

Combating sexual orientation discrimination in employment: legislation in fifteen EU member states

Report of the *European Group of Experts
on Combating Sexual Orientation Discrimination*¹
about the implementation up to April 2004 of
*Directive 2000/78/EC establishing a general framework
for equal treatment in employment and occupation*

8 Germany

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¹ The European Group of Experts on Combating Sexual Orientation Discrimination (www.emmeijers.nl/experts) was established and funded by the Commission of the European Communities under the framework of the Community Action Programme to combat discrimination 2001-2006 (http://europa.eu.int/comm/employment_social/fundamental_rights/index_en.htm). The contents of the Group's report do not necessarily reflect the opinion or position of national authorities or of the European Commission. The report, submitted in November 2004, aims to represent the law as it was at the end of April 2004; only occasionally have later developments been taken into account. The full text of the report (including English versions of all 20 chapters and French versions of most chapters, plus summaries of all chapters both in English and French) will be published on the website just mentioned; links to it will be given on www.emmeijers.nl/experts.

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8.1 General legal situation

Legal protection against discrimination in Germany is based on a few general statutes, some of which target discriminatory acts and some of which ensure anti-discriminatory procedures, e.g. in electing personnel. There are specific laws against sex discrimination, affirmative action laws for the under-represented sex in certain employment sectors, for men who served in the army, and for disabled people.³ There is some criminal law against racist and anti-Semitic speech. In addition, there is one anti-discrimination clause in collective labour law, which covers sexual orientation discrimination. All other laws which do not mention sexual orientation explicitly are not applied in cases of sexual orientation or sexual identity discrimination. There is, beyond the clause in collective labour law, no federal and almost no state law against sexual orientation discrimination in public, private, commercial and other areas.

All anti-discrimination law flows from the federal constitutional right to equality, which is directly binding on public actors, including the legislature, Art. 1 sec. 3 of the constitution. In the revision process after unification, a proposal to include sexual orientation discrimination in Art. 3 sec. 3 Basic Law has been rejected, but some state constitutions have been revised to cover sexual orientation discrimination.

In 2002, the German government accepted the need for legislative revision based on the new directives, and the Ministry of Justice issued a draft law against discrimination in contract law in summer 2002, which however did not cover the workplace.⁴ This draft was met with severe criticism primarily by business, owners of housing for rent, churches, and academics. It became invalid with federal elections, due to the principle of discontinuity.

In 2003, several branches of government were in charge to prepare legislation to implement the Directives, co-ordinated by the Ministry of Family, Seniors, Women and Youth. The Ministry of Commerce and Labour is responsible for labour law, and was in charge of implementing the Directive regarding sexual orientation discrimination; the Ministry of Justice was responsible for civil law aspects; and the Ministry of the Interior was responsible for the implementation regarding federal public employment, while state public employment falls within the competence of the *Länder*.

In 2004, a government draft has been published and was debated in expert hearings by parties in the federal parliament. In addition, some states either have been discussing legislation or issuing statements on implementation within their competence. Already in the past, political parties in the federal parliament launched different drafts of legislation against discrimination.⁵

³ Disabled Persons Act (*Schwerbehindertengesetz*).

⁴ *Diskussionsentwurf eines 'Gesetzes zur Verhinderung von Diskriminierungen im Zivilrecht'*, Bundesministerium der Justiz, February 2002 (Discussion Draft of a 'Law to Combat Discrimination in Civil Law').

⁵ SPD (Social Democratic Party), *BT-Drs. (Bundestags-Drucksache, Parliamentary Papers) 13/9706*; Bündnis 90 /Die Grünen (Green Party), *BT-Drs. 13/10081*. The union of civil servants published a draft law in 1990, printed in Hammer/ Rzadkowski 1991.

The discussion around legislation in Germany to implement the Directives primarily focused on the Race Directive. Sexual orientation discrimination is not discussed as much, and is met with severe scepticism as to the need of legislation in the area. Due to lack of data, and based on a widely shared stereotype that, gay men in particular, as well as lesbians, are, on average, well off and are not discriminated against. This has been part of the reasoning of the Ministry of Justice, and is reflected in the bill against discrimination in contracts and services.

In short, important aspects are:

- Sexual orientation discrimination is only gradually recognised as such and is thus only gradually discussed as a legal problem. One exception is the state of Berlin which passed a law against discrimination and is preparing additional legislation.
- The lack of understanding of sexual orientation discrimination relates to the tendency to understand it to be about respect for homosexual partnerships only, an understanding which severely limits implementation efforts. This is based on the fact that in 2001, federal parliament passed the 'Act on Ending Discrimination of Same-Sex Unions: Life partnerships' (here: Registered Partnership Act).⁶ The Act considers those who register their relationship as spouses in front of the law including assumption of ownership, option to care for a child of the partner, right to inheritance. There is an Additional Bill to the Registered Partnership Act, directed at several economic privileges of married partners, which has not been passed by the second federal chamber.⁷
- There is a lack of understanding regarding terminology, since German law uses different terms (orientation, identity) which imply different scopes of the law, either covering gays and lesbians only, or also covering transsexuals and transgender. Sometimes, 'orientation' is interpreted to narrowly cover any preference for any sexual practice.
- There is a trend to jointly implement all antidiscrimination directives, a lack of clarity regarding potential differences between the categories, and there is a constitutional argument that all kinds of discrimination deserve analogous legal attention, because Art. 3 sec. 3 *Grundgesetz*, just as Art. 13 ECT (European Community Treaty), requires equal treatment for all categories. This discussion also informs the understanding of the structure of the

⁶ In German: *Gesetz zur Beendigung der Diskriminierung gleichgeschlechtlicher Gemeinschaften: Lebenspartnerschaften*, *Bundesgesetzblatt* 2001, I Nr. 9, 266, of 22 February 2001. The Green party failed with a draft to open marriage to same-sex partners, see *Bündnis 90/Die Grünen, BT-Drs.* (Parliamentary Papers) 13/2728. The Act passed survived a challenge in the Federal Constitutional Court (FCC), in which some states argued it violates the explicit protection of 'marriage and the family' in Art. 6 Basic Law. The FCC held this not to be the case as long as homosexual partnerships are not named 'marriage', and that heterosexual unmarried couples can be treated differently, since they have the right to marriage. See *Bundesverfassungsgericht* (Federal Constitutional Court) *Entscheidungen des Bundesverfassungsgerichts* 105, 313 (2002).

⁷ On the other hand, obligations of same sex partners towards each other have long been accepted by courts, e.g., *Amtsgericht* (Civil Court) Duisburg, *Monatschrift für Deutsches Recht* 1971, 1027; but claims for equal benefits for same-sex partners have, in most cases, been rejected, e.g. *Bundesarbeitsgericht* (Federal Labor Court) BAGE 85, 375 (1997 - residence benefits for civil servants, 'Ortszuschlag'). More tolerant views are displayed in *Amtsgericht* (Civil Court) Frankfurt, *Monatschrift für Deutsches Recht* 1993, 116; and Strick 2001; Trimbach/Webert 1998; Grüll 1994; Reiß 1994; Schimmel/Meier 1993.

independent body required by the Race Directive, in that debates focus on the question of whether there should be one body for discrimination on all grounds, or several bodies for different grounds.

- There is lack of clarity on the concept of indirect discrimination, because it is not defined as such anywhere in German legislation.
- There is, traditionally, reluctance to recognise discrimination based on effects, rather than intent.
- There is little knowledge of, and a lack of a doctrinal tradition, regarding the shifting of the burden of proof, as stated in § 611a Civil Code in cases of sex discrimination.
- The following will describe the German legal situation in a more detail, and then focus on the implementation as required by the Directive.

8.1.1 *Constitutional protection against discrimination*

The federal constitution is the supreme law; it lists fundamental rights which are enforced by the Federal Constitutional Court and have to be adhered to by all public actors (Art. 1 sec. 3 *Grundgesetz*), including general and lower courts, according to the so-called '*Drittwirkung*' (third party effect). Based on third party effect doctrine, fundamental rights have to be taken into account by all public actors, including all courts, in interpreting all laws of the country.

There are several clauses which protect individuals against discrimination. The right to human dignity (Art. 1) is often used as a basis. More particularly, Article 3 *Grundgesetz* states that all people are equal before the law (sec. 1), it covers sex discrimination in (sec. 2) and prohibits discrimination based on several enumerated grounds in (sec 3). An explicit reference to sexual orientation has been rejected by the constitutional assembly in the course of debates of constitutional reform before 1994. Art. 33 sec. 2 prohibits discrimination on several grounds in access to public services, including gender, but not including sexual orientation.

Some constitutions of the states ('*Länder*'), which have to be consistent with the *Grundgesetz* and are enforced by state constitutional courts, explicitly protect individuals against sexual orientation discrimination. In Thuringia, Art. 12 of the constitution protects against discrimination regarding 'sexual orientation'. Art. 10 sec. 2 of the Berlin, and Art. 12 sec. 2 of the Brandenburg constitution ensure equality regarding 'sexual identity'. In Berlin, Art. 12 sec. 2 extends protection against discrimination to 'other relationships which are meant to last', just as Art. 26 of the Brandenburg constitution.

Germany is also a party to the European Convention on Human Rights. The Convention is, after ratification, formally a statute, thus ranks below the constitution, but there have been no reported cases in which the Convention has been used in German courts regarding discrimination.

Germany has also ratified all UN Conventions against discrimination, including CEDAW (Convention against discrimination of women). It is part of the International Organisation of Labour (ILO), and ratified Convention No. 111, which prohibits discrimination based on race, colour, gender and national origin.

8.1.2 General principles and concepts of equality

In German constitutional law, the interpretation of the right to equality has for a long time been a purely formal assessment of rational difference between comparable situations or people. By now, the Federal Constitutional Court however interprets equality as a more substantive right. It requires any inequality to be proportional, and demands higher levels of justification if anyone is discriminated against on the basis of an enumerated ground as contained in Art. 3 sec.3.⁸ There has not been a case on the issue whether discrimination based on sexual orientation will be seen as sex discrimination or as discrimination on another ground, analogous to those listed.⁹

In specialised courts, there are differences regarding sexual orientation discrimination. The highest labour court (*BAG*), the highest civil court (*BGHZ*) or criminal court (*BGHSt*), and the highest administrative court (*BVerwG*) as well as the tax court (*BFH*) or social security court (*BSG, Bundessozialgericht*) display different levels of sensitivity to the issue. In labour law, equality tends to mean the prohibition of arbitrary differentiation¹⁰, rather than prohibition of disadvantages or discrimination in a substantive sense. Such differing sensitivity is also found in relation to different aspects and realms of discrimination; while racism is taboo, and sex discrimination is a legal issue, sexual orientation remains mostly a question of marriage and lifestyles.

There is an unwritten equal treatment principle in labour law as 'Gewohnheitsrecht', often combined with general clauses in civil law, primarily art. 242 Civil Code which requires 'trust and faith' ('*Treu und Glauben*') in contracts, and it is underlined by reference to constitutional law. It is interpreted as a general prohibition of different treatment in existing (not in, e.g., negotiated and thus future) contract relations, but is not seen as a measure against sexual orientation or most other discrimination.

8.1.3 Division of legislative powers relating to discrimination in employment

The German constitution distributes legislative powers in Art. 70-75 *Grundgesetz*. Private employment law is subject of federal legislation and can be found in the Civil Code (*BGB, Bürgerliches Gesetzbuch*), in specific labour law, e.g. against unfair dismissal (*Kündigungsschutzgesetz, KSchG*) and in collective labour law (Industrial Relations Act – *BetrVG*). Regulations against discrimination in the Penal Code, procedural law, law of associations, and immigration law are also federal laws (Art. 74 sec. 1, 74 sec. 2 No. 12.; 72). Regarding civil servants, federal employees fall under federal law and state employees fall under state law (Art. 73 sec. VIII, Art. 74a), but there is a federal framework law which governs the whole area (Art. 75 sec. 1).

⁸ Until recently, § 175 of the *Strafgesetzbuch (StGB, Penal Code)* explicitly prohibited gay male sex. It has been struck down by federal parliament, based on long time lobbying efforts and, inter alia, a recommendation by the federal AIDS-Enquete-Commission of the German *Bundestag, BT-Drs.* (Parliamentary Papers) 11/2495, 16 June 1988.

⁹ Some commentators interpret such discrimination as a violation of individual freedoms; Osterloh 1999; Schiek 2000.

¹⁰ Schiek 2000, at 138 et seq.

8.1.4 Basic structure of employment law

German employment law is statutory law, based on a combination of federal and state legislation, with active courts and thus many principles embedded in jurisprudence, some accepted as doctrine ('*Gewohnheitsrecht*'). The law distinguishes between public and private employment, and between individual and collective labour law. Art. 9 sec. 3 *Grundgesetz* guarantees the right to collective labour agreements, which thus form the basis of employment law in many sectors. Based on constitutional protection, religious bodies enjoy significant freedom in employment matters.¹¹

8.1.5 Provisions on sexual orientation discrimination in employment or occupation

Art. 75 of the Industrial Relations Act (*Betriebsverfassungsgesetz*) obliges private employers and workers councils to combat discrimination on grounds of, among others, sexual orientation in employment in larger private enterprises.¹²

In private individual employment law, there is no explicit provision on sexual orientation. In civil service law, some states guarantee equality based on sexual identity and/or orientation.

In Hamburg, § 7 Civil Service Act (*Landesbeamtengesetz*) states that 'applicants shall be elected without consideration of gender, sexual identity and orientation, origin' etc., and § 77 Civil Service Constitution Act (*Personalvertretungsgesetz*), obliges employers and the council of employees to ensure that 'all members of the public service are treated fairly, in particular that all unequal treatment based on gender, sexual identity and orientation' etc. shall not occur.

The state of Lower Saxony prohibits discrimination based on 'sexual identity' in § 8 of the Civil Service Act; § 59 Civil Service Constitution Act obliges employers and employee councils to combat unequal treatment based on 'sexual identity'.

The same is part of the law in the Saarland (§ 9 Civil Service Act, § 70 Civil Service Constitution Act), and in Lower Saxony (§ 8 Civil Services Act, § 58 sec 1 Civil Service Constitution Act).

Berlin passed a law to modify legislation in accordance with the Registered Partnership Act in 2001.¹³ There, several rights of registered same-sex partners are guaranteed in the Civil Service Act. Benefits for widows, benefits in cases of travel or moving home, facilities regarding the time of vacation¹⁴, as well as sickness benefits (*Beihilfe*)¹⁵ are extended to registered partners; as well as the

¹¹ Skidmore 2002, at 448-451; Geck/ Schimmel 1995, 177. An example is the decision by *Senat für Amtszucht der VELKD* Hannover Disciplinary Senate of the Protestant Church Court Hannover), 1990-11-08, *Zeitschrift für evangelisches Kirchenrecht* 36, 210 (1991) (gay priest expelled from active duty).

¹² Schiek 2000, at 116-117. It is unclear whether this extends to contractual discrimination.

¹³ *Gesetz zur Anpassung des Landesrechts auf Grund der Einführung der Eingetragenen Lebenspartnerschaft* (Law to Adopt State Law because of the Registered Partnership) vom 15. Oktober 2001, *Gesetz- und Verordnungsblatt*. S. 540; *Gesetz zur Änderung des Landesbeamtengesetz und des Einkommensangleichungsgesetz* (Law to change the State Civil Service Law and the Adoption of Income Law) vom 10. Juli 2002, *Gesetz- und Verordnungsblatt*. S. 192.

¹⁴ §§ 44, 54, 55 *Landesbeamtengesetz* (State Civil Law), § 10 sec. 6, 17 sec. 1-3 *Landesabgeordnetengesetz* (State Parliament Members Law).

¹⁵ § 44 sec. 2 *Landesbeamtengesetz* (State Civil Law).

recognition of care for relatives in promotion decisions.¹⁶ Berlin law also recognises same sex partners as judges, mediators, or official experts, as incapable of holding office in cases in which their partners are implied.¹⁷ Berlin is also in the process of discussing a more encompassing anti-discrimination law on the issue.¹⁸

8.1.6 *Important case law precedents on sexual orientation discrimination in employment or occupation*

Most relevant cases arose from conflicts in the military. For a long time, German law condoned sexual orientation discrimination in military employment.¹⁹ After the decision of the European Court of Justice in the case of *Kreil*²⁰ opened many sectors of the military to women, the military issued an internal guideline prohibiting any discrimination on grounds of sex or sexual orientation. Then, after the enactment of the Registered Partnership Act, the highest administrative court overruled earlier decisions in favour of discrimination, and stated that although the military does not tolerate sexual relationships, it is not allowed to differentiate between soldiers based on their heterosexual or homosexual nature.²¹

8.1.7 *Provisions on discrimination in employment or occupation that do not (yet) cover sexual orientation*

§§ 611a, 611b, and 612 sec. 3 Civil Code only prohibit gender discrimination in private employment²², which § 5 Federal Sex Equality Law (*Bundesgleichstellungsgesetz*) declares as applicable to public employment as well. Significant parts of the discussion around implementing the directive focus on including sexual orientation or sexual identity in § 611a Civil Code. However, the central clause of § 611a itself has weaknesses regarding the burden of proof (a clause hardly known and used by courts), regarding the amount of damages (already contrary to the European law requirements regarding sex discrimination) etc. At the moment, the government is preparing to implement the gender discrimination directives more consistently, but there is no draft available to the public.

There is a law against sexual harassment in the workplace, the Employees Protection Act (*Beschäftigtenschutzgesetz*), which does not explicitly cover sexual orientation. A revision of this legislation is also under consideration at the moment, but no draft has been issued yet.

¹⁶ § 16 sec. 4 *Laufbahngesetz* (Career Law).

¹⁷ § 44 *Landesdisziplinarordnung* (State Disciplinary Regulation), § 5 *Richterwahlordnung* (State Judges Election Law), § 16 *Schiedsamts-gesetz* (State Mediation Office Law), § 41 *Landesjagdgesetz* (State Hunting Law); § 16 sec. 1 *Landesverfassungsgerichtshofgesetz* (State Constitutional Court Law). See also § 3 sec. 2 s. 3 *Hebammengesetz* (State Birth Aides Law).

¹⁸ *Gesetz zur Gleichberechtigung von Menschen unterschiedlicher sexueller Identität* (Law on Equality of People with Different Sexual Identities); information by members of the administration. It includes: the prohibition of discrimination in the civil service, in collective labour law, in the law of universities, the law on judges.

¹⁹ Kappe 1991; Schmidt-Radefeld 2000. Cases are cited in Skidmore 2002, at 452-453.

²⁰ Judgment of 11 January 2000, Case C-285/98, *Kreil v. Germany* [2000] European Court Reports, I-69.

²¹ *Bundesverwaltungsgericht* (Federal Administrative Court) *BVerwGE* 115, 174 (2002).

²² It has been interpreted as the statutory explication of Art. 3 sec. 2 *Grundgesetz* by the FCC. *Bundesverfassungsgericht* (Federal Constitutional Court) *Entscheidungen des Bundesverfassungsgerichts* 89, 276 (1993).

8.1.8 Provisions on sexual orientation discrimination in other fields than employment and occupation

There are no provisions against sexual orientation discrimination in federal law governing other areas and in almost all states. Only in the state of Sachsen-Anhalt, a general law against disadvantaging lesbians and gays ('*Abbau von Benachteiligungen von Lesben und Schwulen*'), states that 'all public actors are obliged to deliver their services in a way which does not discriminate against anyone based on his or her sexual identity' (§ 1 sec. 1). In addition, 'all regulation and administrative practices shall be tested regarding disadvantages based on sexual identity, and shall be modified when necessary' (§ 1 sec. 2).

The lack of anti-discrimination law causes severe problems in courts. Many courts do not protect, but rather endorse sexual orientation discrimination in several areas of life. General anti-discrimination clauses which might be applicable in such cases are generally not used; neither is sex/gender discrimination interpreted to include sexual orientation discrimination. The following examples may illustrate the point.

In rental law, courts do accept a right to fairness, but do not accept a right to equal treatment with regard to sexual orientation.²³

In consumer protection law, there is a prohibition of racist discrimination in § 81e *Versicherungsaufsichtsgesetz* (VAG, Insurance Control Act), which is not systematically implemented either by organisations nor in courts, but no such protection against sexual orientation discrimination exists.

In insurance law, there is a general equal treatment clause in §§ 11 sec 2, 21 VAG (Insurance Control Act), §§ 178g, 178o *Versicherungsvertragsgesetz* (VVG, Insurance Contracts Act), and a prohibition of racism again in § 81e VAG. Sex discrimination is an issue in insurance practices but there is no law against that. In health insurance law, there are reports of discriminatory practices directed at gay men,²⁴ but no law against that. However, in social security law, the highest court decided in 1985 that compensation for victims of violence may not be withheld because the violence occurred in a gay milieu.²⁵

In the area of accommodation and services, there is no explicit federal or, with the exception of Sachsen-Anhalt, no state legal protection against discrimination.²⁶

Regarding same-sex partnership discrimination, some states extend rights to registered same-sex partners, and thus prevent discrimination. In the state of Hamburg, § 11 of the Hamburg Hospital Act (*Hamburgisches Krankenhausgesetz*) allows medical information to be given to registered same-sex partners. In Saarland, § 4 sec. 1 of the State Broadcasting Act

²³ See *Bundesgerichtshof* (Federal Civil Court) *BGH*, *Zeitschrift für Medienrecht* (ZMR) 1993, 261; Merschmeier 1994; Wild 1998; Schiek 2000, at 182, who points to several decisions on race discrimination; and Hornung 2001.

²⁴ Weichert 1997.

²⁵ *Neue Juristische Wochenschrift* 1986, 2665 (§ 2 sec 1 *Opferentschädigungsgesetz* = Victims Compensation Act).

²⁶ Cases of racism in which authorities acting against the racist were unsuccessful; *Verwaltungsgericht* (Administrative Court) VG Stuttgart, *Gewerbearchiv* (GewArch) 1976, 27; *Oberverwaltungsgericht* (State Administrative Court) OVG Münster, *Gewerbearchiv* (GewArch) 1967, 118.; *Oberlandesgericht* (Higher Civil Court in Hesse) OLG Frankfurt, *Neue Juristische Wochenschrift* 1985, 1720; an exception is *Oberlandesgericht* (Higher Civil Court in Bavaria) BayOLG, *Neue Juristische Wochenschrift* 1983, 2040.

(*Landesrundfunkgesetz*) obliges programs to observe dignity and tolerance, including 'respect for the sexual identity of others'. In Sachsen-Anhalt, police law prohibits discrimination by police forces based on sexual identity (§ 6 *Gesetz über die öffentliche Sicherheit und Ordnung*), and the law of public schools (*Schulgesetz*) states that 'pupils shall gain knowledge and competencies which support equal respect and equal rights for people independent of their gender, heritage, race, disability, sexual identity' etc. (§ 1 sec. 2 No. 3).

In addition, we find ongoing discrimination against transsexuals.²⁷

8.1.9 *Other aspects of the legal background*

In Germany, there is no established legal discourse on law against discrimination, and, as mentioned above, a widespread perception that sexual orientation discrimination is based on relationships only. Some factual effects of discrimination are covered in social security law, so that there seems to be no need to develop a coherent set of anti discrimination provisions. In addition, Germany perceives itself as a society of equals, and that all people are more or less the same, an issue which has only recently been challenged by discussions around the effects of migration. Sexual orientation has, in the mainstream, not been an issue associated with exclusion or disrespect.²⁸ In mainstream society, there is no cultural or political assumption of injustice when gays or lesbians are treated differently than others. Therefore, one still has to prove that there is serious discrimination before the law will change.

8.2 **The prohibition of discrimination required by the Directive**

The Directive requires several changes in German law, mostly based on the lack of explicit legal protection against sexual orientation discrimination.

8.2.1 *Instrument(s) used to implement the Directive*

In Germany, there are several steps to be taken to implement the directive. A draft issued by the Ministry of Justice to amend the Civil Code (*BGB*) to prohibit, among others, sexual orientation discrimination in private contracting relations, faced severe critique, fell to the principle of discontinuity after federal elections were held in 2002, and will not reappear although it was strongly committed to a consistent approach to combat all forms of discrimination. There has never been a draft issued to combat discrimination in employment.

After national elections in 2002 and the regrouping of the government, it took several months to redistribute competencies among ministries. In general, the need for legislation in Germany has been and still is subject to debate. All NGO's, the Green party, and most members of the Social Democratic Party, see a need to legislate. However, the current Minister of Justice, as do many members of the governing parties in federal parliament, rejects these demands. In public statements, the Minister proclaims no need to legislate against sexual

²⁷ E.g. no recognition as father for female to male transsexual, Fachausschuss-Nr. 3599, 17./18. Mai 2001, *Standesamt-Zeitschrift* 2002, 50. Most cases deal with costs of medical treatment; see Correll 1999.

²⁸ See Skidmore 2002.

orientation discrimination, and only limited efforts to implement the race directive. In civil society, opinions differ. One gay male employer's organisation, the Völklinger Kreis, publicly announced that they do not see the need for legislation against sexual orientation discrimination. In general, there is not much lobbying around the issue, and almost no media coverage except for "community" papers.

The government has, as of April 2004, not introduced a draft. Thus, the following remarks are based on substantial indications of what has been or will be done to implement the directive.

8.2.2 *Concept of sexual orientation (art. 1 Directive)*

Usually, German legislators use the term "sexual identity". This is defined to cover homosexuals, transsexuals and intersexuals.²⁹ Until today, bisexuals and heterosexuals have not been part of the legal discussion. This may indicate a lack of transposition of the Directive.

8.2.3 *Direct discrimination (art. 2(2)(a) Directive)*

There is a tendency to restate the Directive. If it so happens, the question remains whether there is sexual orientation discrimination related to relationships. German law distinguishes explicitly and thus directly discriminates between persons of different sexual orientations in legislation on civil status³⁰, on adoption, on inheritance, on partnership benefits for all federal and most state civil servants. Recital 22 of the Directive allows for legal differences in implementing the Directive regarding civil status. Thus, differences which amount to direct or non-justifiable indirect (see 8.2.4) discrimination are inconsistent with European law. In addition, differences amount to discrimination in the law of adoption. In addition, there are regulations in medical law, mostly in guidelines for doctors produced by self regulating bodies, which do not extend the right to artificial insemination to lesbian women. Finally, there seems to be discrimination in employment benefits between unmarried heterosexual and unregistered homosexual partners which has not yet been legally addressed, although it may be covered by § 75 of the Industrial Relations Act (*Betriebsverfassungsgesetz*).

8.2.4 *Indirect discrimination (art. 2(2)(b) Directive)*

There is a tendency to restate art. 2(2)(b) Directive. This would be an important step in German law, because it explicitly addresses a concept which has, until

²⁹ In the former draft of the Bundesministerium der Justiz, sexual identity was also used as the term to cover homosexuality, bisexuality and transsexuality: 'Sexual Identity refers to the discrimination of homosexuals of male and female sex. However, it also applies to transsexual and intersexual people. In German: ' *Die sexuelle Identität nimmt Bezug auf die Benachteiligung von Homosexuellen männlichen und weiblichen Geschlechts. Erfasst werden aber auch transsexuelle oder zwischengeschlechtliche Menschen.*'

'Intersexuals' is the medical term which describes individuals who are born with a mix of male and female genetical information. These individuals are often 'treated' to become one clear sex after birth, but do also often grow up in environments which confront them with stereotypical expectations of gender roles these individuals cannot perform. In some cases, intersexuals develop a – biologically speaking, homo- or heterosexual – sexual orientation which is regarded as homosexual, a case in which they face a specifically complicated set of discriminatory reactions.

³⁰ The Registered Partnership Act provides for less rights than the Civil Code legislation on marriage.

now, been debated or obscure in the courts. However, a conflict arises between anti-discrimination law and privileges for heterosexual marriage over other forms of partnerships, which, again, impacts on employment benefits. It is debatable whether distinctions in civil status will be limited to family law, while not extending to employment relations. Some commentators argue that employment benefits, based on § 75 Industrial Relations Act (*Betriebsverfassungsgesetz*), should already be handed equally to people without regard to sexual orientation.³¹

8.2.5 *Prohibition and concept of harassment (art. 2(3) Directive)*

If a Bill would follow art. 2(2)(b) directive, it would enhance the legal situation regarding the Employees Protection Act (*Beschäftigtenschutzgesetz*), because, and in accordance with European law, intent would not be required anymore, and harassment may be sexual or non-sexual, but has to be defined as discrimination if detrimental in effect. To implement the Directive, the intent requirement and the requirement of sexual nature of harassment have to be removed.

However, it should be noted that the Employees Protection Act, according to a representative study done for the Federal Government recently, is inadequately implemented³², and that no case on the sexual harassment of gays or lesbians has been published, although there are reports that harassment is a serious problem in the lives of many, either based on sexual orientation or the assumption of a specific sexual orientation.

8.2.6 *Instruction to discriminate (art. 2(4) Directive)*

In 2004, the highest labour court decided that an employer who uses a public agency to seek future employees, and does not intervene when the agency discriminates in job advertisements based on sex, is liable under § 611a Civil Code which prohibits sex discrimination in private employment.³³ This indicates that instruction to, as well as lack of attention of discrimination are subject to anti-discrimination law based on general legal principles.

8.2.7 *Material scope of applicability of the prohibition (art. 3 Directive)*

Until today, most activities are directed at private employment, and less has been done regarding public employment, and the military service, which is governed by the *Soldatengesetz*. There is a tendency to not explicitly cover third parties and customer discrimination, which would not fully transpose the Directive.

8.2.8 *Personal scope of applicability: natural and legal persons whose actions are the object of the prohibition*

German employment law is traditionally directed at the actions of employers, and then obliges the employer to protect employees against discrimination. As in the Employees Protection Act against sexual harassment, actions of

³¹ Viehweg/ Hardt (2004).

³² NFO / Baer 2004.

³³ BAG, 5 February 2004, 8 AZR 112/03 .

colleagues, superiors and third parties are covered, yet not directly addressed. This might be a deficit regarding the implementation of the Directive, since victims of discrimination do not have rights to combat injustice themselves.

8.3 What forms of conduct in the field of employment are prohibited as sexual orientation discrimination?

Based on the fact that there is no jurisprudence and very little legal knowledge and correct understanding of sexual orientation discrimination in German legal culture, a Bill will have to explicitly address relevant forms of conduct to ensure implementation. This is particularly relevant for discrimination based on assumed homosexuality, or based on others associating with homosexuals.

8.3.1 Discrimination on grounds of a person's actual or assumed heterosexual, homosexual or bisexual preference or behaviour

There has been no discussion in the legislature or courts on assumed sexual orientation discrimination, but there are some cases on discrimination of homosexuals in the labour market.

The highest labour court, the *BAG*, held that the dismissal of a gay man was unlawful.³⁴ However, there was also criticism of this in legal literature.³⁵ The same court is less protective in the area of employment in religious bodies, and justified dismissal of a gay psychologist employed as a family counsellor by a religious body; the court stated that it was not just stated homosexuality, but any kind of 'being' homosexual.³⁶ Recently, newspapers reported that a lesbian teacher was precluded from teaching religion after she registered with her partner.³⁷ On the other hand, a lower court decided in a case of a social worker employed by a religious body that dismissal based on sexual orientation is unlawful.³⁸

Some courts accept a right to asylum when persecution is based on sexual orientation³⁹, particularly in a case in which a gay man faced the death penalty.⁴⁰ Legislative clarification will however be needed here.

Regarding sexual practices, there are hardly any cases, which signals a taboo rather than a lack of unfair treatment. One court has decided that a person cannot be dismissed from employment based on sadomasochistic sexual practices.⁴¹ The law should clarify the point. An example exists in the German military, which issued guidelines which differentiate between sexual harassment

³⁴ *Bundesarbeitsgericht* (Federal Labor Court) *BAG*, *Neue Zeitschrift für Arbeitsrecht* 1994, 1080.

³⁵ See notes in Skidmore, *supra*, at 447.

³⁶ *Bundesarbeitsgericht* (Federal Labor Court) *BAG*, *Neue Juristische Wochenschrift* 1984, 1917.

³⁷ *Die tageszeitung*, 24/25 May 2002, p.2.

³⁸ *Arbeitsgericht* (Labour Court) *ArbG Lörrach*, *Arbeit und Recht* 1993, 151; upheld by *Landesarbeitsgericht* (State Labour Court) *Landesarbeitsgericht Stuttgart*, *Neue Zeitschrift für Arbeitsrecht* 1994, 416.

³⁹ *Bundesverfassungsgericht* (Federal Constitutional Court) *BVerfG*, *Neue Zeitschrift für Verwaltungsrecht* 1988, 838; Streit 1994, 181; Sachs 1989, 572.

⁴⁰ *Bundesverfassungsgericht* (Federal Constitutional Court) *BVerfG*, *Neue Zeitschrift für Verwaltungsrecht* 1988, 838.

⁴¹ *Arbeitsgericht* (Labour Court) *ArbG Berlin*, 36 Ca 30545/98; *Landesarbeitsgericht* (State Labour Court) *LAGE zu BGB* (Civil Code) § 611 *Kirchliche Arbeitnehmer* Nr. 11.

and sexual practices, the former not being tolerated while the later is, regardless of whether they are homosexual or heterosexual.

In the law of associations, a lower court interpreted the general clause against unfair treatment in art. 242 Civil Code as a prohibition of sexual orientation discrimination, and forced a youth organisation to accept a gay boys choir as a member.⁴² However, another court rejected a right of a gay sports club to join a sports association.⁴³ Thus, clarifying legislation is needed.

Further, there are cases on dismissals of people who are HIV+ or have AIDS. The Federal Labour Court once held that it is not 'immoral' (*sittenwidrig*) to do so.⁴⁴ In another case, it left open whether such a status may provide an acceptable ground for dismissal, while commentators treat it like any other illness⁴⁵, and a lower court held that such dismissals violate general laws.⁴⁶ Yet in 1986, a Bavarian administrative court decided that the prohibition of employment of gay people in a gay sauna as well as the obligation to actively prohibit sex in the sauna was not illegal per se.⁴⁷

8.3.2 *Discrimination on grounds of a person's coming out with, or not hiding, his or her sexual orientation*

It has been argued that the right to lie which the Federal Labour Court accepts in cases, e.g., of pregnancy or other intimate issues, may be used to protect against discrimination.⁴⁸

8.3.3 *Discrimination between same-sex partners and different-sex partners*

The Registered Partnership Act grants some personal status rights to registered homosexuals, but the Additional Act on material rights has not been passed. In addition, there is no prohibition of discrimination against non-registered same-sex partners compared to non-married different-sex partners. Therefore, discrimination regarding the gender of a partner is legal in Germany, which may be interpreted as contrary to the Directive. The Directive itself does not allow for discrimination regarding the sex of a partner.⁴⁹

The Federal Constitutional Court held different treatment regarding partnership laws to be valid, but not to be required by the German constitution.⁵⁰ However, the highest administrative court upheld a regulation of an independent public actor which excludes gays and lesbians from certain benefits by limiting such benefits to married people only.⁵¹ Even in states which explicitly protect against

⁴² *Landgericht* (Higher Civil Court) *LG Heidelberg*, *Neue Juristische Wochenschrift* 1991, 927. See also *Landgericht* (Higher Civil Court) *LG Karlsruhe*, 11. August 2000, Az. 2 O 243/00 (gay choir in singers association with access to public funding).

⁴³ *Kammergericht* (State Civil Court) *KG*, *Neue Juristische Wochenschrift - Rechtssprechungsreport* 1993, 183 with a comment by K.Schmidt, *Juristische Schulung* 1993, 420. See also *Bundesgerichtshof* (Federal Civil Court) *BGH*, *Neue Juristische Wochenschrift - Rechtssprechungsreport* 1986, 583.

⁴⁴ *Bundesarbeitsgericht* (Federal Labour Court) *BAGE* 61, 151 (1989).

⁴⁵ Haesen 1988; Richardi 1988.

⁴⁶ *Arbeitsgericht* (Labour Court) *ArbG Berlin*, *Neue Zeitschrift für Arbeitsrecht* 1987, 637.

⁴⁷ *Verwaltungsgericht* (Administrative Court) *VG München*, *Neue Juristische Wochenschrift* 1987, 2322.

⁴⁸ See par. 8.3.6 below.

⁴⁹ Recital 22 is not binding. For discussion of this, see chapter 1, 19, 20.

⁵⁰ *Bundesverfassungsgericht* (Federal Constitutional Court) *Entscheidungen des Bundesverfassungsgerichts* 105, 313 (2002).

⁵¹ *Bundesverwaltungsgericht* (Federal Administrative Court) *BVerwG*, *Neue Juristische Wochenschrift* 2000, 2038.

sexual identity discrimination in their constitutions, courts allow for discrimination based on heterosexual marriage.⁵² However, tax deductions for sustenance of same sex partners has been accepted by the highest tax court,⁵³ and by Federal Tax authorities.

The highest social court decided that dismissals may be prevented based on marriage, but not on unmarried partnership, be it heterosexual⁵⁴ or homosexual. In inheritance law, there is also a tendency to accept that a personal will dedicating rights to same sex partners shall be accepted as a will of a married partner.⁵⁵

In asylum and immigration law, courts do accept a right to stay for partners in homosexual relationships.⁵⁶

There is ongoing discrimination based on alleged differences between partnership and marriage, because the second chamber did not accept the Additional Act on Registered Partnerships.

8.3.4 *Discrimination on grounds of a person's association with gay/lesbian/bisexual/heterosexual individuals, events or organisations*

There have been cases in the military, now overruled by the Highest Administrative Courts, but no further information regarding legislation on this issue.

8.3.5 *Discrimination against groups, organisations, events or information of/for/on lesbians, gays or bisexuals*

There are no cases documented, but NGOs report that tax law discriminates based on sexual orientation when tax deductions for public organisations are not granted to NGOs which cater for the needs of lesbians and gays in particular.

8.3.6 *Discrimination on grounds of a person's refusal to answer, or answering inaccurately, a question about his or her sexuality*

In Germany, the Federal Labour Court accepts a right to lie if discrimination is prohibited, e.g. against pregnant women⁵⁷ in most cases⁵⁸, or against homosexuals. Therefore, even without explicit recognition, it can be said that German labour law extends this right to homosexuals if they are protected against discrimination. However, if an employer bases a decision on a diversity

⁵² Berlin Constitutional Court (*Verfassungsgerichtshof des Landes Berlin*), *LVerfGE* 3, 10, 14 (no equal rights of same sex partners with married partners in public housing); Berlin Constitutional Court, *Neue Zeitschrift für Verwaltungsrecht* 1998, *Beilage* Nr. 5, 41 (no right to stay for a male foreigner based on gay relationship, although right would be granted to him if he were married to a woman).

⁵³ *Bundesfinanzhof* (Federal Tax Court) *BFH* III R 85/89 (1991).

⁵⁴ *Bundessozialgericht* (Federal Social Court) *BSGE* 52, 276 (1981); critical: Gagel Rn. 179 -181.

⁵⁵ *Oberlandesgericht* (State Civil Court) *OLG München*, *Neue Juristische Wochenschrift* 2002, 305; and *Monatschrift für Deutsches Recht* 2001, 1408.

⁵⁶ *Bundesverwaltungsgericht* (Federal Administrative Court) *BVerwGE* 100, 287 (1996); *OVG* (State Administrative Court) Münster, *Neue Zeitschrift für Verwaltungsrecht* 1997, 189. Some state Ministries of the Interior recognised this in their internal guidelines in 1998 (Nordrhein-Westfalen, Hamburg, Berlin, Hessen). See Hochreuter 1998, 181; Kapell 1999, 260.

⁵⁷ Federal Labour Court (*BAG*), decision of 6 February 2003 - 2 AZR 621/01.

⁵⁸ Compare to ECJ, 5 May 1994, case C-421/92 (*Habermann-Beltermann*).

management scheme directed against discrimination, and thus inquires about sexual orientation, it is justified under the Directive.

8.3.7 *Discrimination on grounds of a person's previous criminal record due to a conviction for a homosexual offence without heterosexual equivalent*

There are no decisions known and no information on legislation on the issue.

8.3.8 *Harassment*

The Employees Protection Act does not explicitly mention any form of sexual orientation discrimination. Harassment is defined 'sexually determined conduct which injures the dignity of the workers', art. 2 sec 2. However, when gays, lesbians or bisexuals are harassed in explicitly sexual terms, the law may be applied because of the sexual nature or the conduct. But this does not protect against homophobic harassment.

The law thus does not cover other harassment against gay men and lesbian women, bisexuals and persons presumed to be gay, lesbian, bisexual. In addition, it requires intent rather than focusing on the effect of the discriminatory act, and thus, even in the few cases mentioned above, would not implement the directive. The law also does not explicitly cover third party harassment, e.g. by clients or customers.

Also, in general, the law is inadequately enforced, and no sexual orientation cases are known. Also theoretically, the Workers Protection Act can be applied. However, this has not happened to date.

8.4 **Exceptions to the prohibition of discrimination**

There is no detailed information available on this point.

8.4.1 *Objectively justified indirect disadvantages (art. 2(2)(b)(i) Directive)*

8.4.2 *Measures necessary for the protections of rights of others (art. 2(5) Directive)*

8.4.3 *Social security and similar payments (art. 3(3) Directive)*

Some states extend social security rights, e.g. married partner benefits, to same-sex registered partners. Based on a decision by the Federal Labour Court in 2004, in federal public employment law, married partner benefits have to be granted to registered partners as well.

8.4.4 *Occupational requirements (art. 4(1) Directive)*

8.4.5 *Loyalty to the organisation's ethos based on religion or belief (art. 4(2) Directive)*

German courts have, in the past, accepted that religious bodies may discriminate against homosexuals and against heterosexual males in cases of

marriage, which may be seen as sexual orientation discrimination per se. However, court decisions have granted less and less freedom to do so, and accept discrimination only in positions in which people have to actively endorse a belief. The Directive requires at least clarification on this point, since religious organisations are explicitly not authorised to discriminate on grounds other than religion or belief. The option to require employees to be loyal to the organisations ethos shall, according to the interpretation by German church officials, only provide for exclusion of people who would with regards to the particular position fully represent the church, and articulate its religious beliefs with authority, if such peoples' behaviour (in the German version, art. 4(2) s. 3: '*Verhalten*') contradict this belief.⁵⁹

In 2003, a court rejected the right of a local church to reject a contract with a gay couple who rented church premises for their partnership ceremony.

At the same time, there have been press reports that lesbian women, employed as social workers in childcare, have been dismissed by a Catholic Church based on their sexual orientation.

8.4.6 *Positive action (art. 7(1) Directive)*

There are no decisions known and no information on legislation on the issue. In the area of gender discrimination, affirmative action laws exist in all states and in the federal civil service, but are based on ECJ decisions rather than on convictions of scholars and judges. For a long time, affirmative action for men who served in the military and for disabled people have existed. There have been no attempts to even start affirmative action for bisexual; or homosexuals. However, adequate interpretation of the right to equality implicates that positive action is not discrimination, but different treatment to end discrimination. Therefore, positive action may be seen as legitimate per se, yet the need for clarifying legislation remains.

8.5 Remedies and enforcement

Generally, remedies for discrimination are barely adequate, if cases of discrimination are adjudicated by the courts at all. In German legal culture, discrimination is an issue of morality rather than harm. Therefore, in the area of gender discrimination, the ECJ had to force the German government to ensure effective sanctions in art. 611a Civil Code.

8.5.1 *Basic structure of enforcement of employment law*

In general, employment law is either a safeguard of collective labour agreements, an obligation to protect individuals in the workplace, or it gives rights to individuals against unfair treatment by employers.

⁵⁹ Bündnis 90/Die Grünen, *Zivilrechtliches Antidiskriminierungsgesetz, Anhörung im Deutschen Bundestag* May 2003.

8.5.2 *Specific and/or general enforcement bodies*

There are specific labour courts, which have three instances (*Arbeitsgericht, Landesarbeitsgericht, Bundesarbeitsgericht*), but no specific enforcement bodies to combat sexual orientation discrimination. In general bodies, there are indicators that there is a lack of sensitivity on the issue, including anti-discrimination law not being an issue in legal education, and no training is given or is available to court personnel.

8.5.3 *Civil, penal, administrative, advisory and/or conciliatory procedures (art. 9(1) Directive)*

Based on recent legislation (*Arbeitsgerichtsgesetz*), people have to seek solutions before they go to court in a mediating procedure, a '*Schiedsverfahren*'. However, there is no procedure to specifically address sexual orientation discrimination.

8.5.4 *Civil, penal and/or administrative sanctions (art. 17 Directive)*

There is no explicit legislation on this issue in the area.

8.5.5 *Natural and legal persons to whom sanctions may be applied*

Generally, constitutional law is binding on all public actors, and labour law applicable to all civil actors, with exceptions for religious bodies and so-called 'tendency' employers, like the press. There is a tendency not to grant damages to victims of discrimination.

8.5.6 *Awareness among law enforcers of sexual orientation issues*

Union members have a right to free legal advice, and the unions employ lawyers. However, studies indicate that they are not specialised and often not sensitive to issues of discrimination⁶⁰, with some exceptions regarding sex discrimination. There is a tendency not to address these issues, based on a lack of awareness of the problems which occur.

8.5.7 *Standing for interest groups (art. 9(2) Directive)*

While group litigation does not exist, only the enforcement of individual rights does, except in the fields of consumer protection and environmental law.

8.5.8 *Burden of proof of discrimination (art. 10 Directive)*

In cases of sex discrimination, the burden of proof is reduced according to art. 611a Civil Code. However, the rule is inadequately enforced, not known to many judges, and thus rarely appears in court decisions. The same is true for the option of using a general evidence principle of '*Anscheinsbeweis*', which is proof if a plausible assumption is established. There are no decisions known on sexual orientation discrimination and no information on legislation on the issue.

⁶⁰ Timm 1999, 32.

8.5.9 *Burden of proof of sexual orientation*

There is no law on the matter.

8.5.10 *Victimisation (art. 11 Directive)*

In the Workers Protection Act, there is a clause against victimisation of those who protest against harassment. Beyond that, there are no decisions known and no information on legislation on the issue.

8.6 **Reform of existing discriminatory laws and provisions**

8.6.1 *Abolition of discriminatory laws (art. 16(a) Directive)*

There are no explicitly discriminatory laws to be abolished.

8.6.2 *Abolition of discriminatory administrative provisions (art. 16(a) Directive)*

There is no information on the matter, since administrative rules do not have to be published.

8.6.3 *Measures to ensure amendment or nullity of discriminatory provisions included in contracts, collective agreements, internal rules of undertakings, rules governing the independent occupations and professions, and rules governing workers' and employers' organisations (art. 16(b) Directive)*

There is no information on the matter.

8.6.4 *Discriminatory laws and provisions still in force*

In most states, no legislation has been introduced to transpose the Directives. Thus, state public employment law, in most cases, does not protect against sexual orientation discrimination. In particular, regulations of employment benefits may still contain provisions which implicitly or explicitly discriminate against homosexuals, normally based on their relationship status.

In private employment, trade agreements and enterprise agreements in most cases do not protect against sexual orientation discrimination, and may contain discriminatory provisions. This is a violation of § 75 Industrial Relations Act (*Betriebsverfassungsgesetz*), and would also violate the Directive if such collective agreements are declared binding by the state.

8.7 **Concluding remarks**

A 2002 study shows that in Germany, 28-30 % of all citizens have negative attitudes towards lesbians and gay men.⁶¹ Thus, changes in the law need to be accompanied by changes in law enforcement to be effective and truly protect.

⁶¹ Chrapa 2003, 2.

This as well as the current state of German legal culture gives rise to concern regarding the transposition of the Directive. There is, in society and in legal circles, a severe lack of sensitivity to the issue of sexual orientation discrimination, which results in a lack of implementation of anti-discrimination law. Acknowledging the difficulties the government faced to legislate in the area at all, more than legislation which explicitly covers sexual orientation discrimination is needed to ensure effective protection against discrimination. In particular, what needs to be addressed is:

- the compartmentalised approach, which tends to establish a hierarchy between different grounds of discrimination, and thus ignores the fact that such grounds do not establish groups, but are factors of discrimination for individual people in very different life circumstances,
- the tendency to not give victims a right to damages, which may be seen as violating the requirement to effectively combat discrimination, and indicates a lack of understanding of the harm discrimination does,
- the problematic discussions around an independent body, where qualification of personnel and accessibility by those in need have to be addressed,
- the lack of training and legal education in the field.

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