Decision of the Federal Constitutional Court of Germany concerning the Transsexual Law – 27 May 2008

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Headnote to the decision of the first Senate of 27 May 2008

1BvL 10/05

§ 8(1) No. 2 of the Transsexual Law ("**TSG**") is in breach of Article 2(1) of the German Basic Law ("**GG**") in conjunction with Article 1(1) GG and Article 6(1) GG as it does not permit a married transsexual who has undergone gender reassignment surgery to obtain legal recognition of his/her acquired gender unless his/her marriage has been dissolved.

In the Name of the People

In proceedings for constitutional scrutiny

whether § 8(1) No. 2 of the Law concerning the change of name and recognition of gender identity in certain cases (Transsexual Law (TSG)) of 10 September 1980 (Bundegesetzblatt 1 p.1654 et seq) is compatible with Articles 1(1), 2(1), 3(1) and 6(1) GG.

The First Senate of the Federal Constitutional Court, composed of the judges:
Papier (President), Hohmann-Dennhardt, Bryde, Gaier, Eichberger, Schluckebier, Kirchhof and Masing,

decided on 28 May 2008 that:

1. § 8(1) No. 2 of the Law concerning the change of name and recognition of gender identity in certain cases (Transsexual Law (TSG)) of 10 September 1980 (Bundegesetzblatt 1 p.1654 et seq) is not compatible with Article 2(1) GG in conjunction with Article 1(1) GG and Article 6(1) GG.

2. Until such time as a new regulation enters into force, § 8(1) No. 2 TSG is inoperative.

A.

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The reference concerns the question whether a rule that makes the legal recognition of a person's surgically reassigned gender contingent on his/her being unmarried is compatible with the Basic Law.

I.

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1. The Law concerning the change of name and recognition of gender identity in particular cases (Transsexuellengesetz – TSG) of 10 September 1980 (Bundesgesetzblatt 1 p1654 et seq.) as amended by the Law relating to the change of the Passport Act and further regulations of 20 July 2007 (Bundesgesetzblatt 1 p1566 et seq.) affords a transsexual person the option to adopt a new name in recognition of the gender with which he/she identifies (so-called "minor solution"). According to § 1(1) No. 1-3 TSG, the preconditions for this option are as follows: the person has experienced the compulsion to live in the chosen gender for a period of three years (No. 1), that the person would be unlikely to revert to the gender assigned at birth (No. 2) and that the person is a German citizen as defined in the Basic Law or meets the alternative criteria set out in No. 3 (No. 3). In addition, § 8 TSG makes provision for a procedure under which an individual who has undergone gender reassignment surgery can have his/her change of gender identity determined by the court, so that the new gender is recognised legally (so-called "major solution"). The legal recognition of the new gender requires additionally that the individual is not married and is permanently incapable of reproducing.

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§ 8 TSG states as follows:

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Requirements

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(1) Where by reason of being transgendered, a person no longer identifies with the gender registered at birth but identifies instead with the opposite gender, and he/she has experienced a compulsion to live in that gender for a minimum of three years, and makes an application to court, the court shall recognise that such person as belonging to the opposite gender if he/she:

1. fulfils the requirements of § 1(1) Nos. 1-3;
2. is unmarried;
3. is permanently incapable of reproducing; and
4. has undergone surgery to achieve all of the outward characteristics of the new gender.

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If a married person who has undergone gender reassignment surgery seeks to have his/her acquired gender legally recognised, he/she must first obtain a divorce. Otherwise, the marriage remains as it was. If a person undergoes gender reassignment surgery to adopt the gender with which he/she identifies, this is not a reason under § 1314 German Civil Code (BGB) for the marriage to be dissolved.

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2. During the legislative procedure, the unanimous view was that if a married transsexual obtains recognition of his/her acquired gender pursuant to § 8 TSG, his/her marriage should no longer endure. The parties did not however agree on how the marriage should be ended. The first draft of the law put forward by the Federal Government (Bundesregierung) envisaged that the marriage would dissolve automatically upon the legal recognition of the transsexual's new gender pursuant to § 8 TSG and the consequences of the dissolution would be the same as under divorce

law (BTDrucks 8/2947, p.6). The Federal Government reasoned that, if the change of gender identity were dependent on a prior divorce, the divorce would have to take place at a point in time before the result of the decision on gender were known. This would cause unnecessary cost and entail a risk that after the divorce, the transsexual's application for legal recognition under § 8 TSG would fail on other grounds. Furthermore, in order to gain a divorce, the marriage must be "damaged". This condition would by no means always be met. In such a case, the transsexual would bear the risk that his/her application for divorce would be refused, and as a result, he/she would be excluded from making use of the "major solution". The Federal Government noted that in light of the decision of the Federal Constitutional Court of 11 October 1978 (BVerfGE 49, 286 et seq) this would appear problematic. As such it would appear that the best way to do justice to the essence of marriage would be to introduce a rule requiring a marriage to be dissolved once it is established that it is both parties are legally recognised as having the same gender (BTDrucks 8/2947).

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The Federal Upper House (Bundesrat) on the other hand, was of the opinion that the automatic dissolution of the marriage was not compatible with the meaning of marriage. In its opinion a married transsexual should be required to obtain a divorce prior to the procedure for legal recognition of his/her acquired gender, in the interests of the other spouse. Only in this way could the consequences of the divorce be examined in a combined procedure with the dissolution of the marriage. Furthermore, this would relieve the other spouse from having to be involved in the legal procedure for recognition of the acquired gender. The Upper House noted that the procedure was highly personal matter in which the person's spouse should not be required to be involved (BTDrucks 8/2947, p. 21).

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When the issue was considered by the Inner Chamber of the Federal Parliament (Bundestag) a majority preferred the proposed solution of the Federal Government. Its reasons were that a married transsexual would be disproportionately encumbered by the necessity to go through divorce proceedings having an uncertain outcome as well as to bear the burden of obtaining judicial recognition of the change of gender (BTDrucks 8/4210 p.16). At conciliation stage the position of the Federal Upper House was adopted (German Federal Parliament, 8th Wp., Plenary protocol of 4 July 1980, 230th sitting, p 18683, 18687 et seq.) meaning that the determination of a person's change of gender required him/her to be unmarried and to obtain a divorce prior to such determination.

II

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The petitioner in the main proceedings is legally considered as male. The petitioner is seeking judicial recognition pursuant to § 8(1) TSG in conjunction with § 1(1) TSG that he should be legally recognised as a female.

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The applicant was born in 1929 and has been married since 1952. There are three children of the marriage. The applicant has long felt a sense of identifying as a female and belonging to the female gender. The petitioner has used a female first

name since 2001, following a court decision pursuant to § 1(1) TSG. In 2002 the petitioner underwent gender reassignment surgery. He then made an application for determination pursuant to § 8(1) and 9 TSG that the sole reason for refusal of his application for recognition as a female was the fact of his being married. This was determined by the local court on 30 June 2003.

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Thereupon the petitioner made an application for determination pursuant to § 8(1) TSG that he is to be recognised as a female. The basis for his argument was that the requirement to obtain a divorce in order to achieve legal recognition of his new gender was not reasonable. He noted that his wife unequivocally refused to go through with a divorce. He explained that he had been a woman in a man's body since birth. His marriage had been affected by the trauma he had experienced during the Nazi era. He noted that his wife was the only person who had enabled him to overcome his inner loneliness and to share his difficulties. She had remained with him through all the troubles on which many marriages founder, made it her life's work and had foregone a promising career. The petitioner explained that in 2001, ever since the petitioner began to live as a woman and publicly appear as a woman, his marriage had become like a same-sex house-sharing community. The emotional and social relationship between the petitioner and his wife had not been damaged. Neither of them would agree to separate. They had lived together for over half a century, had grown old and mature together, and were irreplaceable to each other as life partners. A requirement to divorce would be unreasonable and an insult to their feelings towards one another. The petitioner noted that it shocks him and his wife that their partnership could be treated as a broken marriage and be terminated by divorce. The couple would refuse to undergo the set period of separation that is envisaged for standard divorce situations, and the more so as they did not have the financial means to separate. The petitioner stated that by reason of his fear and panic attacks he would not be able to live apart from his wife. Lastly the petitioner put forward that that he and his wife were not in a position financially to meet the costs of a divorce or of maintaining separate households.

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2. By decision of 8 August 2005, the local court suspended the proceedings and pursuant to Article 100 GG referred the question to the Federal Constitutional Court of whether § 8(1) No. 2 TSG was compatible with the Basic Law. The referring court is of the opinion that the provision is in violation of Article 1(1) GG in conjunction with Art 2(1) GG, and of Articles 6(1) and 3(1) GG.

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According to the local court, by reason of § 8(1) No. 2 TSG, the petitioner could only be recognised unreservedly as a female under the precondition that he had obtained a divorce from his wife, thereby fulfilling the requirement of being unmarried. The court noted that the question of the constitutionality of the provision was necessary for a decision to be made, because if the provision were incompatible with the petitioner's basic rights, the court would allow the petitioner's application.

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In the court's view the petitioner cannot be expected to obtain a divorce. The petitioner cannot be permitted to face a choice, either to meet the criteria for changing

his gender status to the female gender or alternately not to file for divorce, and thereby be unable to change his gender. Owing to his mental and emotional condition the petitioner cannot choose between these options at present. The court noted that it is clear the petitioner experiences a compulsion to live as a woman. This makes it impossible for him to reconcile with the gender assigned to him at birth and live as a male with any lasting certainty. It is this compulsion that justifies a change in gender status. Because gender identity disorders of this nature exist and are untreatable, it has been made possible for persons to adopt their "true" gender with full legal recognition. In the court's view it is a breach of Article 1(1) GG combined with 2(1) GG to force transsexual persons to obtain a divorce in order to achieve recognition of what they feel is their "true" gender. The pursuit of harmony between the mind and the body of person concerned should be in the foreground and not the question of sexuality. If a divorce cannot be carried out because the required conditions have not been met, the person concerned should not be refused the possibility to change his/her gender status. As the Federal Constitutional Court has commented, the imperative to assign to a person the gender to which he/she belongs mentally and physically follows from respect for human dignity and from the fundamental right to personal self-determination.

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The local court noted that both the applicant and his wife are afforded the protection of Article 6(1) GG. In the court's view it is a breach of this norm if the petitioner's change of gender status is made dependent on his marriage having been terminated by divorce. In light of the fact that the spouses do not consider their marriage to have failed as set out in § 1564 BGB, and wish to continue living together and continue to stand by one another, the requirements for a divorce are not met. Neither of the spouses wish to live apart. Under these circumstances a divorce application could not succeed. Nor are the required conditions met for an annulment of the marriage. In the opinion of the court, the spouses have rightfully claimed the protection of Article 6(1) GG. Up to the point where the changed gender status takes effect, there exists a marriage between opposite-sex partners. The intention of one of the partners to adopt the same gender as his spouse is not a reason to deny protection to this marriage before the recognition of gender status has even taken place.

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In the opinion of the court, it is also a breach of Article 3(1) GG to make divorce a precondition for the recognition of a changed gender status. Married transsexuals are excluded from the mechanism under § 8 TSG, in contrast to those who are unmarried. The restriction of the recognition under § 8 TSG to unmarried transsexuals is a differentiation based on personal characteristics and has a significant impact on the personal rights of the person concerned. The court noted this was an exclusion of married transsexuals, and the court could not see any grounds sufficient to justify this differentiation of treatment vis-à-vis unmarried transsexuals. The aim of the differentiation in treatment is to prevent a same-sex marriage coming into being by reason of the recognition of the changed gender status of one of the spouses, as this would offend against the essence of marriage. The court noted that this situation could also be prevented without requiring the spouses to divorce and without excluding married transsexuals from the so-called "major solution". The court noted that according to the original draft of the legislation, it was intended that in proceedings under § 8 TSG, a pre-existing marriage would be dissolved

automatically, at the same time as the court's decision on legal recognition is handed down.

III

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Submissions concerning the reference proceedings were made by the following entities: the Federal Ministry of the Interior on behalf of the Federal Government, the German Society for Social-Scientific Sexuality Research, the Lesbian and Gay Federation, the Ecumenical Working Group for Homosexuality and the Church, the German Society for Transgender- and Intersex Association Identity, the Munich Transsexual Self-Help Group and the German Women Lawyer's Association.

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1. The Federal Ministry for the Interior is of the opinion that § 8(1) No. 2 TSG is compatible with the Basic Law. In its view, in enacting the Transsexual Law, the legislature had afforded transsexuals the possibility of living in accordance with their true self-perception. The Ministry acknowledged that the limitation of legal recognition under § 8 TSG to unmarried transsexuals only was an encroachment on the right to sexual self-determination under Article 2(1) GG in conjunction with Article 1(1) GG. In its view, however, this encroachment was justified – there was a public interest in preventing the occurrence of same-sex marriages, and such marriages would inevitably arise if legal recognition of a change of gender status were open to married transsexuals. The restriction was lessened by the fact that the marriage could be dissolved directly before the judicial decision regarding the change of gender. Furthermore, where a marriage was in existence, § 9(1) TSG a preliminary decision mechanism to minimise uncertainty for the persons concerned in the period between the divorce and the legal recognition of the acquired gender.

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In the opinion of the Ministry, the scope of protection of Article 6(1) GG is not affected by the provision. The question of whether the requirement to be unmarried violates the essential nature of marriage should be considered in light of the fact that transsexuals have been granted the right to change their gender. In the Ministry's view, a married transsexual is making use of an institution, which, as a lasting partnership of man and woman, requires that the partners be of opposite sexes. In entering into a marriage, the transsexual partner is entering an institution in which the requirement of having opposite genders is specified by society and by law. If the transsexual partner wishes to change his/her gender, he/she is thereby recognising that the preservation of his/her marriage is not of concern. The Ministry noted that, in finding that the petitioner has not satisfied the pre-conditions for obtaining a divorce, the referring court has omitted to recognise that the determination of whether a marriage has failed is a decision for the responsible family court, upon application by one or both of the spouses. The petitioner is at liberty not to seek to obtain a divorce. The Ministry observed that a transsexual cannot however act on the assumption that where he/she continues to be married, he/she will also be granted the option to obtain legal recognition of a change of gender. If a married person were not prohibited from having his/her change of gender legally recognised, the legislature would thereby be creating an institution of same-sex marriage. This was the reason for introducing, as a restriction on legal proceedings, the requirement under § 8(1) No. 2 TSG that an

applicant be unmarried. In the view of the Ministry, the reasons for this rule continue to be valid - and are to be valued more highly than any benefits that might accrue for the persons concerned, if there were provision for the dissolution of marriage within the framework of the legal recognition procedure. The Ministry noted that by obtaining a preliminary decision pursuant to § 9 TSG, the procedures for divorce and legal recognition could be carried out consecutively, without a person having to fear that his/her application under § 8 TSG would be refused after the divorce had taken place. The Ministry noted that, even if the marriage were dissolved in the course of the procedure for legal recognition, the consequences of divorce would still take effect, meaning that the divorced spouses would still lack the protection of family rights for a certain period of time, until they had concluded a registered partnership. Therefore, for the purpose of preventing the occurrence of same-sex marriages, the requirement that a person be unmarried was in the Ministry's view a necessary and proportionate pre-condition to legal recognition proceedings. Insofar as this constituted unequal treatment of married and single applicants, this was justified.

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2. To the knowledge of the German Society for Social-Scientific Sexuality Research, the absolute majority of male-to-female transsexuals are sexually attracted to women. In contrast, among the more diverse grouping of female-to-male transsexuals, there is a broad spectrum is evident as regards sexual orientation.

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The Society noted that many male-to-female transsexuals are married and they often have children. They have often tried for years to conceal their desires, with considerable psychological strain, so as not to compromise their marriages or families. When they could no longer succeed in doing so, many of these marriages would break down. In other cases, following difficult discussions, the wife would decide to stay with her husband despite the change of gender. For the wives concerned, the relationship and her emotional health were more important than her husband being of the male gender. Generally the spouses no longer had a sexual relationship, however their love and care for one another continued to be strong. The couples would often be bonded more closely together by what they had undergone together, and this strengthened their connection. Such couples wished to remain married and did not view their marriage as having failed. The TSG had opened up the possibility for transsexuals to maintain a marriage and also to adopt a new first name (under § 1 TSG) and thereby at least have some legal recognition of the new gender identity. For the aforementioned group of male-to-female transsexuals this had proven to be some relief for the emotional and mental strain experienced. Nonetheless, in the Society's view, these persons had legally and symbolically not fully converted to the gender with which they identified, and they were continually referred back to their "discarded" gender. Many of these persons simply accepted the emotional burden this brought, as the only alternative was to obtain a divorce and this would bring far greater emotional and psychological strain. The option to go through with a divorce and then enter a registered partnership is not perceived by the married couples as being a solution for the following reasons: they do not consider their marriages to be failed; they are concerned that the period of separation required under the divorce procedure would be emotionally destabilising and also because registered partnerships are "labelled" as being for homosexuals, while the persons in question do not perceive

their relationships as being same-sex. Furthermore, there are fewer rights and privileges attendant on a registered partnership vis-à-vis a marriage, and the transsexuals in question did not wish their spouses to have to make do with such lesser conditions.

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Based on the results of its studies of married transsexuals and their spouses, the German Society for Social-Scientific Sexuality Research concluded as follows: based on the current state of scientific and clinical knowledge, the fact that a married transsexual who meets the conditions of § 1 TSG has no desire to end his/her marriage, is not the basis of any doubt in his/her transsexuality. The fact that such a person does not wish to end his/her marriage does not justify the refusal of a change of gender status.

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3. The Lesbian and Gay Federation are of the view that § 8(1) No. 2 TSG is unconstitutional, as it infringes upon the sexual self-determination of the petitioner in an unacceptable way, in that it requires him to be unmarried in order for him to obtain legal recognition of his change of gender. The Federation noted that the requirements for a divorce were not met in the case of the petitioner and his wife. Having been married for over fifty years, both of them were certain of this. The contention that the marriage had failed due to separation pursuant to § 1566 BGB would not bear up. As well as requiring the spouses to live apart, such separation required that at least one of the spouses did not wish to re-establish cohabitation. This was clearly not the case, as both spouses wanted to remain in the marriage. A divorce could only be obtained if the petitioner made the untrue submission that he did not wish to live with his wife.

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3. In the Federation's view, the requirement that a person must obtain a divorce prior to officially changing his/her gender identity is disproportionate. The reason for the requirement is to avoid creating the appearance that same-sex marriages exist. However, in the case of transsexuals who, like the petitioner, wish to remain married, this breaches the constitutional imperative under Article 6(1) GG that the State must protect existing marriages. This imperative carries particular import in the present case, as the requirement to obtain a divorce prior to the legal procedure for recognition affects the petitioner's wife as well as himself. For decades this woman has stood by and the supported the petitioner, who has been severely traumatised by his experiences in the Nazi era, and she wishes to continue to do so. It should not be permissible that she is forced to obtain a divorce so that the petitioner's gender may be amended in the register of births. For this reason, in the Federation's view, the so-called "dissolution" solution discussed during the legislative procedure would also be a breach of Article 6(1) GG. The State must protect marriages and it should not be permitted to rescind a marriage contrary to the wishes of the spouses, or require the spouse to file for divorce. Furthermore, following their divorce and the petitioner's official change of gender, the only option for the spouses would be to enter a partnership that would grant lesser provision for the petitioner's wife than the marriage. The legislature's aim to avoid creating the appearance of same-sex marriages was not, in the Federation's view, sufficiently important to justify this serious encroachment on the petitioner's right to sexual self-determination. To remedy this constitutional breach the legislature could erase § 8(1) No. 2 TSG without

replacement. Alternatively, transsexuals who wish to continue living with their spouses could be given the option to convert their marriage into a partnership, to which identical regulations would apply as for marriage. This conversion would follow upon a joint application and be effective as of the date of the decision to grant legal recognition.

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4. The Ecumenical Working Group for Homosexuality and the Church concurs with the reasoning of the local court. In its view the petitioner has not met the required conditions for a divorce. It was not reasonable to expect that he would fulfil such conditions, as he would have to make the untrue statement that he intended to separate from his wife, and such untrue statements are not condoned under the legal system.

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5. The German Society for Transgender- and Intersex Association Identity is of the opinion that the referred provision is not compatible with the Basic Law. If the law permitted persons to remain married under the protection of Article 6(1)GG, even when one partner is transgendered and has opted to gain social recognition of his/her gender by legally adopting a new name, then on the other hand, requiring that a person seeking to change his/her gender must be unmarried is simply a "tokenistic legal trick" employed to uphold traditional gender norms. The unequal treatment is aggravated by the fact that transgender persons who are in registered partnerships have the right to change their gender without having to prove the dissolution of their partnership.

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In other respects, the Society is of the same opinion as the local court. The legal impossibility and unreasonableness of the requirement for a married transsexual to divorce is not limited to cases concerning persons of advanced years and those who have been married for a long time. Every married couple that is affected by this must be protected by Articles 1, 2, 3, and 6 GG, and in particular those who have children together. It should not be permitted that such couples are discriminated against by virtue of a law that all but removes this protection. In the Society's view, conversion of the marriage into a registered partnership should only come into consideration if the persons concerned are allowed the same rights as in a marriage.

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The Society noted that it was aware of cases where, contrary to the regulations, transsexuals and their spouses had obtained a divorce even though they lived together as before, and also knew of cases in which the court had refused to grant a divorce because it was evident to the judge that the spouses had no desire to live apart.

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6. The Munich Transsexual Self-Help Group noted that in its opinion § 8(1) No. TSG is in breach of Articles 1, 2 and 3(1) GG. It noted that the question is why a man who is now 78 should be required to end a marriage which has lasted for over fifty years, only to enter a same-sex partnership with the same woman directly after the divorce and after the legal recognition of change of gender has taken place. This is in circumstances whether neither partner wishes to divorce and where the couple seeks

to spend their remaining years together. The Group noted that, of all the marriages in which one of the spouses has undergone surgical gender reassignment, only a small percentage survive. The legislature should not add to this strain by forcing these separations to occur. Rather, the legislature should consider the possibility of allowing the marriage to be contractually converted into a life partnership in cases such as the petitioner's.

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7. The German Women Lawyer's Association is of the opinion that § 8 TSG is unconstitutional in that it denies a transsexual person the option to obtain legal recognition of his/her changed gender identity, if he/she is married. The petitioner does not satisfy the criteria to obtain a divorce, because he and his spouse wish to remain married. Therefore, in the course of the divorce proceedings, a married transsexual would have to make untrue submissions concerning the failure of the marriage, and thereby giving false evidence to the court. As well as breaching the right to sexual self-determination under Article 2(1) in conjunction with Article 1(1)GG, § 8(1) TSG also breaches Article 6(1)GG. In the Association's view, a transsexual person's marriage does not lose its constitutional protection by reason of his/her change of gender. A married transsexual, who suffers the dilemma that his/her body and gender identity do not match, cannot also be expect to end that marriage and thereby lose the care and support of his/her spouse, in order to obtain legal recognition of his/her acquired gender. If the ability to change one's gender status were opened up to married transsexuals, there would only be a small number of cases in which two persons of the same gender would be married. In the Association's view it should be expected of society and the legal system to allow this, certainly in cases such as the petitioners. Furthermore in the Association's view, one could not concur with a view that marriage can only be concluded between opposite-sex partners by reason that heterosexuality is a fundamental characteristic of marriage. For example in the Netherlands, marriage is open to same-sex partners.

B

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The Transsexual Law is not compatible with Article 2(1) in conjunction with Article 1(1) GG and Article 6(1) GG, insofar as § 8(1) No. 2 TSG requires that, in order to obtain judicial recognition of an affiliation with the gender opposite to that registered at birth, a transsexual applicant who: (i) meets the criteria of § 1(1) Nos 1-3 TSG, (ii) has undergone surgery to achieve the outward characteristics of the acquired gender and (iii) is permanently incapable of reproducing, must also be unmarried, and the law affords a married transsexual no means of achieving legal recognition of his/her change of gender without requiring the termination of his/her legally safeguarded partnership.

I.

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1. Article 2(1)GG in conjunction with Article 1(1)GG provides protection to the inner personal sphere to which the sexual domain belongs, and this includes a person's sexual self-determination and thereby the identification and recognition of one's own gender identity as well as one's sexual orientation. This sphere, which is one of the most intimate areas of personhood, may only be encroached upon where

there is a particular need in the public interest to do so. (see BVerfG 49/286, §298; 115/1 §14).

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A person's gender can change. While a person's affiliation with a particular gender is initially legally determined by outward physical characteristics at the time of birth, it cannot be ascertained in this way only. A person's gender affiliation is significantly dependent on his/her psychological make-up and enduring sense of identifying with a particular gender (see BVerfG 115/1 §15). If a person's perceived affiliation with a particular gender contradicts his/her outward sexual characteristics, as is the case with transsexuals, and a transsexual person has undergone surgery to achieve the appearance of the gender he/she wishes to be, certain fundamental rights apply. In recognition of the importance of the right to self-determination of the person concerned, respect for human dignity and the fundamental right to protection of personhood require that the transsexual's new gender identity be recognised and that he/she be accorded the civil status of the gender to which he/she now belongs, based on both mental and physiological factors (see BVerfGE 49/286, §298; 4116/243, §264)

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2. In principle, § 8 TSG recognises the importance of this. Where a transsexual person experiences an affiliation with the gender opposite to that assigned at birth and has undergone gender reassignment surgery, § 8 TSG allows him/her to apply for a judicial determination (provided the legally prescribed criteria are met) that he/she is to be considered as belonging to the opposite sex, ie, that this is his/her civil status. Pursuant to § 10(1) TSG, once the judicial determination has taken effect, any rights and obligations associated with gender are determined according to the acquired gender.

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3. Nonetheless, for married transsexuals, the right to recognition of a self-determined sexual identity under Article 2(1) in conjunction with Article 1(1) GG is substantially restricted by § 8(1) No. 2 TSG. This is only permissible if the restriction is justified by a legitimate aim and is proportionate.

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The right of a person to obtain civil recognition of the gender with which he/she identifies psychologically and which he/she has adopted physically by means of surgery is restricted by § 8(1) No. 2 TSG. § 8(1) No. 2 TSG sets out as a precondition to legal recognition of the acquired gender that the petitioning transsexual is not married. This impairs the rights of a married transsexual who only discovered his/her true gender identity later on during marriage, or who, like the petitioner, had previously suppressed any feelings of belonging to the opposite sex, but had decided to make these feelings public and to undergo surgery to resemble the other gender physically. The requirement to be unmarried encroaches upon the realisation and exercise of such a person's rights to acquire his/her desired gender status. By reason of this requirement, the married transsexual is faced with a choice – he/she can remain married, however, despite having already undergone a physical gender reassignment, legal recognition of his/her new gender identity is not possible. Instead, he/she may merely take a new name in recognition of the changed gender pursuant to § 1 TSG,

because a change of first name does not require an applicant to be unmarried. The other option is for a married transsexual to obtain a divorce in order to fulfil each of the pre-conditions of § 8 TSG and thereby obtain judicial recognition of the acquired gender. Divorce is also required even where the married transsexual and his/her spouse wish to remain married, in which case he/she would be acting against both partners' wishes. Furthermore, it would be debatable whether the divorce would be granted, given that the marriage had not failed. If the transsexual does not wish to obtain a divorce, having regard to these factors, the provision in question denies him/her the possibility of obtaining a determination of his/her perceived and adopted gender.

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4. The legislature must have accepted that, by enacting this provision restricting the right to obtain civil recognition of a self-determined gender identity, that a married transsexual would be denied the ability to have his/her perceived and adopted gender legally recognised, if he/she were not prepared to obtain a divorce. In this way, the legislature sought to avoid marriages occurring in which both spouses were legally recognised as being of the same gender. This is a restriction of the right to recognition of a self-determined gender identity, a right that that extends into the most intimate areas of personhood. The right derives from Article 2(1) in conjunction with Article 1(1) GG and is thereby rooted in respect for human dignity. As such the restriction is only permissible if it pursues a legitimate aim and is proportionate in its formulation.

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5. The right to legal recognition of one's perceived and adopted gender is withheld from married transsexuals by virtue of § 8(1) No. 2 and this is not justified. The provision is unconstitutional because it does not allow a transsexual person the possibility to obtain legal recognition of his/her acquired gender without requiring that his/her legally safeguarded partnership be terminated.

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a) However, in making the legal recognition of a transsexual person's changed gender subject to the condition of being unmarried pursuant to § 8(1) No. 2 TSG, the legislature is pursuing a legitimate goal in the common interest.

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Article 6(1)GG affords special protection to marriage under the legal order. Certain fundamental structural principles emanate from the linking of Article 6(1) GG to the institution of marriage, combined with the fact that the protected fundamental right is a freedom, and having regard to other constitutional norms (see BVerfGE 31/58 §69; 105/313 §345). In shaping marriage the legislature must respect these structural principles. It is an essential characteristic of marriage as understood under the Basic Law, that, despite societal change, it is the union of a man with a woman in a lasting life partnership based on free will under the aegis of the State (see BVerfGE 10/59 §66; 29/166 §176; 62/323 §330; 105/313 §345). In light of this, it is a legitimate concern for the legislature to seek by means of § 8(1) No. 2 TSG to prevent that, that due to the legal recognition of a married transsexual person's change of gender, marriages will come into being in which the spouses are legally the same gender.

46

b) The provision is also suitable and necessary in order to prevent marriages occurring between partners who are legally recognised as having the same gender, thereby creating the false impression that same-sex couples are permitted to marry.

47

Even just the outward appearance of a married transsexual can create the impression that he/she is in a same-sex marriage. This impression is strengthened by the possibility under § 1(1) TSG for a married transsexual to adopt a new first name in recognition of his/her perceived and adopted gender. However, even though this outward appearance is only slightly altered by the legal recognition of the transsexual person's acquired gender, § 8(1) No. 2 TSG remains appropriate as a means to proscribe same-sex marriages under law.

48

An alternative option was debated during the legislative procedure, under which a transsexual person's marriage would be dissolved by operation of law with effect from the court's recognition of the changed gender. As compared to the rule in §8(1) No. 2 TSG, this option is no less restrictive of fundamental rights. It is accepted that under this alternative, the spouses do not have to undergo the period of mandatory separation required in order to obtain a divorce and to thereby enable the transsexual partner to gain legal recognition of his/her changed gender. However, even in this case, the dissolution puts an end to the marriage as a legally secured partnership, and entails the loss of rights that are linked to marriage. Furthermore, with the aim of protecting the transsexual's privacy, the legislature sought by § 8(1) No. 2 TSG to ensure that the transsexual person's spouse was not involved in the proceedings for judicial determination of affiliation with the opposite gender. This presupposes that the marriage has already been dissolved prior to the proceedings for determination pursuant to § 8 TSG.

49

(c) The detriment experienced by a married transsexual by reason of the requirement under § 8 TSG to be unmarried in order to obtain determination of an affiliation with one's perceived and adopted gender is disproportionate in a narrower sense. It is too much to ask of married transsexual, who has undergone surgery to approximate his/her perceived gender and who otherwise meets the criteria of § 8 TSG, to force a separation from his/her spouse with whom he/she is legally bound and with whom he/she wants to remain together, without permitting the marital relationship to continue in another, equally secure form.

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aa) It is an important concern of the legislature to restrict the institution of marriage, which enjoys the special protection of Article 6(1) GG, to being a legally secured partnership between a man and a woman, ie, to opposite-sex partners. In consequence of this objective the legislature introduced the institution of a registered partnership, in order to enable same-sex couples also to enter into a legally secured partnership. The fact that this applies to a person according to his/her legally recognised gender is not objectionable from a constitutional point of view (see BVerfGE 115/1 §23).

51

The legal recognition of the acquired gender of a married transsexual would lead to a situation in which the marriage would remain in place, but between partners of the same gender. On the one hand, this would not open up marriage to same-sex couples. However, a marriage between partners who were previously of the opposite sex could become a marriage between same-sex partners. The legislature may accept that, even under the current legal situation, certain couples can create the impression that same-sex marriages exist. This can also be the case in reality, by reason of the perceived gender or surgically altered gender of one of the spouses. Nonetheless, the adherence by the legislature to the union of man and woman as a being a characteristic of marriage is a legitimate endeavour.

52
Married transsexuals may change their names in recognition of their perceived gender pursuant to § 1 TSG, while remaining married. Transsexuals of a homosexual orientation who have changed their first name but have not undergone gender reassignment may also become married, without losing this new first name. The Federal Constitutional Court has highlighted a number of options that would enable homosexual transsexuals who had not undergone a sex change to enter into a registered partnership, by allowing civil recognition of the perceived gender or by extending the application of the Life Partnership Law (BVerfGE 115/1 §25). The legislature has not made use of any of these options, and indeed has taken no action in this area. For this reason the transitional arrangement decided upon by the Federal Constitutional Court in its judgment of 6 December 2005 continues to be valid. This holds that § 7 (1) No. 3 TSG is not applicable, meaning that a transsexual who has changed his/her name pursuant to § 1 TSG may enter into a marriage without losing this new name. The name-change may also create the impression that marriage is open to same-sex partners. Lastly, even where a married transsexual undergoes surgical gender reassignment, this has no effect on the validity of his/her marriage. Even if the legislature accepts all these instances in which the appearance of same-sex marriages is created, this does not reduce the importance of the legislature's concern not to allow marriages in which both partners are legally regarded as being of the same-sex.

53
bb) On the other hand, § 8(1) No. 2 TSG causes particular detriment to a married transsexual. It creates a deep inner conflict, because he/she is faced with a choice under which, whatever decision is made, he/she is forced to give up something crucial. It is too much to ask that a married transsexual must first divorce his/her spouse in order to make use of the right to obtain legal recognition of one's perceived and surgically attained gender, derived from Article 2(1) in conjunction with Article 1(1) GG.

54
The requirement for a transsexual to be unmarried in order to obtain recognition of his/her acquired gender is a condition that a married transsexual in an existing partnership can only meet by taking on an unacceptable burden. Divorce is required in order to meet this condition, and divorce in turn requires a marriage to have failed. According to § 1565(1) BGB a marriage has only failed when the marital cohabitation no longer exists, and it cannot be expected that the spouses will wish to re-establish it. The spouses must therefore have the intention to separate permanently. This is,

however, not true in the case of a transsexual who wishes to maintain his/her marriage as a legally safeguarded partnership. A marriage cannot be dissolved unless it has failed. This means that a married transsexual cannot achieve legal recognition of his/her acquired gender by first obtaining a divorce, unless he/she feigns an intention to separate permanently from his/her spouse. Both options are unacceptable. Either the transsexual is barred from achieving legal recognition of his/her perceived and adopted gender, or alternatively he/she would be required to make untrue statements before the court.

55
It is not necessary to consider whether a divorce would be possible if the spouses, despite wishing to live together in the long term, took upon themselves a three-year period of separation, leading to the irrefutable assumption under § 1566(2) BGB that the marriage has failed. It is disproportionate to demand such a long period of separation from a couple that wishes to remain together, so that they can prove the alleged failure of the marriage and obtain a divorce in order for the transsexual partner to meet the pre-condition in § 8(1) No. 2 TSG. This is disproportionate, as the underlying reason for the requirement under § 8(1) No. 2 TSG that an applicant be unmarried is not linked to the failure of the marriage, but rather is based on the legislature's aim to prevent the occurrence of same-sex marriages.

56
(2) Above all, § 8(1) No. 2 TSG is a significant encroachment on the marriage of a transsexual who desires to obtain legal recognition of his/her perceived and adopted gender. The marriage enjoys special protection under Article 6(1) GG. Of additional importance is the fact that the transsexual's spouse is also affected by this encroachment.

57
(a) Marriage consists of a partnership of lasting duration between a man and a woman, in which the partners are equal and support one another (see BVerfGE 105/313, §345). In this way Article 6(1) GG protects marriage in its form as a community of responsibility and guarantees a sphere of private life that is free of State intervention (see BVerfGE 107/27, §53). The spouses may determine themselves how they will conduct their marriage. If the state pushes spouses towards divorce, this does not only go against the essential characteristic of a marriage as a lasting community of responsibility, but also takes away from marriage the protection guaranteed by Article 6(1) GG. Furthermore, the spouses are significantly impaired in their freedom to decide to live together and in their trust in the ability remain married.

58
Article 6(1) GG also protects marriages in which one of the spouses discovers or reveals his/her transsexuality during the course of the marriage, and where that spouse lives according to his/her perceived gender or undergoes gender reassignment surgery. The union has come into being according to law as a marriage between a man and a woman, and when it was entered into, displayed the fundamental characteristics of a marriage. As long as the legislature determines a person's gender for the purposes of marriage as being that of his/her civilly recognised gender status, and does not recognise a transsexual's perceived gender, then the only way transsexuals may conclude a legally safeguarded partnership with a person of the

opposite sex is by entering into marriage. If a transsexual follows this path and enters marriage, then the marriage enjoys the protection of Article 6(1) GG without limitation.

59
This protection does not fall away if, during the marriage, the transsexual spouse undergoes gender reassignment surgery to achieve the outward characteristics of his/her perceived gender. With this, the marriage is effectively one between same-sex partners, and this is also the outward appearance created. However, the marriage remains an enduring community of responsibility between two spouses, who are not excluded from the protection of Article 6(1) GG. If a married transsexual seeks to obtain legal recognition of his/her perceived gender following surgical gender reassignment, he/she is not thereby stating that the marriage is unimportant (as maintained by the Federal Ministry for the Interior, for the Federal Government), nor is he/she waiving the protection of Article 6(1) GG. As the petitioner's case proves, where a married transsexual wishes to gain legal recognition of his/her new gender, this by no means always entails an abandonment of his/her spouse, nor does it always mean that the spouse will seek a separation. If, however, both spouses wish to continue the marital partnership and joint responsibilities, then they have not waived the protection of the marriage. It is constitutionally impermissible to derive such a waiver solely from the fact that the married transsexual seeks to have recognised civilly the gender to which he/she belongs emotionally and physically, a right guaranteed pursuant to Article 2(1) in conjunction with Article 1(1) GG.

60
(b) The requirement for a transsexual to be unmarried in order to obtain legal recognition of a change of gender suggests to a married transsexual that his/her marriage should be terminated. For him, this requirement has the same effect as the withdrawal of the protection of his/her marriage. He thereby comes under psychological strain and pressure to have to end the marriage, in order to gain legal recognition of his/her new gender, despite not wishing to separate from his/her spouse. The transsexual is thereby required to sacrifice the relationship with his/her partner in exchange for the desired gender identity, even when this relationship is a stabilising factor, and even though he/she does not wish his/her spouse to have to undergo divorce and thereby suffer a loss of rights. This conflict is a serious encroachment upon the transsexual's marital relationship.

61
(c) The spouse of a transsexual who seeks legal recognition of his/her changed gender identity also experiences a serious impairment of the right to protection of marriage guaranteed by Article 6(1) GG. The spouse should be able to trust that the legally secured marriage has substance for as long as the pair live together and share responsibility for one another. Although this desire continues notwithstanding that his/her spouse has undergone an operative gender reassignment, he/she is faced with a difficult decision by reason of § 8(1) No. 2 TSG. Either he/she may hold to the marriage, thereby preventing the spouse from obtaining legal recognition of his/her gender identity, knowing that this is of central importance. The alternative is to unwillingly obtain a divorce, thereby not only undergoing a separation but also losing the legal safeguards associated with marriage. This encroaches upon the spouse's interest in the continuance of his/her marriage, protected by Article 6(1) GG.

62
(cc) If one balances on the one hand, the legislature's interest in limiting marriage to opposite-sex couples, and on the other hand the interests of a married transsexual seeking to attain legal recognition of his/her altered gender combined with the spouse's concern in upholding the marriage, both sides have considerable weight. However, taking into account the importance of the right to recognition of one's true gender identity derived from Article 2(1) in conjunction with Article 1(1) GG, it is unreasonable to link the recognition of a married transsexual's perceived and adopted gender to the requirement that he/she previously have ended his/her legally secured marital relationship.

63
(1) These interests, which come into conflict in respect of the protection granted to marriage, are protected by the same fundamental right. Article 6(1) GG protects marriage as a legal institution, which includes its nature as a union of man and woman in a life partnership. Article 6(1) GG also protects existing marriages and the freedom of the marital partners to shape their married life and to continue their marriage. The desire to retain the institution of marriage in its traditional form and therefore to restrict it to opposite-sex partners is not of greater or lesser importance than the protection of a couple's faith in having entered into a lasting community of responsibility that it will not be dissolved by the State against their wishes. Therefore the legislature's interest in upholding the institution of marriage as a union of man and woman does not necessarily take second place after a same-sex couple's interest in the preservation of their marriage - just as the legislature cannot offhand override a married couple's interest in the continuance of their marriage.

64
It is, however, of consequence that genuine relationships are driven into an existential crisis by reason of the provision in question. When in the present case the couple concerned invokes the lasting nature of their marriage, they thereby invoke their personal promise to marry, which they perceive as unchanged and irrevocably binding and which forms part of their identity. In this respect the issue concerns the future fate of a life path that the couple has already trodden together, having life changing consequences. In contrast, the principle that marriage should be entered into by opposite-sex partners is only tangentially affected in view of the current factual circumstances. The cases in question concern a small number of transsexuals, who first of all entered into marriage as man and woman, who only then discovered or revealed their transsexuality during their marriage, and whose marriage is not shattered by this profound change in the relationship, but rather, is sought to be continued by both spouses. Moreover, in the situation described, the impact of the principle is lessened by the fact that the couples concerned already live together as same-sex couples and have first names reflecting the same gender.

65
A crucial factor in the balance is the interplay between Article 6(1) GG on the one hand, and Article 2(1) in conjunction with Article 1(1) GG on the other, and the right to recognition of a self-determined gender identity protected by those Articles. § 8(1) No.2 TSG creates a particular burden by reason of the fact that, in order to effect the legislature's wishes, the exercise of one fundamental right is made dependent on the waiver of the other. § 8(1) No.2 TSG demands married transsexuals to choose

between the legal recognition of their gender identity and the perpetuation of their marriage. Furthermore, this affects the other spouse's fundamental rights under Article 6(1) GG. For the persons concerned it leads to an inner conflict that is hardly possible to resolve, and also to an unreasonable encroachment upon their fundamental rights. § 8 TSG infringes Article 2(1) GG in conjunction with Article 1(1) GG, and Article 6(1) GG, because it does not grant a married transsexual the option to obtain legal recognition of his/her acquired gender unless his/her marriage is ended. § 8 TSG is therefore unconstitutional.

66
Accordingly, it is not necessary to decide whether § 8(1) No.2 TSG contravenes Article 3(1) GG.

67
6. It is up to the legislature to decide the means in which married transsexuals who fulfil the remaining requirements of § 8 TSG may obtain legal recognition of an affiliation with the opposite gender to that registered at birth, without being required to end a legally secured marriage.

68
a) In order to protect the institution of marriage as a partnership between opposite sex partners, the legislature may wish to adhere to the prohibition on a couple remaining married in cases where one spouse obtains a judicial determination of his/her change of gender and the spouses thereby become a same-sex couple. The legislature is at liberty to adhere to this prohibition, as the legislature's concerns take Article 6(1) GG into account.

69
However, the legislature must thereby take care that in any case, the transsexual's pre-existing marriage can continue as a legally safeguarded community of responsibility.

70
If by reason of gender reassignment surgery and civil recognition of changed gender status, a transsexual's marriage changes from being a marriage between opposite-sex partners to being one between same-sex partners, it can no longer be claimed that the marriage is partnership of man and woman. The protection enjoyed by the marriage under Article 6(1) GG relates to the community of responsibility entered into and all of the rights and obligations conferred by to it. The partner's trust in the continuance of this partnership continues to be protected. In this respect, the relationship can be denied as a marriage but not as a community of responsibility. As stated under paragraph B. I. 5. c. cc. above, it is too much to expect of the partners to endure an end to the community of responsibility as well as the loss of the rights accrued from the marriage. This must be taken into account by the legislature in drafting any new provision.

71
It is left to the legislature to ensure that the community of responsibility between a married transsexual and his/her spouse can continue and not be terminated. As such the legislature could provide for the conversion of the marriage into a registered partnership, effective from the date of legal recognition of the changed gender status

of the transsexual spouse. The legislature must however take care to ensure that the couple retains the rights and obligations conferred by marriage, and that these rights and obligations remain undiminished under the subsequent registered partnership. To this end, the legislature may create a "sui generis" form of legally secured life partnership, which ensures that the couple's rights and obligations acquired by marriage are safeguarded. The marriage can be allowed to continue in this other form with effect from the legal recognition of the changed gender of the transsexual spouse.

72
b) There are only a small number of married transsexuals who are affected in this case, ie, those who first discovered or revealed their transsexuality during their marriage, and whose marriage was not shattered by this far-reaching change to the couple's relationship, but rather was continued by desire of both spouses. In light of this, the legislature may decide to grant transsexuals the option to obtain legal recognition of their changed gender while continuing their marriage, and to remove § 8(1) No. 2 TSG from the statute. This option would be constitutionally permissible owing to the protection granted to marriage by Article 6(1)GG, even though Article 6(1)GG protects marriage as a partnership of man and woman.

II

73
The unconstitutionality of § 8(1) No. 2 TSG does not mean that the provision is invalid and void, but rather that it is incompatible with Article 2(1) GG in conjunction with Article 1(1) GG, and with Article 6(1) GG. As demonstrated, there are several options open to the legislature for rectifying the position of unconstitutionality. The legislature is granted the period until 1st August 2009 to put such changes into effect.

74
In light of the gravity of the encroachment suffered by a married transsexual in the denial of legal recognition of his/her perceived and acquired gender, § 8(1) No. 2 TSG is declared inoperative until such time as a new regulation enters into force.

75
If the legislature opts to convert a transsexual's marriage into another form of secured partnership with effect from the civil recognition of his/her acquired gender, the legislature can also provide that, where a married transsexual obtains civil recognition of his/her acquired gender owing to the inapplicability of § 8(1) No. 2 TSG, the marriage can be converted into a legally safeguarded partnership by operation of law. This would take effect from the date of the decision on legal recognition.

76
Judgment is passed by 7 votes to 1 with respect to B. II., 2nd paragraph, and in all other respects is passed unanimously.

Papier	Hohmann-Dennhardt	Bryde
Gaier	Eichberger	Schluckebier
Kirchhof		Masing