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Reform of German Family Law – a Battle against Discrimination

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A. Introduction

Having crossed the threshold of the new millennium, it would now seem to be an appropriate time to review the reforms in family law to date and consider what remains to be done in the future. During the past 100 years of its existence the family law of the German Civil Code of 1900 (*Bürgerliches Gesetzbuch* (the BGB)) has seen fundamental changes. Radical changes in social and economic conditions have led to major reforms in this area that have left hardly any of the provisions of the Fourth Book of the BGB containing family law untouched. In many instances the catalyst for these changes was the coming into effect of the German Basic Law of 1949 (*Grundgesetz* (the GG)). It is necessary, however, to proceed with further reforms of the German family law, in order to take into account both the social change experienced by German society and the provisions of the German Basic Law. The reduction of discrimination has been and remains an essential part of the reform of German family law. It is the aim of the present article to focus on this theme.

Three main areas of discrimination can be discerned. First of all, family law has been traditionally marked by considerable inequality between men and women. The reform of family law during the past century has been a battle to overcome the discrimination against women. Although formal equality between the sexes has finally been accomplished, it still remains to identify and eliminate the more hidden and indirect instances of discrimination. Women are by no means the only victims of discrimination. Illegitimate children have been discriminated throughout history. Despite a century during which their status has gradually improved, it was only three years ago that a fundamental reform of child and parent law has finally overcome the differentiation between legitimate and illegitimate children that until then had still marked German family law. Finally, recent legislation has been aimed at ending discrimination against same-sex partners. The Registered Partnership Act of 2001

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(the LPartG) allows same-sex partners to establish a so-called registered partnership.[1] Although the statute affords same-sex couples significant rights and obligations, it does not accomplish its professed goal of completely eliminating discrimination. This article will address the first and the last of these areas of discrimination: discrimination against women and discrimination against same-sex couples. As to the discrimination against illegitimate children, it suffices to point to the article by Henrich,[2] recently published in this Journal, on the fundamental reform of child and parent law, a reform which has almost – although not entirely – put an end to the varying treatment of children, depending on the marital status of their parents.

B. Discrimination against Women

I. Achieving Formal Equality of Men and Women

1. Family Law and the German Civil Code of 1900

More than 100 years ago, the founding fathers of the German Civil Code created a homogenous family law for the German Reich which was characterized by the patriarchal ideas of the period. Men had a dominant status in all areas of family law. The privileged position enjoyed by men was reflected in the provisions governing the personal relationship between husband and wife and the matrimonial property, in divorce law and in the law of parent and child. The husband had the right to decide on all affairs relating to conjugal life. In particular, it was his to decide on the whereabouts and modalities of residence. The wife was required to take on her husband's surname. The fulfilment of the various marital duties was determined by gender, so it fell to the wife to run the household. Even there she was subject to the directives of her husband on account of his superior position in law. Although a married woman was able to enter into a contract of employment without her husband's consent, he could terminate the contract without notice if the duties that formed part of the employment interfered with conjugal interests, especially with the wife's duty to run the household and look after the children. The superior position occupied by men was equally evident in the economic consequences of marriage. The statutory property regime was that of the *Nutzverwaltung*, a kind of usufruct by the husband of his wife's estate. In accordance with this regime, the wife's assets were

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[1] The Registered Partnership Act (LPartG) is included in Art. 1 of the Act Aimed at Terminating Discrimation against Same-sex Partnerships (*Gesetz zur Beendigung der Diskriminierung gleichgeschlechtlicher Gemeinschaften: Lebenspartnerschaften*) BGBl 2001 I 266.

[2] Henrich, 'The Reform of German Child and Parent Law on the Background of European Legal Development' in (2000) *European Journal of Law Reform*, at pp. 11–26.

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subject to the husband's administration; in return, the husband was obliged to maintain the family. Finally, even parental power – as parental responsibility was referred to at that time – lay primarily with the father. The father had both the right and the duty to care for the personal welfare and the estate of his children. The mother also had the duty to care for her children's personal welfare, although she was not permitted to be their legal representative in this area. Where there was disagreement concerning matters of the children's personal welfare, the wife was obliged to submit to her husband's decision in this as in all other conjugal affairs. Overall, the family law of the German Civil Code of 1900 was largely characterized by a patriarchal model of marriage and family.

2. *Influence of the Principle of Equality Enshrined in the Basic Law of 1949*

The German Basic Law of 1949 requires that family law conform to the principle of equality as stipulated in Article 3 II of the GG. The requirement led to fundamental reforms of the German family law after the German Basic Law had been enacted.[3] Nevertheless it took almost 50 years to eliminate the large number of discriminatory provisions in this area.

(A) EQUAL RIGHTS ACT OF 1957

A first step was taken by the Act on Equal Rights of Men and Women in Civil Law of 1957 (GleichberG).[4] This law was still a far cry from the realization of formal equality, however. Roles within the marriage remained gender-determined. The law was still modelled according to the ideal of the wife as homemaker. Concessions to the changing status of women were made in marginal areas only. The household continued to be the realm of the woman, who was now allowed to be fully responsible for its running. Employment remained permissible only insofar as it was compatible with her matrimonial and familial obligations. Only the right of termination of such contracts by the husband was abolished. Also the husband's right to decide in matrimonial matters was finally abolished. The husband's surname remained the family name; although now, the wife was entitled to add her so-called 'maiden name' to the family name. As far as the personal relations of the spouses were concerned, open discrimination thus remained in place.

The matrimonial property laws were somewhat different. As the legislator had failed in his duty to undertake a reform of the family law within the period of time

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[3] On the influence of the Constitution on the development of family law, Henrich, 'Familienrechtsreform durch die Verfassungsgerichte?' in (1990) *Zeitschrift für Rechtsvergleichung*, at pp. 241–255; Frank, '100 Jahre BGB: Familienrecht zwischen Rechtspolitik, Verfassung und Dogmatik' in (2000) *Archiv für Civilistische Praxis*, pp. 401–425, at pp. 404–408.

[4] Essential Müller-Freienfels, 'Kernfragen des Gleichberechtigungsgesetzes' in (1957) *Juristenzeitung*, pp. 685-696.

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mandated by the Basic Law,[5] the discriminatory *Nutzverwaltung* was substituted by the principle of separation of property as the legal norm. Such a separation of property resulted in the non-participation of the wife in her husband's revenue. For this reason, the new statutory matrimonial property regime of accrued gains (*Zugewinngemeinschaft*) was introduced by the Equal Rights Act in order to guarantee the wife's participation in any gains that were accrued during marriage.[6] During marriage each spouse retains exclusive ownership of his or her assets. In the event of divorce the spouse who has acquired less assets than his or her partner, or none at all, is entitled to claim compensation. Usually the wife will be the claimant, and the husband (in these cases) is required to compensate her for half of any gains he has accrued during the period of marriage that are in excess of any gains she herself has accrued. Thus the equal value of running a household and being gainfully employed was recognized in law.

The ongoing discrimination culminated in the provisions concerning children contained in the so-called Equal Rights Act. Although both – father *and* mother – now had parental power over a minor, only the father was entitled to represent his child legally. In addition, it was the father who had the final say on matters concerning children in the case of disagreement between the parents. The strength of resistance to the establishment of formal equality in the legal positions of men and women, becomes evident if it is considered that the Equal Rights Act introduced this provision although the court rulings made after the expiry of the deadline set by the legislator and prior to the coming into force of the Equal Rights Act were overwhelmingly based on the principles of joint custody and joint representation. The provisions of this so-called Equal Rights Act reflected the prevailing understanding of the principle of equality in the 1950s. This understanding held the view that owing to the biological differences between men and women, equal rights did not lead to the formal according of equal status and to the granting of identical legal positions.[7] Article 3 II of the GG was understood as implementing the general principle of equality, which required that only those things (and persons) which are the *same* should be given the *same* treatment, whereas those which are *not the same* (even though they are equal) could be treated *differently*. According to this interpretation, biological and functional differences between women and men could justify unequal treatment. Hence the principle of equal rights did not call for equality but only for the recognition that men and women are *of equal value*.

(B) FIRST MARRIAGE LAW REFORM ACT OF 1976

It took a couple of decades until formal equality was established as a principle in family law. A decisive impulse came from the Federal Constitutional Court, which

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[5] Art. 117 I of the GG: 1 April 1953.
[6] §§ 1363–1390 of the BGB.
[7] Sacksofsky, *Das Grundrecht auf Gleichberechtigung* (Baden-Baden, 1996, 2nd ed.) at p. 104.

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increasingly interpreted the principle of equality as a prohibition against discrimination. Immediately after the Equal Rights Act came into effect, the Federal Constitutional Court had as early as 1959 declared null and void the father's right to have the last say in case of disagreement between the parents with regard to issues relating to their children and the father's right to be the sole legal representative of the children. However, it was not until the First Marriage Law Reform Act of 1976 (1. EheRG) that formal equality in the personal legal relations between husband and wife was achieved to a greater extent. The legislator refrained from proposing a specific ideal of marriage in this extensive reform act. It was left to the husband and wife to divide the conjugal tasks themselves. Spouses could decide by mutual agreement who was to run the household and who was to be gainfully employed. Equal recognition was accorded to marriages in which both spouses are working full time, those in which one spouse is gainfully employed while the other is taking care of household and children, and those in which one spouse is working part-time in order to supplement the family income. Nevertheless not even this reform act achieved full formal equality. The provisions relating to surnames constituted the last bastion of male dominance in the German Civil Code. In these provisions, the husband's name was no longer automatically taken as the family name; on the contrary, the couple could choose between either the husband's *or* the wife's name as their family name. If they were not able to agree, it was the husband's name that then automatically became the family name. This provision obviously contradicted the principle of equality. It took more than ten years for the Federal Constitutional Court to rule that whenever a couple could not agree on the family name, each of the spouses would keep their own surname, thereby establishing equality between men and women in this area.[8] Since then each spouse keeps his or her own surname if no agreement on a joint family name is reached.

(C) CONCLUSION

The way in which German family law, as enshrined in the German Civil Code, has evolved over the past one hundred years since its establishment is indeed revolutionary. Hardly any of the original provisions remain. The influence of German Basic Law has resulted in the replacement of the largely patriarchal model of marriage and family typical of the family law of 1900, with the current family law which is marked not only by the acknowledgement that men and women are of equal value but also by the achievement of the formal recognition of their equality.

II. Remaining Factual Discrimination

Although all provisions in German family law that openly discriminate against women have been abolished, equality between the sexes has not been achieved in German society. There remains a substantial structural inequality between women

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[8] Judgment of the *BVerfG* of 5 March 1991 in (1991) 84 BVerfGE, at pp. 9–25.

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and men. This is particularly true in the realm of family life. Married women are considerably less likely to be gainfully employed than their partners. In particular, women often interrupt their careers for a prolonged period in order to bring up their children, or are much more likely to turn to part-time employment. In general, women still do considerably more household work and family work than men. The economic situation reflects this imbalance. As a result of this imbalance, assets in Germany tend to be in the hands of men.

Not all of these factual differences are due to legal provisions or can simply be abolished by legislation. Legal provisions, however, can significantly help to decrease factual discrimination. Provisions concerning tax law and social security law, which externalize the cost of children to a greater extent than is hitherto the case, will be of the utmost importance; such provisions can also help reduce discrimination against women. In addition, the provisions of *civil* family law that are relevant in this context must be amended in a way so as to eliminate hidden discrimination against women. The principle of equality is contradicted not only by those provisions which explicitly name gender as a relevant criterion, but also by those which typically result in discrimination against women owing to factual differences.[9] There are a number of provisions in family law that are apparently gender-neutral but which in fact have a different impact on men and women. Such factual discrimination can be found in provisions pertaining to both the personal and to the economic consequences of marriage.

1. Statutory Provisions Relating to Names

The provisions relating to names do not distinguish between the sexes, but nevertheless discriminate against women. As mentioned above, since the First Marriage Law Reform Act of 1976 husband and wife can choose either the husband's or the wife's surname as the couple's married or family name, § 1355 II of the BGB. However, the husband's or wife's surname can only become the couple's married name if the name is his or her name by birth, not if he or she has acquired this name by a prior marriage. Should one of the spouses have been married previously and taken on the name of his or her prior partner, he or she can keep this name after being divorced. However, this name cannot become the family name in a subsequent marriage. Since in the overwhelming majority of marriages the man's surname still becomes the family name after marriage,[10] women who enter into a subsequent marriage have considerably less opportunity to impose their name as the new family name. Although the provision does not differentiate between the sexes, it nevertheless has a different impact on women.

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[9] Heun, in *Grundgesetz-Kommentar* (Dreier (ed.)) (Tübingen, 1996) at Art. 3 para 96; Sacksofsk*y*, *Das Grundrecht auf Gleichberechtigung* (Baden-Baden, 1996, 2nd ed.) at pp. 55–64.

[10] 95 per cent of married couples chose the husband's surname as their family name, Matthias-Bleck, 'Empirische Ergebnisse zur Anwendung des neuen Ehenamensrechts' in (2000) *Deutsches und Europäisches FamilienRecht*, pp. 108–112, at p. 109.

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§ 1617 I, 1 of the BGB concerning the child's surname also contains a hidden discrimination. The Family Name Act of 1993 (the FamNamRG) that was passed as a consequence of the decision of the Federal Constitutional Court gives spouses the right to keep their own surnames after marriage rather than constraining them to adopt a joint family name. The birth name of their first child, however, can only be either the father's or the mother's surname, which then must be used for all subsequent children. The legislator has thus explicitly decided against the interim provision suggested by the Federal Constitutional Court, which gave parents the choice of creating a hyphenated name consisting of both surnames in any chosen sequence.[11] If the parents are not permitted to choose a hyphenated name for their children, they will, in line with tradition, largely resort to the father's surname. This means that the current legislation regarding names has the result of isolating the woman within the family, which from the outset exerts an indirect pressure on women not to keep their birth name after marriage. Ruling out the use of a hyphenated name for children typically has a negative impact on women because of the factual dominance of the man's name.

2. *Matrimonial Property Regime of Accrued Gains*

Factual discrimination can also be found in the provisions concerning the economic consequences of marriage, in particular the matrimonial property regime of accrued gains (*Zugewinngemeinschaft*, § 1363 of the BGB). This property regime was introduced by the Equal Rights Act of 1957. The regime was based on the idea that the contributions by the husband and the wife to marriage are both of equal value, irrespective of the way the tasks have been divided. The regime therefore provided that the spouse who is not gainfully employed, or who is so to a lesser degree, can nevertheless participate in the gains accrued during marriage. Yet such participation is not achieved by making the assets acquired during marriage joint property. On the contrary, the spouse who has accrued gains in the course of marriage remains their sole owner. Thus the term *Zugewinngemeinschaft*, i.e. '*community* of accrued gains', is misleading, as this regime constitutes in fact a *separation* of property. Participation in the accrued gains is realized only when the marriage comes to an end – either by divorce or by death. In the case of divorce, the spouse who has either less accrued gains or none at all can claim compensation. In the case of death, participation in accrued gains generally results in an increase in the share of the inheritance. When both spouses are alive, the property regime of accrued gains means that these are shared only in the event of a divorce. According to § 1353 of the BGB, marriage is entered into for life. It is precisely in this state of affairs, regarded by the law as the rule, that there is no participation in accrued gains.

If the gains accrued by a married couple do not become their joint property by law while the marriage exists, there is a negative impact on the spouse who is either not

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[11] Judgment of the *BVerfG* of 5 March 1991 in (1991) 84 BVerfGE, pp. 9–25, at p. 24.

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or to a lesser extent gainfully employed, usually the woman. Ownership normally allows the free use and exploitation of one's property. Ownership forms the basis of freedom of contract and therefore is closely connected to the right of personality. Current family law gives only limited freedom of action to a spouse who is not gainfully employed or who does not have an income of his or her own. By virtue of § 1357 I, 1 of the BGB this spouse may only make transactions with equal effect for the other spouse if it is necessary to ensure that the necessities of life are provided for the family. Moreover, § 1360 of the BGB determines that the spouse who is gainfully employed must provide appropriate maintenance for the family. But even this entitlement to maintenance does not compensate for the separation of property that exists in the property regime of accrued gains. Unless a husband who is gainfully employed fulfils his obligation to support the family by means of a payment in kind, i.e. by providing housing, clothing or insurance cover, he must make available to his wife, who has charge of the household, the financial means necessary for her task.[12] This money, however, is not assigned to her but only entrusted to her. The spouse who has charge of the household is generally held accountable for any expenditure incurred.[13] In order to satisfy his or her personal needs, this spouse receives an allowance normally amounting to approximately 5 per cent of the net income.[14] The gainfully employed spouse, on the other hand, keeps not only his or her own allowance of 5 per cent but the rest of the income as well, if it exceeds the sum required to adequately support the family. The same applies whenever the spouses agree to live more economically in order to save. In principle these savings are at the free disposal of the spouse who is gainfully employed, the other spouse having no property rights in them whatsoever.

This situation would remain unchanged even if the so-called claim to participation (*Teilhabeanspruch*) approved by the *Bundesrat* (Upper House of the German Parliament) in July 1999 were to become law.[15] It is the intention of the proposed law to state clearly that the spouse who is not gainfully employed is entitled to participate in the financial means that are required to support the family. The reasons given for the proposal reveal, however, that a direct impact on ownership or property rights is not intended.[16] Enacting the aforementioned claim to participation would therefore have a primarily symbolic character. The homemaking spouse would – as is the case at present – remain restricted in his or her personal development insofar as it is based on his or her own property.

The separation of property inherent in the property regime of accrued gains implies a further serious disadvantage affecting wives much more substantially than

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[12] Compare § 1360a II, 2 of the BGB.
[13] Brudermüller, in *Bürgerliches Gesetzbuch* (Palandt (ed.)) (München, 2001, 60th ed.) at § 1360a para 5; but cf. also judgment of the *BGH* of 5 July 2000, in (2001) *Zeitschrift für das gesamte Familienrecht*, pp. 23-25.
[14] Brudermüller, *supra* note 13, at § 1360a para 4.
[15] BR-Drs. 268/99.
[16] Compare at p. 2.

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husbands given the traditional male-female distribution of tasks currently prevailing: for instance the spouse who is gainfully employed may on principle freely dispose of the gains accrued during marriage, this means there is a danger that he or she might lastingly reduce the assets without the homemaking spouse deriving any benefit. The spouse who is not gainfully employed is insufficiently protected against such diminution of the assets. This spouse's consent is required only for transactions concerning household items and for those concerning the assets as a whole.[17] Provided that the income is sufficient, this provision leaves scope for substantial acquisitions without consultation of the homemaking spouse. If, for example, a gainfully employed husband owns the family home he may sell it without his wife's consent, unless it constitutes the entirety of his assets.[18] Likewise, the wife is unable to prevent gifts to third parties or wasteful expenditure by her husband. Such diminutions of assets can only be taken into account in the event of the matrimonial property regime of accrued gains coming to an end.[19] In view of the fact that the distribution of tasks within marriage is still done along gender-specific lines, the economic consequences of the matrimonial property regime of accrued gains differ for men and women.

3. *Versorgungsausgleich*

Equal discriminatory effects can be discerned in the statutory provisions concerning the so-called *Versorgungsausgleich*, the unique instrument in German law providing for the spouse's participation in the partner's entitlements, expectancies or the mere prospect of drawing old age benefits (§ 1587 of the BGB). The spouse whose expected benefits are worth less can claim compensation for the amount of the difference. However, such a claim may not be made until after the marriage has been dissolved. This lack of equal participation in the spouse's benefits during marriage can also result in hidden discrimination against women.

4. *Maintenance after Divorce*

In spite of the fact that in divorce law the fault principle has been superseded by the principle of irretrievable breakdown, a spouse's misconduct can still have a bearing on the right to maintenance after divorce. In general, § 1569 of the BGB states that a spouse who is not able to support himself or herself appropriately through gainful employment is entitled to maintenance regardless of his or her conduct prior to

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[17] §§ 1369, 1365 of the BGB.

[18] For details on the downsides of the *Zugewinngemeinschaft,* Schwab, 'Der Zugewinnausgleich in der Krise' in *Europas universale rechtsordnungspolitische Aufgabe im Recht des dritten Jahrtausends, Festschrift für Alfred Söllner zum 70. Geburtstag* (Gerhard Köbler, Meinhard Heinze and Wolfgang Hromadka (eds)) (München 2000) at pp. 1079–1093; and Dethloff, 'Das Eheverständnis des bürgerlichen Rechts und der gesetzliche Güterstand der Zugewinngemeinschaft' forthcoming in *Juristenzeitung*.

[19] §§1375 II, 1386 II of the BGB.

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separation or divorce. A spouse is considered to be in need as a consequence of having been married especially if he or she has run the household and has brought up the children and has thus foregone the opportunity to obtain professional training or be gainfully employed. However, § 1579 of the BGB stipulates that the maintenance should be denied, reduced or granted only for a limited period if it would be grossly unfair to claim support. This provision applies particularly in the case of unambiguous and obviously gross misconduct by the entitled spouse, § 1579 No. 6 of the BGB. A breach of the duty to conjugal fidelity is deemed to constitute such misconduct. The spouse who of his or her own accord leaves his or her partner and starts a new relationship is not entitled to maintenance.[20] Even if the spouse is entitled to maintenance because he or she is caring for a joint child, application of this hardship clause is not ruled out, although the welfare of any children has to be taken into consideration.[21] This means that the gainfully employed spouse can leave his or her partner without suffering any adverse economic consequences. The homemaker on the other hand loses the basis of his or her livelihood as a result of the same behaviour. If a partner runs the household and cares for the children according to a mutually agreed division of tasks, and is therefore not able to provide for himself or herself following the dissolution of the marriage, he or she may lose his or her entitlement to post-nuptial maintenance upon leaving the marriage.[22] Sanctions against matrimonial misconduct are therefore only applied against the spouse who has foregone all gainful employment in favour of the family. In view of the traditional gender-specific roles that still prevail, the hardship clause penalizes women more heavily than men.

The same applies in general to the entitlement to compensation of gains accrued during marriage within the scope of the matrimonial property regime of accrued gains. § 1381 of the BGB grants a spouse the right to refuse compensation of gains accrued if and to the extent that this would be grossly unfair under the circumstances. The courts have ruled that – even though the BGB has now adopted the principle of entitlement to divorce in case of the irretrievable breakdown of the marriage – a spouse's breach of conjugal duties in the personal sphere – at any rate if the breach continues over an extended period of time – may preclude the compensation of accrued gains.[23] The hardship clause in § 1587c No. 1 of the BGB, which enables *Versorgungsausgleich* to be precluded in the event of gross

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[20] Established practice of the BGH; see judgment of the *BGH* of 28 March 1984 in (1984) *Neue Juristische Wochenschrift*, pp. 2358–2361.

[21] See judgments of the *BGH* of 30 September 1987 in (1987) *Zeitschrift für das gesamte Familienrecht*, pp. 1238–1239; 27 September 1989 in (1990) *Neue Juristische Wochenschrift*, pp. 253–255; 12 March 1997 in (1997) *Neue Juristische Wochenschrift*, pp. 1851–1853.

[22] See also Wellenhofer-Klein, 'Die "Abkehr von der Ehe" als Unterhaltsausschlußgrund nach § 1579 Nr. 6 BGB' in (1995) *Zeitschrift für das gesamte Familienrecht*, pp. 905–915.

[23] Judgment of the *BGH* of 9 October 1980 in (1980) *Zeitschrift für das gesamte Familienrecht*, pp. 977-878; as opposed to the more recent doctrine: Koch, *Münchener Kommentar, Bürgerliches Gesetzbuch* (München, 2000, 4th ed.) at § 1381 paras 31–33.

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unfairness, however, expressly stipulates that the circumstances which have caused the marriage to fail, must not be taken into consideration simply for the reason that they did so. According to the legislation, therefore, a breach of the duty to conjugal fidelity will as such not justify an invocation of the hardship clause. If a spouse who has run the household for almost 26 years wants to leave the marriage in order to live with another partner, his or her claim for *Versorgungsausgleich* will not be reduced.[24] The hardship clause applies only in case of serious personal misconduct against the other spouse.

5. *Conclusion*

Future reforms of the German family law will have to aim at the removal of indirect discrimination. So far it has not been sufficiently acknowledged that a number of provisions of German family law discriminate against women because of factual differences. It is the task of scholars of legal science to trace this less evident discrimination. In order to achieve this goal, a higher level of interdisciplinary work is now required. Whether or not provisions of family law have a discriminatory effect as a result of factual differences can in many instances only be determined by in-depth socio-economic research.

It is to be hoped that court rulings will stimulate such reforms. Recently, the Federal Constitutional Court rendered a decision that has had a significant impact as far as judicial control of the content of matrimonial and divorce agreements is concerned.[25] This decision dealt with a prenuptial agreement in which a pregnant woman had waived all claims to maintenance in the event of divorce and had agreed to exempt her husband-to-be from his obligation to pay child support. The court ruled that partners' freedom of contract on entering marriage was limited in cases where such an agreement reflected the dominant position of one of the spouses deriving from inequitable bargaining positions.[26] If the court in this case recognized that the wife needed to be protected from the disadvantages imposed on her in the matrimonial agreement owing to her inferior position, it is not beyond the bounds of the possible to expect that the courts will in future treat provisions of family law as unconstitutional if they indirectly discriminate against women on whom the burden of running the household and bringing up the children typically rests.

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[24] Judgment of the *BGH* of 13 October 1983 in (1983) *Neue Juristische Wochenschrift*, pp. 165–167.

[25] Judgment of the *BVerfG* of 6 February 2001 in (2001) *Neue Juristische Wochenschrift*, pp. 957–961.

[26] As already in Schwenzer, 'Vertragsfreiheit im Ehevermögens- und Scheidungsfolgenrecht' in (1996) *Archiv für Civilistische Praxis*, pp. 88–113; Dethloff, 'Note' in (1997) *Juristenzeitung*, pp. 414–415; Büttner, 'Grenzen ehevertraglicher Gestaltungsmöglichkeiten' in (1998) *Zeitschrift für das gesamte Familienrecht*, pp. 1–8.

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C. Discrimination against Same-sex Partners

Homosexuals have long been discriminated against both socially and legally. Up until 1969 German law punished 'indecency' between men with a custodial sentence. It was not until 1994 that homosexuals were for the first time given complete equality in the area of criminal law. Since then, the legal issues surrounding cohabitation of same-sex partners have increasingly become the centre of interest.[27] Same-sex partners were constrained to settle their personal and property-right relations by way of a contract or last will. Family status was, however, denied to them. A number of rights thus remained the exclusive domain of married couples. After the Federal Constitutional Court denied same-sex partners access to marriage in 1993,[28] the legislator was increasingly called upon to provide same-sex partners with a legal framework for their relationship.

I. The New Registered Partnership

After heated discussions the German Parliament (*Bundestag*) recently decided to introduce a registered partnership for same-sex couples.[29] The new Registered Partnership Act of 2001 (LPartG), which has entered into force on 1 August 2001, governs the establishment, the legal effects and the dissolution of registered partnerships; these provisions are in many ways comparable to matrimonial law, although in certain areas the Registered Partnership Act contains rules which deviate considerably from those governing marriage. If we wish to decide whether or not discrimination lives on in this Act, it is necessary to examine if in fact the differences between same-sex couples and spouses are justified in light of the aims underlying the respective provisions.

1. Establishment of the Registered Partnership

The initial prerequisite for the establishment of a registered partnership is that the partners are of the same sex. Thus the reference point for the Act, in line with the

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[27] In detail: Schimmel, *Eheschließungen gleichgeschlechtlicher Paare?* (Berlin, 1996); Verschraegen, *Gleichgeschlechtliche 'Ehen'* (Vienna, 1994).

[28] Judgment of the *BVerfG* of 4 October 1993 in (1993) *Neue Juristische Wochenschrift*, pp. 3058–3059.

[29] Compare Diederichsen, 'Homosexuelle – von Gesetzes wegen?' in (2000) *Neue Juristische Wochenschrift*, pp. 1841–1844; Schwab, 'Eingetragene Lebenspartnerschaft: Ein Überblick' in (2001) *Zeitschrift für das gesamte Familienrecht*, pp. 385–398; Battes, '"Ehe" für Homosexuelle?' in (2001) *Renovatio*; see also Strick, 'Gleichgeschlechtliche Partnerschaft: Vom Straftatbestand zum Status?' in (2000) *Deutsches und Europäisches FamilienRecht*, pp. 82–94; from a constitutional point of view Krings, 'Die "eingetragene Lebenspartnerschaft" für gleichgeschlechtliche Paare, Der Gesetzgeber zwischen Schutzabstandsgebot und Gleichheitssatz' in (2000) *Zeitschrift für Rechtspolitik*, pp. 409–415; Scholz and Uhle, 'Eingetragene Lebenspartnerschaft und Grundgesetz' in (2001) *Neue Juristische Wochenschrift*, pp. 393–400.

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principle of protection of a person's private life, is the gender rather than the sexual orientation of the partners, as is the case with marriage. Although registered partnerships will, in reality, generally be established by homosexually oriented partners, the discrimination against whom the legislator primarily sought to eliminate, a registered partnership can also be entered into by two heterosexual partners of the same sex, e.g. by two close friends. Unlike the French *Pacte Civil de Solidarité* (PACS), however, the registered partnership is not open to all unmarried persons regardless of their sex.

A registered partnership can only be established between *two*, not between *several* persons. As with marriage, registered partnerships are therefore based on the principle of monogamy. Even though it cannot be ruled out that in individual cases more than two persons may be joined in a relationship that is meant to be lasting – as is the case in other cultures where partners of different genders live in polygamy – the social reality, at least for the moment, is that a close community based on mutual responsibility such as that envisaged by the law generally exists only between two people. The Act takes cognisance of this fact by limiting the number of partners to two.

The provisions governing the declaration of the intent to enter into a registered partnership are fundamentally the same as those governing marriage. The partners must, while present in person, declare to each other their mutual intent to enter a partnership for life. The declarations cannot be made subject to a time limitation or dependant on conditions.[30] While the draft required that the declarations be made, as with a marriage, before a registrar, the Act itself merely requires that the declaration be made before a proper authority.[31] For reasons of legal competence, it therefore falls to the individual *Länder* (federal states) to determine who these authorities are. Due to their competence in these matters and for the sake of legal clarity, this responsibility should be given to the registrars who generally maintain public records concerning personal status.

The establishment of a registered partnership is prohibited where one of the partners is a minor.[32] This requirement cannot as it can in the case of marriage[33] be waived. Furthermore, a registered partnership can be established only by someone who is not already married or living in a registered partnership with someone else.[34] This impediment is an expression of the principle of monogamy. Surprisingly, in the reverse case, the existence of a registered partnership does not constitute an impediment to marriage: the law concerning legal impediments to marriage has remained unchanged. § 1306 of the BGB only provides that marriage may not be entered into while another marriage exists, not if a registered partnership exists.

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[30] § 1 I, 1 and 2 of the LPartG.
[31] § 1 I, 3 of the LPartG.
[32] § 1 II no.1 of the LPartG.
[33] § 1303 II of the BGB.
[34] § 1 II no.1 of the LPartG.

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According to the wording of this provision, the registrar cannot deny his or her participation in the marriage ceremony if a spouse is already in a registered partnership. Nor does the existence of a registered partnership constitute a reason to dissolve a marriage. There is, furthermore, no legal basis for *ipso iure* dissolution of such a registered partnership upon the conclusion of a marriage.[35] The result is that a partner can live both in a legally valid registered partnership and in a legally valid marriage.

Both registered partnership and marriage are, however, based upon the principle of monogamy. Their legal effects are geared towards an exclusive relationship. If both a registered partnership and a marriage are allowed to exist alongside each other, the personal and property rights and obligations of the two relationships may collide. Moreover, since it is not apparent what justifies this curious situation – wherein one cannot establish a registered partnership while married, but can contract a lawful marriage in spite of the existence of a registered partnership – it must be asked whether the legislator's failure to include registered partnerships in the list of legal impediments to marriage in § 1306 of the BGB is not, in fact, an – astonishing – oversight. Since this omission results in a gap in the law that was presumably not envisaged, an extension by analogy of the impediment of bigamy aimed at spouses to partners seems justified. A registrar called upon to preside over such a ceremony would then be constrained to deny his or her participation in the contracting of the marriage if a spouse was already in a registered partnership. A marriage contracted while a registered partnership still exists, could then be dissolved. In the interests of the need for legal certainty one hopes that the legislator will clarify this point.

Furthermore a registered partnership cannot be established between persons with close blood ties i.e. between parents or grandparents and children, and between full and half siblings.[36] Finally, a registered partnership cannot be validly established if there is no common intent on the part of both partners to assume the obligations of mutual care and support, of a communal arrangement of life and of the taking on of responsibility for each other.[37] This provision, which was not included in the draft of the LPartG, as in the case of the corresponding rule in § 1314 II No. 5 of the BGB, precludes the establishment of sham partnerships which are obviously geared to other purposes, for example, to obtain a residence permit.

Remarkably, the LPartG does not contain any provisions which set out the grounds for nullity. Unlike matrimonial law, the LPartG does not lay down a court procedure whereby the dissolution of a registered partnership may be demanded on the basis of the existence of irregularities present at its establishment, with effect for the future. If a partnership was entered into in the absence of the relevant

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[35] This is considered by Schwab, 'Eingetragene Lebenspartnerschaft: Ein Überblick' in (2001) *Zeitschrift für das gesamte Familienrecht*, pp. 385–398, at p. 389.
[36] § 1 II no.2 of the LPartG.
[37] § 1 II no.4 of the LPartG.

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prerequisites, or with the existence of an impediment to its establishment, providing only directory provisions were breached, then the validity of the partnership remains unaffected; if, however, the irregularities were of a serious nature, then the registered partnership would be rendered ineffective. Finally the absence of special rules on fraud or error gives rise to the question if there remains room for the application of the general provisions governing erroneous expression of intention.

2. Legal Effects of the Registered Partnership

(A) PERSONAL LEGAL EFFECTS

The LPartG has designed the registered partnership as a relationship of communal rights and responsibilities. The principle of solidarity between the partners is given form in the personal area through the provision contained in § 2 of the LPartG, which obliges the registered partners to provide mutual care and support, the communal arrangement of life and the acceptance of responsibility for one another. Prevailing legal opinion derives from the duty to a conjugal life enjoined upon spouses a duty to a common household and to sexual cohabitation.[38] In the LPartG, the legislator included a duty to *a communal arrangement of life*. This phrase was inserted at a late stage by the Committee on Legal Affairs. The legislator thus distanced himself from the given formulation concerning the duties of conjugal life and has thereby rightly refrained from a misguided importation of such legal obligations from matrimonial law.

The rules concerning names are comparable to those pertaining to spouses.[39] Registered partners may therefore, as an expression of their bond, choose a common partnership name or keep the name that they currently hold. A registered partner whose birth name does not become the joint partnership name may also add his or her name to the partnership name. The only thing that the LPartG has not done is to lay down a directory provision governing the selection of a joint name, such as that provided by matrimonial law in § 1355 I, 1 of the BGB, a remnant of the formerly mandatory joint name now held to be unconstitutional.

(B) GENERAL FINANCIAL CONSEQUENCES

Financially, the obligation towards solidarity finds its most significant expression in the partners' obligation to provide each other with appropriate financial support.[40] This means that both partners must use their work and assets to make a financial contribution. It goes without saying that registered partners just like spouses – as is expressly provided for spouses in § 1356 of the BGB – may divide tasks between themselves by mutual consent. In line with this division of tasks partners may fulfil

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[38] Brudermüller, *supra* note 13, at § 1353, para 7.
[39] § 3 of the LPartG.
[40] § 5 of the LPartG.

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their obligation to contribute to the upkeep either by housework or by making available the money gained through employment. The maintenance due concerns the partners' subsistence, i.e. household costs and the personal needs of each partner. The entitlement to maintenance does not, however, extend to the children of a registered partner, not even if they live in the common household.

Beyond the obligation towards maintenance the LPartG also provides for further general financial consequences. These include primarily the so-called *Schlüsselgewalt*, i.e. the joint entitlement and joint obligation through contracts concluded by one partner; this provision applies also in matrimonial law. This entitles each partner to conduct any business aimed at ensuring the partners' adequate subsistence on behalf of both partners. Such contracts generally bind both partners.[41] The other partner can therefore be held liable for any contracts entered into by the other, e.g., to procure food and clothing, furniture or a vehicle intended for personal use, provided that the transaction is not disproportionate to the partners' financial circumstances and standard of living.

This means that the other party to contracts of this kind gains an additional debtor irrespective of the division of tasks within the registered partnership, this additional debtor could remain unknown to the creditor. Such creditor protection seems reasonable only if relationships are generally characterized by a differentiated division of tasks (i.e. each partner tends to assume separate areas of responsibility) and only the partner's joint liability enables the partner who is not gainfully employed to carry out his or her tasks independently. As far as the writer of this article is aware, there seems to be a lack of detailed socio-economic studies dealing with the question of how same-sex partners in Germany divide their tasks. One may assume, however, that a differentiated division of tasks is much rarer in same-sex partnerships than it is in marriages. One reason for this is that there are – at least for the moment – far fewer children in same-sex partnerships than there are in marriages.[42] In Germany childcare still frequently results in a differentiated division of tasks due to the current working conditions and the lack of childcare facilities. Secondly, same-sex partnerships lack a traditional role model. Thus, the strong protection afforded to creditors in the LPartG seems questionable.

As in the case of the matrimonial provision in § 1362 of the BGB it is assumed for the benefit of the creditors of a registered partner that the movable goods in the possession of either partner belong to the debtor.[43] This provision takes into account the fact that the issue of ownership is often unclear in a life partnership and removes the burden of proof from the creditor. Finally, there are important limits to the freedom of contracts imposed by the establishment of a registered partnership. A

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[41] § 8 II, 2 of the LPartG in connection with § 1357 II, 2 of the BGB.

[42] Dannecker, 'Sexualwissenschaftliches Gutachten zur Homosexualität' in *Die Rechtsstellung gleichgeschlechtlicher Lebensgemeinschaften* (Jürgen Basedow, Klaus J. Hopt, Hein Kötz and Peter Dopffel (eds)) (Tübingen, 2000) at pp. 333–350, at pp. 345–347.

[43] § 8 I of the LPartG.

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partner requires the consent of the other partner to dispose of household goods in his or her possession or each of their assets as a whole.[44] Contrary to the corresponding provisions of matrimonial law, which apply only in the matrimonial property regime of accrued gains, the freedom of contract of partners in a registered partnership is limited irrespective of the partners' property regime. The same is true regarding the substitution rule, according to which household goods acquired to replace lost or useless goods become the property of the partner who was owner of the goods that were substituted.[45]

(C) CONSEQUENCES IN PROPERTY LAW

Unlike spouses, registered partners are required to make a declaration concerning the property regime at the establishment of the registered partnership.[46] The partners have the option to choose either the property regime of *Ausgleichsgemeinschaft*, which is an equivalent to the matrimonial property regime of accrued gains, or to settle their financial position by means of a notarized partnership contract; in this contract they can either modify the property regime of accrued gains or choose between the two optional types of property regime available to married couples, that of separation of property or that of communal property. If registered partnerships do not show the division of tasks typical of marriages, then there is no need for a legally mandated property regime which secures a share of the accrued gains for the partner who is not gainfully employed. Rather, the obligation to choose a property regime adequate to the relationship in question seems an appropriate solution. The fact that the LPartG does not offer a similar option concerning the *Versorgungsausgleich*, but rather neglects to regulate the *Versorgungsausgleich* between registered partners is inconsistent.

(D) PARENTAL CARE AND CUSTODY

The LPartG does not allow for joint adoption of a child by registered partners or the adoption of a child of the other partner with both partners becoming its legal parents. It does, however, take into account the possible presence of minors in registered partnerships and has therefore established the so-called *kleines Sorgerecht* (minor custody right).[47] Accordingly, the registered partner who is not a parent of the child may have certain parental rights and duties, in the same way as the law now provides for the new spouse of a parent.[48] First of all, the registered partner is given the right to decide, with the parent who has the care and custody of the child, on matters concerning daily life. This right entails factual obligations of care for the

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[44] § 8 II of the LPartG in connection with §§ 1369, 1365 of the BGB.
[45] § 8 II of the LPartG in connection with § 1370 of the BGB.
[46] § 1 I, 4 in connection with § 6 I of the LPartG.
[47] § 9 of the LPartG.
[48] § 1687b of the BGB.

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child, but also includes the authority to represent the child in relevant legal transactions jointly with the other partner. Family courts have the power to curtail or exclude these rights if this is necessary for the welfare of the child. Secondly, in the event of imminent danger the registered partner of a parent is entitled to perform any legal acts which may be required for the benefit of the child. However, these parental rights and duties exist only if the parent who lives in a registered partnership is the sole person having the care and custody of the child, but not if that partner shares care and custody with the other parent. In the event of the dissolution of the registered partnership the partner of the parent has right of access to any children, provided that the partner has lived in the same household as the children over an extended period of time.[49] This right to access exists regardless of whether the parent in the registered partnership is the sole person having the care and custody of the child, or if he or she shares it with the other parent. Furthermore, the protection afforded to the stepfamily following the fundamental reform of child and parent law now also extends to the registered partner. The registered partner of a parent, who has lived with the parent and the child in the same household over an extended period of time, is entitled to refuse a demand by the other parent to surrender the child if the welfare of the child would be endangered by the surrender.[50]

(E) SUCCESSION

The surviving registered partner is treated, for purposes of the law of inheritance, essentially the same as a spouse. In relation to the statutory heirs of the so-called first class, i.e. the children and their offspring, the registered partner is entitled to a statutory portion of one quarter of the deceased's estate; in relation to statutory heirs of the second class, i.e. the parents or siblings and their offspring, or in relation to grandparents, the registered partner is entitled to a statutory portion of one half of the deceased's estate. If there are no statutory heirs of the first or second classes nor grandparents, the surviving registered partner inherits the entire estate. Thus the LPartG resolves the tension between partners' and relatives' right to a share in the deceased's estate in the same way as in matrimonial law, by stipulating that the partner's share in the deceased's estate is governed by the surviving relatives' degree of relationship to the deceased. The registered partner, as a continuing effect of their community, is also entitled to the items forming part of the partnership household and to the gifts received when the registered partnership was established. Furthermore, registered partners can now draw up a joint will, as spouses can. If the deceased has excluded the registered partner from the inheritance by means of a disposition by will, the surviving partner is entitled to demand from the heirs half the statutory portion of the deceased's estate as his or her compulsory portion. The

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[49] § 1685 II of the BGB as amended by the Act Aimed at Terminating Discrimination against Same-sex Partnerships (*Gesetz zur Beendigung der Diskriminierung gleichgeschlechtlicher Gemeinschaften: Lebenspartnerschaften*) of 2001.

[50] § 1682, 2 of the BGB as amended.

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provision contained in the draft of the LPartG, according equal tax status as spouses to registered partners in terms of inheritance tax, did not become law because it failed to secure a majority in the *Bundesrat*.

3. Dissolution of the Registered Partnership

(A) PREREQUISITES OF *AUFHEBUNG*

A registered partnership, like a marriage, is dissolved either by death or court judgment. The *Aufhebung* of the registered partnership, the term used by the Act referring to the dissolution of a registered partnership by judicial decree, is comparable to the divorce of spouses in a marriage. A registered partnership can be dissolved if one of the following three criteria is met:[51]

(1) if both registered partners have declared that they do not wish to continue the registered partnership, the court then dissolves the registered partnership one year after the declaration;
(2) if only one registered partner has made a declaration to the same effect, dissolution will take place after three years;
(3) if its continuation would impose an unacceptable hardship on the partner who files for dissolution, for reasons relating to the person of the other registered partner.

When one of these criteria is present, it is safe to assume that the registered partnership no longer has any chance of continuing; therefore the LPartG is in the final analysis founded on the principle of irretrievable breakdown. Unlike matrimonial law, however, the LPartG does not specifically provide for an irrefutable presumption of breakdown if the relevant criteria are met, but rather clearly delineates them as grounds for dissolution. The LPartG differs materially from the law of divorce in that dissolution does not require a period of separation, but the completion of a waiting period equalling the periods of separation in divorce law in extent. Whether such waiting periods have been completed is easily ascertained, as the requisite declarations are of necessity publicly registered. In practice, registered partnerships will therefore be considerably harder to dissolve than marriages, since it is difficult for a court to ascertain whether legal separation, which – to protect the financially weaker party – may occur inside the conjugal home,[52] has actually been in effect for the required amount of time. There is no reason for this difference in treatment. If the legislator deems the prerequisite of living apart to be unsuitable due to the danger that it might be circumvented, he should consider the general introduction of waiting periods.

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[51] § 15 of the LPartG.
[52] § 1567 I, 2 of the BGB.

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(B) CONSEQUENCES OF DISSOLUTION

After the dissolution of a registered partnership, the effects of the obligation to support and care continue in the guise of an entitlement to post-partnership maintenance.[53] A partner is entitled to financial support from the other if the partner so demanding cannot care for himself or herself because he or she cannot be expected to take up gainful employment, in particular due to old age, sickness or disability. Finally, on dissolution of a registered partnership, a court judgment may be issued concerning the partners' joint home and household goods.[54] The law makes corresponding provisions for partners living apart.[55]

II. Need to Reform the Law on Parenthood of Same-sex Partners

The new registered partnership substantially contributes to the reduction of discrimination against same-sex partnerships. Couples of the same sex are offered the chance to express their close bond through the acceptance of legal responsibility. As a consequence of the legal recognition of the registered partnership as a community based on mutual responsibility, provisions in matrimonial law that (like maintenance obligations) are an expression of this obligation to care and support are applied to registered partnerships. The fact that the LPartG has in other areas created provisions which deviate from matrimonial law, does not amount to discrimination where the matrimonial provisions – such as the matrimonial property regime of accrued gains and the *Versorgungsausgleich* – are intended to counteract the effects of a mostly differentiated division of tasks, which generally comes about with the existence of children.

The provisions governing the legal relationships between registered partners and children for whom they accept joint parental responsibility, however, give some cause for concern. While the new 'minor custody right' helps to alleviate specific problems concerning stepchildren, the LPartG does not adequately deal with cases in which the child is not the issue of an earlier relationship of one of the partners, but is the product of a joint decision by the partners to be parents. Thus two female registered partners could raise a child born to one through artificial insemination, although German law at present does not allow this. Furthermore, it would also be possible for one registered partner, male or female, to adopt a child on his or her own, which would subsequently be raised by both registered partners. In these cases a factual parent-child relationship would come into being with the non-adopting partner as well. Since the child has a legal relationship to only one parent in cases such as these, it would be in the child's best interest if its relationship to the other partner could be secured through adoption. It would thus acquire an additional alimony debtor. Such a provision would be of particular importance if the biological

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[53] § 16 of the LPartG.
[54] §§ 17 and 18 of the LPartG.
[55] §§ 12-14 of the LPartG.

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parent or the parent by adoption were to become financially insolvent or die. The child's obligations towards his or her adoptive parent that would thus arise, would also in fact mirror the factual parental relationship already existing. Moreover, the law ought to ensure provisions for the care and custody of such children that are in the best interest of the child in the event of dissolution of a registered partnership. The right to access alone, which is currently granted, is not able to accommodate cases in which the child has been predominantly or exclusively cared for by the other registered partner, while the biological parent or parent through adoption pursued gainful employment. Therefore, registered partners ought also to be given the opportunity to jointly adopt a child or to adopt the child of the other registered partner.

D. Conclusion

The reforms seen by German family law over the past century have eliminated a large number of stark discriminations. The departure from the patriarchal model of marriage, which monopolized sexuality and geared it towards procreation, has shaken the BGB's family law to its very foundations. A new family law, however, is yet to emerge. The most recent sign of this absence of a new family law is the fact that registered partnerships were regulated outside the BGB. However, one will not be able to avoid the fundamental question: to what degree can the protection of marriage independent of the existence of children be justified in future? It will be the task of a fundamental reform to freshly stipulate the extent to which legal consequences, which the law has so far connected to marriage, could be more appropriately connected to jointly lived parenthood. Only then will one be able to counter any indirect forms of discrimination which women are subject to, who – in marriages and other partnerships – are still generally responsible for the care of the children. Only a new family law such as this will signify the true end of the discrimination described above.