. I para 28: "Geschmacklosigkeit", "Bei Damenringkämpfen schämt man sich" (my translation).

[21] Rüthers 2013.

[22] Cf. Heun 2008, p. 233 et seqq.; Kahn 2001, p. 574 et seqq.; brief overview in http://www.sandiego.edu/law/centers/csco/; its significance for the *Tea Party*: Foley 2012, p. 167 et seqq.

[23] Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. http://en.wikipedia.org/wiki/Fourteenth_Amendment_to_the_United_States_Constitution

applied or enforced until the U.S. Supreme Court's landmark judgment (1954) in *Brown v. Board of Education*.[24]

Many things self-evident today were seen quite differently some years ago without this being necessarily enshrined in a written legal document. For example, it was commented on regarding the Prussian police and public order law in the 19th century that it does not have to be written law that it be forbidden to smoke in public but that it is permitted to drop litter in the street. Today, it is exactly the contrary which is supposed to be equally obvious.[25] The same is true for the French Declaration of Human and Civil Rights (1789): These rights were not intended to be applicable to a substantial part of society, notably women and Jews.[26] Today, it is exactly this Declaration which is not only seen as a landmark in Human Rights Law, but which is also directly applicable and enforceable in French Constitutional Law. It has been incorporated in the Constitution of the 5th Republic[27] – with, of course, a general applicability to all human beings (or, for some rights, all citizens). This illustrates that originalism is a dangerous and misleading doctrine.

2.2 *The Genesis of the Suspect Criterion of "Sexual Orientation" in Art. 21.1 of the Charter of Fundamental Rights*

When in 1999 the Charter was drawn up by a Convention consisting of a representative from each EU Member State and from the European Commission, as well as Members of the European Parliament and of national parliaments, the prohibition of discrimination based on the ground of sexual orientation was not unknown to the Convention's members. For example, the post-apartheid Constitution of the Republic of South Africa was drafted under constructive advice from scholars worldwide, notably from Germany.[28] The fact that this Constitution contained a non-discrimination clause on those lines evoked no one's anger or astonishment, except for two (out of 400) representatives of the fundamentalist *African Christian Democratic Party* in the Constitutional Assembly.[29] Although EU Member States did not have

[24] Supreme Court of the United States, Nos. 1, 2, 4 and 10 – October Term 1953 (Judgment of 17 May 1954 – *Brown vs. Board of Education*), 1953347 U.S. 483 (1954), http://caselaw.lp.findlaw.com/scripts/getcase.pl?navby=CASE&court=US&vol=347&page=483

[25] Kirchhof, P.: Speech on the occasion of his honorary doctorate at the University of Osnabrück, 23 June 2006; speech on the occasion of the 25-year existence of the Faculty of Law at the University of Osnabrück, 5 November 2005. Both speeches are unpublished but were attended by the author.

[26] Kirchhof (cf. supra).

[27] Cf. Preamble of the Constitution of 4 October 1958: "The French people solemnly proclaim their attachment to the Rights of Man and the principles of national sovereignty as defined by the Declaration of 1789".

[28] Gas 2002, p. 37 et seqq.

[29] Green 1996, col. 375 et seqq.: "we have strong objection to the inclusion of the words 'sexual orientation', which is aimed at giving a lifestyle of homosexuality and lesbianism constitutional recognition. [...] The Bible teaches that homosexuality and lesbianism are sins which people

such a clause before the proclamation of the Charter in 2000,[30] it had been included in the constitutions of some of the German *Länder*.[31] The principal discussions in the Convention concerned matters other than the "sexual orientation" criterion (e. g. the prohibition of discrimination on the ground of age, which was more controversial in both jurisprudence and legal debate in both Germany and the EU).[32] Although it was criticised by some German scholars,[33] the Convention was finally able to adopt the clause outlawing discrimination on grounds of sexual orientation without difficulty or controversy. Later, Germany likewise adopted and ratified the Lisbon Treaty, which conferred on the Charter the status of directly applicable EU primary law. In summary, it must be said that the provision's genesis was far less complicated than its academic discussion and reception. This is supposedly an explanation for the fact that the FCC gave his reasoning on the impact of the clause in German Constitutional Law in very few words, notwithstanding the substantial impact and consequences of its decision in the case to be discussed.

3 The Influence of the European Charter in the FCC's Decision Concerning the Unequal Treatment of Marriage and Registered Civil Partnerships with Regard to Survivors' Pensions ("Hinterbliebenenversorgung")

Although the question to what extent Art. 51 EUCFR directly binds the Member States[34] was not raised in the case under discussion, the FCC accepted Art. 21 EUCFR as well as other norms of International Human Rights Law as sources (among others) for the interpretation of Art. 3 BL: "A strict standard of review in connection with unequal treatment relating to sexual orientation, which approaches the standard applied in connection with other prohibitions of discrimination, is also in line with the development of European law. Both Art. 13 of the EC Treaty and Art. 21.1 of the Charter of Fundamental Rights (ECtHR) of the European Union include sexual orientation in the group of prohibitions of discrimination. The case-law of the European Court of Human Rights also requires just as 'serious grounds' to justify differentiations based on sexual orientation as for those based on sex (ECHR, judgment of 24 July 2003 – no. 40.016/98 – Karner v. Austria, *Österreichische Juristen-*

voluntarily choose to commit [. . .] there is a possibility for homosexuals to leave their sinful life. It is not a permanent condition.".

[30] Since 2005: Chap. 1 Art. 2.4, Chap. 2 Art. 12 Constitution of Sweden; since 2004: Art. 13.2 Constitution of Portugal.

[31] Art. 10.2 Constitution of Berlin (since 1995); Art. 12.2 Constitution of Brandenburg (since 1992); Art. 2.3 Constitution of Thuringia (since 1993); cf. Hölscheidt, in Meyer (2014), Art. 21 para 10.

[32] Hölscheidt, in Meyer (2014), Art. 21 para 23 et seqq.

[33] Streinz, in Streinz (2011), Art. 21 EUCFR para 4, footnote 8; Tettinger 2001, p. 1013.

[34] Cf. Barsch and Garms 2014, p. 54; Kingreen, in Calliess and Ruffert (2011), Art. 51 EUCFR; Ogorek 2014, p. 954 et seqq.; Ruffert 2014, p. 662 et seqq.; Thym 2013, p. 889 et seqq.

Zeitung 2004, p. 36 (38) with further references)."[35] Sexual orientation is de facto made equivalent to the other prohibited grounds in Art. 3.3 BL, for they all describe both personal and unchangeable characteristics. It is clear that the brief reasoning concerning EU law does not necessarily carry sufficient weight for the establishment of a new technique of interpretation. But on the other hand, this may be due to the assumption (yet to be proven) that the analogous application of Art. 3.3 BL when being discriminated against because of sexual orientation does not evoke any dogmatic difficulty. This assumption will be tested by a comparison of two doctrines concerning the interpretation of national law.

4 Interpretation of National (Constitutional) Law in Accordance with the European Charter – a Corollary of the Doctrine of Interpretation of National Law in Accordance with the Directives?

Not only is the doctrine of interpretation of national law in accordance with the directives ("richtlinienkonforme Auslegung") well established in German jurisprudence, but this is also the case with the doctrine of interpretation of national law in accordance with the European Charter. Both are founded on the general principle of loyalty towards the EU ("Unionstreue") as contained in Art. 4.3 TEU and Art. 23.1 BL[36] and on the supremacy of EU law.[37] But this is not so evident when it comes to interpreting national fundamental rights affected by *national* authority, for Art. 51 of the Charter explicitly limits the directly binding effect of the European Charter in this case. A de facto binding effect may thus unlawfully enlarge the Union's competences and could, according to German case law, be considered as a "legal instrument transgressing the limits" ("ausbrechender Rechtsakt"), otherwise called an "ultra vires" act. In other words, this may be an act exceeding EU competences under the principle of conferral and the principle of subsidiarity as elaborated in Art. 5 TEU and thus transgressing the limits of the powers granted with a view to European integration ("Integrationsermächtigung") by the *Bundestag*.[38] Although not only the legislature, but also the executive and even the judiciary are subject to review under the principle of *ultra vires* review, it is, in our case, the FCC's order in the above-mentioned "survivors' pensions" case which may constitute an *ultra*

[35] German FCC, 1 BvR 1164/07 (Order of 7 July 2009) para 88 – *Hinterbliebenenversorgung* (in BVerfGE 124, 199 et seqq.).
[36] E. g. German FCC, 2 BvE 2/08 et al. (Judgment of 30 June 2009) para 240 – *Lissabon-Vertrag* (in BVerfGE 123, 267 et seqq.): "principle of sincere cooperation" (Art. 4.3 TEU) and "the principle of the Basic Law's openness towards European Law (*Europarechtsfreundlichkeit*)" (Art. 23.1 BL).
[37] Jarass 2013, p. 36.
[38] Cf. German FCC, 2 BvE 2/08 et al. (Judgment of 30 June 2009) para 240 – *Lissabon-Vertrag* (in BVerfGE 123, 267 et seqq.); for former reference see German FCC, 2 BvR 2134, 2159/92 (Judgment of 12 October 1993) para 106 – *Maastricht* (in BVerfGE 89, 155 et seqq.).

vires act, i. e. an act of the same body that claims competence for *ultra vires* review. Notwithstanding the fact that the "survivors' pensions" order and the jurisprudence concerning *ultra vires* review emerge from the two different chambers of the FCC and that one may see substantial differences between the "eurosceptical" Second Chamber and the "europhile" First Chamber,[39] it is most unlikely that the FCC will quash its own decisions. In addition, one has to emphasise that the assumption of a doctrine of interpretation of national law in accordance with the European Charter is far from being unlawful when understood in the context of the following principle: If more than one way to interpret a provision of the Basic Law exists, one has to choose the one which is consistent with the European Charter. This is exactly what applies with regard to the doctrine of interpretation of national law in accordance with the directives: If more than one way to interpret a national provision exists, one has to choose the one which is consistent with the relevant EU directive.

5 Evaluation of the Outcome: Should Same-Sex Registered Civil Partners Have the Same Rights as Married Couples?

Rüthers correctly points out that equal treatment only may be given to "equal" persons and that the question whether persons are equal in the sense of "comparable" is inextricably linked to a cultural imprint which may be found implicitly or explicitly in the answer.[40] But in our time, the "cultural imprint" shows in the fact that "sexual orientation" is contained in Art. 21.1 EUCFR as an explicit form of prohibited discrimination. Remember that this is not the will of a few aspiring reformers, but the will of all 28 EU Member States, which adopted and ratified this provision without difficulty.[41] Bearing in mind that these States and their peoples belong to various religious traditions, and that conceptions according to which homosexuality is a sinful aberration and not a personal condition are deeply rooted in some of them, it is of paramount importance that the Member States and their peoples (directly or through their representative bodies) unanimously agreed on the provision.

Nevertheless, equal treatment may lead to a de facto right to marry for homosexuals, which is, by some scholars, seen critically, for in Germany, Art. 6.1 BL contains not only the right to marry, but also an institutional guarantee ("Institutsgarantie") of marriage: "Marriage and the family shall enjoy the special protection of the state." Marriage and the family being linked in this provision, one may argue that marriage is the nucleus of the family which is the nucleus of society and that therefore "special" protection has to be given to couples who are, at least potentially, able to reproduce. This being biologically impossible for homosexuals, one may ask whether granting rights of married couples to them may endanger pop-

[39] Cf. Michael 2010, p. 3542.
[40] Rüthers 2013.
[41] Cf. supra, 2.2.

ulation and social coherence, particularly in times of demographic change and low fertility rates in many EU Member States.

Conversely, marriage is not solely aimed at reproduction. In a State that is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights (cf. Art. 2 TEU, Art. 20.1, 28.1 BL), state authorities are generally prohibited from controlling the reasons for the decision of two individuals to get married. In Germany, a man and a woman may do so without legal obstacles, apart from those contained in §§ 1303 et seqq. German Civil Code (*Bürgerliches Gesetzbuch*).[42] The problems of forced marriages and unconsummated marriages are not discussed here. Apart from such cases, the decision to marry is a personal choice, affecting the core identity and therefore not subject to public control. Couples may marry because they love each other and want to have children, because they love each other, but do not intend to reproduce, in order to save taxes, in order to hide the homosexuality of a spouse, in order to satisfy a demand from parents, in order to "legalise" a long-lasting concubinage before meeting the creator, because although they do not love each other they have sufficient affection to care for each other, because one spouse was offered a barrel of beer by some friends or lost a bet – the list is endless. In many cases, the will to reproduce is of minor importance, and it is clear that the state may not require a couple to provide evidence of their capacity to reproduce before granting a certificate of marriage. Thus, it is far from being obvious that homosexuals should not – albeit directly or indirectly – benefit from the rights of married persons.

It must be added that in our time, the nexus of marriage and reproduction is nothing but a general assumption with many exceptions. And most of the exceptions concern heterosexual, not homosexual couples, which may be seen in the data provided by the latest German mini-census: In 2011, 11.783,000 couples without children (albeit married or not) lived in Germany, compared to 11.710,000 "families" (i. e. married couples with children, unmarried couples with children, lone parents). Of those couples without children, 83.5 % were married, compared to 69.8 % of the "families",[43] so that in fact more than half of all married couples are without children, amounting to a total of 9.838,805 married couples. Even bearing in mind that some of them will reproduce later, the number greatly exceeds the number of registered civil partners which amounted to 27,000 in the same year.[44] Therefore, the "nucleus" aspect makes denying homosexuals equal rights even more questionable, if not absurd. No one would, for example, deny heterosexuals the right to marry who are so far advanced in years that their capacity to reproduce is undoubtedly non-existent. As regards fertility, it is impossible to see a "funda-

[42] http://www.gesetze-im-internet.de/bgb/ (German);
http://www.gesetze-im-internet.de/englisch_bgb/index.html (English).

[43] Federal Statistical Office, Statistical Yearbook 2012, p. 33, https://www.destatis.de/EN/Publications/Specialized/Population/StatYearbook_Chapter2_5011001129004.pdf?__blob=publicationFile

[44] Federal Statistical Office, Statistical Yearbook 2012, p. 38, https://www.destatis.de/EN/Publications/Specialized/Population/StatYearbook_Chapter2_5011001129004.pdf?__blob=publicationFile

mental biological difference"[45] between aged heterosexual couples and homosexual couples.

Last but not least, imagine the following situation: A man and a woman marry and think about whether to have children or not. Will the resulting decision in any way be influenced by *other* couples' legal status and the benefits emerging thereof? Will they deliberately decide against children for the sole reason that with equal treatment of homosexuals, they will have nothing less, but homosexuals will have something more? This is quite unrealistic, for couples will primarily consider their *own* situation. While homosexuals are better off, heterosexuals are not worse off. There is no absolute amount of rights and benefits in this context, and granting rights and benefits to someone does not imply that they are somehow taken away from someone else.[46] This is also the reason why one has to oppose[47] the traditional doctrine of "requirement of distance" ("Abstandsgebot"), supposed to be grounded in the wording of Art. 6.1 BL ("Marriage and the family shall enjoy the *special* protection of the State", my emphasis) as well as in the guarantee of the institution ("Institutsgarantie") of marriage in the same Article: Other legal institutions of partnership are said to keep a distance to marriage,[48] but as was demonstrated, the FCC was right in definitively rejecting this doctrine, which is far from being indisputably enshrined in the Basic Law even at the time of its origin.[49] Contrary

[45] This being *Rüthers*'s reason for denying equal treatment to homosexuals; Rüthers 2013.

[46] Hölscheidt, in Meyer (2014), Art. 21 para 41.

[47] As do, among others: German FCC, 1 BvF 1/01, 1 BvF 2/01 (Judgment of 17 July 2002) para 101 – *gleichgeschlechtliche Lebenspartnerschaft* (in BVerfGE 105, 313 [348]); Barsch and Garms 2014, p. 61 et seqq.; Beck 2010, p. 12; Epping 2015, para 513; Freytag 2012, p. 451; Grünberger 2010, p. 203.

[48] Government of Saxony, Government of Thuringia, cf. German FCC, 1 BvF 1/01, 1 BvF 2/01 (Judgment of 17 July 2002) para 19 et seq. – *gleichgeschlechtliche Lebenspartnerschaft* (in BVerfGE 105, 313 et seqq.); Diederichsen 2000, p. 1843; di Fabio 2003 p. 993; Isensee 2011, para 205; Krings 2000, p. 405 et seqq.; Scholz and Uhle 2001, p. 398; cf. Barsch and Garms 2014, p. 56 et seqq.

[49] German FCC, 1 BvF 1/01, 1 BvF 2/01 (Judgment of 17 July 2002) para 101 – *gleichgeschlechtliche Lebenspartnerschaft* (in BVerfGE 105, 313 [348]): "In the debates on Art. 6.1 of the Basic Law, the question of the protection of new ways of life also played a substantial role (on this, cf. the contributions of Helene Weber, in: *Protokoll der 21. Sitzung des Hauptausschusses*, p. 240, and Elisabeth Selbert, in: *Protokoll der 43. Sitzung des Hauptausschusses*, pp. 552–553). Here, in particular the argument that the special protection of the family excluded the equal treatment of illegitimate children in Art. 6.5 BL (cf. Weber and Süsterhenn in: *Protokoll der 21. Sitzung des Hauptausschusses*, 242–243) was unsuccessful. If Mangoldt, as rapporteur, in his Written Report on Art. 6.1 BL finally noted that this fundamental right was scarcely more than a declaration in the case of which it was not really evident what effect it had as directly applicable law (*Anlage zum stenographischen Bericht der 9. Sitzung des Parlamentarischen Rates*, p. 6), then this reflects that although there was agreement on subjecting marriage and the family to constitutional protection, there was no clarification as to what this means in detail for its relationship to other ways of life. At all events, a requirement of distance cannot be based on this.".
This was confirmed directly or indirectly by many subsequent decisions such as the "survivors' pensions" order and expressly in 2013 in an interview by the Court's vice president F. Kirchhof: "The Basic Law does not contain a requirement of distance", cf. Die Welt, 15 May 2013, http://www.welt.de/newsticker/news2/article114486335/Verfassungsgerichts-Vize-kritisiert-Bayern-wegen-Homo-Ehe.html (my translation).

to *Rüthers*, even originalism does not lead to a requirement of distance. The FCC is on the right track in closing the gap between homosexual and heterosexual couples.

6 Evaluation of the Impact of EU Law

Is there a *general* imperative that all national law has to be interpreted and applied in the light of the European Charter? This may only be a rebuttable presumption, for anything else would overstretch the scope of application of the European Charter, contrary to its Art. 51. Nevertheless, the general principle of loyalty towards the EU ("Unionstreue") as contained in Art. 4.3 TEU and the principle of the Basic Law's receptiveness towards European Law ("Europarechtsfreundlichkeit")[50] require that such a doctrine is applied subject to the following conditions:

- *The wording of the European Charter is unequivocal.* Concerning homosexuality, this is the case with regard to the prohibition of discrimination on the ground of "sexual orientation" in Art. 21.1 EUCFR.
- *The national provision in question does not explicitly exclude the possibility that the Charter should be "read in" and should prevail in the interpretation of the national provision.* This condition is satisfied when Art. 6.1 BL is correctly seen as not containing a "requirement of distance" which would lead to an exception from the general principle of non-discrimination in Art. 3 BL. Although this is a question of major controversy[51], it is sufficient that the requirement of distance is not an explicit and unequivocal obstacle to the application of Art. 21 EUCFR, i. e. *in dubio pro Europa*. In other words: Art. 3.3 BL specifies explicit grounds where discrimination is prohibited, but does not exclude others. Although this was not how the Article was intended to be read[52] (unlike Art. 21.1 EUCFR, it does not contain words on the lines of "any ground such as . . . "), analogous application is at least not explicitly excluded. Therefore the above-mentioned rule applies with the following specification: *If more than one way to interpret a national provision exists without violating its unambiguous wording, one has to choose the interpretation which is consistent with the relevant Charter provision.* It may be added that the general Art. 3.1 BL may serve as a residual norm ("Auffangnorm") for any grounds of discrimination not contained in Art. 3.3 BL and that Art. 3.1 BL shall be applied with the same strict scrutiny as Art. 3.3 BL if a ground such as sexual orientation is equivalent to those grounds encompassed by Art. 3.3 BL.[53]
- *A conflicting norm in EU law of the same rank does not exist.* In the same-sex civil partnership cases, one may ask whether Art. 9 EUCFR may be evoked for it guarantees the right to marry and the right to found a family "in accordance with

[50] E. g. German FCC, 2 BvE 2/08 et al. (Judgment of 30 June 2009) para 240 – *Lissabon-Vertrag* (in BVerfGE 123, 267 et seqq.).
[51] Cf. supra, 5.1.
[52] E. g. Dürig and Scholz, in Maunz and Dürig (1996), Art. 3 para 27 et seq.
[53] Cf. supra, 3.

the national laws governing the exercise of these rights".[54] This may be seen as not requiring the Member States to extend the institution of marriage to same-sex couples on the basis of Art. 21.1 EUCFR. Conversely, the provision does not explicitly or indirectly prevent Member States from doing so, for marriage is not necessarily to be seen as exclusively reserved for two people of different sexes.[55] Moreover, what was said in reference to the "requirement of distance" is also true with regard to Art. 9.1 EUCFR: This Article not requiring, but permitting the requirement of distance, the decision whether to uphold it or not may be determined by Art. 21.1 EUCFR which is thus the decisive provision to which Art. 9.1 EUCFR is subject. The above-mentioned condition has to be interpreted in the following terms: *An uncontestably and thus coercively conflicting norm in EU law of the same rank does not exist.*

7 Conclusion

Who amends the Basic Law? It may be the EU, for Art. 3.3 BL was conceived as containing an exclusive list of grounds for strict scrutiny, which has been enlarged by the ground of sexual orientation as contained in Art. 21.1 EUCFR. But who "amends" the EU Treaties? The Member States as "masters of the Treaties". In some cases, EU law may dynamically develop and thus go far beyond the "masters'" intention. But for the most part, this danger of overstepping the national legislators' conferral of powers and rules is greatly over-estimated. Specifically, the (de facto) incorporation of sexual orientation in Art. 3.3 BL is not legal prestidigitation, but required by the clear wording of Art. 21.1 EUCFR which Member States unanimously and definitively agreed. The interpretation of national law – even constitutional law – in accordance with the European Charter may lead to a substantial "change in the meaning of fundamental rights through European integration" ("Grundrechtswandel kraft europäischer Integration").[56] In the "survivors' pensions" order, the FCC has made a decisive, but probably not final step in the right direction.

A. Weber has always favoured the convergence of national and European fundamental rights,[57] and should therefore be assumed to acclaim this method of interpreting the law. But will he also acclaim the consequences, i. e. the de facto equalisation of same-sex civil partnerships and heterosexual marriages? To be honest, I do not know and I have not asked him. In our numerous discussions on matters

[54] Cf. Barsch and Garms 2014, p. 54 et seqq.; Kingreen, in Calliess and Ruffert (2011), Art. 9 EUCFR para 3.
[55] Freytag 2012, p. 451; Tettinger and Geerlings 2005, p. 425.
[56] Michael 2010, p. 3537 et seqq.; see p. 3542 where he acclaims this kind of interpretation of the BL in German FCC, 1 BvR 1164/07 (Order of 7 July 2009) para 88 – *Hinterbliebenenversorgung* (in BVerfGE 124, 199 et seqq.).
[57] Cf., for example, Weber's article on whether the EUCFR may lead to a "European Constitution": Weber 2000, p. 537 et seqq.

of general political and social interest (which, for a broad-minded scholar on [comparative] constitutional law, European law and International [Human Rights] Law like him, are always inextricably linked to their legal and scientific aspects), we sometimes disagreed. But he has always shown great interest in and openness to the positions of both colleagues and assistants. Being an Emeritus Professor since 2010, *A. Weber* has never ceased to work with his human thirst for knowledge and scientific curiosity. In dealing with an actual and highly controversial topic, this contribution expresses my deep wish that this will long continue in the years to come.

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