Case Note—Judgment of the *Landgericht Frankfurt (Oder)* (Regional Court) of 22 June 2010: Hotelier's Right to Ban Persons from Hotel Premises

By Jule Mulder[*] and Andrea Gideon[**]

A. Introduction

On 22 June 2010, the *Landgericht Frankfurt (Oder)* (Regional Court) ruled on whether a hotel was entitled to deny a member of a nationalist party entrance to its establishment because of the individual's political beliefs or whether such discriminatory conduct constituted an illegal violation of the personality right of that person which would constitute a tort under § 823 of the *Bürgerliches Gesetzbuch* (German Civil Code, "BGB").[1] In making its decision, the Court balanced a property owner's freedom of autonomy, specifically the owner's right to ban a customer from his or her establishment, against the customer's personal rights. Furthermore, the Court considered whether a hotel owner's decision to ban a customer based on his or her political beliefs violated the *Allgemeines Gleichbehandlungsgesetz* (General Equal Treatment Law, "AGG"). Considering the fundamental question of balancing competing interests, of the personal right of the customer and the right of the property owner, and the national public debate concerning the right of members of nationalistic parties to be treated equally, the case goes beyond the interests of the parties involved and is of general importance.

The Court's decision is interesting for several reasons. First, the decision is a good example of how different interests are balanced within tort law once a unilateral action invades another person's personality right, such as the right to self-determination. Second, the decision addresses whether people can be discriminated against on the basis of their political opinion, and if so, to what degree. Third, the case evaluates whether the AGG or EU law offers any kind of protection against such discrimination. Fourth, the Court's decision confirms that the general constitutional equality principle is incapable of adequately protecting people. This fourth issue goes beyond the question of whether the

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[1] *See* Landgericht Frankfurt [Oder] [Regional Court], Reference No. 12 0 17/10, 22 June 2010.

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Claimant in this particular case should be protected, as the Court's assessment could have led to similar results in other situations, including situations where a person is discriminated against because of his or her sexual orientation, race, or religion. Therefore, the Court's decision shows the importance of horizontal non-discrimination law—non-discrimination law that binds two private parties—in sufficiently protecting people from unequal treatment.

In the following section, we will summarize the factual background of the case. After that, we will discuss the parties' arguments. Then, we will present the Court's findings. Lastly, we will discuss the key aspects of the case: the balancing of the different interests and the relevance of the AGG to these kinds of actions.

B. Factual Background

The Claimant is one of the leaders of the National Democratic Party of Germany (NPD), a radical right-wing fascist party. In September 2009, the Claimant's wife booked a four-day holiday for her and her husband via a travel agency. The holiday was supposed to take place in December 2009. At the end of November 2009, the hotel that the couple had planned to stay in (hereinafter the Defendant) informed the Claimant by letter that he was banned from the hotel's premises. According to the letter, the ban also applied to situations where the Claimant booked a room via third parties and under a different name.

After the Claimant demanded an explanation for the ban, the hotel management stated that the Claimant's political beliefs were not in-line with the hotel's aim to guarantee an enjoyable holiday experience for all guests. In response to the ban, the Claimant sued the hotel and sought a judgment that would force the Defendant to lift the ban. It was also noted, that a hotel association, of which the Defendant was a member, had earlier requested its members not to accommodate members of extremist right-wing parties, such as the NPD.

C. Argument of the Claimant and the Defendant

Based on §§ 903 and 1004 of the BGB, the Claimant demanded that the Defendant repealed the ban. In addition, the Claimant insisted that the Defendant would be convicted for vilifying the Claimant and ordered to pay €7,500 in damages based on §§ 823 and 826 of the BGB. The Claimant argued that the ban constituted discrimination and violated his personal right (*Persönlichkeitsrecht*) and the general principle of equal treatment, both of which are protected by the *Grundgesetz* (German Constitution, "GG"). The Claimant argued that these constitutional principles prevented private companies from excluding others from their services when these services were open to the general public. Furthermore, the Claimant argued that his personal political beliefs did not justify the ban because he did not intend to express any political ideas during his stay.

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The Defendant, on the other hand, argued that the ban was protected by the right to freedom of contract also protected by the GG. Additionally, the Defendant asserted that the ban did not impair the Claimant's general right to personal freedom since there were many other hotels in the region where the Claimant could enjoy similar services. Furthermore, the Defendant argued that his aim to ensure an excellent holiday experience for all guests, which motivated the ban, constituted an objective justification. Therefore, the ban could not be considered arbitrary.

The Defendant further argued that the NPD, although not illegal, polarizes the German society to an extent which made it impossible for the hotel to accommodate members of that party while preserving a non-political image. Considering the sensibilities of their targeted customers, it is important for hotels to be apolitical and the Claimant, although not convicted, has been and still is subject of various investigations regarding sedition and denigration of state trappings, which could upset potential customers.

D. Judgment of the *Landgericht Frankfurt (Oder)*

The Court emphasized that the right of the property owner to impose house bans is not automatically limited because the owner's property is generally open to the public. An owner or occupant of property does not lose all rights as owner or occupant simply because he or she offers services to the general public. The fact that a business is offering services to the public simply means that the occupier or owner of the premises intends to provide services to the public. It does not constitute an obligation to provide those services to every individual.[2]

However, the right of the occupant or owner can be limited in special circumstances and the occupant or owner can be obligated to conclude a contract. Unlike gas and energy companies, the postal service, and certain insurance companies, there is no direct legal obligation for hotels to enter into contracts with potential customers. Consequently, an owner or occupant's right can only be limited through an indirect obligation to contract.

The indirect obligation to enter into a contract follows from tort law. If an individual's refusal to enter into a contract constitutes a tortuous act under § 823 of the BGB, it imposes an indirect obligation to conclude the contract. While § 823 of the BGB offers a list of what constitutes a tortuous act, the list is non-exhaustive. The personal freedom as a constitutional personal right derives from the right to human dignity (Article 1 GG) and the right to free personal development (Article 2 GG). However, the Court emphasized that the infringement of the Claimant's personal freedom has to be balanced against the rights of the Defendant, also protected by Article 2 GG (freedom of contract). The Court, after

[2] *See, e.g.*, Bundesgerichtshof [BGH] [Federal Court of Justice], *Neue Juristiche Wochenshrift* [NJW] 188–89 (1994) ("Market Store Case").

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weighing the competing interests, recognized the motives of the defendant to be objectively justified and denied an illegal action although it recognized a limitation of the Claimant's rights. It pointed out, in particular, that there was no inconsistency between the pursued aim of the Defendant and the measures taken, since the Defendant intended to ensure the well-being of *all* guests. Even though some guests might not be disturbed by the Claimant's presence, it was conceivable that others might be offended.

In addition, the Court examined whether the appeal of the ban could result from horizontal equal treatment legislation. Generally, the AGG prohibits discrimination based on race, gender, religion and belief, disability, age, and sexual orientation. According to the Court, discrimination based on belief might include a political opinion, but §§ 19 *et seq*. provide for certain limitations. Specifically, discrimination on the basis of belief is excluded from protection as regards access to goods and services. The AGG's legislative history explains that this exclusion was specifically based on the fear that right-wing extremists could abuse the law in order to achieve entrance to establishments which would have otherwise been denied to them on grounds worthy of protection.[3] The Court also emphasized that the Defendant's ban does not constitute an infringement of EU law because Directive 2004/113 only prohibits discrimination based on gender when the discrimination relates to access to goods and services.

The *Landgericht Frankfurt (Oder)* held that there was neither a basis for the claim to remove the house ban nor was there a basis for compensation for the alleged personal vilification of the Claimant. It denied the claim that the house ban constituted an unjustified violation of the Claimant's rights, which would have required the Defendant to accept the limitation of his property right[4] and to pay immaterial damages based on tort law or the AGG.[5] Instead, the Court upheld the right of the property owner to deny a potential customer access to his property. In addition, the Court emphasized that the property owner is, as a basic principle, free to dispose of his or her property however he or she likes.[6]

E. Comments

The Court's decision, despite the welcomed result in the current case, reveals the impotence of constitutional principles to ensure equal treatment on a horizontal level. This weakness leaves not only leaders of fascist parties unprotected but also other

[3] *See* Deutscher Bundestag: Drucksachen [BT] 16/2022 no. 4(a).

[4] *See* Bürgerliches Gesetzbuch [BGB] [Civil Code], 18 August 1896, §§ 903, 1004.

[5] *See id*. §§ 823, 826.

[6] *See id*. §§ 856, 858, 903, & 1004; *see also* Bundesgerichtshof [BGH] [Federal Court of Justice], *Neue Juristiche Wochenshrift* [NJW] 1054–55 (2006) ("Airport Case").

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individuals who face discrimination because of their personal characteristics, (i.e. religion, ethnic origin, or sexual orientation). The decision can also be criticized because the Court's definition of "belief" in the AGG seems questionable. These issues will be discussed further in the next section.

*I. Balancing Personal Freedom (*Persönlichkeitsrecht*) and Private Autonomy*

The Court's main task was to balance the invasion of the Claimant's general personal freedom and the Defendant's right to autonomy and freedom of contract, both of which are protected by Articles 1(2) and 2 of the GG.

1. The Legal Framework

Since there is no direct obligation to enter a contract in the hotel sector, the Court focused on a possible indirect obligation (*mittelbarer Kontrahierungszwang*), which is generally implied in consumer contracts if the offer includes essential goods and there is no alternative offer at one's disposal.[7] Hence, as the house ban results in a de facto refusal to enter a contract, there might be an indirect obligation to enter a contract if the house ban is an illegal act under § 823 of the BGB. The Court did not deal directly with contract law, but instead, it determined whether the house ban could be considered a tort, which then would lead to an indirect obligation to enter a contract.

According to § 823 of the BGB, a person can claim damages if one of his or her protected rights is illegally violated.[8] The right to personal freedom itself is not mentioned in § 823 of the BGB. However, the sweeping character of the clause, by including *other rights*, enables the courts to imply rights that are in line with the constitutional requirements. Therefore, and according to established case law, the general personal freedom is considered one of the *other rights* mentioned in § 823 of the BGB. Before a violation of an individual's general personal freedom can occur, a protected sphere must be invaded.[9] The protected sphere in this case is the right to self determination, which is included in the general personal freedom protected by Article 2 of the GG.

[7] *See* Moritz Brinkmann, *§ 145*, *in* KOMMENTAR ZUM BGB margin numbers 18–23 (Hanns Prütting, Gerhard Wegen & Gerd Weinreich eds., 2nd ed., 2007); Jürgen Ellenberger, *Einf. § 145*, *in* BÜRGERLICHES GESETZBUCH margin number 8 (Otto Palandt ed., 69th ed., 2010).

[8] *See* Bürgerliches Gesetzbuch [BGB] [Civil Code], 18 Aug. 1896, § 823 *("Wer vorsätzlich oder fahrlässig das Leben, den Körper, die Gesundheit, die Freiheit, das Eigentum oder ein sonstiges Recht eines anderen widerrechtlich verletzt, ist dem anderen zum Ersatz des daraus entstehenden Schadens verpflichtet.")*.

[9] *See* Hanns Prütting, *§ 12*, *in* KOMMENTAR ZUM BGB margin numbers 31–36 (Hanns Prütting, Gerhard Wegen & Gerd Weinreich eds., 2nd ed., 2007); Hartwig Sprau, *Einf. § 823*, *in* BÜRGERLICHES GESETZBUCH margin number 19 (Otto Palandt ed., 69th ed., 2010).

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The illegality of the action is, however, not established if the action can be justified.[10] Therefore, the justification for the hotel's ban in this case was relevant. Since the general personal right is an open right, the Court must balance the competing interests to determine the justification and legality of the hotel's action.[11] In the present case, the Defendant's action could possibly be justified by the right to personal autonomy, which is protected by Article 2 of the GG. However, if the Court determined that the Defendant's action was not justified under Article 2 of the GG, the Defendant would not be allowed to discriminate on the basis of the Claimant's political opinion and the general equality principle would prevail.

2. The Court's Approach

In a rather short and somewhat superficial discussion, the Court argued that the aim of the Defendant was legitimate and that the action taken was suitable and appropriate. The Court pointed out that other guests could be disturbed by the Claimant's presence because he is a leader of an extreme right-wing party, which, although legal, is very controversial within German society. Furthermore, the Court emphasized that the number of guests that would be bothered by the Claimant's presence did not matter so long as it was plausible that some guests would be offended.

Consequently, the Court accepted the aim of the defendant and considered neither the ban unsuitable to achieve that aim nor that it was disproportionate. The Court found that the Defendant's fear that he would lose customers due to the polarizing effect of the NPD outweighed the personal freedom of the right-wing extremist to spend his holiday in the Defendant's hotel. However, the Court did not point out what kind of actions would have been disproportionate. It also failed to provide a deeper analysis of the obvious tension between the right not to be discriminated against, on the one hand, and the right of personal autonomy and freedom of contract, on the other. A more detailed discussion of this controversial area of law, which goes beyond a simple conclusion that the action is justifiable, would have been appreciated, especially because the Court seemed to employ a very succinct test which failed to present the relevant issues clearly and would have provoked much controversy if the discriminated person had not been a right-wing politician.

[10] *See* Renate Schaub, *§ 823*, *in* KOMMENTAR ZUM BGB (Hanns Prütting, Gerhard Wegen & Gerd Weinreich eds., 2nd ed., 2007), margin number 13; Sprau, *supra* note 9, at margin number 24.

[11] *See* Prütting, *supra* note 9, at margin number 37; Gerald Spindler, *§ 823*, *in* KOMMENTAR ZUM BGB margin number 17 (Hanns Prütting, Gerhard Wegen & Gerd Weinreich eds., 2nd ed., 2007); Sprau, *supra* note 9, at margin number 24.

3. Discussion

Before the German legislator implemented the AGG, the question of how the right to enter a contract freely should be balanced with the right to personal freedom and equal treatment was hotly debated. The critics of horizontal non-discrimination law employed a liberal and doctrinal view on contract law. They argued that the right to contract freely ensured the fundamental personal freedom, as protected under Article 2(1) of the GG. Consequently, the State should not force its citizens to behave morally or give direct horizontally binding effect to constitutional equality principles which legal effect should prevail between the State and citizens only, as this would limit the citizens' individual freedom.[12] In contrast, the supporters of horizontal non-discrimination law pointed out that the liberal understanding of freedom of contract only ensured the freedom of the stronger party and that the state had the duty to ensure that all citizens can live freely. Individuals should not be held back based on their personal characteristics (i.e. gender, race or sexual orientation), which neither are, nor should be, relevant to the contractual relationships in question.[13]

While the former view focuses on formal equality and individual freedom, the latter view focuses more on the substantive equality of chances and opportunities, the educational

[12] For an academic critique of horizontal anti-discrimination law, see J. ISENSEE, VERTRAGSFREIHEIT UND DISKRIMINIERUNG (2007); K. Adomeit, *Diskriminierung—Inflation eines Begriffes*, 55 NEUE JURISTISCHE WOCHENSHRIFT (NJW) 1622–23 (2002); K. Adomeit, *Schutz gegen Diskriminierung—eine neue Runde*, 56 NJW 1162 (2003); J. Braun, *Forum: Übrings—Deutschland wird wieder totalitär*, 42 JURISTISCHE SCHULUNG (JuS) 424–25 (2002); T. Pfeiffer, *Diskriminierung oder Nichtdiskriminierung –was ist hier eigentlich die Frage*, 1 ZEITSCHRIFT FÜR VERTRAGSGESTALTUNG, SCHULD- UND HAFTUNGSRECHT (ZGS) 165 (2002); E. Picker, *Antidiskriminierung als Zivilrechtsprogramm*, 58 JURISTENZEITUNG (JZ) 540–45 (2003); E. Picker, *Antidiskriminierung—Der Anfang vom Ende der Privatautonomie?*, 57 JZ 880–82 (2002); M. Rath & E.M. Rütz, *Ende der Ladies Night, der Ü-30-Parties und der Partnervermittlung im Internet?*, 21 NJW 1498–1500 (2007); H. Reichold, *Sozialgerechtigkeit versus Vertragsgerechtigkeit—arbeitsrechtliche Erfahrungen mit Diskriminierungsregeln*, 59 JZ 348–93 (2004); C. Rolfs, *Allgemeine Gleichbehandlung im Mietrecht*, 60 NJW 1489–94 (2007); F. J. Säcker, *Vernunft statt Freiheit! Die Tugendrepublik der neuen Jakobiner*, 35 ZEITSCHRIFT FÜR RECHTSPOLITIK (ZRP) 286–90 (2002).

[13] *See, e.g.*, D. SCHIEK, DIFFERENZIERTE GERECHTIGKEIT? DISKRIMINIERUNGSSCHUTZ UND VERTRAGSRECHT (2000); U. Wendeling-Schröder, *Diskriminierung und Privilegierung im Arbeitsleben*, *in* FESTSCHRIFT FÜR PETER SCHWERDTNER ZUM 65. GEBURTSTAG 269, 270–71 (J.H. Bauer ed., 2003) (referring to the human rights approach of the directives and the aim of the social integration); S. Baer, *Ende der Privatautonomie oder grundrechtlich fundierte Rechtsetzung?*, 35 ZRP 290–94 (2002); S. Baer, *Objektiv-neutral-gerecht? Feministische Rechtswissenschaft am Beispiel sexueller Diskriminierung im Erwerbsleben*, 77 KRITISCHE VIERTELJAHRESSCHRIFT FÜR GESETZGEBUNG UND RECHTSWISSENSCHAFT (KRITV) 154–78 (1994); B. Degen, *Das Allgemeine Gleichbehandlungsgesetz (AGG)—Tanzschritte auf dem Weg zur Gerechtigkeit im Erwerbsleben*, 25 STREIT 15–22 (2007); E. Eichenhofer, *Diskriminierungsschutz und Privatrecht*, 119 DEUTSCHES VERWALTUNGSBLATT (DVBI) 1078–86 (2004); N. Eisenschmid, *Europäischer Verbraucherschutz: Allgemeines Gleichbehandlungsgesetz (AGG)*, 59 WOHNUNGSWIRTSCHAFT UND MIETRECHT (WUM) 475–79 (2006); D. König, *Antidiskriminierungsrichtline vor der Umsetzung*, 36 ZRP 315–18 (2003); R. Kühn, *Das Recht auf Zugang zu Gaststätten und das Verbot der Rassendiskriminierung*, 39 NJW 1397–1402 (1986); J. Neuner, *Diskriminierung durch Privatrecht*, 58 JZ 57–66 (2003); D. Schiek, *Gleichberechtigungsrichtlinien der EU—Umsetzung im deutschen Arbeitsrecht*, 21 NEUE ZEITSCHRIFT FÜR ARBEITSRECHT (NZA) 873–84 (2004); R. Winter, *Mittelbare Diskriminierung bei gleichwertiger Arbeit*, 15 ZEITSCHRIFT FÜR TARIFRECHT (ZTR) 7–15 (2001).

effect of legislation, and the legal reality of many disadvantaged groups. Thus, the debate focused on the question of whether formal individual freedom or substantive equality of opportunities should prevail.

Following the implementation of the AGG, much of the debate abated. However, the issues are still relevant in areas which are not covered by the AGG and where the impotence of the constitutional equality principle becomes obvious. This is not to say that we disagree with the Court's result in this case, or that we think that hotels should not be allowed to ban persons from their premises because of their political opinion. However, the case reveals, on a more fundamental level, why horizontal non-discrimination law is needed to protect minorities from diminishing discrimination, particularly when the reason for the discrimination is a characteristic worthy of protection.

The indirect effect of the constitutional equality principles, which affects the relationship between private parties through the sweeping clauses of the BGB, does not ensure equal treatment of individuals within private relations. The Court in the case in question argued that the Defendant's action was not an illegal infringement of the personal rights of the Claimant because it was plausible that the Defendant's presence would disturb other guests. This is basically an economic argument because the hotel's desire not to disturb its customers is economically motivated. While such an approach might be welcomed in this particular case, it raises the question of what the Court would have done if the banned person was not a known leader of a fascist party but a homosexual or member of a religious minority. After all, hotel guests also might be disturbed by people who have a different sexual orientation or religious beliefs than they do. If we follow the Court's reasoning, hotels could also ban those minorities from their premises, if the AGG would not prevent the hotels from doing so.[14] Because of this ambiguity, a more detailed discussion of the balance between the conflicting constitutional interests would have been welcomed.

The problem with the balancing of interests with regard to contractual relationships has been obvious in the past, particularly in employment contracts. In a headscarf case from 2002, the German Federal Labor Court was asked to decide whether it was illegal to dismiss an employee because she was wearing a headscarf or whether the dismissal was justified on the ground that the headscarf disturbed customers and led to an economic loss for the employer. While the Court denied that the employer had proven that a substantiated loss of profit would occur, and possibly employed a very strict burden of proof to avoid deciding in favor of the employer, it did not dismiss the argument itself as

[14] There have been several cases where people were denied entrance to pubs, bars and restaurants based on their ethnic origin or race. *See, e.g.*, Amtsgericht Oldenburg [Local Court], Case no. E2 C 2126/07, 23 July 2008, NdsRpfl 398–99 (2009).

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irrelevant once the employee's right to freedom of religion was infringed.[15] Therefore, under constitutional principles, a substantiated economic loss can justify unequal treatment even if such treatment is based on the other person's use of their human rights. This explains why horizontal non-discrimination law is still necessary to ensure, or at least promote, equal treatment of people whose personal characteristics, which should be protected in a democratic society, put them in a vulnerable position.

II. The Meaning of Weltanschauung *(Belief) under the* AGG

1. Legal Framework

According to § 21 of the AGG, a person who is suffering from any discrimination cannot only claim damages, but he or she can also ask for the removal of the disadvantage. Consequently, the Court considered whether § 20 in conjunction with § 19 of the AGG could constitute a legal basis for the claim to remove the house ban. § 1 of the AGG prohibits discrimination based on "belief" (*Weltanschauung*). However, §§ 19–20 of the AGG provide an exception in the field of access to and supply of goods and services, and does not apply to the ground of "belief."

2. The Court's Approach

Thus, while the Court considered the Claimant's characteristic as a leader of a fascist political party to be protected under the AGG in general, it denied his protection in this particular case because the AGG does not apply in a case where a hotel bans a person from its premise because of the person's political belief because this case concerns access to goods and services.

Furthermore, the Court emphasized that it was the legislator's expressed intent to avoid situations where members of fascist parties would be protected in the area of supply and access to goods and services as explicitly expressed in parliamentary debate and the printed paper of the *Bundestag* (Lower House of German Parliament).[16]

The Court also explained that the limitation of the scope of the AGG is not contrary to European law because EU law does not provide protection on the ground of belief in the

[15] *See* Bundesarbeitsgericth [BAG] [Federal Labor Court], Case no. AZR 472/01, 10 October 2002, NJW 1685 (2003); *see also* Ute Sacksofsky, *Religion and Equality in Germany: The Headscarf Debate from a Constitutional Perspective*, *in* EUROPEAN UNION NON-DISCRIMINATION LAW 353, 358 (Dagmar Schiek & Victoria Chege eds., 2008).

[16] Deutscher Bundestag: Drucksachen [BT] 16/2022 no. 4(a).

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area of goods and services. Directive 2004/113/EC[17] only provides a framework for combating discrimination based on sex in access to and supply of goods and services.

3. Discussion

In the current situation, neither EU law nor the AGG protects people from discrimination based on belief within the area of supply or access to goods and services. However, it should be emphasized that EU law prohibits discrimination in the area of goods and services that is not only based on sex but also race and ethnic origin.[18]

The Court's argumentation, despite, in our view, reaching the correct result, is nonetheless misleading. The Court seems to suggest that the Claimant would have been protected if the AGG did not limit its scope with regard to access to and supply of goods and services. The Court seems to consider a fascist political opinion to be a "belief" under the AGG and EU law. This means, firstly, that people with a fascist political opinion are protected in other areas where the AGG applies, such as within employment relationships, and secondly, that once the EU broadens the scope of its legislation, suppliers of goods and services will not be able to deny a customer services based on his or her political opinion. Such an interpretation of EU law is especially problematic because the European Commission already proposed extending the scope of the EU non-discrimination law by also prohibiting discrimination in the area of supply and access to goods and services based on religion or belief, age, disability or sexual orientation.[19] Consequently, if the *Landgericht*'s interpretation of "belief" is correct, and the Directive is enacted, people of certain political opinions can no longer be denied access to goods and services by private actors.

We argue, however, that the term "belief" must be interpreted in a narrower sense and that it does not cover political opinion *per se*. Therefore, the AGG does not cover political opinions. However, this does not mean that employees do not enjoy some type of protection against discrimination on the ground of their political opinion, but only that they do not automatically enjoy protection from the AGG. In order to ascertain the correct

[17] *See* Council Directive 2004/113/EC, 13 December 2004, 2004 O.J. (L373) 37 (implementing the principle of equal treatment between men and women in the access to and supply of goods and services).

[18] *See* Council Directive 2000/43/EC, 29 June 2000, 2000 O.J. (L180) 22 (implementing the principle of equal treatment between persons irrespective of racial or ethnic origin).

[19] *See* Proposal for a Council Directive on Implementing the Principle of Equal Treatment Between Persons Irrespective of Religion or Belief, Disability , Age or Sexual Orientation, 27 August 2008, COM(2008) 426 final. A quick enactment of the proposed Directive, however, seems unlikely. *See* Dagmar Schiek & Jule Mulder, *Intersecrionality in EU Law—a Critical Re-appraisal*, *in* EU NON-DISCRIMINATION LAW AND INTERSECTIONALITY—INVESTIGATING THE TRIANGLE BETWEEN RACIAL, GENDER AND DISABILITY DISCRIMINATION (Dagmar Schiek & Anna Lawson eds., forthcoming 2010).

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meaning of "belief" within the AGG, the legislation must be interpreted in light of the European Directives, as well as the other international treaties, such as the European Convention of Human Rights (ECHR).

The national Court seems to be influenced by the apparently broad term *Weltanschauung* (which can also be translated as worldview) as used in the German version. This is surprising as the German Constitution foresees a narrow definition of the term. This inconsistency seems to suggest that the meaning of the term within the AGG, if interpreted in line with the European Directives, would somehow include a different meaning. The Court's broad interpretation fails to acknowledge the connection between *"*belief and religion*"* in the Framework Directive[20] and Article 19 of the Treaty on the Functioning of the European Union ("TFEU" (ex Article 13 Treaty Establishing the European Community)), and it does not resolve any uncertainty around the term "belief."

Although Article 19 of the TFEU and the Framework Directive do not provide a definition of the term "belief," they do mention it in connection with religion, as they grant protection to *"*religion or belief.*"* Therefore, although it is clear that there must be a meaningful difference between *"religion"* and *"belief"* that justifies mentioning both terms,[21] most Member States interpret the legislation to suggest a very limited distinction.[22] Following the Court of Justice's approach to interpretation, a teleological interpretation of the term in light of all the different interpretations of the different language versions is decisive.[23] Additionally, the understanding of the European Court of Human Rights (ECtHR) can be helpful,[24] as all Member States are also members of the ECHR and the ECtHR's decisions heavily influence the interpretation of EU legislation.

In *Campell and Cosans,*[25] the ECtHR draws a distinction between belief (or conviction), as protected by Article 9 of the ECHR, and freedom of expression, as protected by Article 10 of the ECHR. The ECtHR points out that Article 9 requires a "certain level of cogency,

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[20] *See* Council Directive 2000/78/EC, 27 November 2000, 2000 O.J. (L303) 16 (establishing a general framework for equal treatment in employment and occupation.

[21] *See* Janneke Gerards, *Discrimination Grounds*, *in* CASES, MATERIALS AND TEXTS ON NATIONAL, SUPERNATIONAL AND INTERNATIONAL NON-DISCRIMINATION LAW 33, 102 (Dagmar Schiek, Lisa Waddington & Mark Bell eds., 2007).

[22] *See id.* at 33, 117, 120 (providing examples from different Member States).

[23] *See* Dagmar Schiek, *Einleitung*, *in* ALLGEMEINES GLEICHBEHANDLUNGSGESETZ EIN KOMMENTAR AUS EUROPÄISCHER PERSPEKTIVE margin number 72 (Dagmar Schiek ed., 2007). For an overview on the different language versions, *see* Wolfgang Däubler, *§ 1*, *in* NOMOS KOMMENTAR ZUM ALLGEMEINES GLEICHBEHANDLUNGSGESETZ 58–71 (Wolfgang Däubler & Marin Bertzbach eds., 2nd ed., 2008).

[24] *See* Dagmar Schiek, *§ 1*, *in* ALLGEMEINES GLEICHBEHANLDUNGSGESETZ EIN KOMMENTAR AUS EUROPÄISCHER PERSPEKTIVE margin number 23 (Dagmar Schiek ed., 2007).

[25] *See* Campbell and Cosans v. United Kingdom, 48 Eur. Ct. H.R. (ser. A) (1982).

cohesion and importance."[26] Similarly, English law stipulates that a non-religious belief also needs to be philosophical.[27] Accordingly, belief should be understood as a "coherent set of fundamental ideas and attitudes to human life and human existence, without the necessity of reference being made to a higher being."[28]

Such a definition also corresponds with the constitutional meaning of secular belief or philosophical creed (*weltanschaulichen Bekenntnisses*), which is protected in Article 4 of the GG.[29] Furthermore, the need for coherent internal consistency requires people to distinguish "belief" from pure political opinion.[30] Therefore, not every political opinion is automatically covered under the ground *"belief"*[31] and the term more likely focuses on fundamental ideas or attitudes, such as atheism, agnosticism, rationalism or pacifism. The distinction between political opinion and "belief" is admittedly not always easy to draw. As Lerner noted, certain political creeds, such as Communism and Nazism, expected their members to identify with the group in a religious manner, despite their anti-religious attitude. This made it difficult to clearly distinguish political opinion and "belief."[32]

Here, however, ECtHR case law could be considered.[33] Case law suggests that personal convictions are only protected under Article 9 of the ECHR if they are worthy of respect in a democratic society and compatible with human dignity.[34] This additional limitation places Nazism, right-wing radicalists, and other totalitarian beliefs outside of the scope of "belief" and further supports the difference between political opinion and "belief."

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[26] *See id*. at para. 36.

[27] *See, e.g.*, Mark Bell, *A Patchwork of Protection: The New Anti-discrimination Law* Framework, 67 MODERN L. REV. 465, 468 (2004); *Equality and Diversity: The Employment Equality Regulations 2003*, THE NATIONAL ARCHIVES, http://www.dti.gov.uk/er/equality/eeregs.htm (last visited 4 July 2010).

[28] *See* Gerards, *supra* note 21, at 117–18.

[29] *See* Juliane Kokett, *Art. 4*, *in* KOMMENTAR ZUM GRUNDGESETZ (Michael Sachs ed., 3rd ed., 2003), margin number 20; *see also* Bundesarbeitsgericht [BAG] [Federal Labor Court], Case No. 5 AZB 21/94, 22 March 1995, NZA 823, 827 (1995) ("Scientology Case").

[30] *See* Schiek, *supra* note 24, at margin number 24 (providing further references).

[31] *See* Deutscher Bundestag: Drucksachen [BT] 16/2022 no. 4(a) (indicating that the term belief (*Weltansschauung*) should be interpreted narrowly and does not include political opinion). *But see* Jürgen Ellenberger, *§ 1*, *in* BÜRGERLICHES GESETZBUCH (Otto Palandt ed., 69th ed., 2010), margin number 5 (providing a dissenting opinion and arguing that the correct meaning of belief also includes political opinions). However, Ellenberger comes to the same result, as he considers political opinions which threaten the democratic and free state to be outside of the meaning of belief. *See also* Däubler, *supra* note 23, at margin number 71.

[32] NATAN LERNER, GROUP RIGHTS AND DISCRIMINATION IN INTERNATIONAL LAW 78 (2nd ed., 2003).

[33] *See* Campbell and Cosans v. United Kingdom, 48 Eur. Ct. H.R. (ser. A) (1982).

[34] *See id*. at para. 36.

Unfortunately, the case law on this subject is somewhat ambiguous. In earlier cases, the Court declined to address the question of whether Nazism could be classified as "belief" by turning directly to the question of justification.[35]

F. Conclusion

In our opinion, the Court's decision is problematic. Although the Court reached the proper result in this case, it left many important questions unanswered and missed the chance to engage in further discussion of unclear terms in the AGG.

[35] *See, e.g.*, X v. Austria, Application No. 1747/62, 13 December 1963, 6 Y.B. Eur. Conv. H.R. 424 (1963); *see also* Gerards, *supra* note 21, at 33, 120 (for further discussion).

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