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Transsexual Law Unconstitutional: German Federal Constitutional Court Demands Reformation of Law Because of Fundamental Rights Conflict

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**TRANSSEXUAL LAW UNCONSTITUTIONAL: GERMAN FEDERAL
CONSTITUTIONAL COURT DEMANDS REFORMATION OF LAW
BECAUSE OF FUNDAMENTAL RIGHTS CONFLICT**

INTRODUCTION

With the Broadway premiere of *Hedwig and the Angry Inch* (1998), Germany assumed a prominent position in the cultural discussion surrounding transsexuals.¹ Based on the true story of an East German prostitute working as a babysitter in Kansas, *Hedwig* relates the trials experienced by the victim of a botched sex change.² In a recent decision, Germany's Federal Constitutional Court³ addressed the problems of another sort of botched sex change: this time a legal one. A transsexual had to choose between having his new gender recognized under the Transsexual Law⁴ and remaining married to his spouse of over fifty years. The court held that the country's Transsexual Law was unconstitutional because it required post-operative transsexuals seeking recognition of their new gender to choose between two constitutionally protected fundamental rights: individual integrity and marriage.⁵

Transsexuals have long played a role in gender and sexuality discourses, but have proved vexing for legal contexts because the change in gender represents a departure from a category that was traditionally immutable under the law.⁶ The court in the present case attempted to find legal means for

1. See, e.g., Leslie Morris, *Berlin Elegies: Absence, Postmemory, and Art After Auschwitz*, in *IMAGE AND REMEMBRANCE: REPRESENTATION AND THE HOLOCAUST* 288, 299 (Shelley Hornstein & Florence Jacobowitz, eds., 2003).

2. RAYMOND KNAPP, *THE AMERICAN MUSICAL AND THE PERFORMANCE OF PERSONAL IDENTITY* 252–53 (2006).

3. The Federal Constitutional Court (*Bundesverfassungsgericht*) is Germany's highest court for cases concerning constitutional questions. The court is discussed in greater detail in Section IV. Translations are by the author of this Comment unless otherwise indicated.

4. Gesetz über die Änderung der Vornamen und die Feststellung der Geschlechtszugehörigkeit in besonderen Fällen [Transsexuellengesetz—TSG] (“Law on the Changing of First Names and the Establishment of Sex Status in Special Cases”) Sept. 10, 1980, BGBl. I at 1654 [hereinafter TSG]. The law is commonly referred to as the “Transsexual Law” (*Transsexuellengesetz*), and this Comment adopts the term accordingly.

5. Bundesverfassungsgericht [BVerfGE] [Federal Constitutional Court], May 27, 2008, 1 BvL 10/05, § 72, available at http://www.bverfg.de/entscheidungen/1s20080527_1bv1001005.html.

6. See, e.g., BTDrucks 8/2947 at 8 (citing to Bundesgerichtshof decision from September 21, 1971, holding that a transsexual could not have a new gender recognized even after undergoing gender reassignment surgery because there was no legal basis for such a change).

addressing these changes in a fair and constitutional manner.⁷ This Comment examines the existing law and the two legislative alternatives suggested by the court, concluding that the court was right to demand changes to the law, and arguing that the legislature should opt for the larger changes in order to address multiple issues simultaneously. This study begins with an overview of transsexual history and jurisprudence in Germany. Next, the Comment presents the court decision and rationale. Third, the study analyzes European Union guarantees of individual rights and their interaction with German law. Fourth, it details German individual rights guarantees and their relationship to the Transsexual Law. Finally, the note examines the consequences of the court's recommendations for legislative action and makes suggestions for prudent reformation of the law.

I. HISTORY OF TRANSSEXUALITY AND THE TRANSSEXUAL LAW IN GERMANY

The Transsexual Law took effect in 1980 in Germany following a decision by the Federal Constitutional Court.⁸ The passing of the law was a significant moment in transsexual rights in Germany that can best be understood as part of a larger cultural and legal history. This section reviews the cultural history of transsexuality in Germany, the development of transsexuality as a legal concept in Germany, the 1978 court decision and subsequent enactment of the Transsexual Law, and the further definition and codification of transsexual rights through later German court decisions.

A. *Definition and History of Transsexualism in Germany*

Transsexuality falls under the transgender “umbrella” in contemporary academic discourse.⁹ The term transgender includes a number of loosely related phenomena describing individuals who do not readily fit into the traditional binary gender categories.¹⁰ In addition to transsexuals, more common examples are intersexuals, transvestites, “gay drag, butch lesbianism, and such non-European identities as the Native American berdache¹¹ or the

7. BVerfGE 10/05, §72.

8. Volkmar Sigusch, *Medizinischer Kommentar zum Transsexuellengesetz*, NEUE JURISTISCHE WOCHENSCHRIFT, 2740, 2741–42 (1980).

9. Paisley Currah, *Gender Pluralisms Under the Transgender Umbrella*, in TRANSGENDER RIGHTS 3, 4 (Paisley Currah et al. eds., 2006) (discussing the term transgender as an “umbrella” term for gender dysmorphia and explores the history of the transgender umbrella concept stemming from a 1994 Susan Stryker essay).

10. *Id.* at 3–4.

11. The berdache is the Navajo concept of “two-spiritedness,” reflecting both genders in one person. See, e.g., Richard M. Juang, *Transgendering the Politics of Recognition*, in TRANSGENDER RIGHTS 242, 259 (Paisley Currah et al. eds., 2006).

Indian Hijra.”¹² As suggested by the variety of forms the term encompasses, transgenderism is part of a continuum of gender, rather than a particular new class of gender.¹³

Biological sex and, more recently, the social construct of gender typically have defined the binary male/female classification system.¹⁴ Transgender advocates support a more open understanding of sex and gender to reflect the multiplicity¹⁵ of sex and gender constellations.¹⁶ The law has yet to adopt such broad changes, but is increasingly willing to view the social consequences of medical conditions¹⁷ as a basis for granting rights and changing laws.¹⁸ Definitions of “transsexual” vary by jurisdiction, but a typical understanding of such codification of transsexuality in the United States can be found in a Minnesota state anti-discrimination statute, which considers transsexuals as “having or being perceived as having a self-image or identity not traditionally associated with one’s biological maleness or femaleness.”¹⁹

Transsexuality can be defined in a number of ways, as noted above, but for German law the concept²⁰ must first be differentiated from other phenomena, including homosexuality, transvestitism, and intersexuality.²¹ Under German

12. Currah, *supra* note 9, at 4 (quoting Susan Stryker, *My Words to Victor Frankenstein Above the Village of Chamounix: Performing Gender*, GLQ 1:3 (1994)). The Hijra is an Indian concept describing people perceived as eunuchs who do not fit into traditional gender categories. See, e.g., Juang, *supra* note 11, at 259.

13. Currah, *supra* note 9, at 4; see also Dylan Vade, *Expanding Gender and Expanding the Law: Toward a Social and Legal Conceptualization of Gender that is More Inclusive of Transgender People*, 11 MICH. J. GENDER & L. 253, 273–278 (2005) (discussing transsexuality as part of a “gender galaxy”).

14. Vade, *supra* note 13, at 261–62.

15. One list of transgender identities includes: “trans, tranny, trannyboy, trannygirl, transsexual, transgender, shinjuku boy, boi, grrl, boy-girl, girl-boy-girl, papi, third gender, fourth gender, no gender, bi-spirit, butch, dyke-fag, fairy, elf girl, glitterboy, transman, transwoman—just to name a few.” *Id.* at 266.

16. *Id.* at 264.

17. Paisley Currah & Shannon Minter, *Unprincipled Exclusions: The Struggle to Achieve Judicial and Legislative Equality for Transgender People*, 7 WM. & MARY J. WOMEN & LAW 37, 53–54 (2000).

18. Julie A. Greenberg & Marybeth Herald, *You Can’t Take it with You: Constitutional Consequences of Interstate Gender-Identity Rulings*, 80 WASH. L.R. 819, 835–39 (2005).

19. MINN. STAT. ANN. §363A.03(44) (West 2008) (This statute was renumbered from §363.01); see also Currah & Minter, *supra* note 17, at 48–50 (discussing how different jurisdictions incorporate gender identity and transgender into anti-discrimination and hate crime legislation).

20. Even the simple act of speaking of a “concept” in the singular is problematic in the context of transsexuals and the law. See Claudia Lohrenscheit & Anne Thiemann, *Sexuelle Selbstbestimmungsrechte—Zur Entwicklung menschenrechtlicher Normen für Lesben, Schwule, Transsexuelle und Intersexuelle*, in SEXUELLE SELBSTBESTIMMUNG ALS MENSCHENRECHT 15, 30–32 (Claudia Lohrenscheit ed., 2009).

21. Sigusch, *supra* note 8, at 2743.

law, homosexuality occurs when a person is attracted to others of the same sex.²² Transvestitism, on the other hand, occurs when an “extended and extensive” clothing or undergarment fetish exists.²³ Distinguishing between these phenomena and transsexuality does not typically present a problem under German law.²⁴ The law has greater difficulty separating transsexuality from other psychological conditions, however.²⁵ Transsexuality must be distinguished from psychological conditions that may give rise to temporary or otherwise borderline cases where a person expresses the desire to live as a member of the other sex.²⁶ In addition, transsexuals differ from intersexuals in that the former experience a strong desire to live in the sex of which they are not members, while intersexuals do not wish to change their sexual identity.²⁷ Many intersexuals consciously wish to remain androgynous or to resist aligning with traditional gender concepts.²⁸ Under German law, transsexuals differ from others in that they experience from early on a compulsion to live as a member of the gender to which he or she was not assigned at birth.²⁹

Although scientific analyses of transsexuality are a relatively recent phenomenon, the understanding of the condition has developed greatly since German sexologist Magnus Hirschfeld³⁰ first explained it in early twentieth-century Berlin.³¹ As a result of Hirschfeld’s work, Germany was “at the forefront of human sex change experiments” in the 1920s.³² Following the groundbreaking research by Hirschfeld and his colleagues on transsexuality in medicine, other German scientists and politicians have applied biological, sexual, and gender criteria to address the various aspects of transsexuality in

22. *Id.*

23. *Id.*

24. ANJA SCHAMMLER, TRANSSEXUALITÄT UND STRAFVOLLZUG: DIE STÖRUNG DER GESCHLECHTLICHEN IDENTITÄT VON STRAFGEFANGENEN ALS STRAFVOLLZUGSRECHTLICHES PROBLEM 21 (2008).

25. *Id.* at 21–22.

26. *Id.*

27. *Id.* at 19.

28. *Id.*

29. Sigusch, *supra* note 8, at 2742.

30. Hirschfeld (1868–1935) founded the “Journal of Sexual Science” (ZEITSCHRIFT FÜR SEXUALWISSENSCHAFT) in 1913 and the closely related Institute for Sexual Science in Berlin in 1919 to research transsexuality. Friedemann Pfäfflin, *Sex Reassignment, Harry Benjamin, and some European Roots*, INT. J. TRANSGENDERISM 1, 2 (1997), available at: <http://www.iiav.nl/eazines/web/IJT/97-03/numbers/symposion/ijtc0202.htm>.

31. See, e.g., STEFAN HIRSCHAUER, DIE SOZIALE KONSTRUKTION DER TRANSSEXUALITÄT: ÜBER DIE MEDIZIN UND DEN GESCHLECHTSWECHSEL (1993).

32. Joanne Meyerowitz, *Sex Change and the Popular Press: Historical Notes on Transsexuality in the United States, 1930–1955*, 4:2 GLQ: A JOURNAL OF GAY AND LESBIAN STUDIES 159, 162 (1998).

different contexts.³³ Such specialized, context-specific definitions, however, do not generally suffice across the board: “Transgender people represent for law a challenge of the notion of sex as naturally immutable, and therefore serve to problematise [*sic*] the basis of gendered and heterosexual subjectivities.”³⁴

The Federal Republic of Germany (“West Germany”) defined its current views on transsexuality as a legal concept in the “Transsexual Law” of 1980. German lawmakers³⁵ recognized the difficulty in fitting transsexuals into traditional gender categories in creating the Transsexual Law, noting that the existing expectation of “immutability of gender” was no longer “tenable.”³⁶ That law refers to “[p]ersons who feel they belong to another sex than that of their female or male bodily make-up.”³⁷ This definition reflects physical, social, and psychological dimensions in recognizing the phenomenon.³⁸ The legal recognition of the changes, however, is based entirely on medical procedures and the resulting physical changes.³⁹ A transsexual cannot petition for recognition of a new gender unless he or she has experienced the desire to live as a member of the other sex for at least three years.⁴⁰ The application for recognition of a new name or a new gender requires expert testimony in a procedure that normally takes at least six months.⁴¹ In contrast to neighboring Austria, which strictly limits medical treatment to a specific group of doctors at the University of Vienna, Germany is relatively open in accepting opinions from any qualified medical expert.⁴² The Transsexual Law details treatment of transsexuals in civil matters.⁴³ Criminal matters affecting transsexuals have

33. ANDREW N. SHARPE, *TRANSSEXUAL JURISPRUDENCE: DYSPHORIC BODIES OF LAW* 4 (2002).

34. *Id.*

35. The Transsexual Law is a federal law in Germany, unlike in the United States, where each state creates its own provisions subject to federal constitutional limits. Greenberg & Herald, *supra* note 18, at 823–24.

36. BTDrucks, *supra* note 6, at 8.

37. Friedemann Pfäfflin, *Psychiatric and Legal Implications of the New Law for Transsexuals in the Federal Republic of Germany*, 4 INT’L. J. L. & PSYCHIATRY 191, 192 (1981).

38. *See id.* at 198.

39. *Id.* at 194–95.

40. TSG §§ 1(1), 8(1).

41. C. Weitze, M.D. & S. Osburg, M.D., *Empirical Data on Epidemiology and Application of the German Transsexuals’ Act During Its First Ten Years*, 2 INT. J. OF TRANSSEXUALISM 1 (1998), available at <http://www.iiav.nl/eazines/web/IJT/97-03/numbers/symposium/ijtc0303.htm>.

42. Bundesministerium für Justiz, *Mitteilung vom 20. Dezember 1996 über den Erlaß des Bundesministeriums für Inneres betreffend personenstandsrechtliche Stellung Transsexueller*, AMTSBLATT DER ÖSTERREICHISCHEN JUSTIZVERWALTUNG (March 20, 1997), reprinted in *TRANSSEXUALISM IN EUROPE* 32 (2000).

43. *See generally* TSG.

been resolved on a case-by-case basis with reference to both the Transsexual Law and the German Penal Code (“Strafvollzugsgesetz”).⁴⁴

This definition encoded in the Transsexual Law is not the only legal perspective German law has recognized, and historical context can provide insight on the current case. German scholars began addressing the phenomenon of transsexuality on a large scale around 1910, and the first “genital-retrofitting operations” took place in Berlin and Prague in 1912.⁴⁵ The earliest work on transsexualism viewed the phenomenon as primarily a physical condition manifesting itself in psychological terms.⁴⁶ More recently, the academic and legal communities have sought to address the social concerns arising out of the medical/psychological condition, rather than treating some unidentifiable physiological cause.⁴⁷ Experts in Germany do not attempt to “cure” transsexuality, instead viewing gender-reassignment surgeries⁴⁸ as the means for addressing both the medical condition experienced by the transsexual and any related social issues.⁴⁹ Experts rely primarily on the presence of a number of symptoms in making their assessments and must differentiate transsexuality from conditions such as homosexuality and transvestitism in addressing patient and court requirements.⁵⁰

Transsexuality in Germany today is viewed with an eye towards national history and the persecution of transsexuals during the Nazi era, a time that—not surprisingly—can only be viewed as disastrous for transsexual rights.⁵¹ The “Law for the Prevention of Genetically-Sick Offspring” was passed in 1933 and implemented with extreme efficiency following the Nuremberg Laws of 1935.⁵² Under the law, hundreds of thousands were sterilized because they

44. SCHAMMLER, *supra* note 24, at 65–196.

45. Sigusch, *supra* note 8, at 2740.

46. *Id.* at 2741.

47. Although there have been significant refinements in the process, the scientific response to transsexuality and the desire to have a sex change operation varies widely and is fraught with difficulties even today. See, e.g., Dean Spade, *Resisting Medicine, Re/Modeling Gender*, 18 BERKELEY WOMEN’S L.J. 15, 23-37 (2003).

48. A number of different procedures exist which fall under the category of sex-change (gender-reassignment) surgeries. See Michael Sohn & Gereon Schäfer, *Transidentität aus der Sicht der plastisch-rekonstruktiven Genitalchirurgie*, in *TRANSSEXUALITÄT UND INTERSEXUALITÄT: MEDIZINISCHE, ETHISCHE, SOZIALE UND JURISTISCHE ASPEKTE* 131, 131–48 (Dominik Groß, Christiane Neuschuafer-Rube, & Jan Steinmetzer, eds., 2008).

49. Cathrin Correll, *Im falschen Körper: Ein Beitrag zur rechtlichen und tatsächlichen Problematik der Transsexualität*, NEUE JURISTISCHE WOCHENSCHRIFT 3372, 3373 (1999).

50. Sigusch, *supra* note 8, at 2742–43.

51. Friedemann Pfäfflin, *supra* note 30.

52. STEFAN MAIWALD & GERD MISCHLER, *SEXUALITÄT UNTER DEM HAKENKREUZ: MANIPULATION UND VERNICHTUNG DER INTIMSPHÄRE IM NS-STAAT* 64 (1999). In German, the law is called the “Gesetz zur Verhütung erbkranken Nachwuchses.”

were deemed “unworthy of reproduction.”⁵³ The groups singled out for sterilization included gypsies, Jews, invalid veterans from World War I, homosexuals, and transsexuals.⁵⁴ Nazi scientists working for SS-director Heinrich Himmler even performed gruesome experiments designed to increase their efficiency in sterilizing individuals.⁵⁵ In addition to sterilization, concentration camp researchers had a great interest in restoring sexual drives to a “normal” heterosexual state and selected inmates for other studies, including “hormonal repolarization.”⁵⁶ In “repolarization” an artificial gland was surgically implanted into the groin to change the patient’s sexual drive, allegedly resulting in stronger and “better looking” inmates.⁵⁷ As part of a larger program, “repolarization” aimed to increase the nation’s reproductive capacity by manipulating the patients’ sex drive.⁵⁸ Such programs are now widely condemned by officials: the persecution of homosexuals and other individuals “living differently” is now commemorated and condemned by a national monument in the German capital, Berlin,⁵⁹ and a memorial square in Vienna, the capital of Austria.⁶⁰

With these social, medical, and cultural concerns in mind, the Federal Republic of Germany attempted to address the social problems experienced by transsexuals through the Transsexual Law in 1980.⁶¹ Since the introduction of the Transsexual Law, Germany has seen increasing numbers of applications to have new genders recognized.⁶² Estimates of the current transsexual population in Germany range from around 8000 to 83,000.⁶³ At the time the law was enacted, the government estimated there were 7000 to 8000

53. *Id.* at 67. The German speaks of “Fortpflanzungsunwürdigkeit.”

54. *Id.* at 66–67.

55. *Id.* at 72–73.

56. GÜNTER GRAU, *HOMOSEXUALITÄT IN DER NS-ZEIT* 345 (1993).

57. *Id.* at 352–53. According to research reports, other inmates commented to the doctors on the improvement in appearance of patients who had undergone such treatment. *Id.*

58. *Id.* at 346.

59. *Kulturminister Bernd Neumann übergibt Denkmal für die im Nationalsozialismus verfolgten Homosexuellen*, PRESSE- UND INFORMATIONSAMT DER BUNDESREGIERUNG PRESSEMITTEILUNG NR. 188, May 27, 2008, <http://www.bundesregierung.de>.

60. *Mahnmal für homosexuelle und transgender Opfer des Nationalsozialismus auf dem Morzinplatz—Hans Kupelweiser: Der rosa Platz*, 2008, http://www.publicartvienna.at/picts/Morzin_pressemappe_d_neu.pdf. See also Artistic Design: Memorial Commemorating the Homosexual and Transgender Victims of the Nazi Regime at Morizplatz 2 (2008) http://www.publicartvienna.at/picts/Morzin_pressemappe_e_neu.pdf.

61. BTDrucks 8/2947 at 1.

62. Weitze & Osburg, *supra* note 41.

63. SCHAMMLER, *supra* note 24, at 13–14. Estimates in respectable newspapers are as high as 400,000, but academic studies suggests the number is likely much lower than that. Jan Steinmetzer & Dominik Groß, *Transsexualität in den Printmedien: Eine Analyse überregionaler deutschsprachiger Tageszeitungen*, in *TRANSSEXUALITÄT UND INTERSEXUALITÄT: MEDIZINISCHE, ETHISCHE, SOZIALE UND JURISTISCHE ASPEKTE*, *supra* note 48, at 31, 34–35.

transsexuals living in West Germany.⁶⁴ This would correspond to 9000 to 12,000 individuals in contemporary unified Germany.⁶⁵ Courts in the Federal Republic of Germany had 1422 gender-recognition cases under the Transsexual Law between 1981 and 1990⁶⁶ representing 1199 persons.⁶⁷ The male-to-female cases of gender recognition predominated by a ratio of 2.3:1.⁶⁸ The average age of applicants was thirty-three, which may have been artificially high,⁶⁹ because the Transsexual Law initially required applicants to be twenty-five-years old⁷⁰ before their new gender could be recognized.⁷¹ Interestingly, some courts simply ignored the age requirement even before the Federal Constitutional Court struck it down.⁷² On the other hand, there were only six cases of “retransformation,” reversion to the original legal gender, during this period.⁷³

B. German Court Cases Granting and Expanding Transsexual Rights

The Transsexual Law resulted from a Federal Constitutional Court decision in 1978.⁷⁴ The Constitutional Court reviewed a petition for

64. Plenarprotokoll (Plenary Protocol) Deutscher Bundestag 8/230 18683, 18687 (July 4, 1980).

65. This figure is an extrapolation from the government’s earlier estimate. The Federal Statistical Office does not maintain statistics on the number of transsexuals in Germany nor on the number of gender-reassignment applications. E-mail from Meike Kaspari, Statistician, German Federal Statistical Office [Statistisches Bundesamt], to author (Nov. 14, 2008, 04:18 CST) (on file with author). An inquiry with the Ministry for Health [Bundesministerium für Gesundheit] has gone unanswered.

66. No studies addressing the subsequent period exist, and the government does not keep statistics. *Id.*

67. Weitze & Osburg, *supra* note 41.

68. *Id.*

69. Transsexuals generally know early in life that they do not identify with the gender assigned to them. In many cases, however, individuals do not or cannot change their status until later dates. See Loree Cook-Daniels, *Trans Aging*, in *LESBIAN, GAY, BISEXUAL, AND TRANSGENDER AGING: RESEARCH AND CLINICAL PERSPECTIVES* 20, 22–23 (Douglas Kimmel, Tara Rose, & Steven David, eds., 2006).

70. The law required applicants for the “Minor Solution” to be twenty-five-years old, but the Federal Constitutional Court held that the age requirement does not apply to the “Major Solution” because the medical operation required would in effect place the decisions in the hands of treating doctors, rather than with the patient. *Entscheidungen des Bundesverfassungsgerichts [BVerfGE] [Federal Constitutional Court] 1 BvR 938/81. See also I. GG Art 1, 2 I, 3 I; TranssexuellenG §§ 1 I Nr. 3, 8 I Nr. 1 (Keine starre Altersgrenze für Personenstandsänderung eines Transsexuellen)*, in *NEUE JURISTISCHE WOCHENSCHRIFT* 2061, 2061 (1982).

71. Weitze & Osburg, *supra* note 41.

72. *Id.* The court decision striking down the age requirement receives more attention in Part B of the Section.

73. *Id.*

74. *Entscheidungen des Bundesverfassungsgerichts [BVerfGE] [Federal Constitutional Court] Oct. 11, 1978, docket no. 1 BvR 16/72, at juris online/Rechtsprechung.*

recognition of a new gender brought by a man who had undergone hormone therapy and surgery and sought to be recognized as a woman.⁷⁵ The petitioner sought to have the new gender recognized to alleviate employment-related problems in his (her) work as a nurse.⁷⁶ The decision rested primarily on constitutional grounds under the right to individuality in Article 1.⁷⁷ The court held that recognition of a sex change operation would not conflict with social mores as long as it was “medically indicated.”⁷⁸ Since the enactment of the law, a number of court cases have led to expansion of transsexual rights on constitutional grounds. For example, the Federal Constitutional Court concluded that the law must apply without discrimination to both heterosexual and homosexual transsexuals.⁷⁹ The court also eliminated the requirement that petitioners for gender recognition be at least twenty-five-years old as unjustified unequal treatment of citizens under Article 3 of the Basic Law.⁸⁰ Transsexuality is recognized as a medical condition, and as a result, transsexuals now receive medical coverage for operations and related treatment.⁸¹ In addition, the court has expanded the application of the law to non-German nationals with a specified extended residency status in Germany.⁸²

C. Legislative Intent in Response to Constitutional Court Decisions

The Transsexual Law was designed to address the “social hardships” that transsexuals in Germany had endured as a result of their gender.⁸³ Legislators

75. *Id.*

76. *Id.*

77. I. GG Art. 1, 2 I; PStG §§ 30, 46, 46a, 47 I (*Änderung des Geschlechtseintrags im Geburtenbuch bei Transsexuellen*), in NEUE JURISTISCHE WOCHENSCHRIFT, *supra* note 70, at 595, 595.

78. Entscheidungen des Bundesverfassungsgerichts [BVerfGE] [Federal Constitutional Court] Oct. 11, 1978, docket no. 1 BvR 16/72.

79. Entscheidungen des Bundesverfassungsgerichts [BVerfGE] [Federal Constitutional Court] Dec. 6, 2005, 1 Bundesverfassungsgericht [BVL] 3/03, *available at* jurisonline/Rechtsprechung (holding that a homosexual transsexual who had had his name changed to a female first name was allowed to retain the name under the “minor solution” of the Transsexual Law after entering into a marriage with a woman).

80. Entscheidungen des Bundesverfassungsgerichts [BVerfGE] [Federal Constitutional Court] Mar. 16, 1982, docket no. 1 BvR 938/81 at jurisonline/Rechtsprechung.

81. Landessozialgericht [LSG Stuttgart] Nov. 27 1981, docket no. L 4 Kr 483/80.

82. Entscheidungen des Bundesverfassungsgerichts [BVerfGE] [Federal Constitutional Court] July 18, 2006, 1 Bundesverfassungsgericht [BVL] 1/04 (holding in separate, combined cases that a Thai man and an Ethiopian woman could have their new gender recognized in Germany when their home countries would not allow such recognition). *See Transsexuelle erhalten mehr Rechte*, SÜDDEUTSCHE ZEITUNG, Nov. 8, 2006, at 7, *available at* 2006 WLNR 19336709.

83. Friedemann Pfäfflin, *supra* note 37, at 191.

sought to achieve “lasting harmony of soul and body and conflict-free integration in society” by allowing legal recognition of the new gender, departing from the traditional “immutability” of sex.⁸⁴ Legislators had to address the issue in light of the Federal Constitutional Court’s decision; but they also wanted to avoid making it “too easy” for transsexuals by removing “too many obstacles.”⁸⁵ The Bundestag and Bundesrat had differing views on the law, which eventually took on the contours envisioned by the Bundesrat.⁸⁶ The Bundestag argued that the marriage of a transsexual seeking recognition of a new gender would not need to be dissolved in advance, in order to avoid unnecessary costs.⁸⁷ Because the process of gender recognition would require a significant amount of time and might not be successful, it was thought to be risky to allow a married person to enter into the proceedings for gender recognition, and require a divorce in advance, without knowing the result of the gender status decision.⁸⁸ The Bundesrat, on the other hand, concentrated on the effect of the divorce on the other partner in the marriage.⁸⁹ A divorce in advance would allow the marriage partner to avoid the proceedings involved in the recognition of the former spouse’s new gender.⁹⁰ This prior separation was believed both to spare the spouse and allow the transsexual partner to resolve his “highly personal” matter unencumbered.⁹¹ This Bundesrat provision requiring a petitioner to be single became encoded in the “Major Solution” of the Transsexual Law, to be discussed in greater detail below.⁹²

D. Structure of the Law

The Transsexual Law includes two options for transsexuals seeking to have a new legal gender officially recognized. The “Minor Solution” involves changing the petitioner’s name without altering the person’s legal gender.⁹³ The “Major Solution” provision encompasses both a name change and legal recognition of the new gender.⁹⁴ This section discusses the two solutions in turn and compares the requirements and ramifications of both.

84. BTDrucks 8/2947 at 8.

85. Pfäfflin, *supra* note 37, at 196.

86. BVerfGE 10/05, § 13 (quoting Deutscher Bundestag, 8 Wp., Plenarprotokoll v. 4. Juli 1980, 230. Sitzung, S. 18683, 18687 f.).

87. *Id.* § 11 (quoting BTDrucks 8/2947 at 6).

88. *Id.* (quoting BTDrucks 8/2947 at 6).

89. *Id.* § 12 (quoting BTDrucks 8/2947 at 21).

90. *Id.*

91. BVerfGE 10/05, § 12.

92. *See infra* at Part I.D.2.

93. TSG §1.

94. *Id.* §8.

1. “Minor Solution”

Paragraph 1 of the Transsexual Law defines the “Minor Solution,” which allows a person to take a new name in recognition of the individual’s act of living as a person of the opposite gender.⁹⁵ This provision changes the name, but does not allow the new gender to be recognized in a legal sense.⁹⁶ A prerequisite for this option is living for three years under the new gender.⁹⁷ The court must also determine that the individual will not change his/her feeling of belonging to the respective other gender.⁹⁸ Finally, the individual must be a German citizen or resident under the Basic Law and meet certain enumerated conditions listed in clause (3) of the paragraph.⁹⁹ The new gender (name) is recognized only by way of a court decision, which requires opinions from two medical experts.¹⁰⁰ An individual can move to have the name change reversed.¹⁰¹ The name change can also be reversed involuntarily in certain circumstances, such as if the individual has a child more than three hundred days after the name change becomes official, or if the individual marries again.¹⁰² The minor solution becomes automatically invalid if the petitioner enters into a marriage following the recognition of the new name.¹⁰³

2. “Major Solution”

The “Major Solution” allows an individual who has undergone gender-reassignment surgery to have his or her new gender recognized legally.¹⁰⁴ This option includes all of the requirements of the “Minor Solution,” including the three-year period of living in the new gender.¹⁰⁵ The “Major Solution” also adds three additional provisions. First, the individual may not be married.¹⁰⁶ Second, the individual must be “permanently incapable of reproducing.”¹⁰⁷ Finally, the individual must have had surgery to achieve all of the outward

95. *Id.* § 1(1).

96. *Id.* §1.

97. *Id.*

98. TSG §1(2).

99. *Id.* §1(3).

100. *Id.* § 4(3).

101. *Id.* § 6.

102. *Id.* § 7.

103. TSG § 7(1)(3). The Federal Constitutional Court has ruled this provision unconstitutional in a separate decision, but it is unclear how the law will respond. See Peter A. Windel, *Transidentität und Recht—ein Überblick, in TRANSSEXUALITÄT UND INTERSEXUALITÄT: MEDIZINISCHE, ETHISCHE, SOZIALE UND JURISTISCHE ASPEKTE*, *supra* note 48, at 67, 77.

104. TSG § 8.

105. *Id.* § 8(1)(1).

106. *Id.* § 8(1)(2).

107. *Id.* § 8(1)(3).

characteristics of the new gender.¹⁰⁸ Unlike with the “Minor Solution,” there is no provision for retracting the decision recognizing the individual’s new gender, because gender reassignment surgery¹⁰⁹ is irreversible.¹¹⁰ Because marriage is not allowed, there is no provision to invalidate the new gender recognition in the “Major Solution” of the Transsexual Law.¹¹¹

II. OVERVIEW OF THE CASE

This section details the facts of the case and the court’s rationale. The section concludes with an overview of the court’s suggestions for remedying the constitutional defect in the current version of the Transsexual Law.

A. Facts

In May 2008, Germany’s Federal Constitutional Court declared the country’s Transsexual Law¹¹² unconstitutional.¹¹³ The petitioner¹¹⁴ was born in 1929, and after fifty-six years of marriage (including three children), he decided to undergo a gender reassignment surgery in order to live as a woman.¹¹⁵ The petitioner stated unequivocally that he “had been a woman in a man’s body since birth.”¹¹⁶ In accordance with relevant German law requiring the use of a gender-appropriate name in order to have the new gender recognized,¹¹⁷ the petitioner had been using a female first name since 2001.¹¹⁸ After receiving the requisite course of hormone therapy, the petitioner’s gender reassignment surgery took place in 2002.¹¹⁹

108. *Id.* § 8(1)(4).

109. This note follows organizations such as the Transgender Law Center in using the term “gender reassignment surgery” to reflect the goal of changing the gender category to which a person belongs, thus addressing the social construct of gender. *See, e.g., Medi-Cal and Gender Reassignment Procedures*, TRANSGENDER LAW CENTER (May 2002), <http://transgenderlawcenter.org/pdf/MediCal%20Fact%20Sheet.pdf>.

110. Sigusch, *supra* note 8, at 2745.

111. *See* Windel, *supra* note 103, at 76.

112. Gesetz über die Änderung der Vornamen und die Feststellung der Geschlechtszugehörigkeit in besonderen Fällen (Transsexuellengesetz), (September 10, 1980), BGBI.I at 1654.

113. Entscheidungen des Bundesverfassungsgerichts [BVerfGE] [Federal Constitutional Court] May 27, 2008, 1 Bundesverfassungsgericht [BVL] 10/05.

114. “Petitioner” refers to the person seeking recognition of a new gender in this discussion, rather than the petitioner to the Federal Constitutional Court, which was the Berlin district of Schöneberg. *See infra* note 128–30 and accompanying text.

115. BVerfGE 10/05, § 15.

116. *Id.* § 16.

117. TSG § 1.

118. BVerfGE 10/05, § 15.

119. *Id.*

Following surgery, the petitioner sought to be recognized as a woman under the “Major Solution” provision of the Transsexual Law.¹²⁰ Under the Transsexual Law, Germany recognizes the new gender only if the individual is not married.¹²¹ The married couple here wished to remain married, citing their long history and the petitioner’s psychological limitations, which resulted from his abuse while living as a transsexual during the Nazi era.¹²² The petitioner argued that fear and panic attacks would prevent the petitioner from living apart from his wife¹²³ for three years, as required under German divorce law.¹²⁴ Financial limitations also allegedly prevented the couple from divorcing, because they could afford neither to pay for the proceedings nor to maintain two separate households, as required under German law.¹²⁵ Finally, German divorce law requires that a marriage be “damaged,” and here the couple did not agree that this condition could be met, viewing a divorce as an “overwhelming insult” in light of their over fifty-year common history.¹²⁶ The petitioner was seventy-two-years old at the beginning of the proceedings in 2002 and seventy-nine at their resolution in 2008.¹²⁷

The desire to remain married set up a conflict between the petitioner’s constitutionally guaranteed right to a self-determined gender identity and the special protection guaranteed to marriage under a different constitutional provision. The petitioner requested recognition of his new gender under the Transsexual Law at the local administrative office.¹²⁸ In response to the petitioner’s request to remain married, the administrative office of Schöneberg, a municipal district of the city of Berlin,¹²⁹ sought review of the case by the Federal Constitutional Court in August 2005.¹³⁰ The court’s decision came down on May 27, 2008¹³¹ and received wide media attention.¹³² But the legal

120. *Id.*

121. TSG § 8(1)(2).

122. BVerfGE 10/05, § 16.

123. *Id.*

124. Bürgerliches Gesetzbuch [BGB][Civil Code] § 1566(2).

125. BVerfGE 10/05, § 16.

126. *Id.*

127. Sigrid Aversch, *Ehe von Transsexuellen bleibt bestehen: Kein Scheidungszwang nach Geschlechtsumwandlung*, BERLINER ZEITUNG, July 24, 2008, at 6, available at 2008 WLNR 13752369.

128. BVerfGE 10/05, § 15.

129. Berlin is a so-called “Stadt-Staat,” a city that is simultaneously a state. WULF KOEPKE, *DIE DEUTSCHEN* 179 (4th ed. 1993). This action arose in the district administrative office in Schöneberg, which was acting on behalf of the state of Berlin (“Land Berlin”). BVerfGE 10/05 at Leitsatz. The “Landgericht” of the district in which the petitioner lives has jurisdiction over TSG decisions. TSG § 2.

130. BVerfGE 10/05 at Leitsatz.

131. *Id.*

community has not yet discussed the matter in detail, nor has the German parliament decided how to resolve the constitutional dispute.¹³³

B. *The Court's Rationale*

The court found the Transsexual Law unconstitutional, because the law forced individuals to choose between protected fundamental rights.¹³⁴ The constitution guarantees¹³⁵ that marriage is protected as a basic right,¹³⁶ but the constitution also guarantees individual integrity as a protected fundamental right.¹³⁷ The court found the law constitutional except for its marriage provision and declared unconstitutional only TSG § 8(1)(2), the subparagraph requiring that a person be unmarried in order to have his/her new gender recognized.¹³⁸ In reaching the decision, the court considered the law itself, the German Basic Law, and several amicus briefs.¹³⁹ The decision examined whether the law was justified and proportional.¹⁴⁰ For purposes of the Constitutional Court's analysis, a law is proportional if it is suitable, appropriate, and necessary.¹⁴¹ The court's analysis of these aspects will be discussed in turn.

German courts view a law as "justified" if it is "borne by a legitimate goal."¹⁴² The court explained that legislators must recognize the "essential structural principles" of marriage, which despite societal change includes only the union of a man and a woman based on free will under the aegis of the state.¹⁴³ The court agreed with the Ministry of the Interior's *amicus* brief¹⁴⁴ on the definition of marriage, concluding that because the Basic Law operates under this understanding of marriage, the court must interpret the law

132. See, e.g., Averesch, *supra* note 127, at 6; Stefan Geiger, *Gericht stärkt Rechte von Transsexuellen: Karlsruhe erklärt den bisherigen Zwang zur Ehescheidung für verfassungswidrig*, STUTTGARTER ZEITUNG, July 24, 2008, at 18, available at 2008 WL 13750352; *Es gilt die Ehe*, SÜDDEUTSCHE ZEITUNG, July 24, 2008 at 6, available at 2008 WLNR 13741552; *Gift transsexuell får kallas kvinna*, SVENSKA DAGBLADET, July 24, 2008, available at http://www.svd.se/nyheter/utrikes/artikel_1485515.svd.

133. The Bundesrat has not reformed the Transsexual Law, but has officially decided not to take action on the matter. BTDrucks 579/09.

134. BVerfGE 10/05, § 36.

135. See *infra* Part IV (for a discussion of constitutional rights guarantees).

136. Grundgesetz für die Bundesrepublik Deutschland [GG] [Federal Constitution] May 23, 1949. Art. 6, ¶ 1.

137. GG Art. 2, ¶ 1.

138. BVerfGE 10/05, § 36.

139. *Id.* § 22.

140. *Id.* §§ 40, 46.

141. *Id.*

142. *Id.* § 42.

143. BVerfGE 10/05, § 45.

144. *Id.* § 23.

accordingly.¹⁴⁵ The law must balance the “special protection” of marriage and “self-determined gender identity” provided by the Basic Law with the legal construction of marriage provided by German law and societal norms.¹⁴⁶ In the contemporary legal context and under current law, the court concluded that it is a legitimate legislative goal to prevent the combination of two persons of the same gender in marriage under the Transsexual Law.¹⁴⁷ The court closed its initial discussion of justification with the cautionary note that even if the Transsexual Law is justified, it must also be proportional “in its formulation.”¹⁴⁸

The court’s opinion does not discuss proportionality explicitly, but concludes that the Transsexual Law is proportional in a broad sense.¹⁴⁹ The court discussed proportionality of the law in both its broad and narrow sense in determining whether the law was suitable, appropriate, and necessary.¹⁵⁰ The court found the Transsexual Law was suitable to prevent marriages that give the impression that two people of the same gender are married.¹⁵¹ The court also found that the Transsexual Law was appropriate to meet the goal of limiting marriage to a man and a woman.¹⁵² In its discussion of appropriateness, the court also addressed the “Minor Solution” of the Transsexual Law, which allows for a person to live as a member of the new gender with a suitable name without legal recognition of the new gender itself.¹⁵³ The court recognized that the situation arising out of the “Minor Solution” provisions of the Transsexual Law gives “the false impression” that same-sex pairs can enter into marriage.¹⁵⁴ Nevertheless, the court concluded that the marriage dissolution requirement is appropriate for achieving the legitimate legislative goal of preventing marriage between same-sex partners.¹⁵⁵ The court’s analysis then turned from appropriateness to necessity, a requirement the court also deemed satisfied.¹⁵⁶

After examining the goals of the law, the court turned to its effects. Here the court found that TSG § 8(2) is “disproportional in a narrower sense.”¹⁵⁷ The court also rejected an alternative form of the law that the original

145. *Id.*

146. *Id.*

147. *Id.*

148. BVerfGE 10/05, § 42.

149. *Id.* § 49.

150. *Id.* § 46.

151. *Id.*

152. *Id.* § 46.

153. BVerfGE 10/05, § 47.

154. *Id.* § 46.

155. *Id.* § 47.

156. *Id.* § 46.

157. *Id.* § 49.

legislation considered to be sufficiently mild toward the petitioner to justify accepting that version of the law.¹⁵⁸ This earlier alternative was to dissolve the marriage automatically following the recognition of the new gender.¹⁵⁹ The court deemed that solution no better because it, too, failed to address the deprivation of fundamental rights.¹⁶⁰ As the court explained, individuals who enter into marriage through “legally directed” means “enjoy the protection of Art. 6 (1) of the Basic Law without limitation.”¹⁶¹ The court concluded that it would be too much to ask to force a transsexual to give up his spouse, with whom he is “bound” and “wishes to remain together,” without allowing him the opportunity to continue the relationship in another, equally secure form.¹⁶²

At the very least, marriage dissolution would mean that the former spouses would have to live apart in order to comply with the law that requires a three-year separation before a divorce is complete.¹⁶³ This requirement serves to establish that the marriage has truly “failed.”¹⁶⁴ In the case of transsexuals, however, the end of the marriage has nothing to do with the failure of the marriage, but rather with the avoidance of same-sex marriages.¹⁶⁵ Additionally, agreeing with the Federation of Lesbians and Gays,¹⁶⁶ the court emphasized that the Transsexual Law’s requirement that the petitioner be unmarried affects not only the transsexual petitioner, but also the spouse.¹⁶⁷

A forced divorce would deprive the existing marriage of its constitutionally provided protection.¹⁶⁸ Because marriage falls under the protection of Article 6 of the Basic Law, the right to the protection of the marriage is “unlimited.”¹⁶⁹ The court reasoned that when the spouses do not agree to forgo the protection of their marriage, the state cannot force them to do so, because such a requirement would violate fundamental rights.¹⁷⁰

C. Court Suggestions for Resolving the Conflict

In its decision, the court outlined two strategies the German parliament could implement to meet constitutional requirements. First, the government

158. BVerfGE 10/05, § 49.

159. *Id.*

160. *Id.*

161. *Id.* § 58.

162. *Id.* § 49.

163. BGB § 1566.

164. BVerfGE 10/05, § 54.

165. *Id.* § 55.

166. *Id.* § 29. In the original German this organization is the “Lesben- und Schwulenverband.”

167. *Id.* § 56.

168. *Id.* § 57.

169. BVerfGE 10/05, § 58.

170. *Id.* § 59.

could allow the transsexual's marriage to continue in the same legal form—that is, parliament could drop the unmarried requirement from the transsexual law.¹⁷¹ The court deemed this option feasible because of “the minimal number” of people in similar situations.¹⁷² Alternatively, the government could allow the transsexual couple to continue the relationship in a life partnership, provided that the new partnership retain all the rights the marriage had offered.¹⁷³ Until the legislators decide which path to pursue, the law will not apply, and the couple in this case will remain married.¹⁷⁴ Effectively, a *de facto* same-sex marriage exists on an interim basis, because the petitioner is now living as a woman.¹⁷⁵ The court gave the government a grace period until August 1, 2009 to enact a new law addressing the subject.¹⁷⁶ Neither new legislation nor discussion in official parliament sessions has taken place as of January 13, 2010, and it is unclear when the legislature will address the law.

III. THE INTERACTION OF GERMAN AND EUROPEAN UNION LAW

The Transsexual Law is a German federal law applicable exclusively within Germany. Nevertheless, in addition to German law and the German constitution, the European Union Constitution and European Convention on Human Rights determine some limits of the law's application and ensure that certain minimum criteria are met. This section provides an overview of national laws from several European countries to place Germany's law in context. The analysis then shifts to the interaction of EU law with German law to demonstrate that Germany's law must acknowledge certain individual rights in order to avoid running afoul of European constitutional principles.

A. Survey of European Transsexual Laws

A number of strategies for addressing the legal gender of transsexuals exist.¹⁷⁷ Germany allows for legal gender changes and recognizes the new

171. *Id.* § 72.

172. *Id.*

173. *Id.* § 68.

174. BVerfGE 10/05, § 74.

175. *Id.*

176. *Id.* § 73.

177. An overview of the six main possibilities places the German solution in context and illustrates some of the alternatives that the German legislature could have considered when creating the Transsexual Law in 1980. First, the government could forbid sex change operations and declare them punishable as grievous bodily harm. Friedemann Pfäfflin, *supra* note 37, at 192. This option does not allow for recognition of the new gender. *Id.* Second, sex reassignment surgery can be forbidden, which also precludes the recognition of the new gender. *Id.* Third, sex change operations can be permitted without recognizing the new gender. *Id.* Fourth, sex change operations may be permitted and the new gender may be recognized. *Id.* The legal recognition of the new gender may vary by individual case or by local jurisdiction. *Id.* Fifth, uniform legal

gender fully under current law.¹⁷⁸ This option is a more generous grant of legal rights and certainty than in most countries.¹⁷⁹ In Europe, the trend has been toward increasing recognition of the post-operative gender of transsexuals.¹⁸⁰ Sweden enacted the first law allowing for legal recognition of a new gender in 1972, followed by varying degrees of recognition in Germany (1981), Italy (1982), the Netherlands (1985), and Turkey (1988).¹⁸¹ Recognition procedures vary greatly, from the systematic methods of Germany and Austria to the lax case-by-case administration in countries like the former Yugoslavia (now the independent nations Serbia and Montenegro).¹⁸² At least thirty-three European countries now recognize reassignment of gender, and at least twenty-two countries permit transsexuals to marry.¹⁸³ But recognition of a marriage legal in one country may not apply in other EU countries or outside the EU.¹⁸⁴ Many countries have enacted new laws in the area in recent years, revising and broadening provisions on transsexuals to reflect societal trends.¹⁸⁵ German legislators actively reviewed existing European law and other foreign legislation when drafting the Transsexual Law in 1980.¹⁸⁶ However, the law

provisions allow for the sex change operation and recognition of the new gender. *Id.* Finally, a country may not officially acknowledge that transsexualism exists, thus making no mention of the issue in its law. *Id.*

178. See TSG § 8.

179. See Friedemann Pfäfflin, *supra* note 37, at 192 (noting the numerous harsher alternatives).

180. Frédérique Granet, *Consolidated Report on Transsexualism in Europe*, in TRANSSEXUALISM IN EUROPE, *supra* note 42, at 9, 17.

181. Weitze & Osburg, *supra* note 41.

182. See generally Marija Draskic, *Yugoslavia: The Medico-Legal Issue of Transsexuality*, 31 CAL. W. INT'L L.J. 115, 121–25 (2000) (describing Yugoslavian law pertaining to transsexuals). See also Svetlana Vujovic et al., *Transsexualism in Serbia: A Twenty-Year Follow-Up Study*, 6 J. SEXUAL MED. 1018, 1019 (2008).

183. Helen G. Berrigan, *Transsexual Marriage: A Trans-Atlantic Judicial Dialogue*, 12 LAW & SEXUALITY: REV. LESBIAN, GAY, BISEXUAL & TRANSGENDER LEGAL ISSUES 87, 109 (2003). See generally, European TransGender Network, “Country Survey: Civil Status” and “Country Survey: Right of Name” (2005), available at <http://tgeu.net> under “Documents” (surveying the requirements for right of name and civil status in various European countries).

184. See generally Barbara E. Graham-Siegenthaler, *Principles of Marriage Recognition Applied to Same-Sex Marriage Recognition in Switzerland and Europe*, 32 CREIGHTON L. REV. 121 (1998) (comparing the marriage laws of various European countries using Switzerland as a reference point).

185. Germany is an example that certainly applies here, as this note illustrates. See also María Elena Lauroba Lacasa, *El derecho de familia en España, hoy: del matrimonio indisoluble al matrimonio entre personas del mismo sexo*, 75 REV. JUR. U.P.R. 935, 1001–05 (2006) (detailing key Spanish legislation that has broadened its provisions regarding transsexuals in accordance to cultural trends throughout Europe).

186. BTDrucks 8/2947 at 9–11.

has not been revised in a major way since then, even as laws across Europe have changed.¹⁸⁷

B. EU Law and Its Interaction with German Law

EU law places limits on German federal law by way of human rights guarantees. States acceding to EU membership, including Germany, agreed to the fundamental guarantees of personal liberty included in the EU constitution.¹⁸⁸ The EU constitution provides that neither segregation nor limitation of “individual liberty” may exist in member countries.¹⁸⁹ Germany’s Federal Constitutional Court has also recognized that the protection of basic rights has assumed a fundamental position no longer subject to review under national standards.¹⁹⁰ The European Convention for the Protection of Human Rights and Fundamental Freedoms of 1950 (“Convention”), which can be viewed as an “accessory constitution,” established the minimum standards for basic rights.¹⁹¹ In the EU, the Convention guarantees as fundamental the rights to family life and individual integrity.¹⁹² Article 8 of the Convention states that “everyone has the right to respect for his private and family life,” and that “[t]here shall be no interference by a public authority with the exercise of this right.”¹⁹³ Article 12 declares, “[M]en and women . . . have the right to marry and found a family, according to national laws governing the exercise of this right.”¹⁹⁴ The restriction included in Article 12—“according to national laws”—proves critical in this context. National law governs marriage and family law; but human rights can be expanded on the basis of European constitutional guarantees.¹⁹⁵ When Germany enacted the Transsexual Law in

187. *See generally* TSG.

188. Armin von Bogdandy, *Constitutional Principles for Europe*, in *RECENT TRENDS IN GERMAN AND EUROPEAN CONSTITUTIONAL LAW: GERMAN REPORTS PRESENTED TO THE XVIIITH INTERNATIONAL CONGRESS ON COMPARATIVE LAW, UTRECHT, 16 TO 22 JULY 2006*, at 1, 9 (Eibe Riedel & Rüdiger Wolfrum eds., 2006).

189. *Id.* at 8–9.

190. *See* Ralph Alexander Lorz, *Emergence of European Constitutional Law*, in *RECENT TRENDS IN GERMAN AND EUROPEAN CONSTITUTIONAL LAW: GERMAN REPORTS PRESENTED TO THE XVIIIITH INTERNATIONAL CONGRESS ON COMPARATIVE LAW, UTRECHT, 16 TO 22 JULY 2006*, at 37, 50 (Eibe Riedel & Rüdiger Wolfrum eds., 2006).

191. *Id.* at 56 (explaining that an “accessory constitution . . . is and remains a treaty under public international law but a special one: because it is able to have a direct impact on the constitutional orders of its member states”).

192. *Convention for the Protection of Human Rights and Fundamental Freedoms* (1950), in *THE EUROPEAN CONVENTION ON HUMAN RIGHTS* 30, 33 (1975).

193. *Id.* There are some exceptions to this right, such as protection of health or morals. *Id.*

194. *Id.* at 34.

195. Lorz, *supra* note 190, at 56.

1980, for example, legislators referred to a 1979 European Commission on Human Rights.¹⁹⁶

EU efforts to draft laws on transsexual rights provide one avenue for addressing the legal status of transsexuals.¹⁹⁷ For example, the International Commission on Civil Status¹⁹⁸ attempted to create European law in 1999 with the “Convention of the International Commission on Civil Status on the Recognition of Sex Reassignment Decisions and Explanatory Report Adopted by the Lisbon General Assembly on 16 September 1999.”¹⁹⁹ The Commission expressed the desire to “foster the recognition on their territory of decisions recording a person’s sex reassignment, taken in another contracting state.”²⁰⁰ The Commission explicitly left the laws regarding civil status and consequences of the recognition of a new gender to the member states and only sought to expand recognition among member states of the new status granted in the home country.²⁰¹ The recognition provisions take effect in member states only upon ratification by member states.²⁰² Germany has not yet ratified the convention.²⁰³ Such limited efforts at achieving a modicum of recognition across borders have done little to expand fundamental rights for transsexuals, even where they were ratified.²⁰⁴

European court decisions have proven more effective in forcing expansions of rights in many member states under national rights laws in a transition from sex-based to gender-based legal classifications.²⁰⁵ The 1970 United Kingdom case *Corbett v. Corbett* illustrates the older paradigm against which later cases reacted.²⁰⁶ In *Corbett*, a married male-to-female transsexual sought divorce

196. BTDrucks 8/4120 at 13.

197. See generally *Convention (N° 29) of the International Commission on Civil Status (ICCS) on the Recognition of Sex Reassignment Decisions and Explanatory Report Adopted by the Lisbon General Assembly on 16 September 1999*, in *TRANSSEXUALISM IN EUROPE*, *supra* note 42, at 67 [hereinafter *Convention*] (exemplifying this sort of drafting effort).

198. “The ICCS is an intergovernmental organization comprising the following states: Austria, Belgium, Croatia, France, Germany, Hungary, Italy, Luxembourg, the Netherlands, Poland, Portugal, Spain, Switzerland, Turkey, the United Kingdom.” Granet, *supra* note 180, at 9 n.1.

199. See generally *Convention*, *supra* note 197.

200. *Id.* at 68.

201. *Id.* at 73.

202. The ratification is required under Article 5. *Id.* at 69.

203. Commission Internationale de l’Etat Civil, Liste des conventions CIEC, <http://web.lerelaisinternet.com/CIECSITE/ListeConventions.htm> (last visited March 20, 2010) (Convention listed in French original and unofficial English translation. Under Convention 29, select link leading to German translation noting the provision has not been adopted).

204. See generally *Convention*, *supra* note 197.

205. Berrigan, *supra* note 183, at 87–108 (recounting the case law that explains the development of European law transsexual rights from an exclusionary medical definition to the current broad grant of social rights).

206. *Id.* at 91.

from her husband, who knew she was a transsexual and nevertheless had married her.²⁰⁷ The English court held that the marriage was void because the wife had been born as a male and sex was determined at birth.²⁰⁸ The court explained that the wife was a male because she had male chromosomal cells and that her outward appearance was a mere “pastiche of femininity.”²⁰⁹ The court found that biological sex is fixed at birth and cannot be changed.²¹⁰ *Corbett* dominated the legal discourse²¹¹ on transsexuality until 2002,²¹² when the *I v. United Kingdom* court “dismissed *Corbett* from the dialogue.”²¹³ The *I* court held that transsexuals had the right to have their new gender recognized under Art. 8 and the right to marry under Art. 12 of the Convention.²¹⁴ The court cited “major social changes” in its holding, brought about by increased acceptance of gender identity disorders in the medical and scientific community.²¹⁵ The court felt that society should “tolerate a certain inconvenience to enable individuals to live in dignity and worth in accordance with the sexual identity chosen by them at great personal cost.”²¹⁶

Although their early grants were limited in scope, European courts long ago began extending rights to transsexuals, deciding as early as 1976 that transsexuals could rely on Directive 76/207 for its protections against gender discrimination in the employment context.²¹⁷ Such positive protection of rights did not necessarily translate into broad interpretations of secondary law,

207. *Corbett v. Corbett*, [1971] P. 83, 88 (H.L.).

208. *Id.* at 106.

209. *Id.* at 104.

210. *Id.*

211. *See Rees v. The United Kingdom*, App. No. 9532/81, 9 Eur. H.R. Rep. 56 (1986) available at <http://www.echr.coe.int/eng> (expanding transsexual rights by allowing that courts would need to interpret individual rights “in the light of current circumstances”). Following *Rees*, transsexuals could still be denied recognition of their new gender under Art. 8 protection of individual integrity. *Id.* at 42. But the court opened the door to further change in its twelve-to-three decision. *Id.* at 51. *See also Cossey v. United Kingdom*, App. No. 10843/84, 8 Eur. H.R. Rep. 45, 40, 48 (1990) (expanding on the *Corbett* position again by holding ten-to-eight that transsexuals did not have the right to have their new gender recognized under Art. 8). The court in *Cossey* noted “the need for appropriate legal measures concerning transsexuals should be kept under review. . . .” *Id.* at 40.

212. Berrigan, *supra* note 183, at 91.

213. *Id.* at 107–08 (citing *I. v. United Kingdom*, App. No. 25680/94 (2002), available at <http://www.echr.coe.int/eng>).

214. *I v. United Kingdom*, at 73, 83–84.

215. *Id.* at 80.

216. *Id.* at 71.

217. Council Directive 76/207, 1976 O.J. (L. 39/40) 5 (EC). *See also* Heather Lardy and Angus Campbell, *Discrimination against Transsexuals in Employment*, 21(5) EUR. L. REV. 412, 412 (1996) (discussing a case where the court considered whether dismissal of a transsexual for a reason related to his or her reassignment).

however.²¹⁸ England, for example, was reluctant to extend health benefits to persons seeking gender reassignment surgery.²¹⁹ This view was rejected in *Van Kück*, though, when the European Court of Human Rights held that health insurance providers were required to pay for gender reassignment surgery as a treatment for a medical condition.²²⁰ The court justified this conclusion on the basis of individual integrity rights under Art. 8 of the Convention.²²¹

In *Van Kück*, individual integrity was defined as the basic essential of self-determination,²²² and the court noted that the constitution created a positive duty to actively enforce this right.²²³ The court found that the right to “sexual self-determination” was one aspect of the petitioner’s right to respect for her private life.²²⁴ The court also found that a presumption existed that persons were justified in undergoing sex-change operations because they related to “one of the most intimate areas of private life”²²⁵

Recent European case law tends to be more receptive to transsexuals than to homosexuals in the marriage context, to the extent that national family law now explicitly addresses transsexuals.²²⁶ The traditional image of marriage as between one man and one woman dominated European jurisprudence on marriage rights until at least 2000.²²⁷ Since then, the European Court of Human Rights has found that denying transsexuals the right to marry a person of their former, pre-operative gender would violate the right to marry.²²⁸ Decisions granting broader rights to transsexuals than homosexuals could reflect the difficulty implicit in addressing a legal change in a context not adapted to such categorical changes, but it is more likely that this position arises from financial concerns.²²⁹ An internal EU consulting document

218. Liv Jaekel, *The Duty to Protect Fundamental Rights in the European Community*, 28(4) EUR. L. REV. 508, 516 (2003).

219. Lesley-Anne Barnes, *Gender Identity and Scottish Law: The Legal Response to Transsexuality*, 11(2) EDIN. L. REV. 162, 177 (2007) (citing *R. v. West Lancashire Health Auth.* ex p. A, D & G, [2000] 1 WLR 977).

220. *Van Kück v. Germany*, App. No. 35968/97 (2003) available at <http://www.echr.coe.int/eng>.

221. *Id.* at 88.

222. *Id.* at 73.

223. *Id.* at 71.

224. *Id.* at 78.

225. *Van Kück*, at 82.

226. Eugenia Caracciolo di Torella & Annick Masselot, *Under Construction: EU Family Law*, 29(1) EUR. L. REV. 32, 42 (2004).

227. See generally Emily Reid & Eugenia Caracciolo Di [sic] Torella, *The Changing Shape of the “European Family” and Fundamental Rights*, 27(1) EUR. L. REV. 80, 84 (2002) (providing an example of a court’s adherence to the traditional view of marriage in early 2001).

228. See, e.g., *Goodwin v. United Kingdom*, App. No. 28957/95, 35 Eur. H.R. Rep. 18, 48 (2002).

229. Di [sic] Torella & Masselot, *supra* note 226, at 42.

estimated that if it provided equal benefits to same-sex partners, the staffing costs for its employees alone would increase to € 1,537,000 for accommodation allowances with a general total of €4,491,000 on an annual basis.²³⁰ The equal treatment of transsexuals, in contrast, would have “limited financial implications.”²³¹

IV. GERMAN CONSTITUTIONAL GUARANTEES AND THE TRANSSEXUAL LAW

In addition to the rise of the EU constitution, events in both German and world history have led to several major breaks in the constitutional development of today’s Federal Republic of Germany. The end of World War II led to the formulation of the Basic Law (“Grundgesetz”), unified Germany’s current constitution, which was enacted in 1949 as a provisional document in anticipation of the unification of the separated German states.²³² The East German Constitution was adopted in 1949 as well, and the two documents governed concurrently until the two German states united in 1990.²³³ The constitutions set very different priorities, and a brief overview of them is necessary to explain the Basic Law and the constitutional principles in effect today. This section begins by examining the West German Basic Law, then moves to the East German Constitution, before concluding with a discussion of the constitution (“Basic Law”) in contemporary united Germany.

A. *German Constitutional Priorities in the Post-War Era*

Following World War II, Germany had to reconfigure its legal system as part of the de-Nazification of the country.²³⁴ This was complicated by the fact that the Western powers occupying the Federal Republic of Germany were pursuing different priorities than the Soviet-dominated German Democratic Republic, a fact reflected in the differing constitutions of these two countries.²³⁵ Specifically, in the area of human rights and individual liberties, West Germany offered broader protection of individual integrity.²³⁶ Because the two German states unified after the passing of the Transsexual Law in West Germany in 1980, a brief overview of the differences between the constitutions and the principles adopted following unification is necessary to gain a precise

230. *Id.*

231. *Id.*

232. SABINE MICHALOWSKI & LORNA WOODS, GERMAN CONSTITUTIONAL LAW: THE PROTECTION OF CIVIL LIBERTIES 5 (1999).

233. *Id.*

234. Marten Burkens, *The Federal Republic of Germany*, in CONSTITUTIONAL LAW OF 15 EU MEMBER STATES 307, 311–12 (Lucas Prakke & Constantijn Kortmann eds., 2004).

235. *Id.* at 312.

236. Inga Markovits, *Constitution Making After National Catastrophes: Germany in 1949 and 1990*, 49 WM. & MARY L. REV. 1307, 1311 (2008).

understanding of exactly what constitutional guarantees played a role here.²³⁷ This section reviews the constitutional guarantees of rights in both West and East Germany, and follows by analyzing the constitutional law issues resulting from the synthesis of those two states.

The state that later came to be known as West Germany adopted the “Basic Law,” its equivalent to a constitution, on May 23, 1949.²³⁸ The Basic Law drew heavily on experiences under National Socialist rule.²³⁹ In addition to many other atrocities, the Nazis had introduced legislation to criminalize and force the sterilization of certain groups, including transsexuals, who were deemed to be “damaging to the people.”²⁴⁰ This oppressive history led to the inclusion of strongly worded guarantees of fundamental rights in the new Basic Law, to be discussed in greater detail below.²⁴¹ Conservative predecessor laws on marriage and the subordinate role of women in Germany’s Civil Code may also have led in part to the strong sense of equality in the new Basic Law.²⁴²

Unlike in the West, “[d]uring the making of the first East German Constitution of 1949, the past seemed absent.”²⁴³ Communist East Germany viewed itself as a victim of Nazi atrocities and was more interested in transforming the future than addressing past wrongs.²⁴⁴ Nevertheless, the Constitution of 1949 guaranteed basic rights and even included a provision to protect the substance of the basic rights from apparent restriction by any law, including the constitution itself.²⁴⁵ As this protection of protections suggests, the Constitution of 1949 was more concerned with theoretical rights than actual application and protection of individual liberties.²⁴⁶ The Constitution of

237. *Id.* at 1343.

238. GG at Eingangsformel.

239. Blanca Rodríguez Ruiz & Ute Sacksofsky, *Gender in the German Constitution*, in *THE GENDER OF CONSTITUTIONAL JURISPRUDENCE* 149, 149 (Beverly Baines & Ruth Rubio-Marin eds., 2005).

240. STEPHEN WHITTLE, *RESPECT AND EQUALITY: TRANSSEXUAL AND TRANSGENDER RIGHTS*, 161, 161 n.1 (2002).

241. *Id.*

242. MARGARET BARBER CROSBY, *THE MAKING OF THE GERMAN CONSTITUTION: A SLOW REVOLUTION* 260–61 (2008).

243. Markovits, *supra* note 236, at 1314.

244. *Id.*

245. *Verfassung der Deutschen Demokratischen Republik* [Constitution of the German Democratic Republic] [GDR] October 7, 1949 Art. 49. *See also* Markovits, *supra* note 236, at 1318.

246. Markovits, *supra* note 236, at 1320–21.

1949 also guaranteed basic rights of gender equality for males and females²⁴⁷ and the protection of marriage.²⁴⁸

Following German reunification in 1990, the Basic Law was amended and adopted for use throughout the territory of the enlarged Federal Republic of Germany.²⁴⁹ Although some laws from East Germany took effect in united Germany, East Germany did not have legislation addressing recognition of new gender in transsexuals.²⁵⁰ This meant that the Transsexual Law and all related human rights provisions in the Basic Law were adopted throughout what was formerly East Germany.²⁵¹ Consequently, subsequent constitutional interpretations of the Transsexual Law need not refer to East German provisions on transsexual rights.

B. *Guarantees of Individual Civil Rights in Germany*

Under the German constitution, certain rights are non-derogable and cannot be changed by the legislature under any circumstances.²⁵² The constitution enumerates these rights in Article 79(3), which states that any restrictions on Articles 1-20 are “disallowed.”²⁵³ Articles 2 and 3, which provide for the protection of individual integrity and gender equality, are included in the protected provisions.²⁵⁴ Article 6, covering the protection of family and marriage rights, is also considered a non-derogable right.²⁵⁵ The rights to marriage and individual integrity came into conflict in the present case and this note discusses them in turn.

German family law expressed in the Basic Law and its understanding of marriage developed from Germanic tribal law positions on marital status.²⁵⁶ These earlier views tended to create a form of concubinate, which, perhaps

247. GDR Art. 7. This right was later incorporated into the Constitution of April 6, 1968 in Art. 20(2).

248. GDR Art. 30. This right was also later incorporated into the Constitution of April 6, 1968 at Art. 38.

249. Markovits, *supra* note 236, at 1333.

250. *See* Burkens, *supra* note 234, at 314 (discussing the application of the West German Constitution to East Germany following unification and the grace period during which East German departures from newly imposed fundamental rights would continue to be tolerated).

251. *See id.* (indicating that after the end of the grace period on December 31, 1995, the Basic Law, and its attendant freedoms, would preempt any conflicting former East German laws).

252. HELEN IRVING, GENDER AND THE CONSTITUTION: EQUITY AND AGENCY IN COMPARATIVE CONSTITUTIONAL DESIGN 180 (2008).

253. Grundgesetz für die Bundesrepublik Deutschland [GG] [Federal Constitution], May 23, 1949, as amended, art. 79(3).

254. *Id.* arts. 2, 3.

255. *Id.* art. 6.

256. Eva Marie von Münch, *Rechtsprobleme nichtehelicher Lebensgemeinschaften*, in FRAUEN IM RECHT 25, 37–38 (Ulrich Battis & Ulrike Schultz eds., 1990).

unsurprisingly, developed primarily on the basis of property laws.²⁵⁷ Modern law added religious characteristics to the mix, recognizing the role of Christianity in German society.²⁵⁸ Marriage under church auspices was legitimate only if deemed acceptable by the church.²⁵⁹ The civil marriage developed in response to this phenomenon as a marriage under control of the State beginning in 1875.²⁶⁰ The German Basic Law developed its protection of marriage in this historical context.²⁶¹

Germany has struggled in finding adequate solutions to the conflict between constitutional protections of marriage and efforts to prevent discrimination against same-sex couples in creating a partnership that does not disturb the special role of marriage.²⁶² The Federal Constitutional Court now reads the State's duty to protect marriage differently to allow the two partnership forms to coexist under the Constitution.²⁶³ The court had long operated under the belief that it had a "duty to privilege marriage in comparison to other legal institutions."²⁶⁴ Now the court adopts the view that "the constitution allows positive discrimination in favour [*sic*] of marriage but does not oblige the legislator to do so."²⁶⁵ The German federal government eliminated most discriminatory provisions from the *Lebenspartnergesetz* ("Life Partner Law") in 2004, although it maintained separate terminology for some phenomena to differentiate between marriage and same-sex partnerships.²⁶⁶ Some minor differences remain in other areas as well, such as maintenance rights.²⁶⁷ Now that the prohibition on common adoption by same-sex partners has been eliminated,²⁶⁸ the primary exceptions to equal rights are pension rights and major tax differences.²⁶⁹

Gender integrity is guaranteed under Articles 2 and 3 of the Basic Law, which provide for gender equality and recognition of the right of self-

257. *Id.*

258. *Id.* at 38.

259. *Id.*

260. *Id.* at 39.

261. Ruiz & Sacksofsky, *supra* note 239, at 160.

262. MASHA ANTOKOLSKAIA, HARMONISATION OF FAMILY IN EUROPE: A HISTORICAL PERSPECTIVE 419–20 (2006).

263. *Id.*

264. *Id.* at 419 (quoting K. Thorn, *The German Law on Same-Sex Partnerships*, in LEGAL RECOGNITION OF SAME-SEX COUPLES IN EUROPE 85 (K. Boele-Woelki & A. Fuchs eds., 2003)).

265. *Id.* at 420 (quoting K. Thorn, *The German Law on Same-Sex Partnerships*, in LEGAL RECOGNITION OF SAME-SEX COUPLES IN EUROPE 86 (K. Boele-Woelki & A. Fuchs eds., 2003)). See also *Bundesverfassungsgericht*, July 17, 2002, NJW 2543–48.

266. ANTOKOLSKAIA, *supra* note 262, at 420–22.

267. *Id.* at 422.

268. *Lebenspartnerschaftsgesetz* [Life Partner Law], Feb. 16, 2001, § 9. For a discussion of adoption in the context of the Transsexual Law, see BTDrucks 16/4148 at 7.

269. ANTOKOLSKAIA, *supra* note 262, at 422.

determination of the individual.²⁷⁰ German courts were indifferent to these provisions with regard to sexual discrimination until the early 1990s, but have since taken a more proactive role in enforcing equal treatment on the basis of gender.²⁷¹ German courts have enforced gender equality based on biological differences rigorously under Article 3(3) of the Basic Law since the 1970s.²⁷² The courts view such differential treatment as discriminatory.²⁷³ These principles are anchored in the area of transsexual rights by European court decisions,²⁷⁴ as well, which have refined the German constitutional definition of individual integrity regarding transsexual rights.²⁷⁵

C. Conflict Resolution and Court Rationalization for Differentiating Marriage and Unions

When rendering decisions on fundamental rights, the Federal Constitutional Court weighs the interests of the affected individual against the interests of society.²⁷⁶ Germany follows the legal principle recognizing both *lex generalis* and *lex specificis*, meaning that analysis of a particular event must consider both the specific provisions of a narrow statute and the broader concepts of general laws and the Constitution.²⁷⁷ German Constitutional Court decisions rely on an underlying “value system” for interpreting individual provisions of the law.²⁷⁸ The Court can weigh the values of the respective rights at stake against each other in proceedings on constitutional norms, but it cannot restrict the rights in any way.²⁷⁹ The Court may declare a law unconstitutional in whole or in part.²⁸⁰ Alternatively, the Court can require the

270. BVerfGE 1 BvL 10/05 (§§ 19, 21). *See also* GG arts. 2, 3 (guaranteeing rights of free expression and bodily integrity (Article 2) and gender equality (Article 3), respectively).

271. Ruiz & Sacksofsky, *supra* note 239, at 151.

272. *Id.* at 152–53.

273. *Id.* at 153.

274. German courts do not always refer to European court decisions, but the Federal Constitutional Court has established the so-called “take-into-account” requirement, meaning that German court decisions must acknowledge European law and court decisions and incorporate them into the German system. Elisabeth Lambert Abdelgawad & Anne Weber, *The Reception Process in France and Germany*, in *A EUROPE OF RIGHTS: THE IMPACT OF THE ECHR ON NATIONAL LEGAL SYSTEMS* 107, 131–37 (Helen Keller & Alec Stone Sweet eds., 2008).

275. *See, e.g.*, Van Kück v. Germany, App. No. 35968/97, Eur. Ct. H. R. (June 12, 2003).

276. Burkens, *supra* note 234, at 359.

277. Florian Wolff & Felix Prozorov-Bastians, *Introduction to German Business Law: General Private Law*, in *GERMAN TAX AND BUSINESS LAW* 1001, 1029 (2005).

278. Burkens, *supra* note 234, at 316. The Federal Constitutional Court weighed the value of rights in the “monitoring decision” on the legality of recording of private activities by the state, for example. *Id.*

279. *Id.*

280. MICHALOWSKI & WOODS, *supra* note 232, at 43–44, 48.

legislature to amend the law following Court guidance.²⁸¹ The latter option purports to maintain the separation of government by leaving the final choice on statutory development with the legislative branch.²⁸² The deciding principle is ultimately always reducible to a fundamental right protected by the Basic Law, as governed by Article 19.²⁸³ The present case involved a so-called “review *in concreto*,”²⁸⁴ which is a proceeding considering the compatibility of a state law with federal law.²⁸⁵ Such proceedings arise under Article 100 of the Basic Law.²⁸⁶

German law forbids discrimination among different members of like-situated groups.²⁸⁷ But current readings of the Basic Law permit the so-called “furthering principle” for protected groups.²⁸⁸ In other words, the government may give preferential treatment to a particular group, but it may not treat a group worse than others.²⁸⁹ This policy appears to be pure discrimination on its face, but the Federal Constitutional Court views this differently and explained its position with respect to marriage in a 1980 case.²⁹⁰ In that case, the court held that the state has “a positive obligation to . . . support marriage,” and that it is prohibited from “harming or otherwise impairing” marriage as an institution.²⁹¹ The court allows different treatment of civil unions and marriage under its positive duty of support.²⁹² Here, however, the court decision allowing the petitioner’s marriage to continue reflects the minimum rights requirements of the German Basic Law and European law guaranteeing individual integrity and the protection of marriage.²⁹³

281. *Id.* at 43–44.

282. *Id.*

283. Burkens, *supra* note 234, at 360.

284. BVerfGE 1 BvL 10/05, § 17. The German for this term is “*konkretes Normenkontrollverfahren*.” Burkens, *supra* note 234, at 356.

285. Burkens, *supra* note 234, at 356.

286. GG art. 3.

287. *Id.* art. 1.

288. KLAUS TIPKE & JOACHIM LANG, STEUERRECHT 134 (2008). *See also* MICHALOWSKI & WOODS, *supra* note 232, at 46.

289. TIPKE & LANG, *supra* note 288, at 134.

290. BVerfGE 10/05, § 50.

291. *Id.*

292. *Id.*

293. The court considers the right of transsexuals to marry in the present case, BVerfGE 10/05, and also in the 2005 case requiring that both homosexual and heterosexual transsexuals be allowed to enter into civil partnerships. *Id.* § 52 (citing BVerfGE 1 BvL 3/03).

V. COURT RECOMMENDATIONS FOR LEGISLATIVE ACTION TO RESOLVE THE CONFLICT

The Federal Constitutional Court set the Transsexual Law aside as a result of the constitutional conflict it forced on the petitioner.²⁹⁴ The court offered legislators two means for solving the constitutional problem in the law, allowing until August 1, 2009 to meet the requirement.²⁹⁵ This section reviews the two options separately, explains the consequences of each possibility, and concludes by making recommendations on legislative action.

A. The “Minor” Resolution

The court suggested the legislature could solve the constitutional conflict by simply striking the marriage requirement from the Transsexual Law.²⁹⁶ If both partners entered into a legal marriage, they could remain married following recognition of the new gender even if the marriage would give the impression that two members of the same sex were married.²⁹⁷ This option would allow same-sex marriages to exist in the small number of cases where the married couple wished to remain together.²⁹⁸ This solution, which requires fewer changes to existing law, is the logical and consistent extension of the Article 6 protection of marriage.²⁹⁹

B. The “Major” Resolution

Alternatively the court suggested that the legislature could allow the marriage to continue in the form of a civil partnership with all of the rights associated with marriage.³⁰⁰ This option would require changing the Transsexual Law in a minor way to reflect the new partnership form.³⁰¹ More importantly, this strategy would require reconfiguring the laws on civil partnerships available to same-sex partners.³⁰² A same-sex partnership as suggested by the court with all of the rights of marriage would differ from marriage only in a semantic sense.³⁰³ Because the court does not specify what such a partnership would need to include, legislators would need to decide to

294. *Id.* (Leitsatz).

295. *Id.* § 73.

296. BVerfGE 1 BvL 10/05, § 72.

297. Michael Grünberger, *Die Reform des Transsexuellengesetzes – Großer Wurf oder kleine Schritte?*, TRANSSEXUALITÄT UND INTERSEXUALITÄT *supra* note 48, at 81, 105.

298. Transsexuals make up about 0.004% of the population, and many of that small minority will not be or remain married. Weitze & Osburg, *supra* note 41.

299. Grünberger, *supra* note 297, at 106.

300. BVerfGE 1 BvL 10/05, § 71.

301. *Id.*

302. *Id.*

303. Grünberger, *supra* note 297, at 105.

whom the law would apply, i.e., whether to create a new form of partnership to apply only to transsexuals or to expand civil partnerships to everyone to meet the court's requirements.

C. *Consequences of Each Option*

The legislature was required to enact a new version of the Transsexual Law by August 1, 2009.³⁰⁴ The two options presented by the court differ greatly in their effect on both transsexuals and others. An exhaustive list of all of the differences associated with the two alternatives to the current law would go well beyond the scope of this article;³⁰⁵ but selected important areas of law provide a useful framework for discussing the advantages and shortcomings of the two solutions. This section focuses on tax and pensions; inheritance; and health care provisions in German law, with limited mention of other significant effects arising from the Transsexual Law.

1. Tax and Pensions

Under the policy of supporting marriage, the court permits different treatment of married couples and civil partnerships for tax purposes.³⁰⁶ Income tax treatment of couples differs most significantly with regard to income splitting,³⁰⁷ which is allowed only for married couples in Germany.³⁰⁸ Income splitting is optional at the taxpayer's discretion, but not available in the full form to unmarried couples.³⁰⁹ Under current readings of Art. 6 of the Basic Law, the government is obligated to "positively" protect marriage.³¹⁰ This would not preclude extending splitting to unmarried and same-sex couples, but the introduction of income splitting for same-sex couples in Germany has proved problematic because it would require extending the benefits to unmarried couples under Article 6.³¹¹ Although the government is required by the Basic Law to protect marriage, legislation does not need to protect all life partnerships, even if there is clear tax discrimination.³¹² In the case of income splitting, the court has concluded that this tax inequality is not a

304. BVerfGE 1 BvL 10/05, § 73.

305. For a thorough treatment of relevant issues in the US context, many of which also apply in some variation in Germany, see Dean Spade, *Documenting Gender*, 59 HASTINGS L.J. 731 (2008).

306. MICHALOWSKI & WOODS, *supra* note 232, 247–48.

307. Einkommensteuergesetz [EStG] [Income Tax Law], Oct. 19, 2002 BGBl I, at 4210, §§ 26, 26a, 26b, 26c, *available at* juris online/Rechtsprechung.

308. TIPKE & LANG, *supra* note 288, at 134.

309. EStG § 26c.

310. TIPKE & LANG, *supra* note 288, at 134.

311. *Id.* at 135.

312. Roman Seer, *Das Ehegattensplitting als typisiertes Realsplitting*, in Festschrift für Wilhelm Heinrich Kruse 357, 372–74 (Walter Dreneck & Roman Seer eds., 2001).

form of tax favoring, because it merely reflects the “average marriage” by including in splitting the amount of income which two individuals would be able to deduct from income as a standard nontaxable basis income.³¹³ Presently, the nontaxable basis income is €52,152 per person per year, or €104,304 per married couple per year.³¹⁴ This nontaxable income clearly favors married couples where the individual taxpayers have differing amounts of income.³¹⁵

The Transsexual Law does not address tax treatment of transsexuals explicitly, but it does consider the right of a transsexual to receive pension benefits following recognition of a new gender.³¹⁶ Transsexuals who have had their new gender recognized do not have the right to receive “pension plans and other similar regularly recurring payments” stemming from the relationship with the former spouse.³¹⁷ For tax purposes, a double penalty results: transsexuals receive neither a pension from their former spouses, nor the tax benefit³¹⁸ of splitting for separated spouses and those spouses who lead separate households long-term.³¹⁹

2. Inheritance

Germany is one of many European countries to differentiate between heterosexual and homosexual partnerships in inheritance matters.³²⁰ German law distinguishes between categories of heirs in determining tax liabilities on inheritances.³²¹ The taxation categories are assigned to relatives and non-relative heirs on the basis of relationship proximity, with a clear preference for inheritance within a family.³²² Under the Transsexual Law, the parent-child relationship remains intact, including for inheritance tax purposes.³²³ But the surviving partner of a married couple receives significant tax benefits compared to the surviving partner of a life partnership or an unmarried couple.³²⁴ For a surviving spouse, the tax begins at 7% of the inheritance for

313. TIPKE & LANG, *supra* note 288, at 407.

314. *Id.* at 133–34.

315. Seer, *supra* note 312, at 374.

316. TSG § 12(2).

317. *Id.*

318. EStG § 10 I Nr. 1.

319. TIPKE & LANG, *supra* note 288, at 368.

320. NANCY D. POLIKOFF, BEYOND (STRAIGHT AND GAY) MARRIAGE: VALUING ALL FAMILIES UNDER THE LAW 119 (2008).

321. Erbschaftsteuergesetz [ErbStG] [Inheritance Tax Law], Feb. 27, 1997, BGBI I at 378, § 19.

322. TIPKE & LANG, *supra* note 288, at 173–74.

323. TSG § 11.

324. TIPKE & LANG, *supra* note 288, at 524.

up to €52,000 and peaks at 30% for sums over €25,565,000.³²⁵ For same sex partners and many unmarried partners, the tax begins at 17% for sums up to €52,000 and peaks at 50% for sums over €2,565,000.³²⁶ Unmarried partners may also fall in between these two in certain circumstances.³²⁷ Despite awareness of different taxation for different life partnerships,³²⁸ legislation in December 2007 that updated³²⁹ the inheritance tax did not address the classification of same-sex and unmarried partners for tax purposes.³³⁰

3. Healthcare

The Transsexual Law provision requiring unmarried status has little, if any, direct effect on health care among the partners to a marriage or civil union.³³¹ Under the 2001 German Life Partner Law, partners of a civil union, popularly known as “homo-marriage,” have a duty of care identical to that of heterosexual marriages.³³² This duty may extend beyond the duration of the civil partnership if the parties dissolve the partnership.³³³ Partners have the right to share household insurance, visit each other in the hospital, and act as next-of-kin in medical decisions.³³⁴ In the case of divorce, the Life Partner Law applies the same provisions of the Civil Code Book³³⁵ to civil partnerships as to dissolved marriages, including the right to financial support from the former partner.³³⁶ Because the duty of care and support for homosexual partnerships are the same as for traditional heterosexual

325. ErbStG § 19, I.

326. *Id.*

327. TIPKE & LANG, *supra* note 288, at 524.

328. *Id.*

329. The effects of these changes in the tax laws are still unresolved in some respects at the administrative level, but same-sex and unmarried partners are not affected by unresolved questions. See, e.g., Harald Plewka, *Die Entwicklung des Steuerrechts*, NEUE JURISTISCHE WOCHENSCHRIFT 3410, 3414–15 (2009) (describing recent inheritance tax reform without mentioning changes affecting same-sex partnerships).

330. ErbStG § 15(1).

331. For an overview of potentially affected issues, see Emilia Lombardi and Talia Bettcher, *Lesbian, Gay, Bisexual, and Transgender/Transsexual Individuals*, in SOCIAL INJUSTICE AND PUBLIC HEALTH 130, 134 (Barry S. Levy & Victor W. Sidel eds., 2006).

332. Gesetz über die Eingetragene Lebenspartnerschaft [LPartG] [Life Partner Law], Feb. 16, 2001, BGBl. I at 266, last amended by Gesetz, Dec. 21, 2007, BGBl. I at 3189, § 2, *available at* [juris online/Bundesrecht](http://juris.online/Bundesrecht).

333. *Id.* § 16.

334. Jes Kraus, *Monkey See, Monkey Do: On Baker, Goodridge, and the Need for Consistency in Same-Sex Alternatives to Marriage*, 26 VT. L. REV. 959, 982 (2002).

335. The *Bürgerliches Gesetzbuch* is the primary collection of laws relating to private civil matters, such as identification cards. See OTTO PALANDT, *BÜRGERLICHES GESETZBUCH* (Peter Bassenge et al. eds., 2008).

336. LPartG §§ 16, 20.

marriages, health provisions would remain unaffected by the two solutions offered.

4. Other Issues

Other issues come into play in laws addressing transsexuals, many of them extending far beyond the limited scope of the Transsexual Law.³³⁷ For example, either army or civil service is required of German males.³³⁸ This service duty does not extend to females.³³⁹ Transsexuals are excused from this compulsory service as well, including female-to-male transsexuals, who in theory would be required to serve in their new gender.³⁴⁰ For military service purposes, marriage and civil partnerships also figure into the equation, because individuals who are married or living in a civil partnership are excused from military service.³⁴¹ Criminal law plays a role, as well, including the housing and work assignments of transsexual prisoners.³⁴² In addition, prisoners have the right to receive visitors, but this right may be limited by local prison rules.³⁴³ Visits by nonrelatives may be restricted with greater ease than visits by relatives, including spouses.³⁴⁴ Visits may be conditioned on constant supervision.³⁴⁵ The new Transsexual Law needs to address these issues.³⁴⁶ Concerns also arise in employment law, family law, and health care law relating to sex-specific treatments, and in other contexts.³⁴⁷

In addition, and perhaps more importantly, the court's recommendations do not go far enough to right other wrongs in the Transsexual Law itself. Although the court's suggested laws do acknowledge the gender recognition

337. SCHAMMLER, *supra* note 24, at 41–43.

338. Wehrpflichtgesetz [WPG] [Military Service Law], Sept. 16, 2008, BGBl. I at 1886, § 1, available at [juris online/Rechtsprechung](http://juris.online/Rechtsprechung).

339. *Id.*

340. SCHAMMLER, *supra* note 24, at 43 n.168.

341. WPG § 10(1).

342. SCHAMMLER, *supra* note 24, at 65–175. One noteworthy example is the so-called “Pink Giant,” a man currently undergoing hormone therapy in preparation for gender reassignment surgery—with the hope of subsequent release. The “Pink Giant” is a 6’, 6” former police officer who, among other things, murdered five women and a baby between October 1989 and April 1991. The former “Wolfgang” now goes by “Beate” in the prison where he has been living and interacting regularly with other inmates since 1992. *Der sechsfache Mörder von Beelitz erhält eine Hormonbehandlung, um eine Frau zu werden*, MÄRKISCHE ALLGEMEINE ZEITUNG, August 6, 2009, <http://www.maerkischeallgemeine.de/cms/beitrag/11575978/62249/Der-sechsfache-Moerder-von-Beelitz-erhaelt-eine-Hormonbehandlung.html>.

343. Gesetz über den Vollzug der Freiheitsstrafe und der freiheitsentziehenden Maßnahmen der Besserung und Sicherung (Strafvollzugsgesetz) [StVollzG] [Penal Law], March 16, 1976, BGBl. I at 581, § 24.

344. StVollzG § 25.

345. *Id.* § 27.

346. SCHAMMLER, *supra* note 24, at 195–96.

347. *Id.* at 43.

issues implicit in transsexual operations, they do not address the underlying eugenics question that remains under the law's non-fertility provision.³⁴⁸ As described above, the National Socialist regime sought to eliminate transsexuals and other groups it deemed undesirable by sterilizing them.³⁴⁹ The petitioner in the present case suffered at the hands of the Nazis because of his transsexuality.³⁵⁰ Following in that ignoble tradition, the Federal Republic also demands that individuals seeking recognition of their new gender be permanently infertile.³⁵¹ Although transsexuals are generally infertile, it is not always the case.³⁵²

Why the government has retained the infertility requirement is not readily apparent,³⁵³ particularly in light of recent government efforts to condemn³⁵⁴ past eugenics efforts aimed at eliminating homosexuals and other "sexual deviant persons" under the "hereditary health law."³⁵⁵ In addition to such social policy concerns, the infertility requirement likely also conflicts with Article 2 of the Basic Law,³⁵⁶ which protects the right to physical integrity of a person's body.³⁵⁷ It is unclear how the government can reconcile granting rights to medical treatment to transsexuals on the basis of their right to individual integrity³⁵⁸ while simultaneously denying transsexuals the right to reproduce and invading their bodily integrity by requiring their infertility.³⁵⁹ Finally, recent changes in law on adoption and civil partnerships for homosexuals have rendered the original purpose of the infertility provisions redundant.³⁶⁰ The legislature intended to prevent transsexual couples from

348. TSG § 8(1)(3).

349. See, e.g., Friedemann Pfäfflin, *The Connections Between Eugenics, Sterilization and Mass Murder in Germany from 1933 to 1945*, 5 *MEDICINE & LAW* 1, 2–4 (1986).

350. BVerfGE, decision of May 27, 2008, docket number 1 BvL 10/05, § 16, available at [juris online/Rechtsprechung](http://juris.online/Rechtsprechung).

351. TSG § 8(1)(3).

352. Stephen Whittle, *Gemeinschaftsfremden—or How to Be Shafted by Your Friends: Sterilization Requirements and Legal Status Recognition for the Transsexual*, in *LEGAL QUEERIES: LESBIAN, GAY AND TRANSGENDER LEGAL STUDIES* 42, 43–44 (Leslie J. Moran, Daniel Monk & Sarah Beresford eds., 1998).

353. Grünberger, *supra* note 297, at 106.

354. See, e.g., Press Release, Presse- und Informationsamt der Bundesregierung Pressemitteilung Nr. 188, Kulturstatsminister Bernd Neumann übergibt Denkmal für die im Nationalsozialismus verfolgten Homosexuellen (May 27, 2008), available at http://www.bundesregierung.de/nn_774/Content/DE/Archiv16/Pressemitteilungen/BPA/2008/05/2008-05-27-bkm-mahnmal-hohenschoenhausen.html.

355. Pfäfflin, *Sex Reassignment*, *supra* note 30.

356. Grünberger, *supra* note 297, at 103.

357. Grundgesetz für die Bundesrepublik Deutschland [GG] [Constitution] art. 2, ¶ 2 (F.R.G.).

358. See *Van Kück v. Germany*, 2003-VII Eur. Ct. H.R. 1, 22–25.

359. TSG § 8 (1)(3).

360. Deutscher Bundestag Innenausschuss Protokoll 16/31 at 36.

giving the impression that same-sex couples were in a union with children.³⁶¹ Such situations are now possible, eliminating the professed justification for the infertility requirement on that ground, as well.³⁶² In the present case, the court did not reach the infertility provision, because the petitioner only addressed the marriage requirement.³⁶³ The legislature would do well to address both points in reformulating the law.

D. Recommendations

The legislature must eliminate the discriminatory treatment of transsexuals, which the court recognized in the present case.³⁶⁴ This change would meet the minimum guidelines set out by the court and also promote equality. This remedy is most easily achieved by simply removing the clause requiring transsexuals be unmarried to have their new gender recognized, thus allowing the same-sex marriage to continue,³⁶⁵ but legislators should also consider future ramifications of the law affecting homosexuals and civil partnerships in Germany. Discrimination remains in that area of the law, as described above,³⁶⁶ and the simple removal of the “unmarried” requirement from the Transsexual Law will allow those provisions to continue denying basic rights to large portions of the population.³⁶⁷ The State argues that this requirement is justified by a “positive duty to protect” marriage as between a man and a woman.³⁶⁸ Obvious discrimination against same-sex couples is not justified in light of recent German and European cultural, legal, and medical developments, however.³⁶⁹

Legislators have also argued using the idea of medical necessity regarding their positions on transsexuality.³⁷⁰ It is unclear whether the law can provide positive protection to the physiological condition experienced by transsexuals without extending those rights to the equally scientifically verifiable condition

361. *Id.* at 37.

362. *Id.*

363. Grünberger, *supra* note 297, at 104.

364. BVerfGE, decision of May 27, 2008, docket number 1 BvL 10/05, § 49, *available at* [juris online/Rechtsprechung](#).

365. Grünberger, *supra* note 297, at 105.

366. See *supra*, notes 305–63 and accompanying text.

367. Transsexuality, as a sexual identity rather than sexual orientation, compels a greater grant of rights than homosexuality, thus allowing the discrimination against homosexual couples to continue. See Windel, *supra* note 104, at 69.

368. BVerfGE, decision of May 27, 2008, docket number 1 BvL 10/05, § 50, at [juris online/Rechtsprechung: Bundesverfassungsgericht \[BVerfG\] \[Federal Constitutional Court\] Feb. 28, 1980, 53 Entscheidungen des Bundesverfassungsgerichts \[BverfGE\] \[Federal Constitutional Court\] 224 \(F.R.G.\)](#).

369. See generally di Torella & Masselot, *supra* note 226, at 41–43.

370. BTDrucks 8/4120 at 1, *available at* <http://dip.bundestag.de>.

experienced by homosexuals.³⁷¹ That issue is particularly problematic in light of the possibility of marrying under current provisions that homosexual transsexuals and transsexuals opting for the “Minor Solution” have³⁷²—contrary to the legislative intent of avoiding the appearance³⁷³ of same-sex marriage.³⁷⁴ Same-sex marriage stemming from transsexual rights may be the next legal challenge faced on marriage rights in Germany. In the present case, the court does not require sweeping changes. Guaranteed constitutional rights and fundamental fairness, on the other hand, would require them.

VI. CONCLUSION

The court rightfully struck down the Transsexual Law because it required a choice between two fundamental personal rights guaranteed by the German constitution. The Basic Law clearly states that the rights of individual integrity and marriage affected by the Transsexual Law are fundamental and therefore non-derogable.³⁷⁵ Consequently, the court has no choice but to demand reformulation of the law. The only question is whether the legislature will pursue a bold plan or make the smallest possible changes to comply with the law. The court here and EU human rights decisions from recent years suggest that the time has come for a significant expansion of the rights afforded to transsexuals and same-sex couples. The federal government could make these changes with ease as it redraws the Transsexual Law, providing for true equality in Germany. The larger changes would reach into more areas of the law, including tax and inheritance matters, but such refinements of the law would yield long-term benefits and they are fundamentally fair on constitutional grounds.

The present case handles a relatively narrow class of individuals, but the effects of the new legislation may have much greater ramifications than readily apparent. Following the precedent set in this case, at least one additional marriage will fall under the Transsexual Law in whatever form new legislation assumes: a pastor in the evangelical church in Westfalen has stepped down to

371. See, e.g., Ivanka Savic & Per Lindström, *PET and MRI Show Differences in Cerebral Asymmetry and Functional Connectivity Between Homo- and Heterosexual Subjects*, 105 PROCEEDINGS OF THE NATIONAL ACADEMY OF SCIENCES OF THE UNITED STATES OF AMERICA 9403, 9403 (2008), available at <http://www.pnas.org/content/early/2008/06/13/0801566105.full.pdf+html>. See also Vujovic et al., *supra* note 182.

372. See *supra* note 95.

373. The issue of appearances and same-sex marriages arises in the U.S. context, as well. See Melissa Aubin, Comment, *Defying Classification: Intestacy Issues for Transsexual Surviving Spouses*, 82 OR. L. REV. 1155, 1185 (2003).

374. Windel, *supra* note 103, at 78.

375. See *supra* notes 252–55 and accompanying text.

live as a woman.³⁷⁶ His wife claims she will be staying with him.³⁷⁷ Beyond such overlapping cases, however, the legislation could also affect same-sex couples living in life partnerships and potentially even unmarried couples. The ramifications are both personal and public, emotional and financial. In light of the major stakes in this case, the legislators would do well to look carefully at the direct and the indirect effects of their choices. The legal and cultural trends described in this note suggest expanding rights on a broad basis. Hopefully legislators will recognize these developments and act accordingly.

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376. Kath.Net–Katholische Nachrichten, *Absurd: evangelischer Pfarrer will Frau werden*, Sept. 19, 2008, <http://www.kath.net/detail.php?id=20879>.

377. Peter Keller & Marcel Stepniak, *Wie ist eine Ehe, wenn der Mann zur Frau wird?*, *Bild Zeitung*, September 19, 2008, <http://www.bild.de/BILD/news/vermischtes/2008/09/19/gespraech-mit-der-frau-des-transsexuellen-pfarrers/wie-ist-die-ehe.html>.

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