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Violations of Civil and Political Rights of LSBTIQ* Persons in FEDERAL REPUBLIC OF GERMANY

Lesbian and Gay Federation in Germany (LSVD) and Federal Trans* Association (BVT*) submit this shadow report to the Human Rights Committee (hereafter “the Committee”) in anticipation of the Committee’s upcoming review of the Federal Republic of Germany’s (“Germany”) compliance with the International Covenant on Civil and Political Rights in September-October 2020.

SITUATION OF TRANS AND NON-BINARY PEOPLE IN GERMANY

Submission of Federal Trans* Association (Bundesverband Trans*)

Federal Trans* Association (Bundesverband Trans*, <https://www.bv-trans.de/>) is a nationwide umbrella not-for-profit organization and advocacy group committed to the rights of trans people in Germany. The BVT* was founded in 2015 by 59 members of over 30 self support groups, not-for-profit associations, and action groups from all over Germany. The main goals of the BVT* currently are: the abolition of the Transsexuellengesetz (TSG) and the introduction of new legislation regulating legal gender recognition on the basis of self-determination; securing and improving trans health care; protecting the human rights of trans asylum seekers and refugees; supporting trans self-help groups, networks and not-for-profit organizations; elimination of psycho-pathologization and stigmatization of trans and gender non-conforming people; and enhancing anti-discrimination legislation.

For further information please contact us via info@bv-trans.de

Brief assessment of list of issues:

There were no specific recommendations regarding trans issues made to Germany in the 7th periodic report. Recommendations were made on the broader issue of combating violence against women and the related issue of protection of children with variations of sex characteristics.

The rights most commonly violated:

right of self-determination and free personal development (art. 1), right to equality and non-discrimination (arts. 2, 26), protection from inhuman or degrading treatment (art. 7), children's rights and protection of families (arts. 23, 24)

National framework: Legal Gender Recognition and change of first name(s) is regulated by the "Transsexual Law" (Transsexuellengesetz / TSG) from 1980. Access to trans related health care is firstly regulated through the medical guidelines "Gender Incongruence, Gender Dysphoria, and Trans Health" that were published by medical associations in 2018.¹ Secondly, outdated „Standards for Treatment and Examination" issued by a joint committee representing national public health insurance companies in 2009 are still in effect controlling access to the health care system. These standards maintain old requirements, overhauled by the medical guidelines of 2018, of for instance enforced psychotherapy in order to qualify for cost reimbursement based on the diagnosis "gender identity disorder."²

Specific challenges:

1. General obstacles to Legal Gender Recognition (LGR)

The "Transsexual Law" (TSG) is outdated and discriminatory. Although the Federal Constitutional Court (BVerfG) has deemed various aspects of the TSG as incompatible with human rights over past decades, the law has not been replaced nor has it been reformed. Up to the present day a court procedure, two "expert opinions" and a personal meeting with a judge are required to access legal gender recognition. The procedure involves unnecessary pathologization as a diagnosis of "gender identity disorder" is considered a prerequisite. Furthermore, the procedure is time-consuming (Ø 9 months),³ expensive (Ø 1.800€),⁴ and has often been described as humiliating. Two reports for the Federal Ministry for Family Affairs, Senior Citizens, Women and Youth (BMFSFJ) came to the conclusion that the TSG in its current form infringes basic rights and international human rights treaties.⁵ Both reports include a draft for new gender recognition legislation based on human rights.⁶ Nevertheless the coalition agreement of the current government (2018) mentions a reform of the TSG only in the vaguest of terms and it remains unclear when the government is planning to address this human rights violation.

2. Recognition of non-binary trans persons

In 2018, Germany introduced a third gender marker "diverse" and thus, another procedure for legal gender recognition, §45b Personal Statute Law (Personenstandsgesetz/PStG), was established. The introduction of the third gender marker was demanded by the Federal Constitutional Court (BVerfG) in order to recognize the rights of intersex persons who identify outside the gender binary.⁷ Again access to legal gender recognition is linked to pathologization as a medical certificate stating a "variance of gender development" is needed. Since the introduction of this law, it has been an ongoing debate who can access legal gender recognition through §45b PStG. A juridical expertise published by the Federal Ministry for Family Affairs, Senior Citizens, Women and Youth (BMFSFJ) elaborated that this procedure should be accessible to all trans, intersex, and non-binary individuals when past jurisdiction of the Constitutional Court is taken into account. However, non-binary trans people face many obstacles when applying for legal gender recognition through §45b PStG. Requests are turned down arbitrarily, public servants refuse to work on these applications or generally doubt the

¹ Arbeitsgemeinschaft der Wissenschaftlichen Medizinischen Fachgesellschaften (AWMF, 2019): Geschlechtsinkongruenz, Geschlechtsdysphorie und Trans-Gesundheit: S3-Leitlinie zur Diagnostik, Beratung und Behandlung. AWMF-Register-Nr. 138/001

² Medizinischer Dienst des Spitzenverbandes Bund der Krankenkassen (MDS, 2009): Grundlagen der Begutachtung. Begutachtungsanleitung. Geschlechtsangleichende Maßnahmen bei Transsexualität

³ Adamietz & Bager (2017): Regelungs- und Reformbedarf für transgeschlechtliche Menschen. Gutachten im Auftrag des Bundesministeriums für Familie, Senioren, Frauen und Jugend. Begleitmaterial zur Interministeriellen Arbeitsgruppe Inter- & Transsexualität – Band 7, p. 11

⁴ Adamietz & Bager, p. 12

⁵ Adamietz & Bager (2017); Deutsches Institut für Menschenrechte/DIMR (2017): Geschlechtervielfalt im Recht. Status quo und Entwicklung von Regelungsmodellen zur Anerkennung und zum Schutz von Geschlechtervielfalt. Begleitmaterial zur Interministeriellen Arbeitsgruppe Inter- & Transsexualität – Band 8

⁶ Adamietz & Bager, p. 26-32 and DIMR (2017), p. 68-86

⁷ Federal Constitutional Court (BVerfG) Case: 1 BvR 2019/16, decision of 10 October 2017

validity of medical certificates. Non-binary trans people are a substantial part of the trans community with numbers ranging from 25-75% of all trans people identifying as “non-binary”.⁸ To clarify the situation for non-binary individuals, a complaint has been handed in at the Federal Constitutional Court (BVerfG) in June 2020. As binary trans people, non-binary and binary intersex persons have the right to be recognized in their identities, non-binary trans people must have the right to be recognized and respected in their identities as well.

3. Trans parents: A gap in recognition

After a TSG procedure, trans people are legally recognized in every aspect of life except one: parenthood. Trans parents who are biological parents are either misgendered in their child’s birth certificate or risk that legal gender recognition is revoked altogether. Shortly after the sterilization requirement for LGR was dropped in 2011, a trans man gave birth to a child and has been struggling to be recognized as a father ever since. The Federal Supreme Court (BGH) ruled that, although his legal name and status are male, he is to be registered as “mother” with his former female name in the birth register and his child’s birth certificate,⁹ thus effectively listing a person as parent that does not legally exist. The subsequent problems are numerous, making it impossible for him to register his child in school, go for a vacation abroad or even prove that he is the child’s parent without disclosing his trans status, subjecting himself and his child to various forms of discrimination. The Federal Constitutional Court (BVerfG) rejected the appeal of the complainant without explanation in May 2018.¹⁰ The case is now pending before the European Court of Human Rights (ECtHR) together with the complaint of a trans woman advocating for her right to get recognized as mother of her biological child.¹¹

4. Protection of trans children and minors

Although the majority of trans people discover their gender identity before the age of 18 and start to come out earlier than in previous decades, transitioning as a minor is extremely difficult.¹² Access to LGR or trans related health care is regulated even more strictly for minors than for adults and additionally depends on the explicit consent of both parents or legal guardians. This dependency on parental consent is problematic as parents can easily block the child’s or teenager’s options to transition. If parents don’t support their trans children’s identity, it leads to high levels of gender dysphoria, anxiety, depression, and suicidality amongst trans minors, whereas trans children who are supported in their identities are just as healthy as their non-trans peers.¹³ This violates children’s right to health as well as their right to express views affecting them and be heard according to their age and maturity. While access to trans related health care is not regulated by the state but the medical professions, the government can send a strong signal by strengthening trans minors’ right to self-determination when accessing legal gender recognition.

5. Trans refugees & asylum seekers

Trans refugees and asylum seekers are among the most vulnerable people in Germany, often fleeing transphobia in their home countries just to experience transphobia from other refugees in German shelters as well as racism and transphobia by the German population, administration,

⁸ DIMR (2017), p. 46; FRA (2104): Being Trans* in the European Union. Comparative Analysis of EU LGBT Survey Data, p. 16

⁹ Federal Supreme Court (BGH), Case Nr. XII ZB 660/14

¹⁰ Federal Constitutional Court (BVerfG), Case I BvR 2831/17

¹¹ ECtHR Application No. 53568/18 & 54741/18, O.H. and G.H. against Germany. Retrieved from <http://hudoc.echr.coe.int/eng?i=001-191385>

ECtHR Application No. 7246/20, A.H. and others against Germany. Retrieved from <http://hudoc.echr.coe.int/eng?i=001-203947>

¹² Sauer & Meyer (2017). Wie ein grünes Schaf in einer weißen Herde. Lebenssituationen und Bedarfe von jungen Trans*-Menschen in Deutschland. Retrieved from https://www.bundesverband-trans.de/wp-content/uploads/2020/06/web_bvt_schaf_brosch_200609.pdf

¹³ Olson et al. (2016): Mental Health of Transgender Children Who Are Supported in Their Identities. *Pediatrics*; 137(3):e20153223

and legislation. Trans refugees or asylum seekers often decide against disclosing their trans identity for fear of violence within their refugee shelter. Consequently, the City of Berlin decided to regard trans refugees as "vulnerable persons" in the sense of the EU Directive 2013/33/EU which allows for special protection. The federal government has followed this initiative in 2019 and established that regional governments have the duty to particularly address the needs of trans refugees and asylum seekers.¹⁴ However, local governments are often still failing to provide safe accommodation to trans refugees and asylum seekers. Last but not least, trans refugees are not entitled to LGR or trans related health care until the asylum procedure is completed, which often takes more than a year.

6. Compensations for 30 years of enforced sterilization

From 1981 to 2011, the "Transsexual Law" required trans persons to undergo sterilization, hormone therapy and gender reassignment surgery as a prerequisite to apply for LGR. Many trans people therefore decided to undergo sterilization and gender reassignment surgery, giving up their physical integrity and reproductive rights, although they would not have done so, given the choice. Others decided against gender recognition, facing discrimination but unwilling to give up one human right for the other. The Council of Europe Human Rights Commissioner critically remarked in 2009 that "transgender people appear to be the only group in Europe subject to legally prescribed, state-enforced sterilization."¹⁵ This prerequisite was an unspeakable violation of human rights and should therefore be compensated for.

RECOMMENDATIONS:

- 1) Initiate a major legislative reform by replacing the "Transsexual Law" with quick, transparent and accessible procedures based on self-determination. Implement a third gender option that is open to all non-binary persons regardless of sex characteristics. Ensure full access and recognition also for minors, parents, refugees, detainees, migrants and persons with disabilities.
- 2) Ensure safe accommodation, access to gender recognition procedures, and full health care from the date of application for refugee status.
- 3) Set up a national compensation fund for trans people who were coerced into sterilization or unwanted gender reassignment treatment or chose to not seek gender recognition because of these requirements between 1981 - 2011.

Submission of the Lesbian and Gay Federation in Germany (LSVD)

The Lesbian and Gay Federation in Germany (LSVD) is Germany's national organization of lesbians, gays, bisexuals, trans* and intersex persons (LGBTIQ*). Our organization was founded in February 1990 in Leipzig as part of the civil rights movement in former East Germany. Nowadays the LSVD counts around 4.500 individual members and around 100 member organizations. Apart from the organization on the national level, there are LSVD associations in the 16 regions (federal states) and LSVD has offices in several cities in Germany. We work for equal rights and non-discrimination policies for LGBTIQ* people. The LSVD fights against all legal and other discrimination based on sexual orientation and gender identity. By means of campaigning we try to increase the acceptance of LGBTIQ* persons in Germany. Furthermore, we offer support and (legal) advice for LGBTIQ* persons. The LSVD has been strengthening LGBTIQ* families for many years. Since 2002 we conduct the rainbow families project. The aim of the project is to enhance the personal, social and legal status of LGBTIQ* families in Germany via counselling and networking.

For further information please contact us via e-mail: lsvd@lsvd.de

¹⁴ Federal Ministry of Family Affairs, Senior Citizens, Women and Youth (BMFSFJ, 2019). Schutz geflüchteter Menschen in Flüchtlingsunterkünften. Retrieved from <https://www.bmfsfj.de/bmfsfj/themen/engagement-und-gesellschaft/fluechtlingspolitik-und-integration/schutzkonzepte-fluechtlingsunterkuenfte>

¹⁵ Thomas Hammarberg (2009): Human Rights and Gender Identity. CommDH/IssuePaper

1. Hate crime legislation

The LSVD has long demanded **improvements to hate-crime legislation**. In 2015, a reform came into force with the amendment of Section 46 (2) Sentence 2 of the Criminal Code. The amendment's aim was to ensure that hate motivation would play a greater role in determining penalties, and that public prosecutors would examine perpetrators' hate motives better and earlier in investigations. We welcomed the objectives pursued by the amendment, also the fact that an express reference is made in the Criminal Code to racist motivation. However, the Federation was also strongly critical of the fact that other forms of hate crime are treated only as "other hate-motivated grounds". The LSVD considers the omission of homophobic- and transphobic-motivated crime from the amended Section 46 (2) Sentence 2 of the Criminal Code to be a deliberate, structural exclusion. Offenders who make hate-motivated attacks on LGBTIQ* persons are aiming to drive them out of the public space and render them invisible. We regret that the Government invisibilized homophobia and transphobia in the wording of the law. Massive criticism of this selective approach was voiced in the expert hearing on the draft bill in the Bundestag Committee on Legal Affairs. Unfortunately, in March 2015 the Federal Government and the Bundestag parties in the government ignored the objections of experts and of civil society organizations.

It is urgently required for Section 46 (2) Sentence 2 of the Criminal Code to explicitly reference LGBTIQ*-hostile motives. The same also goes for the concurrent amendment of No. 15 of the Instructions on Criminal Procedure and Administrative Fines (RiStBV). Our experience shows that if homophobic and transphobic hate crime are not expressly cited in the law, little attention is paid to these grounds in investigations by police and public prosecutors, and therefore also in criminal proceedings. A mention in the explanatory memorandum to the law will effect little change. There are also fears that education and training of the police and judiciary – which is eminently important – will fail to engage appropriately with manifestations of hate crime that are not explicitly referenced in the law. We see a comparable problem in the crime of incitement to hatred against certain groups (Section 130 of the Criminal Code). This section expressly highlights national, racial or religious groups or groups defined by their ethnic origins as potential targets. LGBTIQ* persons are not mentioned, nor are people with disabilities. There are very few cases in which LGBTIQ*-hostile incitement has led to a conviction under Section 130 of the Criminal Code. Here also, further clarification is required.

2. Criminal Investigation Department Reporting Service for Politically Motivated Crime

The **Criminal Investigation Department Reporting Service for Politically Motivated Crime (KPMD – PMK)** as a framework for monitoring and reporting hate crime also presents problems. By placing hate crime within the context of extremism, and assuming it has to be a "political" act, the department fails to do justice to the different backgrounds and manifestations of hate crime based on sexual orientation, gender identity and expression and sex characteristics, directed against LGBTIQ* persons. It is apparent that many police authorities still have major issues in the way they perceive and classify such offenses. It is necessary to provide a sound, non-discriminatory basis for recording statistics and carrying out public monitoring of hate crimes against lesbians, gay, bisexuals, trans, intersex and queer people, since only a fraction of relevant hate crime has in fact been recorded by the Criminal Investigation Department Reporting Service.

It is positive to note that in some states of Germany, progress is being made on identifying and prosecuting anti-LGBTIQ* hate crime, as well as on preventing secondary victimization. This has been achieved in particular by measures aimed at building trust and confidence in the authorities, and by appointing contact persons for LGBTIQ* individuals within police forces; Berlin has additionally appointed contacts in the public prosecutor's office. However, many measures are limited in reach, and often remain dependent on the commitment of individuals. There are still challenges, for example there are reports of disparaging treatment and victim-blaming by police, which discourages LGBTIQ* people from reporting acts of violence.

3. Continued legal discrimination of LGBTIQ* persons

Deficits in how anti-LGBTIQ* hate crime is perceived, recorded and combated must also be viewed in the context of continued legal discrimination. Hate crime feeds on ideologies of inequality whose essence is to devalue human beings. Such ideologies are permanently re-affirmed as long as Germany does not grant equal rights to lesbians, gay, bisexuals, trans, intersex and queer people, instead treating them as second-class citizens. With the adoption of the Same-Sex Marriage Bill on 30 June 2017, the German Bundestag eliminated a major legal discrimination that also had fundamental symbolic effect. However, there are still major legal and political shortfalls, particularly vis-à-vis trans and intersex people. A credible strategy to combat anti-LGBTIQ* hostility and the ensuing hate crime must therefore also eliminate legal discrimination for good. In particular, the essential measures are to:

- Enact a human rights-oriented reform of ‘transsexual law’ that is defined around self-determination
- Assert the basic right of intersex people to physical integrity and to accord intersex people self-determination within our legal system
- Add sexual orientation and gender identity to Article 3 (3) of the Basic Law (on human rights protections), formulated as “sexual orientation and gender identity”

4. Homophobia and transphobia

Right-wing populist, authoritarian, and Christian fundamentalist tendencies and organizations also provide a platform to homophobic and transphobic slogans and actors, i.e. in protests against diversity education. Well-networked groups such as “Demo for All” or “Concerned Parents” protest against school lessons engaging with LGBTQ* persons as part of mainstream society. Protests usually take the form of fact-twisting rhetorical slogans that allege “early sexualization” of children and debase LGBTIQ* persons.¹⁶

5. National Action Plan

In its coalition agreement, the Federal Government held out the prospect of homophobia and transphobia being included in the “**National Action Plan of the Federal Republic of Germany to Fight Racism, Xenophobia, Anti-Semitism and Related Intolerance**”. However, much time elapsed without any visible efforts. In July 2016, the LSVD, together with the Federal Trans Association (Bundesverband Trans*) and many other civil society organizations, presented the “Cornerstones for Extending the National Action Plan against Racism to include Homophobia and Transphobia”.¹⁷

It is important that **measures to combat hostility against lesbian, gay, bisexual, trans, intersex and queer people are not isolated** – instead, they should be adopted in the context of preventing and combating other manifestations of hostility against particular groups. This opens an intersectional perspective which takes into account not just the diversity of LGBTIQ* persons, but also the multiple forms of discrimination and structural disadvantages to which LGBTIQ* people are subject – i.e. due to gender, nationality, ethnicity, age, origin, social status, external characteristics or disability.

With the “National Action Plan Against Racism – Positions and Measures for Tackling Ideologies of Inequality and Related Discrimination”, presented in May 2017, the Federal Government passed up on the opportunity to extend the anti-racism action plan to cover homophobia and transphobia. Together with the Network Against Racism, the Federal Trans* Association (BVT*) and Lesbian and Gay Federation (LSVD) have spelled out what it would take to eliminate discrimination.¹⁸

¹⁶ see for example the Education & Science Trade Union: Pro diversity education – arguments against ultra-conservative, populist and Christian fundamentalist claims,

https://www.gew.de/fileadmin/media/publikationen/hv/Gleichstellung/Lesben_Schwule_Bisexuelle_Trans_und_Inter/201602_Fu_er_eine_Paedagogik_der_Vielfalt.pdf

¹⁷ See: http://lsvd.de/fileadmin/pics/Dokumente/Aktionsplan/2016_07_18_NAP-Eckpunkte_final.pdf

¹⁸ The joint paper [“Protecting Human Rights – Eliminating Discrimination”](#) (German only), a compilation of civil society demands with respect to the government’s National Action Plan, highlights which measures would be effective in reducing

In principle, it is welcomed that for the first time an attempt has been made at national level to consider the needs and life situations of lesbian, gay, bisexual, trans, intersex and queer people but unfortunately it becomes clear that the Federal Government is not pursuing a coherent strategy for equal rights, diversity and respect. The plan adopted by the Federal Government is not forward-looking or sustainable. In many instances, it is no more than a review packaged in euphemistic terms. It marginalizes LGBTIQ* by its title alone, fails to offer any specific measures and remains non-committal. The LSVD and BVT* therefore view this as a disappointing breach of the coalition agreement, which pledged to expand the “National Action Plan against Racism, Xenophobia and Anti-Semitism” to cover homophobia and transphobia. Given current developments within society, the need for such an addition appears even more pressing. As outlined, religious fundamentalists, right-wing populists and the extreme right are mounting an energetic and increasingly well-networked attack to continue to deny LGBTIQ* persons equal rights and opportunities, and to drive them out of the public space. LGBTIQ*-hostile attitudes and actions can be encountered far beyond this spectrum – also in the very middle of society. Structural and institutional barriers still stand in the way of full participation of LGBTIQ* persons in society, preventing LGBTIQ* individuals from fully asserting and enjoying their human rights. Especially in a changing society, with an increasingly globalized economy and the challenges of immigration, there is a need to continually re-affirm fundamental human rights in everyday life, such as the prohibition of discrimination and the right to equal treatment regardless of gender, age, religion, social affiliation, the presence of disability, sexual orientation, or gender identity.

6. These are our specific recommendations:

- To further improve hate crime legislation and expressly include hate crimes committed on the bases of sexual orientation and gender identity and expression and sex characteristics in Section 46 (2) Sentence 2 of the Criminal Code.
- To make express reference to LGBTIQ* persons, and also to persons with disabilities, as possible victims in the law on incitement to hatred against certain groups (Section 130 of the Criminal Code).
- To make express reference to sexual orientation and gender identity in Article 3 Paragraph 3 of the Basic Law (human rights protections) to expressly grant LGBTIQ* persons protection against discrimination in the wording of the constitution.
- To present a sustainable National Action Plan that effectively counters homophobia and transphobia and, in particular, provides clear targets with defined timeframes, tenable self-commitments by state authorities, and appropriate resources to prevent and combat homophobia and transphobia.
- To enable a better police assessment of the current situation concerning anti-LGBTIQ* violence in Germany, as well as targeted prevention and training measures in the police and the judiciary. It should also provide for the appointment of police contact persons for lesbian, gay, bisexuals, trans, intersex and queer persons – adequately resourced and mandated with appropriate powers.
- To establish an independent complaints commissions and measures for target-group-aware victim assistance.
- To tackle the striking lack of research in Germany on anti-LGBTIQ* hate crime by commissioning relevant studies – one objective being to obtain empirical data on the extent and manifestations of anti-LGBTIQ* hate crime, and to gain reliable insights into how this is dealt with by police and judiciary.