



Lesben- und Schwulenverband

**Member of the board**

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U.N. Human Rights Committee

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## List of Issues (Suggestions for questions):

### *Non-discrimination (articles 2(1), 3 and 26 ICCPR)*

*1. Please provide details on the provisions of the planned non-discrimination law in civil legislation which intends to prohibit discrimination on grounds of race and ethnic origin concerning access to goods, services and housing Will it prohibit discrimination on grounds of sex, religion or belief, sexual orientation, gender identity, disability, HIV status and age ? If not, provide details of how Germany's legislation provides protection against discrimination on these grounds.*

Concerning access to goods, services or housing some groups of persons, e. g. lesbians, gay men and transgender people, members of smaller religious communities or disabled persons experience equal or similar disadvantages and exclusion as people who experience these discrimination on grounds of race or ethnical origin.

Therefore in 2001 a legislative project of the Federal Ministry of Justice foresaw the introduction of an anti-discrimination law in civil law on grounds of gender, race, ethnic origin, religion or ideology, handicap, age, sexual orientation or gender identity. The project was cancelled and meanwhile it has not been pursued by the Federal Ministry of Justice in spite of contrary promises made by the ruling parties during the 2002 election campaign. A limitation of the ban on discrimination on some grounds of discrimination, and not others, would probably mean an offence against the principle of equal treatment.

*2. Please provide information on the measures taken or planned to address the remaining inequalities in legal protection between married couples and same-sex couples living in a registered life partnership („Eingetragener Lebenspartnerschaft“), inter alia in terms of income tax, inheritance and donation tax, pensions of surviving partners, civil service law, adoption and custody law; especially in light of the decision of the German Constitutional Court of July 2002 holding that the registered life partnership can be made completely equal to marriage in rights and responsibilities.*

Registered partners have the same obligations of support as married couples. As for married partners, with regards to social contributions the income of one of the registered partners is taken into account. But unlike married partners registered partners do not benefit from an adequate tax deduction for the support obligation. Concerning inheritance and donation taxes registered partners are still treated as non relatives and are subjected to the highest tax rate. Whereas married partners benefit from a tax allowance of 307.000 € plus a provision allowance of 256.000 €,

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registered partners only benefit from a tax allowance of 5.200 €. There are further differences concerning special tax allowances. In contrast to married couples payments during life time among registered partners connected to house building within the country are not tax-free for registered partners. These great differences may result in expropriation of the surviving partner.

Unlike married couples civil servants living in a registered partnership are excluded from several benefits such as higher salary, pensions for surviving partners and health provision. Concerning public pension schemes there is no pension for surviving registered partners in contrast to surviving married partners<sup>1</sup>. Registered partners do not have common custody for children raised in a registered partnership. A common adoption is also not legally possible.

All of these inequalities raise questions under international human rights law, especially in light of the decisions of the Committee in *Young v. Australia* (2003).

*Privacy and the right to marry (Articles 17 and 23 ICCPR), non-discrimination (article 2(1) and 26 ICCPR)*

*3. Please comment on the compatibility of provisions of the Transsexuals Act 1980 relating to the change of name and sex (especially articles 1 and 7 which de-facto prohibit transsexual persons who have changed their first names to marry and article 8 which requires the dissolution of existing marriages and the carrying out of unnecessary medical procedures in order to affect a change of legal status/sex) with articles 2(1), 17, 23 and 26 ICCPR. Please explain why the Act not applicable to all foreigners who are lawfully resident in the country.*

The German Act on the Change of Christian Names and the Determination of Gender Identity in Special Cases (Transsexuals Act) 1980 (*Transsexuellengesetz*) provides for a change in Christian name (the so-called "small solution") and a change in civil status, i.e. legal sex (the so-called "grand solution") to address the particular situation of transsexual persons. The changes are subject to a number of conditions to be met by transsexual persons and which are of concern in relation to the provisions of the ICCPR and the decisions of the Human Rights Committee.

#### *Change of name*

Article 1 of the Transsexuals Act provides, inter alia, that the forenames of a person who, on account of a transsexual state, no longer feels himself or herself to belong to the sex recorded at birth, but to the opposite sex and has been for three years under the constraint of living with these feelings, shall be changed by the court upon request of the person concerned, if the person is German or a recognised refugee<sup>2</sup>; and there is a high probability that the feeling of the other sex will not change.

The person who wishes to change his or her name, has to make an application to the court, be heard in person and requires two medical assessment by experts in the field of transsexuality (Article 4 Transsexuals Act). The process may take a considerable amount of time and involve drawn out (and sometimes humiliating) psychological

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<sup>1</sup> In the reforms introduced during the last months under the heading of "Reform 2010" the government has in several instances equalized the requirements for registered life partners to support their partners (ie in the case of unemployment) but has not for example equalized the right of life partners to surviving partner pension benefits.

<sup>2</sup> There is currently a challenge before the Constitutional Court to the exclusion of foreigners from the scope of the law: Az. 1 BvL 1/04.

assessments. All the costs have to be borne by the applicant. Once the application to change the name has been granted, the applicant will bear their chosen name, but will continue to be legally considered as belonging to the sex at birth. This leads to incongruity on the birth certificate and will immediately open the applicant to questions of an intimate nature should he or she have to produce the birth certificate (arguably affecting the enjoyment of their right to privacy).

#### *The right to marry and found a family (article 23 ICCPR)*

Pursuant to article 7 of the Transsexuals Act, a change of name will be revoked if (1) a child is born to the applicant 302 days after the decision has come into effect, or if (3) the applicant contracts a marriage. An unmarried transsexual person who has successfully changed his name and wishes to marry will have to adopt his or her previous first names, despite his or her apparent membership of the other sex and changed appearance. A female-to-male transsexual man cannot marry a woman, as he is still legally female even though he is bearing a male name. If he marries a man, his name-change will be reversed. He can furthermore not enter into a registered homosexual partnership with another man, as he is still legally female (and hence the couple would be legally heterosexual).<sup>3</sup> This constitutes a de-facto ban on the right to marry and to contract a registered partnership, and hence a violation of article 23 ICCPR, a violation of article 17 ICCPR in conjunction with article 2(1) or article 26 ICCPR in relation to the partnership law.<sup>4</sup>

#### *The right to privacy (article 17 ICCPR)*

In the decision *A.R. Coriel and M.A.R. Auriel v the Netherlands* (1994), the Human Rights Committee held that the notion of privacy refers to the sphere of a person's life in which he or she can freely express his or her identity. They held that this included "the right to choose and change one's name" - irrespective, inter alia, of administrative considerations invoked by a state party. Hence, it is argued that the exercise of the right to choose and change one's name should not be made dependent on the onerous conditions stipulated in article 1 of the Transsexuals Act including the lengthy and costly court procedure, the proof of a three year compulsion to live as a member of the "chosen" sex and the presentation of two expert statements. (In a written response before Parliament, dated 12 December 2001, the Government had stated that they were considering changes in the Transsexuality law to render the change of first names easier, however no change to legislation has as yet been suggested.)

Neither can an applicant be expected, in realisation of article 17 rights to freely express his or her identity, to forgo or trade off his or her rights under articles 2(1), of other aspects of article 17, 23 ICCPR (and/or 26 ICCPR) in relation to the right to marry or found a family.

#### *Change of legal status/sex*

Article 8 of the Transsexuals Act which stipulates the conditions for a change in legal status, states: (1) The court shall pronounce upon application by a person who, due to her/his transsexual condition, no longer identifies with the gender recorded at birth but the opposite gender and who has been subject to the compulsion to live in accordance his/her conviction for at least three years, that she/he shall be deemed to belong to the

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<sup>3</sup> Just as non-transsexual persons, transsexual persons can be heterosexual, homosexual or bisexual.

<sup>4</sup> The provision of Article 7 (3) of the Transsexuals Act is currently subject to two challenges before the Constitutional Court: Az. 1 BvL 3/03 and Az. 1 BvR 2201/02.

other gender, provided... 2. she/he is not married, 3. she/he is permanently infertile and 4. she/he has undergone an operation changing external sexual characteristics through which a clear approximation to the other gender has been achieved.

*Interference with a person's privacy and family life (article 17 ICCPR)*

Article 8(2) requires married transsexual persons to divorce existing relationships in order to be fully recognised in their "apparent" sex, despite the fact that the Law on Registered Partnerships now allows same-sex partnerships. Hence, it would require a violation of the enjoyment of certain aspects of article 17 and 23 ICCPR (i.e. relating to family life), in order to allow the transsexual applicant to benefit from other aspects of the right to privacy, i.e. the expression of his or her gender identity. (In a written response before Parliament, dated 12 December 2001, the Government stated that the prerequisite of not being married for a change in legal status could be reconsidered in the light of the partnership law allowing same-sex couples to register their partnerships.)

*Interference with bodily integrity*

In the case of female-to-male transsexuals, the requirement of infertility in Article 8(3) of the German Transsexuals Act is usually interpreted by the courts as requiring a hysterectomy and an oophorectomy. This requirement is unreasonable on for the following reasons: these operations are very intrusive and not medically necessary or indicated in order to treat gender dysphoria (transsexuality). To the contrary, even in cases where, due to medical risks, these operations cannot be carried out, the person concerned is seen as not fulfilling all the conditions and cannot register a change in legal status (OLG Hamm, MedR 1984, 146). Furthermore, the requirement of these operations is disproportionate as de-facto infertility is achieved through the taking of hormones, which constitutes an integral part of the treatment for gender dysphoria.

Hence, article 8(3) of the Transsexuals Act seriously affects the enjoyment of rights guaranteed by the Covenant by de-facto requiring interference with the bodily integrity of the transsexual applicant and the dissolution of an existing marriage as a pre-condition for the full enjoyment of the right to the full expression of one's identity and its corresponding recognition in all areas of the law as a member of the "chosen" sex, a right subsumed under the right to privacy (see the decision of the Committee in the case of Coriel above).

*This List of Issues is presented by the Lesbian and Gay Federation in Germany (Lesben- und Schwulenverband in Deutschland - LSVD), the largest civil rights organization for lesbians and gay men in Germany, in conjunction with the International Research Centre for Social Minorities (IRCSM) based in Geneva, the National Council of Centers for Self-Determined Living of Disabled People (Interessenvertretung Selbstbestimmt Leben in Deutschland - ISL e.V.) and the German Network for Equal Rights of Disabled People (Netzwerk Artikel 3 - Verein für Menschenrechte und Gleichstellung Behinderter e.V.).*