

## Alternative report

Referring to the sixth report of the Federal Republic of Germany about the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)

from: Menschenrecht und Transsexualität  
(Human Rights and Transsexualism, community of interest)

*"that all human beings are born free and equal in dignity and rights and that everyone is entitled to all the rights and freedoms set forth therein, without distinction of any kind, including distinction based on sex"<sup>1</sup>*

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<sup>1</sup> From: Convention on the Elimination of All Forms of Discrimination Against Women 18<sup>th</sup> of december 1979

## Referring to the situation of transsexual women in Germany

### Menschenrecht und Transsexualität (community of interest)

v.i.s.d.p.: Kim Schicklang  
Brandäckerweg 7  
89079 Ulm

phone: 0731/44873  
email: recht@mut23.org

## 1. Basic problems

a) Transsexual women are women

The Convention on the Elimination of All Forms of Discrimination Against Women said already in 1979 that

*„Universal Declaration of Human Rights affirms the principle of the inadmissibility of discrimination and proclaims that all human beings are born free and equal in dignity and rights and that everyone is entitled to all the rights and freedoms set forth therein, without distinction of any kind, including distinction based on sex“.*

Consequently the pre - or rather supranational nature of the Human Rights is confirmed again this year and especially in the context of the gender equality it is pointed out, that the contracting member states reached an agreement "to pursue a policy forthwith to abolish the discrimination of women with all suitable means"<sup>2</sup>. Great stress was laid on the repeated phrase "man and woman", ignoring the precise explanation what is a man and a woman or how to define the gender. Accepting the unscientific as well as antiquated idea, that it is possible to distinguish between the genders by means of physical factors like the existence or missing of for example a penis, leads practically to problematic situations in the sense of the Human Rights that transsexual women have to face as well as the assumption that the gender is only a social construct, even only acquired or learned. Until now the legal recognition is refused to concerned women - based on outdated gender theories, though there are enough clues that they exist and that their statement "I am born in the wrong body" is true.

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<sup>2</sup> Article 2, CEDAW 1979

Transsexual women are women whose bodies developed parts of the opposite gender, they were born with a penis and testicles.

*"If you think, there are women who were born with a penis, because their brains are constructed differently, because they are constructed unmanly... then it seems that there are at least some of these individuals."*

*Heino F. L. Meyer-Bahlburg, Dr. rer. nat. Professor of Clinical Psychology, 2007*

This knowledge, that the gender specific differences between man and woman are rather based in the brain and have to do with the differentiation of the genders in the 7th week of pregnancy, is supported by some analysis like e.g. the one published during the 90ties by Dick Swaab, neurobiologist at the institute for brain research in Amsterdam.<sup>3</sup> He found out, that the size of the so called BST-core in the brain of transsexual women in fact corresponds the sex of their female identity and not the one of their "male" body. But even at that moment the idea, that the brain is more important than the genitals when it comes to determine the sex, was not really new. Harry Benjamin, a German-American psychologist and pioneer on the field of research of transsexualism, already said in his book "The Transsexual Phenomenon" in 1966

*"The dominant status of the genital organs for the determination of one's sex has been shaken, at least in the world of science." and "The forces of nature, however, know nothing of this tabu, and facts remain facts. Intersexes exist, in body as well as in mind."*<sup>4</sup>

In 1978, one year before CEDAW, this idea was picked up and named in the explanatory statement in a judgement of the Federal Constitutional Court, which relates to the case of a transsexual woman who claimed the acknowledgement of her civil status.

*"The fact, that one person's sex is not only determined by the consistency and characteristics of the sexual organs but also by psych, has to be seen as a proven medical knowledge today."*<sup>5</sup>

The Federal Constitutional Court further explained in this judgement

*"The legal system is not to ignore these facts, because they determine in equal if not bigger measures than the physical characteristics the ability of the human being to range in the social function of the genders and because these social functions are subject of the legal rule in terms of the sex."*

and argued, that it is not compatible with the human dignity enshrined in the basic law to assign a person against his will to a sex, this person does not psychologically belong to.

<sup>3</sup> Zhou JN, Hofman MA, Gooren LJ, Swaab DF. 1995 A sex difference in the human brain and its relation to transsexuality.

<sup>4</sup> Harry Benjamin, 1966 (The Transsexual Phenomenon)

<sup>5</sup> Federal Constitutional Court (Bundesverfassungsgericht) Judgement (1 BvR 16/72)

## b) The repudiation of the sex by the Law of Transsexuals

The judgement of the Federal Constitutional Court from 1978 set the foundation stone for the so called Transsexuellengesetz (Law of Transsexuals), which followed two years later. And exactly here the calamity for the transsexual women began, because in this Law of Transsexuals two models for the definition of the sex are now used in coexistence and lead to the following paradox: Admittedly it is acknowledged in the Transsexuellengesetz that the psyche/brain is more important for the determination of gender than the physically visible character of a person, but at the same time the acknowledgement of the civil status, which is for the affected women of an importance that is not to be underestimated especially during the medical process, is put at the end of the process, based on the fact, that the civil status depends on the visible external sexual characteristics. The TSG (in the following for Law of Transsexuals/Transsexuellengesetz) says in this context, that the civil status can only be changed, when the concerning person:

*"underwent a procedure that changed his or her external sexual characteristics and by which a significant approach to the physical appearance of the other sex was reached."*<sup>6</sup>

According to the recent law of transsexuals "significant approach to the physical appearance of the other sex" means castration, the infecundity is so claimed presupposition to get legal acknowledgement at all at the end of the medical process. But article 11 of CEDAW says:

*"The right to protection of health... including the safeguarding of the function of reproduction."*

Further this logic of the TSG leads in practice to the scenario, that a transsexual woman is treated as a man in civil status during the medical process until the end (she is seen as a man with "gender identity disorder" in terms of the German sexology), though she was born as a woman (albeit with differing physical characteristics). So the legal existence is refused for this concerning woman; she has no possibility to make a stand against potential discrepancies and problems as a woman pertaining to the medical process, because officially she is a man not a woman.

So the main problem in the TSG, the assumption that a transsexual woman is a "man with a gender identity disorder", a logical construct that is found again in the following phrase:

*"The court is only allowed to accede to the request referring to §1 after having gotten the opinion of two experts, who are familiar with the special problems of transsexuals because of their training and their occupational experience. The experts have to work independently from one another; in their reports they have to pronounce, if it is likely with a high probability according to the knowledge of medical science that the sense of belonging of the person making the motion will not change."*<sup>7</sup>

<sup>6</sup> TSG, Second Chapter. Feststellung der Geschlechtszugehörigkeit §8, Abs.4 („underwent a procedure“ means castration)

<sup>7</sup> TSG, §4, Abs.3

If you know, that the medical process lasts not only a few days but under some circumstances takes a couple of years, the explosive nature of the repudiation comes clear: in every context in which the sexual differentiation is important the concerning woman faces massive problems, because she has no documents that prove her existence.

Here a basic human right is violated: the right of the own sex/gender. A woman is to have the right to be accepted as a woman and to be allowed to live as a woman.

Here are some examples for what rises from the legal paradox mentioned above (and unfortunately still is daily routine in Germany).

## 2. Examples for violation of human rights

### a) First example "Sexual abuse"

An affected transsexual woman engages herself in the procedure as required by the TSG and agrees to the experts process in which she is claimed to be a "man with a psychological disorder". Now she has to see two experts, which then after the surveying give a judicial statement. During the appointment the expert sexually abuses the woman.

For the expert is able to decide the next steps of the procedure, the affected woman has the possibility either to endure the abuse or to sue the expert. If the affected woman sues the expert, she will not be able to go on with a lawsuit which is about the fact that a woman was abused, but an officially "psychologically ill man" claims, that "he" was abused. Who is going to believe this woman? Considering that the psychological experts are in close contact with the courts (because they are also in charge for other cases) you know that legal actions against sexual abuse during the expert's reports are not taken by the affected persons in almost every case. Cases that are not rare in Germany, but that nevertheless disappear in the dark of the parallel world of the TSG and never leak out to the public.

Though the "Sixth report of the Federal Republic of Germany about the Convention on the Elimination of All Forms of Discrimination Against Women" says:

*"Protection against discrimination has been greatly improved through the General Equal Treatment Act, which applies to the characteristics of sex, race and ethnic background, religion and beliefs, age and sexual identity. People who have been the victims of discrimination can claim damages and apply for injunctions for unjustified discrimination under labour and social laws as well as under civil law. They are supported in the pursuit of justice by the antidiscrimination organisations as well as the Anti-Discrimination Office of the federal government."*<sup>8</sup>

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<sup>8</sup> Sixth Report by the Federal Republic of Germany on the United Nations Convention to Eliminate all Forms of Discrimination Against Women (CEDAW)

If a transsexual woman exists in civil status, she could indeed make use of this protection against discrimination, but without legal existence this is in practice as difficult as being heard in a department against discrimination or a department that psychologically and legally helps women who have been sexually abused. It is not made up that affected women found the doors of these institutions closed for their likes.

If the Federal Government took the CEDAW also in the case of the problems of transsexual women seriously, it would be challenged to change the TSG, so that a transsexual woman is already at the beginning of the medical procedure acknowledged as a woman in civil status.

The Federal Government would now be asked to

*"take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women."*<sup>9</sup>

The TSG violates this request until today by accepting the not existing protection of transsexual women. Sexual abuse by psychologists - either the direct abuse or indirect by forcing the women to humiliating forms of treatment like abusing undressing or verbal sexual penetration by the expert - has been ignored until now.

The procedure using experts is also violating the CEDAW in another point. In this procedure the decision if a transsexual woman could be accepted as such is based on stereotypical role allocations. She is expected to fit these role expectations, which are stereotypical for the sex, to be able to change her surname and her civil status. But the CEDAW says:

*"Section 5 [Realisation of women's rights]*

*States Parties shall take all appropriate measures:*

1. *To modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women."*

But transsexual women are supposed to only then count as women according to the TSG and contradicting section 5, when they meet these prejudices which are to be abolished.

## **b) Second example "Enforcement to lie in court"**

A transsexual woman, who was already acknowledged by the Federal Constitutional Court in a judgement from 1978 as a woman (or is to be treated as one), because the psyche "is probably determining the human ability to classify the social function of the genders more

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<sup>9</sup> Article 2f, CEDAW

than the physical characteristics of the sex"<sup>10</sup>, is though treated as a man and is forced to agree to a diagnosis that says referring to ICD10 F64.0 she is a person who wants to have the opposite sex, by undergoing the psychological procedure with experts.

The ICD here means

*"A desire to live and be accepted as a member of the opposite sex."*<sup>11</sup>

and is treated after the DSM-IV, the manual of psychological disorders, which says

*"persistent discomfort with his or her sex or sense of inappropriateness in the gender role of that sex. In children, the disturbance is manifested by any of the following: in boys, assertion that his penis or testes are disgusting or will disappear or assertion that it would be better not to have a penis, or aversion toward rough-and-tumble play and rejection of male stereotypical toys, games, and activities; in girls, rejection of urinating in a sitting position, assertion that she has or will grow a penis, or assertion that she does not want to grow breasts or menstruate, or marked aversion toward normative feminine clothing."*<sup>12</sup>

So it is totally ignored in practice what has been known since the 60's: the psyche/brain determines the sex more than the genitals. In addition a transsexual woman is denied her birth sex which is - if the psyche/brain is the determining factor and not the body (see Federal Constitutional Court on October 11th 1978 -1 BvR 16/72) - actually in consequence "female". She is now forced by law to declare herself (or to be declared) a born man, who has a psychological disorder, to become the legal woman she ever was. But a law that forces people to make a false statement cannot be in accordance with the basic law. If this is a criminal case, a false statement in court would be perjury.

*"Perjury is a crime which implicates prison sentence from one to 15 years. In less serious cases the term of imprisonment is six month up to five years."*  
(from: german wikipedia)

Another enforcement to lie hidden in the TSG has to do with the situation of transsexual women who are married to a woman (for in civil status they are seen as men, this is possible). When these women start the legal process of transition, they have to get a divorce according to the TSG. The conditions for the change of the civil status include that the transsexual woman is

*"not married"*<sup>13</sup>

A marriage can only be dissolved in Germany, when it is rated as failed.

<sup>10</sup> Federal Constitutional Court 11<sup>th</sup> of december 1978 - 1 BvR 16/72 -

<sup>11</sup> ICD10, WHO, F.64.0 Transsexualism

<sup>12</sup> DSM-IV 302.85 (ICD WHO Chapter V - F64.0 Transsexualism), Gender Identity Disorder in Adolescents or Adults

<sup>13</sup> TSG §8, (1)1

*"The marriage can be dissolved when it failed. This is the case, when the marital life partnership according to § 1353 BGB (mensa et toro) doesn't exist anymore and is not expected to be restored."  
(from: german wikipedia)*

Now a transsexual woman is again forced to lie in court, this time in front of the divorce lawyer.

### **c) Discrimination of transsexual women in the public and in the media**

Though transsexual women are adjudicated the right, that the psyche/brain is the determining factor and not the genitals (Federal Constitutional Court 1978) they are pictured in public as men who "want to become women". Considering that the genitals are not in 100 percent of all cases the sex determining factor and that there are people whose bodies partly do not meet their birth sex, you could ask: Why is this not part of the public reporting?

The sixth report of the Federal Republic of Germany about the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) says:

*„The Committee recommends that policies be strengthened and programmes implemented, including awareness-raising and educational campaigns directed at women and men, and specifically at media and advertising agencies, to help ensure the elimination of stereotypes associated with traditional roles in the family and the workplace, and in society at large."*

But if it is - against all scientific logic - totally ignored that the genitals are not the determining factor but the brain of a person (and even some scattered sexology scientists in Germany make the same mistake), we do not have to be surprised that the image of the transsexual woman in public is warped.

So for example Prof. Dr. Günter K. Stalla (department for internal medicine/endocrinology, Max-Planck-Institut of the psychiatric clinic in Munich) says about men who "want to become women" in a press release:

*"The wish to change the sex is often really distinct."<sup>14</sup>*

If he considered what the Federal Constitutional Court had already known in 1978, then this sentence can only be entitled as wrong statement, for transsexualism is not about the wish to change the sex but about acknowledging the actual birth sex - a transsexual woman was born as a woman, even though with the opposite physical characteristics like e.g. penis and testicles.

<sup>14</sup> Press Release of the Deutsche Gesellschaft für Endokrinologie (German Endocrinological Society) 05.10.2007

Sophonette Becker, Dipl. Psych., (psychoanalyst for the sexology department at the university of Frankfurt) makes the same mistake, when she writes in the German version of the so called Standards of Care:

*"Transsexualism is characterised by the constant inner certainty to belong to the other sex" and "The "enforcement" lasting three years means that it is impossible to reconcile with the birth sex."*<sup>15</sup>

Here again the fact that actually the body is not to be assumed as the determining factor for the sex but the psyche/brain has to be the determining factor in case of doubt is massively violated. Who knows that these "Standards of Care" actually wanted to take account of this knowledge, has to ask the question which paradox is openly displayed here - one of those from which transsexual women have to suffer until today.

Section 2d of CEDAW says that the contracting member states are asked to

*"refrain from engaging in any act or practice of discrimination against women and to ensure that public authorities and institutions shall act in conformity with this obligation."*

The spreading of untruths about transsexual women by public institutions (mainly from the psychoanalysts' section) is contradicting this request. Again in this case it would be nice, if the Federal Government considered what has been known for decades: There are people whose physical characteristics differ from their birth sex. These people are in need of protection from abuse and force. One condition of this protection is to notice in the first place that these people actually exist.

#### **d) More examples**

More examples for the violation of Human Rights against transsexual women are numerous, because the legal repudiation of in fact existing persons implies all kinds of discrimination and disadvantage. Other examples are the following:

- Disadvantages at work and the missing possibility to task the AGG (german employment non discrimination law) basing on the right sex<sup>16</sup>
- Delay in medically necessary services (e.g. reconstructing surgery)
- Triggering or intensifying of secondary psychological problems by mistreatment by psychoanalysis
- Medically endocrinological and surgical malpractice caused by random diagnosis of the gender (according to F64.0)

<sup>15</sup> Health Law Standards of Care for Transsexualism (German Version) from the Deutschen Gesellschaft für Sexualforschung (Akademie für Sexualmedizin und der Gesellschaft für Sexualwissenschaft)

<sup>16</sup> This is a violation of the Universal Declaration of Human Rights. „Article 23 (1) Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment.“ See also: CEDAW Article 11: „(a) The right to work as an inalienable right of all human beings...“

Especially emphasized has to be the lacking medical security by using a gender theory based on psychoanalysis, namely the assumption that sex could be instilled (theory of gender as a social construction). For this theory assumes the body as the determining basis of the sex - because there is nothing more to it, if you take a closer look at this theory- the repudiation of women born with the organs of the opposite sex, which is mirrored among others in the DSM or the ICD as well as in the TSG, follows.

The legal repudiation leads in practice to the situation that the health insurance is unable to treat a transsexual woman according to her sex as a woman, but as a man who wants to be treated like the opposite sex. An insurance employee is not able to grant services from the catalogue of important insurance services for women referring to the TSG, but is forced to make the decision about e.g. depilating treatments (or other physical measures) basing on the patient being a man with gender identity disorder (ICD10/DSM). The question why a man should need these measures appears quickly, because the employee assumes to treat a man by consulting his computer and finding the notice "male" or "Mister". If the lawgiver considered that there are people who are born with the characteristics of the opposite sex and gave these people a right to live, this circumstance would be turned into the better in practice. A woman who complains of growth of beard because of a gonadal dysgenesis is treated - if she is registered as a woman - as a woman with a physical problem.

Caused by this non-treatment a transsexual woman is forced to an outing that was already regarded as critical by the Federal Constitutional Court in 2006. Section 13 of the CEDAW says about these matters:

*"Section 13 [Women's Economic and social life]*

*States Parties shall take all appropriate measures to eliminate discrimination against women in other areas of economic and social life."*

The CEDAW also says that the contracting member states campaign for

*"The right to social security, particularly in cases of retirement, unemployment, sickness, invalidity and old age."<sup>17</sup>*

There can be no mention of social security for women who are born with the characteristics of the opposite sex, because the refusal of reconstructing measures is still standard in Germany.

So for example a writing of the Deutsche Gesellschaft für Sexualforschung (German Society of Sexual Studies) still says in 2001:

*"In practice this means that further somatic measures as well as their extent and date do not easily deduce from the widely safe diagnosis of transsexualism."<sup>18</sup>*

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<sup>17</sup> CEDAW, Article 11e

<sup>18</sup> Deutsche Gesellschaft für Sexualforschung (German Society of Sexual Studies), Zeitschrift für Sexualforschung (Journal of Sexual Studies), Sept. 2001

Who assumes that it is necessary to protect men from somatic measures (assuming that the genitals determine the sex) acts surely different than someone who knows that transsexual women were born as women - even if they have the physical characteristics of the other sex. To guarantee the legal acknowledgement of these transsexual women the first step is to consider that these women actually do exist - and that happens to be before medical measures are taken. This begins with the acknowledging of the civil status.

### 3. Over 100 years of ignorance

According to the data of the doctors there are officially about 3.500 transsexual women in Germany (who were rated as male at their birth based on their anatomy)<sup>19</sup>, but the estimated number of unknown cases is likely to be much higher, if you consider that a lot of affected women are not represented in the statistics, because they did not see a contact person from the medical area yet or because this person was not able or was not willing to help after having made contact. It is desirable to be sure, that the topic "transsexualism" would not lead always to a situation like "That is something I am not well versed in" from the people involved in the health system each time a transsexual woman sees a doctor, but hostility and prejudice against transsexuals are often more distinct here than with people "on the streets".

One reason for this could be that theories about the "sex as a social construction" which are socio-politically biased. Since the late sixties they have been taken over increasingly in scientific literature, too, without considering that the assumption of this construction can fit admittedly the referred sex stereotype, but the basic sex of a person remains untouched - and is everything else but constructed from the outside - even has to remain untouched, if you do not want to take transsexual people their right to exist and to make their speciality to a mere effect of the outer circumstances, which is still done by some doctors today.

In this context it is worth to compare two statements to understand in how far the gender theory, which became up to date in the late 60's, actually changed the circumstances:

Statement 1:

*"The last step of the course of the disease is the mania of a sex change."*

Statement 2:

*"Transsexualism is such a neo-gender. It used to be unimaginable that people change their sex in an operation."*

But even if you can hardly believe it, between these two statements there are exactly 120 years. The first one is from the psychiatrist Richard von Krafft-Ebing (1886 in "Psychopathia

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<sup>19</sup> Deutsche Gesellschaft für Endokrinologie (German Endocrinological Society/DGE), October, 2007

sexualis"), the second one from one of the scientists of sexology, who were responsible for the choice of words and the logic of the Law of Transsexuals. He made this statement in early 2006 in an Welt (german newspaper) interview: Volkmar Sigusch.

So transsexual women are still treated today as they were more than 100 years before. The scientist of sexology Magnus Hirschfeld for example treated transsexual women in his Institut<sup>20</sup> in Berlin similarly as today.

*"Hirschfeld experienced that the clothing is vital for the physical and psychological well-being of transvestites. Therefore he raises the question „if the doctor is not only qualified but also bound to permit or even order to change the clothes".*

*"While some doctors and psychotherapists try to eliminate transvestitism of their patients therapeutically, Hirschfeld tries to approach the wish of the transvestites (adaption therapy). He tries to change the bodies of transvestites in the direction they are longing for by injecting organ preparation (extracts of testicles or ovaries). (Rudolph R./Dorchen)*

*In the late 20's his colleague at the institute Felix Abraham reported the first surgical sex changes under the assistance of Ludwig Levy-Lenz.*

*Generally changing the sex follows a chronological order: change of name, transvestite's certification, operation. "<sup>21</sup>*

There has been no real change in spite of (or actually because of) the gender theory, which became popular in the late 60's, transsexual women have in Germany until now no acknowledgement of their existence as what they are - women with the physical characteristics of the opposite sex. So you still talk about men (originating from the physical sex) who "want to become women" (gender) instead of acknowledging that they are already women, because their basic gender is - independent of any gender stereotypes - determined since their birth. It is to be acknowledged that the allocation of the sex from the outside is never infallible, but in case of doubt each affected person has to have the possibility to fight against the forced allocation, especially when the allocation from the outside - in which patriarchal power structures and misuse of power are mirrored - can lead to physical (in case of genital mutilation with intersexualism) or psychical harm.

The Federal Government does not seem to have recognized that the TSG among others in its recent form provokes the abuse of violation - physically and psychologically. So the office of the Federal Chancellor wrote in the autumn of 2007:

*"Dear Mrs. Schicklang, the Transsexuellengesetz (Law of Transsexuals) from 1981 regulates legal questions which arise from the problem you mentioned. "<sup>22</sup>*

<sup>20</sup> Institut für Sexualwissenschaft (Institute of Sexual Studies) 1919-1933, Berlin

<sup>21</sup> Magnus-Hirschfeld-Gesellschaft (Magnus-Hirschfeld-Society) e.V., Berlin

<sup>22</sup> Answer to a question to [direkturkanzlerin.de](http://direkturkanzlerin.de) (website from the Federal Republic of Germany) 07/2007

Taken this as the answer to a request to grapple with the problems of the TSG seems to accord to the motto: No answer is an answer, too. Considering that an existing law causes massive pain for the affected women and every day of waiting is one day too much, this answer leaves a cynical impression.

Especially in the context of the Section 11, CEDAW, the answer is additionally critical, too. Here it says:

*"Protective legislation relating to matters covered in this article shall be reviewed periodically in the light of scientific and technological knowledge and shall be revised, repealed or extended as necessary."*

So it would be for the purposes of CEDAW, too, if the understanding of transsexualism would also change with the new scientific knowledge, especially with the aim to eliminate any form of discrimination, in such ways that the AEMR (Universal Declaration for Human Rights) sect. 1 or the Basic Law sect. 1 are not violated any more as they are e.g. by the TSG.

In the sixth report of the Federal Republic about the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) you can read:

*"The federal government's measures are aimed at effectively protecting the women affected and at holding perpetrators accountable for their actions. The federal government developed a comprehensive concept for all governmental and non-governmental agencies in drafting the first Programme of Action to Combat Violence against Women. The implementation of this plan of action will be continued in 2007. The results of a research study on the Violence Protection Act will also be included."<sup>23</sup>*

In this case offenders are the ones, who are able to keep a clear conscious while exposing people to treatments in which they neither have a legal existence (because they are denied their civil status) nor are protected against being abused physically or psychologically by persons belonging to the German medical system. Every new day of ignorance kills people.

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<sup>23</sup> Sixth Report by the Federal Republic of Germany on the United Nations Convention to Eliminate all Forms of Discrimination Against Women (CEDAW), Chapter „1.1.4 Protecting Women against Violence“

## 4. Voices

What matters most, when you talk about transsexual people, are the people themselves. Unfortunately they are ignored all too often, so now a few of them - besides the ones who think of reforming the TSG as a necessary thing- get the chance to speak.

*"I got the wrong body, it does not fit the brain. That is not my fault. The body is abnormal, like a third arm. So I have every right to get medical treatment for adapting it to my actual sex."*

*(Affected woman)*

*"When the (transsexual) child is born, it has the brain of one sex but the genitalia of the other and so its sex is incorrectly identified at birth."*

*(Lynne Jones, Member of the English Parliament)*

*"I think the TSG is in need of a reform, because you are stuck in a tricky situation before the change of surname and civil status takes place. This leads to big social problems in daily life, which additionally stress the transsexual person."*

*"In my opinion it does not make sense to make it that difficult to change surname and civil status as it is now. For these are things which are easily undone without any harm, if it is proved to have been a mistake afterwards."*

*"I am a woman (even without legal acknowledgement) and a person and I like to be treated with the appropriate respect"*

*"The legal situation for transsexualism does not correspond with the Human Rights and the descriptions/explanations are often not squared with reality. Often our life is made really hard and the common acceptance is way too less."*

*(Affected woman)*

*„The forces of nature, however, know nothing of this tabu, and facts remain facts. Intersexes exist, in body as well as in mind."*

*(Harry Benjamin, 1966 in: The Transsexual Phenomenon)*

*"One thing is clear to me: transsexuals do not feel like being a man/woman, but they are man or woman... and the body has the contrary sex."*

*(From a diploma thesis to this topic 2006)*

*"I am a woman and ever was. No possible operation makes me a woman. I am one. But a disfigured one. And I suffer from this disfiguration. Like every other woman would suffer from these disfigurations."*

*(Affected woman from Hamburg)*

*"A woman wants to talk, to articulate herself, to argument and to let express her feelings without giving up herself. A woman wants to look like a woman. A woman wants to have sex, having sex like a woman"*  
(Affected woman from Frankfurt)

*"I agree with you: the brain determines the sex. This also is the basis for the operation (to adapt the body to the identity of the brain)"*  
(Professor Dr. Dick F. Swaab, Amsterdam, in an answer per e-mail to mut23.org)

*"The procedure using expert's in its recent form is humiliating and does not meet the Human Rights and not section 1 of the basic law... It is misused by the experts to humiliate us. It is to be cancelled."*

*"I am sure, that the social and legal situation is going to change by the battle you are fighting; rights always follow the social enforcement of legal claims; it was or rather is like this with the fight about women's rights and the rights of homosexuals. My conclusion: You cannot argue and do better in the fight for your rights as referring to the basic and Human Rights."*

*(Prof. Dr. Hans Jörg Sandkühler - Manager of the German compartment "Wissenskulturen, Transkulturalität, Menschenrechte" of the UNESCO-professorship for philosophy in an e-mail answer to mut23.org)*

*"I am a girl"*

*(a 4 year old transsexual girl, that was referred the male gender because of her penis in a ABC documentation in April 2007)*

It is time that it is legally acknowledged that there are girls, who are born with penis and testicles. They are seeking help because they suffer from this physical anomalies. Acknowledging this is the first step in a direction of a medical and legal treatment that is in accord with the Human Rights.

## **5. Acknowledgement of the civil status (acknowledgement of existence)**

If you take a look at the basic problem - the lacking legal acknowledgement of biological facts up to now - the question arises where the problems actually should be to take account of these realities by legal regulations. If there are people who are born with the organ of the opposite sex, reforming the TSG would not only be commanded urgently but it also would be unproblematic to find easy regulations that make sense.

One suggestion of Human Right and transsexualism, which by the way has been with the Federal Government since the beginning of 2006, is following up the question, if it is not much more sensible to separate the legal from the medical treatment. In short terms this means:

- a) passing a law for transsexualism, which implements the judgement of the Federal Constitutional Court from 1978 completely<sup>24</sup>. this judgement says:

*"It ought to be proven medical knowledge nowadays that the sex of a person is not only determined by the nature and characteristics of the genitals but by the psyche, too. The legal system should not disrespect these facts, because they determine the person's ability to fit in the social functions of the genders in equal if not higher measure than the physical characteristics and because subject of these legal norms are exactly these social functions referring to the sex:"*

If you take this phrase for serious, the medical procedure (from the beginning to the possible operation to adapt the sex) can not be excepted to be excluded from the area and space of time, which the Federal Government meant by talking about "fitting in the social function of the genders". Especially during the medical procedure in particular this fitting is important (after that it is often less important, because the differences in the treatment of men and women in daily life - even if not in all areas - had already turned into a much more equal form of living together by the policy of equality in the last decades), so that now the thing has to be about bringing back this law free space to the ground of the basic law by real acknowledgement of the civil status.

As a conclusion this would mean to create a law for transsexuals, which makes it possible for transsexual people to be acknowledged in their civil status already at the beginning of the medical treatment. A transsexual woman has to be treated medically as a woman.

- b) the reformation of medical diagnosis. Up to the present the psychoanalysts refer to men who want to become women when they talk about transsexual women instead of acknowledging that there are women who are born with the organs of the opposite sex.

Surely it is difficult to tell from the outside which person actually is a transsexual woman and which is not. After having reformed the TSG this is not important any more, because then there would be no forced allocation of the sex and a person would achieve a medical treatment analogue to his/her civil status.

After the reform of the TSG to that effect that the procedure of experts is not necessary any more for the acknowledgement in civil status the medicine can concentrate on taking care of the medical matters, instead of making forced allocation of the sex from the outside which is - what should be the knowledge of actually recognizing that transsexual and intersexual people exist - not at all or at least not in 100 percent of all cases possible. Consequently the diagnosis of medical treatment would not be about determining the sex but about clarifying which surgery, somatic treatment etc. is necessary.

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<sup>24</sup> Federal Constitutional Court 11<sup>th</sup> of december 1978 - 1 BvR 16/72 -

An important notice is that the procedure of experts should make sure, when the TSG was established, that only people who actually are transsexual could achieve a change in civil status after a supervised physical process of change. So the procedure of experts ought to protect indirectly the people from the irreversible consequences of the physical change. This protection mechanism is now untenable by the recent argumentation of the sexology institutes and the Federal Constitutional Court, for they agree in separating the acknowledging of the civil status from the medical measures. So the DGfS (German Society of Sexual Studies) for example published a statement to the request from the Federal Interior Office (V 5a-133 115-1/1) from 11. December 2000 referring to the revision of the TSG. It says:

*"Against the background of what was said up to now surgery of the outer sex characteristics as a condition for the change in civil status turned out to be problematic and not maintainable from a scientific point of view."*<sup>25</sup>

The Federal Constitutional Court repeated this statement as following:

*"The technical literature does not find substantial reasons any more for a different treatment of transsexuals with or without sex change in case of the civil status" and "This offence against the constitution does not lead to the nullity of some determinations of the Transsexuellengesetz."*<sup>26</sup>

By dropping the pressure to have an operation for transsexual women to be acknowledged in civil status, which is to be expected, the procedure of experts will also be unnecessary, because the reason why it was established in 1980 will be dropped. If you take a closer look at the development of the gender equality, the procedure of experts, which decides from the outside about the gender role a person has to live - and without objective criteria which behaviour is male or female in the expert's opinion - cannot meet the Human Rights (By dropping the forced operation the procedure only refers to the role of the sex).

The medical profession is to accept that it is not always possible to determine one person's sex by the outer appearance.

Concretely this would mean: The elimination of the force to an operation as well as the force to have the expert's procedure from the TSG (the creation of the possibility to change the civil status by application e.g. at the registry office) and the introduction of a diagnosis which is able to meet the individual needs of the affected patients.

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<sup>25</sup> Comment to the Query of the Federal Department Of The Interior (Bundesministeriums des Innern) V 5a-133 115-1/1 on 11<sup>th</sup> of December 2000 to the revision of the Law of Transsexuals (Transsexuellengesetz) Sophinette Becker, Wolfgang Berner, Martin Dannecker und Hertha Richter-Appelt

<sup>26</sup> Federal Constitutional Court (BVerfG, 1 BvL 3/03) 6<sup>th</sup> of December 2005

**Finally some questions:**

What is it that makes it so hard to create this legal possibility? Where is the problem? Can a nation afford it to treat existing persons as non-existing? Is it ethically and morally compatible with Human Rights that psychological and physical harm is done to people by this repudiation? Is it compatible with a modern society that people are denied the approach to the legal system?

Human right is only then human right, when every human being is meant.

For the acknowledgement of transsexual people.

Kim Anja Schicklang - Ulm, 21. December 2007