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S U B M I S S I O N

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to the UN Committee on Economic, Social and Cultural Rights (CESCR) – parallel report to the 6th State Report of Germany

Introduction

The German Women Lawyers' Association is an association of female lawyers and economists. Its primary goal is to achieve substantive equality for women in all areas of society and to help realize women's human rights. It was founded in 1948, bringing together women from all legal professions. The German Women Lawyers' Association addresses gender-based discrimination in every field of society, professional and family life by advocating for and participating in law reforms, by submitting *amicus curiae* briefs to the Federal Constitutional Court, by reporting to human rights bodies, by offering continued legal education, by supporting young female legal professionals and scholars, and by bringing together women lawyers from all walks of life.

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1. NON-DISCRIMINATION (ARTICLE 2)

1.1 Extension and strengthening of the mandate of the Federal Anti-Discrimination Agency (Recommendations of the Committee No. 6-8; List of Issues No. 6)

The mandate of the Federal Anti-Discrimination Agency established by the General Equal Treatment Act is limited to public relations, research activities, advice and assistance to alleged victims of discrimination but does not encompass the authority to deal with complaints. Due to its restricted mandate, the work of the Federal Anti-Discrimination Agency is not as effective as it should be.¹

One of the main obstacles to combatting discrimination, especially on the grounds of sex/gender, is the weak and lonely position of victims of discrimination striving for justice. The German laws on civil court proceedings do not cover any form of group action and, moreover, antidiscrimination bodies have no standing in court to support victims of discrimination. Therefore, antidiscrimination bodies have no other option than to give advice and prejudicial assistance to support victims of discrimination.

The missing possibility of group action and the lack of institutional or organized support for victims of discrimination have been identified as serious barriers for access to justice and thus, for combatting discrimination.

Ten years after its entering into force, the General Equal Treatment Act was thoroughly evaluated. The evaluating anti-discrimination law experts recommended, among many others, the introduction of group action and the extension and strengthening of the mandate of anti-discrimination bodies.² This is in line with the Committee's concluding observations to the German periodic report in 2012. The committee recommended that Germany should 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, to enable it to increase its efficiency to support victims of discrimination unrestrictedly.

The German Women Lawyers' Association recommends:

- **a substantial extension of the mandate of the Federal Anti-Discrimination Agency, including, among others, the introduction of the right of group action;**
- **this extension to be accompanied by an increase in the Agency's budget to enable more effective public information campaigns and basic research on the risks of discrimination, as well as an increase in its legal and research staff;**
- **the formation of anti-discrimination-agencies on state level to meet the demand for advice and support of victims of discrimination.**

¹ Human Rights Committee, Concluding observations on the sixth periodic report of Germany, 31 October 2012, CCPR/C/DEU/CO/6, para 6; Committee on the Elimination of All Forms of Discrimination against Women, Concluding observations on the combined seventh and eighth periodic reports of Germany, 3 March 2017, CEDAW/C/DEU/CO/7-8, para 17(d).

² Sabine Berghahn, Micha Klapp & Alexander Tischbirek, Evaluation des Allgemeinen Gleichbehandlungsgesetzes (Evaluation of the General Equal Treatment Act), Antidiskriminierungsstelle des Bundes, Berlin 2016.

1.2 Protection and legal recognition of intersex infants and children (List of Issues No. 8)

The Committee asked the German government to provide statistical data on the number of surgeries performed on intersex infants and children and to indicate the impact of the 2013 decision to allow a third gender option on birth certificates on their situation.

Under the Law on Amendments to the Civil Status Act of 7 May 2013, which had entered into force on 1 November 2013, parents are no longer obliged to register the sex/gender of an intersex new born child.³ The birth of an intersex infant can now be entered without a gender specification in the register of births, and grownup persons born before 2013 can request for the respective correction of their registered birth gender. Regrettably, the amendments did not cover the legal consequences of living without a registered sex/gender, e.g. concerning marriage, parenthood or anti-discrimination law.

So far, the amended Section 22(3) of the Civil Status Act has not been applied in practice. Only 4% of intersex children born after its entry into force have been registered with no gender specification or a blank gender.⁴ Parents of intersex new born or grown-up intersex individuals could only choose for neither male nor female, i.e. no gender affiliation at all, and not for a third positive entry in the birth registration. Therefore, the amended Civil Status Act was brought before the Federal Constitutional Court.

On 10th October 2017, the Federal Constitutional Court decided that the constitutional prohibition of discrimination based upon sex/gender contained in Article 3(3) of the German Basic Law also protects persons who do not permanently identify themselves as male or female. This prohibition is also violated when the Civil Status Act requires that the gender be registered but does not allow for a further positive entry other than male or female.⁵ The court set a deadline for necessary legislative amendments in conformity with the constitution until the end of 2018. The court suggested either to introduce an adequate third option for gender registration or to consider to renounce the mandatory gender registration.

In June 2018, the Federal Ministry for Internal Affairs presented a draft law suggesting to introduce the third option 'other' under very restricted conditions. The draft is severely criticised for several reasons: the lack of comprehensive regulations of the legal recognition of gender identity and protection against discrimination, a legal gender attribution directly after birth, the legal term 'other', the requirement of a medical attestation making intersex identity a kind of illness, and the lack of covering the necessary legal consequences, especially concerning marriage, parenthood, labour protection and anti-discrimination law.⁶

³ Law on Amendments to the Civil Status Act (*Gesetz zur Änderung personenstandsrechtlicher Vorschriften*) of 7 May 2013, more information under <http://dipbt.bundestag.de/extrakt/ba/WP17/451/45180.html>.

⁴ See Nina Althoff, Greta Schabram & Petra Follmar-Otto, *Gutachten Geschlechtervielfalt im Recht*, DIMR: Berlin, 2016, <https://www.bmfsfj.de/bmfsfj/service/publikationen/gutachten--geschlechtervielfalt-im-recht--status-quo-und-entwicklung-von-regelungsmodellen-zur-anerkennung-und-zum-schutz-von-geschlechtervielfalt/114072>.

⁵ Federal Constitutional Court, judgment of 10 October 2017, 1 BvR 2019/16, available under (in English).

⁶ German Women Lawyers' Association, Statement of 11 July 2018, <https://www.djb.de/verein/Kom-u-AS/K2/st18-11/>.

Despite the fact that since 2013, parents, midwives and medical staff are no longer obliged to register the sex/gender of an intersex new born child as either male or female, the number of gender-confirming surgeries of infants and toddlers has not been decreasing in Germany.⁷ These surgeries are not medically indicated, they often lead to sterilisation and later loss of sexual pleasure, and they constitute a severe violation of the children's rights to bodily integrity and sexual and reproductive health.

In 2016, the Association of the Scientific Medical Societies published guidelines about dealing with 'Varieties of Sex Development'.⁸ These guidelines focus on the varieties of sex/gender development as enhancement for all persons involved, medical and psychological professionals, parents and society. Further, they highlight the overarching goals to empower and encourage parents to accept their child in its uniqueness and to enable the child to participate in decisions concerning its gender identity and its bodily integrity or to make these decisions itself. Unfortunately, these guidelines are not legally binding and obviously, they are not consented within the medical profession and among state authorities responsible for the well-being of children.

The German Women Lawyers' Association recommends:

- **a statute effectively implementing the 2017 decision of the Federal Constitutional Court and its consequences in all legal areas concerned;**
- **immediate and effective measures to guarantee children's rights to bodily integrity, the development of their own gender identity and sexual and reproductive health;**
- **the prohibition of gender-confirming surgeries of intersex infants and children to prevent grave bodily harm, except in case of medical indication.**

2. EQUALITY BETWEEN MEN AND WOMEN (ARTICLE 3)

2.1 Persistent wage gap between women and men and higher poverty risk for women

Women in Germany are suffering from above-average poverty and have less money and savings in every age group.

The gender pay gap remains at more than 20% in Germany, and this situation has not changed since 1995. After several weakening amendments, the Transparency in Wage Structures Act entered into force on 6 July 2017. It covers an individual entitlement to disclosure of information on the average monthly gross remuneration for equal work or work of equal value as well as internal company evaluation procedures and reporting obligations on gender equality and equal pay. But these provisions are fragmentary. First, on the level of application. The individual entitlement to disclosures exists only for employees in establishments that usually count more than 200 employees; the other provisions only encompass employers with more than 500 employees.⁹ But the majority of women is work-

⁷ Ute Klöppel, Zur Aktualität kosmetischer Operationen „uneindeutiger“ Genitalien im Kindesalter (On the up-to-date nature of cosmetic surgeries of "ambiguous" genitals in childhood), 2016, <https://www.gender.huberlin.de/de/publikationen/gender-bulletins/bulletin-texte/texte-42/>.

⁸ Association of the Scientific Medical Societies in Germany, Varianten der Geschlechtsentwicklung (Varieties of Sex Development), 2016, available under <https://www.awmf.org/leitlinien/detail/II174-001.html>.

⁹ *Nota bene*, temporary workers arguably are excluded from the calculation.

ing in smaller establishments. Second, the provisions are not designed for effective implementation, as there are no effective sanctions in case of non-compliance with the reporting duties and the internal company evaluation procedures are not mandatory.

When exercising her rights under the Transparency in Wage Structures Act the female employee has to prove the 'equality' or 'equal value' of the work in question which is often nearly impossible. When a collective agreement applies, the employer is not obliged to provide information on the criteria and procedures of the wage-setting, but can just refer to the agreement although most sophisticated and often still gender-discriminatory job classifications set up by collective agreements are one well-known obstacle to equal pay.

The main problem is that the Transparency in Wage Structures Act itself does not cover any damages of pay discrimination. The employee has to take legal action under the General Act on Equal Treatment. This Act does not cover collective or class action such as the right of associations to start legal proceedings. The restriction to individual claims tackling structural problems (such as discriminatory structures of job classifications especially in collective agreements, gender-segregated labor markets, mostly female part-time work and gender stereotypes in the evaluation of 'female' work) and sex discrimination has been identified as one of the main obstacles to achieve gender equality time and again.

In 2017, the Federal Government decided to carry out an evaluation of the Statute on Pay Transparency in July 2019 – and do nothing until then. Given the obvious deficiencies of the statute, this cannot be accepted as an adequate approach.¹⁰

The gender pay gap is increasingly leading to poverty among older women. Their average pensions from the statutory pension scheme are only half as high as average male pensions. Poverty of women in old age will without much doubt increase in the future. The most important cause of low self-acquired pensions for women can be found in the German pension system. The general pension level depends on the average income of all employees subject to social security contributions. Since women often earn less than average income and/or interrupt their employment for several years because of bringing up children or caring for relatives, their pensions are also significantly below average.

The German Women Lawyers' Association recommends:

- **immediate measures of the German state to effectively reduce the gender wage gap;**
- **the obligation of companies to check their remuneration systems for discrimination and, if necessary, to change them;**
- **measures to guarantee the effective application of the Transparency in Wage Structures Act and the actual access to justice for victims of pay discrimination on the grounds of sex/gender;**
- **measures to introduce collective or class action in cases of structural and persis-**

¹⁰ See the Press Release of the German Women Lawyers' Association of 16 March 2018, <https://www.djb.de/verein/Kom-u-AS/K1/pm18-11/>.

tent discrimination from which many companies unlawfully profit following the example of procedural innovation in the field of consumer protection;

- **the statutory prohibition of incentives to dispense with sufficient individual old-age security provisions in social and tax law during the life course, analyse and identify reform options for the German pension system to end poverty of women in old age.**

2.2 Discriminatory stereotypes regarding the roles and responsibilities of women and men in the family and in society

Gender stereotypes still have a heavy impact on life in Germany. The government does not have an all-round strategy towards overcoming traditional role models and there is no broad public discourse about the reasons for gender stereotyping and its persistence. The German state limits itself to a few individual measures to overcome stereotypes; i.e. so-called ‘girl’s days’ as an inefficient educational campaign. Instead of combating gender stereotyping, a policy of disincentives is pursued in Germany.

An obvious example for such a disincentive is the tax system in Germany. The method of income splitting based on joint income for married couples (known as marital splitting) as well as the non-contributory insurance for married partners with no or low income animates married women in many cases to stay at home or engage in marginal employment instead of participating in sufficient employment. These regulations not only reinforce traditional gender roles, but contradict the incentives in favor of an equal division of paid and unpaid work as a result of the design of parental allowance, introduced in 2007.

The Second Equality Report of the Federal Government stated a significant and persistent ‘Gender Care Gap’ in Germany.¹¹ The redistribution of care responsibilities within the family remains a very remote goal.

Media also significantly contributes to the continuity of traditional gender stereotypes. Sexist advertising is still a serious problem with regard to the stereotyped depiction of women in the German media and in public spaces. The role of the German Advertising Standards Council controlling the advertising in Germany is very weak.

The German Women Lawyers’ Association recommends:

- **the development of an education strategy comprising guidelines and monitoring mechanisms to eliminate discriminatory stereotypes against women in nurseries and schools, in training, at work and in public discourse;**
- **changing the social and tax system to eliminate disincentives to behave according to role model expectations;**
- **the introduction of measures to promote equal representation of women and men in the media;**
- **strengthening the competence and mandate of the German Advertising Standards Council to ensure adequate sanctions against discriminatory gender stereotypes.**

¹¹ Bundesministerium für Familie, Senioren, Frauen und Jugend (2017) *Zweiter Gleichstellungsbericht der Bundesregierung* (Second Equality Report of the Federal Government), p. 102, available under <https://www.gleichstellungsbericht.de/>.

2.3 Work-Life balance and reintegration after parental leave (Recommendations of the Committee No. 16)

It remains very important to continue to expand the offer of child care facilities, especially for children from the age of three months. The qualification of child educators has to be improved and their wages have to be increased to a decent income. The estimated number of missing childcare/nursery places with adequate quality standards was 300 000 in 2017, especially for children under 3 years in urban and rural areas.¹² The closing hours of elementary schools and kindergartens at noon or in the early afternoon are rarely compatible with fastidious jobs. Especially in Western and South Germany, the aforementioned facts combined with the lack of school canteens oblige parents (and to a large extent it is the “mothers’ job”) to either choose precarious small part time jobs¹³ or to completely opt out of the regular labor market for many years or forever and thus, jeopardize the rights of Art. 6 and 7 of the covenant.

The German Women Lawyers’ Association recommends:

- **strengthening of flexibility of working conditions and the adaptability to concrete family needs (flexible time, home office, holiday/sickness breaks), guaranteed by law;**
- **legislative incentives for private companies and guarantees in the public sector;**
- **strengthening of child care facilities, nurseries, all day schools with pedagogic-qualitative facilities and canteens, financed by public subsidies;**
- **changing the tax system and repeal marital splitting to end the one-earner-model and stop disadvantaging double income when it comes to taxes;**
- **introducing the right to return to full-time and, for workers who have not been employed full-time before, the right to extend their working hours up to full-time if such work volume is available, both regardless of the size of the company and the employer’s approval;**
- **effective persecution of direct and indirect discrimination on the grounds of family and parental status at the working place, i.a. by widening the competences of the Federal Equality Agency (ADS).**

2.4 Representation of women in decision-making positions (Recommendations of the Committee No. 9, List of Issues No. 9)

The Committee asked the German government to provide information on the implementation of the Act on the Equal Participation of Women and Men in Executive Positions in the Private Sector and Public Service (2015) and to include updated statistical data on women’s representation in decision-making positions in both the public and private sectors.

¹² See press release of the German Economic Institute in Cologne, 2017 : link <https://www.iwkoeln.de/presse/iw-nachrichten/beitrag/wido-geis-kinderbetreuung-kita-ausbau-haelt-nicht-schritt-355390.html>.

¹³ See <http://www.oecd.org/els/dare-to-share-germany-s-experience-promoting-equal-partnership-in-families-9789264259157-en.htm>.

According to an actual study by the German Institute for Economic Research (DIW), only 24.6% of the supervisory/administrative board members and 8.1% of the executive board members of the 200 largest companies in Germany are female (by the end of 2017).¹⁴ In 68.5% of these companies, there is still no woman on the executive board at all.

Since 2016, the above-mentioned Act on the Equal Participation provides for a statutory 30 % gender quota for supervisory boards of all private companies that are listed and subject to full co-determination. In case of non-compliance, the election is void and the seat designated for a member of the under-represented gender remains vacant. Unfortunately, this binding statutory gender quota covers no more than 108 companies in Germany fulfilling the requirement of being listed and subject to full co-determination.

Further, the Act covers the obligation of 2.500 to 3.500 private companies which are listed or fully co-determined to set themselves target gender quotas, but without any effective sanctions. It is not surprising that $\frac{3}{4}$ of all MDax-listed companies set themselves a 0% gender quota regarding their executive boards for the first period until 30 June 2017.¹⁵ A study conducted by the German Women Lawyers' Association in 2017 found an alarmingly relaxed attitude of private companies towards target gender quotas, one third of the DAX 30 companies set a target gender quota of 0% for their boards.¹⁶

Time and again, the German Women Lawyers' Association has suggested the introduction of binding statutory gender quotas and effective sanctions, such as the invalidity of resolutions of the respective board and corporate tax disadvantages.¹⁷ In January 2018, seventeen women's organizations (including the German Women Lawyers' Association) launched their renewed Berlin declaration claiming for the expansion of the statutory binding 30% gender quota to all listed or co-determined companies as well as the introduction of a statutory 30% gender quota for executive board and higher management positions for women and for effective sanctions.¹⁸ Such sanctions should include the annulment of elections, the substitute appointment by courts, the annulment of decisions, severe fines and public naming and shaming.

The German Women Lawyers' Association recommends:

- **measures of the German state to effectively combat discrimination on the grounds of sex/gender in leading positions in the private sector, especially by introducing a statutory binding 30% gender quota for executive boards and higher management positions covering all larger (listed or co-determined) private companies, accompanied by smart and effective sanctions for non-compliance;**
- **further measures to enhance equal representation in leading positions in the private sector, e.g. offering strong incentives for corporate strategies furthering gender equality and combatting discrimination or launching public awareness-**

¹⁴ German Institute for Economic Research (DIW), Women Executives Barometer 2018, available under

¹⁵ See <http://www.spiegel.de/karriere/frauenquote-in-mdax-unternehmen-keine-weiblichen-vorstaende-a-1135060.html>.

¹⁶ German Women Lawyers' Association, Aktionärinnen fordern Gleichberechtigung – 2017, https://www.djb.de/static/common/download.php/save/2334/180206_Studie%20Aktion%C3%A4rinnen_aktuell.pdf.

¹⁷ German Women Lawyers' Association, Aktionärinnen fordern Gleichberechtigung – 2017, https://www.djb.de/static/common/download.php/save/2334/180206_Studie%20Aktion%C3%A4rinnen_aktuell.pdf.

¹⁸ Available under <https://www.djb.de/st-pm/pm/pm18-04/>.

raising campaigns on gender balanced leadership;

- **information of the German state on effective measures to change corporate culture, by e.g. developing and implementing the leadership “pipeline” and providing for a female talent pool with an appropriate budget or by training the (top) management on the impact of gender related stereotypes, the legal framework of anti-discrimination and the possibility of positive actions.**

3. RIGHT OF FAMILIES, MOTHERS, CHILDREN AND YOUNG PEOPLE TO PROTECTION AND ASSISTANCE (ARTICLE 10)

3.1 Domestic and other forms of violence against women and girls (Recommendations of the Committee No. 23)

So-called domestic violence, violence in close social relationships and especially violence by (ex)partners remains a severe problem in Germany. 35% of all women have been victims of physical and/or sexual violence since their 15th birthday, mostly by their intimate partners (22%), relatives or close friends. In 2016, 357 women suffered life-threatening attacks from their (ex)partners for the main reason that they had left or wanted to leave the (mostly abusive) relationship. 149 of them were killed.

Concerning gender-based violence, there is a significant gap between legislation and legal practices. When a man kills or tries to kill his intimate (ex)partner because she terminated or wanted to terminate a (mostly abusive) relationship, judges, including some of the federal courts, base their rulings on the idea that the perpetrator hurts himself by killing the person that ‘he didn’t want to lose’ with very modest punishments as a result.¹⁹

In 2017, the criminal law on sexual offences was thoroughly amended, introducing the concept of ‘No means no’ and thus, focusing on the (lack of) consent to sexual interaction rather than stereotyped expectations concerning the behavior of the victim (‘fight or flight’). But many court proceedings are still dominated by gender stereotyping, rape myths and secondary victimization. When it comes to sexual assaults or sexualized violence after prior intimacy, the effectiveness of prosecution particularly suffers from stereotyped victim blaming, minor penalties or termination of the proceedings. Courts regularly impose lower sentences for acts of sexual assault committed within or after an intimate relationship.²⁰ Also, legislation on the prosecution of stalking and on combating domestic violence has not led to an improvement of the situation of victims of domestic violence in reality.²¹

The Committee has encouraged the German government in its Concluding Observations regarding the Fifth Periodic Report of Germany (para 23) to continue assessing the implemen-

¹⁹ While so-called honour killings by Muslim or Arab perpetrators are severely punished (life-sentence), many *white* German perpetrators benefit from judges’ empathy for ‘abandoned’ husbands/partners and a cultural understanding of spouse or partner killings as domestic tragedies rather than gender-based violence and emanations of patriarchal culture. For a comparative analysis of German criminal court judgments on lethal domestic violence see Lena Foljanty & Ulrike Lembke, Die Konstruktion des Anderen in der “Ehrenmord”-Rechtsprechung, in: Kritische Justiz 2014, S. 298–315.

²⁰ See German Women Lawyers’ Association, Detailed statement on the effective implementation of the Istanbul Convention of 29 January 2018, <https://www.djb.de/verein/Kom-u-AS/K6/st18-02/>.

²¹ For further information see the CEDAW Alliance of civil society organizations in Germany, CEDAW Alternative Report, 2017, pp. 18ff, available under <https://www.frauenrat.de/cedaw-allianz/>.

tation of various measures and plans on the incidence of violence against women. The studies and statistics mentioned in the Sixth Periodic Report (2.1), however, do not meet the Committee's requirements. For example, police crime statistics only make gender-specific distinctions in the case of suspects and between selected offences in the case of victims. Furthermore, the perpetrator-victim relationship is only recorded for selected offences.²²

The German Women Lawyers' Association recommends:

- **the effective implementation of legislation to prevent, combat and prosecute gender-based violence – especially measures to bring about fundamental legal and cultural change, e.g. measures to improve the professional understanding of gender-based violence for judges and other law enforcement personnel, specific education measures, public awareness raising etc.;**
- **the collection of comprehensive data on violence against women and domestic violence which is generally accessible and the guarantee and promotion of appropriate research through cooperation between state authorities and support systems and the provision of appropriate means.**

3.2 Cruel treatment of female rape victims in court proceedings

The very few victims of sexual violence whose cases went to criminal courts, report harmful proceedings in and before trial: gender stereotypes, rape myths, blaming the victim, secondary victimization, little knowledge about sexual violence and its consequences or about different manifestations of trauma, and obstructions to the work of the legal counsel to whose support they are entitled.

In many criminal courts, victims' legal counsels are denied access to the case files. This violation of legal counsels' statutory rights is justified with the unfounded allegation that the counsels would 'prepare' the victim-witnesses²³, slandering the victims and their legal counsels alike. In addition, this violation of statutory rights can hardly be brought before a higher court due to criminal procedural law.

Another example to illustrate the harmful proceedings is the cruel and degrading treatment a female rape victim faced on request of the defence and approved by the court which cannot be justified under the presumption of innocence nor any other right of the accused: In 2014, a severely drunk woman was raped several times and in several ways by two men who recorded their rape actions in detail. Due to her drunkenness, the victim's recollection of the rape was severely impaired. Although the recording was found on the smartphone of one of the perpetrators which established more than sufficient proof, the court ordered the rape victim to watch the recording in court on request of the defence. This had to be interrupted for several times because the victim needed urgent psychological support. Although it was obvious that the victim's memory would not return and that the victim became severely re-traumatized by watching the recording, the judge did not terminate the obviously needless

²² See German Women Lawyers' Association, Detailed statement on the effective implementation of the Istanbul Convention of 29 January 2018, <https://www.djb.de/verein/Kom-u-AS/K6/st18-02/>.

²³ Higher Regional Court of Hamburg, judgment of 24 October 2014, 1 Ws 110/14, and judgment of 24 November 2014, 1 Ws 120/14; of a (slightly) different opinion: Regional Court of Leipzig, judgment of 12 August 2015, 1 Qs 195/15.

torture for the victim but made her watch the full recording. Afterwards, the regional court of Münster²⁴ decided upon an unusual high amount of compensation for the victim to be paid by the perpetrators stating that it was obviously unnecessary to insist on the showing of the recording and that severe additional harm and trauma was caused to the victim. The judge who decided upon the defence's proposal was neither ordered to pay a compensation²⁵ nor faced any other legal consequences of his decision to make the victim watch the recording despite the obvious consequences for her.

The German Women Lawyers' Association recommends:

- **immediate and effective measures to abolish cruel and degrading treatment of rape victims in criminal proceedings, to hold judges accountable for such treatment, and to safeguard the statutory rights of victims' legal counsels.**

3.3 Digital violence against women (hate speech and cyber harassment)

Digital violence has become a major problem in Germany. Especially persons supporting refugees and defending migration rights are subjected to hate speech, insults, defamations, rape threats and death threats. Moreover, there is an increasing number of cyber feminists, women's rights advocates, gender equality activists or just critical female journalists who are victims of repeated and long-lasting digital violence. This does not only harm the women addressed but gravely endangers democracy and the freedom of speech for everybody, especially minorities. Another form of digital violence against women is the continuance of domestic or ex-partner violence by digital means, including cyber harassment, defamations in digital public, cyber stalking, revenge porn and others.²⁶

The German Penal Code does not cover digital violence explicitly, and generally, it does not cover non-physical violence. Some criminal law remedies could be used to combat digital violence, such as libel, slander, threatening, stalking or anti-porn laws (revenge porn). But prosecuting state authorities very often do not apply the appropriate laws due to a misunderstanding of digital violence as a private matter or due to examining freedom of speech in sole favor of the perpetrator and not the victim and ignoring the victim's fundamental rights as well as questions of discrimination. The same is true for most efforts to tackle digital violence by media law remedies and, moreover, the costs of litigation are a severe obstacle for the victims' access to justice. The above-mentioned introduction of a possibility of group action and anti-discrimination organizations' standing in court could diminish these obstacles.²⁷

²⁴ Regional Court of Münster, judgment of 7 December 2017, 02 O 229/17, http://www.justiz.nrw.de/nrwe/lgs/muenster/lg_muenster/j2017/02_O_229_17_Teil_Versaemnis_und_Schlussurteil_20171207.html.

²⁵ The perpetrators have claimed sudden insolvency and not paid until today.

²⁶ For different forms of appearance and extent of digital violence against women see bff, Fachberatungsstellen und die Digitalisierung geschlechtsspezifischer Gewalt, Oktober 2017, <https://www.frauen-gegen-gewalt.de/aktuelle-studien-und-veroeffentlichungen.html>.

²⁷ See Ulrike Lembke, Kollektive Rechtsmobilisierung gegen digitale Gewalt, E-Paper 2018, <https://www.gwi-boell.de/de/2018/01/09/kollektive-rechtsmobilisierung-gegen-digitale-gewalt>.

The German Women Lawyers' Association recommends:

- **measures to effectively combat gender-based digital violence, especially amendments to criminal law to cover psychological violence with severe consequences and any measures to improve the criminal and the media law enforcement;**
- **furthering the understanding of gender-based violence as a human rights issue in national jurisdiction and law enforcement;**
- **the introduction of a right of group action by women's and other non-governmental organizations to bring cases of gender-based violence before the courts.**

3.4 Sufficient funding for women's shelters and support structures

Battered women's shelters and support structures for victims of gender-based violence such as counselling centers are in permanent lack of sufficient funding. Women's shelters are not able to offer refuge for all women and girls in need of protection. Victims of gender-based violence suffer from long waiting periods when seeking support such as counselling or therapy. And the vast majority of shelters and support structures are not generally accessible, especially not for women with disabilities or women without a more permanent residence status. The funding of women's shelters and support structures for victims of gender-based violence is based upon a confusing mix of social assistance benefits, individual payments, state and local funding, awarded fines and private donations.²⁸

In their coalition agreements, the parties to the new government announced to spend considerable sums for the better funding of women's shelters and support structures. But there is no concrete action except the denial of need, and the structural obstacles to sufficient and reliable funding remain unaddressed. Persistent constitutional law questions concerning the permissible relationship between federal, state and local funding are not answered. Conceptions for major funding by social assistance benefits paid for individual victims seeking refuge or support make it impossible to develop reliable support structures or any planning security. And the main obstacle for dependable support and shelter is the legally unfounded idea that shelter and support for victims of gender-based violence would be a voluntary and not mandatory state task.

The German Women Lawyers' Association recommends:

- **sufficient and reliable funding for women's shelters and support structures for victims of gender-based violence;**
- **the replacement of individualized funding based upon social assistance benefits by models of general, long-term and sustainable funding;**
- **the guarantee of access to shelters and support structures for all women including women with disabilities or health issues, migrant and refugee women, women without (permanent) residence status, poor or homeless women and women with children.**

²⁸ See German Women Lawyers' Association, Detailed statement on the effective implementation of the Istanbul Convention of 29 January 2018, <https://www.djb.de/verein/Kom-u-AS/K6/st18-02/>.

4. RIGHT TO HEALTH (ARTICLE 12)

4.1 Criminalization of objective information on safe and legal abortion (General Comment No. 22)

In its General Comment No. 22, the Committee pointed out that the right to reproductive health includes unhindered access to a whole range of health facilities, goods, services and information (para 5). Health facilities, goods, information and services related to reproductive health care should be accessible to all individuals and groups without discrimination and free from barriers, including information accessibility (para 15). Information accessibility includes the right to seek, receive and disseminate information concerning reproductive health issues, and the right of all individuals to evidence-based information on all aspects of reproductive health, including, among many others, safe abortion and post-abortion care (para 18).

Under Section 219a of the German Penal Code, any ‘advertisement’ for (legal or illegal) abortion constitutes a criminal offence. Regrettably, this includes the objective information provided by doctors or clinics that they offer safe and legal abortion in accordance with the statutory requirements. In November 2017, a family doctor who informed on her website that the safe and legal termination of pregnancy was also one of her services was sentenced to a not inconsiderable fine by a criminal court.²⁹

Since then, there is a lively debate upon this section which was adopted in 1933 and last substantially amended in 1974, thus failing to comply with the current statutory framework on termination of pregnancy adopted in 1995. The main argument against any amendments is that women seeking for an abortion would get all the necessary information when attending mandatory counselling. But many counselling centers have not or are not allowed to disclose this information (e.g. in Bavaria). State authorities are allowed to provide for this information but only Berlin and Hamburg have published the addresses of doctors and clinics and further information on safe and legal abortion. For many regions of Germany, the necessary information is not accessible, and when women are seeking for information online, due to the criminalization of information, they are primarily confronted with websites promoting the ideas of religious fundamentalists denying women’s rights to reproductive health.

The statutory framework on termination of pregnancy of 1995 is based upon the implementation of a decision of the Federal Constitutional Court which, among others, clearly emphasized the importance of doctors to prevent an increase of unsafe and/or illegal abortions or harmful consequences of them. Under the statutory and constitutional requirements, termination of pregnancy has to be performed by a doctor who concludes an effective contract and must request for an adequate fee. Women who are seeking for safe and legal abortion need a doctor who is offering this medical service, but when giving just the objective information about offering it, then the doctor commits a criminal offence. There is serious doubt that this criminalization is in accordance with constitutional law or with women’s human rights to reproductive health.

²⁹ Criminal Court of Gießen, judgment of 24 November 2017 – 507 Ds 501 Js 15031/15.

The German Women Lawyers' Association recommends:

- **the de-criminalization of the objective information which doctors or clinics offer safe and legal termination of pregnancy in accordance with the statutory requirements regardless of who gives that information;**
- **immediate and effective measures to guarantee the right to seek, receive and disseminate information concerning reproductive health issues, and the right of all individuals to evidence-based information on all aspects of reproductive health, including, among many others, abortion and post-abortion care.**

4.2 Mandatory counselling and waiting period when seeking for a safe and legal abortion (General Comment No. 22)

In its General Comment No. 22, the Committee pointed out that the realization of the rights of women and gender equality, both in law and in practice, requires repealing or reforming discriminatory laws, policies and practices in the area of reproductive health (para 28). Removal of all barriers interfering with access by women to comprehensive reproductive health services, goods, education and information is required. States are obliged to adopt legal and policy measures to guarantee women and girls access to safe abortion services and quality post-abortion care, including by training health-care providers; and to respect the right of women to make autonomous decisions about their sexual and reproductive health.

In Germany, women who are in need for a safe and legal abortion face the statutory obligation of receiving mandatory counselling and fulfil a mandatory waiting period after the counselling before they are allowed to have an abortion. The mandatory counselling has the statutory aim to make the woman carry their pregnancy to full term. The mandatory waiting period is not founded upon medical reasons but serves the sole purpose to underline the fact that there is no general access to abortion and that abortion should not be easily available as a medical service for women.

Founded upon this ratio, the mandatory counselling as well as the mandatory waiting period are criticised. Both enforces the stereotype that women are not able to make rational and responsible decisions with regard to their reproductive rights.³⁰ The state should provide for counselling meeting pregnant women's needs and offer it non-mandatory, and every woman should have the possibility to take her individual time. The World Health Organization rejects mandatory waiting periods arguing that they can have the effect of delaying care which can jeopardize women's access to safe and legal abortion services (it has to be kept in mind that in many regions in Germany, only very few or no doctors offer safe and legal abortions) and demean women as competent decision-makers.³¹

In its concluding observations on the last German periodic report in 2017, the Committee on the Elimination of All Forms of Discrimination against Women (CEDAW) recommended that Germany should ensure access to safe abortion without subjecting women to mandatory

³⁰ Article 16 CEDAW guarantees the right of all women to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights. In Germany, 60% of all women seeking for a safe and legal abortion have one or more children.

³¹ World Health Organization, Safe abortion: technical and policy guidance for health systems, 2nd edition 2012, pp. 96f, http://www.who.int/reproductivehealth/publications/unsafe_abortion/9789241548434/en/.

counselling and a three-day waiting period, which the World Health Organization has declared to be medically unnecessary, and ensure that such procedures are reimbursed through health insurance.³²

The German Women Lawyers' Association recommends:

- **measures to guarantee the access to safe and legal abortion in respect for women as competent decision-makers, especially concerning their own reproductive rights;**
- **immediate and effective measures to offer accessible, respectful and supportive counselling on a voluntary basis for every pregnant woman in need.**

4.3 Street harassment of pregnant women seeking counselling (General Comment No. 22)

In its General Comment No. 22, the Committee pointed out that the right to reproductive health includes unhindered access to a whole range of health facilities, goods, services and information (para 5). Health facilities, goods, information and services related to reproductive health care should be accessible to all individuals and groups without discrimination and free from barriers (para 15). It is also important to undertake preventive, promotional and remedial action to shield all individuals from the harmful practices and norms and gender-based violence that deny them their full reproductive health (para 29).

Under German law, women seeking for a safe and legal abortion are obliged to receive mandatory counselling before they receive the medical services needed. The counselling can only be offered by (very few) state-approved counselling centres. For some time, religious fundamentalists have been loitering on the streets directly in front of approved counselling centres to harass the centre staff and the women seeking for counselling with the one aim to make them surrender from seeking counselling and safe and legal abortion. This constitutes a severe violation of the right to reproductive health of women who are in an especially difficult and vulnerable position and who cannot avoid the harassment due to the mandatory character of the counselling and the small number of approved counselling centres.

Most state authorities refuse to protect women against this harassment and interference with their most intimate decisions upon pregnancy and family planning with the argument that the anti-abortion activists would exercise their freedom of religion and freedom of speech. But neither the freedom of religion nor of speech includes the right to impose (religious) opinions upon other people or to harass women, especially not when they are in a vulnerable position and cannot avoid the interference. In 2011 and 2012, German courts decided that religious fundamentalists are not allowed to harass women and that they can exercise their freedom of speech in any other place but close to approved counselling centres or medical practices and clinics offering abortion services.³³

³² Committee on the Elimination of All Forms of Discrimination against Women, Concluding observations on the combined seventh and eighth periodic reports of Germany, CEDAW/C/DEU/CO/7-8, 3 March 2017, para 38(b).

³³ Administrative Court of Freiburg of 4 March 2011, 4 K 314/11; State Administrative Court of Baden-Württemberg of 11 October 2012, 1 S 36/12; approved by the Federal Administrative Court of 22 July 2013, 6 B 3/13.

The German Women Lawyers' Association recommends:

- **immediate and effective measures to guarantee protection against degrading treatment and street harassment of pregnant women in front of approved counselling centres or medical practices and clinics offering abortion services;**
- **further measures to raise awareness among the authorities concerning the obligations to protect women's reproductive health and autonomy, including the obligation to guarantee access to reproductive health facilities, goods, services or information without discrimination and free from barriers such as harmful interferences by private actors.**

4.4 Sterilizations without consent of women with (mental) disabilities (General Comment No. 22)

In its General Comment No. 22, the Committee stated that the full enjoyment of the right to reproductive health is severely restricted for individuals and population groups that experience multiple and intersecting forms of discrimination that exacerbate exclusion in both law and practice, such as persons with disabilities (para 2). Violations of the obligation to respect include laws and policies that prescribe involuntary, coercive or forced medical interventions, including forced sterilization (para 57).

The German law provides for the possibility of sterilization of women with so-called mental disability at the decision of a care-giver and with collaboration of a court. Disabled persons' organizations and women's organizations point out that this possibility of sterilization without the consent of the person involved severely violates human rights under the Convention on the Rights of Persons with Disabilities and the Council of Europe Convention on preventing and combating violence against women and domestic violence.³⁴

There are still around 30-40 annual cases of sterilization of women with so-called mental disability documented following the statutory required procedure. Nevertheless, an unusual high number of women with disabilities, especially so-called mental disabilities, are sterilized in Germany (9% to 18% compared with 2% to 6% of the female population). There seems to be a high number of undocumented cases. According to a study on the sterilization of women with so-called mental disabilities, half of the women explained that they consented to their sterilization while for the other half of the women the determining factors were persuasion by parents, physicians or nursing staff, lack of knowledge about contraception or lack of prospects of living with a child.³⁵

³⁴ See e.g. State Coordination Body for the implementation of the CRPD, Positionspapier Zwangssterilisation (Position Paper on Forced Sterilization), 2017, available under https://www.behindertenbeauftragter.de/DE/Koordinierungsstelle/ArbeitKO/Veroeffentlichungen/Veroeffentlichungen_no_de.html (31.07.2018).

³⁵ BMFSJ (2013), Lebenssituation und Belastungen von Frauen mit Behinderungen und Beeinträchtigungen in Deutschland, <http://www.bmfsfj.de/BMFSFJ/Service/Publikationen/publikationsliste,did=199822.html> (31.07.2018).

The German Women Lawyers' Association recommends:

- **immediate and effective measures to abolish any sterilization without the prior understanding and informed and freely given consent of the person affected;**
- **further measures to raise awareness for the right to reproductive health of women with disabilities and to safeguard the full enjoyment of the right to reproductive health for women with (mental) disabilities.**

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