

**SUBMISSION TO
THE EUROPEAN
COMMISSION
AGAINST RACISM
AND INTOLERANCE
ON GERMANY**

**AMNESTY
INTERNATIONAL**



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Amnesty International submits this contribution to the European Commission against Racism and Intolerance (ECRI) on the occasion of its fifth cycle country monitoring that includes the Federal Republic of Germany.

Amnesty International welcomes that Germany has requested ECRI to evaluate the situation experienced by lesbian, gay, bisexual and transgender and intersex (LGBTI) individuals in Germany. Amnesty International believes that ECRI has a crucial role to play in combating discrimination against LGBTI people in Europe. Some information pertaining to discrimination against transgender and intersex individuals in Germany is therefore included in this submission.

Existing research shows that ethnic and religious minorities, including asylum seekers and migrants, are discriminated against and targeted with violence in Germany. According to the EU-MIDIS research undertaken by the European Union Agency for Fundamental Rights, 30 per cent of Turkish people and 21 per cent of persons originally from the former Yugoslav republics who were living in Germany and who took part in the survey claimed having been discriminated against in the past twelve months. This research has also highlighted that ethnic and religious minorities can be discriminated against on one or several grounds including their ethnicity, migrant origin and religion or belief and that ethnic and religious minorities are more likely to experience multiple discrimination than the general population.¹

In 2012 the Human Rights Committee, in its concluding observations on Germany, expressed concerns on “the persistence of racially-motivated incidents against members of the Jewish and Sinti and Roma communities as well as Germans of foreign origin and asylum seekers in the State party” and on “the persistent discrimination faced by members of the Sinti and Roma communities regarding access to housing, education, employment and healthcare”.²

EXISTENCE AND IMPLEMENTATION OF LEGAL PROVISIONS

A. REGIONAL LEGAL INSTRUMENTS

Germany has yet to implement some of the recommendations put forward by ECRI on the occasion of the fourth monitoring cycle. Germany has neither ratified **Protocol 12** to the European Convention for the Protection of Human Rights and Fundamental Freedoms (recommendation 3) nor the **revised European Social Charter** (recommendation 8).³ Moreover, Germany has not ratified the Council of Europe **Convention on Preventing and Combating Violence against Women and Domestic Violence**.

Amnesty International calls on Germany to ratify these treaties without further delays.

B. CIVIL LAW PROVISIONS AIMED AT COMBATING DISCRIMINATION

On 18 August 2006 the General Equal Treatment Act (Allgemeines Gleichbehandlungsgesetz, AGG) came into force. The law protects against discrimination on grounds of race or ethnic origin, gender, religion or belief, disability, age or “sexual identity” in the field of employment, social protection, social advantages, education and access to goods and services available to the public including housing.

The AGG does not provide a definition of the protected grounds. “Sexual identity” (*sexuelle Identität*), unlike other grounds, is not a protected ground of discrimination in international

law, and it would therefore be critical to count on a clear definition in national law to ensure appropriate application.

The United Nations Committee on Economic, Social and Cultural Rights pointed out in its comment 20 (par. 32) that “*gender identity* is recognized as among the prohibited grounds of discrimination”. The United Nations Human Rights Committee, among other human rights treaty bodies, has reiterated on several occasions that *sexual orientation* is a protected ground of discrimination under article 26 of the International Covenant on Civil and Political Rights (ICCPR).⁴

Amnesty international maintains that states should adopt comprehensive anti-discrimination legislation providing protection against all forms of discrimination including discrimination against lesbian, gays, bisexual, transgender and intersex (LGBTI) people on the grounds of sexual orientation and gender identity. Amnesty International is concerned that the undefined term, “sexual identity”, may not, in practice, provide adequate protection against discrimination on the ground of gender identity.

The AGG provides that differences of treatment on a prohibited ground do not constitute discrimination where “by reason of the nature of the particular occupational activities or of the context in which they are carried out, such grounds constitute a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate” (paragraph 8).

In recent years, several cases of alleged discrimination on the ground of religion or belief have been brought before German Courts by women wearing religious and cultural symbols and dress, especially Muslim women, employed in the public sector⁵. The requirement for state officials to present an impartial and neutral appearance, to the extent of excluding the wearing of religious and cultural symbols and dress, may be an objective and reasonable justification for state officials exercising potentially coercive powers of the state.

Prohibitions to wear religious and cultural symbols and dresses applied to teachers should be assessed on a case-by-case basis and follow the guidelines of the United Nations Special Rapporteur on freedom of religion and belief. It is not, prima facie, necessary for the state to prohibit teachers from wearing religious and cultural symbols and dress in all circumstances in order to ensure impartiality in education..⁶ As a result, to be legitimate, bans on religious or cultural clothing must be narrowly phrased and the state must show their absolute necessity to obtain the stated goal.

Amnesty International recalls that, for the purposes of employment in the private sector, enforcing neutrality, pleasing clients or promoting specific corporate image can not be considered “determining occupational requirements” on the basis of which religious and cultural symbols and dress can be prohibited.

The AGG provides for permissible differences of treatment on the ground of the religion or belief of employees of “religious community, facilities affiliated to it (regardless of their legal form) or organisations which have undertaken conjointly to practice a religion or belief” (paragraph 9).

The notion of “justified occupational requirement” on the basis of which a difference of treatment can be implemented by faith-based employers should be construed narrowly and according to international law. In particular, any difference of treatment can only qualify as objective and reasonable if it is also proportionate to the legitimate aim it seeks to achieve.⁷

The AGG allows for differential treatment in the case of rental property or housing where the difference in treatment “serves to create and maintain stable or balanced social structures or settlement structures”(paragraph 19.3). According to international standards on discrimination, a difference of treatment may be considered as legitimate when it is objectively justified by a legitimate aim and is proportionate and necessary to achieving that aim. A legitimate aim could be related to ensuring public safety, order, health, or the fundamental rights and freedoms of others, for example.

The formulation of paragraph 19.3 of the AGG is very general and does not include any proportionality clause. Amnesty International calls on Germany to follow-up on the recommendation of the Human Rights Committee to “take the necessary steps to clarify the wording of Section 19 subs. 3 of the General Equal Treatment Act of 2006 and ensure that it is not used abusively by landlords to discriminate against people with immigrant backgrounds on the basis of their ethnic origin when renting housing”.⁸

The competences of the Federal Anti-Discrimination Agency (paragraph 27 of the AGG) are limited to public relations, research activities, advice and assistance to alleged victims of discrimination. The agency does not have the mandate to receive individual complaints of discrimination, which is an important aspect for victims of discrimination who seek redress.

Amnesty International calls on Germany to follow-up the recommendation of the Human Rights Committee to “extend the mandate of the Federal Anti-Discrimination Agency including the power to investigate complaints brought to its attention and to bring proceedings before the courts, so as to enable it to increase its efficiency”.⁹

C. CRIMINAL LAW AIMED AT TACKLING CRIMES MOTIVATED BY HOSTILITY TOWARD SPECIFIC GROUPS

International human rights treaty bodies have raised concerns on racially motivated crimes in Germany and on the inadequacy of existing measures aimed at combating them. For instance in 2008 the Committee on the Elimination of Racial Discrimination called on Germany to “take more resolute action at the federal and Länder level to prevent and punish perpetrators of racially motivated acts of violence against members of the Jewish, Muslim and Roma/Sinti communities, as well as German nationals of foreign origin and asylum-seekers, in particular of African origin”.¹⁰

The German Criminal Code (Strafgesetzbuch-StGB) does not include a definition of hate crimes. According to the Organisation for Security and Cooperation in Europe such crime are defined as “criminal offences, including offences against persons or property, where the victim, premises, or target of the offence are selected because of their real or perceived connection, attachment, affiliation, support or membership of a group”.

Since 2001, the police criminal registration and definition system includes the category of “politically motivated crimes” (KPMD-PMK).¹¹ In this system, hate crime (with two sub-categories: “xenophobic” and “antisemitic” crimes) constitutes a specific sub-category of

politically motivated crimes.¹² These categories allow the collection of statistics relating to these forms of crime, though none of them are defined in the law. According to section 46 StGB, judges can take into account the circumstances in which a crime has been perpetrated in order to mitigate or aggravate the sentence.

The gaps in German Criminal law raise concerns over the extent to which an alleged hate motive can be thoroughly investigated and taken into account in the prosecution and the sentence. **Amnesty International calls on Germany to ensure that all crimes perpetrated with a discriminatory motive are subject to criminal prosecution under laws providing for sanctions which reflect the gravity of the human rights abuse.**

D. RACIAL PROFILING

In October 2012 a German Higher Administrative Court found that the identity check performed by the police on a German student with ethnic minority background was against German anti-discrimination law.¹³

In the court proceedings the police admitted that skin colour may be a criterion on the basis of which identity controls are performed on train passengers, especially on those who are suspected of being undocumented migrants.

The court of first instance found no discrimination as it was argued that undocumented migrants often travel by train and thus the police was allowed to perform identity checks on the basis of physical appearance. The decision was appealed and the Higher Administrative Court eventually found that identity checks based on skin colour contravenes the German Constitution (article 3, *Grundgesetz*) according to which discrimination based on characteristics related to racial or ethnic origin is prohibited.

The EU-MIDIS survey undertaken by the European Union Agency for Fundamental rights found that in Germany twice as many people from ethnic minorities (Turkish or persons originally from former Yugoslav republics) were stopped by the police as those from the majority population, which may be an indication of the practice of racial profiling.¹⁴

Amnesty International calls on the German government to introduce specific measures aimed at combating racial profiling by the police. Such measures could include for instance the systematic use of stop forms on which the police record the ethnicity of the person subjected to identity check and the grounds for the stop, ensure the monitoring of those forms and address any indication of racial profiling during those stops. Such data should be collected with due respect to the principles of confidentiality, informed consent and voluntary self-identification.

E. THE SITUATION OF TRANSGENDER AND INTERSEX INDIVIDUALS

Amnesty International is concerned that legislation, policies and practices in force in Germany may discriminate against transgender and intersex individuals on the ground of their gender identity.¹⁵

In 2011 the Committee on Economic, Social and Cultural Rights called on Germany to enact measures to protect the personal integrity and sexual and reproductive health rights of transgender and intersex individuals, noting that they are “often assimilated to persons with

mental illness and that the State party's policies, legislative or otherwise, have led to discrimination against these persons as well as to violations of their sexual and reproductive health rights."¹⁶

The German Transsexual Law (Law on the Changing of First Names and the Establishment of Sex Status in Special Cases)¹⁷, in force since 1980, entails both the possibility to change one's given name (the so-called minor solution) and the gender in the birth registry and on the birth certificate (the so-called major solution).

In order to legally change their gender, trans individuals are required to feel the compulsion to belong to the opposite gender for a minimum period of three years and a probably irreversible "transsexual imprinting" that has to be certified by two independent experts and confirmed by a Court decision. Three further conditions were originally foreseen: single status, incapacity to reproduce and having undergone surgery to change "external sexual characteristics in order that the person's appearance approach that of the other gender". In 2008 and 2011 the Federal Constitutional Court found that these three criteria were unconstitutional.¹⁸

However, other problematic requirements, including the psychiatric diagnosis and the experts' assessments, remain in force. Such requirements are based on the German classification of trans identities as mental health disorders in line with the international classification of the World Health Organization.¹⁹

There is no transparency on the procedure and the criteria followed by experts when assessing whether a person complies with the requirements set out by the TSG. Trans organizations have reported cases where experts have performed physical examinations on the applicants²⁰ and/or have inquired into their sexual life and childhood.

The TSG has not yet been amended. Two draft bills are currently pending before the German Parliament.²¹

Amnesty International calls on the German Parliament to amend the TSG by introducing a quick and transparent mechanism which allows trans and intersex people who wish to do so to legally change their gender without any medical requirements such as, for example, a diagnosis that they suffer from a mental disorder, or the experts' assessment.

Moreover, Amnesty International calls for the removal of trans identities from the list of mental health disorders and for the reclassification of relevant aspect of trans health care in a non-stigmatizing manner in order to facilitate access to health care and to ensure that specific transgender health care consistently with the recommendations of the World Professional Organisation for Transgender Health (WPATH).²² Trans people shall not be subject to any medical treatments unless they express their informed consent to it. Specific medical treatments, including hormonal treatment and gender reassignment surgery, should not be imposed on transgender people as a condition for the legal recognition of their gender change.

International human rights treaty bodies have raised criticism on non-medically necessary surgeries performed on intersex children in Germany. In 2011 the United Nations Committee

against Torture expressed concern at “cases where gonads have been removed and cosmetic surgeries on reproductive organs have been performed that entail lifelong hormonal medication, without effective, informed consent of the concerned individuals or their legal guardians, where neither investigation, nor measures of redress.”²³

In 2009 the Committee on the Elimination of Discrimination against Women called on Germany to enter into dialogue with non-governmental organizations of intersexual and transsexual people in order to better understand their claims and to take effective action to protect their human rights.²⁴ As an aftermath the German Government asked the Ethics Council (*Deutscher Ethikrat*) to develop a position and possible recommendations on the issue. In its opinion, the Ethics Council highlighted that irreversible surgeries on intersex people interfere with their right to bodily integrity, the preservation of their gender and sexual identity and often harm their sexual and reproductive rights. The Ethics Council argued that surgeries on intersex children who are not yet in the position to decide on their own should be performed only after that a thorough evaluation, taking into account assets, drawbacks and long-lasting consequences, has established that such a surgery is absolutely necessary for the well-being of the child.²⁵

According to the information available to Amnesty International, it is not yet clear how the German government intends to follow-up on the recommendations of the Ethics Council.

Amnesty International calls on the German government to ensure that medical procedures performed on intersex infants and children are premised on the best interests of the child, and do not impose standard categories of ‘male’ or ‘female’ on children based on the wishes of parents, guardians and health professionals for their child to be ‘normal’. Where possible, any surgical procedures should be postponed until intersex individuals are able to exercise informed consent to such procedures. When dealing with medically indexed exceptional cases, any surgical intervention must be based upon the best available and ethical medical research which is also endorsed by intersex groups.

ENDNOTES

¹ Fundamental Rights Agency, *EU-MIDIS: European Union Minorities and Discrimination Survey*. 2009, available at: <http://fra.europa.eu/en/publication/2012/eu-midis-main-results-report>

Fundamental Rights Agency, *EU-MIDIS Data in Focus Report 5: Multiple discrimination*, available at http://fra.europa.eu/sites/default/files/fra_uploads/1454-EU_MIDIS_DiF5-multiple-discrimination_EN.pdf, p.11.

² Human Rights Committee, Concluding observations on Germany, CCPR/C/DEU/CO/6, 12 November 2012, Paragraph 12

³ ECRI Report on Germany, CRI (2009)19, adopted on 19 December 2008

⁴ See the most recent individual complaint submitted by Irina Fedotova where the Committee acknowledges so. CCPR/C/106/D/1932/2010 Communication 1932/2010, views adopted by the Committee at its 106th Session. Para. 10.5

⁵ Complaints were brought especially by teachers who were denied the possibility to wear the headscarf in schools. See for instance: Case 2 K 1752/07, Brigitte Maryam Weiss v. Bezirksregierung Düsseldorf, State Administrative Court of Baden-Württemberg, Judgement 4 S516/07, 14 march 2008. Several cases are pending at the moment before Courts in North-Rheine Westfalia

⁶ Amnesty International, "*Choice and Prejudice: discrimination against Muslims in Europe*", pag. 58-60, Index: EUR/01/001/2012

⁷ European Court of Human Rights, Abdulaziz, Cabales and Balkandali v. United Kingdom (Application No. 9214/80), judgment of 28 May 1985, para72. See also the conclusion in this respect on the Netherlands in Choice and Prejudice : Discrimination against Muslims in Europe, pag. 109

⁸ HRC, Concluding observations on the sixth periodic report of Germany, paragraph 7, adopted by the Committee at its 106th session, 15 October to 2 November, available at <http://www2.ohchr.org/english/bodies/hrc/hrcls106.htm>.

⁹ Human Rights Committee, Concluding observations on the sixth periodic report of Germany, paragraph 6 adopted by the Committee at its 106th session, 15 October to 2 November, available at <http://www2.ohchr.org/english/bodies/hrc/hrcls106.htm>.

¹⁰ CERD concluding observations, 2008, par 18

¹¹ Federal Ministry of the Interior, Lexikon, Meldesystems "Politisch motivierte Kriminalität" (KPM - PMK) – definition, available at http://www.bmi.bund.de/cln_104/DE/Service/Glossar/Functions/glossar.html?nn=105094&lv2=296444&lv3=151906.

¹² Federal Ministry of the Interior (BMI), Erster Periodischer Sicherheitsbericht, Berlin, 2001, pag. 263, available at http://www.bmi.bund.de/SharedDocs/Downloads/DE/Veroeffentlichungen/erster_periodischer_sicherheitsbericht_langfassung_de.pdf?__blob=publicationFile

¹³ OVG Koblenz, 7 A 10532/12.OVG, October, 29th, 2012

¹⁴ 24 per cent of Turkish and 25 per cent of ex-Yugoslavian who took part into the survey were stopped by the police in the previous 12 months compared to 11 per cent of the majority.

Fundamental Rights Agency, *EU-MIDIS Data in Focus Report 4: police stops and minorities*, pag. 8

¹⁵ Amnesty International refers to transgender, or trans, people as individuals whose gender expression and/or gender identity differs from conventional expectations based on the physical sex they were assigned at birth. Trans is a political umbrella term that is used to describe a wide range of identities, experiences, and people whose appearance seem to conflict with the binary gender norms of society, including transsexuals, transgender, travesti, gender queers, cross dressers, drag queens, drag kings, and many more. Intersex individuals possess genital, chromosomal or hormonal characteristics which do not correspond to the given standard for 'male' or 'female' categories as for sexual or reproductive anatomy. Intersexuality may take different forms and cover a wide range of conditions.

¹⁶ Committee on Economic, Social and cultural Rights, Concluding Observations of the Committee on Economic, Social and cultural Rights on Germany, Forty-sixth session, Geneva, 2-20 May 2011, E/C.12/DEU/CO/5, available at <http://www2.ohchr.org/english/bodies/cescr/cescrs46.htm>, para.26.

¹⁷ *Gesetz über die Änderung der Vornamen und die Feststellung der Geschlechtszugehörigkeit in besonderen Fällen – Transsexuellengesetz*, from now on TSG.

¹⁸ 27.05.2008: BVerfGE 121, 175 – Abolishment of non-marriage clause 11.01.2011: BVerfGE 128, 109 – Abolishment of the irreversible surgical operation and sterilization clauses

¹⁹ "Transsexuality" or "gender identity disorders" are internationally classified as mental health disorders by the *Diagnostic and Statistical Manual of Mental Disorders* (DSM) of the American Psychiatric Association¹⁹ and also the WHO *International Statistical Classification of Diseases and Related Health Problems* (ICD). Amnesty International believes the pathologisation of trans and intersex individuals contributes to the discrimination against them.

²⁰ http://www.dgti.org/index.php?option=com_content&view=article&id=177

²¹ Deutscher Bundestag, 17. Wahlperiode, Drucksache 17/5916, 25/05/2011, Antrag der Abgeordneten Dr. Barbara Höll, Cornelia Möhring, Matthias W. Birkwald, Heidrun Dittrich, Klaus Ernst, Diana Golze, Katja Kipping, Jutta Krellmann, Caren Lay, Yvonne Pletz, Sabine Zimmermann und der Fraktion DIE LINKE, *Sexuelle Menschenrechte für Transsexuelle, Transgender und Intersexuelle gewährleisten – Transsexuellengesetz aufheben*.

²² "The WPATH Board of Directors urges state healthcare providers and insurers throughout the world to eliminate transgender or trans-sex exclusions and to provide coverage for transgender patients including the medically prescribed sex reassignment services necessary for their treatment and well-being, and to ensure that their ongoing healthcare (both routine and specialized) is readily accessible" www.wpath.org/medical_necessity_statement.cfm

²³ Committee Against Torture, Consideration of reports submitted by States parties under article 19 of the Convention, Concluding observations of the Committee against Torture, Forty-seventh session, 31 October–25 November 2011, CAT/C/DEU/CO/5, available at http://www2.ohchr.org/english/bodies/cat/docs/co/CAT.C.DEU.CO.5_en.pdf, p.6.

²⁴ Committee on the Elimination of Discrimination against Women, Forty-third session, 19 January-6 February 2009, Concluding observations of the Committee on the Elimination of Discrimination against Women, CEDAW/C/DEU/CO/6, available at <http://www2.ohchr.org/english/bodies/cedaw/cedaws43.htm>,

para.62.

²⁵ German Ethics Council, Deutscher Ethikrat, Intersexualität Stellungnahme, 23 February 2012, available at <http://www.ethikrat.org/dateien/pdf/stellungnahme-intersexualitaet.pdf>, p.174.

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