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

Germany

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Executive summary

Introduction

Social ideas of morality and society's attitude toward LBGT people have fundamentally changed since the Federal Republic of Germany's beginnings. At the time the Basic Law was passed, homosexuality was regarded as immoral and criminally prohibited through articles 175ff. of the Criminal Code. The negative judgement of homosexuals was at first also confirmed by the Federal Constitutional Court [*Bundesverfassungsgericht*], which referred to the principle of morality anchored in the Basic Law.[1] Gays and lesbians remained subject to social stigmatisation and discrimination, as well as criminally persecuted in the name of the state. In the period between 1953 and 1965 the police registered almost 100,000 people across the country who were suspected of violating the criminal statute for homosexuality.[2] Between 1950 and 1965, nearly 2,800 homosexuals were convicted each year.[3] It was only after the lifting of the total prohibition in 1969 that the legal practice changed, gradually decreasing social stigmatisation. Yet it was only in 1994 that the criminal statute for homosexuality was completely abolished. All the way into the 1980s, in society as well as in politics and the judiciary, the stigma of immorality overshadowed every discussion about equality for lesbians and gays. The Federal President, Richard von Weizsäcker, explicitly mentioned homosexuals as a victimised group of National Socialism for the first time in his speech of 8th May 1985 – 40 years after the end of the war. It took another 15 years, until December 2000, for the Federal Parliament [*Bundestag*] to apologise to the victims for the injustice they had to endure under National Socialism.[4] In 2002 gays and lesbians who were criminally prosecuted pursuant to article 175 of the Criminal Code under the National Socialist regime were legally rehabilitated. The previous Federal Government (*Bundesregierung*) had also included the subject matter into its coalition treaty.[5] It is stated therein, that in the spirit of the collective compensation for homosexual victims of National Socialism a trust is to be set up, which will work at countering discrimination on grounds of sexual orientation by interdisciplinary research and education. As a consequence, in late August 2011, the cabinet agreed to set up the *Magnus Hirschfeld* Foundation which aims at improving the acceptance of homosexuals and transgender.[6] The foundation is conducting research, offers learning opportunities and provides funding for external projects in this field.

Civil society organisations continue to demand compensation, rehabilitation and annihilation of verdicts passed after 1945, too.[7] In 2012, the Federal Council (*Bundesrat*) adopted a resolution requesting the government to examine the issue of rehabilitation and compensation of

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

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

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

[4] Germany, Federal Parliament (*Bundestag*) (2000), ´Beschlussempfehlung und Bericht des Rechtsausschusses (6. Ausschuss)´, available at: http://dip21.bundestag.de/dip21/btd/14/048/1404894.pdf, p. 3, 30.01.2014.

[5] Germany, Federal Parliament (*Bundestag*) (2009), Koalitionsvertrag der 17. Wahlperiode des Bundestages, available at: www.fdp-bundespartei.de/files/363/091024-koalitionsvertrag-cducsu-fdp.pdf, p. 111, 30.01.2014. .

[6] Germany, Federal Foundation Magnus Hirschfeld (*Bundesstiftung Magnus Hirschfeld*), available at: http://mh-stiftung.de/en/, 13.12.2013.

[7] Germany, Lesbian and Gay Association Berlin-Brandenburg (*Lesben und Schwulenverband Berlin-Brandenburg*) (2009), ´40 Jahre Reform § 175 - Wir fordern Entschädigung für die Strafverfolgung von Homosexuellen´,available at: www.lsvd.de/1211.0.html, 30.01.2014, Press release, 31.08.2009 .

homosexuals convicted after 1945.[8] Additionally, three motions were submitted by parliamentary groups, following a similar line[9] and the committee of legal affairs of the Federal Parliament (*Rechtsausschuss des Bundestags*) discussed the issue in an expert hearing.[10] However, currently the initiative is pending. According to an inquiry by parliamentarians, the Federal Government was not acting upon the *Bundesrat* resolution but waited for the *Bundestag* to decide on the motion.[11] These, however, have expired with the termination of the last election period. It remains to be seen whether the new government will take up the issue.
The current coalition government included a short section on sexual orientation in its coalition agreement.[12] Under the title 'respect sexual identity' (*Sexuelle Identität respektieren*) it includes the aim to further abolish legal provisions discriminating against same-sex partnership. Due to the resistance of the CSU/CDU, however, this does not include opening marriage to same-sex couples or equal rights in regards to adoption.[13]

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

Since the beginning of the 1990s attitudes toward homosexuals have clearly changed. Homophobic discrimination in public discourse is no longer approved. By the same token, gays and lesbians are increasingly accepted in society, as demonstrated by the coming out of prominent politicians, including Berlin's Governing Mayor, Klaus Wowereit, the former First Mayor of Hamburg, Ole von Beust and, recently a former national football player.
Nevertheless, the reluctance of parts of society to accept LGBTI persons as equal became apparent in a recent discussion regarding the new school education concept of Baden-Wurttemberg. A petition against including sexual diversity in the education concept expressed opposition to a more open approach to other forms of sexuality than heterosexuality in schools and sparked a controversial debate.[14]

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[8] Germany, Federal Council (*Bundesrat*) (2012), BR-Drs. 241/12 Beschluss, 27 April 2012, available at: http://webcache.googleusercontent.com/search?q=cache:ErTzq9Ni7LEJ:www.bundesrat.de/SharedDocs/drucksachen/2012/0201-0300/241-12%28B%29.pdf%3F__blob%3DpublicationFile%26v%3D1+&cd=4&hl=de&ct=clnk&gl=de&client=firefox-a, 25 April 2014.

[9] Germany, Federal Parliament (*Bundestag*) (2010), BT-Drs. 17/4042, 01 December 2010, available at: dipbt.bundestag.de/dip21/btd/17/040/1704042.pdf ; BT-Drs. 17/10841, 26 September 2012, available at: dipbt.bundestag.de/dip21/btd/17/108/1710841.pdf ; BT-Drs. 17/11379, 07 November 2012, available at: dipbt.bundestag.de/doc/btd/17/113/1711379.pdf ,, 25 April 2014.

[10] Germany, Committee of legal affairs of the Federal Parliament (*Rechtsausschuss des Bundestags*) (2013), expert hearing: Rehabilitation and compensation, 15 May 2013, available at: www.bundestag.de/dokumente/textarchiv/2013/43661721_kw20_pa_recht_homosexuelle/,25 April 2014.

[11] Germany, Federal Parliament (*Bundestag*) (2013), BT-Drs. 17/14744, 13 September 2013, p. 22, available at: dipbt.bundestag.de/doc/btd/17/147/1714744.pdf, 25 April 2014.

[12] Germany, Federal Government (*Bundesregierung*) (2013), 'Deutschlands Zukunft gestalten - Koalitionsvertrag zwischen CDU, CSU und SPD', p. 105, available at: www.cdu.de/koalitionsvertrag, 25 April 2014.

[13] Germany, Handelsblatt (2013), 'Koalitionsverhandlungen - Heftiger Streit wegen der Homo-Ehe', 12 November 2013, available at: www.handelsblatt.com/politik/deutschland/bundestagswahl-2013/koalitionsverhandlungen-heftiger-streit-wegen-der-homo-ehe/9061368.html, 25 April 2014);

Germany, Christian Social Union (*Christlich-soziale Union, CSU*) (2013), 'Für Privilegierung von Ehe und Familie', available at: www.csu.de/aktuell/meldungen/maerz-2013/fuer-privilegierung-von-ehe-und-familie/, 25 April 2014).

[14] Germany, Bruckner, J. (2014), 'Wider die Toleranz', Sueddeutsche.de, 10 January 2014, available at: www.sueddeutsche.de/bildung/petition-gegen-homosexualitaet-im-unterricht-wider-die-toleranz-1.1859429;

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

Although the law establishes equality for lesbians and gays in many spheres of life, actual discrimination and social unacceptability still remain. In the years of 2006 and 2007 the MANEO Anti-Violence Project conducted the largest Germany-wide study to date, with nearly 24,000 participants; more than every third respondent indicated experiencing violence in the prior 12 months.[15] 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.[16] In the years of 2007 and 2008 the second part of the study was conducted with approximately 17,000 participants and analogous results were obtained.[17] 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.[18] In 2012, *LesMigras* conducted a study on discrimination and violence against homosexual and bisexual women and trans* in Germany (*Diskriminierung und Gewalt gegen lesbische, bisexuelle Frauen und Trans* in Deutschland)*. The results show that derogatory treatment due to gender non-conformist behaviour is considered normality by the affected persons. 30.7% of the respondents stated to have experienced harassment at work or training due to their lesbian/bisexual orientation. 72.6% believe that their performances have been downgraded and 20% reported disrespectful treatment by medical staff. This numbers even increased when looking at the questionnaire specifically directed at trans* persons. One third experienced sexualised violence. Half have experienced discrimination at work and about 44% in relation to medical treatment. [19] According to the Federal Anti-Discrimination Agency, however, comprehensive studies regarding discrimination of LGBTI in the areas of education or employment are currently lacking.

Lüders, C. (2014) ' Zur Vielfalt ermutigen',Sueddeutsche.de, 11 January 2014, available at: www.sueddeutsche.de/bildung/homosexualitaet-in-der-schule-zur-vielfalt-ermutigen-1.1860365, 25 April 2014. On the other hand, the states of Berlin and North Rhine- Palatinate have adopted action plans against homophobia, which include wide ranging and concrete measures for schools and university to strengthen visibility and acceptance of sexual minorities.

[15]Germany,MANEO Anti-Violence Project (*MANEO Anti-Gewalt-Projekt*) (2006/2007), *Gewalterfahrungen der schwulen und bisexuellen Jugendlichen und Männer in Deutschland*, p. 6; www.maneo-toleranzkampagne.de/umfrage-bericht1.pdf , 30.01.2014 .

[16] Germany, MANEO Anti-Violence Project (*MANEO Anti-Gewalt-Projekt*) (2006/2007), *Gewalterfahrungen der schwulen und bisexuellen Jugendlichen und Männer in Deutschland*, p. 25; www.maneo-toleranzkampagne.de/umfrage-bericht1.pdf , 30.01.2014.

[17] Germany, MANEO Anti-Violence Project (MANEO Anti-Gewalt-Projekt) (2007/2008), www.maneo-toleranzkampagne.de/pdf/maneo-umfrage2-bericht.pdf, 30.01.2014).

[18] Frohn, *Sexuelle Identität, (Anti-)Diskriminierung und Diversity am Arbeitsplatz*, available at: www.dominicfrohn.de/downloads/Out-im-Office_SNW_2007.pdf (30.01.2014) .

[19] Germany, Anti-discrimination and Anti-violence work area of the lesbian counselling centre Berlin, LesMigraS (*Antidiskriminierungs- und Antigewaltbereich der Lesbenberatung Berlin e.V.)* (2012) 'Zusammenfassung der Ergebnisse der Studie zu Gewalt- und Mehrfachdiskriminierungserfahrungen von lesbischen/bisexuellen Frauen und Trans*', available at: www.lesmigras.de/kampagne_mehrfachdiskriminierung.html (25 April 2014).

Summarised results of the study

A. Implementation of the Employment Directive 2000//78/EC

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 identity[20] in the employment world and in civil law transactions. The law was very controversial in politics, among jurists and others, and thus contains a series of limitations that may violate European law. With regard to discrimination on the basis of sexual identity, the law's limitations include such areas as insufficient protection from dismissal; short periods for bringing a claim; very limited procedural involvement of associations; as well as the disadvantaged position of civil servants, judges and soldiers who have same-sex partners. On the other hand, going beyond community law, all grounds for discrimination, and therefore also sexual identity, were included in the protection from discrimination under civil law.

With the entry into force of the General Law on Equal treatment on the 16th of August 2006, a federal office (the Federal Anti-Discrimination Agency) for protection from discrimination on manifold grounds, including sexual orientation and gender identity in its remit since the start of its work, was established within the Federal Ministry of Family, Senior Citizens, Women and Youth.[21] Five Federal States have followed suit and also established similar Anti-Discrimination Agency of their own. Hence, it can be noticed that the awareness of the non-discrimination law is slowly expanding in Germany.

B. Freedom of movement

The mobility of citizens of the EU is increasing. In Germany, the most significant legal change for LGBTI persons recently was the amendment of the Law on Freedom of Movement/EU in 2013 to the effect that life partners are now explicitly included in Article 3 (2).[22] Same sex life partners and spouses of EU citizens are now on equal footing regarding all provisions of the Law on Freedom of Movement/EU.[23]

C. Asylum and Subsidiary Protection

Already in 1988, the Federal Court of Administration [*Bundesverwaltungs-gericht]* recognised as relevant to asylum differences based on such immutable personal characteristics as 'irreversible, predestined, homosexual character'. Following recent jurisprudence, a significant

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[20] 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. Unlike the international use of the term, the German term sexual identity encompasses gender identity and sexual orientation.

[21] Germany, Federal Anti-Discrimination Agency (*Anti-Diskriminierungsstelle des Bundes*) (2000), www.antidiskriminierungsstelle.de/ADS/antidiskriminierungsstelle.html, 30.01.2014); Section 1 and 25 ff. of the General Law on Equal Treatment.

[22] Germany, Act amending the Law on Freedom of Movement/EU and further residence law provisions (*Gesetz zur Änderung des Freizügigkeitsgesetzes/EU und weiterer aufenthaltsrechtlicher Vorschriften*, FreizügG/EU uaÄndG), BGBl. I S. 86 (Nr. 3), 21 January 2013, available at: www2.bgbl.de/Xaver/start.xav?startbk=Bundesanzeiger_BGBl#__Bundesanzeiger_BGBl__%2F%2F*[%40attr_id%3D%27bgbl113s0086.pdf%27]__1393582569142 (21.02.2014) (25 April 2014).

[23] Germany, Tewocht, H. (2013) 'Auf dem Weg zur Gleichstellung von Drittstaatsangehörigen und Unionsbürgern? – Zu Inhalt und Reichweite der sogenannten ‚Rahmenrichtlinie'' *Zeitschrift für Ausländerrecht und Asylpolitik*, ZAR 7/2013, p 255, available at: www.zar.nomos.de/archiv/2012/heft-7/ (25 April 2014).

change of policy has been announced by the Federal Agency for Migration and Refugees, which stated that it cannot be expected of a person to hide his/her sexual orientation in order to avoid persecution.[24] Nevertheless, as a general trend it can be noted that in practice, the **asylum article** enshrined in article 16(a) of the Basic Law hardly plays a role. On the basis of regulations that have applied since 1993, the Federal Republic is surrounded with 'safe third countries' where asylum seekers are legally considered to be safe from persecution. In the European context after the entry into force of the so called *Dublin II* regulation most asylum seekers are dealt with according to the procedures laid down therein. If lesbian and gay asylum seekers cannot be expelled to a so-called 'safe third country' from which or through which they entered, then, in accordance with article 60 para. 1 of the Residence Law, they may not be deported to their country of origin if their life, physical integrity or their freedom is threatened due to their 'belonging to a certain social group'.

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

D. Family Reunification

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, basic German language skills and assured livelihood are preconditions. However, the latter usually does not have to be proved. Reunification of a family with a third-country national first requires that the person has 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, as well as the proof of existing basic language skills. EU citizens and some other third-country nationals are exempt from the language requirement. The EU Commission is currently examining whether German language requirements are compatible with Article 7(2) of Directive 2003/86/EC.[25]

E. Freedom of Assembly

Freedom of assembly is guaranteed as a fundamental right in article 8 of the Basic Law [*Grundgesetz*], according to which all Germans have the right to assemble peacefully and without weapons, without required prior registration or permission. The Law Concerning Assemblies and Processions [*Versammlungsgesetz*] as well as the practice of the courts and other public authorities do not differentiate according to the sexual orientation of the

[24] Germany, Federal Office of Migration and Refugees (*Bundesamt für Migration und Flüchtlinge*, BAMF) Schmidt, M. letter from 27 December 2012, available at: www.lsvd.de/fileadmin/pics/Dokumente/Recht/BAMF-121227.pdf (25 April 2014).

[25] European Union, European Commission (2013), *Letter of formal notice: Integration measures under Article 7(2) of Directive 2003/86/EC*, 30 May 2013, available at: http://ec.europa.eu/eu_law/eulaw/decisions/dec_20130530.htm#de, 25 April 2014.

participants, or the political goal of the demonstration. Currently, gay and lesbian demonstrations are taking place in over 30 German cities and have not been prevented by any counterdemonstrations. The freedom of assembly for LGBTI persons is not generally a problem in Germany. Small demonstrations against the rights of LGBTI have occurred recently in the context of a new education concepts for schools in Baden-Wuerttemberg.

F. Hate Speech and Criminal law

The crime of **incitement** is defined in article 130 of the Criminal Code. Underpara. 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. A motion[26] of the parliamentary group of the Green party demanding legal changes to include persons who have been targeted due to their sexual identity in Article 130 Criminal Code has been rejected.[27] No further draft laws have been submitted or legal changes made.

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.

G. Transgender issues

Regarding the issue of transsexuality there is a slow trend towards more rights for trans* persons. This is particularly driven by the Federal Constitutional Court. In the German legal system, discrimination against **transsexuals** is considered discrimination on the basis of sexual orientation.

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

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[26] Germany, Federal Parliament (*Bundestag*) (2012), BT-Drs. 17/8796, 29 February 2012, available at: dip21.bundestag.de/dip21/btd/17/087/1708796.pdf, 25 April 2014.
[27] Germany, Federal Parliament (*Bundestag*) (2012), BT-PlPr.17/189, p. 23955, 18 October 2012, available at: dip21.bundestag.de/dip21/btp/17/17198.pdf, 25 April 2014.

In a further decision of 2008 the Federal Constitutional Court held that a married transsexual who wanted to legally change his gender after a surgical change of his sex from male to female but remain married to his wife cannot be forced by the pertinent provision of the Law on Transsexuals to divorce in order to have his gender reassignment legally recognised.[28] This is due to the impact of the constitutionally guaranteed right to recognition of the freely chosen and self-determined gender identity which needs to be appropriately balanced with the constitutional guarantee of marriage as an institution as enshrined in Article 6 para 1 of the Basic Law. The decision led to a change of the Law on Transsexuals, which eliminated the rule in question from the law.[29] This development, ending forced divorce for married couples in which one of the partners is transgender, was explicitly welcomed by the Council of Europe Commissioner for Human Rights in an issue paper titled "Human Rights and Gender Identity".[30]

In another decision in 2011, the Constitutional Court considered the prerequisites for a statutory recognition of the new gender identity to be unconstitutional and therefore sections of the Law on Transsexuals inapplicable until new legislation is passed.[31] The German Constitutional Court has called upon the Government to revise current legislation. Following the court decision the parliamentary group of the Left party submitted a motion demanding the abolition of the Law on Transsexuals (*Transsexuellengesetz*).[32] This motion was transferred to the relevant committees the Bundestag[33] but further proceedings terminated by the end of the legislation period. So far no furthers steps have been taken to transpose the ruling of the Constitutional Court.

H. Intersex

The issue of **intersexuality** has received increasingly more attention in the past few years and a slow but overall positive trend can be noticed. In 2012, after numerous consultations with concerned individuals and experts, the German Ethics Council (*Ethikrat*) published a comprehensive opinion on intersexuality. It concludes with a range of concrete recommendations for the government in order to safeguard the rights of intersex persons. In a first step, the German *Bundestag* passed the Act Amending the Law on Registers of Birth, Death and Marriage (*Personenstandsrechtsänderungsgesetz*), which entered into force in November 2013 and provides *inter alia* that parents of intersex children shall not decide between male or female for birth register entry and rather leave the category 'gender' open.

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[28] Germany, Federal Constitutional Court (Bundesverfassungsgericht, (BVerfG) 1 BvL 10/05, 27 May 2008, available at: www.bundesverfassungsgericht.de/entscheidungen/ls20080527_1bvl001005.html (30.01.2014).
[29] Germany, BGBl. I, Nr. 43, p. 1978, Article 5 (22nd July 2009); available at: http://www.bgbl.de/banzxaver/bgbl/start.xav?start=//*[@attr_id=%27bgbl109s1978.pdf%27]#__bgbl__%2F%2F*[%40attr_id%3D%27bgbl109s1978.pdf%27]__1402593365069 (28.02.2014).
[30] Council of Europe, Comissioner for Human Rights (CoE) (2009), Human Rights and Gender Identity, Issue Paper by Thomas Hammarberg, para 3.2.2: https://wcd.coe.int/ViewDoc.jsp?id=1476365, 30.01.2014.
[31] Germany, Federal Constitutional Court (*Bundesverfassungsgericht*, BVerfG), 1 BvR 3295/07, 11 January 2011, press release, available at: www.bundesverfassungsgericht.de/pressemitteilungen/bvg11-007en.html (20 February 2014).
[32] Germany, Federal Parliament (*Bundestag*) (2011), BT.-Drs. 17/ 5916,25 May 2011, available at: dipbt.bundestag.de/dip21/btd/17/059/1705916.pdf, 25 April 2014.
[33] Germany, Federal Parliament (*Bundestag*) (2011), BT-PlPr 17/114, 9 June 2011, p. 13097A - 13097B, available at: dipbt.bundestag.de/dip21/btp/17/17114.pdf, 25 April 2014.

I. Miscellaneous

Regarding the equal rights and numbers of those living in a registered partnership a constant positive development is to be noticed. The **Life Partnership Law** [*Lebenspartnerschaftsgesetz*][34] 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*] [35] took effect four years later, providing further rights to this institution, including the extensive adoption of marital property and maintenance laws, the possibility of step-children's adoption, the introduction of the statutory equalisation of pensions, as well as the inclusion of the life partner in provision for surviving dependants. In 2009, the relevant inheritance and income tax law was changed insofar that same-sex life partners are now on an equal footing with married couples concerning tax exemption amounts. Since July 2013, the rate of taxation on income is no longer depended on whether one lives in a civil partnership or marriage. Also federal laws created a unified competence for the establishment of life partnerships with the civil registry offices. Since 1 January 2012 this is implemented in all German states.

The Federal Constitutional Court (*Bundesverfassungsgericht*) has played a decisive role in strengthening the rights of persons in civil partnerships beyond the Life Partnership Law. The Court has declared different treatment of marriage and civil partnerships unconstitutional on several occasions to the effect that civil partnerships are now equal before the law in most aspects other than the adoption law.[36]

[34] Germany,), Life Partnership Law (*Gesetz über die eingetragene Lebenspartnerschaft*), available at: http://bundesrecht.juris.de/lpartg/, 30 January 2014.

[35] Germany, Law on Revision of the Life Partnership Law (*Gesetz zur Überarbeitung des Lebenspartnerschaftsrechts*), available at: www.buzer.de/gesetz/7390/, 30 January 2014.

[36] Germany, Lesbian and Gay Association of Germany, (*Lesben- und Schwulenverband in Deutschland*, LSVD) (2014), 'Stand der Gleichstellung', available at: www.lsvd.de/recht/lebenspartnerschaft/stand-der-gleichstellung.html, 13 December 2013.

A. Implementation of Employment Directive 2000/78/EC

A.1. General Law on Equal Treatment

EU Council Directive 2000/78/EC was transposed through a uniform "law on the transposition of European directives on the implementation of the principle of equality" of 14th August 2006 (hereinafter: 'Transposition Law').
From the beginning the law was very controversial among politicians, jurists, associations, civil society and others. This meant that discussion of an anti-discrimination law stretched into 2006. Due to the difficult birth of the law, a complicated compromise was reached which, in the end, contained a number of limitations likely not in compliance with European law[37] (see below, chapter A.2. and A.3.).

The main component of the Transposition Law is the General Law on Equal Treatment [*Allgemeines Gleichbehandlungsgesetz – AGG*] [38], set out in article 1 of the Transposition Law. Part 1 of article 1 describes the aim of the law as "preventing or eliminating discrimination on the basis of race, ethnic origin, gender, religion or philosophical belief, disability, age or sexual orientation". In addition, the scope of the law extends to workplace, social protection, social advantages, education, civil law, thereby going beyond the provisions of the EC directive. Finally, the part of the law defines the terms direct and indirect discrimination, harassment, as well as sexual harassment.

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

Part 3 contains provisions on protection from discrimination in civil law transactions. In accordance with the above-mentioned guidelines of EU directives 2000/43/EC and 2004/113/EC, specific prohibitions on discrimination under civil law are established. All grounds for discrimination, and therefore also sexual orientation, are included in the protection from discrimination, in order to avoid the exclusion of fundamental areas of legal life from the protection against discrimination.[39]

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

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[37] Belgium, European Commission (2008), letter from the Commission of the European Communities to the German Foreign Minister of 31st January 2008 ; and letters from the Commission of the European Communities of October 2009:
http://dip21.bundestag.de/dip21/btd/17/004/1700421.pdf (30.01.2014).
[38] Germany, General Law on Equal Treatment (*Allgemeines Gleichbehandlungsgesetz – AGG*):
http://dejure.org/gesetze/AGG , 30.01.2014.
[39] See official reasoning, in: BT-Drs. 16/1780 from 6th June 2007, p. 2.

including on the basis of sexual orientation, 'when this is based on actuarially demonstrable grounds' (article 20 para. 2, 3rd sentence of the AGG).

Legal remedy for those affected is regulated in part 4 of the AGG. The regulations on the burden of proof, which basically provide for analleviation for the claimant, state that if a person has circumstantial evidence that indicate a discrimination according to Article 1 AGG, the other party has to proof that no discrimination occurred (Article 22 AGG): *"Wenn im Streitfall die eine Partei Indizien beweist, die eine Benachteiligung wegen eines in § 1 genannten Grundes vermuten lassen, trägt die andere Partei die Beweislast dafür, dass kein Verstoß gegen die Bestimmungen zum Schutz vor Benachteiligung vorgelegen hat."*[40]

Additionally, the claimant can request the support of anti-discrimination associations, under certain circumstances, the worker´s council and the trade union represented in the respective company can invoke the labour court.

With the entry into force of the General Law on Equal treatment on the 16th of August 2006, a federal office (the Federal Anti-Discrimination Agency) for protection from discrimination on manifold grounds, including sexual orientation and gender identity in its remit since the start of its work, was established within the Federal Ministry of Family, Senior Citizens, Women and Youth.[41] Five Federal States, Berlin, Brandenburg, Thuringia, Schleswig-Holstein and North Rhine-Westphalia, have followed suit and also established similar Antidiscrimination Offices of their own.

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

A.2. General Gaps in Transposition

First, the transposition is criticized with regard to protection from discrimination in the area of occupational pensions. Article 2 para. 2, 2nd sentence of the AGG makes reference to the Law on Occupational Pensions [*Betriebsrentengesetz – BetrAVG*] of 19th December 1974, which itself does not contain a prohibition on discrimination.

Secondly, article 2 para. 4 of the AGG is criticized as it stipulates that the provisions on general and special protection apply in the case of dismissals. These provisions regulate the conditions governing dismissal as defined by EU directives, however, they don´t provide for any prohibitions of discrimination in accordance with the requirements of community law. They only declare dismissals invalid for reasons that have no link with the grounds against which the directives against discrimination provide protection, including, for example, sexual orientation. In case-law this difficulty has been accepted and the Article is no longer applied.

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

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[40] Germany, General Law on Equal Treatment (*Allgemeines Gleichbehandlungsgesetz – AGG*): http://dejure.org/gesetze/AGG (12.06.2014).

[41] Germany, Federal Anti-Discrimination Agency (*Antidiskriminierungsstelle des Bundes*) (2014), On the tasks of the Federal anti discrimination agency, available at: www.antidiskriminierungsstelle.de/DE/UeberUns/Aufgaben/aufgaben_node.html , 30.01.2014; Section 1 and 25 ff. of the General Law on Equal Treatment: http://dejure.org/gesetze/AGG (30.01.2013).

own institutions on the basis of religion or belief (para. 1) and allowing to require employees to act in good faith and with loyalty to the ethos of the organisation (para. 2). German jurisprudence grants the churches an almost unlimited right to self-determination. The question of whether this means that employees may be dismissed, for example, if they enter into a life partnership, even though the basis of reasoning of the EU directives on equal treatment should be 'the kind of activity and the circumstances of the exercise of the activity´ is still controversial in Germany. In 2007, the Labour Court of Hamburg 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.[42] The second instance Federal State Labour Court of Hamburg had denied the claim of the applicant, arguing that the precondition for discrimination as regards job applications is objective qualification for the job and since the applicant was not qualified he could not be discriminated against.[43] The action was also unsuccessful at the Federal Labour Court (*Bundesarbeitsgericht*) for similar reasons and the court did not consider whether discrimination occurred due to religion or ethnic background but based the decision of the lack of objective qualifications.[44] A complaint against this decision at the Federal Constitutional Court was turned down.[45]
In 2010, the European Court of Human Rights decided two cases regarding dismissal of church employees for adultery. The court essentially confirmed the right to self-determination of churches in Germany in its core but empathized that domestic courts are required to balance rights of both parties and take account of the specific nature of the post concerned.[46]

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.[47] In 2010, however the EU Court of Justice took a different view and confirmed in a preliminary ruling the compatibility of the 2 month period with the Council Directive 2000/78/EC of 27 November 2000.[48]
The Federal Labour Court also ruled in 2012, that the two month period is compatible with European law.[49] In this case, the Federal Labour Court had to decide on an appeal against the ruling of the state labour court of Saarland. The claimant had demanded damages and compensation as he held the opinion that he had been discriminated against due to his disability when applying for a position as a teacher. This claim was not made within the 2- month period

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[42] Labour Court (*Arbeitsgericht*) Hamburg, judgment of 4th December 2007. case no.: 20 Ca 105/07.
[43] Federal State Labour Court (*Landesarbeitsgericht*) Hamburg, judgment of 29th October 2008, case no.: 3 Sa 15/08.
[44] Germany, Federal Labour Court (*Bundesarbeitsgericht*) (2010), 8 AZR 466/09, 19 August 2010.
[45] Germany, Federal Constitutional Court (*Bundesverfassungsgericht*) (2014), 1 BvR 512/11, 23 December 2014.
[46] Council of Europe, European Court of Human Rights (ECtHR) (2010), *Obst v Germany*, No.425/03, 23 September 2010; *Schüth v Germany*, No. 1620/03, 23 September 2010.
[47] ECJ/C-52 and 53/99 (2nd February 2001) (*Camarotto and Vignone*).
[48] European Union, Court of Justice of the European Union (CJEU) (2010), C-246/09, *Susanne Bulicke v Deutsche Büro Service GmbH*, 8 July 2010, available at:
http://curia.europa.eu/juris/liste.jsf?language=en&jur=C,T,F&num=C-246/09&td=ALL.
[49] Germany, Federal Labour Court (*Bundesarbeitsgericht*), 8 AZR 160/11, 15 March 2011, available at:
http://juris.bundesarbeitsgericht.de/cgi-bin/rechtsprechung/document.py?Gericht=bag&Art=en&Datum=2014&nr=16084&linked=urt.

and had therefore been rejected. The Federal Labour Court upheld the previous decisions and the appeal was unsuccessful.
Contrary to this position, the director of the Federal Anti-Discrimination Agency demands to extend the period for bringing a claim for damages or compensation.[50]
Anti-discrimination associations may appear in court proceedings as counsel to disadvantaged persons, provided the association attends to the particular interests of persons or groups of persons discriminated against; the representation of interests is one of its essential aims; the association operates on a non-profit and non-temporary basis; and it has at least 75 members or is comprised of at least seven associations altogether (article 23 of the AGG). NGOs are not able to initiate proceedings themselves on behalf or in support of a victim. Their limited powers as well as the lack of sufficient funding have been criticized. Also the inadequate number of institutions providing advisory services in cases of discrimination throughout Germany – be it governmental or non-governmental –leads to a lack of information on relevant cases. The procedural competences of NGOs remain moreover rather limited.[51]

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

Following above mentioned jurisprudence regarding the expansive right of self-determination for religious communities, the Labour Court in Stuttgart considered the fact that a person was living in a civil partnership a permissible ground of differential treatment, as provided in Article 9 AGG. The applicant had applied for a position as kindergarten teacher in at a catholic association. Her initial acceptance was revoked after the employer learned of her civil partnership. According to the Court, a civil partnership and homosexuality can be considered incompatible with loyalty to the ethos of the organisation.[52] The case has not been challenged.

Finally, the inequality of 'remuneration' for the same-sex partners of civil servants, judges, and soldiers has been largely revoked. Married civil servants, judges and professional soldiers, as well as those living in a civil partnership, receive a family subsidy and their spouses receive assistance in matters of health, nursing needs, and birth (*Beihilfe*). Currently only Saxony is differentiating between marriage and civil partnership when granting assistance to public servants in matters of health, nursing needs, and birth (*Beihilfe*).[53] The question whether assistance granted to public servants in the event of illness (*Beihilfe*) is to be interpreted as remuneration in the meaning of the Employment Directive 2000/78/EU was decided

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[50] Germany, Federal Anti-Discrimination Agency (*Anti-Diskriminierungsstelle des Bundes*) (2011), ´5 Jahre AGG – 5 Forderungen - Leiterin der Antidiskriminierungsstelle fordert stärkeren Diskriminierungsschutz in Deutschland´, Press release, 15 August 2011, available at: www.antidiskriminierungsstelle.de/SharedDocs/Pressemitteilungen/DE/2011/20110816_5Jahre.html?nn=1532912.

[51] Germany, Federal Parliament (*Deutscher Bundestag*) (2008), Motions requiring amendments of the AGG and the other provisions transposing the EC directive with regard to the mentioned deficiencies in para 30 et seq. have been rejected by the Federal Parliament on 2nd July 2009 (*Deutscher Bundestag)*, Plenarprotokoll 16/230; see also the committee recommendation for this decision by the legal committee of the parliament (*Rechtsausschuss*) BT-Drs.16/13675, 1 July 2009, and from the failed motions particularly the motion "Effektiven Diskriminierungsschutz verwirklichen", BT-Drs. 16/9637, 18 June 2008, available at: http://dipbt.bundestag.de/dip21/btd/16/096/1609637.pdf) (31.01.2014).

[52] Germany, Labour Court (*Arbeitsgericht*), Stuttgart/14 Ca1585/09, 28 April 2010.

[53] Germany, Lesbian and Gay Association of Germany, (*Lesben- und Schwulenverband in Deutschland*, LSVD), 'Stand der Gleichstellung', available at: www.lsvd.de/recht/lebenspartnerschaft/stand-der-gleichstellung.html#c629 (31 January 2014).

affirmatively by way of preliminary rulings by the Court of Justice of the European Union.[54] This means that civil servants, judges, and soldiers living in a civil partnership can invoke retroactively the Law on Civil partnerships since its entering into force implementing the Directive 2000/78/EC.

Surviving spouses as well as civil partners receive widows' or widowers' payments in case of death. The Federal Constitutional Court (*Bundesverfassungsgericht*, BVerfG) ruled in 2009 that the Supplementary Pensions Agency for Federal and *Laender* Employees (*Versorgungsanstalt des Bundes und der Länder*, VBL) has to pay the same widows' and widowers' payments to surviving civil partners as they pay to surviving spouses.[55] This decision is similarly applicable to same-sex life partners in the so called free professions such as for example architects, doctors and lawyers.[56]
Further additional benefits for same-sex life partners such as costs for relocations and compensation for family separation as well as the entitlement to special vacation and to career promotion are likewise provided for both groups of partners.[57] On the Federal level as well as state level this is regulated by law, the only exception is Saxony, here this is regulated through administrative provisions. After a judgment of the Federal Constitutional Court in 2012 remuneration and pension laws have to be adjusted.[58] Up to now in Berlin, Brandenburg, Bremen, Hamburg, Hesse, Lower Saxony, Northrhine-Westfalia, Mecklenburg-Western Pomerania, Rhineland-Palatinate, Saarland, Saxony-Anhalt and Schleswig-Holstein state legislation puts civil partnerships and marriage on equal footing. Currently, Baden-Wuertemberg, Bavaria and Thuringia have only adjusted the legal regulations relating to civil servants; Saxony has not adopted Equal Treatment legislation.[59]

A.4. Additional Information

Going beyond the obligations arising from the Employment Directive, the AGG also prohibits discrimination on the basis of sexual orientation in the areas of social protection, including social security and health services; social benefits; education; access to and the provision of goods and services, including housing; as well as in civil law transactions. However, "civil law transactions" relate essentially only to the conclusion of so-called mass contracts, when obligations arise under a large number of cases (article 19 para. 1 (1) of the AGG) and insurance policies under private law. By contrast, prohibitions of discrimination are not applicable to legal

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[54] European Union, Court of Justice of the European Union (CJEU), C-124/11, *Federal Republic of Germany v. Dittrich and Others* 6 December 2012, preliminary ruling, available at: http://curia.europa.eu/juris/liste.jsf?language=en&num=C-124/11 (25 April 2013).
[55] Germany, Federal Constitutional Court (*Bundesverfassungsgericht,* BVerfG) 1 BvR 1164/07, 07 July 2009, available at: www.bundesverfassungsgericht.de/entscheidungen/rs20090707_1bvr116407.html (25 April 2014).
[56] Germany, Lesbian and Gay Association of Germany, (*Lesben- und Schwulenverband in Deutschland*, LSVD), www.lsvd.de/recht/ratgeber-zum-lpartg/8-berufsstaendische-versorgungswerke.html (31 January 2014).
[57] Germany, Federal Administrative Court (*Bundesverwaltungsgericht*, BVerwG) (2010), 2 C 53/09, 28 October 2010 (overseas allowance for registered partners of civil servants);
Germany, Federal Anti-Discrimination Office (*Antidiskriminierungsstelle des Bundes, ADS*) (2014), Selected decisions by German courts with regard to the anti-discrimination law(*Ausgewählte Entscheidungen deutscher Gerichte zum Antidiskriminierungsrecht*), p. 167 ff, available at: www.antidiskriminierungsstelle.de/SharedDocs/Downloads/DE/publikationen/rechtsprechungsuebersicht_zum_antidiskriminierungsrecht.pdf?__blob=publicationFile.
[58] Federal Constitutional Court (*Bundesverfassungsgericht*, BVerfG) (2012), 2 BvR 1397/09, 19 June 2012.
[59] Germany, Lesbian and Gay Association of Germany, (*Lesben- und Schwulenverband in Deutschland*, LSVD), 'Stand der Gleichstellung', available at: www.lsvd.de/recht/lebenspartnerschaft/stand-der-gleichstellung.html (13 December 2013).

relationships of family and inheritance (article 19 para. 4, as well as obligations, in which a particular affinity or confidential relationship of the parties or their relatives is established. This is also true for tenancy law, especially when the parties or their relatives live on the same property (article 19 para. 5). Also rental of housing is only covered if no less than 40 apartments are let out by the lessor (article 19 para 5 of the AGG).

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

The Federal Anti-discrimination Agency provides support to persons who approach it in the belief that they have been discriminated against on grounds listed in article 1 of the AGG, including sexual identity. In this regard it can provide information on claims and possibilities of legal action in the context of statutory regulations on protection from discrimination, facilitate legal advice through other offices, as well as seek an amicable settlement between those involved. Additionally, the office engages in public relations, measures to prevent discrimination, and conducts scientific studies on discrimination. Every four years the office is to produce a report covering discrimination on grounds of sexual orientation and amongst others provide recommendations on the elimination and prevention of this form of discrimination. In 2013, the last joint report was published, focusing particularly on discrimination in education and employment.[60]

Finally, the Anti-discrimination Agencyis 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). The Proposal for a Council Directive of 2 July 2008 implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation has been rejected by the German government so far. While this opposition is no longer explicitly expressed in the coalition treaty of the new government of December 2013, it cannot be concluded that the coalition government now supports the directive. The new government has not publicly taken a position on the Proposal yet.

Based on recent research and figures provided by the German Federal Anti—Discrimination Agency, it is not possible identify any trends relating to the Employment Equality Directive in regards to sexual identity or discrimination due to religion. It is noticeable that there has been increasingly more jurisprudence in regards to the right of self-determination for religious communities. Higher court have so far confirmed the wide scope of the right, however, there seems to be increasingly more discussion in society and jurisprudence. Cases mainly relate to religious affiliation, rarely sexual identity. The increase in cases, however does not necessarily

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[60] Germany, Federal Anti-Discrimination Agency (*Anti-Diskriminierungsstelle des Bundes*, ADS) (2013) 'Discrimination in education and employment -Second joint report of the Federal Anti- Discrimination Office and the concerned commissioners of the Federal Government and Parliament' (*Diskriminierung im Bildungsbereich und im Arbeitsleben -Zweiter Gemeinsamer Bericht der Antidiskriminierungsstelle des Bundes und der in ihrem Zuständigkeitsbereich betroffenen Beauftragten der Bundesregierung und des Deutschen Bundestages*), available at: www.antidiskriminierungsstelle.de/SharedDocs/Downloads/DE/publikationen/Gemeinsamer_Bericht_2013.html (25 April 2014).

mean an increase in discrimination in this field, but could also result from an increased awareness.

B. Freedom of Movement

B.1. Law on Freedom of Movement/EU

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

European citizens have a fundamental right to freedom of movement if certain criteria are fulfilled, for example, looking for employment, occupational training, or self-employment. The same applies to their family members (article 2 para. 2 of the Law on Freedom of Movement/EU). The Law on Freedom of Movement/EU was amended in 2013 and life partners are now explicitly included in Article 3 (2).[61] Same sex life partners and spouses of EU citizens are now on equal footing regarding all provisions of the Law on Freedom of Movement/EU.[62]

The partners or family members of German citizens are generally not in a position to benefit from freedom of movement unless the German citizen has made use of his/her right to freedom of movement. The use of this right has to be of some substantiality. The Higher Administrative Court of North-Rhine Westphalia followed the jurisprudence of the Federal Administrative Court[63] and decided in 2012 that moving to another EU country for a short period of time, e.g. less than a month does not trigger rights according to the freedom of movement for the partner.[64]

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 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, 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

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[61] Germany, Act amending the Law on Freedom of Movement/EU and further residence law provisions (*Gesetz zur Änderung des Freizügigkeitsgesetzes/EU und weiterer aufenthaltsrechtlicher Vorschriften*, FreizügG/EU uaÄndG), BGBl. I S. 86 (Nr. 3), 21 January 2013, available at: www2.bgbl.de/Xaver/start.xav?startbk=Bundesanzeiger_BGBl#__Bundesanzeiger_BGBl__%2F%2F*[%40attr_id%3D%27bgbl113s0086.pdf%27]__1393582569142, 21.02.2014.

[62] Germany, Tewocht, H. (2013) 'Auf dem Weg zur Gleichstellung von Drittstaatsangehörigen und Unionsbürgern? – Zu Inhalt und Reichweite der sogenannten ‚Rahmenrichtlinie'' *Zeitschrift für Ausländerrecht und Asylpolitik*, ZAR 7/2013, p 255, available at: www.zar.nomos.de/archiv/2012/heft-7/ (25 April 2014).

[63] Germany, Federal Administrative Court (*Bundesverwaltungsgericht*), 1 C 23/09, 11 January 2011, available at: www.bverwg.de/informationen/english/decisions/1_c_23_09.php (24 April 2014).

[64] Germany, Higher Administrative Court of North-Rhine Westphalia (*Oberverwaltungsgericht Nordrhein-Westfalen*), 18 B 1181/11, 25 April 2012, available at: www.justiz.nrw.de/nrwe/ovgs/ovg_nrw/j2012/18_B_1572_11beschluss20120424.html (25 April 2014).

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).

B.2. Residence Law

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

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 residence law, as a rule, the granting of a residence permit will continue to depend on whether adequate income, living space and -health insurance can be demonstrated.[65] 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).

[65]Germany, Residence Law (*Aufenthaltsgesetz*, AufenthG), Art. 27 (2), available at: http://dejure.org/gesetze/AufenthG/27.html (13 .06.2014).

C. Asylum and Subsidiary Protection

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

Following the jurisprudence of the Federal Constitutional Court, the right of asylum in article 16a of the Basic Law is grounded in the belief stemming from the inviolability of human dignity and that no state has the right to endanger or injure the body, life or personal freedom of the individual solely on grounds of his/her political beliefs, religious convictions, or in innate or immutable characteristics of the person.[66] The decision of the Constitutional Court does not specify what is covered by the term 'innate or immutable characteristics of the person; mentioned are: political conviction, religious belief or other immutable characteristics which determine the otherness of the individual. 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.[67]

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.[68] Accordingly, the court also recognised as relevant to asylum a difference based on immutable personal characteristics, such as an 'irreversible, predestined, homosexual character'.[69] However, the explanation goes on to state that the criminal prosecution of homosexual activity by itself does not necessarily constitute a targeted infringement of homosexual disposition relevant to asylum. To the extent that such criminal prohibitions serve the protection of public morals, including the maintenance of public order and mores and the protection of citizens from harassment and insult, and if an urgent public need for such protection exists in the country concerned, an imminent persecution is not relevant in the context of asylum unless additional targeted infringements occur. However, criminal prosecution can amount to political persecution if it is not only considered particularly rigorous, but if it is in addition 'obviously unbearably severe and in every conceivable facet simply unreasonable as punishment of a violation against public morals.'[70]

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'[71] where asylum seekers – according to lawmakers – could have found safety from persecution. This, in turn, precludes recognition of asylum status in Germany. This practice has been called into question by several decisions of the Federal Constitutional Court; which, in 2009, issued interim orders to stop extraditions of several asylum seekers to Greece under the so called *Dublin II* procedure.[72] Following the argumentation of the

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[66] Federal Constitutional Court, (*Bundesverfassungsgericht*), BVerfGE 76,143.
[67] Federal Constitutional Court (*Bundesverfassungsgericht*), BVerfGE 80, 315 (335).
[68] Convention Relating to the Status of Refugees of 28th July 1961 (BGBl. 1953 II, p. 560).
[69] Federal Court of Administration (*Bundesverwaltungsgericht*), BVerwGE 79,143 (146-147).
[70] Federal Court of Administration (*Bundesverwaltungsgericht*), BVerwGE, /79, 143 (146-147).
[71] "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.
[72] Germany, Federal Constitutional Court (*Bundesverfassungsgericht*, BVerfG)(2009), 2 BvQ 56/09, 8 September 2009, press release available at: www.bundesverfassungsgericht.de/pressemitteilungen/bvg09-103en.html,

Court these cases will give cause to examine the specifications of the right to asylum in Art. 16a (2) of the Constitution, in light of whether the constitutionally necessary exceptions to the exclusion of interim legal protection against deportation to safe third states need to be specified, in order to determine whether constellations are conceivable in which the deportation to a member state of the EU may be suspended, as is possible under European Law according to the *Dublin II* Regulation. In 2010, the German government narrowly avoided the fundamental examination of the question whether the third country clause complies with fundamental and human rights through the Constitutional Court by suspending deportations to Greece.[73] In 2011, the European Court of Human Rights as well as the Court of Justice of the European Union have clarified that it is not admissible for states to generally assume that other EU member states are irrevocably safe. Further, the courts concluded that member states may not use these assumptions to exclude interim legal protection against deportation.[74] This, however, has been the case in Germany until recently. Only since the Act transposing the Directive 2011/95/EU came into force in 2013, a period of one week has to be granted to the person facing deportation in order to take legal actions and apply for interim legal protection against it. With regard to applications for asylum from asylum seekers who enter by air and come from a so-called safe country of origin,[75] 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). According to the coalition agreement of the newly elected government, the list of safe countries of origin shall be expanded and include Serbia, Bosnia-Herzegovina and Macedonia.[76]

According to the answer of the government to a minor interpellation of the parliamentary group the Left (*die Linke*) sexual orientation is very seldom submitted credibly as a ground for asylum. There are no numbers on how often sexual orientation is claimed as reason for persecution as the Federal Ministry of Migration and Refugees (*Bundesamt für Migration und Flüchtlinge*, BAMF) does not keep record of the declared reasons for fear of persecution.[77] The lack of statistical data prevents to make any statements regarding trends, a positive development is the announcement by the BAMF described below, however it remains to be seen whether it has any practical impacts.

Very recently the BAMF announced a shift of its policy in regard to homosexuality as reason for granting asylum. Following the 1988 decision of the Federal Administrative Court of Germany (*Bundesverwaltungsgericht*, BVerwG), the BAMF and many German administrative courts repeatedly justified the rejection of asylum applications with the reasoning, that it can be expected of individuals to refrain from public expressions of their sexual orientation in their

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www.bundesverfassungsgericht.de/entscheidungen/qk20090908_2bvq005609.html, Germany, Federal Constitutional Court (Bundesverfassungsgericht, BVerfG)(2009), 2 BvR 2115/09, www.bundesverfassungsgericht.de/entscheidungen/rk20091009_2bvr211509.html, 09.10.2009).

[73] Germany, Federal Constitutional Court (*Bundesverfassungsgericht*) (2011), 2 BvR 2015/09, 25 January 2011.

[74] Council of Europe, European Court of Human Rights (ECtHR) (2011), *M.S.S. v. Belgium and Greece*, No. 30696/09, 21 January 2011; Court of Justice of the European Union (CJEU) *N.S. et al v. Secretary of State for the Home Department et al,* Joined cases C-411/10 NS and C-493/10 ME, Strasbourg, 21 December 2011.

[75] "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.

[76] Germany, Federal Government (*Bundesregierung*) (2013), 'Koalitionvertrag 2013', p.109, available at: www.bundesregierung.de/Content/DE/_Anlagen/2013/2013-12-17-koalitionsvertrag.pdf?__blob=publicationFile&v=2, Berlin, 27.11.2013

[77] Germany, Federal Parliament (*Bundestag*), BT-Drs. 17/8357, 18 January 2012, available at: dip21.bundestag.de/dip21/btd/17/091/1709193.pdf (24 April 2014).

countries of origin in order to avoid persecution (see C. 2. below). In a recent case the BAMF had denied asylum to a man from Cameroon, who claimed to have been arrested and maltreated due to his homosexuality (see below for more detail in case law section). The administrative court overruled this decision. In its appeal, the BAMF referred to the principles laid out in the decision of the Court of Justice of the European Union *Federal Republic of Germany v Y (C-71/11) and Z (C-99/11)*[78], reaffirming their applicability but denying the credibility of the applicant and his personal risk of persecution. The Higher Administrative Court rejected the appeal in March 2013.[79]

In the highly important decision *Federal Republic of Germany v Y (C-71/11) and Z (C-99/11)* the BVerwG had asked the European Court for preliminary rulings to define what acts may constitute an 'act of persecution' in the context of a serious violation of freedom of religion. The Court considered this a fundamental question as its answer determines who can claim refugee status and enjoy international protection under Directive 2004/83/EC. The court held that:

"Article 9(1)(a) of Council Directive 2004/83/EC of 29 April 2004 must be interpreted as meaning that a severe violation of freedom of religion, regardless of which component of that freedom is targeted by the violation, is likely to amount to an 'act of persecution' where the asylum-seeker, by exercising that freedom or infringing the restrictions placed on the exercise of that freedom in his country of origin, runs a real risk of being executed or subjected to torture, or inhuman or degrading treatment, of being reduced to slavery or servitude, or of being prosecuted or imprisoned arbitrarily.(…) (2) Article 2(c) of Directive 2004/83 must be interpreted as meaning that there is a well-founded fear of persecution where the asylum-seeker intends, once back in his country of origin, to pursue religious activities which expose him to a risk of persecution. In this context, and in order to ensure observance of the fundamental rights enshrined in the Charter of Fundamental Rights of the European Union, the authority responsible for examining the application for asylum cannot reasonably expect the asylum seeker to forego these activities, and specifically to forego manifesting his faith.

The relevant issue is the kind of repressions connected to a certain action and whether or not the applicant in his/her particular situation is threatened by persecution. The ruling has been applied by national courts dealing with asylum claims for reasons of sexual orientation. The Administrative Court of Baden-Wurttemberg, for example, announced that it would transfer these principles and will no longer suggest a change of way of life for homosexuals in order to avoid persecution.[80] Shortly after, in December 2012, the president of BAMF explained in a letter to a parliamentarian that "(…) it cannot be expected of an applicant to avoid risky (*gefahrenträchtig*) behaviour in order to avoid persecution, which he/she would otherwise be subjected to, due to, for example, his/her sexual orientation."[81]
In November 2013, following its own jurisprudence, the Court of Justice of the European Union laid down minimum standards relating to the conditions for granting refugee status or subsidiary protection status to person with homosexual orientation.[82] This jurisprudence has been promptly

[78] European Union, Court of Justice of the European Union (CJEU) (2012), Joint cases C-71/11 and C-99/11, *Federal Republic of Germany v Y (C‑71/11), Z (C‑99/11)*, 19 April 2012.
[79] Germany, Higher Administrative Court (*Verwaltungsgerichtshof)* Baden-Wuerttemberg/A 9 S 1872/12, 07 March 2013.
[80] Germany, Higher Administrative Court (*Verwaltungsgerichtshof*) Baden-Wuerttemberg/A 9 S 1872/12, 7 March 2013.
[81] Germany, Federal Office of Migration and Refugees (*Bundesamt für Migration und Flüchtlinge*, BAMF) Schmidt, M., letter from 27 December 2012, available at: www.lsvd.de/fileadmin/pics/Dokumente/Recht/BAMF-121227.pdf (24 April 2014).
[82] European Union, Court of Justice of the European Union (CJEU), Joined Cases C-199/12 to C-201/127, *X, Y and Z v Minister voor Immigratie en Asiel*, 7 November 2013.

applied in November 2013 by the Administrative Court Regensburg in an appeal against a decision by the BAMF. The authority had denied refugee status or subsidiary protection to a homosexual man from Nigeria. The court found that the Nigerian legislation regarding homosexuals 'must be regarded as being a punishment which is disproportionate or discriminatory and thus constitutes an act of persecution' (Joined Cases C-199/12 to C-201/12, 79 (2)) and therefore giving rise to a right to asylum. In this particular case, however, no asylum according to Article 16a Residence Law was granted, as the applicant was unable to prove that he did not enter Germany without travelling through a safe third country where he could have found safety from persecution. According to Article 16a (2) German Constitution, asylum is not granted to anyone entering Germany from a European Union or safe third country. Due to the real risk of persecution, however, the applicant was awarded 'suspension of deportation' according to Article 60 (1) Residence Act.[83]

At the beginning of August 2013, the Federal Ministry of Migration and Refugees, BAMF granted asylum to a homosexual man from Russia. This is the first publicly known case.[84]

C.2. Subsidiary Protection

If lesbian and gay asylum seekers cannot be expelled to a so-called 'safe third country' from which or through which they entered, then, in accordance with article 60 para. 1 of the Residence Law, they may not be deported to their country of origin if their life, physical integrity or their freedom is threatened due to their 'belonging to a certain social group' (so-called small asylum[85]). Among others, persecutions on grounds of sexual orientation fall into the category of 'social group' (article 60 (1) of the Residence Law in conjunction with article 10 para. 1 (d of Directive 2011/95/EU– the so-called Qualification Directive).

The law transposing the new EU Qualification Directive 2011/95/EU into national law entered into force in December 2013.[86] As a consequence subsidiary protection was integrated into the asylum procedure; this means that with every application for asylum, recognition as refugee as well as subsidiary protection according to the Directive 2011/95/EU is examined by the BAMF. Additionally, the Dublin regulation is now applicable to European subsidiary protection. A further result of the new law is that subsidiary protected persons now have equal legal status as persons who have been granted refugee status in accordance with Article 16a GG in certain areas, such as family asylum according to Article 26 Asylum procedure law (*Asylverfahrensgesetz*). Relevant in this context is also that it entitles unmarried life partners, parents of under aged children, minor single siblings and others entitled to custody to the status of the applicant. There is no equal treatment with refugees in other areas, e.g. subsidiary protected persons do not have a right to family reunification and a residence permit is only granted for one year.

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

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[83] Germany, Administrative Court (*Verwaltungsgericht*) Regensburg/RN 5 K 13.30226, 19 November 2013.
[84] Germany, Roykov, A., `Der erste schwule Flüchtling aus Russland',*Zeit online*, 1 November 2013, available at: www.zeit.de/2013/44/russland-verfolgung-homosexuelle (15 Febuary 2014).
[85]Federal Constitutional Court (*Bundesverfassungsgericht*), BVerfGE 94, 49 (97).
[86] Germany, Act transposing Directive 2011/95/EU (*Gesetz zur Umsetzung der Richtlinie 2011/95/EU*), BGBl 1 Nr. 54, 5 September 2013, available at: www2.bgbl.de/Xaver/start.xav?startbk=Bundesanzeiger_BGBl#__Bundesanzeiger_BGBl__%2F%2F*[%40attr_id%3D%27bgbl113s3474.pdf%27]__1393582997222 (27.02.2014).

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.'[87] The above mentioned jurisprudence of the Court of Justice of the European Union, which concluded `that the existence of criminal laws, (…) which specifically target homosexuals, supports the findings that those persons must be regarded as forming a particular social group`[88] as well as the subsequent ruling of the German court following this jurisprudence[89] removed the last vestige of doubt whether homosexual persons may constitute a social group.

C.3. Case Law

The controversy 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') should be ended by the Court of Justice's decision *Republic of Germany v Y (C-71/11) and Z (C-99/11*) and the subsequently announced change of policy of the BAMF, and more recently the Court of Justice's decision of 7 November 2013.

Prior to this judgement no common approach existed. This description of case law should be overridden by the above mentioned high-level jurisprudence, however, it illustrates the contradicting case law of German courts up until now. Some courts expected homosexuals to practice their disposition in hiding,[90] and despite the criminality of homosexuality in the country of origin, they characterised government actions as 'improbable because it is to be expected of those concerned that they themselves will undertake everything to keep themselves extremely concealed'[91] 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.'[92] However, other courts assumed '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.'[93]

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[87] Bundestag, document no. 224/07, p. 339.

[88] European Union, Court of Justice of the European Union (CJEU), Joined Cases C-199/12 to C-201/127*, X, Y and Z v Minister voor Immigratie en Asiel*, 7 November 2013.

[89] Germany, Administrative Court (*Verwaltungsgericht*) Regensburg/RN 5 K 13.30226, 19 November 2013, para.18.

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

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

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

[93] 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-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.

There used to be 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.'[94] By contrast, with reliance on the jurisprudence of the Federal Court of Administration, the Administrative Court Frankfurt an der Oder explainde: '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.'[95] 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 […].'[96]

According to non-governmental organisations,[97] it is also problematic that asylum applicants are obligated to present in detail and comprehensibly all reasons for flight at their first hearing before the BAMF within days after submitting their applications. For many lesbian and gay refugees, it is not (yet) possible to report openly about their sexual orientation and corresponding persecution within days of their arrival in Germany. For those persons, their outing in front of agency employees, who are strangers to them, represents an immense barrier. Yet if they only raise the actual reason for flight later, it is not 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. The BAMF continues to expect a detailed description of personal experiences. According to the letter of the BAMF, to be credible and likely to be describing real events, the description of the experiences has to be specific, vivid and detailed.[98] It can be doubted that every persons is capable of sharing details of his/her sexual orientation in the expected openness.

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 professional opinions or witness statement. A positive development is the decision of the BAMF to no longer demand psychological or medical opinions. It will, however, continue to consider statements opinions from advice centres for lesbians and gays in Germany, witness statements from life partners, etc. if submitted. The issue of credibility therefore remains a problem and a real risk exists that the authorities will be

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[94] Court of Administration Düsseldorf, judmgent of 14th September 2006, case no.: 11 K 81/06.A.

[95] 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.

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

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

[98] Germany, Federal Office of Migration and Refugees (*Bundesamt für Migration und Flüchtlinge*, BAMF) Schmidt, M. letter from 27 December 2012, p.2 available at: www.lsvd.de/fileadmin/pics/Dokumente/Recht/BAMF-121227.pdf.

reluctant to believe homosexuality, in particular in cases of bisexuality, post-flight coming outs or incoherent stories. Another risk is, that decision makers will rely on stereotypes or assumptions, including visible markers, or a lack thereof and deny asylum to individuals who do not fit the clichés.

With regard to the above-mentioned decision of the Federal Court of Administration, the courts also for quite some time examined 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. In more recent jurisprudence these considerations play a decreasing role.[99]

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,[100] to which article 60 para. 1, 1st sentence of the Residence Law refers.
One positive example can be mentioned here: in 2010 the Administrative Court Potsdam (11 K 397/06.A) asserted that a claim to political asylum or refugee status which was based on the grounds of being a member of "the group of same-sex orientated persons" ("*Gruppe der gleichgeschlechtlich orientierten Menschen*") could not be precluded under Section 28 Asylum Procedure Act. In this case refugee status was granted to a lesbian woman from Cameroon who had based her asylum claim (in 2005) on a risk of harassment and attacks from family members of her deceased (male) partner in Cameroon. Her "coming out" apparently took place later on and the court was notified in 2009 that the claimant had entered a same-sex marriage (*Lebenspartnerschaft*).[101]

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

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[99] Germany, Kalkmann, M. (2011) 'Das Projekt Fleeing Homophobia', *Asylmagazin: Zeitschrift für Flüchtlings- und Migrationsrecht*, pp. 363-365, available at:, www.asyl.net/fileadmin/user_upload/beitraege_asylmagazin/Beitraege_AM_2011/AM2011-11-363-Kalkmann.pdf (25 April 2014).

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

[101] Germany, Administrative Court (*Verwaltungsgericht*) Potsdam/11 K 397/06, 19 January 2010. A case description can be found in the German questionnaire for the study *Fleeing homophobia,* available at: www.rechten.vu.nl/nl/Images/Germany%20questionnaire_tcm22-240406.pdf (24 April 2014).

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.

On the basis of the exceptions developed by the Federal Constitutional Court the Administrative Court Schleswig in the Federal State of Schleswig-Holstein issued an interim order to stop the extradition of an Iranian asylum seeker to the Czech Republic and ordered the stay of transfer under the *Dublin II* Regulation. It applied the reasoning of the Federal Constitutional Court, which asks - in exceptional cases - for protective measures and interpretation of the German Law in the light of the right to an effective legal remedy according to Art. 19 para 4 of the Basic Law. The Iranian asylum seeker who had claimed persecution based on homosexuality was to be excluded from the asylum process because he denied to be subjected to a sexological phallometric examination. This practice which is known as 'phallometry' or 'phallometric testing' literally denotes a test of the physical reaction of asylum seekers who claim to be homosexual to heterosexual erotic material, when establishing the credibility of asylum claims based on sexual orientation. This procedure was found not to be in conformity with human rights standards.[102]

In the earlier mentioned (C.1) case of a Cameroonian citizen the courts decided that homosexuals in Cameroon may constitute a social group. The plaintiff is a Cameroonian citizen who entered Germany in November 2011. He initiated legal proceedings in April 2012 to gain recognition of his right of asylum. After partially withdrawing the action, he was successful with his application to be recognized as a refugee in June 2012. The Sigmaringen Administrative Court obligated the defendant to recognize the plaintiff as a refugee by applying section 60 (1) of the German Residence Act (*Aufenthaltsgesetz*). The Court stated that the plaintiff had argued convincingly that he is homosexual and will face imprisonment or other punishment in Cameroon because of his homosexuality. The defendant appealed in July 2012 because the plaintiff had not convinced the authority of the fact that he will be punished for his homosexuality in Cameroon. The Higher Administrative Court of Baden-Württemberg dismissed the appeal. The Court was convinced that the plaintiff is homosexual and therefore belongs to a "social group" in terms of section 60 (1) of the German Residence Act (*Aufenthaltsgesetz*) that has the right to be recognized as a refugee.[103]

[102] Administrative Court Schleswig-Holstein [*Verwaltungsgericht*], judgement of 7th. September2009.
[103] Germany, Higher Administrative Court (*Verwaltungsgerichtshof*) Baden-Wurttemberg/A 9 S 1872/12, 07 March 2013.

D. Family Reunification

German law does allow for family reunification with registered life partners. This follows from article 27 para. 2 of the Residence Law[104], which – amongst other provisions - declares articles 28 to 31 of the Residence Law to be applicable to registered life partnerships. This is a consequence of article 11 para. 1 of the Life Partnership Law[105], which states that registered life partners are to be considered as family members of their registered life partner. Reunification with unregistered (or unmarried) same sex life partners is not possible under the Residence Law.

In accordance with article 27 para. 2 of the Residence Law, the rules on reunification of families with Germans (article 28 of the Residence Law) and with foreigners (article 29 and 30 of the Residence Law) and the rule on the independent residence rights of spouses (article 31 of the Residence Law) apply to registered life partners in the very same manner they apply to marriages.[106]

Even though this principally requires a registered life partnership under German law, life partnerships and same sex marriages resulting from foreign legal systems are recognised under German law by article 17 b para. 1 of the Introduction Law to the Civil Code[107], insofar as they are comparable to the German registered life partnership. Also according to article 17 b para. 4 of the Introduction Law to the Civil Code the legal consequences of foreign life partnerships or same sex marriages are the same of a German registered life partnership but cannot extend further than the legal effects under the German Life Partnership Law. Therefore a reunification with a same sex marriage partner is legally possible. With regard to family reunification of foreign registered life partners with Germans (article 28 of the Residence Law), German language ability (pursuant to article 28 para 1 phrase 3 in connection with article 30 para. 1 of the Residence Law) and assured livelihood (according to the general preconditions set out in article 5 of the Residence Law) are preconditions for the granting of a residence permit. German language ability is required for reunification with a German national or third-country national not however for a EU citizen. No difference is made between married partners or registered life partners.

However, the latter usually does not have to be proved.

According to a decision by the Federal Administrative Court (*Bundesver-waltungsgerichtshof*) the language skills condition has to be waived if it is unreasonable to expect the third-country spouse to acquire basic German language skills, he/she is unable or was unsuccessful after one year to gain basic language skills.[108] Assured livelihood is not generally to be proven. The provision was intended *inter alia* to deny family reunification if insufficient funds were available to sustain the partner and the German national additionally holds a second nationality. The BVerwG, however, clarified that the person cannot be expected to move abroad in order to be united with his/her partner as a German national does have a right to reside in Germany

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[104] Germany, Residence Law (*Aufenthaltsgesetz*), Art. 27 available at: http://dejure.org/gesetze/AufenthG/27.html 27.02.2014 ,

[105] Germany, Life Partnership Law (*Gesetz über die Eingetragene Lebenspartnerschaft*), available at: www.gesetze-im-internet.de/lpartg/, 27.02.2014.

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

[107] Germany, Introduction Law to the Civil Code (*Einführungsgesetz zum BGB*), available at:, www.gesetze-im-internet.de/bgbeg/BJNR006049896.html#BJNR006049896BJNG032701140 (28.02.2014).

[108] Germany, Federal Administrative Court (*Bundesverwaltungsgerichtshof*, BVerwG) 10 C 12.12, 04 September 2012.

according to Art. 11 basic law (*Grundgesetz*).[109] A number of exceptions do exist regarding the language requirement, e.g. certain countries of origin, certain types of visas held by the already in Germany living person etc.[110] The EU Commission is currently examining whether German language requirements are compatible with Article 7(2) of Directive 2003/86/EC.[111]

Under article 29 of the law, reunification of a family with a foreigner residing in Germany first requires that the foreigner have a settlement permit, an EC long-term residence permit, residence permit or blue card; 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 denied when the person with whom the family is being reunited relies on social assistance for the financial support of other family members or members of the household.

The reunification of a registered life partner with a foreigner residing in Germany additionally requires the fulfilment of the conditions set out in article 30 of the Residence Law, e.g. German language ability. According to article 31 of the Residence Law, following dissolution of a life partnership, the residence permit for the conduct of the life partnership is revoked, unless the 'life partnership communion' existed for at least three 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). The Administrative Court Ansbach considered in the case of a Columbian national whether him returning to Columbia due to the dissolution of his civil partnership and the resulting termination of his residence permit would constitute a particular hardship according to Art 32 (2) Residence Law. The applicant submitted that due to his registered civil partnership and the fact that his homosexuality is now publicly known, he will be discriminated against in Columbia. The Court held that for Art. 31 (2) Residence Law to be applicable, an individual has to be discriminated against in a way that would make an independent way of life impossible. In this particular case, the court ruled, that this would not be the case for Columbia.[112]

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[109] Germany, Federal Administrative Court (*Bundesverwaltungsgerichtshof*, BVerwG) 10 C 12.12, 04 September 2012.

[110] German Residence Law (*Aufenthaltsgesetz*) Art. 28 - 30. Phone inquiry Association of binational families and partnerships, iaf e.V. (*Verband binationaler Familien und Partnerschaften*), 30 January 2014.

[111] European Commission, Letter of formal notice: Integration measures under Article 7(2) of Directive 2003/86/EC, available at: http://ec.europa.eu/eu_law/eulaw/decisions/dec_20130530.htm#de;
Taz.de (3013) 'EU Kommission gegen Deutschtests', 13 July 2013,available at: www.taz.de/!119661/ (27.2.2014)

[112] Administrative Court (*Verwaltungsgericht*, VG) Ansbach, Case no. AN 5 K 10.02211, 28 July 2011.

E. Freedom of Assembly

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

Freedom of assembly is guaranteed as a fundamental right in article 8 of the Basic Law, according to which all Germans, without the need for registration or permission, have the right to assemble peacefully and without weapons. Non-Germans can only appeal to article 2 para. 1 of the Basic Law – general freedom of action. Article 8 has a special standing and contains both a negative right against unreasonable state intervention as well as a fundamental decision of constitutional law.[113] It forms a 'fundamental element of democratic openness'[114] and guarantees 'a piece of original, unbridled direct democracy'.[115] As the Federal Constitutional Court emphasises,[116] 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.[117]

However, with the "Love Parade Decision" of 2001,[118] 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

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

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

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

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

[116] Federal Constitutional Court (*Bundesverfassungsgericht*), BVerfGE 69, 315 (344ff) (*Brokdorf Decision*)

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

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

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

An outdoor public assembly must be registered with the competent authority at least 48 hours before announcement of its conduct. Additionally, outdoor public assemblies must be registered if they cannot keep to this registration deadline (so-called urgent assemblies). Spontaneous, unplanned assemblies, which arise from a current cause are also subject to protection from article 8 of the Basic Law and do not require registration.[119]

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".[120]

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.

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

F. Hate speech and Criminal Law

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

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

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

Although the laws lack explicit mention of homophobic background, there have been individual cases that have resulted in convictions. Thus, on 9th January 2004 the Braunschweig magistrates' court sentenced a self-described itinerant preacher to three months' incarceration with a suspended sentence for incitement and defamation.[121] In public squares and pedestrian zone, the 68-year old had called for the 'nuclear eradication' of homosexuals and labelled women wearing trousers 'whores'. According to the judge's opinion, the remarks were directed against human dignity, which places limitations on the right to freedom of speech.

In another case, on 6th January 2007, the Hamburg magistrates' court fined a 52-year old 4,500 Euros for incitement.[122] The cause was a sign that the convicted man had affixed to the rear window of his car, reading: 'Stop animal testing, take the paedophiles, asylum-seekers, gays.' The judge justified his verdict and the amount of the fine with the observation that such slogans are discriminating and insulting, and additionally can threaten whole segments of the population.

By contrast, in early 2004 the prosecution office in Cologne discontinued an investigation of Cardinal Joachim Meisner on suspicion of incitement and defamation.[123] 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:

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[121] Germany, Queer.de (2004) 'Homophobic preacher sentenced' (*Homophober Prediger verurteilt*), available at: www.queer.de/news_detail.php?article_id=469, 12.02.2014).

[122] Germany, Queer. de (2007) 'Homophobic pet lover sentenced' (homophober Tierfreund verurteilt), available at: www.queer.de/news_detail.php?article_id=6214, 12.02.2014.

[123] Germany, Queer.de (2004) 'Meisner goes unpunished' (Meisner bleibt straffrei), available at: www.queer.de/news_detail.php?article_id=564 , 12.02.2014).

'Meisner spoke generally about homosexuality from the viewpoint of Catholic morals, but not about homosexuals. Therefore, there were also no remarks made against homosexual persons'.

The *Lesben- und Schwulenverband in Deutschland* [Lesbian and Gay Association in Germany] for instance initiated 27 procedures in 2008 and 15 procedures in 2009 and pressed charges under the Criminal Code against various artists who had a history of homophobic music invoking violence against gays and lesbians. These criminal complaints led to concerts being cancelled by the organisers or being supervised by police with regard to discriminating content. In cases where no conduct punishable under the Criminal Code took place the public prosecutor's office than dropped the criminal charges.[124]According to the LSVD, more recently, the organisation refrains from pressing charges in most cases in order to avoid creating even more publicity for the individuals expressing discriminatory or hateful opinions.[125] A motion submitted by the parliamentary group of the Green party in the last legalisation period demanding stricter persecution of bias-motivated crimes has not been successful.[126] (See also below F2)

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

According to article 46 para. 2 of the Criminal Code, in assessing the severity of a punishment, the court must weigh circumstances that speak in favour of and against the perpetrator. To this end, article 46 para. 2, 2nd sentence of the Criminal Code contains a summary of circumstances that are to be especially considered in the assessment. Amongst these are the motivations and goals of the crime, as well as the beliefs that emanate from the crime and the intent applied to the crime. Even though already these formulations require the courts to find motivations of contempt for humanity as aggravating circumstances in the process of assessing the severity of a punishment, this provision hardly finds application by the courts in the context of the homophobic background of a crime.[127] In 2011 and 2012, the parliamentary group *Bündnis 90/Grünen*[128], the Social Democratic Party (SPD)[129] as well as the German Federal Council *(Bundesrat)*[130] submitted a motion and draft laws to the Federal Parliament (*Bundestag*) demanding stricter persecution of bias-motivated crimes. The motion of *Bündnis 90/Grünen* requests *inter alia* to alter Article 130 Criminal Code (StGB) (incitement to hatred) to explicitly include persons who have been targeted due to their sexual identity, gender, belief, disability or age. The German Federal Council submitted a draft law on the amendment of the Penal Code. Therein, motives arising from racial hatred shall be taken into account when determining penalties. Inhuman, racist or xenophobic motivation or purposes shall be included under "particular circumstances" detailed in Article 46 (2) StGB. Racially motivated crimes should

[124] Cf.: enclosed correspondence with the *Lesben- und Schwulenverband in Deutschland* [Lesbian and Gay Association in Germany].
[125] Germany, Lesbian and Gay Association in Germany (*Lesben- und Schwulenverband in Deutschland*, LSVD) written inquiry, Email 23 January 2014.
[126] Germany, Federal Parliament (*Bundestag*), BT-Drs. 17/8796, 29 February 2012, available at: dip21.bundestag.de/dip21/btd/17/087/1708796.pdf (24 April 2014).
[127] Bundesrat, publication no. 572/07.
[128] Germany, Federal Parliament (*Bundestag*), BT-Drs. 17/8796, 29 February 2012, available at: dip21.bundestag.de/dip21/btd/17/087/1708796.pdf (25 April 2014).
[129] Germany, Federal Parliament (*Bundestag*), BT-Drs. 17/8131, 14 December 201, available at: dip21.bundestag.de/dip21/btd/17/081/1708131.pdf (24 April 2014).
[130] Germany, Federal Council (*Bundesrat*), BR-Drs.26/12, 17 January 2012, available at: dipbt.bundestag.de/extrakt/ba/WP17/416/41670.html (24 April 2014).

therefore result in higher penalties.[131] In October 2012, the German Federal Parliament rejected the draft laws as well as the motion.[132]

In order to guarantee to the person concerned the protection against becoming a victim of crimes due to sexual orientation as anchored in existing provisions on sentencing of the Criminal Code, the governments of the *Laender* Brandenburg and of Saxony-Anhalt sent a draft amendment to the criminal code to the Second Chamber of Parliament [*Bundesrat*] on 14th August 2007.[133] 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 of the appropriate sentence. The draft law was elaborated upon and in the final version the proposed criteria were reduced to motivations of contempt for humanity, racism and xenophobia. By contrast sexual orientation was amongst others discarded from the draft as a relevant criterion.[134].

[131] Germany, Federal Parliament (*Bundestag*) (2012) BT.-Drs 17/9345, 18 April 2012, available at: dip21.bundestag.de/dip21/btd/17/093/1709345.pdf (24 April 2014).
[132] Germany, Federal Parliament (*Bundestag*) (2012), BT-PlPr.17/189, p. 23955, 18 October 2012, available at: dip21.bundestag.de/dip21/btp/17/17198.pdf (24 April 2014).
[133] Bundesrat, publication no. 572/07.
[134] Germany, Federal Parliament (*Bundestag*)(2007), BT-Drs. 572/07 , available at: http://dipbt.bundestag.de/dip21/brd/2007/0572-07.pdf, p. 9; http://www.bundesrat.de/cln_090/SharedDocs/Drucksachen/2008/0401-500/458-08,templateId=raw,property=publicationFile.pdf/458-08.pdf, p. 1, 12.02.2014.

G. Transgender issues

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

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

It can be concluded from the explanatory notes of the General Law on Equal Treatment that transsexuals should be treated in the same way as homosexuals.[135]

G.2. Freedom of Movement

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

G.3. Asylum and Subsidiary Protection

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

One example for case law was identified: in 2010, in the case of a transsexual male-to-female person, the Administrative Court of Sigmaringen (A 7 K 987/09) denied refugee status but decided on a prohibition of deportation for medical reasons. This bared the authorities from deporting the woman to Kosovo because of a lasting need of medical treatment which could not be provided in Kosovo (hormonal treatment following surgery for breast enlargement).[136]

G.4. Family Reunification

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

G.5. Freedom of Assembly

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

G.6. Criminal Law

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

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[135] Bundestag, publication no. 16/1780, p. 31.

[136] The Netherlands, Questionaire for Vrije Universiteit Amsterdam (2011), *Fleeing Homophobia, Asylum Claims Related to Sexual Orientation and Gender Identity in Europe*, available at: www.rechten.vu.nl/nl/onderzoek/conferenties-en-projecten/onderzoeksproject-fleeing-homophobia/national-questionnaire/index.asp, 27.02.2014.

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

Transsexuality does not influence the familial status. It only impacts on the sexual status. The causal connection, therefore, is rather the reverse. The familial status or its change can preclude the change of sex. In order to take account of the special situation of transsexuals, the law of 10th September 1980 on the changing of given names and the determination of sexual identity in special cases[137] followed the seminal decision of the Federal Constitutional Court of 1978.[138] 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).

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,[139] it based the correction of entering the male gender of a transsexual in the birth register on article 2 para. 1 of the Basic Law (general freedom of action), considered together with article 1 para. 1 of the Basic Law (human dignity). It was only after this fundamental decision of the Federal Constitutional Court that the parliament passed the Law on Changing Given Names and the Determination of Sex Identity in Special Cases [*Gesetz über die Änderung der Vornamen und die Feststellung der Geschlechtszugehörigkeit in besonderen Fällen*].

In later years, the Federal Constitutional Court took up the Law on Transsexuals now seven decisions and declared important provisions to be unconstitutional. In 1982[140] and 1993[141] it objected to the age requirement of 25 for changing civil status and given names. In 2005[142] it decided that the provision according to which same-sex transsexuals also lose their changed given names if they marry although they cannot enter into a life partnership, is inoperative pending a new legal regulation. Finally, in 2006[143] it gave legislators a deadline until 30th June 2007 to create a new regulation in place of the prohibition on changing a given name and civil status for foreign transsexuals who legally and not just temporarily reside in Germany, provided that the law of their homeland does not have comparable regulations. This requirement was complied with when the Federal Parliament adopted a law changing the Law on Transsexuals

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[137] BGBl I, p. 1654.
[138] Federal Constitutional Court, BVerfGE, 286.
[139] Germany, Federal Constitutional Court (*Bundesverfassungsgericht*) 1 BvR 16/72 11.October 1978.
[140] Germany, Federal Constitutional Court (Bundesverfassungsgericht), 1 BvR 938/81, 16 March 1982..
[141] Germany, Federal Constitutional Court (*Bundesverfassungsgericht*), 1 BvL 38/92; 1 BvL 40/92; 1 BvL 43/92. 26 January1993
[142] Germany, Federal Constitutional Court (*Bundesverfassungsgericht*), 1 BvL 3 /03, 6 December 2005; *Zeitschrift für das gesamte Familienrecht* (2006), p. 182, 6.12.2005.
[143] Germany, Federal Constitutional Court (*Bundesverfassungsgericht*), 1 BvL 1,12/04, 18 July 2007, available at: www.bundesverfassungsgericht.de/entscheidungen/ls20060718_1bvl000104.html (26.02.2014); *Zeitschrift für das gesamte Familienrecht* (2006), p. 1818;

in that respect. 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.[144]

In a more recent decision the Federal Constitutional Court held that a married transsexual who wanted to legally change his gender after a surgical change of his sex from male to female but remain married to his wife cannot be forced to divorce in order to have his sex change legally recognised. According to article 8 para 1 nr. 2 of the Law on Transsexuals not being married is a prerequisite for the legal determination and recognition of the gender change. The Federal Constitutional Court concluded that the relevant provision is unconstitutional since it is not just and reasonable to demand a divorce when both partners want to remain legally bound to one another. Therefore the legislature was under the duty to adjust the pertinent provision in light of the decision in order to enable transsexuals to remain in a legally secure partnership while at the same time obtaining legal recognition of the gender change. This is due to the impact of the constitutionally guaranteed right to recognition of the freely chosen and self-determined gender identity which needs to be appropriately balanced with the constitutional guarantee of marriage as an institution as enshrined in Article 6 para 1 of the Basic Law.[145] The decision has led to a change of the Law on Transsexuals by the Federal Parliament, which eliminated the rule in question from the law.[146] This development, ending forced divorce for married couples in which one of the partners is transgender, was explicitly welcomed by the Council of Europe Commissioner for Human rights in an issue paper titled "Human Rights and Gender Identity".[147]

Both changes to the Law on Transsexuals were criticised by civil society organisations which had put forward a coordinated proposal of changes that they consider as appropriate in 2009[148] and again in 2012 (more details below).[149] The criticism is based in the circumstance that the reforms exclusively complied with the specific requirements set forth by the Federal Constitutional Court and did not seize the opportunity for a broader adjustment to changed societal perceptions and scientific findings as well as human rights standards and practical demands. In 2011, the Constitutional Court reached the decision that further provisions of the Laws on Transsexuals are unconstitutional. This decision referred to the prerequisites for the determination of gender identity.[150] (For more details see below)

The previous Federal Government coalition of the Christian Democratic Union and the Free Democratic Party considered comprehensive changes to the Law on Transsexuals as necessary and had explicitly included the subject matter in its coalition treaty.[151]. However, the legislative period of the government has ended in October 2013 without changes to the Law on

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[144] Germany, Federal Constitutional Court (*Bundesverfassungsgericht*), ,2 BvR 1833/95, 15 August 1996; *Neue Juristische Wochenschrift (NJW)* (1997), p. 1632.

[145] Germany, Federal Constitutional Court (*Bundesverfassungsgericht*) (2008), BVerfG 1 BvL 10/05, 27 May 2008; , available at: www.bundesverfassungsgericht.de/entscheidungen/ls20080527_1bvl001005.html, 26.02.2010.

[146] Germany, Bundesanzeiger Verlag, Bundesgesetzblatt, BGBl. I, p. 1978, Nr. 43, Article 5 (22nd July 2009); http://www2.bgbl.de/Xaver/start.xav?startbk=Bundesanzeiger_BGBl (26.02.2010).

[147] Council of Europe (COE), para 3.2.2: https://wcd.coe.int/ViewDoc.jsp?id=1476365, 08.04.2010.

[148]Germany, Transgender Netzwerk Berlin (TGNB)/ TransInterQueer e.V. (TrIQ) (2009), available at: www.abqueer.de/fileadmin/dateien/Eckpunkte_TSG_April_09.pdf ; , 12.02.2014.

[149] Germany, German nationwide working group on reforming the TSG (*Bundesweiter Arbeitskreis TSG Reform*) (2012), 'Forderungspapier zur Reform des Transsexuellenrechts', available at: www.tsgreform.de/wp-content/uploads/2012/06/Forderungspapier_AK-TSG-Reform_1.6.201211.pdf , 12.02.2014.

[150] Federal Constitutional Court (*Bundesverfassungsgericht*, BVerfG, order of 11 January 2011, 1 BvR 3295/07.

[151] Germany, Christian Democratic Union /Liberal Party (*Christlich Demokratische Union (CDU) / Freie Demokratische Partei (FDP)*) (2009), Coalition Agreement, p.108, available at: www.fdp-bundespartei.de/files/363/091024-koalitionsvertrag-cducsu-fdp.pdf, 12.02.2014).

Transsexuals having been implemented or draft laws being debated. The current government coalition of the Christian Democratic Union and the Social Democratic Party has included a short section on the issue of trans* persons in their coalition agreement and explicitly condemns homophobia and transphobia and announces to take actions, yet without specifying these. The coalition plans on expanding the existing national action plan against racism, racial discrimination, xenophobia, anti-Semitism and related intolerance in order to include homophobia and transphobia. Contrary to the previous coalition agreement, the agreement does not mention legislatives steps in order to bring the Law of Transsexual in line with the jurisprudence of the Constitutional Court.[152]

As mentioned above, when entering into force, the law included a minimum age of 25 for changing a given name as well as the legal recognition of a change of gender identity. After only one year the Federal Constitutional Court declared the age limit regarding the so-called 'big solution' according to Article 8 (1) (1) TSG in the existing form unconstitutional (see first paragraph). The legislator consequentially did not set a minimum age for gender reassignment surgery. Years later, the minimum age of 25 for the 'small solution' according to Article 1 (1) (3) TSG was also ruled unconstitutional.[153] If a person under 18 years files an application for the change of name or gender identity, the legal representative of the minor has to give his/her consent.[154] So in addition to the prerequisites listed above, under-aged persons also need the consent of their legal representatives.

G.8. Changing a Given Name

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

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

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

In accordance with the jurisprudence of the Federal Constitutional Court, already after the change of name, the person is to be addressed in accordance with his/her newly understood identity. Further, under article 5 of the Law on Transsexuals, given names used at the time of the change must not be made public without his/her agreement. Finally, with the change in

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[152]Germany, Christian Democratic Union /Social Democratic Party (*Christlich Demokratische Union (CDU) / Soziale Demokratische Partei (SPD)) (2013*) 'Coalition Agreement', p. 105, available at: www.cdu.de/sites/default/files/media/dokumente/koalitionsvertrag.pdf (12.02.2014).

[153] Germany, Wielpütz, S. (2011) *Über das Recht, ein anderer zu werden und zu sein*, Baden-Baden, Nomos, 52-54.

[154] Germany, German association of transidentity and intersexuality (*German association of transidentity and intersexuality (Deutsche Gesellschaft für Transidentität und Intersexualität)*), Answer to a written inquiry by the German Institute for Human Rights, Berlin, 26 April 2014.

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 employers[155] as well as government institutions.

In accordance with article 7 of the Law on Transsexuals, however, the change in given name becomes ineffective if the person in question gives birth to a child or marries. In 2005, the Federal Constitutional Court ruled the provision in Article 7 (1)(3), determining that a person will lose his or her adopted name when entering a marriage unconstitutional for as long as it was denied to homosexual transsexuals without sex change to enter a civil partnership.[156] In a more recent case in 2011, the Constitutional Court handed down a ruling concerning this issue (see below).

G.9. Determination of Gender Identity

In 2011, the Federal Constitutional Court ruled parts of the provisions relating to the determination of gender identity of the Law on Transsexuals (Articles 8-12 of the Law on Transsexuals) incompatible with German basic law. The complainant was born with male genitals but perceived herself a woman with female homosexual orientation. In accordance with Article 1 Act of Transsexuals (*Transsexuellengesetz*, TSG) (so-called small solution) she had changed her male name into a female name. With her partner she applied for the registration of a civil partnership, which was refused by the registrar on the grounds that civil partnership was exclusively for two parties of the same gender. The only two options were to enter into a marriage, which the complainant rejected or undergo sex change surgery for statutory recognition of the new gender identity. The Court ruled that the requirements of gender identification determination are incompatible with the German basic law (*Grundgesetz*).

Previous to the decision prerequisites for statutory recognition of the new gender of a person were permanent infertility (Article 8 (1)(3) TSG) and sex change surgery (Article 8 (1)(4) TSG).The Constitutional Court ruled that the prerequisites of the recognition of transsexuals under the law of civil status for entering into a civil partnership as set out under Article 8 (1)(3) and (4) TSG are not compatible with the right to sexual self-determination pursuant to Article 2 (1) in conjunction with Article 1 (1) of the Basic Law (*Grundgesetz*, GG) and with the right to physical integrity under to Article 2 (2) GG. The provisions were declared inapplicable until a new legislation has entered into force".[157]
In a subsequent ruling the Court clarified that the fact that the provisions are inapplicable must not lead to a situation in which the determination of gender identity process is deferred until new legislation is passed.[158]

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.

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[155] Federal Constitutional Court, decision of 15th August 1996, case no.: 2 BvR 1833/95; *Neue Juristische Wochenschrift (NJW)* (1997), p. 1632.
[156] Germany, Federal Constitutional Court (*Bundesverfassungsgericht*, BVerfG), 1 BvL 3/03, 6 December 2005, available at: www.bverfg.de/entscheidungen/ls20051206_1bvl000303.html (26 April 2014).
[157] Germany, Federal Constitutional Court (*Bundesverfassungsgericht*, BVerfG) 1 BvR 3295/07, 11 January 2011, press release: www.bundesverfassungsgericht.de/pressemitteilungen/bvg11-007en.html (12.02.2014).
[158] Germany, Federal Constitutional Court (*Bundesverfassungsgericht*, BVerfG), 1 BvR 2027/11, 27 October 2011 available at: www.bundesverfassungsgericht.de/entscheidungen/rk20111027_1bvr202711.html (12.02.2014).

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.

In its most recent report on Germany the European Commission against Racism and Intolerance (ECRI) the commission recommends that Germany shall introduce a right of transsexuals to change their gender marker in documents such as educational diplomas and employment certificates.[159] The lack of the right to do so was also identified as a major problem by a study conducted by the Federal Anti-discrimination Agency (see I.3).

G.10. Costs

Provided that appropriate expert reports show that the person affected suffers a psychological strain due to his/her transsexuality that can only be remedied or alleviated by a sex-change operation and not through psychotherapeutic measures, the health insurance companies must pay the costs of the sex-change treatment and operation.[160]

G.11. Legal Shortcomings

The Constitutional Court has demanded of the legislator to reform the Law on transsexuals. While some sections are currently inapplicable a fundamental reform of the law is necessary. For example, 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. Those who choose the big solution can either marry or enter a same-sex life partnership. Legal adjustment of the gender identity is possible if the transsexual already lives in a registered life partnership. After the aforementioned decision of the Federal Constitutional Court and the respective change in the Law on Transsexuals a divorce is now unnecessary.

Generally, the TSG is particularly critised for it intertwines medicine and law and requires a medical diagnosis of transsexuality.[161] In September 2011, a working group came together with more than 30 organisations and individuals throughout Germany participating. The task of the working group was to draft a list of demands to reform the law of transsexuals. The list was published in 2012 and recommends *inter alia* to abolish the obligation for two expert opinion attest a person's transsexuality as prerequisite for a change of name or gender identity, as currently provided for under Article 4 (3) TSG. Additionally the group recommends to integrate the TSG into other legal frameworks in order to avoid further stigmatisation through special laws. For the change of name, this could be done by a change of Article 11 of the Law on the change of family and first names (*Gesetz über die Änderung von Familien- und Vornamen*,

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[159] Council of Europe, European Commission against Racism and Intolerance (ECRI) (2014), Report on Germany, p. 33, available at: www.coe.int/t/dghl/monitoring/ecri/Country-by-country/Germany/DEU-CbC-V-2014-002-ENG.pdf, Straßburg, 25 February 2014

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

[161] Germany, Federal Anti Discrimination Agency (*Anti-Diskriminierungsstelle des Bundes*, ADS) (2010) Disrimination of trans* persons in the working life (*Benachteiligung von Trans* Personen im Arbeitsleben*), p.16, available at: www.antidiskriminierungsstelle.de/SharedDocs/Downloads/DE/publikationen/benachteiligung_von_trans_personen_insbesondere_im_arbeitsleben.pdf?__blob=publicationFile (12.02.2014).

NamÄndG) allowing the authority of civil status register the change of name through an administrative act, rather than having a court decide. Regarding the statutory recognition of gender identity, the Constitutional Court has ruled unconstitutional most prerequisites with the consequence that the factual conditions are equal to those of a mere name change. The process should therefore also be an administrative act rather than a court decision. Furthermore, the recommendations suggest tightening the prohibition of disclosure of the former identity of transsexual persons.[162] The Federal Anti-Discrimination Agency welcomed and supported the recommendations.[163] Generally speaking, there is a trend towards granting more rights to trans* persons, however the driving force on a legal level is the Constitutional Court, while the legislator has still not transposed the Courts rulings. The number of persons changing their name or have a different gender registers has been increasing over the last decade; the statistics, however 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 and do not allow analysing a the proceedings individually.

[162] Germany, German nationwide working group on reforming the TSG (*Bundesweiter Arbeitskreis TSG-Reform*) (2012) 'Forderungspapier zur Reform des Transsexuellenrechts', available at: www.tsgreform.de/wp-content/uploads/2012/06/Forderungspapier_AK-TSG-Reform_1.6.201211.pdf (12.02.2014).

[163] Germany, Federal Anti-Discrimination Agency, (*Anti-Diskriminierungsstelle des Bundes*, ADS) (2012) press release 24 September 2012, available at: www.antidiskriminierungsstelle.de/SharedDocs/Aktuelles/DE/2012/20120924_Trans_Intergeschlecht.html (20.02.2014).

H. Intersexuality

H.1. Non-Discrimination Legislation

Intersexuality is a relatively new topic in the German human rights discourse. According to scientific studies, there are between 150 and 340 children born each year who can be classified as intersexual.[164]The government estimates, the total number of people affected by severe variance in sex development to be around 8,000-10,000[165], non-governmental inter* associations, however, assume much higher numbers.[166]
In 2009 and 2011, the issue of inter* persons in Germany was taken up by UN bodies in their concluding recommendations. The Committee on the Elimination of Discrimination against Women (CEDAW) criticised the government for failing to engage in a dialogue with non-governmental organizations of intersexual and transsexual people and recommended doing so as well as bringing on the way measures to improve the human rights protection of those concerned.[167] In its concluding observations the Committee against Torture voiced concern regarding surgeries on reproductive organs that have been performed without effective, informed consent of the concerned individuals or their legal guardians, where neither investigation, nor measures of redress have been introduced.[168]
As a consequence of the CEDAW recommendations, in December 2010, the Federal Government commissioned the German Ethics Council (*Ethikrat*) to continue and expand the already on-going dialogue with intersexual persons and their organisations and to develop an opinion.

In February 2012, the Ethics Council presented its opinion on the situation of intersex persons in Germany.[169] Central recommendation of the Ethics Council refer to medical treatment as well as the legal framework and include *inter alia*: Decisions on surgery on the sex organs of individuals with DSD (differences of sex development) should always be taken only by the individual concerned. In the case of a minor, such measures should be adopted only after exhaustive considerations of all consequences or in doubtful situation wait for the young person to reach decision-making ability. Medical diagnosis and treatment of persons with DSD should be restricted to specialized interdisciplinary centres.
The Council further recommended the creating of a fund for those, who have suffered damages by medical treatment, to install an ombudsman and to provide financial funding for organisations of concerned persons. Regarding the Law on Registers of Birth, Death and Marriage (*Personen-standsrechtsgesetz*) it is recommended to provide the possibility to register not only as "female" or "male" but also as "other" and to allow persons registered as "other" to enter a relationship recognised by the state. The opinion paper, which was commissioned by the government, is based on multi-stage dialogue procedure. The process included interviews, a public hearing and an online discourse with intersex persons, self-help organisations and experts, which had its start with a public event in 2010.

In Germany, intersex persons are not explicitly included in German non-discrimination legislation; however, the phenomenon was noted during drafting. The explanatory note of the

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[164] Germany, Federal Parliament (*Bundestag*), BT-Drs. 17/12859, 20 March 2013, available at: dip21.bundestag.de/dip21/btd/17/128/1712859.pdf (26 April 2014).
[165] Bundestag, publication no. 16/4786, p. 3.
[166] Federal Parliament (*Bundestag*), BT-Drs. 17/12859, 20 March 2013, available at: dip21.bundestag.de/dip21/btd/17/128/1712859.pdf (26 April 2014).
[167] United Nations, Committee on the Elimination of Discrimination against Women, CEDAW/C/DEU/CO/6, 10 February 2009.
[168] United Nations, Committee against Torture, CAT/C/DEU/CO/5, 12 December 2011.
[169] Germany, German Ethics Council (*Deutscher Ethikrat*) (2012) 'Intersexualität', Berlin, Pinguin Druck.

General Law on Equal Treatment (*Allgemeines Gleichbehandlungsgesetz*) explicitly mentions intersexual people. While the explanatory note subsumed intersexuality under the discrimination ground of sexual identity[170], the dominant view today is that it is covered by the characteristic 'sex'.[171] So far, no court decisions have been based on this.
The Federal Anti-Discrimination Agency explicitly refers to intersexual persons and demands more focus to be put on their rights and rights violations.[172] Generally speaking, intersexual persons are included in non-discrimination measures and policies against discrimination on grounds of gender but no policies specifically designed for intersex persons could be identified during research.
In November 2013, Transgender Europe (TGEU) and ILGA-Europe* have jointly organised the Legal Gender Recognition Roundtable, which was hosted by the Federal Anti-Discrimination Agency in Germany. 30 experts from various European countries discussed the civil status law situation of trans* and intersex people.[173]

On 31 January 2013, the German Bundestag passed the Act Amending the Law on Registers of Birth, Death and Marriage (*Personenstands-rechtsänderungsgesetz*)[174]; it entered into force in November 2013. Among other changes, the Act provides that the gender marker field in the register of births shall be left blank if the sex of a child cannot be ascertained unambiguously. The amended Article 22 (3) Law on Registers of Birth, Death and Marriage (*Personenstandsgesetz*) therefore does not implement the recommendations of the Ethics Council and inter* organisations, who have demanded to create a third option. While the amendment has been welcomed by many, as it indicates a shift away from the binary of male/female, it has been criticised for a number of reasons: It does not provide parents with an option, but it is a legal obligation to leave the gender marker field blank. The law does not specify who will make the decision and organisations voice concern that medical staff may continue to put pressure on parents to agree to surgeries on reproductive organs.[175] Furthermore, the law leaves many questions open, such as, whether children have to decide for one or the other category at some point and whether this can be changed later on.[176] Additionally, it is unclear whether is it possible to enter a partnership or marriage without deciding for one category or how to issue a passport.

The Federal Constitutional Court decided with regard to transsexuals that the fundamental right to the free development of personality protects psychological gender identity.[177] According to the opinion of some legal scholars, this right must also be granted to intersexuals, thus recognising their psychological identity even if that simultaneously places the construed medical

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[170] Germany, Federal Parliament (Bundestag), BT-Drs. 16/1780, 8 June 2006, p.31, available at: dip21.bundestag.de/dip21/btd/16/017/1601780.pdf (26 April 2014).
[171] Germany, German Ethics Council (*Deutscher Ethikrat*) (2012) 'Intersexualität', Berlin, Pinguin Druck, p. 133.
[172] Germany, Federal Anti-Discrimination Agency (*Anti-Diskriminierungsstelle des Bundes*) www.antidiskriminierungsstelle.de/DE/ThemenUndForschung/Geschlecht/Geschlecht_node.html (21.02.2014).
[173] Germany, Federal Anti-Discrimination Agency (*Anti-Diskriminierungsstelle des Bundes*) www.antidiskriminierungsstelle.de/SharedDocs/Aktuelles/EN/2013/European_Round_Table.html?nn=4194106 (21.02.2014).
[174] Germany, Federal Parliament (*Bundestag*), Act Amending the Law on Registers of Birth, Death and Marriage (*Personenstands-rechtsänderungsgesetz*) 07 May 2013, BGBl. I 2013 Nr. 23, available at: www.buzer.de/gesetz/10637/index.htm (20.02.2014).
[175] Germany, Blog website ´Zwischengeschlecht.info´ (2013) 'Bundestag 31.1.13: Staatliches Zwangsouting für "Intersex-Kinder"`', available at: http://blog.zwischengeschlecht.info/post/2013/01/31/Deutschland-staatliches-Zwangsouting-Intersex (21.02.2014).
[176] Germany, Federal Association Intersex People (*Intersex Menschen e.V. Bundesverband*) (2013) 'Änderung des Personenstandsgesetzes 01.11.2013', available at: www.intersexuelle-menschen.net/aktivitaeten/2013_11_01_personenstandgesetz_intersex.php (21.02.2014).
[177] Federal Constitutional Court BVerfGE 49, 286.

and legal categorisation in question.[178] 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.[179]

H.2. Surgical and Medical Interventions

In Germany, surgical and medical interventions were, and still are, performed on intersex children who cannot be assigned clearly to one sex. Due to massive criticism from persons concerned and the increasing knowledge about long-term consequences, the medical profession are currently reconsidering and a broader debate occurring.[180]
Under German law, generally surgery constitutes the offence of bodily harm even if medically indicated, if performed without consent. This can be concluded from the right to self-determination which is anchored in the German basic law Article 2 (2) (1), physical integrity and general personal rights (Article 2 (2) in conjunction with Article 1(1). Consent is only valid if the person is in a position to understand the nature of the operation, the consequences of performing the surgery or refraining from it and its necessity. Prerequisite is decision-making ability. There is no legal age limit for decision-making ability of minors; it is often assumed at the age of 14 to 16.[181] The Federal Court of Justice (*Bundesgerichtshof*) confirmed in a case involving a 15 years old girl, a child's right to oppose a serious medical intervention, if this can be postponed without endangering the child.[182] While this judgement was handed down in a different context, it did apply to serious medical intervention, insufficient information and lack of consent of the minor. Surgical and medical sex assignment interventions on intersex children unable of decision-making need to be consented by the parents entitled to custody. This is provided by the German Civil Code (*Bürgerliches Gesetzbuch*, BGB) Articles 1626, 1627 and 1629.[183] This right to make decision on behalf of the child is limited by the best interest of the child. Further limitations can be found for example in the provision in Article 1631c BGB, which prohibits parents to consent to the sterilisation of their child[184] or the Article 1666 BGB, which provides that family courts can intervene if they gain knowledge of physical or psychological harm to the child.

Generally, medically indicated measures are understood as being in the best interest of the child. Sex assignment surgeries aim at adjusting the body of the intersex child to a gender norm. Traditionally, this has been argued to be in the best interest of the child as it was seen as a chance for a better psychosexual and psychosocial development of the child. More recent studies as well as statements and the work of inter* persons and associations have casted doubts on these assumptions. According to the study of the Ethics Council, the prevailing opinion these days is that parents cannot agree to sex assignment surgery which leads to infertility unless it is medically necessary. The parents' right to make medical decisions on behalf of their child is

[178] See Tolmein (2002), *Zeitschrift für das gesamte Familienrecht*, pp. 957 ff.
[179] Bundestag, publication no. 16/4322, p. 5.
[180] Germany, Federal Parliament (*Bundestag*), 24 November 2011, BT-Drs. 17/143, availabble at: dipbt.bundestag.de/dip21/btp/17/17143.pdf (26 April 2014).
[181] Germany, German Ethics Council (*Deutscher Ethikrat*) (2012) 'Intersexualität', Berlin, Pinguin Druck, p. 146 ff.
[182] Germany, Federal Court of Justice (*Bundesgerichtshof*) VI ZR 74/05, 10 October 2006.
[183] Germany, German Civil Code (*Bürgerliches Gesetzbuch*, BGB) Articles 1626 ff, available at: http://dejure.org/gesetze/BGB/1626.html (21.02.2014).
[184] Germany, German Civil Code (*Bürgerliches Gesetzbuch*, BGB) Articles 1631c, available at: http://dejure.org/gesetze/BGB/1631c.html (21.02.2014).

opposed by the child's right to physical integrity (Article 2(2)(1) GG) and the right to sexual self-determination and reproduction (Article 2 (1) in conjunction with Article 1(1) GG).[185]
Only very few court decisions have been made on this issue. On 6th February 2008, the Cologne Regional Court[186] 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. In a subsequent court decision, the amount of damaged was determined to be 100,000€ plus interest in this particular case.[187]

The recommendations of the Ethics Council were welcomed by the Conference of the Ministers of Health (*Gesundheitsministerkonferenz*) in 2012 and a thorough examination regarding their feasibility was decided. The results of this examination have not been published so far.[188]
In 2012, the parliamentary group of the Alliance 90/ the Green Party submitted a minor interpellation inquiring how the recommendations of the Ethics Council in the medical field have been transposed. The overall tenor of the answer by the government was that the examination of the recommendation is not concluded yet and that many medical issues fall within the realm of the states.[189]
The medical procedure and quality standards currently applicable have been drawn up by the Association for paediatrics and Youth Medicine (*Deutsche Gesellschaft für Kinder- und Jugendmedizin e.V.*); the guidelines to sexual development disorder (*Störungen der Geschlechtsentwicklung*). These guidelines are currently being updated and the revised version is planned for the end of the year 2014.[190] The guidelines recommend involving a multidisciplinary team in the diagnosis as well as in designing the therapy. The guidelines name a number of specialists, who should be involved in advising the parents and clarifies that surgery may only carried out by specialist who have sufficient expertise and regularly carry out these operations. Regarding rehabilitation, the guidelines suggest, that contact to intersexual person's organisations should be facilitated. The current guidelines, however, are not binding and have been criticised by NGOs, *inter alia*, for not considering ethical and human rights aspect sufficiently.[191]

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[185] Germany, German Ethics Council (*Deutscher Ethikrat*) (2012) 'Intersexualität', Berlin, Pinguin Druck, 154-155.p.
[186] Germany, District Court (*Landgericht*) Köln, case no.: 25 O 179/07, 06 February 2008.
[187] Germany, District Court (*Landgericht*) Köln, case no.: 25 O 179/07, 12 August 2009.
[188] Germany, 85th Conference of the Ministers of Health (*Gesundheitsministerkonferenz*) (2012), Beschluss TOP 6.13, 28 June 2012, available at: www.gmkonline.de/Beschluesse.html?id=85_06.13&jahr=2012 (14.02.2014).
[189] Germany, Federal Government (*Bundesregierung*) BT-Drs. 17/11855, 12 December 2012, available at:.dipbt.bundestag.de/doc/btd/17/118/1711855.pdf (26 April 2014).
[190] Germany, Association for paediatrics and Youth Medicine (*Deutsche Gesellschaft für Kinder- und Jugendmedizin e.V.*) (2010), 'Leitlinien- Störungen der Geschlechtsentwicklung', available at: www.awmf.org/leitlinien/detail/ll/027-022.html, 1 January 2010.
[191] Germany, Blog website ´Zwischengeschlecht.info´ (2011) 'Offener Brief von Zwischengeschlecht.org zur DGE 2011', 1 April 2011, available at: http://blog.zwischengeschlecht.info/pages/Offener-Brief-Zwischengeschlecht-zur-DGE-2011 (21.02.2014).

I. Miscellaneous

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

The previous opposition in the Federal Parliament, namely the Social Democratic Party, the Green Party and the Left Party proposed an amendment of the Basic Law and have each introduced a draft law calling for an explicit inclusion of the criterion of "sexual identity" among the enumeration of forbidden discrimination grounds listed in Article 3 of the Basic Law.[192] In 2011, the parliament voted against the inclusion of the criteria sexual identity as one ground of discrimination in the non-discrimination clause in Article 3 *GG*. According to the ruling coalition there was no need for a change to the constitution since discriminations on grounds of sexual identity are covered by the general principle of equality.[193] A similar legislative motion had been previously put forward in the Council of Federal States [*Bundesrat*] by the governments of the Federal States of Berlin, Bremen and Hamburg[194] but was rejected by the political majority.[195] The non-discrimination clause in Article 3 para. 3 of the Basic Law as of now explicitly includes: sex, parentage, race, language, origin and descent, faith, or religious or political opinions and disability.

I.2. Same-Sex Life Partnership Law

In order to take account of evolving social reality, in 2001 the very controversial Life Partnership Law was passed as a milestone for gay and lesbian equality. It took effect on 1st August 2001. It creates a separate institution for same-sex couples in family law and for the first time offers them the possibility of legal security. Amongst other things, the law provides for regulations in maintenance, tenancy, inheritance, social security, and aliens' law. In its judgement of 17th July 2002,[196] 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.

Today, very few areas of life in which equality has not been achieved remain; many important legal aspects of the same-sex life partnerships have been equalised by the legislature and the

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[192] BT-Drs 17/88 of 27th November 2009:
http://dip21.bundestag.de/dip21/btd/17/000/1700088.pdf;
BT-Drs 17/254 of 15th December 2009:
http://dip21.bundestag.de/dip21/btd/17/002/1700254.pdf;
BT-Drs 17/254 of 20th January 2010:
http://dip21.bundestag.de/dip21/btd/17/004/1700472.pdf (12.02.2014).

[193] Germany, Federal Parliament (*Bundestag*) BT- Plenarprotokoll 17/117, 30 June 2011, pp. 13515 and 1364 ff, available at: dipbt.bundestag.de/dip21/btp/17/17117.pdf (26 April 2014).

[194] Germany, Federal Council (*Bundesrat*) BR-Drs. 741/09, 29 September 2009, available at: www.artikeldrei.de/dokumente/Bundesrat%200741_09.pdf (26 April 2014).

[195] Germany, Federal Council (*Bundesrat*) (2009), BR- Plenarprotokoll 864, p. 426D., Berlin, 27 November 2009.

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

judiciary. In 2009 the relevant inheritance and income tax law was changed insofar that same-sex life partners are now on an equal footing with married couples concerning the tax exemption amounts. Since July 2013, the rate of taxation on income is no longer depended on whether one lives in a civil partnership or marriage. Also federal laws created a unified competence for the establishment of life partnerships with the civil registry offices, which since 2012 is implemented in all states.[197] Only Bavaria allows for the civil partnership to be registered alternatively with the civil registry offices or a notary.[198] The Federal Constitutional Court (*Bundesverfassungsgericht*) has played a decisive role in strengthening the rights of persons in civil partnerships beyond the Life Partnership Law. The Court has declared different treatment of marriage and civil partnerships unconstitutional on several occasions to the effect that civil partnerships are now equal before the law in most aspects other than the adoption law.[199]

The pertinent legal provisions for civil service employees have been equalised progressively on the federal level and in the jurisdictions of the Federal States.[200] This development is also apparent in a rage of decisions of the Federal Constitutional Court e.g. on the unequal treatment of marriage and same-sex life partnerships regarding pensions for surviving dependents of public employees in the civil service field[201], unequal treatment of marriage and same-sex life partnerships regarding gift and inheritance and tax,[202] family allowance[203] or income splitting for spouses.[204]

An impact study on the subject of same-sex life partnerships was conducted under the auspices of the Scientific Service of the Federal Parliament [*Wissenschaftlicher Dienst des Deutschen Bundestag*], which deals with the legal implications of the decision of the Federal Constitutional Court concerning same-sex life partners dependants' pensions in the civil service field.[205] The study concludes that the landmark decision immediately affects nearly all legal fields relevant to life partnerships except adoption law and is binding upon all state bodies. Another study of the Scientific Service of the Federal Parliament deals with same sex life partners' right to regular adoption. The author argues that the denial of same sex life partners' right to regular joint adoption of a child which is not the biological child of one of the partners cannot be upheld in

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[197] Personenstandsgesetz, article 1 : http://bundesrecht.juris.de/pstg/; Personenstandsverordnung, article 1: http://bundesrecht.juris.de/pstv/; Gesetz über die eingetragene Lebenspartnerschaft, article 1: http://bundesrecht.juris.de/lpartg/ (13.02.2014).

[198] Germany, Lesbian and Gay Association of Germany, (*Lesben- und Schwulenverband in Deutschland*, LSVD), 'Stand der Gleichstellung', available at: www.lsvd.de/recht/lebenspartnerschaft/stand-der-gleichstellung.html (12 February 2013).

[199] Germany, Lesbian and Gay Association of Germany (Lesben- und Schwulenverband in Deutschland, LSVD), ´Stand der Gleichstellung´, available at: www.lsvd.de/recht/lebenspartnerschaft/stand-der-gleichstellung.html (13.12.2013).

[200] Germany, Lesbian and Gay Association of Germany (Lesben- und Schwulenverband in Deutschland, LSVD), ´Stand der Gleichstellung von verpartnerten Beamten mit ihren verheirateten Kollegen, available at: http://www.lsvd.de/194.0.html#c1372;
´Die Rechtsprechung des Bundesverwaltungsgerichts´, available at: http://www.lsvd.de/194.0.html#c4760 (12.02.2014).

[201] Germany, Federal Constitutional Court (*Bundesverfassungsgericht*), 1 BvR 1164/07, 07 July 2009, available at: /www.bundesverfassungsgericht.de/pressemitteilungen/bvg09-121.html, www.bverfg.de/entscheidungen/lk20090810_1bvl001509.html (12.02.2014).

[202] Germany, Federal Constitutional Court (*Bundesverfassungsgericht*), 1BvR 611/07; 1BvR 2464/07, 21 July 2010, available at: www.bundesverfassungsgericht.de/entscheidungen/rs20100721_1bvr061107.html (12.02.2014).

[203] Germany, Federal Constitutional Court (*Bundesverfassungsgericht*), 2 BvR 1397/09, 19 June 2012, available at: www.bundesverfassungsgericht.de/entscheidungen/rs20120619_2bvr139709.html (12.02.2014).

[204] Germany, Federal Constitutional Court (*Bundesverfassungsgericht*), 2 BvR 909/06, 7 May 2013, press release available at: www.bundesverfassungsgericht.de/en/press/bvg13-041en.html 26 April 2014).

[205] http://www.bundestag.de/dokumente/analysen/2009/Gleichstellung_eingetragener_Lebenspartnerschaften.pdf (13.02.2014).

light of the recent jurisprudence of the Federal Constitutional Court on same sex life partnerships.[206]

The landmark Constitutional Complaint dealt with the discriminatory handling of marriage and registered civil partnership in the area of provisions for dependants' pensions for public employees in the civil service field.[207] In contrast to the compulsory public pension fund insurance the additional insurance for the provision for dependants does not provide for pensions for same sex life partners. The general prohibition of unequal treatment as laid down in Article 3 para 1 of the Basic Law demands that all humans are being treated equal in front of the law. It is also forbidden to exclude one group of persons from benefits which another group of persons enjoys if the two groups are comparable and there are no objective reasons for the justification of the unequal treatment. In the case at hand registered civil partnership were discriminated against as compared to marriages under the rules determining the additional insurance for the provision for dependants in the public service field. The rules on the additional insurance for the provision for dependants of public employees in the civil service are to be evaluated under strict standards set out by the requirements of the general prohibition of unequal treatment as laid down in Article 3 para 1 of the Basic Law. The condition of constitutionality does apply directly even though the rules in question in the case at hand are of a private law nature. The strict requirements need to be observed because the entity in question is established under public law and serves the common good and exercises public functions.

This binding verdict stands in direct contrast to an earlier decision of the Federal Constitutional Court not to rule upon the non-payment of family subsidies for civil servants living in same-sex life partnerships.[208] Than it had held that the non-payment of a family subsidy to civil servants living in a same-sex life-partnership does not constitute a violation of the constitutional principle of equal treatment in relation to married civil servants who receive such subsidy. Yet this earlier decision is not binding materially, because it only ruled upon the admissibility of the matter.

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

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[206] Germany, Hoppe, T. (2010) 'Gleichstellung eingetragener Lebenspartnerschaften: gemeinschaftliche Adoption eines fremden Kindes', available at: www.gruene-bundestag.de/fileadmin/media/gruenebundestag_de/themen_az/lesben_schwule/adoptionsrecht_fuer_gleichgeschlechtlich/327575.gutachten_lebenspartnerschaft_und_adopti.pdf (13.02.2014).
[207] Germany,Federal Constitutional Court (*Bundesverfassungsgericht*) (2009), 1 BvR 1164/07, 7 July 2009, available at: http://www.bverfg.de/entscheidungen/lk20090810_1bvl001509.html (12.02.2014).
[208] http://www.bundesverfassungsgericht.de/entscheidungen/rk20080506_2bvr183006.html (13.02.2014).

In 2010, the Federal Constitutional Court handed down a decision ruling unequal treatment of marriage and registered civil partnerships in gift and inheritance tax act unconstitutional.[209] In these cases the complainants challenged the fact, that even after the creation of the legal institution of civil partnership in 2001, civil partners were significantly more burdened than spouses under inheritance law. Pursuant to Articles 15(1) and 19(1) the old version of the inheritance tax law (*Erbschafts- und Schenkungssteuergesetz*, ErbStG) spouses were subject to the most beneficial tax class 1 and charged a significant lower tax rate than civil partners, who were classified as "other recipients" and placed in tax class III. In the Inheritance Tax Reform Act (*Erbschaftssteuerreformgesetz*) of 24 December 2008, the provisions were amended to the benefit of registered civil partners to the extent that the personal exemption and the exemption for retirement benefits are determined in the same way for both inheriting civil partners and spouses. Nevertheless, registered civil partners continue to be treated like distant relatives and unrelated persons and taxed at the highest tax rates. The Federal Constitutional Court decided that the inheritance tax law discrimination against registered civil partners in comparison to spouses regarding the personal exemption and the tax rate, as well as their exclusion from the exemption for retirement benefits, is incompatible with the general principle of equality (Article 3 (1) Basic Law). The legislature was given time until the end 2010 to enact a new rule for those old cases affected by the Gift and Inheritance Tax Act, former version, that removes the infringement on equality from the time period between the effective date of the Act on the Termination of the Discrimination of Same-Sex Couples (*Gesetz zur Beendigung der Diskriminierung gleichgeschlechtlicher Gemeinschaften*) of 16 February 2001 until the effective date of the Inheritance Tax Reform Act of 24 December 2008.

In 2012, the Federal Constitutional Court again ruled unequal treatment of civil partners and spouses unconstitutional.[210] A civil servant in a registered partnership had been refused payments of family benefits. Article 40 (1) (1) Federal Pay Act (*Bundesbesoldungsgesetz*) only refers to marriage. The BVerfG decided that this constitutes an unjustifiable differentiated treatment of registered partnership and marriage and declared Article 40 (1) (1) Federal Pay Act incompatible with Article 3 (1) Basic Law (*Grundgesetz*, GG) (equality). Article 3 (1) GG demands equal treatment of all persons, a preferential treatment of some to the detriment of others is allowed only under strict appliance of the proportionality rule. The differences between marriage and registered partnership do not justify unequal treatment. In the meantime the Act on transferring regulations regarding marriage to civil partnerships (*Gesetz zur Übertragung ehebezogener Regelungen im öffentlichen Dienstrecht auf Lebenspartnerschaften*) entered into force and added Article 17b Federal Pay Act, which states that all provisions relating to marriage in the law equally apply to registered partnerships.[211]

In a further case the Constitutional Court clarified that unequal treatment of registered partnership and marriage regarding tax on land acquisition is unconstitutional.[212]

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[209] Germany, Federal Constitutional Court (*Bundesverfassungsgericht*) 1BvR 611/07; 1BvR 2464/07, 21 July 2010, press release 17 August 2010, available at: www.bundesverfassungsgericht.de/pressemitteilungen/bvg10-063en.html (13.02.2014).

[210] Germany, Federal Constitutional Court (*Bundesverfassungsgericht*) (2012), Berlin 2 BvR 1397/09, ´Unequal treatment of registered civil partnerships and marriage in the family allowance under civil service law unconstitutional´, 19 June 2012, press release 1 August 2012, available at: www.bundesverfassungsgericht.de/pressemitteilungen/bvg12-059en.html (13.02.2014).

[211] Germany, Federal Pay Act (*Bundesbesoldungsgesetz*) available at: www.buzer.de/gesetz/1599/a173302.html (12.02.2014).

[212] Germany, Federal Constitutional Court (*Bundesverfassungsgericht*), 1 BvL 16/11, 8 July 2013, available at: www.bundesverfassungsgericht.de/entscheidungen/ls20120718_1bvl001611.html (13.02.2014).

In 2013, two landmark decisions of the Federal Constitutional Court further strengthened the position of registered partnerships of same-sex couples in family law and taxation issues (family law see next section). In this case, 2 BvR 909/06 (combined with 2 BvR 1981/06 and 2 BvR 288/07), the Court ruled that the unequal treatment of registered civil partnerships and marriages regarding income splitting for spouses unconstitutional. The three complainants had challenged the unequal treatment of married couples and same-sex couples in a registered partnership regarding the matter of tax advantages. The advantage that the complainants desired to be granted is the so-called income splitting (*Ehegattensplitting*) which is a tax system in which husband and wife each pay income tax on half the total of their combined incomes. The complainants claimed that an unequal treatment of married couples and registered partnerships violates Article 3 (1) GG because the two groups are substantially equal but are not equally treated regarding the tax-paying advantages. They argue that the criterion of "sexual orientation" is very close to the criterion of "gender" in Article 3 (3) GG and therefore a very strict scale of proportionality has to be applied. Thus, if the court applied the criterion of marriage for the joint assessment regulation, couples who are in a same-sex registered partnership were indirectly treated unequally because of their sexual orientation. The court decided in favour of the complainants. The court argued that the corresponding provisions of the Income Tax Law violate the general right to equality before the law according to Article 3 (1) basic law because there are no sufficiently weighty factual reasons for the unequal treatment. The unequal treatment of married spouses and registered civil partners in the provisions on income splitting for spouses constitutes an indirect discrimination because of sexual orientation. The Court ruled, that the statutory framework has to be amended; until this has occurred in order to avoid insecurity about the legal situation, the existing provisions on income splitting have to be applied to registered civil partnerships.[213]

Reacting to the decision of the Court on discriminatory taxation, the German Bundestag quickly adopted the Act Amending the Income Tax Act to Implement the Federal Constitutional Court Decision of 7 May 2013 (*Gesetz zur Änderung des Einkommensteuergesetzes in Umsetzung der Entscheidung des Bundesverfassungsgerichtes vom 7. Mai 2013*) which was passed on 27 June and came into force on 19 July 2013.[214] Hence, registered partners can now also opt for "partner splitting" in taxation.

Equal financial treatment of same-sex couples living in registered partnerships was also the matter of a decision of the Federal Finance Court (*Bundes-finanzhof*). The Court decided in August 2013 that the complainant was entitled to receive benefits for the children of her female civil partner as it is usual for married couples.[215]

Opening marriage for same sex-couples has been repeatedly discussed in the German Federal Parliament and a number of motions and draft laws have been submitted. To name the latest: in the new legislative period the first one was submitted by the parliamentary group of the Left Party, who submitted a draft law demanding opening the institution marriage for same sex partners in October 2013.[216] In the previous legislative period the Alliance 90/The Greens

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[213] Germany, Federal Constitutional Court (*Bundesverfassungsgericht*), 2 BvR 909/06, 7 May 2013, press release available at: www.bundesverfassungsgericht.de/en/press/bvg13-041en.html.
[214] Germany, Act Amending the Income Tax Act to Implement the Federal Constitutional Court Decision of 7 May 2013 (*Gesetz zur Änderung des Einkommensteuergesetzes in Umsetzung der Entscheidung des Bundesverfassungsgerichtes vom 7. Mai 2013*) www.buzer.de/gesetz/10781/index.htm (13.02.2014).
[215] Germany, Federal Finance Court (*Bundesfinanzhof*), VI R 76/12, 8 August 2013, available at: http://juris.bundesfinanzhof.de/cgi-bin/rechtsprechung/document.py?Gericht=bfh&Art=en&nr=28778.
[216] Germany, Federal Parliament (*Bundestag*), BT-Drs. 18/8, 23 October 2013, available at: dip21.bundestag.de/dip21/btd/18/000/1800008.pdf (26 April 2014).

presented a legislative proposal to allow same sex marriages.[217] Also in 2013, the Federal Council proposed a draft law to this very end.[218] In 2012, the Liberal Party, which is no longer represented in the Federal Parliament, decided in its new programme that all couples should be able to get married.[219] However, the coalition of CDU and CSU are strongly opposing any reforms to grant equal treatment of registered partnerships and marriage or even opening up marriage to same sex partners. The conservative parties also oppose the right to joint adoptions of civil partners. As the parties are holding the majority of the seats in Parliament currently, further legal changes may possibly only occur if demanded by the Constitutional Court.

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

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

In 2009 the Federal Constitutional Court confirmed the right to adoption of stepchildren for same-sex life partners.[220] The case concerned a woman in a same-sex life partnership who wanted to adopt her partner's child according to Section 9 (7) para 2 of the Same-Sex Life Partnership Law in connection with the pertinent provisions on adoption of the Civil Code. The case was referred to the Federal Constitutional Court by a local court which had considered the provision to be incompatible with the Basic Law and therefore demanded a concrete judicial review by the Federal Constitutional Court. The question being whether the same sex partner could be granted a position of parenthood equal to that of the biological parent. In particular an incompatibility with the right to be a parent as protected in Article 6 of the Basic Law was invoked. The Federal Constitutional Court rejected this line of argumentation and held to the contrary that biological parenthood has no precedence over social family ties, in the sense of a union of responsibility, which are also protected by Article 6 of the Basic Law. Social and biological parents are thus the same under the Constitution, which is also valid for homosexual parents

Lower instance courts have followed suit with the change in jurisprudence and apply the pertinent provisions on step children adoption in light of the constitutional requirements set forth by the Federal Constitutional Court.[221]

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[217] Germany, Federal Parliament (*Bundestag*), BT-Drs. 17/13912, 12 June 2013, available at: dip21.bundestag.de/dip21/btd/17/139/1713912.pdf (26 April 2014).
[218] Germany, Federal Council (*Bundesrat*), BT-Drs. 17/13426, 08 May 2013, available at: dipbt.bundestag.de/dip21/btd/17/134/1713426.pdf (24 April 2014).
[219] Germany, Liberal Party (*Freie Demokratische Partei* FDP) (2012), Programme p.50, available at: www.fdp.de/files/408/Karlsruher_Freiheitsthesen.pdf (14.02.2014).
[220] Germany, Federal Constitutional Court (*Bundesverfassungsgericht BVerfG*) (2009), Berlin 1 BvL 15/09, ´Richtervorlage zu § 9 Abs. 7 LPartG unzulässig´, available at: http://www.bundesverfassungsgericht.de/pressemitteilungen/bvg09-098.html, http://www.bundesverfassungsgericht.de/entscheidungen/lk20090810_1bvl001509.html (26.02.2014).
[221] Landgericht Berlin, Az.: 87 T 36/09 of 17th August 2009;

In 2013, the Constitutional Court handed down a further judgment regarding adoption by registered partners. In this case, the Court dealt with two combined procedures (1 BvL 1/11; 1 BvR 3247/09)[222] and ruled that non-admission of successive adoption by registered civil partners was unconstitutional. Under the current legal framework, it is possible to adopt the biological child of one's registered civil partner (so-called stepchild adoption, Article 9 (7) LPartG). Not feasible, however, is the adoption of a child that was taken on by the registered civil partner (so-called successive adoption), which was at issue in these particular cases. Spouses, on the other hand, are granted both the option of stepchild adoption, and of successive adoption. The underlying proceedings regarded individuals who entered into a registered civil partnership and who now intend to also adopt the respective child. The Court came to the conclusion, that the exclusion of successive adoption by registered civil partners violates the general principle of equality before the law (Article 3 (1) GG). Further, the court ruled that the unequal treatment of the respective children as compared to children adopted by spouses is not justified. The same applies to the unequal treatment of the respective partners, as compared to married spouses, who have the option to successively adopt. The judges also explicitly denied the reasoning that it was harmful for the child to grow up with same-sex parents. The Court assumed that the sheltered conditions in a registered civil partnership can be as supportive for the children as they are growing up as such conditions in a marriage.

The deadline for transposing the BVerfG decision into legislation ends on 30 June 2014. The 84th Conference of the Ministers of Justice requested the government seize this opportunity and also create the legal preconditions to allow for joint adoptions for registered partners and demanded a legal revision that ensures complete equality of civil partners and spouses regarding the law of adoption.[223]
A draft proposal for a law transposing the decision has been presented on 30 January 2014 by the Ministry of Justice and Consumer Protection.[224] The draft law contains the minimum solution and only transposes the ruling of the Constitutional Court regarding successive adoption. It does not take the opportunity to provide for the legal basis of joint adoption even though the Constitutional Court is currently in the process of deciding on this exact question.[225] This equal right regarding adoption was rejected by the CDU/ CSU during coalition agreement negotiations.

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

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Amtsgericht Münster, Az.: 22 111128/09 of 15th September 2009, http://www.lsvd.de/fileadmin/pics/Dokumente/Rechtsprechung2/AGMuenster090915.pdf (14.02.2014).

[222] Germany, Federal Constitutional Court (*Bundesverfassungsgericht*), 1 BvL 1/11; 1 BvR 3247/09, 19 February 2013, press release 19 February 2013, available at: www.bundesverfassungsgericht.de/pressemitteilungen/bvg13-009en.html (13.02.2014).

[223] Germany, Conference of the Ministers of Justice (*Konferenz der Justizministerinnen und Minister*) (2013) Beschluss TOP1.2, 12./13 June 2013, available at: www.jm.nrw.de/JM/justizpolitik/jumiko/beschluesse/2013/fruehjahrskonferenz13/TOP_I_2.pdf (26 April 2014).

[224] Germany, Federal Parliament (*Bundestag*) (2014), BT-Drs. 18/1285, 30 April 2014, available at:dip21.bundestag.de/dip21/btd/18/012/1801285.pdf (13.06.2014).

[225] Germany, Federal Constitutional Court (*Bundesverfassungsgericht* BVerfG) (2014), ´Unzulässige Richtervorlage zum gemeinschaftlichen Adoptionsrecht von eingetragenen Lebenspartnerschaften´, , press release 13/2014, 21 February 2014, available at: www.bundesverfassungsgericht.de/pressemitteilungen/bvg14-013.html (27.02.2014).

as long as for the same-sex couple the artificial insemination was conducted with the consent of the other partner.

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

Civil society organisations remain critical and demand further legal developments with regard to the right to found a family based upon principle 24 of the Yogyakarta-Principles.[226] Thus in particular a non discriminatory law of descent, non-discrimination as concerns family planning and a right to regular adoption for same sex life partners are being demanded.[227]

In 2009, the Federal Ministry of Justice released a scientific study on the situation of children in same-sex life partnerships and in particular on the effects of the law on same-sex life partnerships in this regard. The study concluded that children and adolescents in so called rainbow-families show the same degree of development as in other forms of family structures. The surveyed youngsters from same-sex partnership families even showed a higher level of self-esteem and more autonomy in their relationship with both parent than their counterparts in traditional families.[228]

I.4. Institutional Homophobia

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

Yet from a historical perspective regarding the first decades after the founding of the Federal Republic of Germany homosexuality was regarded as immoral and criminally prohibited through articles 175ff. of the Criminal Code. This was at first also confirmed by the Federal Constitutional Court, which referred to the principle of morality anchored in the Basic Law.[229] Gays and lesbians remained subject to social stigmatisation and discrimination, as well as criminally persecuted in the name of the state. In the period between 1953 and 1965 the police registered almost 100,000 people across the country who were suspected of violating the

[226] Indonesia, Yogyakarta, international seminar of legal experts on human rights (2006), Yogyakarta Principles, available at: http://www.yogyakartaprinciples.org/principles_en.pdf (14.04.2014).
[227] Germany, Lesbian and Gay Association of Germany (*Lesben- und Schwulenverband in Deutschland,* LSVD) (2008), Beschlüsse des Verbandstages 2008, http://www.lsvd.de/914.0.html (14.02.2014).
[228] Germany, Federal Ministry of Justice (*Bundesministerium für Justiz* BMJV) (2009), 'Die Lebenssituation von Kindern in gleichgeschlechtlichen Lebenspartnerschaften', available at: www.bmj.de/SharedDocs/Downloads/DE/pdfs/Forschungsbericht_Die_Lebenssituation_von_Kindern_in_gleichgeschlechtlichen_Lebenspartnerschaften.pdf?__blob=publicationFile .
[229] Federal Constitutional Court (*Bundesverfassungsgericht*), BVerfGE 6, 389 (434).

criminal statute for homosexuality.[230] Between 1950 and 1965, nearly 2,800 homosexuals were convicted each year.[231] It was only after the lifting of the total prohibition in 1969 that the legal practice changed, gradually decreasing social stigmatisation. Nevertheless different protected age limits for heterosexual and homosexual acts respectively remained in force. It was only in 1994 that the criminal statute for homosexuality was completely repealed. Until the decriminalisation of homosexuality amongst consenting adults in the Federal Republic of Germany in 1969 about 50.000 verdicts were rendered. Until that complete repeal of the criminalisation of homosexuality in 1994 about 3500 additional sentences were handed out. In the German Democratic Republic homosexuality amongst consenting adults was also decriminalised in 1968 and until 1989 the criminally punishable protected age limits for homosexual acts were different from those for heterosexual acts. It is estimated that in the German Democratic Republic about 4300 verdicts were rendered according to article 151 of its Criminal Code.[232] The Federal President, Richard von Weizsäcker, explicitly mentioned homosexuals as a victimised group of National Socialism for the first time in his speech of 8th May 1985 – 40 years after the end of the war. It took another 15 years, until December 2000, for the German Parliament to apologise to the victims for the injustice they had to endure under National Socialism.[233] In 2002 homosexuals who were criminally prosecuted pursuant to article 175 of the Criminal Code under the National Socialist regime were legally rehabilitated. Yet this does not concern all persons which were persecuted after the end of National Socialism according to the same article of the Criminal Code, which remained in force unchanged. The current Federal Government has included the subject matter into its coalition treaty.[234] It is stated therein, that in the spirit of the collective compensation for homosexual victims of National Socialism a trust is to be set up, which will work at countering the discrimination on grounds of sexual orientation by interdisciplinary research and education. Yet civil society organisations demand further compensation, rehabilitation and annihilation of verdicts passed after 1945, too.[235]As concerns the protection of minors, pornographic material will be banned by the Federal Department for Media Harmful to Young Persons[236] regardless of whether its content is of a heterosexual or homosexual nature. To the contrary, one of the indicators for a ban of certain media in the practice of the Federal Department for Media Harmful to Young Persons according to article 18 of the Protection of Young Persons Act is discriminatory content, which also comprises discrimination on the basis of sexual orientation. For example the Lesbians and Gay

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

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

[232]Germany, Federal parliament (*Deutscher Bundestag*) (2008), ´Antrag - Rehabilitierung und Entschädigung der nach 1945 in Deutschland wegen homosexueller Handlungen Verurteilten´, available at: http://dip21.bundestag.de/dip21/btd/16/114/1611440.pdf,

´Antrag - Rehabilitierung für die Verfolgung und Unterdrückung einvernehmlicher gleichgeschlechtlicher Handlungen in der Bundesrepublik Deutschland und der Deutschen Demokratischen Republik und Entschädigung der Verurteilten´, available at: http://dip21.bundestag.de/dip21/btd/16/109/1610944.pdf (26.02.2014).

[233]Germany, Federal parliament (*Deutscher Bundestag*) (2000), Proposed decision and report of the legal committee (*Beschlussempfehlung und Bericht des Rechtsausschusses*), available at: http://dip21.bundestag.de/dip21/btd/14/048/1404894.pdf, p. 3 (26.02.2014).

[234]Germany, Liberal Party (Freie Demokratische Partei FDP) (2009), Coalition agreement between CDU, CSU and FDP (*Koalitionsvertrag zwischen CDU, CSU und FDP*), available at: http://www.fdp-bundespartei.de/files/363/091024-koalitionsvertrag-cducsu-fdp.pdf, p. 111 (26.02.2010).

[235] Germany, Lesbian and Gay Association of Germany (*Lesben- und Schwulenverband in Deutschland,* LSVD)(2009), ´40 Jahre Reform § 175 - Wir fordern Entschädigung für die Strafverfolgung von Homosexuellen´, press release, 31 August 2009 http://www.lsvd.de/1211.0.html; (26.02.2014).

[236]Germany, Federal Review Board for Media Harmful to Minors (*Bundesprüfstelle für jugendgefährdende Medien* BPjM), General information, available at: www.bundespruefstelle.de/bpjm/Service/english.html (26.02.2014).

Association in Germany initiated a procedure to ban music of a nature discriminatory against homosexuals by an artist which was successful.[237]

Today many initiatives are active in the field of education and antidiscrimination concerning homosexuality and receive or have received governmental financial means and/or are supported by state organs.[238] Thus for example the Federal Centre for Health Education publishes a manual called "Heterosexual? Homosexual?".[239]

In isolated instances public authorities have shown some reluctance to support particular educational antidiscrimination material. For example in the Federal State of Nordrhein-Westfalen. The Ministry for Health, Social Matters, Family and Women of Nordrhein-Westfalen had published an educational manual called "Different in More Ways Than One: Providing Guidance for Teenagers on Their Way to Identity, Sexuality and Respect" in 2004.[240] The antidiscrimination manual was promoted within a European Framework and supported by the than acting governing coalition of the Social Democratic Party and the Green Party in Nordrhein-Westfalen. After a change in government in the summer of 2005 the Ministry for Education was run by the Christian Democratic Party and decided not to use the manual in schools anymore and to stop the online distribution. The reasoning behind this was that it was not in line with the Christian values of the Federal State government. The manual is now distributed by a private association but needs to be accompanied by an official disclaimer of the government of the Federal State of Nodrhein-Westfalen.[241] At the same time the current Ministry for Generations, Family, Women and Integration of the Federal State of Nordrhein-Westfalen publicly supports an initiative called "School without Homophobia – School of Diversity".[242]

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

[238] Germany, KomBi – Kommunikation und Bildung, Berlin, General information on the organisation, available at: http://www.kombi-berlin.de/01-start-engl.html;

Germany, AG Schwule Lehrer bei der GEW Berlin, General information on the working group, available at: http://www.schwulelehrer.de/ (26.02.2014).

[239] Germany, Federal Centre for Health Education (*Bundeszentrale für gesundheitliche Aufklärung* BZgA), information material on Aids, available at: http://www.bzga.de/?uid=10e7dba5ff6db8a8c3deaf179e4eecfc&id=medien&sid=71&idx=42 (26.02.2014).

[240] Germany, Project TRIANGLE (Projekt TRIANGLE (Transfer of Information to Combat Discrimination Against Gays and Lesbians in Europe)), general information available at: http://www.schlau-nrw.de/triangle2/ (26.02.2014).

[241] Germany, Schwules Netzwerk NRW e.V., general information available at: http://www.schlau-nrw.de/ (26.02.2014).

[242] Germany, RUBICON / Sozialwerk für Lesben und Schwule e.V., general information available at: http://www.schule-der-vielfalt.de/index.htm (26.02.2014).

J. Good Practice

J.1. Prohibitions on Discrimination in the Constitutions of the Laender

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

J.2. Studies conducted by Antidiscrimination-Office

The federal Antidiscrimination-Office published the results of a recently conducted study (the so-called 'Sinus-Milieu-Studie') in April 2009, which focuses on the question as to whether discrimination is a subject of concern in Germany. The analysis is supposed to provide for an insight into the population's perception of and attitude towards discrimination on the grounds of "race", ethnic origin, sex, age, disability, religion or belief and of "sexual identity". Concerning the topic of discrimination on grounds of "sexual identity" the study concludes that in many social deeply rooted prejudices exist towards sexual orientations that are off the mainstream.[243]

Another study which covers a project period of 2009 until 2011 seeks to quantitatively research experiences of discrimination made by lesbian and bisexual women as well as "transident" (transgender) persons.[244]

The Federal Antidiscrimination Agency conducted a study on discrimination of trans* persons in the working environment and came to the conclusion that one of the major problems is the fact that trans* persons are unable to obtain documents verifying school and vocational training which match the gender lived presently. Rules and procedures concerning this issue vary greatly between states and no general right to have documents amended exists.[245]

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[243]Germany, Federal Anti Discrimination Agency (*Antidiskriminierungsstelle des Bundes* ADS), General information on their website, also available in English:http://www.antidiskriminierungsstelle.de/bmfsfj/generator/RedaktionBMFSFJ/RedaktionADS/PDF-Anlagen/2009-04-02-schriftenreihe-band4,property=pdf,bereich=ads,sprache=de,rwb=true.pdf, p. 17; English at p. 138; http://www.antidiskriminierungsstelle.de/bmfsfj/generator/ADS/Service/downloads,did=121488.html (26.02.2010).

[244] Cf.: enclosed correspondence with the Federal Anti-Discrimination Agency. See studies by civil society: LesMigras study.

[245] Germany, Federal Antidiscrimination Agency (*Anti-Diskriminierungsstelle des Bundes*) (2010), Discrimination of trans* persons, in particular, in the working environment (*Benachteiligung von Trans*Personen, insbesondere im Arbeitsleben*), available at:

J.3. Civil Society

A hotline against violence and discrimination against lesbians was established in Berlin to address the need for protection and support in the light of increased numbers of physical violence and attacks against Lesbians in the last months.[246] The anti violence project is targeted towards the support of lesbians in particular since several hotline for anti gay violence were already in existence.[247]

Within the Deutsche Telekom Group employees from different areas of the company and its subsidiaries founded a network of heterosexuals, gays, lesbians and transgender in order to strengthen tolerance on every level of the enterprise and to promote acceptance for different variations of lifestyles. The aim is to enable intercourse between the colleagues and to create a positive working climate.[248]

The study (*Diskriminierung und Gewalt gegen lesbische, bisexuelle Frauen und Trans* in Deutschland)* included a qualitative as well quantitative analysis and collected data about frequency, form and causes of violence. More than 2100 questionnaires were evaluated, a group discussion with lesbian and trans* of colour as well as several in-depth interviews were conducted. The results show that derogatory treatment due to gender non-conformist behaviour is considered normality by the affected persons. 30.7% of the respondents stated to have experienced harassment at work or training due to their lesbian/bisexual orientation. 72.6% believe that their performances have been downgraded and 20% reported disrespectful treatment by medical staff.
This numbers even increased when looking at the questionnaire specifically directed at trans* persons. One third of the 228 persons who filled in this questionnaire have experienced sexualised violence. Half have experienced discrimination at work and about 44% in relation to medical treatment. Another questionnaire specifically collected information on multiple discrimination. It was answered by about half of all study participants. Results show, that about 52.2% of those who have experienced multiple discrimination, have been discriminated within the family context. Over half stated to find it difficult to defend themselves, as it is often unclear on what grounds discrimination is taking place. Trans* and People of Colour do not only experience discrimination more frequently, they also experience more physical violence than the overall population of the study. The research showed that most persons turn to family, partners or friends (83.5%) and community/social networks (44.9%) for support. Very seldom legal actions are taken; this can possibly be interpreted as an indicator of a general distrust of lesbians and trans* of colour towards state institutions.[249]

A conference on the situation of elderly LGBT in care took place in Hannover in November 2012. Organised by the city of Hannover, the conference examined legal aspects of questions

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www.antidiskriminierungsstelle.de/SharedDocs/Downloads/DE/publikationen/benachteiligung_von_trans_personen_insbesondere_im_arbeitsleben.html?nn=4193516 (27.02.2014).

[246] Germany, Lesbian and Gay Association of Germany (Lesben- und Schwulenverband in Deutschland, LSVD) (2012), ´ LSVD schaltet Lesben-Hotline gegen Gewalt und Diskriminierung´, press release, 27 July 2012, available at: https://berlin.lsvd.de/allgemein/lsvd-schaltet-lesben-hotline-gegen-gewalt-und-diskriminierung-2//(27.02.2014).

[247] Germany, MANEO – the gay anti-violence project in Berlin (MANEO - *Das schwule Anti-Gewalt-Projekt in Berlin*), general information on the project available at: http://www.maneo.de/highres/english/e_hindex.html.

[248] www.queerbeet.info/ (27.02.2014).

[249] Germany, Antidiscrimination and Anti-violence work area of the Lesbenberatung Berlin, LesMigraS (*Antidiskriminierungs- und Antigewaltbereich der Lesbenberatung Berlin e.V.)* (2012) 'Zusammenfassung der Ergebnisse der Studie zu Gewalt- und Mehrfachdiskriminierungserfahrungen von lesbischen/bisexuellen Frauen und Trans*', available at: www.lesmigras.de/kampagne_mehrfachdiskriminierung.html (27.02.2014).

regarding adequate treatment of elderly LGBT old persons with various sexual orientations. Due to very limited staff resources, no documentation of the conference is available.[250]

J.4. Police sets up special agents to liaise with the LGB community

Some police agencies on the Federal States level as well as in several cities have established an office for a special police agent who is specifically responsible for matters concerning violence against gays and lesbians, as well as other matters related to the LGB community. The function of these special spokespersons is to serve as contact to associations and organisations of gays and lesbians, to work in the field of prevention of violence against gays and lesbians and to sensitise colleagues as well as the public to police relevant matters related to the LGB community. [251]

In 2012, Berlin's public prosecutor's office introduced a contact person for homophobic hate crimes. It is the first office of this kind in Germany. In the process of establishing the office, responsibilities of the unit on violent and hate crimes were expanded to included ´deeds, which have been carried out against a person solely or predominantly due to his/her sexual orientation´.[252] A public interest in the prosecution of crimes against lesbian, gay, bi- or transsexual persons will now be generally assumed and a termination of the proceedings in view of the possibility of bringing the civil proceedings or due to insignificance is therefore generally impossible.[253]

[250] Germany, Hannover, Gay and Lesbian Advice services of the state capital (*Schwulen- und Lesbenberatung der Landeshauptstadt*), Phone interview, 10 December 2012.
[251]Germany, Federal Association of the lesbian, lesbian-gay and transgender anti-violence initiatives Germany (*Bundesverband der lesbischen, lesbisch-schwulen und transidenten Anti-Gewalt-Initiativen Deutschland e.V.*), contact details available at: http://broken-rainbow.de/web/2013/07/gewalt/polizei/ansprechpartner-der-polizei/ Germany, Police of Rheinland Pfalz, contact for same-sex lifestyles available at: www.polizei.rlp.de/internet/nav/28b/28b2093b-1222-3e21-13c0-11f42680e4cd.htm (27.02.2014).
[252] Germany, Public Prosecutor's Office Berlin: Contact person for homophobic hate crimes (*Ansprechpartnerin für gleichgeschlechtliche Lebensweisen der Staatsanwaltschaft Berlin*), available at: www.berlin.de/sen/justiz/ansprechpartnerin-homophobe-hasskriminalitaet/startseite.php (27.02.2014).
[253] Germany, Lesbian and Gay Association Berlin-Brandenburg (*Lesben- und Schwulenverband Berlin-Brandenburg*, LSVD) 'Berliner Staatsanwaltschaft hat erstmals eine Ansprechpartnerin für gleichgeschlechtliche Lebensweisen', news, 14 August 2012, available at: http://berlin.lsvd.de/neuigkeiten/berliner-staatsanwaltschaft-hat-erstmals-eine-ansprechpartnerin-fur-gleichgeschlechtliche-lebensweisen/ (27.02.2014).

Annex I – Case law

A. Implementation of Employment Directive 2000/78/EC

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

Case title	6 C 27.06
Decision date	25th 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 24th 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 [*Bezirksärztekammer Koblenz*]. The doctor died on 5th 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 statutorial 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	15th 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 31st July 2004. On 5th 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 [*Bundesbesoldungsgesetz*] 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	15th 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 [*Hessische Bezügestelle*]. 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 2nd December 2003.
Main reasoning/argumentation (max. 500 chars)	Para. 40(1)(1) of the Federal Remuneration Law [*Bundesbesoldungsgesetz*] 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	4th 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 [*Diakonische Werk Hamburg*], 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.

Case title	14 Ca 1585/09
Decision date	28 April 2010
Reference details (type and title of court/body; in original language and English [official translation, if available])	Arbeitsgericht Stuttgart [Labour Court Stuttgart]
Key facts of the case (max. 500 chars)	The applicant had applied for a position as kindergarten teacher in at a catholic association. Her initial acceptance was revoked after the employer learned of her civil partnership. The plaintiff argued that she had been discriminated against due to her sexual orientation and claimed damages amounting to 22.500,00 EU.

Main reasoning/argumentation (max. 500 chars)	According to the Court, a civil partnership and homosexuality can be considered incompatible with loyalty to the ethos of the organisation
Key issues (concepts, interpretations) clarified by the case (max. 500 chars)	The Labour Court in Stuttgart considered the fact that a person was living in a civil partnership a permissible ground of differential treatment, as provided in Article 9 AGG.
Results (sanctions) and key consequences or implications of the case (max. 500 chars)	The claim was unsuccessful; the plaintiff has to pay the costs of the proceedings

See also case law Miscellaneous

B. Freedom of movement

Case title	1 C 23/09
Decision date	11 January 2011
Reference details (type and title of court/body; in original language and English [official translation, if available])	Bundesverwaltungsgerichtshof [Federal Administrative Court]
Key facts of the case (max. 500 chars)	The Complainant, a Russian national, entered Germany on a Schengen visa issued by the Greek diplomatic mission in Moscow. On 1 August 2008 he married a German national in Denmark and he returned to Germany on that same day. On 8 August 2008 the Complainant applied for a residence permit based on marriage. By a decision dated 25 September 2008 the Respondent denied the application and threatened him with deportation. The Administrative Court denied the complaint in a judgment of 5 November 2009. The Respondent defends the lower court's decision.
Main reasoning/argumentation (max. 500 chars)	According to the case law of the European Court of Justice in so-called 'returnee cases', a third country national spouse of a German national is entitled to a right of residence under Community law only if the German national has made a sustained exercise of his or her right of free movement under Community law. A brief stay for the purpose of marrying in another Member State (here: Denmark) does not suffice for this purpose (as in judgment of 16 November 2010 - BVerwG 1 C 17.09).

Key issues (concepts, interpretations) clarified by the case (max. 500 chars)	A short stay abroad of a German national does not entitle a third-country national spouse to a right of residence
Results (sanctions) and key consequences or implications of the case (max. 500 chars)	The Complainant's appeal to the Federal Administrative Court failed on the merits. The Administrative Court rightly denied that the Complainant is entitled to a residence permit for subsequent immigration as a spouse without having previously carried out a national visa application procedure, and it correctly affirmed the appealed rejection decision as lawful. It correctly held (1.) that the Complainant is subject to the terms of the Residence Act, (2.a) that he does not fulfil the general requirement for a visa under Section 5(2) sentence 1 of the Residence Act, and that (2.b) he neither is exempted from that requirement pursuant to Section 39 of the Residence Regulation nor (2.c) can he demand that the Respondent waive this requirement within its power of discretion under Section 5(2) sentence 2 of the Residence Act.

C. Asylum and subsidiary protection

Case title	9 C 278/86
Decision date	15th 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	20th 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	27th 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 [*Bundesamt für die Anerkennung ausländischer Flüchtlinge*] is obligated to recognise the plaintiff as a person entitled to asylum.

Case title	RN 5 K 13.30226
Decision date	19 November 2013
Reference details (type and title of court/body; in original language and English [official translation, if available])	Verwaltungsgericht Regensburg [Administrative Court Regensburg]
Key facts of the case (max. 500 chars)	The applicant, a Nigerian citizen, allegedly homosexual, applied for asylum due to being threatend in Nigeria.
Main reasoning/argumentation (max. 500 chars)	His homosexual activity had become known in Nigeria and the man had already suffered discrimination and physical harm before leaving Nigeria. This can be expected with considerable probability to continue upon return.
Key issues (concepts, interpretations) clarified by the case (max. 500 chars)	The authority had denied refugee status or subsidiary protection to a homosexual man from Nigeria. The court found that the Nigerian legislation regarding homosexuals 'must be regarded as being a punishment which is disproportionate or discriminatory and thus constitutes an act of persecution' (Joined Cases C-199/12 to C-201/12, 79 (2)) and therefore giving rise to a right to asylum.
Results (sanctions) and key consequences or implications of the case (max. 500 chars)	In this particular case, however, no asylum according to Article 16a Residence Law was granted, as the applicant was unable to prove that he did not enter Germany without travelling through a safe third country where he could have found safety from persecution.

Case title	A 9 S 1872/12
Decision date	07 March 2013
Reference details (type and title of court/body; in original language and English [official translation, if available])	Verwaltungsgerichthof Baden-Wurtemberg [Higher Administrative Court]
Key facts of the case (max. 500 chars)	The Federal Office for Migration and Refugee had denied asylum to a man from Cameroon. Challenging this decision, the administrative Court had ruled that the man must be granted asylum due to his persecution as a homosexual man in Cameroon. The BAMF challenged this decision.
Main reasoning/argumentation (max. 500 chars)	The BAMF In its appeal, the BAMF referred to the principles laid out in the decision of the Court of Justice of the European Union *Federal Republic of Germany v Y (C-71/11) and Z (C-99/11)*[254], reaffirming their applicability but denying the credibility of the applicant and his personal risk of persecution. The Higher Administrative Court rejected the appeal in March 2013
Key issues (concepts, interpretations) clarified by the case (max. 500 chars)	The Court was convinced that the plaintiff is homosexual and therefore belongs to a "social group" in terms of section 60 (1) of the German Residence Act (*Aufenthaltsgesetz*) that has the right to be recognized as a refugee.
Results (sanctions) and key consequences or implications of the case (max. 500 chars)	The Higher Administrative Court dismissed the appeal. The Federal Office for Migration and Refugees is obligated to recognise the plaintiff as a person entitled to asylum.

Re: Point 59: There was no relevant jurisprudence.

[254] European Union, Court of Justice of the European Union (CJEU), Joint cases C-71/11 and C-99/11, *Federal Republic of Germany v Y (C‑71/11), Z (C‑99/11)*, 19 April 2012.

D. Family reunification

Case title	AN 5K 10.02211
Decision date	28 July 2011
Reference details (type and title of court/body; in original language and English [official translation, if available])	Verwaltungsgericht Ansbach [Administrative Court Ansbach]
Key facts of the case (max. 500 chars)	The applicant, a Columbian citizen entered Germany in 2009 on a visa for family reunification. He entered into a civil partnership with a German citizen and held a residence permit according to Art. 28 Abs. (1) (1) residence law (AufenthG). In Febuary 2010, the partner notified the authorities that the partnership no longer existed; in July 2010 the applicant applied to have his residence permit extended. This was denied by the immigration authorities. The authority argued, that no particular hardship was recognizable in this particular case. As the partnership did not exist more than 3 years, which is the minimum period, a particular hardship has to be proven in order to obtain an residence title., which The plaintiff challenged this decision.
Main reasoning/argumentation (max. 500 chars)	The court denied particular hardship in the case of a homosexual person returning to Columbia. The Court did not find evidence that homosexuals were systematically discriminated against in Columbia
Key issues (concepts, interpretations) clarified by the case (max. 500 chars)	No other relevant reasons could be identified giving rise to a residence title.
Results (sanctions) and key consequences or implications of the case (max. 500 chars)	The case was dismissed;

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.7. – G.11.:

Case title	1 BvR 16/72
Decision date	11th 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	15th 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 [*Landgericht*].

Case title	1 BvL 3/03
Decision date	6th December 2005

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

Case title	1 BvL 1,12/04
Decision date	18th 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 30th June 2007 to come up with a new, constitutional provision.

Case title	1 BvL 10/05
Decision date	27th May 2008
Reference details (type and title of court/body; in original language and English [official translation, if available])	Bundesverfassungsgericht [Federal Constitutional Court]
Key facts of the case (max. 500 chars)	The Federal Constitutional Court held that a married transsexual who wanted to legally change his gender after a surgical change of the sex from male to female but remain married to his wife cannot be forced to divorce in order to have his sex change legally recognised. The formerly male applicant has been married for 56 years and has three children but has felt that he belongs to the female sex. The applicant and his wife intend to stay married. The court competent for the recognition of the sex change therefore referred the case to the Federal Constitutional Court for a concrete judicial review by the Constitutional Court according to Article 100 para 1 of the Basic Law.
Main reasoning/argumentation (max. 500 chars)	According to article 8 para 1 nr. 2 of the Law on Transsexuals not being married is a prerequisite for the legal determination and recognition of the gender change. The Federal Constitutional Court concluded that the relevant provision is unconstitutional since it is not just and reasonable to demand a divorce when both partners want to remain legally bound to one another.

Key issues (concepts, interpretations) clarified by the case (max. 500 chars)	The constitutionally guaranteed right to recognition of the freely chosen and self-determined sexual identity needs to be appropriately balanced with the constitutional guarantee of marriage as an institution as enshrined in Article 6 para 1 of the Basic Law. Thus article 8 para 1 nr. 2 of the Law on Transsexuals is constitutionally not proportional, since it absolutely demands the divorce.
Results (sanctions) and key consequences or implications of the case (max. 500 chars)	The legislature needed to adjust the pertinent provision in order to enable transsexuals to remain in a legally secure partnership while at the same time obtaining legal recognition of the gender change and has complied with the requirements set forth in the decision .

Case title	1 BvR 3295/07
Decision date	11 January 2011
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 complainant was born with male genitals but perceived herself a woman with female homosexual orientation. In accordance with Article 1 Act of Transsexuals (*Transsexuellengesetz*, TSG) (so-called small solution) she had changed her male name into a female name. With her partner she applied for the registration of a civil partnership, which was refused by the registrar on the grounds that civil partnership was exclusively for two parties of the same gender and that the only possibility was to enter into a marriage. The Court ruled that the requirements of gender identification determination are incompatible with the German basic law (*Grundgesetz*)
Main reasoning/argumentation (max. 500 chars)	" The First Senate of the Federal Constitutional Court has decided that the prerequisites of the recognition of transsexuals under the law of civil status for entering into a civil partnership as set out under § 8.1 nos. 3 and 4 TSG are not compatible with the right to sexual self-determination pursuant to Article 2.1 in conjunction with Article 1.1 of the Basic Law (/Grundgesetz/ – GG) and with the right to physical integrity under to Article 2.2 GG. It is a violation of the general right of personality in its manifestation as the right to sexual self-determination pursuant to Article 2.1 in conjunction with Article 1.1 GG that to legally secure their partnership, transsexuals with a homosexual orientation either have to enter into a marriage or undergo gender reassignment surgery that results in infertility for their perceived gender to be recognised and for themselves to be able to enter into a registered civil partnership that corresponds to their relationship, which they perceive as a homosexual one." (press release)

Key issues (concepts, interpretations) clarified by the case (max. 500 chars)	The requirement to either enter a marriage or undergo gender reassignment surgery is
Results (sanctions) and key consequences or implications of the case (max. 500 chars)	The provisions in Article 8 (1)(3) and (4) TSG are inapplicable until a new legislation has entered into force

The decision quoted in the main body (G.3 Asylum and Subsidiary protection) is not available as court file. The description provided above is based on the study: Feeing homophobia (see footnote for reference).

H. Miscellaneous

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

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

Key issues (concepts, interpretations) clarified by the case (max. 500 chars)	The introduction of the legal institution of registered life partnerships for same-sex couples does not violate art. 6(1) of the Basic Law. The special protection of marriage in art. 6(1) of the Basic Law does not prevent legislators from providing rights and privileges for same-sex life partnership that are the same as or approximate those of marriage.
Results (sanctions) and key consequences or implications of the case (max. 500 chars)	The Life Partnership Law is compatible with the Basic Law. The constitutional complaint is rejected.

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

Results (sanctions) and key consequences or implications of the case (max. 500 chars)	The Constitutional Court held that the right to equal treatment as established in Art. 3 para 1 of the Basis Law was violated, annulled the decision of the Federal Court of Justice [*Bundesgerichshof*] and ordered the issue to be decided anew under adequate consideration of the constitutional requirements set out in the verdict.

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

Case title	2 BvR 1397/09
Decision date	19 June 2012

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)	A civil servant in a registered partnership had been refused payments of family benefits. Article 40 (1) (1) Federal Pay Act (Bundesbesoldungsgesetz) only refers to marriage. The BVerfG decided that this constitutes an unjustifiable differentiated treatment of registered partnership and marriage and declared the Article Article 40 (1) (1) Federal Pay Act incompatible with Article 3 (1) Federal Constitution (Equality)
Main reasoning/argumentation (max. 500 chars)	Article 3 (1) demands equal treatment of all persons, a preferential treatment of some to the detriment of others is allowed only under strict appliance of the proportionality rule. The differences between marriage and registered partnership do not justify unequal treatment.
Key issues (concepts, interpretations) clarified by the case (max. 500 chars)	Unequal treatment of registered partnership and marriages in relation to familiy benefits opf civil servants is incompatible with the principle of equality
Results (sanctions) and key consequences or implications of the case (max. 500 chars)	The government is required to amend the Federal Pay Act to ensure an equal treatment of registerd partnerships and marriage in regards to family benefits

H.2.Right to custody and access in rainbow families:

Case title	Right to adoption for same sex couples
Decision date	10 August 2009
Reference details (type and title of court/body; in original language and English [official translation, if available])	Bundesverfassungsgericht [Federal Constitutional Court], case no.: 1 BvL 15/09
Key facts of the case (max. 500 chars)	The case concerned a woman in a registered civil partnership who wanted to adopt her partner's child according to Section 9 para 7 of the same sex life partnership law in connection with the pertinent provisions on adoption of the Civil Code. Both the biological mother and the biological father had agreed to this.

Main reasoning/argumentation (max. 500 chars)	The case was referred to the Federal Constitutional Court by a local court which had considered the provision to be incompatible with the Basic Law and therefore demanded a concrete judicial review by the Federal Constitutional Court according to Art. 100 para 1 of the Basic Law. The question being whether the same sex partner could be granted a position of parenthood equal to that of the biological parent. In particular an incompatibility with the right to be a parent as protected in Art. 6 of the Basic Law was invoked. The Constitutional Court rejected this line of argumentation and held to the contrary that biological parenthood has no precedence over social family ties in the sense of a union of responsibility which are also protected by Art. 6 of the Basic Law. Social and biological parents are thus the same under the Constitution, which is also valid for homosexual parents.
Key issues (concepts, interpretations) clarified by the case (max. 500 chars)	The interpretation of Art. 6 of the Basic Law is to be seen in the context of changing societal circumstances. This constitutes a confirmation of the constitutional right to parenthood for same sex couples.
Results (sanctions) and key consequences or implications of the case (max. 500 chars)	The Constitutional Court rejected the request of the local court for concrete juridical review but for reasons of clarification entered into the merits in order to transcribe its jurisdiction on non biological parents in general to the special situation of same sex partnerships.

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

Key issues (concepts, interpretations) clarified by the case (max. 500 chars)	The interpretation of Art. 6 of the Basic Law is to be seen in the context of changing societal circumstances. This constitutes a confirmation of the constitutional right to parenthood for same sex couples.
Results (sanctions) and key consequences or implications of the case (max. 500 chars)	The Constitutional Court rejected the request of the local court for concrete juridical review but for reasons of clarification entered into the merits in order to transcribe its jurisdiction on non biological parents in general to the special situation of same sex partnerships.

Re H.3.: Intersexuality:

Case title	25 O 178/02
Decision date	06 February 2008
Reference details (type and title of court/body; in original language and English [official translation, if available])	Landgericht Köln [District Court Cologne]
Key facts of the case (max. 500 chars)	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. The doctor had removed her female genitalia, thus making her irrevocably a man.
Main reasoning/argumentation (max. 500 chars)	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.
Key issues (concepts, interpretations) clarified by the case (max. 500 chars)	If a person is insufficiently informed about the kind of surgery, its content and form, no valid consent exists.
Results (sanctions) and key consequences or implications of the case (max. 500 chars)	The Court awarded compensation for pain and suffering to an intersexual person 30 years after the surgery. The amount of compensation was determined in a separate case: 25 O 178/02, Landgericht Köln [District Court Cologne] 12 August 2009 and was determined 100,000 € plus interest.

Annex II – Statistics

A. Implementation of Employment Directive 2000/78/EC

Re: Para. 38 - 39

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.

For the number of complaints in the areas of work, education, rental of flats etc. see the sections on trans*, intersex and homosexual persons.

According to the report published in 2013 focusing on education and employment of 270 counselling requests between 2009 and 2012 in the area of education, 26 (9,63 %) concerned gender (including trans*/ inter*) and 9 cases (=3.33%) concerned sexual identity.

In the same time frame the ADS received 2,511 counselling request regarding employment, of which 640 (25,49 %) concerned gender (including trans*/ inter*) and 72 (= 2.87 %) related to sexual identity [255].

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.

[255] Germany, Federal Anti-Discrimination Agency (*Anti-Diskriminierungsstelle des Bundes*, ADS) (2013) 'Discrimination in education and employment -Second joint report of the Federal Anti- Discrimination Office and the concerned commissioners of the Federal Government and Parliament' (*Diskriminierung im Bildungsbereich und im Arbeitsleben -Zweiter Gemeinsamer Bericht der Antidiskriminierungsstelle des Bundes und der in ihrem Zuständigkeitsbereich betroffenen Beauftragten der Bundesregierung und des Deutschen Bundestages*), p.50; 182; available at: www.antidiskriminierungsstelle.de/SharedDocs/Downloads/DE/publikationen/Gemeinsamer_Bericht_2013.html (25 April 2014).

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 participated[256] (see the introduction, para. 5).

B. Freedom of movement

Relevant country-wide statistics are not available, as the Federal Office of Migration and Refugees does not record data on sexual orientation or gender identity.[257]

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.[258]

D. Family reunification

Relevant country-wide statistics are not available.[259] ().

[256] 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).
[257] Germany, Federal Office of Migration and Refugees (Bundesamt für Migration und Flüchtlinge), answer to a written inquiry, 23 April 2014.
[258] Germany, Federal Office of Migration and Refugees (Bundesamt für Migration und Flüchtlinge), answer to a written inquiry, 23 April 2014.
[259] Germany, Federal Office of Migration and Refugees (Bundesamt für Migration und Flüchtlinge), answer to a written inquiry, 23 April 2014.

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[260]	33[261]
Number of demonstrations against tolerance of LGBT people.	1[262]	0[263]

An update of this table has not been attempted as internet research might not be able to present an adequate number

F. Hate speech and Criminal law

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

[260] http://www.sozioland.de/rp/csd2006/5.html (20th February 2008).

[261] 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).

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

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

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'.[264] 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 Agency also does not register such proceedings. (See enclosed correspondence with the Anti-Discrimination Agency.)

Additionally, we reference the MANEO Anti-Violence Project of Berlin, which conducted the largest Germany-wide study to date, with nearly 24,000 participants and its second part with 17,000 participants: 'Experience of Violence of Gay and Bisexual Youth and Men in Germany'.[265] (See introduction, above.)

This information is still valid.

G. Transgender issues

The Federal Anti-Discrimination Agency provided following information[266]:

Year	2009	2010	2011	2012	2013	Labour law (2009-13)	Civil law (2009-13)	Education (2009-13)	Living space/ letting (2009-13)

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

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

[266]Germany, Federal Anti-Discrimination Agency (*Anti-Diskriminierungsstelle des Bundes*, ADS), Answer to a written inquiry, Email, 25 April 2014.

Number of counselling requests regarding Trans*	13	37	40	50	28	49	22	10	4

The numbe

r of proceedings under the Law on Transsexuals can be ascertained from the following excerpt from the administrative overview of the local courts.[267] 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.

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

Year	2007	2008	2009	2010	2011	2012
Number of Proceedings	799	903	992	1118	1657	1277

[267] Federal Ministery of Justice (*Bundesministerium der Justiz*, BMJ) (2013) Zusammenstellung der Geschäftsübersichten des Amtsgerichte 1995 bis 2012, available at: www.bundesjustizamt.de/DE/SharedDocs/Publikationen/Justizstatistik/Geschaeftsentwicklung_Amtsgerichte.pdf%3F__blob%3DpublicationFile%26v%3D5+&cd=1&hl=de&ct=clnk&gl=de&client=firefox-a (25 April 2014).

H. Miscellaneous

Same sex partnerships living in the same household[268]

Year	total	male	female	Thereof registered partnerships Total	male	female
Results of the German microcensus 2012						
2006	62000	39000	23000	12000	8000	/
2007	68000	44000	24000	15000	10000	5000
2008	70000	46000	23000	19000	14000	5000
2009	63000	37000	27000	19000	12000	7000
2010	63000	36000	27000	23000	13000	10000
2011	67000	40000	27000	27000	16000	11000
2012	73000	42000	31000	32000	18000	14000

The Federal Anti-Discrimination Agency provided following information[269]:

[268] Germany, Federal Statistics Office (2013) (*Statistisches Bundesamt*) registered partnerships- results of the microcensus 2012, available at: www.destatis.de/DE/ZahlenFakten/GesellschaftStaat/Bevoelkerung/HaushalteFamilien/EingetrageneLebenspartnerschaften.html.

[269] Germany, Federal Anti-Discrimination Agency (*Anti-Diskriminierungsstelle des Bundes*, ADS), Answer to a written inquiry, Email, 25 April 2014.

	2009	2010	2011	2012	2013	Labour law (2009-2013)	Civil law (2009-2013)	Education (2009-2013)	Living space, letting (2009-2013)
Number of counselling requests regarding homosexual persons	53	66	76	182	45	98	63	7	19

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'.[270]

Re: H.3. Intersexuality:

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

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

[270] http://www.ifb.bayern.de/forschung/regenbogen.html (29th February 2008).

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

The Federal Anti-Discrimination Agency provided following information[271]:

	2009	2010	2011	2012	2013	Labour law (2009-2013)	Civil law (2009-2013)	Education (2009-2013)	Living space, letting (2009-2013)
Number of counselling requests regarding intersex persons	-	2	2	1	1	-	1	-	-

[271] Germany, Federal Anti-Discrimination Agency (*Anti-Diskriminierungsstelle des Bundes*, ADS), Answer to a written inquiry, Email, 25 April 2014.

Table 1: Requirements for rectification of the recorded sex or name on official documents

	Intention to live in the opposite gender	Real life test	Gender dysphoria diagnosis	Hormonal treatment/ physical adaptation	Court order	Medical opinion	Genital surgery leading to sterilisation	Forced/ automatic divorce	Unchangeable	Notes
AT	✓	✓	✓	✓		✓	✗ court decision	✗ court decision		Legal changes expected to confirm court decisions
BE	✓			✓		✓	✓			Rectification of recorded sex
BE	✓			✓		✓				Change of name
BG				?	✓	✓	?	✓	✓ (birth certificate)	Only changes of identity documents are possible (gap in legislation)
CY						✓	✓	?		
CZ	✓	✓	✓	✓		✓	✓	✓		These requirements are not laid down by law, but are use by medical committees established under the Law on Health Care
DE	✓		✓		✓	✓				Small solution: only name change
DE	✓		✓	✓	✓	✓	x Court declared requirement unconstitutional, law will have to be amended	✗ court decision and law		The Law on Transsexuals [*Transsexuellengesetz*] provides transsexuals with two solutions: a change in given name without a surgical procedure, (small solution = Art.1 TSG)) and the determination of gender after a gender reassignment surgery (big solution = Art.8 TSG). Legislation must be revised in order to transpose court decisions
DK	✓	✓				✓	✓	?		Rectification of recorded sex
DK			✓			✓				Change of name
EE	✓	✓				✓	✓	?		
EL					✓	✓	✓	?		
ES			✓	✓		✓				
FI	✓	✓	✓			✓	✓	✓		Name change possible upon simple notification, also before legal recognition of gender reassignment

FR			✓	✓	✓	✓	✓	✓		Requirements set by case law, legal and medical procedures uneven throughout the country
HU						✓		✓		No explicit rules in place. Requirements descend from praxis, but unclear what is necessary in order to obtain a medical opinion. After 1 January 2011 a marriage can be transformed into a registered partnership
IE									✓ (name change possible by Deed Poll and under Passports Act 2008)	Further changes expected following court case *Lydia Foy* (2007)
IT			✓	✓	✓	✓	✓	✓		
LT									✓ (personal code)	Legal vacuum due to lack of implementing legislation, courts decide on an ad hoc basis.
LU										No provisions in force, praxis varies.
LV						✓	✓ Change of name is possible after gender reassignment			Medical opinion is based on an intention to live in the opposite gender and on a diagnosis of gender dysphoria. For rectification of the recorded sex, currently the Ministry of Health decides case-by-case (parameters not specified). Amendments to the law were proposed but not adopted.
MT	✓	✓	✓	✓	✓	✓	✓	(only unmarried, divorce not possible)		Requirements unclear, decided by Courts on an ad hoc basis
NL	✓	✓	✓	✓	✓	✓	✓			According to Article 28a of the civil code, the requirement of physical adaptation does not apply if it would not be possible or sensible from a medical or psychological point of view. Changes are underway, forced sterilisation might be removed.

PL				✓	✓	✓	✓	✓		No legislation in place, requirements set by court practice
PT	✓		✓	✓	✓	✓	✓			Case-by-case decisions by courts, new act expected
RO				✓	✓	✓	✓			
SE	✓	✓			?	✓	✓	✓		Decision issued by forensic board
SI										No formalities for change of name
SK							✓	?		Change of name granted simply upon application accompanied by a confirmation by the medical facility.
UK										Change of name requires no formalities
UK	✓	✓	✓			✓		✓		Rectification of the recorded sex

Notes: This is not a table about the requirements for accessing gender reassignment treatment. This means, in particular, that gender dysphoria diagnosis might be in practice required by medical specialists as a pre-condition for a positive opinion. This situation is not captured by this table, which illustrates the conditions for legal recognition of gender reassignment.

✓= applies; ?=doubt; ✗=removed; change since 2008

Table 2: Discrimination on grounds of sexual orientation in legislation: material scope and enforcement bodies

Country Codes	Material scope			Equality body	Comments
	Employment only	Some areas of RED[272]	All areas of RED*		
AT		✓		✓	Two of nine provinces have not extended protection to all areas covered by RED: Vorarlberg and Lower Austria. Vorarlberg extended protection to goods and services in 2008.
BE			✓	✓	
BG			✓	✓	
CY	✓			✓	
CZ			✓		New anti-discrimination legislation adopted
DE			✓	✓	
DK	✓			✓	New equality body set up
EE	✓			✓	New anti-discrimination legislation adopted
EL	✓			✓	
ES			✓		
FI		✓			
FR	✓			✓	
HU			✓	✓	
IE		✓		✓	
IT	✓				

[272] Employment discrimination is prohibited in all EU Member States as a result of Directive 2000/78/EC. Directive 2000/43/EC (Racial Equality Directive) covers, in addition to employment and occupation, also social protection (including social security and healthcare), social advantages, education and access to and supply of goods and services which are available to the public, including housing.

Country Codes	Material scope			Equality body	Comments
	Employment only	Some areas of RED[272]	All areas of RED*		
LT		✓		✓	
LU		✓		✓	
LV		✓		✓	
MT	✓				
NL		✓		✓	
PL	✓				
PT	✓				
RO			✓	✓	
SE			✓	✓	
SI			✓	✓	
SK			✓	✓	
UK			✓	✓	The Equality Act 2010 replicates the sexual orientation protection offered in the Equality Act (Sexual Orientation) Regulations 2007 and the Employment Equality (Sexual Orientation) Regulations 2003 and expands protection in a number of ways. The new Equality Act is expected to enter into force October 2010.
TOTAL	**9**	**7**	**11**	**20**	

Note: ✓ **=** Applies; **?** = doubt; **x** = removed; **change since 2008**

Table 3: Discrimination on grounds of gender reassignment or identity in national legislation

Country Codes	Form of "sex" discrimination	Autonomous ground	Dubious/unclear	Comments
AT	✓			Legal interpretation and explanatory memorandum
BE	✓			Explicit provision in legislation or *travaux préparatoires*
BG			✓	
CY			✓	
CZ	✓			The new Antidiscrimination Act makes reference to 'gender identification'.
DE			✓	Constitutional amendment proposal by opposition ('sexual identity') → have been rejected
DK	✓			Decisions by the Gender Equality Board
EE			✓	The Gender Equality and Equal Treatment Commissioner has dealt with one application and took the view that the Gender Equality Act could apply to 'other issues related to gender'.
EL			✓	
ES			✓	The Constitutional Court held that gender identity is to be read in among the prohibited grounds of discrimination in Article 14 of the Constitution. Together with the adoption of several regional laws, a trend can be noted towards the protection of gender identity.
FI	✓			Committee for law reform proposes to explicitly cover transgender discrimination in equality legislation.
FR	✓			Case law and decisions by the equality body
HU		✓		
IE	✓			The Employment Equality Act 1998-2004 is interpreted in accordance with the case law of the Court of Justice of the EU.
IT			✓	
LT			✓	
LU			✓	
LV			✓	
MT			✓	
NL	✓			Case law and opinions of the Equal Treatment Commission

Country Codes	Form of "sex" discrimination	Autonomous ground	Dubious/unclear	Comments
PL			✓	
PT			✓	
RO			✓	
SE	✓	✓		Discrimination on grounds of gender reassignment is still considered 'sex' discrimination. The new ground 'transgender identity or expression' now covers other forms of gender variance, regardless of gender reassignment.
SI			✓	The Act Implementing the Principle of Equal Treatment contains an open clause of grounds of discrimination.
SK	✓			Explicit provision in legislation
UK		✓		The Equality Act 2010 replicates the 'gender reassignment' protection offered in the Sex Discrimination Act since 1999, but removes the requirement to be under "medical supervision" and expands protection in several ways. The new Equality Act is expected to enter into force in October 2010.
TOTAL	**10**	**3**	**15**	

Note: ✓ = applicable; positive development since 2008

Table 4: Criminal law provisions on 'incitement to hatred' and 'aggravating circumstances' covering explicitly sexual orientation

Country Codes	Criminal offence to incite to hatred, violence or discrimination on grounds of sexual orientation	Aggravating circumstance	Comments
AT			Existing provisions of the criminal law against incitement to hatred explicitly restrict the protection to groups other than LGBT people.
BE	✓	✓	
BG			Existing provisions of the criminal law against incitement to hatred explicitly restrict the protection to groups other than LGBT people.
CY			General provisions could extend to LGBT people.
CZ			New Criminal Code in 2009 contains no explicit recognition of homophobic hate crimes. LGBT could fall under the category 'group of people', but as the law entered into force in January 2010 there is no case law yet. The explanatory report of the law also does not define the term.
DE			Hate speech legislation does not explicitly extend to homophobic motive, but extensive interpretation has been confirmed by courts.
DK	✓	✓	
EE	✓		
EL		✓	Article 23 of Law 3719/2008 provides for an aggravating circumstance in cases of hate crime based on sexual orientation.
ES	✓	✓	
FI		✓	According to the pertinent preparatory works, LGBT people could fall under the category 'comparable group'. A working group has proposed that the provision on incitement be amended to explicitly cover sexual minorities (2010).
FR	✓	✓	
HU			LGBT people could fall under the category 'groups of society'. Penal Code was amended to include hate motivated crimes against 'certain groups of society'. Case law has shown this includes the LGBT community.
IE	✓		Homophobic motivation might be taken into consideration at the sentencing stage, but this is left to the discretion of the courts.
IT			Existing provisions of the criminal law against incitement to hatred explicitly restrict the protection to groups other than LGBT people.
LT	✓	✓	Homophobic motivation was included in the list of aggravating circumstances in June 2009.

Country Codes	Criminal offence to incite to hatred, violence or discrimination on grounds of sexual orientation	Aggravating circumstance	Comments
LU			General provisions could extend to LGBT people.
LV			Homophobic motivation might be taken into consideration at the sentencing stage, but this is left to the discretion of the courts.
MT			Existing provisions of the criminal law against incitement to hatred explicitly restrict the protection to groups other than LGBT people.
NL	✓	✓	The 2009 Public Prosecution Service's Bos/Polaris Guidelines for Sentencing recommend a 50% higher sentence for crimes committed with discriminatory aspects.
PL			General provisions could extend to LGBT people
PT	✓	✓	
RO	✓	✓	Art. 317 of the Criminal Code sanctions only hate speech as 'incitement to discrimination', but includes sexual orientation. Article369 on incitement to hatred does not mention sexual orientation explicitly, but covers incitement against a 'category of persons', without further specification. The new Criminal Code will enter into force on 1 October 2011.
SE	✓	✓	
SI	✓		Article 297 of the new Penal Code concerning provoking or stirring up hatred, strife or violence, or provoking other inequality explicitly includes sexual orientation. Homophobic intent is only considered an aggravating circumstance in the case of murder.
SK			LGBT people could fall under the category 'group of people'
UK (N-Ireland)	✓	✓	
UK (England & Wales.)	✓	✓	The Criminal Justice and Immigration Act 2008, extending provisions on incitement to racial or religious hatred to cover the ground of sexual orientation, came into force on 23.03.2010. It applies to Scotland as well.
UK (Scotland)	✓	✓	In June 2009, the Offences (Aggravation by Prejudice) (Scotland) Act was passed, entry into force on 24 March 2010, also indicating homo- and transphobic motive as an aggravating circumstance.

Note: ✓= applicable; positive development since 2008

Table 5 - Definition of 'family member' for the purposes of free movement, asylum and family reunification

Country Codes	Free movement[273]		Family Reunification		Asylum		Comments
	spouse	partner	spouse	partner	spouse	partner	
AT		✓		✓		✓	Article 59 of the Registered Partnership Act (BGBl. I, No. 135/2009) modifies Article 9 of the Settlement and Residence Act, which now stipulates that the definition of 'family member' includes a registered partner. Article 57 of the Registered Partnership Act modifies Article 2/1 of the Asylum Act [Asylgesetz], which now stipulates that the definition of 'family member' includes a registered partner, provided that the registered partnership had already existed in the country of origin. Same-sex spouses are likely to be treated as registered partners.
BE	✓	✓	✓	✓	✓	✓	
BG							Article 7 of the new Family Code (01.10.2009) confirms that marriage is a mutual agreement between a man and a woman.
CY							
CZ		✓		✓		✓	Same-sex spouses are likely to be treated as registered partners. Rights concerning family reunification and asylum are restricted to registered partnerships.
DE		✓		✓		✓	Same-sex spouses are likely to be treated as registered partners. Rights concerning family reunification and asylum are restricted to registered partnerships. Since 2013, the law on Freedom of Movement puts registered partner and spouses equal. Family reunification/asylum: equal treatment.
DK	✓	✓	✓	✓	✓	✓	
EE							The new Family Law Act (entry into force 01.07.2010) defines marriage as a different-sex institution only and considers marriage between persons of the same sex invalid. Family reunification possible when the partner can prove that he/she is economically or socially dependent.
EL							
ES	✓	✓	✓	✓	✓	✓	Organic Law 2/2009 of 11 December (Spain/Ley Orgánica 2/2009 (11.12.2009)) has modified Organic Law 4/2000 in order to grant couples who have an affective relationship similar to marriage the right to family reunification. Implementing regulations to this law have not been adopted, thus the meaning of the requirement that the 'affective relationship' be 'duly attested' remains to be clarified. Article 40 of the Law 12/2009 of 30 October on the right to asylum and subsidiary protection [del derecho de asilo y de la protección subsidiaria] replaces Law 5/1984 of 26.03.1984 and, by transposing the EU acquis, confirms the notion that a family member includes the de facto partner having an affective relationship similar to marriage.
FI	✓	✓	✓	✓	✓	✓	
FR	?	?	?	?	?	?	As a result of the entry into force on 14.05.2009 of a new Article 515-7-1 of the French Civil Code, inserted by law 2009-526 of 12.05.2009, foreign registered partnerships are recognised in France; the repercussions of this change for the purposes of free movement of EU citizens are still unclear. Family reunification of third country nationals depends upon the authorities' discretion, which may require additional conditions. No information available on refugees.
HU		✓		✓		?	Entry and residence rights for free movement are also granted for the unmarried *de facto* partner, subject to conditions.

[273] In the vast majority of the Member States, no clear guidelines are available concerning the means by which the existence either of a common household or of a 'durable relationship' may be proven for the purposes of Art. 3 (2) of the Free Movement Directive.

Country Codes	Free movement[273]		Family Reunification		Asylum		Comments
	spouse	partner	spouse	partner	spouse	partner	
IE		✓		✓		✓	Adoption of Civil Partnership Act in 2010. Immigration, Residence and Protection Bill not yet enacted, but the government intends to treat registered partners in the same way as spouses.
IT							
LT							
LU		✓		✓		✓	The new law on free movement and immigration (29.08.2008) recognises as a family member a spouse or registered partner provided the conditions set forth in article 4 of the partnership law (09.07.2004) are fulfilled. Rights concerning family reunification and asylum are restricted to registered partnerships. Same-sex spouses are likely to be treated as registered partners.
LV		✓					Article 3.4 of the Cabinet of Ministers Regulation No. 586 on Entry and Residence includes in its definition of family member a person who is a dependant of a Union citizen or his or her spouse and who has shared a household with a Union citizen in their previous country of domicile.
MT							
NL	✓	✓	✓	✓	✓	✓	
PL							
PT	✓	✓	✓		✓		Allows same-sex couples to enter into a marriage since June 2010.
RO		?					The new Civil Code (2009) includes a prohibition of same-sex partnership and marriage, including denial of recognition of partnerships and marriages concluded in other countries.
SE	✓	✓	✓	✓	✓	✓	Allows same-sex couples to enter into a marriage since May 2009.
SI							Provides a legal scheme for registered partnership in domestic law, but without granting entry and residence rights to registered partners
SK							Family reunification possible when the partner can prove economic or social dependence.
UK	✓	✓	✓	✓	✓	✓	
TOTAL	**8**	**15**	**8**	**13**	**8**	**12**	

Note: ✓= applicable; ? = doubtful/unclear; positive changes since 2008; other developments since 2008.