Non-admission of successive adoption by registered civil partners is unconstitutional

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The refusal to allow the successive adoption of children who were taken on by a registered civil partner by the other partner violates the right to equal treatment (Art. 3 sec. 1 of the Basic Law, Grundgesetz - GG) of both the children and the partners concerned. This is what the First
Senate of the Federal Constitutional Court decided in a judgment that was delivered today. The legislature is given time until 30 June 2014 to make a regulation that is in accordance with the Constitution. Until the law is amended, the Civil Partnerships Act (Lebenspartnerschaftsgesetz - LPartG) is to be applied with the stipulation that a successive adoption is also possible in registered civil partnerships.
The decision is essentially based on the following considerations:
1. Under the current legal framework, it is possible to adopt the biological child of ones registered civil partner (so-called stepchild adoption, 9 sec. 7 LPartG). Not feasible, however, is the adoption of a child that was taken on by the registered civil partner (so-called successive adoption), which is at issue in the present case. Spouses, on the other hand, are granted both the option of stepchild adoption, and of successive adoption.
2. The underlying proceedings regard individuals who entered into a registered civil partnership and who live in the same household as their partners and their partners adopted child. They now intend to also adopt the respective child.
The complainant in the proceedings 1 BvR 3247/09 entered into a civil partnership in 2005. Prior to this, her partner had adopted a child who
was born in Bulgaria. The complainant and her partner live with the child in a shared household. In 2008, the complainant filed an application to adopt her partners child. The ordinary courts rejected this application (last ruling: OLG Hamm, order of 1 December 2009 - I-15 Wx 236/09 -, juris). With her constitutional complaint, the complainant contests all decisions of the ordinary courts and indirectly challenges 9 sec. 7 LPartG. She claims a violation of her fundamental rights under Art. 3 sec. 1 (right to equal treatment) and Art. 6 sec. 1 (protection of the family) of the Basic Law.
The cause for the concrete judicial review proceedings no. 1 BvL 1/11 is an order for referral by the Hamburg Hanseatic Higher Regional Court (Hanseatisches Oberlandesgericht Hamburg) of 22 December 2010. The parties to the main proceedings entered into a civil partnership in December 2002. Shortly before this, one of the partners had adopted a child who was born in Romania. The child lives in the shared household of the parties, who jointly assume parental responsibilities. The other partner intends to adopt the child as well. Both the Local and the Regional Courts rejected the application for adoption. The Hanseatic Higher Regional Court stayed the proceedings and asked the Federal Constitutional Court to decide whether the denied successive adoption by the adoptive parents partner under 9 sec. 7 LPartG is compatible with the Basic Law (order of 22 December 2010 - 2 Wx 23/09 -, juris).
The Hanseatic Higher Regional Court stated, inter alia, that denying the partner of the adoptive parent to successively adopt, which followed
from 9 sec. 7 LPartG and 1742 of the Civil Code (Bürgerliches Gesetzbuch - BGB), violated Art. 3 sec. 1 GG because the unequal treatment of marriage and registered civil partnerships was not justified in this case. It was incomprehensible, the court claimed, that the biological child of a partner could be adopted by the other partner, while the child that a partner had adopted on his or her own could not, even though it could be assumed that a child adopted by only one person had a far greater need for further protection than a biological child.
3. The exclusion of successive adoption by registered civil partners violates the general principle of equality before the law (Art. 3 sec. 1 GG).
a) In this context, a standard of review that is much stricter than the mere prohibition of arbitrariness has to be applied. With a view to the unequal treatment of the children involved, this already applies because fundamental rights which are vital for the development of the childrens personalities are affected. The justification of the unequal treatment of married people and those who are in registered civil partnerships is also subject to strict constitutional requirements, since it is related to sexual identity.
b) The unequal treatment of the respective children as compared to children adopted by spouses is not justified. The same applies to the unequal treatment of the respective partners, as compared to married spouses, who have the option to successively adopt.
aa) The general objective of the limitation of successive adoptions is to prevent the particular risk that a child is subject to competing parental rights, which could be exercised in a conflicting way. For the benefit of the child it is also intended to avoid that, via successive adoption, the child can be passed on from family to family. Because these dangers are deemed to be negligible if the parents are married, the successive adoption by spouses is permitted. The adoption by a registered civil partner, however, does not differ in either regard from the one by a spouse. In particular, the registered civil partnership is likewise intended to be lasting and is - like a marriage - marked by a binding assumption of responsibility.
bb) The exclusion of successive adoption cannot be justified by the argument that it is harmful for the child to grow up with same-sex
parents. It can be assumed that the sheltered conditions in a registered civil partnership can be as supportive for the children as they are growing up as such conditions in a marriage. The vast majority of experts refuted in their testimonies any general concerns against
children growing up in same-sex parental unions. Furthermore, the exclusion of successive adoption would be inappropriate to eliminate potential dangers such as this, because it can, may, and shall not prevent a child from living with his adoptive parent and his or her same-sex partner. Neither the single adoption by homosexual people nor the factual living together of registered civil partners with one of the partners child could be prevented without major violations of the Basic Law. The Civil Partnerships Act, in contrast, supports their living together by providing regulations for this very case that grant the partner who is not a parent under the law competences which are typical of parents, including the option to use a common civil partnership name.
The successive adoption as well does not, per se, interfere with the childs best interest, but tends to be beneficial in the constellations
that are at issue here. According to the assessment of the experts consulted, it is suitable to result in stabilising developmental-psychological effects. Furthermore, it improves the legal position of the child in the case of disintegration of the civil partnership due to separation or death. This concerns, on the one hand, custody, which then can in case of separation be adjudicated upon on a case-by-case basis, considering the best interests of the child. On the other hand, this applies at the material level, because a child benefits from double parenthood especially with regard to child support and the law of succession.
Finally, an endangerment of the childs best interests by allowing the successive adoption need also not be feared, because every adoption - including successive adoption - is preceded by a case-by-case assessment, during which potential specific problems of the adoption in question can be taken into consideration.
cc) The exclusion of successive adoption is not justified by the aim to avoid a circumvention of the legislatures decision to not admit a joint adoption by two registered civil partners. It is not necessary to decide at this point whether the exclusion of the joint adoption is compatible with the Basic Law, even though the law allows it for married couples.
dd) The specific protection of marriage that is guaranteed by Art. 6 sec. 1 GG does not justify the discrimination of adopted children of a
civil partner as compared to the adopted children of a spouse. It is true that due to the constitutionally protected institute of marriage, the legislature can, in principle, favour it as compared to other ways of life. However, for the justification of the discrimination of comparable ways of life a sufficiently weighty factual reason is needed, which does not exist in this case.
c) There are also no differences between the adoption of a registered civil partners biological child and the adoption of child that was taken on by the registered civil partner which could justify a different treatment.
4. The childs right to governmentally safeguarded parental care and upbringing, the fundamental right of parents, and the fundamental right of families, however, are - taken on their own - not violated.
a) Art. 2 sec. 1 in connection with Art. 6 sec. 2, sentence 1 GG grants the child a right to governmentally safeguarded parental care and
upbringing. How the government fulfils its obligation to an effective protection of this fundamental right, is first and foremost to be decided by the legislature. In the present case, the legislature did not venture beyond the limits of its discretion. The children concerned are
not without parents, but have one parent in the legal sense. Furthermore, by granting typical parental rights that are of practical importance (cf. 9 sec. 1 and 2 LPartG), the legislature has in other ways taken care to ensure that the adoptive parents civil partner can, to a certain degree, exercise parental powers.
b) The fact that a registered civil partner cannot adopt the child taken on by his or her partner does not violate the parental right protected by Art. 6 sec. 2 sentence 1 GG. It is true that Art. 6 sec. 2 sentence 1 GG does not only protect parents of different sexes, but also two same-sex parents. This already follows from the fact that the fundamental right of parents is directed at the childs best interests. Neither the wording of the fundamental right of parents nor differing historic concepts are contrary to its application to two people of the same sex. However, a mere social-familial parental relationship towards the civil partners child does not constitute parenthood within the meaning of the Constitution. As a rule, only people who are in a parental relationship with the child that is either based on descent or on assignment by ordinary law can be holders of the constitutional parental right.
c) Finally, the exclusion of successive adoption does not violate the fundamental right of families guaranteed by Art. 6 sec. 1 GG. It is true that the

social-familial community between registered civil partners and one partners biological or adopted child forms a family that is protected by Art. 6 sec. 1 GG. However, the legislature has some latitude in the legal definition of family. This has not been exceeded by the denial of successive adoption. Art. 6 sec. 1 GG does not oblige the legislature to grant complete parental rights in every case of a factual parent-child relationship.

Bundesverfassungsgericht
Schloßbezirk 3
76131 Karlsruhe
Deutschland
Telefon: 0721/91010
Telefax: 0721/9101-382
Mail: bverfg@bundesverfassungsgericht.de
URL: http://www.bundesverfassungsgericht.de
<img src="http://www.pressrelations.de/new/pmcounter.cfm?n_pinr_=531392" width="1" height="1">

Pressekontakt

Bundesverfassungsgericht

76131 Karlsruhe

bundesverfassungsgericht.de
bverfg@bundesverfassungsgericht.de

Firmenkontakt

Bundesverfassungsgericht

76131 Karlsruhe

bundesverfassungsgericht.de
bverfg@bundesverfassungsgericht.de

Das Bundesverfassungsgericht in Karlsruhe wacht über die Einhaltung des Grundgesetzes für die Bundesrepublik Deutschland. Seit seiner Gründung im Jahr 1951 hat das Gericht dazu beigetragen, der freiheitlich-demokratischen Grundordnung Ansehen und Wirkung zu verschaffen. Das gilt vor allem für die Durchsetzung der Grundrechte. Zur Beachtung des Grundgesetzes sind alle staatlichen Stellen verpflichtet. Kommt es dabei zum Streit, kann das Bundesverfassungsgericht angerufen werden. Seine Entscheidung ist unanfechtbar. An seine Rechtsprechung sind alle übrigen Staatsorgane gebunden. Die Arbeit des Bundesverfassungsgerichts hat auch politische Wirkung. Das wird besonders deutlich, wenn das Gericht ein Gesetz für verfassungswidrig erklärt. Das Gericht ist aber kein politisches Organ. Sein Maßstab ist allein das Grundgesetz. Fragen der politischen Zweckmäßigkeit dürfen für das Gericht keine Rolle spielen. Es bestimmt nur den verfassungsrechtlichen Rahmen des politischen Entscheidungsspielraums. Die Begrenzung staatlicher Macht ist ein Kennzeichen des Rechtsstaats.