

Alternative Report Follow-up Germany 2011

submitted by German Women's Rights Organisations

in Response to the Written Information of Germany

on the steps undertaken to implement the recommendations contained in paragraphs 40 and 62 and as requested as a follow up report in paragraph 67 of the Concluding Observations of the CEDAW Committee, 12 February 2009 [CEDAW/C/DEU/CO/6],

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Introduction

The German State party's written follow up information submitted to CEDAW on 16th Aug. 2011 is utmost disappointing to the authors of this Alternative Report and the NGOs in which they are active. It reflects the general attitude of the German government to still continue to be active only in investing time and resources in studies, written guidelines, reports, recommendations by external experts and defining so called voluntary agreements but hiding away from creating any temporary special measures (Art 4.1) with the character of a legal binding instrument. As such there are not really new measures with a meaningful effect for the victims of the various discriminations and violations on ground of sex and gender which are already identified in the long term dialogue within the UN on the CEDAW implementation with the CEDAW Committee, the State party and the women's rights and gender focused NGOs.

Again there have been no specific consultations with the NGOs even though the CEDAW Committee repeatedly urged for it. Not even CEDAW's clear request "to enter into dialogue with non-governmental organizations of intersexual and transsexual people to better understand their claims and to take effective action to protect their human rights" (CO 2/2009 para 62) was truly realized. Instead a third instance, the German Council for Ethics (*Deutscher Ethikrat*) was ordered to carry out the dialogue. It might be a chance for an open dialogue of the civil society. But this body is not representing the Government and this 'out-sourcing' policy can as well be interpreted as a disgracing act of denial of contact with the targeted victims.

The activities of the German government to implement CEDAW and a de facto gender equality in Germany especially as to the improvement of the three highlighted issues as described in their written information are mainly not new and are not a direct response to the CEDAW request of 2009 (CO para 67). Many activities and the approach to study the root causes are welcomed by the authors and NGOs. Others are critically commented in the following alternative report in detail.

The Government's own general approach seems to be to select single women's human rights issues rather than working on the full range of issues under CEDAW.

There is a structural omission in the implementation of CEDAW that is relevant for all fields including the gender pay gap: What is missing between this kind of selective strategy and the integral approach and demand of CEDAW as laid down in the Convention, especially in Article 1 and linked with other human rights treaties, are (temporary special) measures as suggested in Article 4(1). Temporary special measures had also been recommended with regard to Article 11

about discrimination in the labour market in the 2009 Concluding Observations (para. 38) which is closely connected to the gender pay gap.

The German State party up to now has not unfolded their full potential and flexibility to “pursue by all appropriate means” (Art.2, General recommendation No. 28, para 23) a policy to eliminate all forms of discrimination against women based on sex and gender. This results, inter alia, in a persistent pay and income gap. Although a great number of ‘urgent’ recommendations by the CEDAW Committee and NGOs had been mentioned and requested ever since the first state report.

The government also does not undertake broad visible efforts to spread human rights education. Instead it tends to shift responsibility to other institutions. Its own inactivity in certain aspects such as redress measures are in contradiction to the government’s “obligation to protect” according to General Recommendation No. 28, para. 9.

While the government considers the remaining gender pay gap a “key indicator” to reveal several aspects of continued discrimination against women in professional and labour market in its intermediate report (p.3), this remaining gap can also be understood as a key indicator for the absence of a comprehensive and effective approach to end this discrimination by searching for appropriate measures - including temporary special measures according to Article 4 (1) and including the state obligation to end discrimination by enterprises according to CEDAW Article 2. The NGOs thus welcome very much the clarification of the meaning and scope of Article 2 in General Recommendation No. 28. Again we call for a systematic and comprehensive approach including evaluations with indicators and benchmarks to implement CEDAW and to end the elimination of all identified forms of discriminations and violations against women and on grounds of sex and gender in Germany. We recommend a CEDAW –conform National Action Plan for Gender Equality.

We hope that the CEDAW Committee in its consultation can outline the German obligation for a CEDAW supported approach to the gender pay gap and the obligation to create binding instruments for equal pay. As long as the gender pay gap exists women should have compensation e.g. in tax, retirement equalization or any such kind of Art. 4.1. conform temporary special measures guaranteed by the State party. In addition the various relevant ILO Conventions (e.g. No. 100, 111, 156) should as well be implemented. The German State Party shall as well protect, compensate or enact equal remuneration due to CEDAW et al. in Germany and elsewhere in the global economy where German based companies are responsible for employment and equal remuneration (Art.2, Gen. rec.28, para 12).

Part I

Reduction and Elimination of Pay and Income Differences between Women and Men

I. German CEDAW-Response Excludes Important Scientific Results

The gender pay gap has been the object of numerous studies over the last years, including for example the first German expert-commission-report on gender equality. Although this study has been realized on behalf of the German government, it is only very selectively mentioned in the German intermediate report.

Most of the aspects causing the gender pay gap mentioned hereafter have been the subject of public discussion in Germany for many years. Some of them are specific to Germany and most of them have already been identified in the gender equality report:

II. Traditionally Lower Appreciation of Female Jobs and Professions Requires Positive Action

The Gender pay gap has a long-standing tradition in Germany. About one hundred years ago, gender pay observations commenced, identifying a pay gap between female and male industrial workers of up to 70 percent. Today this gap has been reduced, particularly by trade union action, to 23 %. But the traditionally lower appreciation of professions and jobs held predominantly by women prevails and is apparently still considered justified in many areas: employers are often not prepared to deal with equal pay, policy regulations may still reflect the idea of a woman's earnings being an addition only to the family sustaining income generated by a "male head of household", collective contracts, that have not been revised according to equal treatment provisions, still exist - to name but a few aspects supporting the perpetuation of the pay gap.

- The German **vocational training system** shows, that the lower appreciation for professions, studies and apprenticeships predominantly chosen by women, is being established even before women enter the labour market. In particular, professional trainings, which are not subject to the so-called "dual system" (training on the job within a company plus school periods for theoretical instruction) are later-on subject to low-pay, which in most cases does not grant the individually necessary subsistence level. Therefore, the view-point is widespread, that wages in professional fields predominantly chosen by women, e.g. healthcare and other caring professions, is unjustifiably lower than wages for other comparable fields of professions predominantly chosen by men, e.g. in the technical sector – even if the respective level of qualification and the duration of training are comparable.

Moreover, the traditionally lower appreciation also concerns professions within the dual vocational training system, if they are predominantly attributed to women. It is therefore quite "normal" in Germany that women working for instance as doctors' assistants, office assistants, hair stylists, restaurant and hotel staff, indoor

cleaners (as opposed to e.g. window cleaners) receive lower pay than their male colleagues.

In many cases, the full-time school-based system is made responsible for the pay gap. The latter is said to fail to provide homogenous qualification profiles or nationwide standards. But the fact that women dominate in this full-time school-based system is not sufficiently taken into account. It is also said, that these educations mainly lead to jobs in the social and caring sector of the labour market – where low pay prevails.

At this point, we have to ask the Government and other legal institutions, why they do not provide for equal treatment and equal pay in these sectors, but leave improvements to voluntary agreements and action. Although we know from science and practice that an improvement does depend on legal and public decisions concerning market conditions, payment rates and collective bargaining conditions, the German Government leaves the improving action to companies and the persistence of women, although it is also clear that they are particularly vulnerable concerning public and financial estimation and access to sufficient income as well as to social security. Such unequal division of rights, opportunities and means demands **legal adjustments** and supporting **positive action**.

- The problem of discrimination in the vocational training system is multiplied for **women with disabilities**. Women with disabilities face the same problems based on gender-role-stereotypes as women in general. Needing a vocational retraining, they often are referred to jobs in the field of housekeeping or office work. As a mirror of society, jobs in sheltered workshops for disabled people mostly occupied by women with disabilities are paid less than jobs mostly done by men with disabilities. (Not to mention the problem, that people with disabilities in sheltered workshops cannot gain their living or choose their work freely in an open, inclusive and accessible labour market as set forth in article 27 of the CRPD)

III. Framework-Conditions Keep Women within the “Additional Family Income Range”

The currently applicable institutional framework conditions in Germany continue to create strong incentives for unequal distribution of employment and care work between spouses. Mainly the **spousal tax splitting system**, the **matrimony-derived social insurance entitlements** and the **marginal employment market**/so called **mini-jobs** (see the appendix to this report for further explanation) motivate married women, especially married mothers, either to leave the labour market altogether or to work in marginal employment only. These family-related periods out of work and reductions of work time lead to life-long poorer earnings and lower career prospects for women. These effects were already pointed out in the shadow report of the Alliance of German women organizations as well as in prior shadow reports and in the supplementary shadow report by the German Women Lawyers Association (Deutscher Juristinnenbund). They were also mentioned as a point of concern in the concluding observations of the CEDAW Committee in February 29, 2009 (paras 37-38, para 30 for the tax system). The mini-job sector promoted by government has proven to be a “trap” for women in terms of career development. It is almost impossible to step forward from a mini-job, which is not subject to social insurance contributions, to a job *including* such contributions. Mini-jobs are

unique in Europe in excluding employees with low incomes from the social system and define an upper income-level, up to which the social security is subject to either family relations or the benefit systems. Familywork-related periods without employment or with part-time employment, particularly in mini-jobs, are still being held responsible for life-long poor earnings and low career prospects of women.

But very often they are also due to the lack of preparedness of employers to treat women equally, so that the prospects for women willing to move on from the low-pay sector to a better-paid position are in general significantly worse than those for men.

Here we find both sides of a medal: The general low-pay-situation of women matches with the German taxation system and family-deriving social security, thus perpetuating their dependence – either from a husband/spouse or from the supporting social benefit system.

Although the discussion is well known to the German government, neither the long established criticism of the tax-splitting system nor the effects of the mini-job system are analyzed or presented as a core reason for lower incomes of women in Germany in the Government's Report. This is an unacceptable omission.

IV. Migrant Women on the Labour Market

The German CEDAW 2011 intermediate report explains that social integration is based on “fair chances **for all**”(p. 3). But it does not mention **migrant women** at all, even though they suffer from discrimination in many respects. Certainly, CEDAW's Concluding Observations (para. 40) of 2009 oblige the government to include migrant women as well as non-migrants.

- Structural discrimination in general and certain specific obstacles are highly detrimental to the economic situation of migrant workers, especially women migrant workers in Germany. One concrete obstacle to equal pay for migrant women has to do with administrative regulations: Their **foreign professional degrees/qualifications are rarely recognized by the German authorities**. As a result, migrants, especially women, often work in positions that are tremendously below their qualifications. Many women academics with a PhD work as cleaning personnel and thousands of migrant academics become part of the unskilled labour force.
- A law to change this situation, promised since December 2009, has now been drafted (“Entwurf eines Gesetzes zur Verbesserung der Feststellung und Anerkennung im Ausland erworbener Berufsqualifikationen” -“Berufsqualifikationsfeststellungsgesetz”, BQFG) and referred to the Bundestag in July 2011. About 300,000 people would benefit from a reform half of which will be migrant women.
- We welcome this initiative as a step forward and call the German State to keep the issue as a priority in the parliamentary process and not let pass another year and a half to solve it.
- However, we agree with the parliamentary opposition in the following points that need to be highlighted again:
 - (1) The title of the law implies, that it is going to materially rule formal recognition of professional degrees/qualifications. This is not the case. The

law is about a procedural improvement. It introduces the right to reach a decision on the recognition within three months. Still, this does not mean that the degrees will be recognized which is the essential problem.

- (2) The law does not include many academic professions.
- (3) We are concerned about procedural provisions not being harmonized enough between all the German *Länder*, so that the actual place of residence may determine recognition of qualifications.
- (4) We also miss draft provisions for central institutions to support migrants during the whole process. They are urgently needed.

- In addition, we call for a systematic integration of migrant perspectives into labour market policies and measures to reduce the gender pay gap.
- Furthermore, we call for ratification of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families of 1990.

For a transitional period we suggest temporary special measures according to the Concluding Observations (paras 25, 26) to improve women migrant workers position on the labour market:

The government could oblige employers to formulate job offers

- open/inclusive to migrants by announcing the respective job title/requirements “or a comparable foreign professional qualification”
- and/or by introducing combined quota policies in a company.

(For more contextual information and references, e.g. to international law please refer to separate document by "Lawyers without Frontiers").

V. **The Incomes of Women Reflect the Increasing Low Appreciation Shown to Women**

- The **earnings in the service sectors** with a high percentage of women have increasingly decoupled from general earning trends over the last 15 years. The employment rate of women in (West)Germany has risen in recent years, in particular within the service sectors. But this increase is only due to the increasing numbers of jobs in the marginal employment market with part time jobs and so called mini jobs (see further explanation in the appendix). The overall participation of women as measured in equivalent full-time employment has hardly changed at all. This is contrary to almost all other European countries. These facts were already mentioned in the former Alternative Reports and the concluding observations of the Committee.
- **Women with disabilities** do not benefit from labour market programmes to the same extent as men with disabilities do. In 2009 only 38.8% of women with disabilities obtained in-service labour market integration assistance in comparison to 61% of men with disabilities.

They are also directed to mini-jobs as a substitute for jobs, as they are assumed to face longer odds of labour market integration. Whereas 61% of men with disabilities have been placed in a job with the support of the Integration Service (Integrationsfachdienste, a special Service to support persons with disabilities in

gaining employment), only 39 % of women with disabilities received a job by the placement of the same Service-Centre (Deutscher Bundestag, German Parliament, 2010).

As a result, women with disabilities have a distinctly lower income than men with disabilities, also due to their lower labour market participation. In 2005 15% of men with disabilities in the age range of 25-45 years had a net income of less than 700 €, whereas 39% of women with disabilities are obliged to live of a net income of less than these 700 € (3rd Government Report on Poverty and Wealth, 2008, 163).

- As already described above, most current **job evaluation systems** are not designed to exclude gender-based discrimination. Even collective wage agreements are not gender-neutral, which is already known to the social partners, but is – with respect to framework conditions and money-saving trends in public and private services – not easily abolished, although several trials (and errors) by the unions could have been observed and followed, if employers – private and public – would have been prepared to generally follow the equal-pay strategy of female unionists and women's organizations. But: This is not the case.

Instead of undertaking appropriate measures the German government reasserts, that there is no direct intervention options in this area. This argument abuses the principle of autonomy in wage agreements to legitimize inaction on the part of the government (see already Alternative report of the German Women Lawyers Association 2008, p. 7). It cannot justify the resistance to procedural legislation for implementing equal pay. Such a law that uses non-discriminatory labour evaluation systems has already been worked out years ago and is well known to the German government. The government nevertheless does not bring this (or any similar) draft into the legislative process.

- Furthermore there is no real progress within the area of representation of **women in management and decision making positions**. This is well documented in the statistics presented by the German response (p. 8-10). These statistics also prove that women with higher education and in higher decision making positions have to face even higher inequalities when it comes to income. Within the services sector, this situation is to be regarded as being even worse, if you take into account that, in services, the percentage of female employees is even higher than in general. But this does not lead to a higher percentage of female managers, compared to the rates within the other industries.

In spite of these facts the German government has not created one single binding temporary measure like it is enshrined in CEDAW Art. 4.1 to compensate or/and to eliminate this obvious structural discrimination. Instead the government still relies on a voluntary agreement between the German Federal Government and the leading German trade associations, nursing the hope to hereby promote equal opportunity for men and women in the private industrial and services sector, though its ineffectiveness to change the gender distribution of management positions has been proven over the last nine years.

VI. German Government's Non-Action Infringes on International Law

The response of Germany to the follow-up recommendations of the Committee reveals, that the German government is not seriously facing the problem of the gender pay gap with a consistent policy, although proper measures have been discussed in the public for years (see below). Maintaining its policy, which leads to grave gender inequality of male and female incomes, Germany gravely and systematically violates international law i.e. the rights set forth in the Convention on the Elimination of all Forms of Discrimination of Women. The reasons for the wage gap have been analyzed for a long time. There is no priority for further analysis. It is time now to abolish structures that work as incentives for discrimination and prevent women from adequately exploiting their potential in the employment system, thus leading to significantly lower incomes. And it is also time to develop a consistent policy towards an employment model that avoids the role model of partnership with asymmetric working patterns.

VII. Solutions have already been discussed sufficiently – positive Action is overdue

The following measures have been discussed in the German public for years. Although they are well-known to the German government, hardly any effort has been visible to abolish discriminating effects or to develop new instruments:

- **Gender Budgeting** (see the appendix to this report for further explanation) and **Mainstreaming processes** on the national level of the state budget in coherence with the *Länder* which addresses (evaluates and steers) by ex-ante and ex-post gender and human rights impact assessment the obligations of CEDAW (and the Basic Law and other legal obligations as of the ILO or EU framework). The implementation of a systematically integrated Gender Budgeting and a gender mainstreaming process into labour market programs (including programs for people with disabilities, with migration background etc.) could help overcoming the gender pay gap. This process shall also make transparent the gender pay gap on the public service through a transparent account of part- and fulltime remuneration equivalents (for further explanation see the appendix).
- Rules in **social and income tax law** which favor asymmetric role models in families should be subjected to fundamental reform. The CEDAW Committee already recommended an assessment of this system in its concluding observations 2009, para 30. Notably the German taxation of spouses should be changed. The different taxation levels in **Income Tax Class Combination III/V** (see further explanation in the appendix “spousal tax splitting system”) motivate women to limit their work incomes. They furthermore have negative impacts on the claiming of income replacement benefits such as unemployment benefit and parental allowance. These laws should be replaced by a model of individual taxation that is common in Europe.

In addition the non-contributory **joint spousal insurance** in statutory health insurance system (see further explanation in the appendix “matrimony-derived social insurance entitlements”) should be replaced by an independent social insurance.

- The special status of **marginal employment positions without social insurance** has to be abolished. This status creates misleading incentives for companies and

employees to split up work that is subject to social insurance contributions into so-called mini-jobs with poor future prospects. These rules mainly affect women and are associated with long-term biographical disadvantages (see further explanation in the appendix). And they especially affect women with disabilities, who are directed to midi- and mini-jobs as a substitute for jobs, as they are assumed to face longer odds of labour market integration.

- An **Equality Act for the private** sector is needed to counter unchanged segregation on labour markets. The agreement between the Federal Government and the leading confederations of German business and industry, as described in the German response (p. 12), has failed. A broad coalition of women's NGOs in Germany had already called for such a law in 2003, in its alternative report to the 5th state report; NGOs have repeated this critique in 2009 and we need to highlight again: voluntary agreements, which are still central to government's strategy, have failed. Both unions' and other women's organizations have therefore ever since been requesting the installation of binding anti-discrimination acts for equal payment, equal treatment in private employment and obligatory quotas for women.
- **Minimum wage** should be introduced for all branches of the employment market. Experience in the United Kingdom has shown that a minimum wage can reduce pay inequality in lower income sectors and that women in particular benefit from it. The issue of minimum wages is one of the most controversial in Germany, but its gender dimension is not reflected enough. We consider the resistance against minimum wages for all branches especially unfair against women because women are at a higher risk to work in precarious and low-paid contracts.

Due to the special German labour market situation, it is recommendable to follow a **three-step minimum-wage model**: General validity of branch collective contracts as a first step, then general validity according to the Employee Posting Act (Arbeitnehmer-Entsendegesetz), and thirdly general minimum wages for sectors, which are not subject to any collective agreement.

- Gender-specific disadvantages in **job evaluation methods**, job assignment systems and compensation systems have to be abolished. At present two methods are discussed, which offer a certain progress. The application of such instruments should be compulsory for operational protagonists.
 - **Logib-D**: This instrument has been developed on behalf of the German Ministry of Family Affairs, Senior Citizens, Women and Youth referring to a similar Swiss model. Logib-D does not check equal payment between women and men. The criteria of Logib-D – education, years of service, (potential) work experience, the professional status of the job and its level of performance are considered in this context – are themselves not free from discrimination. (see further explanation in the appendix). Some women's rights organization estimate Logib-D to be an improper instrument to abolish wage and income differences between women and men. All agree that this instrument should be added to by another one, e.g. **EG-check.de**

- In the future, companies have to be obliged to promote and reach **transparency**, concerning their system of payment in order to enable women to claim for equal payment.
- On top of that, it has to be criticized that Germany does not offer any opportunity for unions and associations to make use of **collective proceedings** in the name of people being discriminated against. German legislation still relies on individual court cases, which do not offer general solutions, but only individual ones (see further explanation in the appendix “Legal action against gender discrimination”).

Individual claims for compensation after violation of wage equality should therefore be facilitated. Collective legal action is to be introduced into the General Equal Treatment Act (Allgemeines Gleichbehandlungsgesetz – AGG).

- The parties to **collective wage agreements** should be compelled to use gender neutral job evaluation systems. A majority of women’s rights organizations favor in addition a system to **check** these **wage agreements** to be established and compulsory for the parties to collective wage agreements. The loose cooperation with labour unions, which is described in the German Follow-up response 2011 (p. 14) is not sufficient to overcome gender discrimination in job evaluation systems. The mere recommendation of using LogibD in the brochure “Fair P(l)ay – Pay Equity for Women and Men“ does not bring any change either. The collective bargaining organizations themselves have not managed to design a non-discriminatory job evaluation systems.

This petition especially draws attention to the collective bargaining, which has taken place in the **public sector** and which ran around the target due to the unwillingness of the German governmental negotiation partners to improve the general wage level of female professions in the public sector – it was said that this would be too expensive(!). Instead, **public authorities** should become a **positive role model** here.

- The **vocational training system**, which is divided into a dual branch and a full-time school-based branch, should be reformed and standardized with the goal of uniform nationwide standards in vocational training and promoting the professionalization and improvement of the status of personal occupation. The current systems allow disadvantages for women, who are strongly represented in the school-based training system.
- Instruments to rectify weaknesses in **discontinuous employment** and **education paths** should be developed or existing instruments for younger students as the German Federal Education and Training Assistant Act (*BAföG*) should be expanded to create an “adult BAföG”
- The **parental allowance** system should be developed further. Even though the law allows for several combinations between the partners, in practice it is not used to its full potential. In particular the so-called partner months, which would be lost for the couple if not taken by the second parent, are taken by fathers. So, at the moment, the most widespread combination is two months taken by the father and twelve months taken by the mother, leading to severe disadvantages for these

women in their further income because of this period of work interruption. To tackle this practice the share of months should be extended. There should be no disadvantages for the parents when both claim parental allowance at the same time combining it with part time work. If both parents work 50% and truly want to share child-raising duties, each of them should have the right to half the parental leave subsidy for 12 months. Thus far, the combined parental leave period for two partners with part-time positions ends after the first 6 months of the child's life.

- **Childcare services** have to be improved. In its intermediate Report on page 15 the government considers the long-term effects of the family break and outlines, that the duration of this break is relevant. Comparing East and West Germany the government describes the availability of child care as one core factor for the gap (p.8) CEDAW in its preamble emphasizes “that the upbringing of children requires a sharing of responsibility between men and women and society as a whole” and in its article 11 (2c), calls States to “encourage the provision of the necessary supporting social services to enable parents to combine family obligations with work responsibilities and participation in public life, in particular through promoting the establishment and development of a network of child-care facilities”. Government has set the following target: 35% of under-threes in childcare by 2013. This has to be achieved. Women’s NGOs furthermore doubt that this target meets the actual demand and call for an evaluation. In addition, flexible opening hours of childcare services and all-day schools with lunch-time services and after school supervision of homework are necessary to really enable parents to work full-time if they choose to do so.

Part II - Dialogue with Non-governmental Organizations for Intersexual and Transsexual People

I. Intersexed Humans

In no. 62 of the concluding observations to the 6th state report of Germany on CEDAW dated 10.02.2009, the Committee has asked Germany, to take effective measures for the protection of the human rights of intersexed people, and to start a dialogue with NGOs of intersexed people in order to understand their claims. In no. 67, Germany has been asked to send, within two years, an interim report to the CEDAW Committee of the United Nations, and inform in this interim report, inter alia, on the measures, which have meanwhile been undertaken regarding no. 62.

In the interim report of the Federal Government, it is explained in great detail, that the government has commissioned the German Ethics Council to start this dialogue with intersexed people. The German Ethics Council is going to have analyzed the results of its three-part discussion by December 2011. This can lead to recommendations, which can be followed. However the recommendations of the Ethics Council do not have any legislative effect.

We hold the opinion, that the recommendations of the CEDAW Committee have not been fulfilled. The German Ethics Council cannot enact laws. Therefore the initiation of the dialogue with the German Ethics Council does run contrary to the intention of the Committee, i.e. to immediately implement the rights of CEDAW for intersexed people.

Despite several requests, no dialogue between representatives of the government and the parallel rapporteurs of the NGO has taken place up until today. No dialogue with any NGO association of intersexed people has been conducted by representatives of the government. Neither the parallel rapporteurs, nor the representatives of the NGO or the IVIM Berlin, another NGO of intersexed people, have been contacted. The human rights violations have not been stopped. The Federal Government has, from the point of view of the parallel rapporteurs, not sufficiently and immediately fulfilled the obligations of CEDAW.

The association of intersexed people welcomes the dialogue with the German Ethics Council, which is important for the shaping of ideas of politicians and the public. Even though this is an important step into the right direction, it is not equivalent to the direct dialogue with the Federal Ministry of Family Affairs, Senior Citizens, Women and Youth and with other ministries. And it is also not equivalent to a direct dialogue with the Federal Ministry of Health, which has the authority to enforce the existing national laws for the protection of patients' human rights in the light of art. 12 CEDAW and of art. 16 CEDAW. Despite all respect for the work of the Ethics Council, it has to be stated, that valuable time has been and is being wasted. Intersexed children are still irreversibly damaged at their genitalia without having themselves given consent; children are still deprived of their fertility and gonadectomized people are still substituted with hormones insufficiently. Any child violated because of this waste of time, is one child too many.

But there is yet another reason to criticize the shuffle off responsibility to the Ethics Council. The Ethics Council's dialogue is strongly shaped by the majority of participating physicians, medical ethicists and medical jurists. It is them who benefit from current medical treatment in their everyday work. This clearly establishes a conflict of interest, colliding with the interests of intersexed people. It remains to be seen, to what extent the interests of intersexed people will be included into the recommendations of the Ethics Council.

Genital surgeries and surgeries to the human germ lines most certainly are ethical questions too. But this statement focuses on the matter of discrimination because of the sexual condition and the unfulfilled obligations of the state for a minority, which is being denied any protection.

Within German civil society, the concluding observations of 2009 have initiated a broader discussion, in which the majority supports the claims of the parallel rapporteurs. The consciousness within several political parties is growing, so two applications have been filed into the Bundestag (House of Representatives).

The application "preserving the basic rights of intersexed people" has been filed by the faction Bündnis 90/Die Grünen on 13.4.2011 (file number 17/5528). The first reading has not taken place yet. File number 17/5916 of the 25.05.2011 of the faction „Die Linke“ demands: „Ensure sexual human rights for transsexual, transgender, and intersexual people“.

Other human rights groups and associations have declared their support of the claims of the parallel rapporteurs.

On 20.05.2011, the CESCR Committee has, in no. 26 of the concluding observations to the 5th state report of Germany to the CESCR, recognized the violations of the human right to health (art. 12 CESCR) and of the prohibition of discrimination (art. 2 CESCR) regarding gender identity, fertility, sexual condition, and physical integrity, as well as regarding the pathologization of intersexuality. This has decisive importance for CEDAW also, because art. 12 CEDAW also contains the universal human right to health, in this instance focusing on the prohibition of any discrimination against women regarding health. In addition to that, art. 16 CEDAW contains the right to reproductive self-determination. And art. 3 CEDAW prohibits the discrimination against women regarding all universal human rights, which have been ratified by the respective state, thus including art. 12 CESCR, which explicitly protects the highest attainable standards of physical and mental health for the respective human being. Rarely any other universal human right has such a close connection to the human dignity (art. 1 UDHR) as the human right to health. That is why this statement concentrates on the state's negligence of the responsibility to protect the human right to health of intersexed people, because most other violations of their universal human rights result from the violation of the human right to health.

The violations of the informed consent, which according to art. 8 general comment 14 to the CESCR is included in the human right to health, are still not prevented. Genital-altering operations on intersexed children are taking place while we write with only the consent of the parents, even though without any threat to life or to organ failure, there is

no legal basis for a consent of the parents to such irreversible sex-altering surgery. Also cosmetic surgery to the outer genital of intersexed children is executed without their own wish and even though there is no emergency. Because of the danger of the loss of sensitivity, the decision on genital-altering surgery may only be made by the intersexed person him/herself. Genital-altering surgery without one's own consent is, especially if it leads to the loss of sensitivity, as much incompatible with art. 12 CEDAW as the circumcision of girls, which has been proscribed by the Committee in general comment 14 to CEDAW. And both cases deal with practices that already have been proven to lack scientific justification.

Intersexed people are still castrated because of the unproven, presumably increased cancer risk. In non-intersexed people the recommendations include early preventive medical check-ups instead of the removal of organs. However intersexed people are obviously treated differently. Castration violates art. 12 CEDAW, art. 16 CEDAW, and the universal human dignity (art. 1 UDHR), not only because of the destruction of the reproductive capacity, but also because of further life-long damage to the health of intersexed people. The only choice left is between diseases due to a lack of hormones or the side-effects of hormone substitution.

The right to health, in addition to that, is infringed, because, existing knowledge on the side-effects of hormone substitution therapies is not systematically researched. The right to access to medication without being discriminated is violated. This also refers to the reimbursement of the costs by the public health insurances. Necessary hormone replacement is not covered by health insurances, if it does not fit with the publicly registered gender. These violations of the human right to health are a regularly occurring consequence of castration which itself is unnecessary and of course a violation of human rights.

The surrender of a patient's files including clear documentation of treatment is, in many cases, still denied. This effects the claims of intersexed people regarding failed treatment so that these claims come under the statute of limitations. That is why the NGO association of intersexed people demands the unsolicited handing-over of patient files.

The German people commits to invulnerable and inalienable human rights as the foundation of any human community, of peace, and of justice in the world itself due to the inviolable human dignity (art. 1 part. Basic Law), according to art. 1 par. 2 Basic Law. The words „in the world“ mean the universal human rights, because the text of art. 1 par. 2 Basic Law has verifiably been inspired by the first paragraph of the preamble of the UDHR.

The German Federal Court of Justice and the Constitutional Court have also confirmed the direct applicability and the justifiability of the universal human rights, which have been ratified by Germany, in no. 19 of the Mauerschützen III judgement of the 20.03.1995 (published at BGHSt 41,101) and in no. 96 of the Bodenreform III decision of the 26.10.2004 (published at BVerfGE 112,1), and have confirmed, that the universal human rights belong to the "ius cogens" (art. 53 and 64 Vienna Convention on the Law of Treaties, VCLT). Also no. 279-281 of the judgement of the EU Court of First Instance on file number T-306/01 and the ICJ expert report mentioned in that judgement, confirm, that

the universal human rights belong to the „ius cogens“. According to art. 25 Basic Law, all "ius cogens" is directly applicable to Germany.

Also the CEDAW Committee has, in no. 22 of the concluding observations dated 10.02.2009 to the 6th state report of Germany on CEDAW, confirmed the binding nature and the direct applicability of CEDAW.

According to art. 27 Vienna Convention on the Law of Treaties, obligation of international law are preminent to the simple laws at the national level. This applies to the universal human rights, which belong to the „ius cogens“. As far as an international-law-friendly interpretation of existing (national) laws is not sufficient to stop human rights violations, simple laws have to be changed. In this regard, the human right to health has a high priority because of its special connection to the human dignity. And for this purpose, the direct contact with the ministries responsible for human rights and for health is crucial. Effective protection and the right to informed consent, as well as free access to an adequate health supply have also been the claims of the parallel report to the 5th state report to the CESCR at 2010.

II. Transsexual People

In 2008 the Aktion Transsexualität und Menschenrecht e.V. / ATME (Campaign Transsexuality and Human Rights) has submitted a comprehensive alternative report concerning the situation of transsexual women in Germany to the United Nations. At that time our main area of concern had been the following issues:

- Transsexual women are considered to be „men with gender identity disorders“ (ICD 10 / F64.0)
- The gender status of a person depends on the genitals
- The correction of official papers about the civil status of a person and his/her gendermarkers often takes several months, if not years.
- Mortifying and discriminating psychiatric „examinations“ which are based purely on gender cliché are necessary for the juridical recognition
- On grounds of lack of a juridical recognition in their right gender, transsexual women are completely and utterly at the mercy of the psychiatrists
- Not transsexual women decide about their gender-marker – finally a judge decides, if a transsexual woman will get „female papers“ or not. There are transsexual women in Germany who are legally male, because judges decided against them.
- Press and media spread the stereotyped ideology of the psychiatry that defines transsexual women as „men with psychic disorder / born as men“ and thus contribute to massive discrimination

These points of criticism led to the following main demand:

People must have the right to choose their gender status self-determinedly and at the time of their own choice to get immediately accepted before law and right in their own sex.

Till today the Government in Germany ignores, that the only way to protect transsexual people against patient abuse, sexual abuse, political oppression, arbitrariness or misjudgment is to give them identity documents that reflect their gender as fast as possible. In due consideration of the vulnerability of transsexual people directly after coming out as transsexual, it is obvious that transsexual people need their identity documents immediately and without stereotyped requirements and decisions from psychiatrists and judges who are still part of the so called Transsexuellengesetz („Law of Transsexuals“) in Germany. Still the „Law of Transsexuals“ leads to medical malpractice and arbitrariness and refuses transsexual people their right to autonomy and self-determination regarding their gender status.

What happened, however, since 2008?

Politicians and the medical professions promote transsexual women as „men who feel like women“. This transphobia is the main reason for the discrimination against transsexual people. Likewise the medical like juridical treatment of transsexual people is based on this transphobic idea in Germany.

Already in 2008 the Federal Government was criticized for said circumstances. The CEDAW Committee joined this criticism and explained in February 2009 that it was a paradox to define transsexual women as psychically ill men, so that they could be recognized as women. At that time CEDAW Committee member Silvia Pimentel expressed in Geneva „This paradoxon must be stopped“.

In May, 2009 300 organisations from 75 countries and many individuals, including 3 Nobel Prize Laureates made an appeal to the United Nations and the states of the world not to define transsexual people as psychically ill any longer.

The government parties at that time in Germany, CDU (Christian Democratic Union of Germany) and SPD (Social Democratic Party of Germany) therefore have decided in May 2009 to want to principally maintain the "Transsexuellengesetz" (TSG): "The decision on further changes in the Law Of Transsexuals is left to the next legislative period" one said in the draught of the government coalition at that time (printed matter 16/13157). As the result of a judgment of the Federal Constitutional Court from 27th of May, 2008 (Federal Constitutional Court - 1 BvL 10/05-) the government before had to delete the requirement of the forced divorce of a marriage for the legal recognition of a transsexual person from the Law of Transsexuals. However the reform or abolition of the Law Of Transsexuals once more was adjourned.

In July 2009 the Commissioner of Human Rights of the Council of Europe, Thomas Hammarberg, expressed himself to transsexuality. Thus among other things he criticized forced sterilizations as a legal need of the juridical recognition of transsexual people which was still demanded at that time also in Germany as well as the classification of trans-sexuality as a psychic disorder. He asked the governments of Europe also to take account of transsexual people when talking about laws and juridical regulations (Strasbourg, 29 July in 2009, CommDH/IssuePaper (in 2009) 2).

The Parliamentary Assembly of the Council of Europe (PACE) asked the governments of Europe in May 2010 to protect transsexual people and "(16.11) ... ensure in legislation and in practice their right to (16.11.2) official documents that reflect an individual's preferred gender identity, without any prior obligation to undergo sterilization or other medical procedures such as sex reassignment surgery and hormonal therapy." (PACE, May, 2010, resolution 1728).

In 2010 the Aktion Transsexualität und Menschenrecht e.V. (ATME / Campaign Transsexuality and Human Rights) submitted their alternative human rights report about „Transsexual People in Germany“ to the UN-Committee on Economic, Social and Cultural Rights. In this report once more transsexual people repeated the demand for abolishing the terms „gender identity disorders“ or „gender dysphoria“, as well as the gender-stereotyped examination practice for the juridical recognition of transsexual people in their own gender as specified in the German Law Of Transsexuals.

In December 2010 the so-called Federal Anti-Discrimination Agency (ADS) published the brochure "Discrimination of Trans*Persons, in particular in the working life". Facts and figures about Germany are not embodied in this brochure: It is only a collection of already known publications about Europe, the USA and Australia that has been

downloadable from the internet for quite some time. Also the Federal Government had excluded the participation of a wide alliance of human rights organizations in the production of an informative study because the ADS applied a strange procedure. Instead of giving all organizations, above all those which argue with the human rights situation of transsexual people in Germany, the chance to participate in the production of this brochure, they had chosen an award procedure. Only one single organization was chosen by the ADS and has been involved in the production of the brochure. Consequently a lot of critical voices were excluded. The report easily could be seen as a fig leaf for politicians in Germany who are not willing to reform the „Law of Transsexuals“. Those politicians now can argue towards the UN and the CEDAW Committee, that they are in contact with all transsexual associations and human rights organizations in Germany who fight for an ending of transphobic ideologies, when in fact they are not.

Once more the Federal Constitutional Court judged in January 2011 on the subject of Transsexuality. The judges argued, that the juridical recognition of transsexual people may not be made conditional furthermore by genital surgeries (Federal Constitutional Court - 1 BvR 3295/07-). But because there still has been no reform of the Law of Transsexuals till today, some district courts who are responsible for the change of the gender markers in official documents, do not handle applications for changing the gender status anymore and refer to the missing reform of the Law of Transsexuals. For example the district court of Mannheim judged on the 4th of April 2011: „Pending lawsuits whose decisions would depend on the unconstitutional part must stay until a constitutional-juridically new right will be enacted“ (AG Mannheim decision of the 4/4/2011, Ke 2 UR III 4/11).

The UN-Committee on Economic, Social and Cultural Rights published in June 2011 the Concluding Observations concerning the State Report of Germany. The Committee asks Germany among other things not to define transsexual people by law furthermore as people with mental illness (E / C.12 / DEU / CO. / 5, Consideration of reports submitted by States parties under Articles 16 and 17 of the Covenant).

What, however, did the German Government do?

The Law of Transsexuals exists to this day. Transsexual women furthermore are defined in Germany as „man who want to live in the women’s role“ (in Germany politicians and society still distinguish between male and female gender roles) or „men with a gender identity disorder“. Even in the brochure of the Federal Anti-Discrimination Agency (as mentioned above) transsexual women are described as „sex-changed“ and on account of this as persons who had been men before genital surgery („Discrimination of Trans*Persons, in particular in the working life“, pages 71, 75, 78) instead of simply recognizing that transsexual women are women.

Furthermore in Germany still exists a psychiatric examination procedure for the juridical recognition of transsexual people. Transsexual women must agree to be defined as „mentally ill men who want to become women“ from two psychiatrists to get the chance of correcting her gender marker and still this is no guarantee that a judge says „yes“ to their applications. This practice and paradox had been criticized already in 2008 by the

United Nations as an offence against human rights but still exists till this day. Even though the Federal Constitutional Court in Germany criticized the forced sterilizations in January 2011 it otherwise supports these stereotyped and person-despising psychiatric procedures:

"An adjustment of the external appearance and adaptation of the behaviour pattern to the felt gender is necessary if a person wants to live in the other gender. This is caused first only by suitable clothes, presentation and appearance manner to test in the everyday life whether a lasting change of the gender role can be mastered psychically generally."

(Federal Constitutional Court - 1 BvR 3295/07-)

Those judicial and as well medical gender-clichés leads us to the question: Is this for the purposes of a real equality of the genders? Applications of the opposition parties (Bündnis 90 / Die Grünen and Die Linke) who demand a comprehensive reform of the Law of Transsexuals and an abolition of the psychiatric examination practice were passed on in June 2011 to the Innenausschuss (Federal Committee on Internal Affairs). The government parties CDU and FDP (Free Democratic Party), as well as the SPD (since 2009 the SPD is an opposition party) want to maintain the psychiatric examination practice contrary to human rights. Helmut Brandt from the CDU expressed in June that it would be enough „to adapt the Law of Transsexuals as defined in the contract of the governmental coalition [...] to the jurisdiction of the Federal Constitutional Court [...]“. Gabriele Fograscher from the SPD takes the view that still there had to be one psychiatric examination, instead of two as before (114th meeting of the German Bundestag on Thursday, 9th of June, 2011). And also the FDP rejected the applications of the parties Bündnis 90 / Die Grünen and Die Linke.

Conclusion

The views of the parties CDU, FDP and SPD (CDU and FDP are governing now, the SPD was in a government coalition with the CDU until 2009) coincide with the ongoing unwillingness to institute far-reaching reforms of the Law of Transsexuals (Transsexuellengesetz, TSG) in Germany. Though there have been modifications of the Law of Transsexuals, these changes – like the abolishment of the forced divorce and forced sterilization – only took place because of the judgements of the Federal Constitutional Court and are not based on the Government's will to reform. A few month ago ATME (Campaign Transsexuality and Human Rights) asked the parties about their plans in reforming the Law of Transsexuals and the answers led to the conclusion that politicians from the CDU, SPD and FDP still believe that transsexual women are „biologically men“. 3 out of 5 parties represented in the Bundestag therefore are not willing to accept transsexual women as women and consequently are not interested in giving them the right to correct their gender markers and civil status immediately and uncomplicatedly. So Germany still refuses the transsexual's right to self-determination regarding their gender and equality before the law.

It cannot be the intention of CEDAW to define women as „men with identity disorders“ if they do not correspond physically to the stereotype of someone who is called a „typical woman“ by society. It cannot be the intention of CEDAW to anchor gender cliché in laws and to dictate gender-stereotyped behaviour judically (article 5 CEDAW). It cannot be in

terms of CEDAW that theories around so-called "gender identity disorders" are still accepted as a doctrine in societies. It cannot be in terms of CEDAW to divide people's behaviour into "gender-typical" and "gender-atypical" and to concede to people fewer human rights who are called "gender-atypical" on the grounds of arbitrarily chosen attributes, than to those, who have the "luck" to be untroubled by this stereotyped classifications.

Again we ask the Federal Government of Germany to accept transsexual women as women and not to continue acting as if they would not exist. We ask Germany once more to abolish the Transsexuellengesetz („Law of Transsexuals“) and to create juridical possibilities for transsexual people to correct their gender marker (sex marker) self-determinedly and without the practice of psychiatric examinations. We demand juridical as well as medical security for transsexual people. Transsexuality is no "life-style" or "concept", but a natural sexual variation. Sex is more than the fulfilling of gender-stereotypes and more than body features. To accept the variety of sex means to accept the knowledge a person has about his/her own self. We hope that Germany will start to act accordingly.

Appendix (in alphabetical order)

Gender Budgeting

It shall analyze all labour market policies and financial options of temporary special measures through expenditure and allocation. The gender budgeting process shall differentiate in the impact analyses and steering processes between various targeted groups: by age, people with disabilities, migrant women and men, asylum seekers, refugees et al. as to define programs, policies and (ts) measures fitting to their needs and capabilities and the enjoyment of full gender equality.

The capability of Gender Budgeting to make transparent the gender pay gap in the public service became visible in 2010 the first time in the Land of Berlin's gender budgeting process and budget planning document. It proved a gender pay gap of 3.5 to 23 percent in the public services even if an overall share of women and men of 40: 60 % employment was the average distribution. Gender budgeting must have a focus equally on this special responsibility to govern in compliance with CEDAW and the full human rights regime although the government can and shall additionally outreach with gender budgeting analyses and measures to the external approach of remuneration by companies which are contracted by state entities or even only get partly subventions. This gender budgeting approach can be strengthened by accompanying legal act for the private sector as CEDAW and the NGOs recommended since years. As a State party of the international laws human rights conventions the German government is obliged to secure that a) no Cent or EURO of the citizens feed state expenditure is used against the international law and e.g. against CEDAW and b) no women's rights violation based on sex or /and gender appears, persists and becomes systematic or structural on the territory of Germany which covers the private sector, the economy, or other autonomous systems which have to accept the rule of law on the State party's territory and extended obligations of the State party as its responsibilities for the compliance of international law by German citizens or German registered companies internationally.

Logib-D/EG-check.de

Logib-D is an instrument which is offered by the Ministry of Family Affairs, Senior Citizens, Women and Youth. Companies can use it voluntarily for a gender-differentiated analysis of their payment structure. The instrument is based on a method developed in Switzerland, where its application (and positive results) is compulsory for companies that want to achieve public orders. In Germany not only the application of Logib-D but also the elimination of the calculated pay gap is voluntary.

Moreover Logib-D, due to its methodological background, is not appropriate to identify pay discrimination, although it literally means "Equal pay in the Company - Germany". It may instead point out where women are engaged on a job level below their qualifications. The main reason for this is that Logib-D is not based on the legal definition of equal pay: "equal pay for equal work and for work of equal value". In contrast to this legal definition, Logib-D starts from the principle that women and men must receive the same payment if they are equal regarding particular personal factors that are considered to be income-determining. But the selection of these explanatory factors is critical. Education, years of service, (potential) work experience, the

level of demands/value level of the job and its hierarchical position are considered in this context. If men and women are different regarding to these criteria Logib-D will justify pay inequality. But this consideration ignores a very important point: The explanatory factors themselves are not free from discrimination. Particularly the value level of a job is a good example. Logib-D relies on the valuations of jobs undertaken by the companies themselves. But scientific studies have often shown that it is not done in a gender neutral way. Widespread requirements for women-dominated jobs (proportion of women about 70 percent) such as psycho-social skills or responsibility for the welfare of others are often not taken into account. In these cases women can be indirectly discriminated by the job evaluation and grading system without this discrimination showing up in the results of Logib-D. By this it is rather likely that Logib-D certifies equal payment in a company although discrimination takes place, e.g. by undervaluing women-dominated jobs. Therefore, in view of the results of Logib-D companies might feel safe and do not question wage inequality any more.

Finally, it should be pointed to the fact that with **eg-check.de** another instrument has been developed in Germany to check equal pay on company, industry and individual level. It is based on the legal concept of equal pay and considers international standards of discrimination-free job evaluation, laid down for example in a guide by the International Labour Office and used by job-evaluation systems developed in Switzerland (Abakaba), the United Kingdom (“NJC”) Sweden (HAC-System) and Canada (Ontario and Quebec).

Legal action against gender discrimination

In 2006 the General Equal Treatment Act (Allgemeines Gleichbehandlungsgesetz – AGG) was codified in Germany to fulfill requirements of the European Union. For women, the General Equal Treatment Act (AGG 2006) has brought only limited improvements over the provisions of §§611 a ff. BGB (Civil Code).

The AGG does not permit anti-discrimination associations to take legal action on its behalf – they are only allowed an advisory function at lower court levels. The federal Anti-Discrimination Office (ADS) newly established in 2006 does as well not have the right to sue. Women must continue to take legal action themselves and to bear the entire risk of the litigation alone.

Furthermore the AGG's inadequate assignment of the burden of proof is another reason why hardly any anti-discrimination cases are brought by women in the field of labor law. The AGG has not attempted the least improvement in the assignment of the burden of proof although women's organizations have repeatedly demanded that it be reversed. The burden of proof as set out in §22 of the General Equal Treatment Act (AGG) requires victims of discrimination to first present and substantiate facts which indicate the occurrence of discrimination. Only then are employers obliged to demonstrate that they have not discriminated. This has been the legal situation of the former Civil Code since 1980. The AGG has not attempted the least improvement in the assignment of the burden of proof although women's organizations have repeatedly demanded that it be reversed. This demand is legitimate, as it is difficult for those who have suffered discrimination to produce data and evidence for successful legal action whereas it is easy for fair employers to prove that they have not undertaken discriminatory acts.

Marginal employment positions / “Mini-jobs” /Midi-jobs

Marginal employment, i.e. employment at low earnings, has been gaining importance in the German economy over the past decade. Employments with earnings of Euro 400 or less (“Mini-jobs”) are not subject to social security contributions.

Though employers have to pay for every marginal employee a social insurance flat rate, the employees are not covered under health-, pension- and unemployment insurance.

The so called “Hartz-legislation” led to some reforms of the marginal employment, coming into force January 2003. The new rules followed the idea to make this type of employment more attractive to give industry more flexibility in employing low-wage earners. The Hartz-reforms introduced the new type of midi-jobs with a sliding pay scale ranging from Euro 400,01 to Euro 800. In this pay scale the social security contributions rise proportionally up to full contribution at Euro 800. The limitation of working hours per month in mini-jobs (15 hours per week) was repealed in 2003 also due to Hartz-legislation.

Migrant Women on the Labour Market

please refer to separate document by "Lawyers without Frontiers"



Spousal tax splitting system

The German tax laws give married couples the option of selecting tax class V for the partner who has little or no earnings. This means that the partner who earns more (tax class III) has a relatively lower tax rate, while the partner who chooses class V, generally the wife, pays proportionately more. Most married couples with different income levels choose this model because their combined tax burden is less than it would be if the two partners had the same tax class. This model especially favors couples in which only one partner is gainfully employed. Because most women earn less than men anyway for the reasons already discussed, this model has the psychological effect of discouraging them from working because the relatively high taxes on their (lower) income make work seem not worthwhile. Many women therefore do not reenter the workforce after leaving their jobs for family-related reasons. As such, this tax class option perpetuates old role models.