

Legal Study on Homophobia and Discrimination on Grounds of Sexual Orientation – Germany

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Executive summary

Introduction

- [1]. Social ideas of morality and society's attitude toward homosexuality 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, which referred to the principle of morality anchored in the Basic Law.¹ Homosexuals 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 German Parliament [*Bundestag*] to apologise to the victims for the injustice they had to endure under National Socialism.
- [2]. This 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 High 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.
- [3]. Since the beginning of the 1990s attitudes toward homosexuals have clearly changed. Homophobic discrimination in public discourse is

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.

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.

- [4]. 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.
- [5]. 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. 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.⁴ 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.⁵ 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.⁶

Summarised results of the study

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

⁴ MANEO Anti-Gewalt-Projekt [MANEO Anti-Violence Project], *Gewalterfahrungen der schwulen und bisexuellen Jugendlichen und Männer in Deutschland*, p. 6.

⁵ MANEO Anti-Gewalt-Projekt, *Gewalterfahrungen der schwulen und bisexuellen Jugendlichen und Männer in Deutschland*, p. 25.

⁶ 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).

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.

- [7]. However, as before, there remain areas of life in which equality has not been achieved. Missing are changes in inheritance and income tax law, civil service and adoption law, as well as a unified federal agency competent for the establishment of the life partnership.
- [8]. 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 identity⁷ in the employment world and in civil law transactions. The law was very controversial in politics and among jurists, 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 limitations include such areas as insufficient protection from dismissal; religious communities' right of self-determination; short periods for bringing a claim; burden-of-proof regulations; 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.
- [9]. In accordance with EU Directive 2000/78/EC, a federal office (the Federal Anti-discrimination Office) for protection from discrimination on manifold grounds, including sexual identity, was established within the Federal Ministry of Family, Senior Citizens, Women and Youth.
- [10]. With regard to **freedom of movement**, same-sex life partners are not treated as family members; as a result, for the entry and residence of a life partner of a German, EU, or EEC citizen who is not entitled to freedom of movement, the Residence Law and not the Law on Freedom of Movement/EU is to be applied. For the issuance of a residence permit, the Residence Law requires firstly that a foreign life partner have entered Germany legally and secondly, that the 'life partnership communion' actually exists or is earnestly intended.
- [11]. Already in 1988, the Federal Court of Administration [*Bundesverwaltungsgericht*] also recognised as relevant to asylum a

⁷ 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.

difference based on such immutable personal characteristics as ‘irreversible, predestined, homosexual character’.

- [12]. 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 has surrounded itself with ‘safe third countries’ where asylum seekers – according to lawmakers – could have found safety from persecution. 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’.
- [13]. 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.
- [14]. 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.
- [15]. **Freedom of assembly** is guaranteed as a fundamental right in article 8 of the Basic Law, 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.

- [16]. 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.
- [17]. 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.
- [18]. In the German legal system, discrimination against **transsexuals** is considered discrimination on the basis of sexual orientation.
- [19]. 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 be unmarried and have 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.
- [20]. 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.

A. Implementation of Employment Directive 2000/78/EC

A.1. General Law on Equal Treatment

- [21]. 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’)
- [22]. From the beginning the law was very controversial both among politicians and German jurists. 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 law⁸ (see below, chapter A.2. and A.3.).
- [23]. The main component of the Transposition Law is the General Law on Equal Treatment [*Allgemeines Gleichbehandlungsgesetz – AGG*], set out in article 1 of the Transposition Law. Section 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 (workplace, social protection, social advantages, education, civil law), with few exceptions, is defined in accordance with the provisions of the EC directive. Finally, the section defines the terms direct and indirect discrimination, harassment, as well as sexual harassment.
- [24]. Continuing in section 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.
- [25]. Section 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

⁸ 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>).

grounds for discrimination, and therefore also sexual orientation, are included in the protection from discrimination, in order to avoid the exclusion of fundamental areas of legal life from the protection against discrimination.⁹

- [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. Following that is discrimination on the basis of gender. Finally, the law forbids discrimination on other grounds, however, it makes an exception for the concept of philosophical belief [*“Weltanschauung”*], a regulation which was included in view of right-wing radicalism. 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). 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).
- [27]. Legal remedy for those affected is regulated in section 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.
- [28]. An Antidiscrimination Office [*“Antidiskriminierungsstelle”*] was established at the federal level within the Federal Ministry of Family, Senior Citizens, Women and Youth in accordance with the provisions of section 6 of the AGG (see below, para 38-39).
- [29]. 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

- [30]. First, the transposition is criticized with regard to protection from discrimination in the area of occupational pensions. Article 2 para. 2,

⁹ See official reasoning, in: BT-Drs 16/1780 from 6th June 2007, p. 2.

2nd sentence of the AGG makes reference to the Law on Occupational Pensions [*Betriebsrentengesetz – BetrAVG*] of 19th December 1974, which itself does not contain a prohibition on discrimination.

- [31]. 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.
- [32]. 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. German jurisprudence grants the churches an almost unlimited right to self-determination. Accordingly, 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'. 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.¹⁰
- [33]. 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.¹¹

¹⁰ Labour Court (*Arbeitsgericht*) Hamburg, judgment of 4th December 2007. case no.: 20 Ca 105/07.

¹¹ ECJ/C-52 and 53/99 (2nd February 2001) (*Camarotto and Vignone*).

- [34]. Additionally, article 22 of the AGG appears to be in violation of the directive. According to this provision, those affected must *prove* [*beweisen*] facts that suggest discrimination on the basis of a ground of discrimination. Contrary to this, the directive requires solely that facts be *established* [*glaubhaft machen*], which clearly eases the burden of proof and therefore places the person affected in a much more favourable situation.
- [35]. Anti-discrimination associations may, within the scope of their statute, appear in court proceedings as counsel to disadvantaged persons, provided they do not pursue these interests on a temporary basis only and provided they do not act with a commercial interest (article 23 of the AGG). Article 23 para. 2 of the AGG, by making reference to other civil and general administrative procedure law, effectively further restricts the right of associations to appear in proceedings as the relevant provisions only allow them to appear as participants in first-instance proceedings, and only in proceedings with a maximum sum in dispute of 5,000 Euros. This regulation appears to be incompatible with article 9 para. 2 of Directive 2000/78/EC, according to which the inclusion of relevant associations under procedural law must be enabled in all court and administrative proceedings.¹²

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

- [36]. 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 do not receive these benefits. The *Laender* of Berlin, Bremen, Hamburg, Mecklenburg-Western Pomerania, Northrhine-Westphalia, and Schleswig-Holstein have placed their partnered civil servants on equal footing with their married colleagues only in matters of assistance, and Bremen has done so with regard to family subsidy. Article 24 of the AGG does state that the provisions of the Law on Equal Treatment apply

¹²See Kocher (2005), *Juristen Zeitung*, pp. 518-519.

analogously to civil servants and judges ‘considering their special legal position’, and similarly to soldiers on the basis of the Law on 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.

- [37]. 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 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).
- [38]. In accordance with article 25 para. 1 of the AGG, a federal office (the Federal Anti-discrimination Office, “*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.
- [39]. 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 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

[40]. 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.

[41]. 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.

- [42]. 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).
- [43]. 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

- [44]. 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).
- [45]. 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

- [46]. 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.¹³ 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.¹⁴
- [47]. 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.¹⁵ Accordingly, the court also recognised as relevant to asylum a difference based on immutable personal characteristics, such as an ‘irreversible, predestined, homosexual character’.¹⁶ 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

¹³ Federal Constitutional Court, (*Bundesverfassungsgericht*), BVerfGE 76,143.

¹⁴ Federal Constitutional Court (*Bundesverfassungsgericht*), BVerfGE 80, 315 (335).

¹⁵ Convention Relating to the Status of Refugees of 28th July 1961 (BGBl. 1953 II, p. 560).

¹⁶ Federal Court of Administration (*Bundesverwaltungsgericht*), BVerwGE 79,143 (146-147).

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.’¹⁷

[48]. 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’¹⁸ where asylum seekers – according to lawmakers – could have found safety from persecution. This, in turn, precludes recognition of asylum status in Germany. With regard to applications for asylum from asylum seekers who enter by air and come from a so-called safe country of origin,¹⁹ 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).

¹⁷ Federal Court of Administration (*Bundesverwaltungsgericht*), BVerwGE, /79, 143 (146-147).

¹⁸ “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.

¹⁹ “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.

C.2. Subsidiary Protection

- [49]. 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 asylum²⁰). 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).
- [50]. 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, persecution on grounds of belonging to a particular social group also applies to persecution on the basis of sexual orientation.²¹
- [51]. 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.’²²
- [52]. 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).

²⁰Federal Constitutional Court (*Bundesverfassungsgericht*), BVerfGE 94, 49 (97).

²¹ Bundestag, document no. 15/420, p. 91.

²² Bundestag, document no. 224/07, p. 339.

C.3. Case Law

- [53]. 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.²³
- [54]. 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,²⁴ 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’²⁵ 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.’²⁶ 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 considerable probability, will also very likely become known to Iranian criminal prosecutors, so that the homosexual must seriously fear being punished by death.’²⁷

²³ See Regional Court of Administration (*Oberverwaltungsgericht*) of the Free State of Saxony, judgment of 20th October 2004, Case no.: A 2 B 273/04 .

²⁴ Court of Administration (*Verwaltungsgericht*) Düsseldorf, judgment of 5th September 2005, case no.: 5 K 6084/04.A.

²⁵ Court of Administration (*Verwaltungsgericht*) Bremen, judgment of 28th April 2006, case no.: 7 K 632/05.A.

²⁶ Court of Administration (*Verwaltungsgericht*) Düsseldorf, judgment of 14th September 2006, case no.: 11 K 81/06.A.

²⁷ 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 InfAuslR 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-

- [55]. 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.’²⁸ 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.’²⁹ 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 [...]’.³⁰
- [56]. According to non-governmental organisations,³¹ 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

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.

²⁸ Court of Administration Düsseldorf, judgment of 14th September 2006, case no.: 11 K 81/06.A.

²⁹ 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.

³⁰ Court of Administration Potsdam, judgment of 11th September 2006, case no.: 9 K 189/03.A.

³¹ 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).

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 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.

- [57]. 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.
- [58]. 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,³² to which article 60a para. 1, 1st sentence of the Residence Law refers.

³² 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

- [59]. 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 status, and, finally, it cannot be expected of the person to practice the life partnership in the partner’s country of origin.

D. Family Reunification

- [60]. In accordance with article 27 para. 2 of the Residence Law, articles 28 to 31 of the Residence Law are among the provisions applied for the establishment and preservation of a life partnership communion. Accordingly, to be used are the regulations on reunification of families with Germans and with foreigners and the regulations on the independent residence rights of spouses to registered life partnerships.³³
- [61]. With regard to family reunification with Germans (article 28 of the Residence Law), German language ability and assured livelihood are preconditions. However, the latter usually does not have to be proved.
- [62]. Under article 29 of the law, reunification of a family with a foreigner 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. However, the granting of a residence permit can be

his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.’

³³ Renner (2005) *Ausländerrecht*, Article 29 para. 2, Article 31 para. 2 and Article 27 para. 26.

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.

- [63]. 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

- [64]. 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.³⁴ It forms a ‘fundamental element of democratic openness’,³⁵ and guarantees ‘a piece of original, unbridled direct democracy’.³⁶ As the Federal Constitutional Court

³⁴ H.D. Jarass and B. Pieroth (1999) *Grundgesetz für die Bundesrepublik Deutschland, Kommentar*, Munich, no. 1 on art. 8.

³⁵ Federal Constitutional Court (*Bundesverfassungsgericht*), BVerfGE 69, 315 (344ff.) (*Brokdorf Decision*).

³⁶ Federal Constitutional Court, (*Bundesverfassungsgericht*), BVerfGE 69, 315 (344ff.) (*Brokdorf Decision*).

emphasises,³⁷ 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.³⁸

- [65]. However, with the “Love Parade Decision” of 2001,³⁹ 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.

E.2. The Law Concerning Assemblies and Processions

- [66]. 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

³⁷ Federal Constitutional Court (*Bundesverfassungsgericht*), BVerfGE 69, 315 (344ff) (*Brokdorf Decision*)

³⁸ H.D. Jarass and B. Pieroth (1999) *Grundgesetz für die Bundesrepublik Deutschland, Kommentar*, Munich, no. 12 on art. 8.

³⁹ Federal Constitutional Court (*Bundesverfassungsgericht*), decision of 12th July 2001, case no.: 1 BvQ 28/01 and 1BvQ 30/01.

order, the competent authority can ban it or make it dependant on certain conditions.

- [67]. 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.
- [68]. 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.⁴⁰
- [69]. 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”.⁴¹
- [70]. 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.

F. Hate speech and Criminal Law

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

⁴⁰ Federal Constitutional Court, BVerfGE, 69, 315 (*Brokdorf Decision*).

⁴¹ Federal Constitutional Court, BVerfGE, 69, 315 (*Brokdorf Decision*); see also Federal Constitutional Court, BVerfGE 73, 206 (249-250).

- [71]. 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.
- [72]. 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.
- [73]. 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.⁴² 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.
- [74]. In another case, on 6th January 2007, the Hamburg magistrates' court fined a 52-year old 4,500 Euros for incitement.⁴³ 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.
- [75]. By contrast, in early 2004 the prosecution office in Cologne discontinued an investigation of Cardinal Joachim Meisner on

⁴² http://www.queer.de/news_detail.php?article_id=469 (15th January 2008).

⁴³ http://www.queer.de/news_detail.php?article_id=6214 (15th January 2008).

suspicion of incitement and defamation.⁴⁴ The alleged remark that homosexuals are ‘a poison that the 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’.

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

- [76]. 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.⁴⁵
- [77]. 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 the Second Chamber of Parliament [*Bundesrat*] on 14th August 2007.⁴⁶ 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 factor for the assessment

⁴⁴ http://www.queer.de/news_detail.php?article_id=564 (15th January 2008).

⁴⁵ Bundesrat, publication no. 572/07.

⁴⁶ Bundesrat, publication no. 572/07.

of the appropriate sentence. To date the draft law has remained in the legislative process.

G. Transgender issues

- [78]. 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]

- [79]. 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.⁴⁷

G.2. Freedom of Movement

- [80]. 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

- [81]. 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 not played a role, neither as a ground for asylum nor in the context of protection from deportation.

⁴⁷ Bundestag, publication no. 16/1780, p. 31.

G.4. Family Reunification

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

G.5. Freedom of Assembly

- [83]. 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

- [84]. 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]

- [85]. 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 cases⁴⁸ followed the seminal decision of the Federal Constitutional Court of 1978.⁴⁹ 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).

⁴⁸ BGBI I, p. 1654.

⁴⁹ Federal Constitutional Court, BVerfGE, 286.

[86]. In the meantime, the Federal Constitutional Court has taken up the Law on Transsexuals in five decisions and deemed some provisions to be unconstitutional.⁵⁰ 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. One amendment to the Law on Transsexuals was already passed on 20th July 2007.⁵¹

G.8. Changing a Given Name

[87]. 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).

[88]. 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).

[89]. 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).

[90]. 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

⁵⁰ 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.

⁵¹ BGBl. I, p. 1566, Article. 3a (20th July 2007).

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 employers⁵² as well as government institutions.

- [91]. 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 Sexual Identity

- [92]. 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 are unmarried and 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 para. 3 of the Law on Transsexuals, obtain two expert opinions before making its decision.

- [93]. 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

- [94]. 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.⁵³

⁵² Federal Constitutional Court, decision of 15th August 1996, case no.: 2 BvR 1833/95; *Neue Juristische Wochenschrift (NJW)* (1997), p. 1632.

⁵³ This was decided by the Federal Social Court (*Bundessozialgericht*), BSGE, 62, 83.

G.11. Legal Shortcomings

- [95]. 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.
- [96]. 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. This does not require dissolution of the life partnership. By contrast, a married person must first divorce before she/he can achieve by a court decision the legal assignment to the other gender. However, a divorce requires that the married couple first live separately for one year, which for a couple that also wishes to live together after legal adjustment of the gender identity is obviously unreasonable and illogical.
- [97]. Although the described flaws of the Law on Transsexuals have been known for some time and the mentioned decisions of the Federal Constitutional Court have served to remind of this, the legislature has avoided fundamental amendment of the law to correspond to the current state of sexual science.

H. Miscellaneous

H.1.(Same-Sex) Life Partnership Law

[*Lebenspartnerschaftsgesetz*]

- [98]. 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 2002,⁵⁴ 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.

[99]. However, as before, there remain areas of life in which equality has not been achieved. Whilst the same provisions on maintenance apply to life partnerships as to marriages, the life partners' liability for providing maintenance to each other has no parallel with regard to income tax. Further, tax exemptions apply to married couples but not to same-sex partners. This leads to treating same-sex partners – who have lived in a long-term partnership, and who are obligated to each other's maintenance, and, if necessary, care for their partners until death – as non-partners for purposes of inheritance and gift tax. In addition, those same-sex partners who are civil servants are not entitled to some essential rights from the federal remuneration law (*Bundesbesoldungsgesetz*) and law on pensions for civil servants (*Beamtenversorgungsgesetz*). They are denied family subsidy and the civil servant pension, whereby the family subsidy is not primarily dependent on family status, but rather concrete obligations to dependants. A further shortcoming in the institution of the registered same-sex partnership is seen in the lack of a unified federal agency competent for its registration. In this, the *Laender* have chosen different approaches: in most *Laender* the registry offices are competent, while in *Bavaria* it is the notaries. Finally, there is no joint right of adoption for registered partnerships, for which only the possibility of step-child adoption was made available (see below).

⁵⁴ Federal Constitutional Court, decision of 17th July 2002, case no.: 1BvF 1/01, BVerfGE 105, 313.

H.2. Rights to Custody and Access in Rainbow Families

- [100]. 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 do not apply to tax law, resulting also in a negative financial effect on the child.
- [101]. 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.
- [102]. 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.

H.3. Intersexuality

- [103]. 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 8,000-10,000.⁵⁵
- [104]. 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 determination of a classification for a double-gendered person to one or the other sex, her/his psychological tendencies can be considered.⁵⁶
- [105]. 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.⁵⁷
- [106]. 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.⁵⁸ According to the opinion of critics, this right must also be granted to intersexuals, thus recognising their psychological identity even if that

⁵⁵ Bundestag, publication no. 16/4786, p. 3.

⁵⁶ Regional Court (*Oberlandesgericht*) Naumburg, decision of 14th December 2000, case no.: 10 Wx 12/00; *Praxis der Freiwilligen Gerichtsbarkeit (FGPrax)* (2001), p. 239.

⁵⁷ 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.

⁵⁸ Federal Constitutional Court BVerfGE 49, 286.

simultaneously places the construed medical and legal categorisation in question.⁵⁹ 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.⁶⁰

[107]. 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.⁶¹ So far, no court decisions have been based on this.

[108]. 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.⁶² In this context a recent ruling⁶³ 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 consent and that the intersexual claimant had not been comprehensively informed by the defendant surgeon.

I. Good Practice

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

[109]. 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 [...]

⁵⁹ See Tolmein (2002), *Zeitschrift für das gesamte Familienrecht*, pp. 957 ff.

⁶⁰ Bundestag, publication no. 16/4322, p. 5.

⁶¹ Bundestag, publication no. 16/1780.

⁶² Bundestag, publication no. 16/4322, p. 3.

⁶³ District Court (*Landgericht*) Köln, case no.: 25 O 179/07.

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 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

[110]. 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 1978,⁶⁴ 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*].

[111]. In later years, the Federal Constitutional Court took up the Law on Transsexuals in five decisions and declared important provisions to be unconstitutional. In 1982⁶⁵ and 1993⁶⁶ it objected to the age requirement of 25 for changing civil status and given names. In 2005⁶⁷ 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

⁶⁴ Federal Constitutional Court, BVerfGE 49, 286.

⁶⁵ Federal Constitutional Court, BVerfGE 60, 123.

⁶⁶ Federal Constitutional Court, BVerfGE 88, 87.

⁶⁷ Federal Constitutional Court, decision of 6th December 2005, case no.: 1 BvL 3/03; *Zeitschrift für das gesamte Familienrecht* (2006), p. 182.

pending a new legal regulation. Finally, in 2006⁶⁸ 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. Moreover, the Federal Constitutional Court has ruled that already after a change in name, a person is to be addressed according to her/his newly understood role.⁶⁹

⁶⁸ Federal Constitutional Court, decision of 18th July 2007, case no.: 1 BvL 1,12/04; *Zeitschrift für das gesamte Familienrecht* (2006), p. 1818.

⁶⁹ Federal Constitutional Court, decision of 15th August 1996, case no.: 2 BvR 1833/95; *Neue Juristische Wochenschrift (NJW)* (1997), p. 1632.

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.

DISCLAIMER: This study has been commissioned as background material for a comparative report on homophobia and discrimination on grounds of sexual orientation by the European Union Agency for Fundamental Rights. The views expressed here do not necessarily reflect the views or the official position of the FRA. The study is made publicly available for information purposes only and does not constitute legal advice or legal opinion.

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.
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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.

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.

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. No statistical differentiation by area of life was conducted. The Anti-Discrimination Office does not interpret any complex information on the number of court trials or their outcomes. 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 participated⁷⁰ (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).

⁷⁰ 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).

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).

	2006	2007
Number of demonstrations in favour of tolerance of LGBT people, gay pride parades, etc	>16 ⁷¹	33 ⁷²
Number of demonstrations against tolerance of LGBT people.	1 ⁷³	0 ⁷⁴

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

⁷¹ <http://www.sozioland.de/rp/csd2006/5.html> (20th February 2008).

⁷² <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).

⁷³ http://www.queer.de/szene_politik_deutschland_detail.php?article_id=4920 (20th February 2008).

⁷⁴ http://www.queer.de/news_detail.php?article_id=7135 (20th February 2008).

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’.⁷⁵ 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.

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

Additionally, we reference the MANEO Anti-Violence Project of Berlin, which conducted the largest Germany-wide study to date, with nearly 24,000 participants: ‘Experience of Violence of Gay and Bisexual Youth and Men in Germany’.⁷⁶ (See introduction, above.)

G. Transgender issues

The Federal Anti-Discrimination Authority does not provide relevant information. (See enclosed correspondence with the Anti-Discrimination Authority.)

⁷⁵ Federal Ministry of Interior (*Bundesministerium des Innern*) (2006), *Verfassungsschutzbericht*, p. 30.

⁷⁶ MANEO Anti-Gewalt-Projekt [MANEO Anti-Violence Project], *Gewalterfahrungen der schwulen und bisexuellen Jugendlichen und Männer in Deutschland*, p. 6.

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.

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
Change of given name	4	8	4	7	2	7	2	4
Sex change	4	3	3	2	6	1	0	1

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, estimates⁷⁷ the total number of existing same-sex life partnerships in Germany, as of 2005, at around 60,000 to 173,000.⁷⁸

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'.⁷⁹

Re: H.3. Intersexuality:

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

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

⁷⁷ Federal Statistics Office (*Statistisches Bundesamt*), *Leben und Arbeiten in Deutschland, Haushalte, Familien und Gesundheit, Ergebnisse des Mikrozensus 2005*, p. 34.

⁷⁸ 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.)

⁷⁹ <http://www.ifb.bayern.de/forschung/regenbogen.html> (29th February 2008).