

Legal Study on Homophobia and Discrimination on Grounds of Sexual Orientation and Gender Identity

Update February 2010

CONTENTS

EXECUTIVE SUMMARY	5
A. IMPLEMENTATION OF EMPLOYMENT DIRECTIVE 2000/78/EC	11
A.1. General Law on Equal Treatment	11
A.2. General Gaps in Transposition	12
A.3. Specific Gaps in Transposition Pertaining to Sexual Orientation.....	14
B. FREEDOM OF MOVEMENT	16
B.1. Law on Freedom of Movement/EU	16
B.2. Residence Law.....	17
C. ASYLUM AND SUBSIDIARY PROTECTION.....	18
C.1. Fundamental Right to Asylum in Article 16a of the Basic Law and Article 60 of the Residence Law	18
C.2. Subsidiary Protection.....	19
C.3. Case Law	20
D. FAMILY REUNIFICATION.....	24
E. FREEDOM OF ASSEMBLY	26
E.1. Article 8 of the Basic Law – Freedom of Assembly	26
E.2. The Law Concerning Assemblies and Processions	27
F. HATE SPEECH AND CRIMINAL LAW	28
F.1. Article 130 Paragraph 1 and 2 of the Criminal Code	28
F.2. Article 46 Paragraph 2 of the Criminal Code	29
G. TRANSGENDER ISSUES	31

G.1.	Allgemeines Gleichbehandlungsgesetz (AGG) [General Law on Equal Treatment]	31
G.2.	Freedom of Movement.....	31
G.3.	Asylum and Subsidiary Protection	31
G.4.	Family Reunification	31
G.5.	Freedom of Assembly.....	32
G.6.	Criminal Law	32
G.7.	Transsexuellengesetz (TSG) [Law on Transsexuals]	32
G.8.	Changing a Given Name	34
G.9.	Determination of Gender Identity	34
G.10.	Costs	35
G.11.	Legal Shortcomings	35
H.	MISCELLANEOUS.....	36
H.1.	Legislative Initiatives for an amendment of Article 3 of the Basic Law	36
H.2.	Same-Sex Life Partnership Law.....	36
H.3.	Rights to Custody and Access in Rainbow Families	39
H.4.	Intersexuality	40
H.5.	Institutional Homophobia	42
I.	GOOD PRACTICE	44
I.1.	Prohibitions on Discrimination in the Constitutions of the <i>Laender</i>	44
I.2.	Jurisprudence on the Law on Transsexuals.....	45
I.3.	Studies conducted by Antidiscrimination-Office	46
I.4.	Civil Society.....	47
I.5.	Retroactive equalisation of remuneration for same-sex life partner civil servants in Hamburg.....	47

I.6. Police sets up special agents to liaise with the LGB
community47

ANNEXES49

Executive summary

Introduction

Social ideas of morality and society's attitude toward LGBT people have fundamentally changed since the Federal Republic of Germany's beginnings. At the time the Basic Law was passed, homosexuality was regarded as immoral and criminally prohibited through articles 175ff. of the Criminal Code. The negative judgement of homosexuals was at first also confirmed by the Federal Constitutional Court [Bundesverfassungsgericht], which referred to the principle of morality anchored in the Basic Law.¹ Gays and lesbians remained subject to social stigmatisation and discrimination, as well as criminally persecuted in the name of the state. In the period between 1953 and 1965 the police registered almost 100,000 people across the country who were suspected of violating the criminal statute for homosexuality.² Between 1950 and 1965, nearly 2,800 homosexuals were convicted each year.³ It was only after the lifting of the total prohibition in 1969 that the legal practice changed, gradually decreasing social stigmatisation. Yet it was only in 1994 that the criminal statute for homosexuality was completely abolished. All the way into the 1980s, in society as well as in politics and the judiciary, the stigma of immorality overshadowed every discussion about equality for lesbians and gays. The Federal President, Richard von Weizsäcker, explicitly mentioned homosexuals as a victimised group of National Socialism for the first time in his speech of 8th May 1985 – 40 years after the end of the war. It took another 15 years, until December 2000, for the Federal Parliament [Bundestag] to apologise to the victims for the injustice they had to endure under National Socialism.⁴ In 2002 gays and lesbians who were criminally prosecuted pursuant to article 175 of the Criminal Code under the National Socialist regime were legally rehabilitated. The current Federal Government (Bundesregierung) has also included the subject matter into its coalition treaty.⁵ It is stated therein, that in the spirit of the collective compensation for homosexual victims of National Socialism a trust is to be set up, which will work at countering discrimination on grounds of sexual orientation by interdisciplinary research and education. Yet civil society organisations demand compensation, rehabilitation and annihilation of verdicts passed after 1945 too.⁶

¹ Federal Constitutional Court (*Bundesverfassungsgericht*), BVerfGE 6, 389 (434).

² Müller (2003), *Ausgrenzung der Homosexuellen aus der 'Volksgemeinschaft': die Verfolgung von Homosexuellen in Köln 1933-1945*, Cologne, p. 218.

³ Müller (2003), *Ausgrenzung der Homosexuellen aus der 'Volksgemeinschaft': die Verfolgung von Homosexuellen in Köln 1933-1945*, Cologne, p. 218.

⁴ <http://dip21.bundestag.de/dip21/btd/14/048/1404894.pdf>, p. 3 (26.02.2010).

⁵ <http://www.fdp-bundespartei.de/files/363/091024-koalitionsvertrag-cducus-fdp.pdf>, p. 111 (26.02.2010). The coalition treaty is an agreement between the governing political parties that establishes the political plan for the legislative period but is not externally binding (cf.: explanation by the Scientific Service of the Federal Parliament (*Wissenschaftlicher Dienst des Deutschen Bundestag*):

http://www.bundestag.de/dokumente/analysen/2009/Koalitionsverhandlungen_-_Koalitionsvertrag.pdf (26.02.2010).

⁶ <http://www.lsvd.de/1211.0.html>; <http://news.gay-web.de/njus/id1001> (26.02.2010).

The change in attitude in the 1980s ran parallel to the controversial AIDS debate, as a consequence of which the stigma of immorality fell. The Federal Court of Justice [Bundesgerichtshof] ruled at the time that it could no longer be determined that the cohabitation of unmarried persons of the same or different sexes was deemed immoral. Therefore, cohabitation, as a product of the general freedom of action, stands under the protection of the Basic Law.

Since the beginning of the 1990s attitudes toward homosexuals have clearly changed. Homophobic discrimination in public discourse is no longer approved. By the same token, gays and lesbians are increasingly accepted in society, as demonstrated by the coming out of prominent politicians, including Berlin's Governing Mayor, Klaus Wowereit, and the First Mayor of Hamburg, Ole von Beust.

In order to take account of evolving social reality, in 2001 the very controversial Life Partnership Law [Lebenspartnerschaftsgesetz] was passed as a further milestone for the equality of gays and lesbians. It creates a separate institution under family law for same-sex couples and for the first time offers them the possibility of legal security.

Although the law establishes equality for lesbians and gays in many – but by no means all – spheres of life, actual discrimination and social unacceptability still remain. In the years of 2006 and 2007, the MANEO Anti-Violence Project conducted the largest Germany-wide study to date, with nearly 24,000 participants; more than every third respondent indicated experiencing violence in the prior 12 months.⁷ Remarkably, only 11.9 per cent of all cases were reported to police, and conversely, in 88.1 per cent of the cases, police were not informed.⁸ In the years of 2007 and 2008, the second part of the study was conducted with approximately 17,000 participants and analogous results were obtained.⁹ A similar situation exists in the employment world. In a study prepared by the University of Cologne, in which 2,230 gays and lesbians participated, 52 per cent of the respondents remain quiet about their sexual orientation at the workplace. By contrast, only 22.5 per cent experienced no discrimination at work.¹⁰

Summarised results of the study

The **Life Partnership Law** [Lebenspartnerschaftsgesetz]¹¹ was passed in 2001, which was crucial to the gay and lesbian community for symbolic as well as

⁷ MANEO Anti-Gewalt-Projekt [MANEO Anti-Violence Project], *Gewalterfahrungen der schwulen und bisexuellen Jugendlichen und Männer in Deutschland*, p. 6; <http://www.maneo-toleranzkampagne.de/umfrage-bericht1.pdf> (26.02.2010).

⁸ MANEO Anti-Gewalt-Projekt, *Gewalterfahrungen der schwulen und bisexuellen Jugendlichen und Männer in Deutschland*, p. 25; <http://www.maneo-toleranzkampagne.de/umfrage-bericht1.pdf> (26.02.2010).

⁹ <http://www.maneo-toleranzkampagne.de/pdf/maneo-umfrage2-bericht.pdf> (26.02.2010).

¹⁰ Frohn, *Sexuelle Identität, (Anti-)Diskriminierung und Diversity am Arbeitsplatz*, available at: http://typo3.lsvd.de/fileadmin/pics/Dokumente/News/Out-im-Office_Erg.-Zus.-Fass_DF.pdf (26.02.2010).

¹¹ Life Partnership Law [*Gesetz über die eingetragene Lebenspartnerschaft*]: <http://bundesrecht.juris.de/lpartg/> (26.02.2010).

practical reasons. It creates a separate institution of family law for same-sex couples and for the first time, offers them the possibility of legal security. Amongst other things, the law provides for regulations in maintenance, tenancy, inheritance, social security, and aliens' law. The Law on Revision of the Life Partnership Law [Gesetz zur Überarbeitung des Lebenspartnerschaftsrechts]¹² took effect four years later, providing further rights to this institution, including the extensive adoption of marital property and maintenance laws, the possibility of step-children's adoption, the introduction of the statutory equalisation of pensions, as well as the inclusion of the life partner in provision for surviving dependants.

In 2009, the relevant inheritance and income tax law was changed insofar that same-sex life partners are now on an equal footing with married couples concerning the tax exemption amounts. Nevertheless, the rate of taxation remains different. Also federal laws created a unified competence for the establishment of life partnerships with the civil registry offices. Yet two Federal States [Bundesländer] used an exemption clause to opt out of the unified federal competence and assigned the competence to their administrative districts.¹³ Moreover, differences persist as regards the annulment of same-sex life partnerships and in adoption law. The pertinent legal provisions for civil service employees remain widely differentiated but are being equalised progressively on the federal level and in the jurisdictions of the Federal States.¹⁴ This development is also apparent in a landmark decision of the Federal Constitutional Court on the unequal treatment of marriage and same-sex life partnerships regarding pensions for surviving dependants of public employees in the civil service field.¹⁵ Furthermore the current Federal Government [Bundesregierung] coalition of the Christian Democratic Union and the Free Democratic Party has put the subject matter on its agenda and included the equalisation of same-sex life partnerships in the civil service sector in its coalition treaty.¹⁶

In transposing European directives on realising the principle of equality, the **General Law on Equal Treatment** [Allgemeines Gleichbehandlungsgesetz] was passed in 2006; it was to serve in fighting discrimination on grounds including sexual identity¹⁷ in the employment world and in civil law transactions. The law was very controversial in politics, among jurists and others, and thus contains a series of limitations that may violate European law. With regard to discrimination on the basis of sexual identity, the law's

¹² Law on Revision of the Life Partnership Law [Gesetz zur Überarbeitung des Lebenspartnerschaftsrechts]: <http://www.bgbportal.de/BGBL/bgb11f/bgb1104s3396.pdf> (26.02.2010).

¹³ <http://www.lsvd.de/230.0.html#c6286> (26.02.2010).

¹⁴ <http://www.lsvd.de/194.0.html#c1372>;

<http://www.lsvd.de/194.0.html#c4760> (26.02.2010).

¹⁵ <http://www.bundesverfassungsgericht.de/pressemitteilungen/bvg09-121.html>,

http://www.bverfg.de/entscheidungen/lk20090810_1bvl001509.html (26.02.2010).

¹⁶ <http://www.fdp-bundespartei.de/files/363/091024-koalitionsvertrag-cducsu-fdp.pdf>, p. 111 (26.02.2010).

¹⁷ German legislation does not clearly differentiate between 'sexual identity' and 'sexual orientation.' Both terms are used in different laws. This report uses both terms according to which is used in the laws cited.

limitations include such areas as insufficient protection from dismissal; short periods for bringing a claim; very limited procedural involvement of associations; as well as the disadvantaged position of civil servants, judges and soldiers who have same-sex partners. On the other hand, going beyond community law, all grounds for discrimination, and therefore also sexual identity, were included in the protection from discrimination under civil law.

With the entry into force of the General Law on Equal treatment on the 16th of August 2006, a federal office (the Federal Anti-Discrimination Agency) for protection from discrimination on manifold grounds, including sexual orientation and gender identity in its remit since the start of its work, was established within the Federal Ministry of Family, Senior Citizens, Women and Youth.¹⁸ Three Federal States have followed suit and also established similar Antidiscrimination Offices of their own.¹⁹

Already in 1988, the Federal Court of Administration [Bundesverwaltungsgericht] also recognised as relevant to asylum a difference based on such immutable personal characteristics as ‘irreversible, predestined, homosexual character’.

In practice, the **asylum article** enshrined in article 16(a) of the Basic Law hardly plays a role. On the basis of regulations that have applied since 1993, the Federal Republic is surrounded with ‘safe third countries’ where asylum seekers are legally considered to be safe from persecution. In the European context after the entry into force of the so called Dublin II regulation most asylum seekers are dealt with according to the procedures laid down therein. If lesbian and gay asylum seekers cannot be expelled to a so-called ‘safe third country’ from which or through which they entered, then, in accordance with article 60 para. 1 of the Residence Law, they may not be deported to their country of origin if their life, physical integrity or their freedom is threatened due to their ‘belonging to a certain social group’.

The practice of the Federal Agency for Migration and Refugees and the administrative courts in the use of these provisions has been wide ranging, and continues to fail to guarantee comprehensive protection for homosexuals who are persecuted in their countries of origin. The often-contradictory decisions of the Agency and administrative courts are based on the foreign ministry’s sometimes-controversial situation reports, in which it is claimed that lesbians and gays in the country of origin in question can engage in sexual activity in the private sphere without danger. In addition, NGOs harshly criticise the process through which subsidiary protection can be conferred. They complain about the course of the hearing before the Agency, the demand for substantiation of lesbian or gay sexual orientation, as well as the ignoring of post-flight facts of the case.

¹⁸ <http://www.antidiskriminierungsstelle.de/ADS/antidiskriminierungsstelle.html>,
<http://www.antidiskriminierungsstelle.de/ADS/Antidiskriminierungsstelle/aufgaben.html>
 (08.04.2010); Section 1 and 25 ff. of the General Law on Equal Treatment:
<http://www.antidiskriminierungsstelle.de/RedaktionBMFSFJ/RedaktionADSen/PDF-Anlagen/2009-08-28-agg-englisch-neues-design.property=pdf,bereich=adsen,sprache=en,rwb=true.pdf> (08.04.2010).

¹⁹ <http://www.antidiskriminierungsstelle.de/ADS/Service/links.html> (26.02.2010).

²¹ <http://www.bundesverfassungsgericht.de/pressemitteilungen/bvg08-077.html>.

In accordance with the Residence Law, regulations on family reunification with Germans and with foreigners and the regulations on the independent residence rights of spouses to registered life partnerships are to be used. With regard to family reunification with Germans, German language ability and assured livelihood are preconditions. However, the latter usually does not have to be proved. Reunification of a family with a foreigner first requires that the foreigner have residence papers, that she/he has adequate living space at her/his disposal, and that she/he be able to provide proof of health insurance.

Freedom of assembly is guaranteed as a fundamental right in article 8 of the Basic Law [Grundgesetz], according to which all Germans have the right to assemble peacefully and without weapons, without required prior registration or permission. The Law Concerning Assemblies and Processions [Versammlungsgesetz] as well as the practice of the courts and other public authorities do not differentiate according to the sexual orientation of the participants, or the political goal of the demonstration. Currently, gay and lesbian demonstrations are taking place in over 30 German cities and have not been prevented by any counterdemonstrations.

The crime of **incitement** is defined in article 130 of the Criminal Code. Under para. 1, incitement to hatred or appeals to violent or wanton measures against parts of the population, as well as attacks on the human dignity of others through abusive language, malicious contempt or vilification is punishable by sentences from three months to five years. Additionally, the regulation provides that the act must be conducted in such a manner that it is capable of disturbing the public peace. Especially the latter element of the crime means that in practice there are few convictions for incitement.

In accordance with the general part of the German Criminal Code, in assessing the severity of a punishment, the court must weigh the motivations and goals of the criminal act. However, in the practice of the courts, this finds hardly any application with regard to the homophobic background of a crime.

In the German legal system, discrimination against **transsexuals** is considered discrimination on the basis of sexual orientation.

The Law on Transsexuals [Transsexuellengesetz] provides transsexuals with two solutions: a change in given name without a surgical procedure, and the determination of gender after a sex-changing operation. Prerequisite to the first solution is that the person concerned feels that she or he belongs to the other gender, and has felt the drive to fulfil this feeling of belonging for at least three years. Further, it is necessary that a change in this feeling is not to be expected. The second solution requires additionally that the transsexual person has undergone a sex-changing operation that must have made her/him incapable of reproduction. For both solutions, the court must also obtain two expert opinions before making its decision.

In the meantime, the Federal Constitutional Court has taken up the Law on Transsexuals in five decisions and deemed individual provisions to be unconstitutional. In the view of the justices, assumptions about transsexuality that form the basis of the Law on Transsexuals (for example, the assumption that transsexuals are heterosexual), can no longer be scientifically justified in core aspects, which makes a revision of the law necessary.

In a further decision of 2008 the Federal Constitutional Court Federal Constitutional Court held that a married transsexual who wanted to legally change his gender after a surgical change of his sex from male to female but remain married to his wife cannot be forced by the pertinent provision of the Law on Transsexuals to divorce in order to have his sex change legally recognised.²¹ This is due to the impact of the constitutionally guaranteed right to recognition of the freely chosen and self-determined gender identity which needs to be appropriately balanced with the constitutional guarantee of marriage as an institution as enshrined in Article 6 para 1 of the Basic Law. The decision led to a change of the Law on Transsexuals, which eliminated the rule in question from the law.²² This development, ending forced divorce for married couples in which one of the partners is transgender, was explicitly welcomed by the Council of Europe Commissioner for Human rights in an issue paper titled “Human Rights and Gender Identity”.²³

²² BGBl. I, Nr. 43, p. 1978, Article 5 (22nd July 2009);

http://www2.bgbli.de/Xaver/start.xav?startbk=Bundesanzeiger_BGBI (26.02.2010).

²³ para 3.2.2: <https://wcd.coe.int/ViewDoc.jsp?id=1476365> (08.04.2010).

A. Implementation of Employment Directive 2000/78/EC

A.1. General Law on Equal Treatment

EU Council Directive 2000/78/EC was transposed through a uniform “law on the transposition of European directives on the implementation of the principle of equality” of 14th August 2006 (hereinafter: ‘Transposition Law’)

From the beginning the law was very controversial among politicians, jurists, associations, civil society and others. This meant that discussion of an anti-discrimination law stretched into 2006. Due to the difficult birth of the law, a complicated compromise was reached which, in the end, contained a number of limitations likely not in compliance with European law²⁴ (see below, chapter A.2. and A.3.).

The main component of the Transposition Law is the General Law on Equal Treatment [Allgemeines Gleichbehandlungsgesetz – AGG]²⁵, set out in article 1 of the Transposition Law. Part 1 of article 1 describes the aim of the law as “preventing or eliminating discrimination on the basis of race, ethnic origin, gender, religion or philosophical belief, disability, age or sexual orientation”. In addition, the scope of the law extends to workplace, social protection, social advantages, education, civil law, thereby going beyond the provisions of the EC directive. Finally, the part of the law defines the terms direct and indirect discrimination, harassment, as well as sexual harassment.

Continuing in part 2, provisions of labour law on the protection of employees are set out, with an explicit prohibition of discrimination as well as possible exceptions. Further, the measures and obligations of the employer and rights of the employee are regulated. The provisions on compensation and damages are essential elements (article 15 of the AGG), which link the provisions of the EU directive with German law on compensatory damages.

Part 3 contains provisions on protection from discrimination in civil law transactions. In accordance with the above-mentioned guidelines of EU directives 2000/43/EC and 2004/113/EC, specific prohibitions on discrimination under civil law are established. All grounds for discrimination, and therefore also sexual orientation, are included in the protection from discrimination, in

²⁴ See the letter from the Commission of the European Communities to the German Foreign Minister of 31st January 2008:

<http://typo3.lsvd.de/fileadmin/pics/Dokumente/ADG/Kommission080131.pdf>;

and letters from the Commission of the European Communities of October 2009:

<http://dip21.bundestag.de/dip21/btd/17/004/1700421.pdf> (26.02.2010).

²⁵ General Law on Equal Treatment [Allgemeines Gleichbehandlungsgesetz – AGG]:

<http://www.antidiskriminierungsstelle.de/ADS-en/Service/downloads.did=129628.html>

(26.02.2010).

order to avoid the exclusion of fundamental areas of legal life from the protection against discrimination.²⁶

However, protection under civil law was differentiated in accordance with certain grounds. The strongest focus of the law is on discrimination on the basis of race or ethnic origin, which the law declares as impermissible. For all other grounds of discrimination the prohibition of discrimination under civil law relates only to so called mass contracts when obligations arise under a large number of cases (article 19 para. 1 (1) of the AGG). Also rental of housing is only covered if no less than 40 apartments are let out by the lessor (article 19 para 5 of the AGG) In response to the demands of gay and lesbian associations, discrimination in regard to obligations arising of a relationship with private law insurance companies were also declared impermissible (article 19 para. 1 (2) of the AGG). In this regard, the law does allow differential treatment, including on the basis of sexual orientation, ‘when this is based on actuarially demonstrable grounds’ (article 20 para. 2, 3rd sentence of the AGG).

Legal remedy for those affected is regulated in part 4 of the AGG. In addition to the regulations on the burden of proof, which basically provide for an alleviation for the claimant, the claimant can request the support of anti-discrimination associations, under certain circumstances, the worker’s council and the trade union represented in the respective company can invoke the labour court.

With the entry into force of the General Law on Equal treatment on the 16th of August 2006, a federal office (the Federal Anti-Discrimination Agency) for protection from discrimination on manifold grounds, including sexual orientation and gender identity in its remit since the start of its work, was established within the Federal Ministry of Family, Senior Citizens, Women and Youth.²⁷ Three Federal States have followed suit and also established similar Antidiscrimination Offices of their own.²⁸

Further articles of the Transposition Law contain an independent, analogous law on the protection of soldiers from discrimination (article 2), as well as consequential changes to existing laws (article 3 of the Transposition Law).

A.2. General Gaps in Transposition

First, the transposition is criticized with regard to protection from discrimination in the area of occupational pensions. Article 2 para. 2, 2nd sentence of the AGG makes reference to the Law on Occupational Pensions [Betriebsrentengesetz –

²⁶ See official reasoning, in: BT-Drs 16/1780 from 6th June 2007, p. 2.

²⁷ <http://www.antidiskriminierungsstelle.de/ADS/antidiskriminierungsstelle.html>, <http://www.antidiskriminierungsstelle.de/ADS/Antidiskriminierungsstelle/aufgaben.html> (08.04.2010); Section 1 and 25 ff. of the General Law on Equal Treatment: <http://www.antidiskriminierungsstelle.de/RedaktionBMFSEJ/RedaktionADSen/PDF-Anlagen/2009-08-28-agg-englisch-neues-design.property=pdf.bereich=adsen.sprache=en.rwb=true.pdf> (08.04.2010).

²⁸ <http://www.antidiskriminierungsstelle.de/ADS/Service/links.html> (26.02.2010).

BetrAVG] of 19th December 1974, which itself does not contain a prohibition on discrimination.

Secondly, article 2 para. 4 of the AGG is criticized as it stipulates that the provisions on general and special protection apply in the case of dismissals. These provisions regulate the conditions governing dismissal as defined by EU directives, however, they don't provide for any prohibitions of discrimination in accordance with the requirements of community law. They only declare dismissals invalid for reasons that have no link with the grounds against which the directives against discrimination provide protection, including, for example, sexual orientation.

Article 9 of the AGG appears to be particularly problematic in that it established a broad right of self-determination for religious communities, allowing for differential treatment within their own institutions on the basis of religion or belief (para. 1) and allowing to require employees to act in good faith and with loyalty to the ethos of the organisation (para. 2). German jurisprudence grants the churches an almost unlimited right to self-determination. The question of whether this means that employees may be dismissed, for example, if they enter into a life partnership, even though the basis of reasoning of the EU directives on equal treatment should be 'the kind of activity and the circumstances of the exercise of the activity' is still controversial in Germany. The Labour Court of Hamburg recently pointed to this contradiction and decided that the churches' exempting provision must be interpreted in conformity with the directives. According to the decision, the self-conception of a religious community is not an absolute and final standard for differential treatment. Rather, the self-conception of the church can only play a decisive role when it stands in a direct relationship with the relevant field of professional activity.²⁹ The case is now currently under consideration in the instance of revision at the Federal Labour Court [Bundesarbeitsgericht]. The second instance Federal State Labour Court of Hamburg had denied the claim of the applicant, arguing that the precondition for discrimination as regards job applications is objective qualification for the job and since the applicant was not qualified he could not be discriminated against.³⁰

Further, the two-month period granted to the employee for bringing a claim for damages (article 15 para. 1 of the AGG) and compensation (article 15 para. 2 of the AGG), as well as for an assertion of claims regarding the infringement of the prohibition against discrimination under private law (article 21 para. 5 of the AGG) are deemed to be too short. Accordingly, they seem to violate article 9 para. 1 of Directive 2000/78/EC, according to which periods for bringing claims or other time limits may not overly burden the efficacy of prosecution of a claim, or make it impossible.³¹

Anti-discrimination associations may appear in court proceedings as counsel to disadvantaged persons, provided the association attends to the particular

²⁹ Labour Court (*Arbeitsgericht*) Hamburg, judgment of 4th December 2007. case no.: 20 Ca 105/07.

³⁰ Federal State Labour Court (*Landesarbeitsgericht*) Hamburg, judgment of 29th October 2008, case no.: 3 Sa 15/08.

³¹ ECJ/C-52 and 53/99 (2nd February 2001) (*Camarotto and Vignone*).

interests of persons or groups of persons discriminated against; the representation of interests is one of its essential aims; the association operates on a non-profit and non-temporary basis; and it has at least 75 members or is comprised of at least seven associations altogether (article 23 of the AGG). NGOs are not able to initiate proceedings themselves on behalf or in support of a victim. Their limited powers as well as the lack of sufficient funding have been criticized. Also the inadequate number of institutions providing advisory services in cases of discrimination throughout Germany – be it governmental or non-governmental – leads to a lack of information on relevant cases. The procedural competences of NGOs remain moreover rather limited.³²

A.3. Specific Gaps in Transposition Pertaining to Sexual Orientation

Finally, the continued existence of inequality of ‘remuneration’ for the same-sex partners of civil servants, judges, and soldiers should be highlighted in the context of inadequate implementation of the analyzed directive. While married civil servants, judges and professional soldiers receive a family subsidy and their spouses receive assistance in matters of health, nursing needs, and birth as well as widows’ or widowers’ payments in case of death, partnered civil servants and their partners presently do not receive these benefits in all Federal States and in all respects. The Federal States of Berlin, Brandenburg, Bremen, Mecklenburg-Vorpommern, Rheinland-Pfalz and Saarland have placed same-sex life partners on an equal footing with their married colleagues concerning the pensions for surviving dependants. The Federal States of Berlin, Brandenburg, Bremen, Mecklenburg-Vorpommern and Rheinland-Pfalz grant same-sex life partners the right to family subsidy. Assistance is granted in the Federal States of Berlin, Brandenburg, Bremen, Hamburg, Mecklenburg-Vorpommern, Nordrhein-Westfalen, Rheinland-Pfalz, Saarland and Schleswig-Holstein. Further additional benefits for same-sex life partners such as costs for relocations and compensation for family separation as well as the entitlement to special vacation and to career promotion are likewise regulated differently in the various Federal States.³⁴ The same applies to the situation of same-sex life partners in the so called free professions such as for example architects, doctors and lawyers, concerning the equal entitlements of which only the Federal States of Berlin, Bremen, Hamburg, Rheinland-Pfalz and Saarland have regulated the matter by law.³⁵ Article 24 of the AGG does state that the provisions of the Law on Equal Treatment apply analogously to civil servants and judges ‘considering their special legal position’, and similarly to soldiers on the basis of the Law on

³² Motions requiring amendments of the AGG and the other provisions transposing the EC directive with regard to the mentioned deficiencies in para 30 et seq. have been rejected by the Federal Parliament on 2nd July 2009 (Deutscher Bundestag, Plenarprotokoll 16/230; see also the committee recommendation for this decision by the Rechtsausschuss Bundestagsdrucksache 16/13675, 1 July 2009, and from the failed motions particularly the motion “Effektiven Diskriminierungsschutz verwirklichen”, Bundestagsdrucksache 16/9637, 18 June 2008, available at: <http://dipbt.bundestag.de/dip21/btd/16/096/1609637.pdf>) (26.02.2010).

³⁴ <http://www.lsvd.de/194.0.html#c1372> (26.02.2010).

<http://www.lsvd.de/194.0.html#c4760>.

³⁵ <http://www.lsvd.de/1269.0.html> (26.02.2010).

the Equal Treatment of Soldiers. However, this does not automatically abrogate all discriminatory provisions in other legislation, thus adjusting them to Directive 2000/78/EC. The principle of non-discrimination only applies to the actions of administrators, for example to their hiring, advancement and dismissal. Consequently, indirect discrimination on grounds of sexual orientation in remuneration can occur, which, according to Directive 2000/78/EC, is forbidden.

Under article 2 of the AGG, discrimination on the basis of sexual orientation is also impermissible in the areas of social protection, including social security and health services; social benefits; education; access to and the provision of goods and services, including housing; as well as in civil law transactions. However, "civil law transactions" relate essentially only to the conclusion of so-called mass contracts, when obligations arise under a large number of cases (article 19 para. 1 (1) of the AGG) and insurance policies under private law. By contrast, prohibitions of discrimination are not applicable to legal relationships of family and inheritance (article 19 para. 4, as well as obligations, in which a particular affinity or confidential relationship of the parties or their relatives is established. This is also true for tenancy law, especially when the parties or their relatives live on the same property (article 19 para. 5). Also rental of housing is only covered if no less than 40 apartments are let out by the lessor (article 19 para 5 of the AGG).

In accordance with article 25 para. 1 of the AGG, a federal office (the Federal Anti-discrimination Agency, "Antidiskriminierungsstelle") was established in the Federal Ministry of Family, Senior Citizens, Women and Youth. The head of the office is autonomous in the exercise of his/her office, and only bound by the law. However, his/her tenure in office ends with the start of each new legislative term, which could have a negative effect on his/her political independence. All federal agencies and other federal authorities are obligated to support the Anti-discrimination office in the fulfilment of its mandate, especially through submission of required information.

The Federal Anti-discrimination Office provides support to persons who approach it in the belief that they have been discriminated against on grounds listed in article 1 of the AGG, including sexual identity. In this regard it can provide information on claims and possibilities of legal action in the context of statutory regulations on protection from discrimination, facilitate legal advice through other offices, as well as seek an amicable settlement between those involved. Additionally, the office engages in public relations, measures to prevent discrimination, and conducts scientific studies on discrimination. Every four years the office is to produce a report covering discrimination on grounds of sexual orientation and amongst others provide recommendations on the elimination and prevention of this form of discrimination.

Finally, the Anti-discrimination Office is supposed to involve in its work non-governmental organisations as well as institutions at European, federal, Laender, or regional levels that are active in protection from discrimination on grounds of sexual orientation (article 29 of the AGG).

B. Freedom of Movement

B.1. Law on Freedom of Movement/EU

The fundamental legal base for freedom of movement, meaning entry and exit, as well as the residence of foreigners in Germany, is regulated by the Immigration Act, which took effect on 1st January 2005. Its article 1 contains the Residence Law, its article 2 the Law on the General Freedom of Movement for European Citizens, and the remaining articles contain amendments to various other laws. According to article 1 para. 1 of the Residence Law, the Residence Law serves the purpose of controlling and restricting the access of foreigners to the Federal Republic of Germany. The law covers citizens of so-called third states, meaning citizens of states that are not members of the European Union or the European Economic Community (EEC). Citizens of an EU member state are entitled to freedom of movement as European citizens and are not subject to the Residence Law's scope of application. The legal status of European citizens is regulated in the Law on the Freedom of Movement/EU.

European citizens have a fundamental right to freedom of movement if certain criteria are fulfilled, for example, looking for employment, occupational training, or self-employment. The same applies to their family members (article 2 para. 2 of the Law on Freedom of Movement/EU). Same-sex life partners are not considered family members (article 3 para. 2 of the Law on Freedom of Movement/EU). However, according to article 14 of the Law Introducing the Civil Code [Einführungsgesetz zum Bürgerlichen Gesetzbuch] all general effects of marriage fall under the law of the state of which both spouses are citizens or where both have their regular residence or with which they are in another way closely connected. Consequently, same sex partners are considered "spouses" in accordance with article 2 para. 2 of the Law on Freedom of Movement/EU and enjoy freedom of movement.

According to article 4 of the Law on Freedom of Movement/EU, European citizens not gainfully employed, their family members and their life partners from the EU or the EEC also enjoy this right if they have adequate health insurance and minimal means of subsistence at their disposal. In the case of students residing in the federal territory, this only applies to their spouses, their life partners from the EU or EEC, as well as their dependent children. Whilst European citizens do not require a visa for entry or a residence permit for residence, family members from non-EU countries do need a visa for entry in accordance with the provisions for foreigners to whom the Residence Law applies (article 2 para. 4 of the Law on Freedom of Movement/EU). Regardless of additional conditions mentioned in article 2 para. 2 of the Law on Freedom of Movement/EU, European citizens, their family members and life partners who have lawfully resided in the federal territory for five years, are entitled to permanent residence (article 4a para. 1 of the Law on Freedom of Movement/EU).

Finally, article 3 para. 6 of the Law on Freedom of Movement/EU stipulates that for entry and residence of an EU or EEC citizen's life partner who is not entitled

to freedom of movement, the provisions of the Residence Law applying to the life partner of a German are to be used.

B.2. Residence Law

For the issuance of a residence permit, the Residence Law requires firstly that a German's foreign life partner have entered Germany legally and secondly, that the 'life partnership cohabitation' actually exists or is earnestly intended. Usually at least a common address must exist, but a narrowly defined way of life, for example a sexual relationship or fidelity, is not stipulated (article 27 of the Law on Freedom of Movement/EU, and practice of the German courts).

The amendment of the Residence Law of 19th August 2007 contained in the "law on the transposition of residency and asylum directives of the EU" limited the right of life partners and spouses from third countries to join their partners and spouses in Germany. According to article 5 para. 2 no 1 of the law, as a rule, the granting of a residence permit will continue to depend on whether adequate income, living space and life insurance can be demonstrated. Following the amendment, the foreign partner must be able to have rudimentary communication in German already at the moment of entry into the country (article 30 of the Residence Law in conjunction with article 27 para. 2 of the Residence Law).

C. Asylum and Subsidiary Protection

C.1. Fundamental Right to Asylum in Article 16a of the Basic Law and Article 60 of the Residence Law

Following the jurisprudence of the Federal Constitutional Court, the right of asylum in article 16a of the Basic Law is grounded in the belief stemming from the inviolability of human dignity and that no state has the right to endanger or injure the body, life or personal freedom of the individual solely on grounds of his/her political beliefs, religious convictions, or in innate or immutable characteristics of the person.³⁶ Accordingly, persecution is political when it inflicts on an individual targeted violations of rights in connection with his/her beliefs, his/her religious convictions, or with characteristics innate to him/her, which shape his/her individuality – and when the intensity of these violations is such that they exclude him/her from the legal protection of the state.³⁷

Already in 1988, the Federal Administrative Court also subsumed under political persecution relevant to asylum within the meaning of the guaranteed right of asylum in the Basic Law grounds for persecution other than those explicitly named in article 1(A)(2) of the Geneva Convention on Refugees.³⁸ Accordingly, the court also recognised as relevant to asylum a difference based on immutable personal characteristics, such as an ‘irreversible, predestined, homosexual character’.³⁹ However, the explanation goes on to state that the criminal prosecution of homosexual activity by itself does not necessarily constitute a targeted infringement of homosexual disposition relevant to asylum. To the extent that such criminal prohibitions serve the protection of public morals, including the maintenance of public order and mores and the protection of citizens from harassment and insult, and if an urgent public need for such protection exists in the country concerned, an imminent persecution is not relevant in the context of asylum unless additional targeted infringements occur. However, criminal prosecution can amount to political persecution if it is not only considered particularly rigorous, but if it is in addition ‘obviously unbearably severe and in every conceivable facet simply unreasonable as punishment of a violation against public morals.’⁴⁰

In any case, asylum law in accordance with article 16a of the Basic Law hardly plays a role in practice. On the basis of regulations that have applied since 1993, the Federal Republic has surrounded itself with ‘safe third countries’⁴¹ where

³⁶ Federal Constitutional Court, (*Bundesverfassungsgericht*), BVerfGE 76,143.

³⁷ Federal Constitutional Court (*Bundesverfassungsgericht*), BVerfGE 80, 315 (335).

³⁸ Convention Relating to the Status of Refugees of 28th July 1961 (BGBl. 1953 II, p. 560).

³⁹ Federal Court of Administration (*Bundesverwaltungsgericht*), BVerwGE 79,143 (146-147).

⁴⁰ Federal Court of Administration (*Bundesverwaltungsgericht*), BVerwGE, 179, 143 (146-147).

⁴¹ “Safe third countries” (“*Sichere Drittstaaten*”) are all EU Member States and those states designated in annex I to Article. 26a of the Asylum Procedures Law, currently Norway and Switzerland.

asylum seekers – according to lawmakers – could have found safety from persecution. This, in turn, precludes recognition of asylum status in Germany. This practice has been called into question by recent decisions of the Federal Constitutional Court, which issued interim orders to stop extraditions of several asylum seekers to Greece under the so called *Dublin II* procedure.⁴² Following the argumentation of the Court these cases will give cause to examine the specifications of the right to asylum in Art. 16a (2) of the Constitution, in light of whether the constitutionally necessary exceptions to the exclusion of interim legal protection against deportation to safe third states need to be specified, in order to determine whether constellations are conceivable in which the deportation to a member state of the EU may be suspended, as is possible under European Law according to the Dublin II Regulation. With regard to applications for asylum from asylum seekers who enter by air and come from a so-called safe country of origin,⁴³ decisions are made through an expedited procedure at the airport (article 18a of the Asylum Procedures Law, “Asylverfahrensgesetz”). For those affected, it is assumed they are not politically persecuted in those countries. The asylum seekers must therefore present facts and evidence to substantiate an assumption that they are threatened by political persecution in their individual case as an exception to the general situation (article 29a of the Asylum Procedures Law).

C.2. Subsidiary Protection

If lesbian and gay asylum seekers cannot be expelled to a so-called ‘safe third country’ from which or through which they entered, then, in accordance with article 60 para. 1 of the Residence Law, they may not be deported to their country of origin if their life, physical integrity or their freedom is threatened due to their ‘belonging to a certain social group’ (so-called small asylum⁴⁴). Among others, persecutions on grounds of sexual orientation fall into the category of ‘social group’ (article 60a para. 1, 5th sentence of the Residence Law in conjunction with article 10 para. 1 (d) 2nd sentence of Directive 2004/83/EC – the so-called Qualification Directive).

Within the ruling coalition that passed the immigration law – which was to regulate and limit immigration as well as regulate the residence and integration of European citizens and foreigners – there were plans to mention persecution on grounds of sexual orientation explicitly in article 60. However, it was decided not to include a precise formulation. Nevertheless, as can be concluded from the explanatory notes of the law, this ground for persecution should be taken into consideration, since, in accordance with the will of the legislator,

⁴² <http://www.bundesverfassungsgericht.de/pressemitteilungen/bvg09-103en.html>,
http://www.bundesverfassungsgericht.de/entscheidungen/qk20090908_2bvq005609.html,
<http://www.bundesverfassungsgericht.de/pressemitteilungen/bvg09-116en.html>,
http://www.bundesverfassungsgericht.de/entscheidungen/rk20091009_2bvr211509.html
 (26.02.2010).

⁴³ “Safe countries of origin” (“*Sichere Herkunftsstaaten*”) are all EU Member States and those states designated in annex II to Article 29a of the Asylum Procedures Law, currently Ghana and Senegal.

⁴⁴ Federal Constitutional Court (*Bundesverfassungsgericht*), BVerfGE 94, 49 (97).

persecution on grounds of belonging to a particular social group also applies to persecution on the basis of sexual orientation.⁴⁵

Article 60 of the Residence Law was amended in 2007 to explicitly require the complementary application of, among others, article 10 of Directive 2004/83/EC for the determination of persecution relevant to asylum. The explanatory notes of the law state that ‘depending on the conditions in the country of origin – a sexual orientation, for example homosexuality, [can] be a defining characteristic for a social group.’⁴⁶

The Federal Agency for Migration and Refugees [Bundesamt für Migration und Flüchtlinge – BAMF] is to assess the ban on deportation at the same time as the decision on the application for recognition as a person entitled to asylum. The decision grants those affected the status of refugees under the Geneva Convention on Refugees (article 3 of the Asylum Procedures Law).

C.3. Case Law

The practice of the Federal Agency for Migration and Refugees and the administrative courts in the use of the new provisions has been very diverse, and continues to guarantee only incomplete protection for homosexuals who are persecuted in their countries of origin. The often contradictory decisions of the BAMF and administrative courts are based on the situation reports of the Foreign Ministry, which, in turn, are sometimes controversial, in that they claim that lesbians and gays can engage in sexual activity in the private sphere without danger in the respective country of origin.⁴⁷

Another controversy exists with regard to the question of whether for the granting of protection from deportation, the necessary persecution relates to the so-called ‘forum externum’ (i.e. public visibility) or merely includes the minimal sexual self-determination in the domestic or private sphere (‘forum internum’). Some courts expect homosexuals to practice their disposition in hiding,⁴⁸ and despite the criminality of homosexuality in the country of origin, they characterise government actions as ‘improbable because it is to be expected of those concerned that they themselves will undertake everything to keep themselves extremely concealed’⁴⁹ and finally, ‘not let their homosexual disposition and activity become known to the outside, but rather to limit it to one’s closest personal circle.’⁵⁰ However, other courts assume ‘that a homosexual man returning to Iran will, in all probability, not refrain from punishable homosexual activity because he cannot refrain from such activity.’ ‘The homosexual activity that can be expected of such an asylum applicant with

⁴⁵ Bundestag, document no. 15/420, p. 91.

⁴⁶ Bundestag, document no. 224/07, p. 339.

⁴⁷ See Regional Court of Administration (*Oberverwaltungsgericht*) of the Free State of Saxony, judgment of 20th October 2004, Case no.: A 2 B 273/04 .

⁴⁸ Court of Administration (*Verwaltungsgericht*) Düsseldorf, judgment of 5th September 2005, case no.: 5 K 6084/04.A.

⁴⁹ Court of Administration (*Verwaltungsgericht*) Bremen, judgment of 28th April 2006, case no.: 7 K 632/05.A.

⁵⁰ Court of Administration (*Verwaltungsgericht*) Düsseldorf, judgment of 14th September 2006, case no.: 11 K 81/06.A.

considerable probability, will also very likely become known to Iranian criminal prosecutors, so that the homosexual must seriously fear being punished by death.⁵¹

There is also a crucial discrepancy among the courts in judging the relevance in asylum law of the right to sexual self-determination. The Administrative Court Düsseldorf, quoted above, states: ‘When one considers, finally, that generally in the Islamic cultural area, and specifically in Egypt, homosexuality is seen as an especially despicable and loathsome deviance, then a far-reaching limitation of homosexual activity for the protection of the dominant morals does not represent political persecution.’⁵² By contrast, with reliance on the jurisprudence of the Federal Court of Administration, the Administrative Court Frankfurt an der Oder explains: ‘Without regard to the circumstance that prohibitions on the consensual homosexual activity of adults in Iran as such are intended for the maintenance of public morals, it must be assumed from the present actual and legal conditions in Iran that the person who – through his/her predestined homosexual character – does not abide by the existing prohibitions, through the imposition and enforcement of the death penalty, should also have his/her homosexual disposition considered a relevant characteristic in asylum law.’⁵³ The Court of Administration Potsdam, which argued similarly, also relied on the above-mentioned Qualification Directive: ‘The purpose of the inhuman or degrading punishment (article 9 para. 1 (a) of the Qualification Directive and article 15 para. 2 and article 3 of the ECHR) and of the disproportionate or discriminatory prosecution or punishment (article 9 para. 2 (c) of the Qualification Directive) is to target the person with homosexual disposition also in a characteristic that is relevant under asylum law, and not only to punish a violation of public morality [...]’⁵⁴

According to non-governmental organisations,⁵⁵ it is also problematic that asylum applicants are obligated to present in detail and comprehensibly all reasons for flight at their first hearing before the BAMF within days after submitting their applications. For many lesbian and gay refugees, it is not (yet) possible to report openly about their sexual orientation and corresponding persecution within days of their arrival in Germany. For those persons, their outing in front of agency employees, who are strangers to them, represents an immense barrier. Yet if they only raise the actual reason for flight later, it is not

⁵¹ Court of Administration (*Verwaltungsgericht*) Frankfurt an der Oder, judgment of 27th January 2005, case no.: 4 K 652/01.A ; similarly, with regard to Nigeria, Court of Administration (*Verrwaltungsgericht*) Leipzig, judgment of 21st December 1998, case no.: A 2 K 30357/95 in InfAusIR 1999, p. 309; as well as Court of Administration (*Verwaltungsgericht*) Chemnitz, judgment of 9th May 2005, case no.: A 6 K 30358/97; similarly, with regard to Yemen, Court of Administration Gießen, decision of 26th August 1999, case no.: 10 E 30832/98 in NVwZ-Beilage I 1999, p. 119; similarly, with regard to Lebanon, Court of Administration (*Verwaltungsgericht*) Düsseldorf, judgment of 1st September 2004, case no.: 5 K 1367/00.A; with regard to Sudan, Court of Administration Potsdam, judgment of 11th September 2006, case no.: 9 K 189/03.A.

⁵² Court of Administration Düsseldorf, judgment of 14th September 2006, case no.: 11 K 81/06.A.

⁵³ Court of Administration Frankfurt an der Oder, judgment of 27th January 2005, case no.: 4 K 652/01.A; see also Federal Court of Administration (*Bundesverwaltungsgericht*), BVerwGE 79, pp. 143ff.

⁵⁴ Court of Administration Potsdam, judgment of 11th September 2006, case no.: 9 K 189/03.A.

⁵⁵ Lesben- und Schwulenverband in Deutschland (LSVD) [Lesbian and Gay Association of Germany], *Asylrecht für Lesben und Schwulen* [Asylum Law for Lesbians and Gays], available at: <http://www.typo3.lsvd.de/852.0.html> (accessed on 22nd February 2008).

seldom dismissed as ‘heightened submission,’ meaning that the refugees are reproached that they could (and should) have shared these reasons already in the first hearing; the new presentation is considered to lack credibility.

Additionally, NGOs criticise the demand for substantiation of lesbian or gay identity. A hearing on evidence of homosexuality held in the country of origin would be unconstitutional, and concrete proof, for example medical proof, cannot be provided. There remains, therefore, only circumstantial evidence – for example, psychological opinions, opinions from advice centres for lesbians and gays in Germany, witness statements from life partners, etc. With regard to the above-mentioned decision of the Federal Court of Administration, the courts also usually examine whether a so-called ‘irreversible homosexuality’ exists. According to this, the mere tendency for same-sex activity, the fulfilment of which is more or less up to those concerned, is not considered to be relevant in the context of asylum, it is rather the ‘inescapable, predestined commitment to homosexual behaviour or sexual satisfaction, under which the person concerned is incapable of refraining him/herself from same-sex activity’. As a consequence of such assessments, the BAMF or the courts often demand from refugees to present psychiatric evaluations of the ‘extent’ of their homosexuality, conducted at their own expense.

Finally, also seen as problematic is article 28 of the Asylum Procedures Law, according to which so-called post-flight facts of the case are not taken into account in the context of asylum-seeking gays and lesbians. This is understood to include facts and events that arose after the foreigner left his/her country of origin. These facts are only recognized if they constitute expressions or continuations of a belief or orientation that already existed in the country of origin (article 28 para.1 and 2 of the Asylum Procedures Law and article 5 para. 2 of Directive 2004/38/EC). This can lead to problems when foreign lesbians or gays first experience their coming out in Germany and, therefore, have a fear of persecution if they have to return to their countries of origin. In any case, this practice seems irreconcilable with article 33 par. 1 of the Geneva Convention on Refugees,⁵⁶ to which article 60a para. 1, 1st sentence of the Residence Law refers.

In accordance with article 11 of the Life Partnership Law, a life partner is subsumed under the term ‘family member’ of the other life partner. This applies to the granting of a residence permit to the life partner and underage single child of a foreigner, who is indisputably recognised as entitled to asylum, or on whom refugee status is indisputably conferred in accordance with article 29 para. 2 of the Residence Law. In these cases, the prerequisites of secured financial maintenance (article 5 para. 1, No 1 of the Residence Law) and access to adequate housing (article 29 para. 1 no 2 of the Residence Law) can be left aside. However, the corresponding application for the granting of a residence permit must be submitted within three months of the person’s undisputed recognition as someone entitled to asylum or undisputed conferment of refugee

⁵⁶ Art. 33(1) of the Geneva Convention on Refugees provides as follows: ‘No Contracting State shall expel or return a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.’

status and, finally, it cannot be expected of the person to practice the life partnership in the partner's country of origin.

On the basis of the exceptions developed by the Federal Constitutional Court the Administrative Court Schleswig in the Federal State of Schleswig-Holstein issued an interim order to stop the extradition of an Iranian asylum seeker to the Czech Republic and ordered the stay of transfer under the Dublin II Regulation. It applied the reasoning of the Federal Constitutional Court, which asks - in exceptional cases - for protective measures and interpretation of the German Law in the light of the right to an effective legal remedy according to Art. 19 para 4 of the Basic Law. The Iranian asylum seeker who had claimed persecution based on homosexuality was to be excluded from the asylum process because he denied to be subjected to a sexological phallometric examination. This practice which is known as 'phallometry' or 'phallometric testing' literally denotes a test of the physical reaction of asylum seekers who claim to be homosexual to heterosexual erotic materia, when establishing the credibility of asylum claims based on sexual orientation. This procedure was found not to be in conformity with human rights standards.⁵⁷

⁵⁷ Administrative Court Schleswig-Holstein [*Verwaltungsgericht*], judgement of 7th. September 2009.

D. Family Reunification

German law does allow for family reunification with registered life partners. This follows from article 27 para. 2 of the Residence Law⁵⁸, which – amongst other provisions - declares articles 28 to 31 of the Residence Law to be applicable to registered life partnerships. This is a consequence of article 11 para. 1 of the Life Partnership Law⁵⁹, which states that registered life partners are to be considered as family members of their registered life partner. Reunification with unregistered (or unmarried) same sex life partners is not possible under the Residence Law.

In accordance with article 27 para. 2 of the Residence Law, the rules on reunification of families with Germans (article 28 of the Residence Law) and with foreigners (article 29 and 30 of the Residence Law) and the rule on the independent residence rights of spouses (article 31 of the Residence Law) apply to registered life partners in the very same manner they apply to marriages.⁶⁰

Even though this principally requires a registered life partnership under German law, life partnerships and same sex marriages resulting from foreign legal systems are recognised under German law by article 17 b para. 1 of the Introduction Law to the Civil Code⁶¹, insofar as they are comparable to the German registered life partnership. Also, according to article 17 b para. 4 of the Introduction Law to the Civil Code, the legal consequences of foreign life partnerships or same sex marriages are the same of a German registered life partnership but cannot extend further than the legal effects under the German Life Partnership Law. Therefore, a reunification with a same sex marriage partner is legally possible. With regard to family reunification of foreign registered life partners with Germans (article 28 of the Residence Law), German language ability (pursuant to article 28 para 1 phrase 3 in connection with article 30 para. 1 of the Residence Law) and assured livelihood (according to the general preconditions set out in article 5 of the Residence Law) are preconditions for the granting of a residence permit. However, the latter usually does not have to be proved.

Under article 29 of the law, reunification of a family with a foreigner residing in Germany first requires that the foreigner have a settlement permit, an EC long-term residence permit or residence permit; that she/he have adequate living space at her/his disposal; and that she/he can provide proof of health insurance.

⁵⁸ Residence Law (*Aufenthaltsgesetz*), BGBl. I, 2004, Nr. 41, p. 1950 (of 5th August 2004), http://www.bgbl.de/Xaver/start.xav?startbk=Bundesanzeiger_BGBI, http://www.gesetze-im-internet.de/aufenthg_2004/.

⁵⁹ Life Partnership Law (*Gesetz über die Eingetragene Lebenspartnerschaft*), BGBl. I, Nr. 9, p. 266 (of 22nd February 2001), http://www.bgbl.de/Xaver/start.xav?startbk=Bundesanzeiger_BGBI, <http://www.gesetze-im-internet.de/lpartg/>.

⁶⁰ Renner (2005) *Ausländerrecht*, Article 29 para. 2, Article 31 para. 2 and Article 27 para. 26.

⁶¹ Introduction Law to the Civil Code (*Einführungsgesetz zum BGB*), BGBl. I, 1994, Nr. 63, p. 2494 (of 21st August 1994), http://www.bgbl.de/Xaver/start.xav?startbk=Bundesanzeiger_BGBI, <http://www.gesetze-im-internet.de/bgbeg/BJNR006049896.html#BJNR006049896BJNG032701140>.

However, the granting of a residence permit can be denied when the person with whom the family is being reunited relies on social assistance for the financial support of other family members or members of the household.

The reunification of a registered life partner with a foreigner residing in Germany additionally requires the fulfilment of the conditions set out in article 30 of the Residence Law, e.g. German language ability. According to article 31 of the Residence Law, following dissolution of a life partnership, the residence permit for the conduct of the life partnership is revoked, unless the 'life partnership communion' existed for at least two years prior to the separation or the partner died before and the foreign life partner was in possession of a residence permit during this time. However, in order to avoid a particular hardship, the residence permit can be exceptionally extended even in cases of an earlier separation. This occurs in case the foreign partner faces substantial disadvantages due to the social or legal situation in his/her country of origin, or in case the life partner cannot be reasonably expected to be further committed to the life partnership communion (for example, in case of domestic violence).

E. Freedom of Assembly

E.1. Article 8 of the Basic Law – Freedom of Assembly

Freedom of assembly is guaranteed as a fundamental right in article 8 of the Basic Law, according to which all Germans, without the need for registration or permission, have the right to assemble peacefully and without weapons. Non-Germans can only appeal to article 2 para. 1 of the Basic Law – general freedom of action. Article 8 has a special standing and contains both a negative right against unreasonable state intervention as well as a fundamental decision of constitutional law.⁶² It forms a ‘fundamental element of democratic openness’⁶³ and guarantees ‘a piece of original, unbridled direct democracy’.⁶⁴ As the Federal Constitutional Court emphasises,⁶⁵ the special status of freedom of assembly is primarily embodied through demonstrations. Additionally, article 8 contains a fundamental obligation of the state to enable the conduct of assemblies and demonstrations and, if applicable, protect its participants from disruptions and outbreaks of violence.⁶⁶

However, with the “Love Parade Decision” of 2001,⁶⁷ the Federal Constitutional Court joined the view of the so-called narrow concept of assembly, whereby the participants in the assembly must pursue a common purpose that is in the common interest. According to the Federal Constitutional Court, the Love Parade only displays a lifestyle and constitutes a mass party. It follows that the Love Parade is only an event that does not come under the scope of article 8 of the Basic Law. To the extent that gay and lesbian demonstrations are connected to political demands, they, on the other hand, are subsumed under the narrow concept of assembly and, to that extent enjoy the protection of art. 8 of the Basic Law. This differentiation primarily plays a role for the question of coverage of the costs of police protection and cleaning, which are paid from public funds only in the case of an assembly protected under article 8 of the Basic Law.

⁶² H.D. Jarass and B. Pieroth (1999) *Grundgesetz für die Bundesrepublik Deutschland, Kommentar*, Munich, no. 1 on art. 8.

⁶³ Federal Constitutional Court (*Bundesverfassungsgericht*), BVerfGE 69, 315 (344ff.) (*Brokdorf Decision*).

⁶⁴ Federal Constitutional Court, (*Bundesverfassungsgericht*), BVerfGE 69, 315 (344ff.) (*Brokdorf Decision*).

⁶⁵ Federal Constitutional Court (*Bundesverfassungsgericht*), BVerfGE 69, 315 (344ff.) (*Brokdorf Decision*).

⁶⁶ H.D. Jarass and B. Pieroth (1999) *Grundgesetz für die Bundesrepublik Deutschland, Kommentar*, Munich, no. 12 on art. 8.

⁶⁷ Federal Constitutional Court (*Bundesverfassungsgericht*), decision of 12th July 2001, case no.: 1 BvQ 28/01 and 1BvQ 30/01.

E.2. The Law Concerning Assemblies and Processions

Limitations in the arrangement of the fundamental freedom of assembly arise primarily from the Law Concerning Assemblies and Processions of 15th November 1978 [Versammlungsgesetz, VersG]. The law denies certain groups of persons the right to organise assemblies or participate in them. This relates to persons against whom decisions in accordance with article 18 of the Basic Law (Revocation of Fundamental Rights) have been rendered, persons who want to advance the goals of an unconstitutional political party or its substitute organisation, political parties deemed unconstitutional by the Federal Constitutional Court, as well as organisations that have been banned under the Associations Law. Carrying weapons or masking the identity of the assembly's participants is also forbidden. Further, since 18th March 2005, assemblies at memorial sites can be forbidden. If the conduct of the assembly or demonstration presents a danger to public security or order, the competent authority can ban it or make it dependant on certain conditions.

Preventative banning of an assembly is the gravest intervention in the freedom of assembly. They can be appealed with applications for interim relief. Decisions of the Administrative Appeals Tribunals can be overturned by the Federal Constitutional Court through a provisional legal remedy.

An outdoor public assembly must be registered with the competent authority at least 48 hours before announcement of its conduct. Additionally, outdoor public assemblies must be registered if they cannot keep to this registration deadline (so-called urgent assemblies). Spontaneous, unplanned assemblies, which arise from a current cause are also subject to protection from article 8 of the Basic Law and do not require registration.⁶⁸

With regard to the special standing of the freedom of assembly, participants in road traffic are regularly expected to accept hindrances caused by a demonstration "as long as these cannot be avoided without disadvantages for the event's purpose".⁶⁹

There have been large lesbian and gay demonstrations since 1972 – the first in the Federal Republic of Germany occurring on 29th April 1972 in the city of Muenster. Currently, gay and lesbian demonstrations are taking place in over 30 German cities under the name CSD (Christopher Street Day); these are neither prevented by public authorities nor disturbed by any counterdemonstrations. A prohibition of a homophobic demonstration could only be issued in accordance with the strict regulations of the Law Concerning Assemblies and Processions, taking into account the special status of the fundamental right of freedom of assembly and in accordance with the principles as detailed in the above.

⁶⁸ Federal Constitutional Court, BVerfGE, 69, 315 (*Brokdorf Decision*).

⁶⁹ Federal Constitutional Court, BVerfGE, 69, 315 (*Brokdorf Decision*); see also Federal Constitutional Court, BVerfGE 73, 206 (249-250).

F. Hate speech and Criminal Law

F.1. Article 130 Paragraph 1 and 2 of the Criminal Code

The offence of incitement is defined in article 130 of the Criminal Code, whose para. 1 and 2 are relevant to incitement with a homophobic background. Under para. 1, incitement to hatred or appeals to violent or wanton measures against parts of the population, as well as attacks on the human dignity of others through abusive language, malicious contempt or vilification is punishable with sentences ranging from three months to five years. Additionally, the regulation provides that the act must be conducted in such a manner that it is capable of disturbing the public peace. All possible public expressions in print, publication or picture that fulfil the characteristic elements named in para.1 are included in the threat of punishment contained in para. 2. Article 130 of the Criminal Code rests on the historical experience with National Socialism, which among other things, was also enabled by a legal tolerance of incitement propaganda in the Weimar Republic.

By contrast, so-called ‘hate speech’ is not considered as an insult under article 185 of the Criminal Code as it is not aimed at particular individuals. The remarks are not connected with characteristics that are clearly attributable to all individual gays, according to the German courts.

Although the laws lack explicit mention of homophobic background, there have been individual cases that have resulted in convictions. Thus, on 9th January 2004 the Braunschweig magistrates’ court sentenced a self-described itinerant preacher to three months’ incarceration with a suspended sentence for incitement and defamation.⁷⁰ In public squares and pedestrian zone, the 68-year old had called for the ‘nuclear eradication’ of homosexuals and labelled women wearing trousers ‘whores’. According to the judge’s opinion, the remarks were directed against human dignity, which places limitations on the right to freedom of speech.

In another case, on 6th January 2007, the Hamburg magistrates’ court fined a 52-year old 4,500 Euros for incitement.⁷¹ The cause was a sign that the convicted man had affixed to the rear window of his car, reading: ‘Stop animal testing, take the paedophiles, asylum-seekers, gays.’ The judge justified his verdict and the amount of the fine with the observation that such slogans are discriminating and insulting, and additionally can threaten whole segments of the population.

By contrast, in early 2004 the prosecution office in Cologne discontinued an investigation of Cardinal Joachim Meisner on suspicion of incitement and defamation.⁷² The alleged remark that homosexuals are ‘a poison that the

⁷⁰ http://www.queer.de/news_detail.php?article_id=469 (26.02.2010).

⁷¹ http://www.queer.de/news_detail.php?article_id=6214 (26.02.2010).

⁷² http://www.queer.de/news_detail.php?article_id=564 (26.02.2010).

European person [must] sweat out' had been reported to the authorities by several private persons and the *Lesben- und Schwulenverband in Deutschland* [Lesbian and Gay Association in Germany]; the Prosecutor's Office, after taking statements from Meisner's secretary and a journalist, who had spread the quote in the newspaper *Kölner Stadt-Anzeiger*, concluded that he had not made the remark. The Prosecutor's Office stated: 'Meisner spoke generally about homosexuality from the viewpoint of Catholic morals, but not about homosexuals. Therefore, there were also no remarks made against homosexual persons'.

The *Lesben- und Schwulenverband in Deutschland* [Lesbian and Gay Association in Germany] for instance initiated 27 procedures in 2008 and 15 procedures in 2009 and pressed charges under the Criminal Code against various artists who had a history of homophobic music invoking violence against gays and lesbians. These criminal complaints led to concerts being cancelled by the organisers or being supervised by police with regard to discriminating content. In cases where no conduct punishable under the Criminal Code took place, the public prosecutors office then dropped the criminal charges.⁷³

F.2. Article 46 Paragraph 2 of the Criminal Code

According to article 46 para. 2 of the Criminal Code, in assessing the severity of a punishment, the court must weigh circumstances that speak in favour of and against the perpetrator. To this end, article 46 para. 2, 2nd sentence of the Criminal Code contains a summary of circumstances that are to be especially considered in the assessment. Amongst these are the motivations and goals of the crime, as well as the beliefs that emanate from the crime and the intent applied to the crime. Even though already these formulations require the courts to find motivations of contempt for humanity as aggravating circumstances in the process of assessing the severity of a punishment, this provision hardly finds application by the courts in the context of the homophobic background of a crime.⁷⁴

In order to guarantee to the person concerned the protection against becoming a victim of crimes due to sexual orientation as anchored in existing provisions on sentencing of the Criminal Code, the governments of the Laender Brandenburg and of Saxony-Anhalt sent a draft amendment to the criminal code to the Second Chamber of Parliament [Bundesrat] on 14th August 2007.⁷⁵ Amongst other things, the draft law would put the regulation of article 46 para. 2, 2nd sentence into concrete terms and would supplement it by enhancing the 'circumstance that a motivation for the crime is the political stance, nationality, ethnic origin, race, skin colour, religion, philosophical belief, origin, outer appearance, disability or sexual orientation of the victim' to an independent

⁷³ Cf.: enclosed correspondence with the *Lesben- und Schwulenverband in Deutschland* [Lesbian and Gay Association in Germany].

⁷⁴ Bundesrat, publication no. 572/07.

⁷⁵ Bundesrat, publication no. 572/07.

factor for the assessment of the appropriate sentence. The draft law was elaborated upon and in the final version the proposed criteria were reduced to motivations of contempt for humanity, racism and xenophobia. By contrast sexual orientation was amongst others discarded from the draft as a relevant criterion.⁷⁶

⁷⁶ <http://dipbt.bundestag.de/dip21/brd/2007/0572-07.pdf>, p. 9;
http://www.bundesrat.de/cln_090/SharedDocs/Drucksachen/2008/0401-500/458-08.templateId=raw.property=publicationFile.pdf/458-08.pdf, p. 1 (26.02.2010).

G. Transgender issues

In the German legal system, discrimination against transsexuals is considered discrimination on the basis of sexual orientation. As this ground is not mentioned in article 3 para. 3 of the Basic Law, which enumerates special equality rights, discrimination against transsexuals is treated within the framework of the general principle of equality in article 3 para. 1 of the Basic Law.

G.1. Allgemeines Gleichbehandlungsgesetz (AGG) [General Law on Equal Treatment]

It can be concluded from the explanatory notes of the General Law on Equal Treatment that transsexuals should be treated in the same way as homosexuals.⁷⁷

G.2. Freedom of Movement

Transsexuality is irrelevant in the context of freedom of movement because regulations on residence law refer solely to the criteria of nationality and familial status.

G.3. Asylum and Subsidiary Protection

In case a transsexual person is threatened in his/her home country because of his or her transsexuality, the element could be relevant in the asylum law in the same way as homosexuality. However, in the practice of German courts the characteristic of transsexuality has rarely played a role.

G.4. Family Reunification

Transsexuality is also irrelevant in the context of family reunification because the relevant regulations refer solely to the criteria of nationality and familial status.

⁷⁷ Bundestag, publication no. 16/1780, p. 31.

G.5. Freedom of Assembly

With regard to enjoyment of freedom of assembly, the transsexuality of the person entitled to fundamental rights plays just as minor a role as is the case for homosexuals.

G.6. Criminal Law

Regarding incitement and other criminal acts with a homophobic background, the same sentencing guidelines apply as those described above.

G.7. *Transsexuellengesetz (TSG)* [Law on Transsexuals]

Transsexuality does not influence the familial status. It only impacts on the sexual status. The causal connection, therefore, is rather the reverse. The familial status or its change can preclude the change of sex. In order to take account of the special situation of transsexuals, the law of 10th September 1980 on the changing of given names and the determination of sexual identity in special cases⁷⁸ followed the seminal decision of the Federal Constitutional Court of 1978.⁷⁹ According to the justices' opinion, article 2 para. 1 of the Basic Law (general freedom of action) in conjunction with article 1 para. 1 (human dignity) affords the right to correction of the entry of a transsexual's male gender in the register of births if a medically determined, irreversible case of transsexualism is at issue and if a sex-changing operation has been conducted. The Law on Transsexuals that took effect on 1st January 1981 offers those concerned with two solutions. In addition to a process in which a transsexual's given name can be changed without the person first having to undergo a surgical procedure (the so-called small solution), the law provides the possibility of determining the gender and changing the given name after a sex-changing operation (the so-called big solution).

In the meantime, the Federal Constitutional Court has taken up the Law on Transsexuals in five decisions and deemed some provisions to be unconstitutional.⁸⁰ In the view of the justices, some assumptions about transsexuality that form the basis of the Law on Transsexuals can no longer be scientifically justified in core aspects, which makes a revision of the law necessary. An amendment to the Law on Transsexuals was passed on 20th July

⁷⁸ BGBI I, p. 1654.

⁷⁹ Federal Constitutional Court, BVerfGE, 286.

⁸⁰ At issue were the following points: the minimum age of 25 years required for the change of civil status and change of given name; the loss of the changed given name for transsexuals of same-sex orientation if they become married, even though they cannot enter into a life partnership; prohibition of changing a given name and change of civil status for foreign transsexuals who legally and not just temporarily reside in Germany, provided that the law in their homeland does not include similar regulations.

2007,⁸¹ in order to incorporate a decision of the Federal Constitutional Court requiring the legislature to create a new regulation in place of the prohibition on changing a given name and civil status for foreign transsexuals who legally and not just temporarily reside in Germany, provided that the law of their homeland does not have comparable regulations.⁸²

In a further decision of 2008, the Federal Constitutional Court Federal held that a married transsexual who wanted to legally change his gender after a surgical change of his sex from male to female but remain married to his wife cannot be forced by the pertinent provision of the Law on Transsexuals to divorce, in order to have his sex change legally recognised.⁸³ This is due to the impact of the constitutionally guaranteed right to recognition of the freely chosen and self-determined gender identity which needs to be appropriately balanced with the constitutional guarantee of marriage as an institution as enshrined in Article 6 para 1 of the Basic Law. The decision led to another legislative change of the Law on Transsexuals, which eliminated the rule in question from the law.⁸⁴ This development, ending forced divorce for married couples in which one of the partners is transgender, was explicitly welcomed by the Council of Europe Commissioner for Human rights in an issue paper titled “Human Rights and Gender Identity”.⁸⁵

Both changes to the Law on Transsexuals were criticised by civil society organisations which had put forward a coordinated proposal of changes that they consider as appropriate.⁸⁶ The criticism is based in the circumstance that the reforms exclusively complied with the specific requirements set forth by the Federal Constitutional Court and did not seize the opportunity for a broader adjustment to changed societal perceptions and scientific findings as well as human rights standards and practical demands.

The current Federal Government coalition of the Christian Democratic Union and the Free Democratic Party considers comprehensive changes to the Law on Transsexuals as necessary and has explicitly included the subject matter in its coalition treaty.⁸⁷ Therein it is stated, that the legal provisions on transsexuals which are currently in force do in parts not adequately reflect the medical and scientific findings of the last 30 years. Thus the Law on Transsexuals is to be updated under consideration of the jurisprudence of the Federal Constitutional Court in order to enable the concerned persons to lead a free and self-

⁸¹ BGBI. I, p. 1566, Article. 3a (20th July 2007);

<http://www.bgblportal.de/BGBL/bgbl1f/bgbl107s1566.pdf> (26.02.2010).

⁸² <http://www.bundesverfassungsgericht.de/pressemitteilungen/bvg06-107.html>,

http://www.bundesverfassungsgericht.de/entscheidungen/ls20060718_1bvl000104.html
(26.02.2010).

⁸³ <http://www.bundesverfassungsgericht.de/pressemitteilungen/bvg08-077.html>,

http://www.bundesverfassungsgericht.de/entscheidungen/ls20080527_1bvl001005.html
(26.02.2010).

⁸⁴ BGBI. I, p. 1978, Nr. 43, Article 5 (22nd July 2009);

http://www2.bgbl.de/Xaver/start.xav?startbk=Bundesanzeiger_BGBI (26.02.2010).

⁸⁵ para 3.2.2: <https://wcd.coe.int/ViewDoc.jsp?id=1476365> (08.04.2010).

⁸⁶ http://www.transinterqueer.org/uploads/Eckpunkte_TSG_April_09.pdf;

<http://www.transinterqueer.org/index.php/home/presse/06-04-2009-pm-tsg-eckpuntepapier.html>;

<http://www.transinterqueer.org/index.php/news/15/83.html> (26.02.2010).

⁸⁷ <http://www.fdp-bundespartei.de/files/363/091024-koalitionsvertrag-cducsu-fdp.pdf>, p. 108
(26.02.2010).

determined life. Yet up to date no concrete legislative steps towards the realisation of the changes to the Law on Transsexuals have been made public.

G.8. Changing a Given Name

In accordance with the small solution, regulated under articles 1-7 of the Law on Transsexuals, transsexuals may obtain a given name of the desired other gender. The prerequisite is that the person concerned feels that she or he belongs to the other gender, and has felt the drive to fulfil this feeling of belonging for at least three years. Further, it is necessary that a change in this feeling is not to be expected. However, despite the change in given name, the law will still regard the transsexual as belonging to the gender to which he or she feels he or she does not belong (article 1 para. 1 of the Law on Transsexuals).

In its current version the Law on Transsexuals does not only apply to Germans and persons entitled to asylum, but also to foreigners who have their legal domicile or their usual residence in Germany, and whose homeland law contains no regulation comparable to this law (article 1 para. 1 no. 3 of the Law on Transsexuals).

Before reaching its decision, the competent magistrates' court must consult two experts who give their opinions on whether, in accordance with the findings of the medical sciences, the applicant's feeling of belonging will likely not change (article 4 para. 3 of the Law on Transsexuals).

In accordance with the jurisprudence of the Federal Constitutional Court, already after the change of name, the person is to be addressed in accordance with his/her newly understood identity. Further, under article 5 of the Law on Transsexuals, given names used at the time of the change must not be made public without his/her agreement. Finally, with the change in given name, transsexuals have a right to certified copies as well as new official documents issued with their new given names. This applies both to employers⁸⁸ as well as government institutions.

In accordance with article 7 of the Law on Transsexuals, however, the change in given name becomes ineffective if the person in question gives birth to a child or marries.

G.9. Determination of Gender Identity

For the determination of whether a person belongs to the other gender/sex (articles 8-12 of the Law on Transsexuals), the law also demands that the transsexuals have undergone a sex-change operation making them incapable of reproduction (article 8 para. 1 of the Law on Transsexuals). In this judicial process the competent magistrates' court must also, in accordance with article 9

⁸⁸ Federal Constitutional Court, decision of 15th August 1996, case no.: 2 BvR 1833/95; *Neue Juristische Wochenschrift (NJW)* (1997), p. 1632.

para. 3 of the Law on Transsexuals, obtain two expert opinions before making its decision.

Finally, it should be noted that the change of civil status leaves the legal relationships between the person affected and her/his parents and children untouched. The same is true for pension claims and similarly functioning benefits.

G.10. Costs

Provided that appropriate expert reports show that the person affected suffers a psychological strain due to his/her transsexuality that can only be remedied or alleviated by a sex-change operation and not through psychotherapeutic measures, the health insurance companies must pay the costs of the sex-change treatment and operation.⁸⁹

G.11. Legal Shortcomings

With regard to the small solution, legislators assumed that in the case of marriage, the transsexual would again feel a belonging to her/his own gender, and lose the already assumed given name of the other gender. When the Law on Transsexuals was passed 25 years ago, it was unknown to legislators and sexual science that a man-to-woman transsexual can feel lesbian and a woman-to-man transsexual can feel gay. At the same time, entering into a same-sex partnership is completely ruled out for transsexuals who feel lesbian or gay and have decided to change their given names. By contrast, those who are already married can take advantage of the small solution to take on a given name of the other gender. Accordingly, singles are treated differently than married transsexuals.

Those who choose the big solution can either marry or enter a same-sex life partnership. Legal adjustment of the gender identity is possible if the transsexual already lives in a registered life partnership. After the aforementioned decision of the Federal Constitutional Court and the respective change in the Law on Transsexuals a divorce is now unnecessary.

⁸⁹ This was decided by the Federal Social Court (*Bundessozialgericht*), BSGE, 62, 83.

H. Miscellaneous

H.1. Legislative Initiatives for an amendment of Article 3 of the Basic Law

The current opposition in the Federal Parliament, namely the Social Democratic Party, the Green Party and the Left Party propose an amendment of the Basic Law and have each introduced a draft law calling for an explicit inclusion of the criterion of “sexual identity” among the enumeration of forbidden discrimination grounds listed in Article 3 of the Basic Law.⁹⁰ A similar legislative motion was put forward in the Council of Federal States [Bundesrat] by the governments of the Federal States of Berlin, Bremen and Hamburg but was rejected by the political majority.⁹¹ The non-discrimination clause in Article 3 para. 3 of the Basic Law as of now explicitly includes: sex, parentage, race, language, origin and descent, faith, or religious or political opinions and disability.

H.2. Same-Sex Life Partnership Law

In order to take account of evolving social reality, in 2001 the very controversial Life Partnership Law was passed as a milestone for gay and lesbian equality. It took effect on 1st August 2001. It creates a separate institution for same-sex couples in family law and for the first time offers them the possibility of legal security. Amongst other things, the law provides for regulations in maintenance, tenancy, inheritance, social security, and aliens’ law. In its judgement of 17th July 2002,⁹² the Federal Constitutional Court confirmed the law’s constitutionality and saw no violation of article 6 para. 1 of the Basic Law (protection of marriage), nor of article 3 para. 1 of the Basic Law (general right to equality), or article 14 para. 1 of the Basic Law (right to property). The Law on Revision of the Life Partnership Law that took effect on 1st January 2005 provided further rights to this institution, including the extensive adoption of marital property and maintenance laws, the possibility of step-children’s adoption, the introduction of the statutory equalisation of pensions, as well as the inclusion of the life partner in provision for surviving dependants.

Even though areas of life in which equality has not been achieved remain, important legal aspects of the same-sex life partnerships have been equalised by the legislature and the judiciary. In 2009 the relevant inheritance and income tax

⁹⁰ BT-Drs 17/88 of 27th November 2009:

<http://dip21.bundestag.de/dip21/btd/17/000/1700088.pdf>;

BT-Drs 17/254 of 15th December 2009:

<http://dip21.bundestag.de/dip21/btd/17/002/1700254.pdf>;

BT-Drs 17/254 of 20th January 2010:

<http://dip21.bundestag.de/dip21/btd/17/004/1700472.pdf> (26.02.2010).

⁹¹ http://www.artikeldrei.de/dokumente/Bundesrat%200741_09.pdf (26.02.2010).

⁹² Federal Constitutional Court, decision of 17th July 2002, case no.: 1BvF 1/01, BVerfGE 105, 313.

law was changed insofar that same-sex life partners are now on an equal footing with married couples concerning the tax exemption amounts. Nevertheless, the rate of taxation remains different. Also, federal laws created a unified competence for the establishment of life partnerships with the civil registry offices.⁹³ Yet two Federal States used an exemption clause to opt out of the unified federal competence and assigned the competence to their administrative districts.⁹⁴ Moreover, differences persist as regards the annulment of same-sex life partnerships and in adoption law, since there is no joint right of adoption but only the possibility of step-children adoption is available (see below). The pertinent legal provisions for civil service employees remain widely differentiated but are being equalised progressively on the federal level and in the jurisdictions of the Federal States.⁹⁵ This development is also apparent in a landmark decision of the Federal Constitutional Court on the unequal treatment of marriage and same-sex life partnerships regarding pensions for surviving dependents of public employees in the civil service field (see below).⁹⁶ Furthermore the current Federal Government coalition of the Christian Democratic Union and the Free Democratic Party has put the subject matter on its agenda and included the equalisation of same-sex life partnerships in the civil service sector in its coalition treaty. It is planning to transpose the rules pertinent to married couples on remuneration, provisions, and assistance to same-sex life partners, too.⁹⁷

An impact study on the subject of same-sex life partnerships was conducted under the auspices of the Scientific Service of the Federal Parliament [Wissenschaftlicher Dienst des Deutschen Bundestag], which deals with the legal implications of the decision of the Federal Constitutional Court concerning same-sex life partners dependants' pensions in the civil service field.⁹⁸ The study concludes that the landmark decision immediately affects nearly all legal fields relevant to life partnerships except adoption law and is binding upon all state bodies. Another study of the Scientific Service of the Federal Parliament which is not yet published deals with same sex life partners' right to regular adoption. The author argues that the denial of same sex life partners' right to regular joint adoption of a child which is not the biological child of one of the partners cannot be upheld in light of the recent jurisprudence of the Federal Constitutional Court on same sex life partnerships.⁹⁹

⁹³ Personenstandsgesetz, article 1 : <http://bundesrecht.juris.de/pstg/>; Personenstandsverordnung, article 1: <http://bundesrecht.juris.de/pstv/>; Gesetz über die eingetragene Lebenspartnerschaft, article 1: <http://bundesrecht.juris.de/lpartg/> (26.02.2010).

⁹⁴ <http://www.lsvd.de/230.0.html#c6286> (26.02.2010).

⁹⁵ <http://www.lsvd.de/194.0.html#c1372>;
<http://www.lsvd.de/194.0.html#c4760> (26.02.2010).

⁹⁶ <http://www.bundesverfassungsgericht.de/pressemitteilungen/bvg09-121.html>,
http://www.bverfg.de/entscheidungen/lk20090810_1bvl001509.html (26.02.2010).

⁹⁷ <http://www.fdp-bundespartei.de/files/363/091024-koalitionsvertrag-cducsu-fdp.pdf>, p. 111 (26.02.2010).

⁹⁸ http://www.bundestag.de/dokumente/analysen/2009/Gleichstellung_eingetragener_Lebenspartnerschaften.pdf (26.02.2010).

⁹⁹ BT-Drs 17/421 of 12th January 2010, p. 2:

<http://dip21.bundestag.de/dip21/btd/17/004/1700421.pdf>;
<http://www.faz.net/s/RubFC06D389EE76479E9E76425072B196C3/Doc~EF9C43E35E1474D0694D5E37A5E7D84E6~ATpl~Ecommon~Scontent.html>;
http://www.sozialticker.com/wissenschaftlicher-dienst-des-bundestages-bestaetigt-adoptionsverbot-fuer-schwule-und-lesben-ist-verfassungswidrig_20100217.html (26.02.2010).

The landmark Constitutional Complaint dealt with the discriminatory handling of marriage and registered civil partnership in the area of provisions for dependants' pensions for public employees in the civil service field.¹⁰⁰ In contrast to the compulsory public pension fund insurance the additional insurance for the provision for dependants does not provide for pensions for same sex life partners. The general prohibition of unequal treatment as laid down in Article 3 para 1 of the Basic Law demands that all humans are being treated equal in front of the law. It is also forbidden to exclude one group of persons from benefits which another group of persons enjoys if the two groups are comparable and there are no objective reasons for the justification of the unequal treatment. In the case at hand registered civil partnership were discriminated against as compared to marriages under the rules determining the additional insurance for the provision for dependants in the public service field. The rules on the additional insurance for the provision for dependants of public employees in the civil service are to be evaluated under strict standards set out by the requirements of the general prohibition of unequal treatment as laid down in Article 3 para 1 of the Basic Law. The condition of constitutionality does apply directly even though the rules in question in the case at hand are of a private law nature. The strict requirements need to be observed because the entity in question is established under public law and serves the common good and exercises public functions

This binding verdict stands in direct contrast to an earlier decision of the Federal Constitutional Court not to rule upon the non-payment of family subsidies for civil servants living in same-sex life partnerships.¹⁰¹ Than it had held that the non-payment of a family subsidy to civil servants living in a same-sex life-partnership does not constitute a violation of the constitutional principle of equal treatment in relation to married civil servants who receive such subsidy. Yet this earlier decision is not binding materially, because it only ruled upon the admissibility of the matter.

In an earlier decision the Federal Labour Court had also held that same sex life partners are to be treated equally with married couples as concerns businesses retirement pensions.¹⁰² Surviving dependants in the sense of the pertinent provisions can also be persons who qualify for the compulsory public pension fund insurance as beneficiaries of a pension due to death. Therefore same sex life partners fall under this definition, because they are provided for in the compulsory public pension fund. Yet even though theoretically the General Law on Equal Treatment covers the entitlement of same sex life partners to business retirement pension in the concrete case at hand the applicant was not successful, since his claims were not under the temporal scope of application of the law.

¹⁰⁰ <http://www.bundesverfassungsgericht.de/pressemitteilungen/bvg09-121.html>,
http://www.bverfg.de/entscheidungen/lk20090810_1bv1001509.html (26.02.2010).

¹⁰¹ http://www.bundesverfassungsgericht.de/entscheidungen/rk20080506_2bvr183006.html
 (26.02.2010).

¹⁰² <http://juris.bundesarbeitsgericht.de/cgi-bin/rechtsprechung/document.py?Gericht=bag&Art=pm&sid=5886007150f64627bdf686b189cf3f8&nr=13208&pos=0&anz=2>; <http://juris.bundesarbeitsgericht.de/cgi-bin/rechtsprechung/document.py?Gericht=bag&Art=pm&sid=5886007150f64627bdf686b189cf3f8&anz=2&pos=0&nr=13388&linked=urt> (26.02.2010).

H.3. Rights to Custody and Access in Rainbow Families

Due to the amendment of the Life Partnership Law, since 1st January 2005 same-sex partners also have the option of step-child adoption (article 9 para. 7 of the Life Partnership Law). Accordingly, a registered partner can adopt the child of the other. A prerequisite is that the other life partner has the sole right to custody. This can be the case for a child from a previous relationship as well as a child born into a family through artificial insemination. With the adoption, the adoptive parents form a legal and familial relationship to the child that includes a full right of custody, just as it exists for biological children. However, for homosexual couples, the consequences only partially apply to tax law.

In a recent case the Federal Constitutional Court confirmed the right to adoption of stepchildren for same-sex life partners.¹⁰³ The case concerned a woman in a same-sex life partnership who wanted to adopt her partner's child according to Section 9 (7) para 2 of the Same-Sex Life Partnership Law in connection with the pertinent provisions on adoption of the Civil Code. The case was referred to the Federal Constitutional Court by a local court which had considered the provision to be incompatible with the Basic Law and therefore demanded a concrete judicial review by the Federal Constitutional Court; the question being whether the same sex partner could be granted a position of parenthood equal to that of the biological parent. In particular, an incompatibility with the right to be a parent as protected in Article 6 of the Basic Law was invoked. The Federal Constitutional Court rejected this line of argumentation and held to the contrary that biological parenthood has no precedence over social family ties, in the sense of a union of responsibility, which are also protected by Article 6 of the Basic Law. Social and biological parents are thus the same under the Constitution, which is also valid for homosexual parents

Lower instance courts have followed suit with the change in jurisprudence and apply the pertinent provisions on step children adoption in light of the constitutional requirements set forth by the Federal Constitutional Court.¹⁰⁴

For regulations that exist for heterosexual and homosexual couples, there remain differences in the area of the law of descent. Whilst heterosexual couples who, through mutual agreement, decide to artificially transfer semen from a third person, cannot later have parental responsibility withdrawn from them for the child produced in this manner, for lesbian couples an additional adoption procedure is required. This differentiated regulation in descent law has no foundation as long as for the same-sex couple the artificial insemination was conducted with the consent of the other partner.

¹⁰³ <http://www.bundesverfassungsgericht.de/pressemitteilungen/bvg09-098.html>,
http://www.bundesverfassungsgericht.de/entscheidungen/lk20090810_1bvi001509.html
(26.02.2010).

¹⁰⁴ Landgericht Berlin, Az.: 87 T 36/09 of 17th August 2009;
Amtsgericht Münster, Az.: 22 111128/09 of 15th September 2009,
<http://www.lsvd.de/fileadmin/pics/Dokumente/Rechtsprechung2/AGMuenster090915.pdf>
(26.02.2010).

In the area of the right of access, it is of great importance to rainbow families that an expansion of this right to third persons is a limited possibility. Beyond the already existing right of access for parents, siblings, grandparents, spouses or former spouses of one of the parents, thanks to the Life Partnership Law, since 2004 a right of access for the life partner or former life partner of one of the parents has been introduced (article 1685 of the Federal Civil Code [Bürgerliches Gesetzbuch – BGB]). The same applies to persons with whom the child was in foster care for an extended time. It is required that this serve the welfare of the child and, additionally, in the case of step-parents, that they actually are or were responsible for the child. However, biological parents who do not live with the child have priority in the right of access. Next come other close relatives, for example the grandparents, then step-parents and possibly other persons with a relationship, such as foster parents.

Civil society organisations remain critical and demand further legal developments with regard to the right to found a family based upon principle 24 of the Yogyakarta-Principles.¹⁰⁵ Thus in particular a non discriminatory law of descent, non-discrimination as concerns family planning and a right to regular adoption for same sex life partners are being demanded.¹⁰⁶

The Federal Ministry of Justice recently released a scientific study on the situation of children in same-sex life partnerships and in particular on the effects of the law on same-sex life partnerships in this regard. The study concluded that children and adolescents in so called rainbow-families show the same degree of development as in other forms of family structures. The surveyed youngsters from same-sex partnership families even showed a higher level of self-esteem and more autonomy in their relationship with both parent than their counterparts in traditional families.¹⁰⁷

H.4. Intersexuality

Intersexuality is a relatively new topic in the German human rights discourse. According to scientific studies, there are around 150 children born each year who can be classified as intersexual. The total number of people affected by severe variance in sex development is around 8,000-10,000.¹⁰⁸

The existence of intersexuals, however, was not anticipated in the German legal system. The legal framework covers the sex categorisation of the population into male and female. According to article 21 para. 1 no. 3 of the Civil Status Act (Personenstandsgesetz), the sex of a child is entered into the register of births. According to this regulation, the determinable physical characteristics are decisive for the entry of sex, and in cases of doubt, the entry should reflect the sex primarily indicated by the physical characteristics. However, in the

¹⁰⁵ http://www.yogyakartaprinciples.org/principles_en.pdf.

¹⁰⁶ <http://www.lsvd.de/914.0.html>.

¹⁰⁷ <http://www.bmj.de/files/->

/3813/Zusammenfassung_Lebenssituation_von_%20Kindern_%20in_gleichgeschl_LP.pdf.

¹⁰⁸ Bundestag, publication no. 16/4786, p. 3.

determination of a classification for a double-gendered person to one or the other sex, her/his psychological tendencies can be considered.¹⁰⁹

So far the courts have refused to change the registered sex of an intersexual in the birth register to 'hermaphrodite'. A right to legal recognition of a third gender on the basis of the right of self-determination in accordance with article 2 para. 1 of the Basic Law, in conjunction with article 1 para. 1 of the Basic Law (free development of personality), does not exist because two fundamental institutions of law – marriage and military service – require the categorisation of people into two genders. Additionally, even the Basic Law, in its article 3 para. 2, 1st sentence, assumes the differentiation of people as males and females.¹¹⁰

This jurisprudence is criticised, however, with reference to the Federal Constitutional Court, which decided with regard to transsexuals that the fundamental right to the free development of personality protects psychological gender identity.¹¹¹ According to the opinion of critics, this right must also be granted to intersexuals, thus recognising their psychological identity even if that simultaneously places the construed medical and legal categorisation in question.¹¹² In this context it has even been discussed whether parental discretion over children should be limited in such a way as to rule out operations on minors with the goal of clarifying physical sex within the binary framework of man and woman.¹¹³

However, with passage of the General Law on Equal Treatment, the phenomenon of intersexuality was certainly noted. One can conclude from the explanatory notes of the law that the protection from discrimination also includes intersexual people.¹¹⁴ So far, no court decisions have been based on this.

Finally, the concern is raised whether medical interventions for the purpose of sex polarisation with children incapable of giving their consent runs contrary to the constitutionally guaranteed fundamental rights of self-determination and freedom from bodily harm.¹¹⁵ In this context a recent ruling¹¹⁶ could be of great consequence for intersexuals. On 6th February 2008, the Cologne Regional Court awarded compensation for pain and suffering to an intersexual person 30 years after a doctor had removed her female genitalia, thus making her irrevocably a man. The intersexual claimant – still a man under civil law – brought suit for damages on grounds of erroneous assignment of a sex and physical mutilation against the surgeon who, in 1977, when she was 18 years old, had removed her uterus and fallopian tubes. In its decision, the court ruled that the momentous operation had been conducted without the necessary

¹⁰⁹ Regional Court (*Oberlandesgericht*) Naumburg, decision of 14th December 2000, case no.: 10 Wx 12/00; *Praxis der Freiwilligen Gerichtsbarkeit (FGPrax)* (2001), p. 239.

¹¹⁰ Germany/Arbeitsgericht/722 UR III 302/00 (13th September 2001); *Neue Juristische Wochenschrift (NJW) – Rechtssprechungsreport* (2001), p. 1586; District Court (*Landgericht*) München I/16 T 1944/02 (30th June 2003); *Zeitschrift für das gesamte Familienrecht* (2004), p. 269; *Neue Juristische Wochenschrift (NJW) – Rechtssprechungsreport* (2003), p. 1590.

¹¹¹ Federal Constitutional Court BVerfGE 49, 286.

¹¹² See Tolmein (2002), *Zeitschrift für das gesamte Familienrecht*, pp. 957 ff.

¹¹³ Bundestag, publication no. 16/4322, p. 5.

¹¹⁴ Bundestag, publication no. 16/1780.

¹¹⁵ Bundestag, publication no. 16/4322, p. 3.

¹¹⁶ District Court (*Landgericht*) Köln, case no.: 25 O 179/07.

consent and that the intersexual claimant had not been comprehensively informed by the defendant surgeon.

The Committee on the Elimination of Discrimination against Women (CEDAW) in its 43rd session referred to the topic of intersexual persons' rights and concerns voiced in the shadow report by the Association of Intersexed People.¹¹⁷ According to the response of the then acting Federal Government to a minor interpellation by the Left Party the former Federal Government coalition of the Social Democratic Party and the Christian Democratic Union considered changes in legislation related to intersexual persons' rights to be unnecessary.¹¹⁸ Pursuant to the former Federal Government's position, changes in the legal provisions concerning first name, civil status as well as marriage and life partnership were deemed to be unnecessary. The now ruling coalition of the Christian Democratic Union and the Free Democratic Party has not explicitly included the subject matter in its political agenda. The coalition treaty only deals with changes to the Law on Transsexuals and discrimination in general.¹¹⁹ Thus it remains to be seen which concrete point of view the governing coalition is going to take on the need for a reform of the legal provisions pertaining to intersexual persons' rights.

H.5. Institutional Homophobia

As of today no general institutional bans on materials that agitate for homosexual relations exist. Neither are bans on materials specifically conceived for the protection of minors in place. Nor exists a ban on the promotion of homosexual relations in public places.

Yet from a historical perspective regarding the first decades after the founding of the Federal Republic of Germany homosexuality was regarded as immoral and criminally prohibited through articles 175ff. of the Criminal Code. This was at first also confirmed by the Federal Constitutional Court, which referred to the principle of morality anchored in the Basic Law.¹²⁰ Gays and lesbians remained subject to social stigmatisation and discrimination, as well as criminally persecuted in the name of the state. In the period between 1953 and 1965 the police registered almost 100,000 people across the country who were suspected of violating the criminal statute for homosexuality.¹²¹ Between 1950 and 1965, nearly 2,800 homosexuals were convicted each year.¹²² It was only after the lifting of the total prohibition in 1969 that the legal practice changed, gradually decreasing social stigmatisation. Nevertheless different protected age limits for

¹¹⁷ <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N09/236/50/PDF/N0923650.pdf?OpenElement>; http://intersex.shadowreport.org/public/Association_of_Intersexed_People-Shadow_Report_CEDAW_2008.pdf (26.02.2010).

¹¹⁸ <http://dip21.bundestag.de/dip21/btd/16/132/1613269.pdf> (26.02.2010).

¹¹⁹ <http://www.fdp-bundespartei.de/files/363/091024-koalitionsvertrag-cducsu-fdp.pdf>, p. 108, p. 18, p. 126/127 (26.02.2010).

¹²⁰ Federal Constitutional Court (*Bundesverfassungsgericht*), BVerfGE 6, 389 (434).

¹²¹ Müller (2003), *Ausgrenzung der Homosexuellen aus der 'Volksgemeinschaft': die Verfolgung von Homosexuellen in Köln 1933-1945*, Cologne, p. 218.

¹²² Müller (2003), *Ausgrenzung der Homosexuellen aus der 'Volksgemeinschaft': die Verfolgung von Homosexuellen in Köln 1933-1945*, Cologne, p. 218.

heterosexual and homosexual acts respectively remained in force. It was only in 1994 that the criminal statute for homosexuality was completely repealed. Until the decriminalisation of homosexuality amongst consenting adults in the Federal Republic of Germany in 1969 about 50.000 verdicts were rendered. Until that complete repeal of the criminalisation of homosexuality in 1994 about 3500 additional sentences were handed out. In the German Democratic Republic homosexuality amongst consenting adults was also decriminalised in 1968 and until 1989 the criminally punishable protected age limits for homosexual acts were different from those for heterosexual acts. It is estimated that in the German Democratic Republic about 4300 verdicts were rendered according to article 151 of its Criminal Code.¹²³ The Federal President, Richard von Weizsäcker, explicitly mentioned homosexuals as a victimised group of National Socialism for the first time in his speech of 8th May 1985 – 40 years after the end of the war. It took another 15 years, until December 2000, for the German Parliament to apologise to the victims for the injustice they had to endure under National Socialism.¹²⁴ In 2002 homosexuals who were criminally prosecuted pursuant to article 175 of the Criminal Code under the National Socialist regime were legally rehabilitated. Yet this does not concern all persons which were persecuted after the end of National Socialism according to the same article of the Criminal Code, which remained in force unchanged. The current Federal Government has included the subject matter into its coalition treaty.¹²⁵ It is stated therein, that in the spirit of the collective compensation for homosexual victims of National Socialism a trust is to be set up, which will work at countering the discrimination on grounds of sexual orientation by interdisciplinary research and education. Yet civil society organisations demand further compensation, rehabilitation and annihilation of verdicts passed after 1945, too.¹²⁶

As concerns the protection of minors, pornographic material will be banned by the Federal Department for Media Harmful to Young Persons¹²⁷ regardless of whether its content is of a heterosexual or homosexual nature. To the contrary, one of the indicators for a ban of certain media in the practice of the Federal Department for Media Harmful to Young Persons according to article 18 of the Protection of Young Persons Act¹²⁸ is discriminatory content, which also comprises discrimination on the basis of sexual orientation.¹²⁹ For example, the Lesbians and Gay Association in Germany initiated a procedure to ban music of a nature discriminatory against homosexuals by an artist which was successful.¹³⁰

¹²³ <http://dip21.bundestag.de/dip21/btd/16/114/1611440.pdf>,

<http://dip21.bundestag.de/dip21/btd/16/109/1610944.pdf> (26.02.2010).

¹²⁴ <http://dip21.bundestag.de/dip21/btd/14/048/1404894.pdf>, p. 3 (26.02.2010).

¹²⁵ <http://www.fdp-bundespartei.de/files/363/091024-koalitionsvertrag-cducsu-fdp.pdf>, p. 111 (26.02.2010).

¹²⁶ <http://www.lsvd.de/1211.0.html>; <http://news.gay-web.de/njus/id1001> (26.02.2010).

¹²⁷ <http://www.bundespruefstelle.de/bpjm/information-in-english.html> (26.02.2010).

¹²⁸ <http://bmfsfj.de/RedaktionBMFSFJ/Abteilung5/Pdf-Anlagen/juSchGenglisch.property=pdf,bereich=,rwb=true.pdf> (26.02.2010).

¹²⁹ http://www.bundespruefstelle.de/bpjm/Jugendmedienschutz/Indizierungsverfahren/spruchpraxis_did=104224.html (26.02.2010).

¹³⁰ Cf.: enclosed correspondence with the Lesbians and Gay Association in Germany (26.02.2010).

Today many initiatives are active in the field of education and antidiscrimination concerning homosexuality and receive or have received governmental financial means and/or are supported by state organs.¹³¹ Thus for example, the Federal Centre for Health Education publishes a manual called "Heterosexual? Homosexual?".¹³²

In isolated instances public authorities have shown some reluctance to support particular educational antidiscrimination material. For example, in the Federal State of Nordrhein-Westfalen. The Ministry for Health, Social Matters, Family and Women of Nordrhein-Westfalen had published an educational manual called "Different in More Ways Than One: Providing Guidance for Teenagers on Their Way to Identity, Sexuality and Respect" in 2004.¹³³ The antidiscrimination manual was promoted within a European Framework and supported by the then acting governing coalition of the Social Democratic Party and the Green Party in Nordrhein-Westfalen. After a change in government in the summer of 2005 the Ministry for Education was run by the Christian Democratic Party and decided not to use the manual in schools anymore and to stop the online distribution. The reasoning behind this was that it was not in line with the Christian values of the Federal State government. The manual is now distributed by a private association but needs to be accompanied by an official disclaimer of the government of the Federal State of Nordrhein-Westfalen.¹³⁴ At the same time the current Ministry for Generations, Family, Women and Integration of the Federal State of Nordrhein-Westfalen publicly supports an initiative called "School without Homophobia – School of Diversity".¹³⁵

I. Good Practice

I.1. Prohibitions on Discrimination in the Constitutions of the *Laender*

The federal Land of Brandenburg was the first to adopt a relevant prohibition on discrimination, in article 12 para. 2 of its constitution ('No one may [...] be favoured or discriminated against due to [...] their sexual orientation.'). Three other *Laender* followed: Berlin (article 10 para. 2: 'No one may [...] be discriminated against or favoured due to their sexual orientation.'); Bremen (article 2: 'No one may [...] be favoured or discriminated against due to [...] their sexual orientation.); and Thuringia (article 2 para. 3: 'No one may [...] be favoured or discriminated against due to their sexual orientation.'). This step is of primarily symbolic importance, which nevertheless should not be underestimated considering the history of the old article 175 of the criminal

¹³¹ <http://www.kombi-berlin.de/01-start-engl.html>;
<http://www.schwulelehrer.de/> (26.02.2010).

¹³² <http://www.bzga.de/?uid=10e7dba5ff6db8a8c3deaf179e4eeecfc&id=medien&sid=71&idx=42>
(26.02.2010).

¹³³ <http://www.schlau-nrw.de/triangle2/> (26.02.2010).

¹³⁴ <http://www.schlau-nrw.de/> (26.02.2010).

¹³⁵ <http://www.schule-der-vielfalt.de/index.htm> (26.02.2010).

code. Further, it sends administrators a clear signal that the prohibition on discrimination on the basis of sexual orientation deserves particular attention in the public authorities' work and organs due to its fundamental character and constitutional dimension.

I.2. Jurisprudence on the Law on Transsexuals

Since taking effect on 1st January 1981, the Law on Transsexuals was not reformed for 26 years. The amendment of 2007 also fails to account for the findings of the sexual sciences. Since the late 1960s, the jurisprudence of the Federal Constitutional Court, however, has continuously strengthened the rights of transsexuals. In its decision of 1978,¹³⁶ it based the correction of entering the male gender of a transsexual in the birth register on article 2 para. 1 of the Basic Law (general freedom of action), considered together with article 1 para. 1 of the Basic Law (human dignity). It was only after this fundamental decision of the Federal Constitutional Court that the parliament passed the Law on Changing Given Names and the Determination of Sex Identity in Special Cases [Gesetz über die Änderung der Vornamen und die Feststellung der Geschlechtszugehörigkeit in besonderen Fällen].

In later years, the Federal Constitutional Court took up the Law on Transsexuals in five decisions and declared important provisions to be unconstitutional. In 1982¹³⁷ and 1993¹³⁸ it objected to the age requirement of 25 for changing civil status and given names. In 2005¹³⁹ it decided that the provision according to which same-sex transsexuals also lose their changed given names if they marry although they cannot enter into a life partnership, is inoperative pending a new legal regulation. Finally, in 2006¹⁴⁰ it gave legislators a deadline until 30th June 2007 to create a new regulation in place of the prohibition on changing a given name and civil status for foreign transsexuals who legally and not just temporarily reside in Germany, provided that the law of their homeland does not have comparable regulations. This requirement was complied with when the Federal Parliament adopted a law changing the Law on Transsexuals in that respect.¹⁴¹ Moreover, the Federal Constitutional Court has ruled that already

¹³⁶ Federal Constitutional Court, BVerfGE 49, 286.

¹³⁷ Federal Constitutional Court, BVerfGE 60, 123.

¹³⁸ Federal Constitutional Court, BVerfGE 88, 87.

¹³⁹ Federal Constitutional Court, decision of 6th December 2005, case no.: 1 BvL 3/03; *Zeitschrift für das gesamte Familienrecht* (2006), p. 182.

¹⁴⁰ Federal Constitutional Court, decision of 18th July 2007, case no.: 1 BvL 1,12/04; *Zeitschrift für das gesamte Familienrecht* (2006), p. 1818;

<http://www.bundesverfassungsgericht.de/pressemitteilungen/bvg06-107.html>,

http://www.bundesverfassungsgericht.de/entscheidungen/ls20060718_1bvl000104.html (26.02.2010).

¹⁴¹ BGBI. I, p. 1566, Article. 3a (20th July 2007);

<http://www.bgblportal.de/BGBL/bgbl1f/bgbl107s1566.pdf> (26.02.2010).

after a change in name, a person is to be addressed according to her/his newly understood role.¹⁴²

In a recent decision, the Federal Constitutional Court held that a married transsexual who wanted to legally change his gender after a surgical change of his sex from male to female but remain married to his wife cannot be forced to divorce in order to have his sex change legally recognised. According to article 8 para 1 nr. 2 of the Law on Transsexuals, not being married is a prerequisite for the legal determination and recognition of the gender change. The Federal Constitutional Court concluded that the relevant provision is unconstitutional since it is not just and reasonable to demand a divorce when both partners want to remain legally bound to one another. Therefore, the legislature was under the duty to adjust the pertinent provision in light of the decision in order to enable transsexuals to remain in a legally secure partnership while at the same time obtaining legal recognition of the gender change. This is due to the impact of the constitutionally guaranteed right to recognition of the freely chosen and self-determined gender identity which needs to be appropriately balanced with the constitutional guarantee of marriage as an institution as enshrined in Article 6 para 1 of the Basic Law.¹⁴³ The decision has led to a change of the Law on Transsexuals by the Federal Parliament, which eliminated the rule in question from the law.¹⁴⁴ This development, ending forced divorce for married couples in which one of the partners is transgender, was explicitly welcomed by the Council of Europe Commissioner for Human rights in an issue paper titled “Human Rights and Gender Identity”.¹⁴⁵

1.3. Studies conducted by Antidiscrimination-Office

The federal Antidiscrimination-Office published the results of a recently conducted study (the so-called ‘Sinus-Milieu-Studie’) in April 2009, which focuses on the question as to whether discrimination is a subject of concern in Germany. The analysis is supposed to provide for an insight into the population’s perception of and attitude towards discrimination on the grounds of “race”, ethnic origin, sex, age, disability, religion or belief and of “sexual identity”. Concerning the topic of discrimination on grounds of “sexual identity” the study concludes that in many social deeply rooted prejudices exist towards sexual orientations that are off the mainstream.¹⁴⁶

¹⁴² Federal Constitutional Court, decision of 15th August 1996, case no.: 2 BvR 1833/95; *Neue Juristische Wochenschrift (NJW)* (1997), p. 1632.

¹⁴³ <http://www.bundesverfassungsgericht.de/pressemitteilungen/bvg08-077.html>,
http://www.bundesverfassungsgericht.de/entscheidungen/Is20080527_1bvl001005.html
(26.02.2010).

¹⁴⁴ BGBl. I, p. 1978, Nr. 43, Article 5 (22nd July 2009);
http://www2.bgbli.de/Xaver/start.xav?startbk=Bundesanzeiger_BGBI (26.02.2010).

¹⁴⁵ para 3.2.2: <https://wcd.coe.int/ViewDoc.jsp?id=1476365> (08.04.2010).

¹⁴⁶ Available in English:
<http://www.antidiskriminierungsstelle.de/bmfsfj/generator/RedaktionBMFSFJ/RedaktionADS/PDF-Anlagen/2009-04-02-schriftenreihe-band4.property=pdf.bereich=ads.sprache=de.rwb=true.pdf>,
p. 17; English at p. 138;

Another study which covers a project period of 2009 until 2011 seeks to quantitatively research experiences of discrimination made by lesbian and bisexual women as well as “transident” (transgender) persons.¹⁴⁷

I.4. Civil Society

A hotline against violence and discrimination against lesbians was established in Berlin to address the need for protection and support in the light of increased numbers of physical violence and attacks against Lesbians in the last months.¹⁴⁸ The anti violence project is targeted towards the support of lesbians in particular since several hotline for anti gay violence were already in existence.¹⁴⁹

Within the Deutsche Telekom Group employees from different areas of the company and its subsidiaries founded a network of heterosexuals, gays, lesbians and transgender in order to strengthen tolerance on every level of the enterprise and to promote acceptance for different variations of lifestyles. The aim is to enable intercourse between the colleagues and to create a positive working climate.¹⁵⁰

I.5. Retroactive equalisation of remuneration for same-sex life partner civil servants in Hamburg

The competent committee for interior matters of the Federal State of Hamburg’s citizenry decreed that same-sex life partners employed in the civil service sector of the Federal State are to be remunerated in an equal manner to married civil servants. Civil servants who have entered a same-sex life partnership from the date of 1st of August 2001 will be compensated retroactively concerning their remuneration in all respects.¹⁵¹

I.6. Police sets up special agents to liaise with the LGB community

Some police agencies on the Federal States level as well as in several cities have established an office for a special police agent who is specifically responsible for matters concerning violence against gays and lesbians, as well as other

<http://www.antidiskriminierungsstelle.de/bmfsfj/generator/ADS/Service/downloads.did=121488.html> (26.02.2010).

¹⁴⁷ Cf.: enclosed correspondence with the Federal Anti-Discrimination Agency.

¹⁴⁸ <http://www.onyva.lsvd.de/>.

¹⁴⁹ http://www.maneo.de/highres/english/e_hindex.html.

¹⁵⁰ <http://www.queerbeet.info/english/index.html>.

¹⁵¹ <http://typo3.lsvd.de/index.php?id=1276>.

matters related to the LGB community. The function of these special spokespersons is to serve as contact to associations and organisations of gays and lesbians, to work in the field of prevention of violence against gays and lesbians and to sensitise colleagues as well as the public to police relevant matters related to the LGB community.¹⁵²

¹⁵² <http://www.broken-rainbow.de/material/Kontaktbeamte.pdf>;
<http://www.berlin.de/polizei/praevention/homosexualitaet/>; http://www.polizei-nrw.de/essen/Wir_stellen_uns_vor/gleichgeschlechtliche-lebensweisen/.

ANNEXES

ANNEX I – CASE LAW

A. Implementation of Employment Directive 2000/78/EC

Case title	IV ZR 267/04
Decision date	14 th February 2007
Reference details (type and title of court/body; in original language and English [official translation, if available])	Bundesgerichtshof [Federal High Court of Justice]
Key facts of the case (max. 500 chars)	The plaintiff has worked in the civil service since 1977, and had complementary insurance with the defendant, the Pension Fund of the Federation and Laender [<i>Versorgungsanstalt des Bundes und der Länder</i>]. Since 2001 he has lived in a registered life partnership. The plaintiff filed an application for a determination that in calculating the plaintiff's initial credit, the defendant must use the more beneficial tax category that applies to married people, and pay his life partner a survivor's pension until the plaintiff's death.
Main reasoning/argumentation (max. 500 chars)	It is clear from ECJ jurisprudence that in legal differentiation by a family status that is accessible to women and men independent of their sexual orientation, there is no discrimination on the basis of sex or sexual orientation. The preferential legal treatment of married persons on the basis of family status does not devalue the communion of same-sex partners, but rather treats them in accordance with their particular nature. The favouring of married persons serves to support heterosexual communions with regard to reproduction and education of their own offspring, something to which same-sex partnerships typically cannot contribute in the same manner.
Key issues (concepts, interpretations) clarified by the case (max. 500 chars)	Under the statutes of the Pension Fund of the Federation and Laender, registered life partners (in contrast to married persons) are not entitled to a survivor's pension; also, for life partners, the more beneficial tax category that applies to married persons in the calculation of the initial credit is not to be used. This does not violate higher-ranking law.
Results (sanctions) and key consequences or implications of the case (max. 500 chars)	The plaintiff's appeal is not founded and is rejected.

Case title	6 C 27.06
Decision date	25 th July 2007
Reference details (type and title of court/body; in original language and English [official translation, if available])	Bundesverwaltungsgericht [Federal Administrative Court]
Key facts of the case (max. 500 chars)	On 24 th November 2003, the claimant entered into a life partnership with a formerly self-employed doctor who had had his own practice, and who was insured with the defendant, the District Doctors' Association of Koblenz [<i>Bezirksärztekammer Koblenz</i>]. The doctor died on 5 th February 2004. The defendant rejected the application for a survivor's pension with reference to its statutes.
Main reasoning/argumentation (max. 500 chars)	Preferential treatment for marriage over life partnership, even if it is not urgently demanded, is admissible due to the special constitutional protection for marriage.
Key issues (concepts, interpretations) clarified by the case (max. 500 chars)	The statutory provisions of a pension fund, according to which the widow or widower of a doctor receives a survivor's pension, but the surviving life partner does not, is not in violation of federal or European law.
Results (sanctions) and key consequences or implications of the case (max. 500 chars)	The plaintiff's appeal is unfounded and is rejected.

Case title	2 BvR 855/06
Decision date	15 th November 2007
Reference details (type and title of court/body; in original language and English [official translation, if available])	Bundesverfassungsgericht [Federal Constitutional Court]
Key facts of the case (max. 500 chars)	The appellant was a civil servant working for the Land Baden-Württemberg until 31 st July 2004. On 5 th November 2001 she had entered into a registered life partnership. The Stuttgart Administrative Court rejected her suit for payment of family subsidy at level one.

Main reasoning/argumentation (max. 500 chars)	The inequality anchored in para. 40(1)(1) of the Federal Remuneration Law [<i>Bundesbesoldungsgesetz</i>] is based on the characteristic of family status. The law differentiates between married civil servants and such civil servants who are either single or living in a partnership other than marriage.
Key issues (concepts, interpretations) clarified by the case (max. 500 chars)	The extension under para. 40(1)(1) of the Federal Remuneration Law of family subsidy only to married persons, in the sense of art. 6(1) of the Basic Law (Protection of the Family), is not unconstitutional unequal treatment of the appellant.
Results (sanctions) and key consequences or implications of the case (max. 500 chars)	The constitutional complaint is unfounded and is not taken up for a decision.

Case title	VG 9 E 3777/06
Decision date	15 th November 2007
Reference details (type and title of court/body; in original language and English [official translation, if available])	Bundesverwaltungsgericht [Federal Administrative Court]
Key facts of the case (max. 500 chars)	The plaintiff is a tenured secondary school teacher in the service of the defendant, the Hessian Remuneration Authority [<i>Hessische Bezügestelle</i>]. He entered into a registered life partnership in 2002. His life partner receives neither a family subsidy nor a comparable benefit. The defendant rejected an application of the plaintiff to grant him family subsidy at level one, retroactive to 2 nd December 2003.
Main reasoning/argumentation (max. 500 chars)	Para. 40(1)(1) of the Federal Remuneration Law [<i>Bundesbesoldungsgesetz</i>] only allows the granting of family subsidy at level one to civil servants who are married. It is neither an unplanned gap nor a violation of higher-ranking law that para. 40(1)(1) of the law does not consider civil servants who enter into a registered life partnership. The institutions of marriage and registered life partnerships under family law are not similar, so that the family status of persons belonging to each legal institution are not comparable.
Key issues (concepts, interpretations) clarified by the case (max. 500 chars)	A civil servant living in a registered life partnership has no claim to family subsidy at level one.
Results (sanctions) and key consequences or implications of the case (max. 500 chars)	The plaintiff's appeal is rejected.

Case title	20 Ca 105/07
Decision date	4 th December 2007
Reference details (type and title of court/body; in original language and English [official translation, if available])	Arbeitsgericht Hamburg [Hamburg Employment Court]
Key facts of the case (max. 500 chars)	The plaintiff – a German of Turkish descent born as, but not a practicing Muslim – seeks restitution due to discrimination on the basis of religion by the Welfare and Social Work Committee of Hamburg [<i>Diakonische Werk Hamburg</i>], which in a process for filling the position of a social educator for an EU-supported project, rejected her application.
Main reasoning/argumentation (max. 500 chars)	For a concrete professional activity, the self-conception of the church may only play a decisive role when this activity stands in direct relationship to that self-conception, which is only to be presumed for areas related to preaching.
Key issues (concepts, interpretations) clarified by the case (max. 500 chars)	The right of self-determination for church employers must be interpreted in conformity with directives and is not an absolute and final standard for differentiated treatment.
Results (sanctions) and key consequences or implications of the case (max. 500 chars)	The defendant was ordered to pay the plaintiff 3,900 Euros.

B. Freedom of movement

There was no relevant jurisprudence.

C. Asylum and subsidiary protection

Case title	9 C 278/86
Decision date	15 th March 1988
Reference details (type and title of court/body; in original language and English [official translation, if available])	Bundesverwaltungsgericht [Federal Administrative Court]
Key facts of the case (max. 500 chars)	The plaintiff, an Iranian citizen born in Tehran in 1947, was, according to his information, serving as a finance official in Tehran and is now seeking a grant of political asylum. He cites the threat of danger to him in Iran due to his homosexuality.
Main reasoning/argumentation (max. 500 chars)	The plaintiff is politically persecuted in the sense of art. 16(2)(2) of the Basic Law (fundamental right to asylum) because with considerable probability upon a return to Iran he would face a threat of persecution based on his homosexual orientation, and thus also a targeting of his existing tendency.
Key issues (concepts, interpretations) clarified by the case (max. 500 chars)	Political persecution in the sense of art. 16(2)(2) of the Basic Law can exist under certain conditions even when grounds and characteristics other than those explicitly listed in art.1(A)(2) of the Geneva Refugee Convention are taken as the basis for its provision (here: the death penalty in Iran targeting irreversible, innate homosexual orientation).
Results (sanctions) and key consequences or implications of the case (max. 500 chars)	The plaintiff is entitled to the asserted asylum claim on the basis of the determined facts.

Case title	A 2 B 273/04
Decision date	20 th October 2004
Reference details (type and title of court/body; in original language and English [official translation, if available])	Oberverwaltungsgericht Sachsen [Administrative Appeals Court of Sachsen]
Key facts of the case (max. 500 chars)	The applicant, an Iranian citizen who says he is homosexual, seeks a grant of political asylum or protection from deportation.
Main reasoning/argumentation (max. 500 chars)	It is possible to live in a private manner in Iran with an irreversible homosexual orientation.
Key issues (concepts, interpretations) clarified by the case (max. 500 chars)	There is no danger of political persecution for a homosexual of irreversible orientation upon returning when he has exited the country without persecution, is not subject to any special interest in observation or persecution due to his homosexuality, and lives his homosexual orientation discreetly in the private sphere.
Results (sanctions) and key consequences or implications of the case (max. 500 chars)	The court rejects the appeal of the administrative court's judgement to deny asylum and protection from deportation.

Case title	4 K 652/01.A
Decision date	27 th January 2005
Reference details (type and title of court/body; in original language and English [official translation, if available])	Verwaltungsgericht Frankfurt/Oder [Administrative Court of Frankfurt an der Oder]
Key facts of the case (max. 500 chars)	The applicant, an Iranian citizen, says he is homosexual and seeks recognition as a political refugee.
Main reasoning/argumentation (max. 500 chars)	The homosexual activity that can be expected with considerable probability from an asylum seeker will, in all likelihood, become known to Iranian prosecuting agencies, so that the homosexual must seriously fear being sentenced to death.
Key issues (concepts, interpretations) clarified by the case (max. 500 chars)	Without regard to the circumstance that prohibitions on the consensual homosexual activity of adults in Iran, as such are intended for the maintenance of public morals, it must be assumed from the present actual and legal conditions in Iran that the person who – through his/her predestined homosexual character – does not abide by the existing prohibitions, through the imposition and enforcement of the death penalty should also have his/her homosexual disposition considered a relevant characteristic in asylum law.
Results (sanctions) and key consequences or implications of the case (max. 500 chars)	The Federal Office for the Recognition of Foreign Refugees [<i>Bundesamt für die Anerkennung ausländischer Flüchtlinge</i>] is obligated to recognise the plaintiff as a person entitled to asylum.

Re: Point 59: There was no relevant jurisprudence.

D. Family reunification

There was no relevant jurisprudence.

E. Freedom of assembly

There was no relevant jurisprudence.

F. Hate speech and Criminal law

The decisions quoted in the main body of the study are not available to us. As stated in the footnotes, we refer exceptionally to media reports. It was impossible to obtain more detailed information on the proceedings described. The relevant NGOs were also not in a position to assist.

G. Transgender issues

Re: G.1. – G.6.: There was no relevant jurisprudence.

Re: G.7. – G.11.

Case title	1 BvR 16/72
Decision date	11 th October 1978
Reference details (type and title of court/body; in original language and English [official translation, if available])	Bundesverfassungsgericht [Federal Constitutional Court]
Key facts of the case (max. 500 chars)	Following adjustment of his outer appearance, the appellant leads the life of a woman, but is legally still treated as a man (male transsexual). With his constitutional complaint, he opposes the rejection of changing the entry of sex in the birth register from ‘male’ to ‘female’.
Main reasoning/argumentation (max. 500 chars)	It is accepted as medically certain that transsexualism has nothing to do with homosexuality or fetishism and can be clearly separated from psychosexual anomalies and perversions. Decisive is that for transsexuals, it is not sexuality, but a problem of personal self-conception that is manifested in the gender role and identity. The male transsexual rejects the homosexual man and expressly seeks a partner of heterosexual orientation.
Key issues (concepts, interpretations) clarified by the case (max. 500 chars)	Art. 2(1) in conjunction with art. 1(1) of the Basic Law (general freedom of action and human dignity) affords correction to the entry of a transsexual’s male gender in the register of births if at issue is a medically determined, irreversible case of transsexualism and if a gender-changing operation has been conducted.

Results (sanctions) and key consequences or implications of the case (max. 500 chars)	The matter is referred back to the Federal High Court of Justice. The Federal Republic of Germany is to reimburse the appellant for the necessary expenditures.
Case title	2 BvR 1833/95
Decision date	15 th August 1996
Reference details (type and title of court/body; in original language and English [official translation, if available])	Bundesverfassungsgericht [Federal Constitutional Court]
Key facts of the case (max. 500 chars)	The appellant, who is serving a life sentence, feels as if she belongs to the female gender despite a strong biologically male appearance. In accordance with her application, her originally male given name was changed to a female one. Irregardless, the prison employees – in a male prison – still at times addressed her as ‘Mr ...’; the prison administration also continued to use the male form of address in written communications regarding her. The appellant’s application to the institution’s management, requesting that she henceforth exclusively be addressed as a woman, was refused.
Main reasoning/argumentation (max. 500 chars)	The question of a person’s sexual identity goes to her/his area of sexuality, which, as part of the private sphere, the Basic Law has placed under constitutional protection through its art. 2(1) in conjunction with art. 1(1). State authorities’ respect of this area includes the obligation to respect a person’s individual decision with regard to his/her sexual identity.
Key issues (concepts, interpretations) clarified by the case (max. 500 chars)	Respect for the decision on identity, provided for in para. 1 of the Law on Transsexuals requires that after the change of name appropriate to his/her new understood identity, the person is to be addressed accordingly.
Results (sanctions) and key consequences or implications of the case (max. 500 chars)	The constitutional complaint is clearly founded. The matter is referred back to the District Court [<i>Landgericht</i>].

Case title	1 BvL 3/03
Decision date	6 th December 2005
Reference details (type and title of court/body; in original language and English [official translation, if available])	Bundesverfassungsgericht [Federal Constitutional Court]
Key facts of the case (max. 500 chars)	The appellant of the initial proceedings belongs to the male sex. His given name 'Kai' was changed to 'Karin Nicole'. He did not undergo a sex-change operation. After the appellant married a woman, to whom – from his point of view – he is leading a same-sex relationship, the registry official noted in the birth registry, in accordance with art. 7(1)(3) of the Law on Transsexuals, that appellant once again uses the given name 'Kai'. The appellant then pursued two legal avenues to reclaim the female given name that had been revoked from him.
Main reasoning/argumentation (max. 500 chars)	By now it has not only become known that homosexuality also exists for transsexuals, but it is proven that even for transsexuals who have undergone a sex change, there is a not-inconsequential number of same-sex orientations. Clinging to sexual identity in civil status law that is determined by outer sexual characteristics on the one hand, and the legal institutions' use of this legal sexual categorisation on the other means that man-to-woman transsexual without a sex change who is homosexual and would like to partner with a woman cannot enter into a life partnership because under civil status law he is still considered a man.
Key issues (concepts, interpretations) clarified by the case (max. 500 chars)	Para. 7(1)(3) of the Law on Transsexuals violates a homosexual transsexual's protected right to use a name, as well as his right to protection of his intimate sphere, as long as is available to him a legally secured partnership without loss of the changed given name that corresponds to his perceived gender.
Results (sanctions) and key consequences or implications of the case (max. 500 chars)	The Law on Transsexuals is incompatible with art. 2(1) in conjunction with art. (1)(1) of the Basic Law, to the extent that it affords homosexual transsexuals without a sex change a legally secured partnership, but not without loss of the changed given name. Therefore the provision is not to be applied until there is a new legal formulation.

Case title	1 BvL 1,12/04
Decision date	18 th July 2006
Reference details (type and title of court/body; in original language and English [official translation, if available])	Bundesverfassungsgericht [Federal Constitutional Court]
Key facts of the case (max. 500 chars)	The participant in the initial proceeding is a Thai citizen born of the male sex. He underwent a sex-change operation to the female sex. Since April 2002 he has lived in Germany together with a German citizen. Both intend to marry. Because the sex-change is not recognised under Thai law, he applied for an exemption from the furnishing of a certificate of no impediment. With reference to the Law on Transsexuals, this was refused. Therefore he applied to the magistrates' court for a determination that he is to be recognised as belonging to the female sex.
Main reasoning/argumentation (max. 500 chars)	The entitlement to file an application in proceedings to change a given name, as well as in proceedings on the determination of sexual identity – restricted to Germans and persons with German personal status – results in inequality between Germans and persons with German personal status and transsexual foreigners who legally and not only temporarily reside in Germany, and whose domestic law does not include comparable regulations.
Key issues (concepts, interpretations) clarified by the case (max. 500 chars)	The Law on Transsexuals violates the precept of equal treatment in conjunction with the fundamental right to protection of personality to the extent that it excludes from the entitlement to file an application for the changing of a given name and determination of sexual identity foreign transsexuals who legally and not just temporarily reside in Germany, provided that the law in their homeland does not include similar regulations.
Results (sanctions) and key consequences or implications of the case (max. 500 chars)	Para 1(1)(1) of the Law on Transsexuals violates the precept of equal treatment (art. 3(1) of the Basic Law) in conjunction with the fundamental right to protection of personality (art. 2(1) in conjunction with art. 1(1) of the Basic Law). Legislators were given until 30 th June 2007 to come up with a new, constitutional provision.

Case title	1 BvL 10/05
Decision date	27 th May 2008
Reference details (type and title of court/body; in original language and English [official translation, if available])	Bundesverfassungsgericht [Federal Constitutional Court]
Key facts of the case (max. 500 chars)	The Federal Constitutional Court held that a married transsexual who wanted to legally change his gender after a surgical change of the sex from male to female but remain married to his wife cannot be forced to divorce in order to have his sex change legally recognised. The formerly male applicant has been married for 56 years and has three children but has felt that he belongs to the female sex. The applicant and his wife intend to stay married. The court competent for the recognition of the sex change therefore referred the case to the Federal Constitutional Court for a concrete judicial review by the Constitutional Court according to Article 100 para 1 of the Basic Law.
Main reasoning/argumentation (max. 500 chars)	According to article 8 para 1 nr. 2 of the Law on Transsexuals not being married is a prerequisite for the legal determination and recognition of the gender change. The Federal Constitutional Court concluded that the relevant provision is unconstitutional since it is not just and reasonable to demand a divorce when both partners want to remain legally bound to one another.
Key issues (concepts, interpretations) clarified by the case (max. 500 chars)	The constitutionally guaranteed right to recognition of the freely chosen and self-determined sexual identity needs to be appropriately balanced with the constitutional guarantee of marriage as an institution as enshrined in Article 6 para 1 of the Basic Law. Thus article 8 para 1 nr. 2 of the Law on Transsexuals is constitutionally not proportional, since it absolutely demands the divorce.
Results (sanctions) and key consequences or implications of the case (max. 500 chars)	The legislature needed to adjust the pertinent provision in order to enable transsexuals to remain in a legally secure partnership while at the same time obtaining legal recognition of the gender change and has complied with the requirements set forth in the decision .

H. Miscellaneous

Re: H.1. (Same-Sex) Life Partnership Law [Lebenspartnerschaftsgesetz]:

Case title	1 BvF 1/01
Decision date	10 th July 2002
Reference details (type and title of court/body; in original language and English [official translation, if available])	Bundesverfassungsgericht [Federal Constitutional Court]
Key facts of the case (max. 500 chars)	In the course of a judicial review procedure, several German federal Laender have complained of the incompatibility between the Life Partnership Law as a whole, as well as some of its individual provisions, and the Basic Law.
Main reasoning/argumentation (max. 500 chars)	As an institution, marriage in its constitutional structural principles and its form through legislation is not affected by the Life Partnership Law. Its legal foundation has not undergone any change. All regulations that give marriage a legal framework and equip the institution with legal consequences continue to apply as before. The institutional guarantee, precisely because it only references marriage, cannot imply a prohibition on opening the possibility of a similarly formed partnership under law for same-sex partners. The institution of marriage is not threatened with losses by an institution aimed at persons who cannot enter into a marriage together.
Key issues (concepts, interpretations) clarified by the case (max. 500 chars)	The introduction of the legal institution of registered life partnerships for same-sex couples does not violate art. 6(1) of the Basic Law. The special protection of marriage in art. 6(1) of the Basic Law does not prevent legislators from providing rights and privileges for same-sex life partnership that are the same as or approximate those of marriage.
Results (sanctions) and key consequences or implications of the case (max. 500 chars)	The Life Partnership Law is compatible with the Basic Law. The constitutional complaint is rejected.

Case title	Unequal treatment of marriage and same sex life partnership
Decision date	7 July 2009
Reference details (type and title of court/body; in original language and English [official translation, if available])	Bundesverfassungsgericht [Federal Constitutional Court], case no.: 1 BvR 1164/07
Key facts of the case (max. 500 chars)	The Constitutional Complaint dealt with the discriminatory handling of marriage and registered civil partnership in the area of provisions for dependants' pensions for public employees in the civil service field. In contrast to the compulsory public pension fund insurance the additional insurance for the provision for dependants does not provide for pensions for registered civil partners.
Main reasoning/argumentation (max. 500 chars)	The general prohibition of unequal treatment as laid down in Art. 3 para 1 of the Basis Law demands that all humans are being treated equal in front of the law. It is also forbidden to exclude one group of persons from benefits which another group of persons enjoys if the two groups are comparable and there are no objective reasons for the justification of the unequal treatment. In the case at hand registered civil partnership were discriminated against as compared to marriages under the rules determining the additional insurance for the provision for dependants in the public service field.
Key issues (concepts, interpretations) clarified by the case (max. 500 chars)	The rules on the additional insurance for the provision for dependants of public employees in the civil service are to be evaluated under strict standards set out by the requirements of the general prohibition of unequal treatment as laid down in Art. 3 para 1 of the Basis Law. The condition of constitutionality does apply directly even though the rules in question in the case at hand are of a private law nature. The strict requirements need to be observed because the entity in question is established under public law and serves the common good and exercises public functions.
Results (sanctions) and key consequences or implications of the case (max. 500 chars)	The Constitutional Court held that the right to equal treatment as established in Art. 3 para 1 of the Basis Law was violated, annulled the decision of the Federal Court of Justice [<i>Bundesgerichtshof</i>] and ordered the issue to be decided anew under adequate consideration of the constitutional requirements set out in the verdict.

Case title	Unequal treatment of marriage and same sex life partnership concerning business pensions
Decision date	14 th January 2009
Reference details (type and title of court/body; in original language and English [official translation, if available])	Bundesarbeitsgericht [Federal Labour Court], case no.: 3 AZR 20/07
Key facts of the case (max. 500 chars)	The claimant was the surviving same sex life partner of an employee of the respondent. In its business pension plan the respondent did not provide for surviving dependants' pensions of same sex life partners but did so for married couples. The courts of lower instances had denied the claims of the claimant on general legal grounds.
Main reasoning/argumentation (max. 500 chars)	The Federal Labour Court held that same sex life partners are to be treated equally with married couples as concerns businesses retirement pensions. This follows from the jurisprudence of the European Court of Justice in the Maruko Case. The protection of family as enshrined in Article 6 para 1 of the Basic Law does not oblige the legislator to disadvantage same sex life partners in comparison with marriages.
Key issues (concepts, interpretations) clarified by the case (max. 500 chars)	Surviving dependants in the sense of the pertinent provisions can also be persons who qualify for the compulsory public pension fund insurance as beneficiaries of a pension due to death. Therefore same sex life partners fall under this definition, because they are provided for in the compulsory public pension fund.
Results (sanctions) and key consequences or implications of the case (max. 500 chars)	Even though theoretically the General Law on Equal Treatment covers the entitlement of same sex life partners to business retirement pension in the concrete case at hand the applicant was not successful, since his claims were not under the temporal scope of application of the law, because the life partner had died before the entry into force of the amendment to the Same Sex Life Partnership Law.

Case title	Right to adoption for same sex couples
Decision date	10 August 2009
Reference details (type and title of court/body; in original language and English [official translation, if available])	Bundesverfassungsgericht [Federal Constitutional Court], case no.: 1 BvL 15/09
Key facts of the case (max. 500 chars)	The case concerned a woman in a registered civil partnership who wanted to adopt her partner's child according to Section 9 para 7 of the same sex life partnership law in connection with the pertinent provisions on adoption of the Civil Code. Both the biological mother and the biological father had agreed to this.
Main reasoning/argumentation (max. 500 chars)	The case was referred to the Federal Constitutional Court by a local court which had considered the provision to be incompatible with the Basic Law and therefore demanded a concrete judicial review by the Federal Constitutional Court according to Art. 100 para 1 of the Basic Law. The question being whether the same sex partner could be granted a position of parenthood equal to that of the biological parent. In particular an incompatibility with the right to be a parent as protected in Art. 6 of the Basic Law was invoked. The Constitutional Court rejected this line of argumentation and held to the contrary that biological parenthood has no precedence over social family ties in the sense of a union of responsibility which are also protected by Art. 6 of the Basic Law. Social and biological parents are thus the same under the Constitution, which is also valid for homosexual parents.
Key issues (concepts, interpretations) clarified by the case (max. 500 chars)	The interpretation of Art. 6 of the Basic Law is to be seen in the context of changing societal circumstances. This constitutes a confirmation of the constitutional right to parenthood for same sex couples.
Results (sanctions) and key consequences or implications of the case (max. 500 chars)	The Constitutional Court rejected the request of the local court for concrete juridical review but for reasons of clarification entered into the merits in order to transcribe its jurisdiction on non biological parents in general to the special situation of same sex partnerships.

Re H.2.Right to custody and access in rainbow families: There was no relevant jurisprudence.

Re H.3.: Intersexuality: The relevant decision of the Cologne Regional Court is not yet available in written form.

ANNEX II – STATISTICS

A. Implementation of Employment Directive 2000/78/EC

Re: Para. 38 - 39

According to the Federal Anti-Discrimination Office (see enclosed correspondence), the requested information has either not been collected or the Office has not succeeded in ascertaining it. A detailed database with information on the origin and the content of the consultation inquiries is currently being built.

The Anti-Discrimination Office functions through research, counselling, and public relations departments, thus pursuing a horizontal approach with regard to grounds for discrimination. There are no separate working units for individual grounds.

The Anti-Discrimination Office supports those affected by advising them before and during court proceedings. Under the provisions of the General Law on Equal Treatment, it has no other procedural authority.

Because the Anti-Discrimination Office's database is still under construction, it was only able to provide general statistical data. In the period from 31st July 2006 to 15th December 2007, there were 3,659 consultation inquiries, of which 5.15 per cent related to the ground of sexual identity in the sense of the General Law on Equal Treatment. In the period between August 2006 until December 2009 the statistical material was divided according to discrimination criteria. A total number of 147 consultations related to the criterion of sexual identity, which equals about 4.32 percent of the whole number of consultations. Out of the total number of consultations 35 cases related to labour law (in particular derogatory comments in the workplace) and 20 cases related to civil law (in particular rental of flats and everyday commercial transactions). The remainder of the consultations concerned social law (dependants' pensions). The Anti-Discrimination Office does not interpret any complex information on the number of court trials or their outcomes. (See enclosed correspondence with the Anti-Discrimination Agency.) Not all employment courts even track such information, which makes the consolidation of results that could be analysed impossible.

Statistical data regarding the actual engagement of anti-discrimination associations is not available.

The Anti-Discrimination Office is not in the possession of complete information regarding the number of court proceedings or their outcomes. The consolidation of results that can be analysed is difficult since not all labour courts even track such information.

We also reference a study prepared by the University of Cologne on the topic: 'Sexual Identity, (Anti-)Discrimination, and Diversity in the Workplace', in which 2,230 gays and lesbians participated¹⁵³ (see the introduction, para. 5).

B. Freedom of movement

Relevant country-wide statistics are not available. (See enclosed correspondence with the Federal Agency for Migration and Refugees).

C. Asylum and subsidiary protection

Relevant country-wide statistics are not available. The Federal Agency for Migration and Refugees keeps statistics only on the number of applications and decisions (for example, approvals, rejections, grants of protection from deportation, determinations of prohibition on deportation), and not on the grounds of asylum. (See enclosed correspondence with the Federal Agency for Migration and Refugees.)

D. Family reunification

Relevant country-wide statistics are not available. (See enclosed correspondence with the Federal Agency for Migration and Refugees).

E. Freedom of assembly

Every year many gay and lesbian demonstrations are organised in over 30 German cities, but their number is neither statistically tracked by public authorities, nor by various NGOs.

The following statistics could be collected on the basis of individual internet sources (see footnotes).

¹⁵³ Frohn, *Sexuelle Identität, (Anti-)Diskriminierung und Diversity am Arbeitsplatz*, available at http://typo3.lsvd.de/fileadmin/pics/Dokumente/News/Out-im-Office_Erg.-Zus.-Fass._DF.pdf (20th January 2008).

	2006	2007
Number of demonstrations in favour of tolerance of LGBT people, gay pride parades, etc	>16 ¹⁵⁴	33 ¹⁵⁵
Number of demonstrations against tolerance of LGBT people.	1 ¹⁵⁶	0 ¹⁵⁷

F. Hate speech and Criminal law

According to information from the Federal Interior Ministry (see enclosed correspondence), there is no explicit record in the Police Crime Statistics [*Polizeiliche Kriminalstatistik - PKS*] for the motive ‘hatred of same-sex life way of life’, meaning anti-homosexual actions that are relevant under civil and criminal law. This also cannot be deduced from the ‘offence recording codes,’ because no special elements of the crime exist.

In the ‘Constitutional Protection Report’ published by the Federal Interior Ministry, acts with a homophobic background are recorded together with numerous other grounds under so-called ‘politically motivated criminality’.¹⁵⁸ The annual report on politically motivated criminality from the Criminal Investigation Agency [*Bundeskriminalamt*] contains augmenting information on investigations, but this is not made public.

Finally, prosecution statistics on convictions, in accordance with provisions of para. 130 considered here, are essentially organised according to criminal criteria, but not according to cases with a homophobic background.

¹⁵⁴ <http://www.sozioland.de/rp/csd2006/5.html> (20th February 2008).

¹⁵⁵ <http://www.sozioland.de/rp/csd2007/4.html> (20th February 2008); several sources even mention more than 39 demonstrations: http://de.wikipedia.org/wiki/Christopher_Street_Day (20th February 2008).

¹⁵⁶ http://www.queer.de/szene_politik_deutschland_detail.php?article_id=4920 (20th February 2008).

¹⁵⁷ http://www.queer.de/news_detail.php?article_id=7135 (20th February 2008).

¹⁵⁸ Federal Ministry of Interior (*Bundesministerium des Innern*) (2006), *Verfassungschutzbericht*, p. 30.

The Federal Anti-Discrimination Agency also does not register such proceedings. (See enclosed correspondence with the Anti-Discrimination Agency.)

Additionally, we reference the MANEO Anti-Violence Project of Berlin, which conducted the largest Germany-wide study to date, with nearly 24,000 participants and its second part with 17,000 participants: 'Experience of Violence of Gay and Bisexual Youth and Men in Germany'.¹⁵⁹ (See introduction, above.)

G. Transgender issues

The Federal Anti-Discrimination Agency provided the information that consultations by transsexual are classified under the criterion of gender. In the period between August 2006 until November 2009 out of these consultations concerning gender issues, 40 were related to transsexuality. 6 cases related to labour law, 3 and the rest was related to social law (in particular the recognition of a certain degree of disability in connection with a surgical sex change). (See enclosed correspondence with the Anti-Discrimination Agency.)

The number of proceedings under the Law on Transsexuals can be ascertained from the following excerpt from the administrative overview of the labour courts. However, the cases recorded here include both changes in given name under article 1 of the Law on Transsexuals, as well as proceedings on the determination of sexual identity under articles 8 ff. of the Law on Transsexuals. Information for 2007 is not yet available. (See enclosed correspondence.)

Year	2000	2001	2002	2003	2004	2005	2006
Number of Proceedings	722	772	758	767	886	791	644

In response to requests regarding proceedings under the Law on Transsexuals, we received answers from all of the Federal *Laender* (see correspondence), although only four institutions had relevant information. All Federal States except Mecklenburg-Vorpommern were not able to provide relevant information for the update. Yet the Federal Ministry of the Interior provided the general numbers for the whole of Germany from the courts of first instance, which are not classified according to the different procedures of change of given name (article 1 of the Law on Transsexuals) and sex change (article 8 article 1 of the Law on Transsexuals). In 2007 a total of 799 procedures under the Law of Transsexuals was recorded and in 2008 a total of 903.

¹⁵⁹ MANEO Anti-Gewalt-Projekt [MANEO Anti-Violence Project], *Gewalterfahrungen der schwulen und bisexuellen Jugendlichen und Männer in Deutschland*, p. 6. ; <http://www.maneo-toleranzkampagne.de/umfrage-bericht1.pdf>; <http://www.maneo-toleranzkampagne.de/pdf/maneo-umfrage2-bericht.pdf>.

Municipal Authority of the Free Hanseatic City of Bremen:

	2000	2001	2002	2003	2004	2005	2006	2007
Change of given name	2	0	6	7	4	7	5	1
Sex change	0	2	2	4	5	6	5	3

Interior Ministry of Mecklenburg-Vorpommern:

	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009
Change of given name	4	8	4	7	2	7	2	4	5	4
Sex change	4	3	3	2	6	1	0	1	2	4

Statistical State Office of Rheinland-Pfalz:

	2002	2003	2004	2005	2006
Change of given name and sex change	11	19	33	23	23

Thüringen State Office for Statistics:

	2000	2001	2002	2003	2004	2005	2006	2007
Change of given name	2	3	5	1	3	8	13	1
Sex change	2	1	2	1	2	3	2	0

The Federal Ministry of Family, Senior Citizens, Women and Youth does not have relevant information available to it. (See enclosed correspondence.)

H. Miscellaneous

Re: H.1. (Same-Sex) Life Partnership Law [*Lebenspartnerschaftsgesetz*]: On the basis of a survey of the *Laender* on the number of established life partnerships, conducted in 2006, the Federal Interior Ministry assumes that around 4,000 life partnerships are established every year, and therefore that about 20,000 life partnerships have been registered since the Life Partnership Law took effect.

The below is an incomplete overview of the number of established life partnerships:

	male	female	total
Baden-Württemberg (until 30 th June 2005)	897	507	1404
Bayern (until July 2006)			2000
Berlin (until 31 st December 2005)	1508	510	2018
Brandenburg (until 31 st December 2005)	194	123	317
Bremen (until 31 st December 2004)	123	64	187
Hamburg (until 31 st December 2004)			926
Hessen (until 31 st May 2004)			1141
Mecklenburg-Vorpommern (until 31 st Dec 2005)			162
Niedersachsen (no information)			

Nordrhein-Westfalen (until 31 st December 2004)	2372	1116	3488
Rheinland-Pfalz (until 3 st December 2004)	333	154	487
Saarland (until 30 th September 2004)	91	54	144
Sachsen (until 12 th September 2006)	270	143	413
Sachsen-Anhalt (until 30 th June 2005)	111	63	174
Schleswig-Holstein (until 31 st December 2004)	62	30	92
Thüringen (until 30 th June 2006)	72	44	116

The Federal Statistics Office, however, estimates¹⁶⁰ the total number of existing same-sex life partnerships in Germany, as of 2005, at around 60,000 to 173,000.¹⁶¹

Re H.2.: Rights to custody and access in rainbow families:

To date there are no statistical data with regard to children in rainbow families.

We refer to the study currently being conducted by the State Institute for Family Research [*Staatsinstitut für Familienforschung*] at the University of Bamberg on the topic, 'Children in same-sex life communities'.¹⁶²

Re: H.3. Intersexuality:

Hospital statistics compiled by the Federal Statistics Office (*Diagnostic Data on Patients in Hospitals*) include the number of disruptions in sex identity (see correspondence with the Federal Statistics Office):

Year	2000	2001	2002	2003	2004	2005	2007	2008
Number of disruptions	696	845	950	862	676	629	787	806

¹⁶⁰ Federal Statistics Office (*Statistisches Bundesamt*), *Leben und Arbeiten in Deutschland, Haushalte, Familien und Gesundheit, Ergebnisse des Mikrozensus 2005*, p. 34.

¹⁶¹ Because of the lower number of cases and the voluntary nature of the information, the results of the survey are augmented with a second number, the so-called estimation concept. (See the explanation of the Federal Statistics Office.)

¹⁶² <http://www.ifb.bayern.de/forschung/regenbogen.html> (29th February 2008).

The Federal Statistics Office also provided the information that in 2007 a total number of 419 sex change operations was recorded in hospital statistics. In 2008 the number was 462. The statistics are divided according to the kind of sex change which took place (see correspondence with the Federal Statistics Office).

The Federal Anti-Discrimination Agency provided the information that consultations by intersexuals are classified under the criterion of gender. In the period between August 2006 until November 2009 about 15 consultations took place, of which 1 concerned labour law, 3 were related to civil law matter and the rest to social law (see enclosed correspondence with the Federal Anti-Discrimination Agency)