



## **Violations of Economic, Social and Cultural Rights of Persons with Diverse Gender Identities in FEDERAL REPUBLIC OF GERMANY**

Submitted for consideration at the 64th Session of the Committee on Economic, Social and Cultural Rights Geneva, September - October 2018

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Bundesvereinigung Trans\* e. V. represents: twenty-five German trans\* organisations and groups at the regional, national, and federal level, and was founded in 2015 to create a national umbrella organisation representing trans\* people and to lobby for their federal rights. We seek to preserve the autonomy of the groups and individuals we represent, and to both respect the diversity of the trans\* community and promote respect for this diversity outside the community and within. Our understanding of trans\* is an inclusive one, using the word as an umbrella term to include people who identify as transsexual, transgender, genderqueer or non-binary, and many more. Our mission is to improve the overall living conditions of trans\* people in Germany.

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Bundesvereinigung Trans\* e. V. (BVT\*) submits this shadow report to the Committee on Economic, Social, and Cultural Rights (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 Economic, Social, and Cultural Rights (“Covenant”) in September-October 2018.

Studies quoted in the text are referenced in full at the end of the text; selected acronyms are also identified here, along with a glossary of important terms.

## Summary

The purpose of this report is to direct the Committee's attention to serious and ongoing violations of the Covenant rights of persons with diverse gender identities in Germany. The information provided in this report is relevant to Issue No. 8 in this Committee's List of Issues for Germany:

*Please provide statistical data on the number of surgeries performed on intersex infants and children. Please indicate the measures taken to address the challenges, physical and mental, faced by intersex infants and children. Please indicate the impact of the decision to allow a third gender option on birth certificates in 2013 on the situation of intersex infants and children. Please also provide information on the measures taken to combat and prevent discrimination and violence based on sexual orientation and gender identity and indicate whether the State party has the intention to make explicit reference to homophobia in its hate crime legislation.<sup>i</sup>*

In particular, this report will focus on Germany's violation of its obligation to guarantee the enjoyment – without discrimination on the basis of gender identity – of the following Covenant rights:

- I. The right to non-discrimination (Article 2)
- II. The right to health (Article 12), including the right to sexual and reproductive health;
- III. The right to work (Articles 6 and 7);
- IV. The right to protection of the family, mothers and children (Article 10); and
- V. The right to education (Article 13).

This report will conclude with suggested recommendations to be made in this Committee's Concluding Observations.

### I. Violations of Non-discrimination

The Constitutional Court ruled that a third gender option must be introduced until the end of 2018 to recognize intersex persons who identify outside the gender binary<sup>ii</sup>, but it remains unclear if the third option will be open to non-binary trans\* persons or reserved exclusively for intersex persons. Trans\* persons can only change their names and gender marker from "male" to "female" or vice-versa. There is no legal status for persons outside the gender binary, and yet 25-75%<sup>iii</sup> of trans\* persons identify as "non-binary". Since *binary trans\** persons have the right to be recognized before the law and *non-binary intersex* persons have the right to be recognized before the law, *non-binary trans\** persons must also have the right to be recognized before the law.

### II. Violations of the Right to Health

Article 12 (1) of the Covenant confirms the right of every individual to the "enjoyment of the highest attainable standard of physical and mental health".<sup>iv</sup> States parties are obliged to guarantee the exercise of this right "without discrimination of any kind",<sup>v</sup> including discrimination on the basis of sexual orientation and gender identity<sup>vi</sup>.

According to the General comment No. 22 (2016) on the right to sexual and reproductive health, “[t]he right to sexual and reproductive health is also indivisible from and interdependent with other human rights. It is intimately linked to civil and political rights underpinning the physical and mental integrity of individuals and their autonomy, such as the rights to life; liberty and security of person; freedom from torture and other cruel, inhuman or degrading treatment; privacy and respect for family life; and non-discrimination and equality.”<sup>vii</sup>

Germany has failed to meet its obligation with respect to health. Persons with diverse gender identities face discrimination in obtaining equal access to healthcare services (see Section IIIA). In a broader perspective, they are denied respect for their gender identity and are confronted with pervasive violence and discrimination (see Section IIIB).

#### **A. Discrimination in Access to Health Care Services and Discriminatory Treatment by Health Care Providers**

The right of persons in Germany with diverse gender identities to equal access to quality healthcare is violated in three ways: first, by the lack of adequate attention to their particular health needs and the failure to adequately train healthcare providers to address these needs; second, by discriminatory practices of health practitioners in hospitals, medical centres, and clinics; and third, through a discriminatorily outdated health insurance payment system which disregards human rights through its gender reassignment measures. The current concept is still based on ongoing psychopathologization – i.e., enforcing 12-18 months of psychotherapy on trans\* persons who wish to access trans\*-related healthcare, regardless whether they need or want psychotherapy or not.

##### **1. Inadequate attention to the health needs of persons with diverse gender identities and failure to train health providers to address these needs**

Healthcare providers violate the right to health of persons with diverse gender identities in that healthcare establishments do not provide the necessary services and healthcare providers lack the appropriate information and training to attend to these individuals’ health requirements.

For example, trans\* persons, who are pregnant, giving birth, or nursing do not have adequate access to reproductive health services provided by public and/or private healthcare providers. The State has failed to develop and implement any mechanisms or programs to ensure the availability of these services to trans\* persons giving birth, who are pregnant, giving birth, or nursing.

Professional community-based counselling has proved to be a valuable tool for not only trans\* persons, but also their families and other individuals invested in their wellbeing such as teachers, social workers and mental health professionals dealing with trans\* issues for the first time. A recent study on professional community-based counselling facility found that 93% of its users found counselling helpful and 82% indicated it was important to them that the counsellor was a trans\* person themselves<sup>viii</sup>. Counselling is often the first place to go when seeking accurate information on trans\* issues or help in the coming-out process, despite the fact that there are currently only a handful of professional trans\* counsellors in Germany, approximately amounting to no more than six full-time jobs.

The State has not developed a health policy or training for healthcare providers to promote health services for or the inclusion of persons with diverse gender identities in health services for this vulnerable group. This failure violates Article 12, as the State is not fulfilling its obligation to ensure that the right to health of these individuals is effectively protected, promoted, and enforced.

## 2. Discriminatory practices of healthcare practitioners in hospitals, medical centers, and clinics

### *Case Study:*

*There is one large university hospital with a department for Sexology and Sexual Medicine. Because of their positive reputation, trans\* persons seeking gender-confirming treatment are often referred to this place. There, their experiences range from slightly irritating to traumatizing.*

- *One former patient, a trans\* woman, described that she was "interrogated" on her first appointment by a panel of more than five people for an hour, after which the leading psychiatrist proclaimed that she was "not a transsexual" and they wouldn't treat her. After this experience she did not dare to approach trans\*-specific healthcare providers for several years. She transitioned eventually, but lost precious years and suffered severe mental stress.*
- *Another patient described that a psychiatrist of this hospital, instead of treating her with gender-confirming hormones – as was her request – treated her with GnRH-Analoga instead, blocking all sexual hormones in her body in order to find out if her "transsexual fantasies" would persist without testosterone. This is not only against the current (and outdated) standards of care, but is unheard of and needs to be classified as an appalling human experiment.*
- *A third patient, a trans\* minor, was prescribed hormone blockers (GnRH-Analoga) until his eighteenth birthday – these blockers are designed to and would have 'paused' biological puberty to 'buy time' for the patient. When the patient turned eighteen the treatment was terminated without ensuring continued treatment in another facility and without even providing a referral letter for additional hormone treatment. Therefore, at eighteen years of age, his biological female puberty resumed while he was desperately searching for a psychotherapist who would write a referral letter for gender-confirming hormone therapy.*

The anecdotes are countless. Although the facility has a very bad reputation among trans\*-specific health-care providers, they generally have a good academic reputation and are considered 'experts', therefore trans\* persons are continuously referred there. This especially happens to vulnerable people without community contacts, who cannot be warned by their peers.

### *Case Study:*

- *A mother of a trans\* minor (eleven years old in 2009) approached a specialised Child and Adolescent Psychiatry. The mother is worried about the future of her child, whom she thinks from as early as age one is transgender. She considers it necessary to start a treatment with hormone blockers (GnRH-Analoga). The child goes on to live their early childhood in their verbalized gender. Without any social or behavioral problems the child completes primary school. There was the concern that with the onset of puberty the minor will develop psychological strain through the impact of endogenous sex hormones, which prompted a diagnostic process for years: three experts and specialists of Child and Adolescent Psychiatry were assigned for interviews, exploration, diagnostics, and questionnaires. The result showed three contradictory expert reports. Moreover, the entire process was so lengthy that the child's biological puberty resumed and the psychological strain that resulted was so more severe than it ever was during childhood.*

## **B. Failure to Protect Against Violence, Discrimination, Homophobia, and Transphobia**

Germany has failed to meet its obligation to protect persons with diverse gender identities from violence and discrimination. It has failed to amend its Constitution and enact laws that specifically and comprehensively prohibit discrimination on the basis of gender identity and that adequately address the problem of hate crimes. On the contrary, Germany still has laws that actively discriminate against trans\* persons.

### *Case Study:*

- Although not explicitly required by the "Law on Transsexuals" (TSG), long-established common practice for the courts is that trans\* persons be subjected to the full set of psychiatric diagnostic criteria of the ICD-10 (including the so-called "real-life-test") by two independent 'experts'.
- The lengthy and heteronomous court process is endangering the health of trans\* persons (in several instances developing depression or suicidal tendencies) and is rendering them vulnerable to blatant discrimination (i.e., in the labour market).
- 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 xenophobia and transphobia in the German system. Often, they decide against disclosing their trans\* status or coming out as trans\* 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. Unfortunately, neither the federal government nor any of the other constituent states (Länder) has followed this example. Additionally, trans\* refugees are not entitled to LGR or trans\*-related healthcare until the asylum procedure is completed, which often takes more than a year.
- Although the majority of trans\* persons discover their gender identity before the age of eighteen, transitioning as a minor is extremely difficult. Access to LGR or trans\*-related healthcare is more complicated than it is for adults and only available with explicit consent of both parents. If parents don't support their trans\* children's identity it leads to high levels of gender dysphoria, anxiety, depression, and suicidal thoughts amongst trans\* minors – whereas trans\* children who are supported in their identities are just as healthy as their non-trans peers<sup>ix</sup>. 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 healthcare is not regulated by the state but by the medical profession itself through, the government could – and should – send a strong signal by strengthening trans\* minors right to self-determination and ending legal discrimination.

In view of the evidence of violence and discrimination against persons with diverse gender identities, it is particularly important that Germany abolish laws that discriminate against trans\* persons and adopt legislation against violence and discrimination on the basis of gender identity. The adoption of such laws must be followed by vigorous enforcement and by an educational campaign teaching the principles of equality, equity, and respect for gender diversity.

### III. Violations of the Right to Work

Under Articles 6, 7, and 2(2) of the Covenant, Germany has the obligation to protect persons with diverse sexual orientations and gender identities from employment discrimination.<sup>x</sup> Unfortunately, Germany has not complied with this obligation. The German General Equal Treatment Act (AGG) needs reformation in several points. For example, it needs to apply to public institutions such as schools, public authorities, and universities, but also needs its period in which to assert claims to increase from two to six months, to include the right of appeal for anti-discrimination associations, and to strengthen individuals' protection against sexual harassment.

### IV. Violations of the Right to Protection of the Family, Mothers and Children

Under Article 10, Germany has the obligation to provide the widest possible protection and assistance to families without any discrimination for reasons of parentage, with which Germany has not complied. The right to private life (Article 8 of the European Convention on Human Rights [ECHR]) is infringed through not listing trans\* parents as their recognised gender in birth registers and on their children's birth certificates, which undermines the right to non-discrimination at the very least, if not resulting in greater stigmatisation, dependence, and the overall perpetuation of heteronormativity (Article 14 ECHR).

#### *Case Study:*

- *After a TSG procedure trans\* persons are legally recognised in every aspect of life except one: parenthood. 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 recognised as a father ever since. The Federal Supreme Court (BGH) recently 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 on his child's birth certificate<sup>xi</sup>, which effectively lists a parent that does not legally exist. The subsequent problems are numerous, including making it impossible for him to register his child in school, vacation abroad, or simply prove that he is the child's parent without disclosing his trans\* status, subjecting himself and his child to discrimination in the process. The Federal Constitutional Court rejected the appeal of the complainant without explanation in May 2018.*

The current draft law (June 2018) on Amendments for civil status by the federal Ministry of Internal Affairs states that every person who gives birth to a child is the mother of the child regardless of the individual's civil gender status. This is a deterioration compared to the current legal situation. The BGB §1591 states that the "mother of a child is the woman who gives birth to the child." Currently there is no legal regulation for people who give birth to children who do not identify as "woman".

### V. Violations of the Right to Education

Persons with diverse gender identities in Germany also experience discrimination in education, in violation of their right to education under Article 13 of the Covenant.

Homophobia, transphobia, and related discrimination in schools have serious consequences for students with diverse gender identities. They damage the victims' self-esteem, which can then lead to lower grades and a higher likelihood of dropping out of school – ultimately sabotaging their future.

Children and adolescents need clearly-regulated protection from discrimination but also encouragement and support so that they can develop in their own living space in their self-defined social gender. It is therefore important that the adoption of protective laws must be followed by a nationwide educational campaign teaching the principles of equality, equity, and respect for sexual

differences. These principles should also be included in university curriculums for students studying to become teachers.

- Recognition of and respect for a student's gender identity and/or expression depends on the willingness and anti-discrimination policies of schools. Once LGR is complete, schools are legally obliged to use the student's correct name and pronoun, but before this can even happen pupils rely on the supportive environment created by the goodwill of teachers, pupils, and parents. This can be easily encouraged by dropping prohibitive barriers to LGR (see Section 2B)
- Access to physical education class of choice is completely unregulated; it depends completely on the willingness and anti-discrimination policies of schools.
- Access to bathroom of choice is completely unregulated; it depends completely on the willingness and anti-discrimination policies of schools.
- There is currently no available statistic of the number or rate of trans\* pupils dropping out of school, but experience in trans\* counseling centers indicates that many trans\* pupils who develop severe symptoms of minority stress often stop going to school and therefore drop out at some point.

## **VI. Suggested Recommendations for Germany**

We respectfully urge this Committee to make the following recommendations to Germany:

The German government should set up a national strategy on gender identity and expression, including establishing within the Federal Ministry of Health a specialist department for trans\* and non-binary services. The latter would include a consultation and law unit to assist with the overall reformation of the "Law on Transsexuals" (TSG) and the establishment and expansion of a broad-based, medical-psychological interdisciplinary care structure. The strategy should further address all demands posed by the Transgender Resolution of the Council of Europe (2015), including but not limited to addressing trans\* persons in a national suicide prevention strategy, non-discrimination on the labour market, equal opportunities, and equal access to goods and services.

The German government should take more targeted action against discrimination of gender-nonconforming identities. The existing "General Equal Treatment Act" is far from meeting the needs of trans\* persons (and others) and also needs revision. The Federal Anti-Discrimination Office (ADS Bund) should work comprehensively on both federal and state levels in close contact with trans\* organizations. Gender-differentiated research and gender- and nonconforming-sensitive evaluation of studies should be encouraged on matters such as gender equality, levels of full- and part-time employment, income levels by sector and gender, race discrimination, ethnic origin, age, religion and beliefs, disabilities, and sexual identity and orientation.

Finally, the German government should establish the possibility to register parents as gender neutral. Trans\* and non-binary parents should be allowed to choose how they want to be registered – which name they prefer and what relationship they have to the child (mother, father, or single parent). The BGB (§1591 und §1592) needs to be reformed to include trans\* and non-binary parents. Children of trans\* and non-binary parents need to be specifically protected against discrimination.

## Glossary

gender non-conforming	People whose behavior or gender expression does not comply with the norms of the gender they have been assigned.
non-binary	Non-Binary" is an umbrella term for people, whose gender identity is not exclusively male or female. Non-binary persons may identify between male and female or as neither-male-nor-female or even as male-AND-female. "Non-binary" is not to be confused with "intersex". Intersex refers to a person's physical sex characteristics whereas "non-binary" refers to gender identity.
trans*, transgender	People who do not (only) identify with the gender they were assigned at birth. Used in this report as an umbrella term; in the context of self-definition many other terms are used.

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## References

- i Committee on Economic, Social, and Cultural Rights, *List of issues in relation to the sixth periodic report of Germany*, E/C.12/DEU/Q/ 6, available at [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2fDEU%2fQ%2f%206&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2fDEU%2fQ%2f%206&Lang=en)
- ii Case: 1 BvR 2019/16, decision of 10 October 2017
- iii DIMR (2017), p. 46; FRA (2104): Being Trans\* in the European Union. Comparative Analysis of EU LGBT Survey Data, p. 16
- iv Covenant, *supra* note 1, Art. 12(1)
- v Id., Art. 2(2).
- vi Committee on Economic, Social and Cultural Rights, *General Comment No. 14 (2000) on the Right to the Highest Attainable Standard of Health (Article 12 of the International Covenant on Economic, Social and Cultural Rights)*, 18, U.N. Document E/C.12/2000/4 (2000).
- vii Economic and Social Council, *General comment No. 22 (2016) on the right to sexual and reproductive health (Article 12 of the International Covenant on Economic, Social and Cultural Rights)*, E/C.12/GC/22, available at [https://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2fGC%2f22&Lang=en](https://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2fGC%2f22&Lang=en)
- viii Focks et al. (2017): "Ich fühlte mich verstanden und das ist alles, was zählt." Wissenschaftliche Begleitforschung zum Pilotprojekt "Inter\* und Trans\* Beratung Queer Leben". Berlin: Schwulenberatung Berlin (eds.)
- ix Olson et al. (2016): Mental Health of Transgender Children Who Are Supported in Their Identities. *Pediatrics*; 137(3):e20153223
- x Covenant, *supra* note 1, Arts. 2(2), 6 and 7; Committee on Economic, Social and Cultural Rights, *General Comment No. 18 (2005) on the Right to Work (Article 6 of the International Covenant on Economic, Social and Cultural Rights)*, U.N. Doc. E/C.12/GC/18 (6 Feb. 2006).
- xi BGH Case Nr. XII ZB 660/14