Chapter 11
At the Crossroads Between Privacy and Community: The Legal *Status* of Same-Sex Couples in German, Austrian and Swiss Law

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Abstract The *status* of same-sex couples in German, Austrian and Swiss law reveals many similarities, from both the substantial (with regard to parental and material rights, particularly in the field of social benefits) and the institutional perspective (with regard to the shared powers between the central authority and the member States and to the dialectics between the Legislator and the judiciary). In the three jurisdictions examined, the traditional resistance toward same-sex marriage has not prevented the national Legislators from adopting, over the past decade, a regulation introducing same-sex registered partnerships. The main common features of these provisions are admittance to registered partnerships only for same-sex couples, a regulatory framework imitating the basic structure of marriage, and a progressive inclusion of registered partners within the social security schemes. This common model, which could per se be referred to a 'separate but equal' rhetoric, is undergoing some significant transformations in the field of parental rights, whose increasing enjoyment by registered partners (above all in Germany) is broadening the legal and symbolic relevance of same-sex relationships.

11.1 Introduction

The inquiry into the legal *status* of same-sex couples in the countries examined in this contribution moves from the assumption of the common features lying behind the different national models. Germany, Austria and Switzerland indeed have a largely common historical and cultural background, which reflects the different regulations concerning the legal treatment of same-sex couples. According to a

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recent classification,[1] these three countries—despite the different solutions given in some areas—share a common approach regarding both the substantive questions surrounding same-sex couples and the institutional ones.

By "substantive questions" I mean, with Bamforth, "the content of the legal rights afforded to those in same-sex partnerships in the jurisdiction concerned" and, in this vein, they encompass both material and parental consequences of same-sex partnerships. For this aspect, the problems raised in the German, Austrian and Swiss jurisdiction are taken into account from the perspective of the constitutional background that has biased the recognition of rights to marriage and cohabitation for same-sex couples, as well as from the most significant judicial decisions that have marked the evolution of this topic in the national fields. Constitutional background is meant to operate as a matrix shaping judicial as well as legislative decisions and, in this way, it reflects the deepest underpinnings of the different models sketched out in these pages.[2] On this basis, special attention is thus given to the questions arising from the social security benefits granted to same-sex couples in respective jurisdictions, since the three countries taken into consideration have a highly complex and evolved Welfare State system, whose basic inclusive premises have for the most part accepted granting some basic benefits to (registered) same-sex couples. Another aspect highlighted in the following pages concern parental rights, traditionally a hotly debated issue when the *status* of same-sex couples is at stake: in this case, the three models examined show partially different solutions, in particular with regard to the extension of adoption rights, and to access to medically assisted reproduction.

Substantive questions are nonetheless not the only ones that merit examination: behind these, institutional questions arise, "concerning the proper roles and powers of different state institutions in resolving the substantive questions". From this perspective, it must be stressed that the Federal character of the three countries concerned has influenced the evolution of the *status* of same-sex couples, both from the political point of view (in particular when member States show a more traditional approach to these issues) and moreover because of the legislative and administrative powers that fall within their powers, particularly in the field of social security and of family issues procedure (e.g. name, ceremony). Another, although less evident, institutional question concerns the division of powers between the Legislator and the courts, in particular constitutional courts (at least for Germany and Austria, whereas Switzerland lacks a proper system of constitutional judicial review on federal law).

Among the three countries examined in this contribution, Germany is given much more attention because of the scholarly and judicial attention given in recent years to the topic in question and, above all, since its system of registered

[1] Bamforth (2011), p. 551.

[2] A general overview about the problems raised by the constitutional family law in a comparative perspective is that of Marella and Marini 2012, p. 747. Specifically on the comparative legal treatment of same-sex relationships see Sáez (2011), p. 1.

partnership (adopted in 2001) has served as a model for the subsequent Swiss (2004) and Austrian (2010) legislation, that raised until now a narrow judicial litigation.

11.2 The *Status* of Same-Sex Couples in German Law

11.2.1 Constitutional Background

According to a widespread trend in comparative constitutionalism, the explicit granting of family rights in the Constitution is a relatively new phenomenon in German law.[3]

Whereas the Art. 119 of the Weimar Constitution (1919) enshrined a program of State protection for the family by considering it a relevant element in safeguarding the basic tenets of the society, the *Grundgesetz* of 1949 (Basic Law, BL) embodied in Art. 6 a set of directly enforceable guarantees, which aimed at protecting marriage (para. 1), the rights and duties of parents (paras 2 and 3), the role of the mother (para. 4), and the removal of every discrimination toward children born out of wedlock (para. 5).

The provision of Art. 6 BL most relevant to same-sex relationships is obviously that enshrined in its para. 1, according to which "Marriage and family shall enjoy the special protection of the State". According to the prevailing literature and the longstanding case-law of the Constitutional Federal Tribunal (further referred to as CFT), the constitutional notion of marriage is marked by three necessary elements: it requires State recognition, it must be basically not limited in time, and it requires the different sex of the partners.[4] The influence of Art. 6 BL on the establishment of a system of guarantees for same-sex couples is therefore deeply biased by the traditional arrangements of family law, which historically has been forged upon the model of heterosexual couples, because of their openness to children and to the consequent creation of a "family", which enjoys the rights embodied in the other paras of Art. 6.[5] Before dealing with the concrete *status* homosexual couples can have in German law, it bears mentioning the interpretive developments affecting Art. 6, in order to assess its contribution to the most recent evolution concerning homosexual marriage and registered partnership.

The CFT has stated from the early stage of its activity that Art. 6, para. 1, BL embodies a three-fold guarantee, since marriage and family cannot be reduced to a plain individual right, not only because marriage and family are institutions that the law inherits from social practices, but also because they are deeply shaped by these

[3] For the historical evolution see Ipsen (2009), p. 432.

[4] Gröschner (2004), Artikel 6, para. 39. The leading cases of the CFT in this field are BVerfGE 10, 59 (66), 49, 286 (300) and 62, 323 (330).

[5] Papier (2002), p. 2129.

practices and by individual (religious, cultural, ethical) beliefs.[6] Their protection and enforcement therefore imply a wider range of constitutional protection, which must take into account, at the same time, both the individual dimension of marriage and its social embeddedness. At an initial stage, the right to marriage is thus deemed to encompass a sphere of private autonomy which protects individuals from State intervention (*Abwehrrecht*): according to this function of right to marriage, Art. 6 ensures that both individuals that decided to marry and spouses should not be deprived of their freedom by the State—a freedom needed to reserve to individuals the basic decisions concerning whether, when, how and with whom to marry and to establish a family. In this light, the fundamental right empowers individuals to react against external, i.e. public, pressure on their free will, that they are called to exercise responsibly in order to freely shape their matrimonial and familiar choices.[7]

At a second stage, the right to marriage must be considered a guarantee of the institution of marriage (*Institutsgarantie*), in that it protects the "core" of the public regulation of marriage and family law against a reshaping which may threaten their basic tenets.[8] This peculiar mode of protection of fundamental rights related to deeply-rooted social institutions, which German legal doctrine inherited from the Weimar period and which reflects the enmeshment of constitutional provisions and basic choices made over time by the Legislator, is intended to protect individuals not only from State interventions, but also to ensure them and society a substantial continuity in the discipline of the legislative basic ordering (*Ordnungskern*) of marriage: individual rights are infringed whether the legal framework of marriage is abolished or, more plausibly, whenever a legislative choice imperils an element of this basic ordering, whereas in other cases Parliament is free to regulate marriage.[9] It bears stressing that the institutional guarantee had great relevance for the questions concerning same-sex couples, since it was deemed to set a limit against any effort to recognize the union between homosexuals—be it marriage or registered partnership—by reason of the heterosexual structure of marriage enshrined in the legislation.

At the third and final stage, the right to marriage is understood as an objective value (*objektive Wertentscheidung or Grundsatznorm*): in this sense, Art. 6, para. 1, establishes a duty for the Legislator to protect and support marriage and family, as well as a value system, which influences other areas of law (such as tax law or social law) in order to provide a favourable treatment for people that have decided to marry and to establish a family. According to this third way of conceiving the right to marriage, this is thus detached from its individual component and operates

[6] So BVerfGE 31, 58 (83).

[7] BVerfGE 6, 55 (71). For further references on this aspect see Sanders (2012), p. 917.

[8] BVerfGE 76, 1 (49).

[9] BVerfGE 31, 58 (69). For an insightful overview of the right to marry as a guarantee of institution see Pieroth and Kingreen (2002), p. 224.

as a general policy directive, which aims to favour the legislative conditions that encourage and sustain people entering wedlock.[10]

11.2.2 The Emergence of Same-Sex Relationships Issues and the Right to Marriage: The Different Cohabitation Regimes

Before dealing with the enjoyment by same-sex couples of the fundamental rights to live together, it is worth noting that homosexuals acts were generally criminalized in Germany until 1969, when the crime of sodomy (*Unzucht*) was narrowed in its application to male sexual relationships involving a partner under 21 years of age, with the aim of "protecting young men". In 1974 the age limit was even reduced to 18 and the crime was labelled as "sexual acts" (*sexuelle Handlungen*). Only in 1994 was any differential treatment between heterosexual and homosexual relationships abolished in the Criminal Code. It thus appears clear that all debate concerning the *status* of same-sex couples has been deeply influenced, at least until a certain period, by the widespread criminalization of homosexual practices.

11.2.2.1 Same-Sex Marriage

As noted above, the traditional interpretation of Art. 6 BL has described marriage as the relationship that necessarily involves, among other things, two persons of different sex. Notwithstanding this, several efforts have been made in order to broaden the scope and the field of application of the right to marriage to same-sex couples, although neither the Parliament nor the CFT have until now accepted, each one within its own agency, introducing same-sex marriage.

The main critical opinions against this resistance can be summarized in that a similar reading of Art. 6 BL ignores the potential stemming from the anti-discrimination clause enshrined in Art. 3, para. 3 BL, according to which "No person shall be favoured or disfavoured because of sex . . .". Although the notion of "sex" calls into question the male/female dichotomy and not the sexual orientation as such (which is *per se* neutral *vis-à-vis* biological divide), it has been held that it is not sufficient to retain that Art. 6 is a special law applicable only to couples of mixed sex,[11] since the similarities between sex and sexual orientation should call upon the CFT to use very weighty reasons in denying same-sex couples access to marriage.[12]

[10] BVerfGE 87, 1 (35). For further insights see von Coelln (2011), Artikel 6, paras 34–51.

[11] As the CFT lastly did in its admissibility judgment of 4. October 1993 in NJW 1993, 3058, on the basis of its precedents: BVerfGE 10, 59 (66); 49, 286 (300); 53, 224 (245); 87, 234 (264).

[12] Sanders (2012), p. 931 and, even more expressly, Möller (2005), p. 65.

On the other side, beyond the wording of Art. 6 BL, the most relevant question concerning the introduction of same-sex marriage seems to rely upon the possibility of furthering an evolutive interpretation of the right to marriage. Although the CFT has not excluded the possibility of a future overruling—if and when the socially accepted notion of marriage evolves toward accepting same-sex matrimonial relationships[13] and, moreover, the impossibility of procreation is devaluated to an incidental element of marriage, in that the relative decision is safeguarded by the protection of intimacy both for heterosexual and for homosexual couples[14]—the prevailing literature (even that stemming from the progressive wing) has emphasized the unsuitability of an interpretation of Art. 6 BL aimed at bringing same-sex marriage within its field of application.[15]

The contribution arising from the constitutional debate on the legitimacy of same-sex marriage can be seen in the legal evaluation of the discrepancy between the shared meaning of the Art. 6 BL, traditionally referred to heterosexual couples, and social evolution, which has been progressively shown, in Germany, a growing acceptance toward other models of partnerships. In this light, while the majority of scholars recall originalist and essentialist arguments in order to exclude even for the future the constitutionality of same-sex marriage[16] and a minority fosters an over-interpretation of Art. 6 grounded on shared social practices in order to render it applicable to other forms of partnerships,[17] a more nuanced and convincing line of reasoning is that supporting a reading of Art. 6 BL according to which it does not protect same-sex marriage *per se*, but does not rule out that other forms of partnership could be introduced and permitted by the Constitution.[18]

Moreover, in Germany, the strict ban on same-sex marriage has seen a significant exception of relevance for the future chances of broadening the constitutional meaning of marriage. In 1978, the CFT[19] recognized that a post-operative transsexual is admitted to marriage with a person of the opposite gender, although the spouses share the same biological sex. Although this exception to the strictly biological heterosexual paradigm has been justified by the fact that transsexual couples do not call into question the classical social schemes, in that they accept playing the roles of wife and husband and, in so doing, they reinforce tradition, on the other hand this decision is noteworthy since it openly calls into question the potential to procreate as a constitutive aspect of marriage. In the same vein, in 2008 the CFT upheld Art. 8, para. 1, of the law regulating transsexualism (*Transsexuellengesetz*), in that it imposed divorce upon married couples consisting of a partner who, at a certain time, has decided to change his or her gender and become

[13] Sanders (2012), p. 931.

[14] Gröschner (2004), Artikel 6, para. 44.

[15] Pieroth and Kingreen (2002), p. 220.

[16] Among others see Burgi (2000), p. 487 and Robbers (2010), Artikel 6, para 45.

[17] See the authors cited *supra*, note 12, and also Ott (1998), p. 117.

[18] Pieroth and Kingreen (2002), p. 222.

[19] BVerfGE 49, 286.

transsexual.[20] The CFT explicitly recognizes that the aim of the challenged provision was to preserve the heterosexual structure of marriage[21] so that its unconstitutionality in the light of Art. 6, paras 1 and 2 BL can be considered another step toward the erosion of the conceptual hegemony of heterosexuality in marriage issues.

11.2.2.2 *De Facto* Homosexual Couples

If marriage can be considered the main road to the legal recognition of same-sex couples, their *de facto* union can be considered the lesser binding and relevant one, since they do not enter into a specified legal regime. Despite this, same-sex couples that are engaged in a factual relationship (as well as heterosexual couples) are not deprived of a minimum standard of rights.

Although their relationship is not entitled to enjoy rights and benefits accorded to married couples (because in their case a public recognition is lacking), it is still protected by Art. 2 BL, according to which:

> Every person shall have the right to free development of his personality insofar as he does not violate the rights of others or offend against the constitutional order or the moral law.

In the jurisprudence of the CFT as well as in the literature, it has been held that *de facto* couples should not be favoured over married couples, nor could they in any way be equated,[22] although the Legislator is not prescribed to refuse them every kind of legal recognition.[23] The problem is rather whether and to what extent same-sex couples are entitled to enjoy the same rights as heterosexual couples: the equivalence is hotly debated, since some scholars emphasize that even in *de facto* relationships the requisite of opposite sex should be respected—and in this light a difference is drawn between "non-matrimonial community of life" and "community of life similar to registered partnership"[24],—while for others there is no reason to distinguish between sexual orientations of *de facto* partners, since in the light of Art. 2 BL they are both deemed to exercise a "free development of personality".[25]

Apart from this debate and the underlying discrimination profiles, another resource for *de facto* same-sex couples are the so-called "partnership contracts" (*Partnerschaftsverträge*), which are agreements aimed at regulating mutual economic assistance. Even if partnership contracts are freely available to same-sex couples, it must be stressed that their sphere of regulation is closely bound by

[20] BVerfGE 121, 175.
[21] BVerfGE 121, 175 (193).
[22] BVerfGE 9, 20 (35).
[23] BVerfGE 82, 6 (15) and 87, 234 (267).
[24] von Coelln (2011), Artikel 6, para. 48.
[25] Schüffner (2007), p. 374.

economic matters, since every agreement aimed at intervening in personal or lifestyle aspects must be considered void according to Art. 134 and 138 of BGB (contrast with good morals).

11.2.2.3 Registered Partnerships (*Lebenspartnerschaft*)

In Germany, the most important legal instrument same-sex couples can refer to in order to recognize their union is registered partnership (*Lebenspartnerschaft*: literally "life-partnership"), introduced in 2001. The Act on registered partnerships (*Lebenspartnerschaftsgesetz*, further referred to as LPartG) was approved by a coalition of social-democrats and the Green Party despite huge resistance stemming both from the broad areas of the population more sensitive to opposition by the two leading religious groups (Catholics and evangelicals), and from the more conservative executives of the *Länder*. For this reason, the parliamentary majority decided to split the Act into two different regulations, since many articles needed to be approved by the *Bundesrat*, whose majority was represented by hostile *Länder* members. The first one, LPartG, was published on 16 February 2001 as a part of a broader legislative intervention aimed at ending all discrimination toward same-sex couples,[26] while the more controversial aspects (concerning tax law and public employment law) were delayed to a later time and were approved only in 2004,[27] after the CFT had ruled on the constitutionality of LPartG in 2002.[28]

The regulation model of LPartG reflects the constitutional constraints which led to its approval in 2001, under which the necessity was invoked to preserve a "principle of distance" (*Abstandsgebot*) with respect to marriage. Many scholars argued that the protection of marriage enshrined in Art. 6 BL implied that no other family regime, be it heterosexual or homosexual, could be afforded an equal, or even similar, protection and *status*. For this reason, the legislator in 2001 created a model of registered partnership which was centred upon the special nature of the subjects involved therein and upon a limited equivalence with marriage, in particular in the most debated fields of social benefits of registered partners and their relationships with children.

For the first aspect, LPartG reserves access to partnership exclusively to same-sex couples: if opposite sex partners were allowed to engage in a registered partnership, according to the leading opinion, this regime would concur with marriage and thus the "principle of distance" would be imperilled with the consequent violation of Art. 6 BL. Although this policy choice has been strongly criticized, since in so doing it ignores many other relationships that deserve protection without fitting into the "same-sex relationship" cluster, this special

[26] BGBl. I 2001, p. 266.

[27] Gesetz zur Überarbeitung des Lebenspartnerschaftsgesetzes of 15.12.2004 (BGBl. I p. 3396).

[28] See paragraph 11.2.3.1.

regime has remained unchallenged until now and represents, as we shall see in the next paragraph, one of the core reasons used by the CFT in order to justify the constitutionality of LPartG.

Despite this, upon deeper analysis LPartG shows evident similarities among the basic tenets of marriage and registered partnership. According to § 1, the relationship is assumed to be life-long and it cannot in any way be subject to particular conditions or terms. Moreover, according to § 2, partnership is considered as a community of life within which life-partners are compelled to mutual care and support as well as to common life-planning, and are involved in a shared responsibility. They can even choose a common family name (§ 3). All these elements, together with other relevant aspects, lead to the conclusion that the legal framework of registered partnership in Germany has derived from marriage those basic elements concerning mutual engagement and shared responsibility that are not a strict consequence of the heterosexual paradigm: in this vein, it has been correctly held that marriage and registered partnership are "separate but equal".[29]

For the aspects not strictly related to the structure and requisites of partnership, in particular in the social and childcare fields, the choices of 2001 were marked by an outstanding prudence and only in subsequent years, thanks to the joint action of the legislator and of the CFT, were some restrictions eliminated. As we shall see,[30] it has been up to the CFT (also under pressure from the EU Court of Justice) in recent years to erode some discrimination concerning the enjoyment of social benefits by same-sex couples, whose awarding was initially denied both for constitutional reasons and due to political resistance, since social rights often involve executive competences of the *Länder*.[31]

11.2.2.3.1 Constitutional Review of Registered Partnership and the Right to Marriage: The Overcoming of the Principle of Distance (*Abstandsgebot*)

After the stark criticism that accompanied the approval of LPartG on both formal and material grounds, the first decision by the CFT on its constitutionality marked a real turning point, whose reasons and effects deeply influenced the evolution of the issue in subsequent years. Called upon to decide on the claims raised by the governments of some *Länder* according to the procedure of "abstract control" (*abstrakte Normenkontrolle*), the CFT rejected the several grounds of unconstitutionality aimed at ascertaining the violation, among others, of Art. 6 BL, since the institute of *Lebenspartnerschaft* was deemed to threaten the constitutional protection of marriage, which deserves a "special" protection and is thus infringed whenever another family law regime is given the same (or almost equal) *status* and protection.

[29] Grünberger (2010), p. 208.

[30] See paragraph 11.2.3.2.

[31] Scherpe (2011), p. 156.

The heart of the decision lies in the solution given by the Karlsruhe Tribunal to the relationship between the legislative measure afforded by LPartG and the "special protection" granted to marriage. The problem is taken into account by separating the different dimensions of the constitutional right to marriage sketched above: as an individual freedom, as a guarantee of the institution as such, and as an objective value reference.

In the form of individual freedom to marry, Art. 6 BL is not infringed by the creation of registered partnership: every person able to marry is not limited in her or his intention by the entry into force of LPartG, since marriage is reserved for heterosexual couples just as registered partnership is reserved to homosexual ones.[32]

Even the guarantee of marriage as an institution is not violated by LPartG: although the concept of marriage has to be drawn mainly by the evolution of social structures, it still involves the basic elements that were highlighted above, under which the sexual difference of the spouses has a cornerstone relevance. This has led the CFT to rule that registered partnerships are excluded from the sphere of protection of Art. 6 BL, in that the Legislator has introduced them in order to safeguard the free expression of personality and the prohibition of discrimination toward homosexuals enshrined in Art. 2 and 3 of the Basic Law. The different sphere of application, which reflects the different personal elements that characterize the legal regimes at stake, means that the right to marriage in not endangered by the possible devaluation afforded by the introduction of registered partnerships.[33]

However, the most controversial question, one that had been hotly debated before the CFT's judgment, regarded the possible infringement of the right to marriage in the established terms of an objective value choice (*objektive Wertentscheidung*). Given that Art. 6 BL assigns to marriage a "special protection", this was meant to establish a "principle of distance" from other forms of cohabitation, i.e. a principle according to which both non-matrimonial heterosexual and same-sex relationships should be treated less favourably than marriage, whose structure and basic elements are deemed to be exclusively referred to it and should not be extended to other forms. This "principle of distance", drawn literally from the reference to the "special protection", also implied in its most extreme strains that marriage should be positively accorded a preference over other forms of relationship: in this wider acceptation, LPartG should have been even more evidently unconstitutional, since LPartG expressly draws from the legal framework of marriage some basic features, such as life-long engagement, mutual support, shared responsibility and so on.[34]

[32] This assertion is all the more true in that a performed partnership is not a limit per se on a person involved in it marrying a person of the opposite sex, even though in such cases the public officer celebrating the marriage is entitled to evaluate the actual will of the spouses to engage in a conjugal relationship: BVerfGE 105, 313 (342).

[33] BVerfGE 105, 313 (345–6).

[34] Among others Burgi (2000), p. 487.

In its 2002 judgment, the CFT rejected these extreme conceptions and stated that, from the constitutional mandate to promote and support marriage, no principle aimed at treating other forms of relationships like registered partnerships less favourably can be drawn: their recognition and promotion does not endanger its significance, which could be threatened only if these other forms concurred with marriage in that partners would enjoy the same rights but would be subject to fewer duties. However, this risk is not run in the case of registered partnerships, since this concurrence is excluded a priori by the different subjects these institutions refer to: "because of this difference, registered partnership is not a marriage under a false label, but a completely other thing" (*ein aliud zur Ehe*).[35] In other words, the constitutional right to marriage is not violated by LPartG because it can still fulfil its functions without any limitation on or prejudice to its basic tenets, while registered partnership—by reason of its functional and structural difference from marriage—does not conflict with Art. 6 BL, even though its introduction is not considered mandatory under the Constitution.[36]

The significance of this decision is undoubted, and has paved the way to the enlargement of guarantees and benefits accorded to registered partners, as shown by the approval in 2004 of the Act containing the provisions in the social field that had been excluded for political reasons in 2001. In this light, it is worth noting that the arguments used by the CFT provide a meaningful account of the constitutional framework that distinguishes registered partnerships from marriage.

The CFT has refused to measure the constitutionality of the 2001 provision moving from a comparison with marriage and, on the contrary, has highlighted the even symbolic difference between the two regimes: while marriage is deemed to operate as a constitutionally mandatory regime, which implies rights and duties whose balance is not generally at the political majorities' disposal, registered partnership operates as a "simple" family law regime,[37] whose significance should not be symbolically overestimated as a "second-choice marriage" and whose main features remain in the hands of the legislator, since it enjoys only the constitutional protection offered by Art. 2 and 3 BL.

One might say that, in so doing, the CFT has devalued the constitutional significance of same-sex relationships, particularly because it has left its introduction in the simple hands of the Legislator, although bound by the freedom to express their personality and the right to equality and non-discrimination. On the other hand, it is to be said that with its judgment, the CFT has weakened the criticisms against registered partnership as a "lesser marriage", which for opposite reasons could have imperilled the autonomy and persistence of LPartG. On the one hand, the drastic distinction drawn by the CFT erodes every effort to conceive of registered partnership as an institution aimed at threatening the centrality of

[35] BVerfGE 105, 313 (351).

[36] For a similar reading of Art. 6 BL see Pieroth and Kingreen (2002), p. 241 and Gröschner (2004), Artikel 6, para. 49.

[37] Robbers (2001), p. 782.

marriage. On the other hand, the pragmatic approach used by the CFT ends up rendering same-sex relationships something even symbolically different from marriage, in that they can deploy a proper symbology and a rhetoric that is not blatantly forged upon marriage and its heterosexual paradigm.[38]

11.2.2.3.2 The *Status* of Registered Partners in the Social Field

Since the constitutionality of the Act introducing registered partnership was affirmed in 2002, its legitimacy has remained unchallenged until now. Moreover, grounding its legislative action upon the outcomes of the 2002 judgment, since 2004 the Legislator has introduced a wider range of social provisions, aimed at progressively enacting the principle of equal treatment between marriage and registered partnerships. For example, several dispositions of the Code of Social law (*Sozialgeseztbuch*) have been modified by Art. 3 of the Act revising LPartG in order to grant benefits like compulsory social insurance (*gesetzliche Rentenversicherung*) or the widower's pension (*Hinterbliebenenversorgung*) not only to spouses, but to registered partners as well. In the same vein, Art. 4 of the same Act extended measures in the field of social assistance provided by Federal law (*Bundesversorgung*). The Federal legislation was however not completely free to regulate the social matter, since in the field of pensions and other state benefits many legislative powers fall within the competence of the German States, which have correspondingly not made uniform provisions in this area.[39]

Since 2004, federal and local interventions in the social field—each within its own realm—and judgments by the CFT have alternated, and, in so doing, a certain overlapping has been created, although it should be recognized that the regulative stream now flows steadily toward a progressive widening of social guarantees ensured to same-sex registered partners. This stream has moreover been corroborated by the constitutional reform concerning federalism of 2006, which clarified the separation of powers between the Federation and the States, often by strengthening the position of the former over the latter.

Within this framework, the CFT's decisions have helped steer the interpretation of constitutional guarantees concerning the matter at hand, and have influenced the enactment of local and federal provisions aimed at granting a wider spectrum of social benefits to same-sex partners.

The point of departure is represented by two decisions of 2007 and 2008, in which the CFT was called upon to decide whether the denial of a family allowance to registered partners violated Art. 3 BL and the principle of non-discrimination

[38] An example, among others, of this virtuous approach lies for example in the recognition that registered partners, unlike spouses, are not legally compelled to engage in a sexual relationship: BVerfGE 105, 313 (317). This fact should not necessarily be regarded as a deficiency with respect to marriage, but rather as a difference that qualifies same-sex relationships and makes them able to develop a proper constellation of values and symbols.

[39] For an overview see Hußmann (2010), p. 194.

enshrined therein. In both cases, the Karlsruhe Tribunal provided a traditional interpretation of the non-discrimination clause against same-sex couples, mainly referring the notion of "sex" to the differential treatment grounded on biological sex and not sexual orientation. Since this factor rests outside the realm of Art. 3 BL, registered partners are not infringed in their rights to enjoy such benefits granted to married couples. Moreover, the CFT stresses that the preference accorded to married couples is to be drawn from the duty to promote marriage over other forms of partnership as vested in Art. 6 BL (*Förderungspflicht*). This restrictive interpretation of the principle of non-discrimination appears to narrow the chances for a fuller enjoyment of social benefits by same-sex couples if one considers that in the 2008 judgment, the CFT was called upon to decide also on the basis of a preliminary ruling by the European Court of Justice (further referred to as ECJ),[40] which had stated in the same year that the denial of a widower's pension to a German registered partner infringed Directive 2000/78/EC, which prohibits discrimination grounded on sexual orientation.[41]

Even though it was devalued in 2008, the contribution of the ECJ's *Maruko* ruling played a key role in 2009 when the CFT had to deal with the refusal to recognize the widower's pension to a registered partner as had been provided for by the organizational norms of the main pension agency for public officers (*Versorgungsanstalt des Bundes und der Länder*—VBL). On this occasion, the CFT reversed its interpretive principles. On the one hand, it stated, in accordance with a trend emerging in European law,[42] that discrimination grounded on sexual orientation should be encompassed among those prohibited in Art. 3 BL, since it is at any rate centred upon a personal trait that should render the scrutiny of the judge much more strict and severe.[43] On the other hand, the equation in this field between married couples and registered partners is not prevented by the "special protection" afforded to marriage, which in this case was connected, according to the first-instance judges, with the objective of the widower's pension to support the family as a whole, i.e. the surviving spouse and the couple's children. The CFT upheld this established interpretation by ruling that the presence of children is not necessary in order to grant the benefit in question and therefore the discrimination is not justified, because the legislative aim to support couples engaged in a life-long relationship, in mutual support and in a shared responsibility should regard married as well as

[40] *Tadao Maruko v. Versorgungsanstalt der deutschen Bühnen*, C-267/06, judgment of 1st April 2008 [2008] ECR I-1757. The principles enshrined in *Maruko* are at the core of the following decision *Jürgen Römer v. Freie und Hansestadt Hamburg*, C-147/08, judgment of 10th May 2011, ECR I-3591.

[41] See the Chapter by Orzan in this volume.

[42] Michael (2010), p. 3539.

[43] BVerfGE 124, 199 (220). The same argument has recently been used by the CFT in order to reverse its previous case-law concerning family allowance, whose denial to registered partners is unconstitutional: see Second Senate Decision of 19 June 2012 (2BvR 1397/09).

same-sex registered couples.[44] In this light, the enjoyment of the widower's pension finds its *raison d'être* not in the furtherance of a given social role played by the heterosexual family (which is deemed per se open to procreation), but rather in a partnership which engages in a community of life, in which a basically common set of rights and duties is accepted. In such a framework, the partner's sexual orientation loses its discriminatory potential.[45]

11.2.2.3.3 The *Status* of Registered Partners and Children

The first version of LPartG in 2001 was very hesitant with regard to the rights of registered partners toward children, since the only provision in this field concerned "small parental custody", which implies the right of a member of the couple to take decisions concerning the everyday life of the other member's child and to intervene in case of emergency (§ 9, paras 1 and 2, LPartG). However, this provision does not create a family bond, with the consequence that between the child and the other registered partner, no legal parenthood is established. This lack of recognition has been considered a disadvantage for the child, because, should the only legal parent die, the other partner would not be entitled to take care of him or her or to let him or her benefit from the parental *status* (e.g. for succession, maintenance, or social benefits). For these reasons, the Act revising LPartG introduced the step-child adoption (§ 9, para. 7, LPartG), according to which a life partner may solely adopt a child of his or her partner.[46]

The issue of constitutionality raised against this provision was declared inadmissible by the CFT in 2009 on formal grounds.[47] A recent decision adopted by the CFT has on the contrary declared this provision partially unconstitutional, in that it forbids the adoption by a life partner of the child previously adopted by the other (successive adoption).[48] It bears emphasizing that the grounds of unconstitutionality on this occasion have been found in the discrimination suffered by the child adopted by a single involved in a life partnership as compared with the child adopted by a single before marriage, who can be freely adopted by the other spouse after the establishment of the marriage bond. Notwithstanding this, the CFT has not seen in the prohibition of successive adoption made by § 9, para. 7, LPartG for life partners a violation of Art. 6 LF, since a similar right is considered to rest outside the core-content of the right to family, and therefore it is deemed to fall within Legislator's discretion.

[44] BVerfGE 124, 199 (226). In the same vein, the CFT has declared unconstitutional on 7 May 2013 the impossibility for registered couples to benefit of the regime of separate taxation (income splitting) which was available only to married couples (so called *Ehegattensplitting*, 2 BVR 909/06).

[45] Classen (2010), p. 411.

[46] Critical insights toward an enlargement of partners' adoption rights in Gärditz (2011), p. 932.

[47] Decision of 10.8.2009, 1BvL 15/09.

[48] Decision of 19.2.2013, 1 BvL 1/11, 1 BvR 3247/09.

11.3 The *Status* of Same-Sex Couples in Austrian Law

11.3.1 Constitutional Background and the Introduction of Registered Partnerships in 2010

The acceptance of same-sex couples in Austrian law has taken more time and met more resistance than in Germany or even in Switzerland.

The main feature concerning Austria lies in the influence that the European Convention on Human Rights, thanks to its constitutional ranking, has deployed in internal law in these matters. The hostility toward a legal recognition of same-sex couples, which also stems from the narrow space for equalization left open by constitutional rights concerning anti-discrimination and in the absence of a constitutional clause granting the right to marriage and family life,[49] has only in recent years been broadly dismantled due to the interventions of the Strasbourg Court, which has held on two occasions that Austrian same-sex couples are entitled to enjoy a legal *status* assuring them a set of rights and guarantees that takes account of their enduring relationship.[50]

In *Karner v. Austria*,[51] the European Court of Human Rights (further referred to as ECtHR) was called upon to decide whether the inability of a homosexual to succeed in the rent contract of his *de facto* same-sex partner with whom he cohabited was in violation of Art. 8 (Right to respect for private and family life) and 14 (Prohibition of discrimination) of the European Convention on Human Rights (further referred to as ECHR). On that occasion, the necessity to protect the family in the traditional sense was deemed too abstract a goal for justifying a denial that impinges directly upon the sexual orientation of the applicant without any reasonable justification.

Seven years later, in *Schalk and Kopf v. Austria*,[52] Strasbourg judges had to decide whether the impossibility for same-sex couples to access marriage established by Art. 44 of the Austrian Civil Code, which explicitly reserves marriage to "persons of opposite sex", conflicted with Art. 8, 14 and 12 (Right to marry) of the ECHR. In this case, the ECtHR stated that the ban on same-sex marriage did not conflict with the Convention's rights, mainly because marriage issues, given their deep rootedness in society's basic value choices, fall within the state's margin of appreciation and, secondly, because Austria had in the meantime enacted a federal act introducing registered partnership. Although this provision should not be considered fully satisfactory for the applicant's claims, the spaces for

[49] The Austrian Constitutional Court has held in two occasions, with a sharply brief motivation, that same-sex marriage is unconstitutional: in Case B 777/03, 12th December 2003 and in Case B 1512/03, 14th October 2004.

[50] On the ECtHR jurisprudence see the Chapters by Crisafulli and Pustorino in this volume.

[51] N. 40016/98, judgment of 24th July 2003.

[52] N. 30141/04, judgment of 24th June 2010.

legal recognition it opens reduce, to a certain degree, the harm and distress suffered by same-sex couples living in an entirely *de facto* relationship.

The Registered Partnership Act,[53] which now provides a complete regulation of the *status* of same-sex registered couples, entered into force on 1st January 2010. According to its § 2,

> A registered partnership may be formed only by two persons of the same sex (registered partners). They thereby commit themselves to a lasting relationship with mutual rights and obligations.

The rules on the establishment of registered partnership, its effects and its dissolution, resemble the rules governing marriage: like married couples, registered partners are expected to live together as spouses in every respect, to share a common home, to treat each other with respect and to provide mutual assistance (§ 8(2) and (3)). As in the case of spouses, the partner who is in charge of the common household and has no income has legal authority to represent the other partner in everyday legal transactions (§ 10). Registered partners have the same obligations regarding maintenance as spouses (§ 12). The Registered Partnership Act also contains a comprehensive range of amendments to existing legislation in order to provide registered partners with the same *status* as spouses in various other fields of law, such as inheritance law, labour, social and social insurance law, fiscal law, the law on administrative procedure, the law on data protection and public service, passport and registration issues, as well as the law on foreigners.[54]

The recent entry into force of the EPG has yet to raise significant judicial litigation, both at the constitutional and ordinary levels. A noteworthy exception concerns a decision of 22nd September 2011 by the Constitutional court,[55] ruling on the constitutionality of reserving registered partnership only to same-sex couples and not to heterosexual couples. The applicants claimed infringement of Art. 8 and 14 of the ECHR as well as of the constitutional clauses on equality (Art. 2 of the Fundamental law on citizen's rights and Art. 7 of the Federal Constitutional Law). The Constitutional court dismissed the application with reference to both parameters, since neither from the ECHR nor from the Constitution should a principle of equal treatment between same-sex (registered) couples and heterosexual (married or non-married) couples be drawn: marriage and registered partnership are placed on a different—although in certain aspects equated—scale, and the legitimacy of the EPG rests upon the different subjects that can be involved therein. Access by heterosexual couples to registered partnership, as well as by same-sex couples to marriage, imperils this separation of areas and, in so doing, threatens the preference accorded to marriage as the cornerstone of family law. Moreover, in a recent decision,[56] the Constitutional court decided to declare unconstitutional those

[53] Federal Law Gazette (Bundesgesetzblatt) vol. I, no. 135/2009 (further referred to as EPG).

[54] Further elements in Aichberger-Beig (2010), p. 68.

[55] Case B 1405/10-11.

[56] Case B 125/11-11, 12.12.2012.

provisions of the EPG that discriminated registered partners with respect to spouses as to the place of the ceremony (since partnership ceremony was performed according to the EPG before the District Administrative Authority whereas marriage is concluded before the Office of personal *status*).

11.3.2 The Enjoyment of Social Rights by Registered Partners

Despite the even symbolic distance that in some aspects pervades marriage and registered partnerships (e.g., spouses share a "family name" whereas partners have a "last name") and the significant exclusion of parental rights for same-sex couples (as we will see in the next paragraph), vast fields of ordinary legislation have been modified by the EPG in order to equate partners' and spouses' rights, with particular respect to social benefits. A significant example of such an equivalence concerns the widower's pension, which has been extended to registered partners under the same terms prescribed for spouses.[57]

11.3.3 The Enjoyment of Parental Rights by Registered Partners

However, the most significant restriction on registered partners' rights concerns parental rights, as they are not allowed to adopt, nor is a partner allowed to adopt the other registered partner's child (step-child adoption) pursuant to § 8(4) of the EPG. Only in 2013 the prohibition of step-child adoption has been declared contrary to Art. 8 and 14 by the European Court of Human Rights, since it infringes the rights of registered partners not to be discriminated in comparison with unmarried different-sex couples, in which one partner is entitled to adopt the other partner's child, whereas a similar discrimination is not found by the Court with regard to married couples.[58] Despite of this recent decision, the restrictive vein of the Austrian legislation is however plain to see in § 2(1) of the Federal law on medically assisted reproduction,[59] that indirectly prohibits access to artificial procreation by same-sex partners, be they registered or not, because such a right is attributed exclusively to "married couples or marriage-like relationships".

[57] See §§ 216 and 259 of the General Law on Social Security (Allgemeines Sozialversicherungsgesetz, in BGBl. I Nr. 116/2009).

[58] Grand Chamber, *X and others v. Austria*, n. 19010/07, judgment of 19th February 2013. For further insights see the Chapters by Crisafulli and Pustorino in this volume.

[59] Fortpflanzungsmedizingesetz (BGBL. I 1992, 1299).

11.4 The *Status* of Same-Sex Couples in Swiss Law

11.4.1 Constitutional Background and the Introduction of Registered Partnership in 2007

The constitutional background concerning the rights of same-sex partners in Switzerland shares many features with Germany and Austria. Even in this case, a constitutional tradition which is basically hostile to full recognition of the same-sex relationship in the form of marriage has been able to establish a legal framework aimed at regulating registered partnerships. This outcome was made possible after the entry into force in 1999 of the new Federal Constitution, which contains some basic rights whose introduction has paved the way to the recognition of same-sex relationships. In this light, it must be emphasized that Art. 14 of the Constitution states that "The right to marry and to found a family is guaranteed" without linking the access to marriage to a necessary heterosexual relationship, and that Art. 8 (2) Const., containing a general principle of equality which prohibits—among others—discrimination grounded on "sex" and "way of life", is deemed to enshrine a general clause prohibiting discrimination grounded upon sexual orientation.[60]

Despite this, according to the long-standing case law of the Federal Tribunal (*Bundesgericht*), same-sex marriage is not protected by the Constitution since it infringes the basic tenets of public order and its legitimacy cannot be drawn by an evolutive interpretation of Art. 8 and 12 ECHR,[61] because the Strasbourg Court has held, as we already know, that the right to allow same-sex couples to marry falls within the state's margin of appreciation and its denial is not a violation of conventional rights. Nevertheless, the wording of Art. 14 is significant in that it should not hinder the Legislator from introducing same-sex marriage without modifying the text of the Constitution: this perspective is, however, unlikely for the moment,[62] although a significant exception to the heterosexual paradigm concerns, as in Germany, post-operative transsexuals, who can marry a person of their same (biological) sex.

In this framework, in 2004 the Swiss Parliament adopted the "Federal Act concerning same-sex registered partnerships",[63] which was approved by a 58 % majority of Swiss voters in a *referendum* held on 5th June 2005, entering into force on 1st January 2007. In its quality as Federal law, PartG has a derogatory force toward Cantonal law, with the effect that it has quashed several Cantonal regulations that already provided a basic structure for registered partnership, which in

[60] Ziegler and Bueno (2012), p. 41.

[61] ATF 119 II 264 and ATF 126 II 425.

[62] Peters (2011), p. 310.

[63] Bundesgesetz über die eingetragene Partnerschaft gleichgeschlechtlicher Paare—Loi fédérale sur le partenariat enregistré entre personnes du même sexe (RS 211.231, further referred to as PartG).

several cases had a wider sphere of application, e.g. as in Zürich, where partnership had been introduced before 2005 with the possibility to establish homosexual as well as heterosexual registered partnerships.

The Swiss model of registered partnership has much in common with the German and the Austrian models: partnership is reserved exclusively to same-sex couples and establishes a community of life with mutual rights and duties (Art. 2, paras 1 and 2), and partners must give reciprocal assistance and take mutual care (Art. 12), also by contributing, with their own resources and capacities, to the community's maintenance (Art. 13).

On the basis of requisites of this kind, registered partnerships are deemed to establish a long-standing relationship and, in so doing, they are open to those benefits and privileges that are granted to married couples, such as those in the areas of succession, taxes, hospital visitation, and property rights.[64] In this way, a strengthened approach to the anti-discrimination principle is seen at work, since equalization with marriage in mainly economic fields is considered a consequence of the similarly strong and persistent mutual commitment by partners.

Notwithstanding this, in other fields a full equalization has been considered in contrast with a persisting preference accorded to marriage, such as in the field of citizenship, for whose achievement registered partners do not enjoy the preferred position accorded to spouses but are, on the contrary, bound to the limits valid for everyone. Along with other minor differences of treatment in the field of work benefits,[65] the other main area in which registered partners are not equated with spouses, with even more severe restrictions than in Germany, concerns parental rights.[66]

To sum up, the quest for equalization of rights between married couples and registered partners stems from the different interpretations of the above-mentioned principle of equality: whether it is limited to the centrality accorded to marriage pursuant Art. 14 Const. or whether it should discern more strictly the differences in treatment that are justified because of the involvement of children: in all other cases, a full equalization should be targeted by both the legislator and judges.[67]

11.4.2 The Enjoyment of Social Rights by Same-Sex Couples

The 2004 PartG has not provided detailed regulation in the social field, also because many competences pertaining to social benefits fall within the power of Cantons, which have adopted a multifarious, although progressively inclusive, legislation concerning registered partnership. In the absence of systematic intervention by

[64] Peters (2011), p. 313.

[65] Examples in Ziegler and Bueno (2012), p. 44.

[66] See paragraph 11.4.3.

[67] Further insights in Ziegler and Bueno (2012), p. 43.

Parliament and judges, it is worth noting that one of the most relevant benefits accorded to spouses, i.e. the widower's pension, is granted to registered partners with no discrimination, and to non-registered partners, whether homosexual or heterosexual, if the surviving partner has significantly contributed to the widower's maintenance or has lived with him or her for 5 years.[68]

11.4.3 The Enjoyment of Parental Rights by Registered Partners

The more severe limitation of registered partners' rights concerns their relationship with children. Art. 27 PartG prescribes the duty for the partner to contribute appropriately to the other partner's child maintenance, albeit with due respect for the rights of natural parents. The partner is entitled, in case of separation, to be granted the right to visit the child. It should be evident that, in this way, partners are not equipped with an instrument similar to the *kleines Sorgerecht* existing in German law, and their contribution to the child's upbringing is strictly limited to contribution duties.

Even more clearly, Art. 28 PartG stated that:

> Persons living in a registered partnership are admitted neither to adoption nor to medically assisted reproduction.

In relation to the latter, PartG only reaffirmed the limits already established in the Federal law on medically assisted reproduction (Art. 3, para. 3)[69] according to which only married couples are entitled to access these techniques, for the sake of protecting the child's best interest.

In the field of adoption, the denial enshrined in Art. 28 PartG for registered partners is much more debated, since pursuant to Art. 264b of the Swiss Civil code single persons are entitled to adopt. This raises a discrimination which has not been challenged for the moment,[70] even if a decision recently taken by the European Court of Human Rights in the case *E.B. v. France*[71] may have an effect on internal law. On that occasion, the Strasbourg Court declared the violation of the

[68] Art. 19a and 20a, para. 1, a) of Bundesgesetz über die berufliche Alters-, Hinterlassenen- und Invalidenvorsorge—Loi fédérale sur la prévoyance professionnelle vieillesse, survivants et invalidité (RS 831.40). On the interpretation of the latter provision see the Bundesgericht decision of 3.2.2012, 9C_676/2011.

[69] Bundesgesetz über die medizinische unterstützte Fortpflanzung—Loi fédérale sur la procréation médicalement assistée (of 18.12.1998—RS 810.11).

[70] An interlocutory decision is that of Bundesgericht of 5.5.2011 (ATF 137 III 241), in which the Supreme Tribunal refused to deal with the legitimacy of Art. 28 in a case concerning step-child adoption, since the registered couple did not have the requisites demanded by the Civil Code for married couples.

[71] Grand Chamber, n. 43546/02, judgment of 22nd January 2008.

Convention in that French law admits single persons to adopt with the exception of homosexuals. Even if the ECtHR recently had a more severe approach in the case *Gas and Dubois v. France*[72] (concerning adoption by a registered partner of a child born after artificial procreation with an anonymous donor), it bears mentioning that in March 2012 the Council of States (the branch of Parliament representing Cantons) asked the Federal Council (the federal Executive organ) to modify Art. 28 PartG and the norms of the Civil code prohibiting adoption even to heterosexual unmarried couples, with the aim of allowing step-child adoption, when necessary for the child's best interest.

11.5 Conclusions: The "Central European" Model of Same-Sex Partnership at the Crossroads Between Symbols and Reality

The common refusal of same-sex marriage and the introduction of an exclusively homosexually framed model of registered partnership is the main common aspect that emerges from the analysis. Behind the solution given by Legislators, the common approach that arises in the three countries examined mainly concerns the constitutional justification of registered partnerships with respect to rights and principles traditionally centred upon the preference accorded to marriage and (heterosexual) family (at least in Germany and Switzerland) and the discriminatory potential of "sex" intended as biological sex (i.e. running through the male/female divide) and not as "sexual orientation" (i.e. running through the homosexual/heterosexual divide). In this regard, the common approach of German, Austrian and Swiss legislations on registered partnership moves from the assumption of a radical symbolic difference between it and marriage, whose justification rests on different principles (family rights for the latter and personality rights for the former, community versus privacy[73]). In this way, same-sex partnerships are conceptually built outside the symbolic realm of family.

Despite this, the concrete aspects concerning the legal relationship between partners, moving from their mutual rights and duties, the requisites for admittance to partnership, and the limits to its dissolution and the economical consequences thereof, show in the three jurisdictions concerned strong similarities with marriage. In the same vein, the public side of the regulation of same-sex couples (first of all in the field of social security) has progressively moved toward a full equalization of

[72] N. 25951/07, judgment of 15th March 2012. On these cases see the Chapter by Crisafulli in this volume.

[73] The difference between communitarian and privacy models of family law has been recently re-elaborated by Marella and Marini (2012), pp. 485 and 489.

the benefits granted to partners with respect to spouses, and the still persisting discrepancies are often connected to the presence of children and to the capacity of spouses to procreate.

The only legal area in which this difference is at the moment more debated is that of parental rights in their different sub-aspects: right to custody, adoption (either in the form of step-child adoption or of successive adoption, whose legitimacy is currently before the German CFT), and access to medically assisted reproduction. The *status* of same-sex couples' parental rights lies at the crossroads of the divergent interests that have until now characterised the model sketched out in these pages: on the one hand since their enlargement risks threatening the symbolic centrality of marriage and the effort to relegate registered partnership to the totally different domain of the free expression of the partners' personality, and on the other hand because the substantial equivalence attained in the different legislations implies almost logically a wider access to parental rights. For this reason, the initial (and still persisting) resistances of the Austrian and Swiss legislation and the recent openness of the German legal system may reveal a significant path of evolution.

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