

The German Draft Legislation On the Prevention of Discrimination in the Private Sector

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I. Introduction

[1] On 3 December 2001 the German Minister of Justice, Herta Däubler-Gmelin, presented a draft of legislation aiming at the elimination of discrimination in the private sector and declared her firm determination to have the law passed before the end of this parliamentary term. Presentation of the draft legislation complied with paragraph IX.10 of the Coalition Agreement of 20 October 1998, which anticipates these efforts. (1)

[2] The new anti-discrimination legislation is intended to provide for effective civil law remedies against discrimination in everyday life by private persons, especially concerning access to housing, restaurants, education etc. According to the Government, the law works on two fronts: (a) stating unambiguously that private citizens have a duty to refrain from discrimination; and (b) giving the victims of discrimination more effective protection. (2) At the same time, certain provisions of German law relating to contractual capacity, to formal requirements of a valid will and to evidence in the civil as well as criminal procedure that were not perfectly adapted to the needs of disabled people are to be changed. This report, however, will only focus on those provisions of the draft law that provide for protection against discriminatory behavior of private persons.

[3] The adoption of a wide-ranging anti-discrimination law applicable to the private sector has been under discussion for several years, due, *inter alia*, to the continuous calls of the Committee on the Elimination of Racial Discrimination for the enactment of a comprehensive anti-discrimination law, (3) necessitated by Germany's obligations under art. 2 (1) (d) and 5 (d), (e), (f) of the International Convention on the Elimination of Racial Discrimination. (4) In spite of these recommendations and the encouraging examples of comprehensive anti-discrimination legislation in other countries, Germany remained hesitant until a European directive created a strong incentive to act.

[4] On the basis of article 13 EC Treaty, Council Directive 2000/43/EC of 29 June 2000 aims at implementing the principle of equal treatment between persons irrespective of racial or ethnic origin. (5) Concerning the grounds of discrimination, the EC directive is limited to distinctive treatment based on race or ethnic origin, (6) whereas the German draft legislation also encompasses discrimination on grounds of sexual identity, religion, belief, age, disability and sex. (7) In this sense, the draft law exceeds the scope of the Directive. The Directive applies, in relation to conditions for access to employment, to: (a) employment and working conditions; (b) membership and involvement in an organization of workers or employers, or any organization whose members carry on a particular profession; (c) to social insurance; (d) education; and (e) access to and supply of goods and services which are available to the public, including housing. (8)

[5] In this context it is worth noting that on 27 November 2000 the Council of the European Union adopted another Directive, which fills in the gaps left by the earlier Directive (2000/43/EC, 29 June 2000), extending protection in the area of employment and occupation against discrimination on the grounds of religion or belief, disability, age or sexual orientation. (9) The German legislature decided to implement the provisions of the two directives that refer to employment in a separate, labor market oriented law, (10) a decision in line with the traditional separation of private and labor law in Germany. Consequently, the draft legislation excludes discrimination in the area of employment and only deals with discrimination in relation to contracts offered to the public (except with regard to contracts relating to occupation other than employment, healthcare or education) and to membership and involvement in any organization other than organizations of workers or employers whose members carry on a particular profession. (11)

[6] This report first presents the current legal framework for dealing with discrimination in the private sector in Germany, in order to assess the necessity of the draft legislation (II). Second, it will examine the draft legislation in detail (III).

II. The State of German Law with regard to Discrimination in the Private Sector

[7] Three examples should help to assess the state of German law with regard to discrimination in the private sector:

(a) A landlord categorically refuses to rent his apartment to a Jewish citizen.

(b) A restaurant denies entry to colored people.

(c) A federation of vocalist associations is not willing to give membership to an association of homosexual vocalists although this association fulfills all membership requirements and although the federation usually accepts every association in the area.

The cases require the determination of two points: (a) whether these persons have behaved illegally under current German law; and (b) in the case that their behavior violates the law, what are the consequences.

[8] At first glance, it might seem that each of the examples constitute a violation of article 3 para. 3 of the German Basic Law, which provides: "No one may be disadvantaged or favored because of his sex, his parentage, his race, his language, his homeland and origin, his faith, or his religious or political opinions. No one may be disadvantaged because of his handicap." However, the prohibition of discrimination contained in article 3 para. 3, a fundamental right, applies only to State authorities. A direct *Drittwirkung* (horizontal effect) of the fundamental rights contained in the German Constitution, that is a direct applicability of these provisions to private persons, has been rejected in Germany based on, inter alia, the wording of article 1 para. 3, (12) which invokes the traditional understanding of fundamental rights as rights of the citizen against the State. (13) This approach is confirmed, *a contrario*, by article 9 para 3 s. 2. (14) Finally, what should not be forgotten is the fact that compelling private citizens to comply with the fundamental rights of the Constitution necessarily results in a restriction of the citizen's personal freedom.

[9] And this personal freedom in the area of private law is also constitutionally protected: According to the case law of the German Constitutional Court art. 2 para. 1 German Basic Law includes as part of the *Handlungsfreiheit* (general freedom of action), (15) the guarantee of private autonomy. Hence, with regard to contract law, the freedom to conclude a contract, to determine the content of the contract and to decide with whom to sign a contract is constitutionally protected. (16) But does that mean that the landlord, the restaurant owner and the federation in our examples can rely on a constitutional provision in order to justify their discriminatory behavior?

[10] The fundamental freedoms guaranteed by the Constitution are not without limits. In the application of article 2 para.1 German Basic Law by the Constitutional Court, the general right to freedom of action is limited not only by the Basic Law itself, but by every procedural and substantive norm that conforms to the Constitution. (17) Especially concerning the guarantee of private autonomy, the *Bürgerliches Gesetzbuch* (German Civil Code) contains certain provisions likely to restrain the freedom of private persons in the contractual context. These are the so called general clauses (*Generalklauseln*) contained in §138 and §826 German Civil Code, which refer to the concept of *gute Sitten* (good faith). (18)

[11] It is at this point that the prohibition of discrimination contained in article 3 para. 3 German Basic Law re-enters onto the stage. As stated by the Constitutional Court in its *Lüth* decision, the Basic Law "has also set up an objective value system in its section on fundamental rights." This value system "manifestly influences the civil law: no provision of civil law may be in contradiction with it; each one must be interpreted in its spirit." Particularly relevant in this context, according to the Constitutional Court, are those provisions of private law that contain mandatory law and thus constitute a part of the public order, as is the case for the "general clauses" which have been called "points where the fundamental rights break in to civil law." (19) Therefore, a private act normally covered by private autonomy can be considered to be in contradiction with public morals because the act is discriminatory, thus rendering §138 or §826 German Civil Code applicable. (20) This constitutional influence on the norms of civil law constitute an indirect *Drittwirkung*.

[12] Ultimately, with respect to most cases of discrimination in the private sphere, §138 German Civil Code is not of much help. As our three examples demonstrate, the discriminatory act very often consists in the refusal to enter into an agreement. (21) More relevant is §826 which provides for compensation for damages suffered as a consequence of an act contrary to good faith. In the light of article 3 para. 3 German Basic Law, discrimination based on religion (as in example (a)), on grounds of race (as in example (b)) and on grounds of sexual identity (as in example (c)) could be considered acts contrary to good faith, thereby enabling the victims to recover damages. (22) But what should be kept in mind is that the victims bear the burden of proof in this scenario: If they cannot prove the discrimination, and this is a difficult task in such cases, they will not be able to recover damages. The possibility of resorting to *prima facie* evidence constitutes some relief in this respect. (23)

[13] It is widely accepted that §826 German Civil Code can in certain cases, generate an obligation to contract, especially for firms with a monopoly in the provision of electricity or water. But whether this is also the case for discrimination is not clear. (24) Concerning example (c), the *Landgericht* (Regional Court) Karlsruhe for example has interpreted §826 as giving the claimant a right of access to the federation. (25) The *Kammergericht* (Higher Regional Court Berlin) that dealt with a similar case a few years earlier was more hesitant. (26) In our examples (a) and (b), the opinions of legal scholars diverge. (27)

[14] German civil law already provides for protection against arbitrary discrimination on the grounds enumerated in article 3 para. 3 of the German Basic Law by means of indirect *Drittwirkung*. One could therefore question the necessity of new legislation on discrimination in the private sector. The impact of article 3 para. 3 German Basic Law on §138 and §826 German Civil Code is, in principle, accepted by the legal scholarship. The case-law on this subject, however, is rather scarce and opinions in the legal literature as to when exactly a duty to contract exists under §826 German Civil Code are divided. (28) Especially for laymen, the state of German law on the subject of discrimination in the private sector is not at all clear. It is against this background that the draft legislation on discrimination in the private sector must be considered: It serves to state explicitly the illegality of discrimination in the private sector and as a consequence clarifies for the victim the possible remedies and definitely establishes the illegality of the act for the offenders.

III. The Provisions of the Draft

[15] The draft legislation on the prevention of discrimination in the private sector introduces a new sub-title 5 regarding prohibited discrimination to section 3 (Contractual Obligations) title 1 (Creation, Subject Matter and Cessation) of the German Civil Code.

[16] Section 319a prohibits, in the conclusion, termination and content of contracts offered to the public, any direct or indirect discrimination on the basis of sex, race, ethnicity, religion or belief, disability, age or sexual identity. The prohibition is limited in scope to those contractual relations related to an occupation, to healthcare or education. According to the explanatory note "offered to the public" means that the offer has to go beyond the private sphere. (29) If the landlord in example (a) offers his apartment for rent in a newspaper advertisement, he would be bound by §319a. Also concerned by the prohibition of discrimination is the field of membership and involvement in an organization whose members carry on a particular profession. The ban on discrimination also implies the prohibition of harassment which is defined, in the same words as used in the European Directive, as an unwanted conduct related to one of the grounds of discrimination mentioned above having the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment. (30) The explanatory note gives the example of a restaurant which is willing to serve colored people, but does so in a degrading and humiliating manner. (31)

[17] Section 319b defines direct discrimination as conduct by which one person is treated less favorably than another is, has been or would be treated in a comparable situation on the basis of one of the grounds enumerated above. Indirect discrimination, on the other hand, is taken to occur where an apparently neutral provision, criterion or practice would put persons with one of the listed characteristics at a particular disadvantage as compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary. §319b para. 4 specifies that an instruction to discriminate is deemed to be discrimination within the meaning of §319a.

[18] Section 319d is designed to take account of the fact that a ban on discrimination with regard to the private sector cannot be an absolute as is the case with the prohibition on discrimination by State authorities. (32) The constitutionally protected private autonomy creates the need for the possibility of balancing the interests of the private persons involved in each case. Therefore, § 319d permits different treatment, as an exception, under certain circumstances. With regard to contracts relating to an occupation and organizations whose members carry on a particular profession, different treatment is deemed permissible if the existence or the absence of one of the characteristics described above constitutes a genuine and determinative requirement for the occupation or for membership in the organization or if consideration of age or disability is justified by a *sachlicher Grund* (reasonable purpose). In all other cases, differential treatment on the basis of sex, religion or belief, disability, age or sexual identity is possible when based on reasonable grounds. According to the explanatory note a ground or purpose is reasonable if it not only reflects a personal apprehension, but relates to the content of the planned legal transaction and is understandable for an average observer. However, differential treatment can only be regarded as justified by a reasonable ground if the difference in treatment cannot be avoided by means of modification of the contract. This restriction was introduced specifically with regard to disabled people. (33) Concerning race and ethnicity, differential treatment is never possible. In this context the draft legislation explicitly states that it does not prevent the adoption of specific measures to prevent or compensate for disadvantages linked to one of the characteristics described above, thereby endorsing affirmative action. (34)

[19] A practically important provision is § 319c, concerning the burden of proof in civil actions involving claims of discrimination. When persons who consider themselves wronged because the principle of equal treatment has not been applied to them establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, pursuant to this article the burden shifts to the respondent to prove that there has been no discrimination or that the differential treatment was permissible as an exception. This provision

is similar to §611 a para.1 s. 3 of the German Civil Code which concerns the equal treatment of men and women concerning the conclusion of employment contracts.

[20] The most interesting point, perhaps, is the way the draft legislation deals with the consequences of unjustified discrimination. On this point the EC directive leaves a wide margin of appreciation to member States, only requiring sanctions, that may comprise the payment of compensation to the victim, to be effective, proportionate and dissuasive. (35) The German draft would, in § 319e, provide for two statutory claims. First, a claim for non-repetition of the discriminatory act. Naturally, this claim only becomes relevant if a repeat of the discriminatory act is feared. Second, the main right of a victim of an unjustified differential treatment is the right to be treated without discrimination and to have the consequences of the discriminatory wiped out (*Folgenbeseitigungsanspruch*).

[21] How this claim is to be satisfied depends on the circumstances of the case. The performance can consist in a factual conduct. If, for example, the owner of a shopping mall prevents people of color from walking through the mall and looking at the displays, he will have to provide access in application of § 319e. But the fulfillment of the claim arising from § 319e can also consist in the modification of a contract: If for example transsexual persons have to pay a higher price for insurance, they can rely on § 319e and sue to have the price modified. The conclusion of a contract or access to an organization can, however, only be claimed if, without the discrimination, the contract would have been concluded or access would have been given. This will regularly be the case with a store which normally is interested in selling goods. In our example (a) (involving the Landlord who refuses to rent an apartment to a Jewish applicant), however, it is more likely that, even without the discrimination, the landlord would not rent the apartment to anybody. In any case, the conclusion of the contract cannot be claimed if the "offender" concluded a contract on the same object with a third person. If relief by the means described is impossible, the concerned person can seek compensation. Imagine for example a person that has been denied entry to a concert which is only performed once.

[22] Finally, it is important to mention the possibility for associations, organizations or other legal entities which give advice to disadvantaged persons to engage in judicial proceedings for the enforcement of the obligations described above (*Verbandsklage*). This is a rare exception in German law, that does not know the *actio popularis*.

IV. Conclusion

[23] The present draft legislation certainly is an important step in the fight against discrimination. The success of the law and its acceptance by the citizens will be determined to a great extent by the way judges apply the law. (36) The example of § 611a of the German Civil Code, which is also based on an European directive, demonstrates not only what far-reaching results such legislation can have, but also that the law itself and its application by the judiciary will be subject to close scrutiny by the German Constitutional Court. (37)

(1) The draft and an explanatory note can be found at: <http://www.bmj.bund.de/images/11312.pdf>. Please note: if this link does not work, please type the URL from hand. The draft document (67 pages) is at the address indicated in the link.

(2) Explanatory note to the draft, p. 18.

(3) Report of the Committee on the Elimination of Racial Discrimination, General Assembly, Official Records, Forty-eighth Session, Supplement No. 18 (A/48/18), 1994, para. 447; Concluding Observations of the Committee on the Elimination of Racial Discrimination: Germany. 23/04/97, CERD/C/304/add. 24.

(4) On the scope of the obligation resulting from these provisions see P. Rädler, *Verfahrensmodelle zum Schutz vor Rassendiskriminierung*, 1999, p. 43; R. Wolfrum, *Das Verbot der Rassendiskriminierung im Spannungsfeld zwischen dem Schutz individueller Freiheitsrechte und der Verpflichtung des einzelnen im Allgemeininteresse*, in: E. Denninger (ed.), *Festschrift für P. Schneider*, 1990, p. 524.

(5) Member States are bound to implement the directive by 19 July 2003, see art. 16 Council Directive 2000/43/EC.

(6) Art. 2 para.1 Council Directive 2000/43/EC.

(7) Draft §319a of the German Civil Code.

(8) Art. 3 para.1 Council Directive 2000/43/EC.

(9) Council Directive 2000/78/EC of 29 November 2000 establishing a general framework for equal treatment in

employment and occupation.

(10) Explanatory note to the draft, p. 19.

(11) Draft §319a of the German Civil Code.

(12) Art. 1 para. 3 German Basic Law: „The following basic rights are binding on legislature, executive, and judiciary as directly enforceable law.”

(13) See B. Pieroth/B. Schlink, Grundrechte, 2001, n° 175.

(14) Article 9 para 3 s. 1, 2 German Basic Law: „The right to form associations to safeguard and improve working and economic conditions is guaranteed to everyone and for all professions. *Agreements which restrict or seek to impair this right are null and void, measures directed to this end are illegal.*” Emphasis added by the author.

(15) See D.P. Kommers, The Constitutional Jurisprudence of the Federal Republic of Germany, 2nd ed., 1997, p. 315ff.

(16) BVerfGE 68, 274 (328); 70, 123; 72, 170; Erman-Hefermehl, vor §145, n°16; Palandt-Heinrichs, Überblick vor §104, n°1, Einführung vor §145, n°7.

(17) Kommers (fn. 15), p. 317.

(18) §138 para. 1 German Civil Code: „A legal transaction which offends public morals is void.”; §826 German Civil Code: „A person who wilfully causes damage to another in a manner contrary to public morals is bound to compensate the other for the damage.” For a discussion of the meaning of the German legal term "guten Sitten" see, *Lords of Democracy: What the German Constitutional Court (in the Hessen Election Review Case) and the U.S. Supreme Court (in Bush vs. Gore) Are Telling Us About the State of Democracy*, 2 German L. J. No. 4 (1 March 2001), available at: http://www.germanlawjournal.com/past_issues.php?id=53

(19) BVerfG 7, 198 in: Decisions of the Bundesverfassungsgericht – Federal Constitutional Court – Federal Republic of Germany Vol. 2/Part I: Freedom of Speech, p. 5.

(20) Staudinger-Bork, Vorbemerkung zu §§ 145ff, n°24.

(21) §138 German Civil Code would for example be helpful in dealing with a sales contract relating to a house which contains a clause prohibiting the buyer to sell the house to people of other ethnic origin.

(22) For the scope of the recoverable damages, especially compared to damages recoverable under §823 para. 1 and §823 para. 2 in such cases see T. Bezenberger, *Ethnische Diskriminierung, Gleichheit und Sittenordnung im bürgerlichen Recht*, AcP196 (1996), 395 (424ff).

(23) Bezenberger (fn. 22), p. 431ff.

(24) Rädler (fn. 4), p. 46.

(25) Explanatory note to the draft, p. 18.

(26) Neue Juristische Wochenschrift-Rechtsprechungsreport 1993, 183.

(27) In favor of an obligation to contract Maunz/Dürig, Grundgesetzkommentar, Art. 3 Abs.I, n°516; against R. Kühner, *Das Recht auf Zugang zu Gaststätten und das Verbot der Rassendiskriminierung*, in: Neue Juristische Wochenschrift 1986, 1397 (1401).

(28) See for example Kühner (fn. 27) p. 1401.

(29) Explanatory note to the draft, p. 39.

(30) Draft article §319b of the German Civil Code.

(31) Explanatory note to the draft, p. 44.

(32) Explanatory note to the draft, p. 45.

(33) Explanatory note to the draft, p. 48.

(34) See K. Hailbronner, Die Antidiskriminierungsrichtlinien der EU, *Zeitschrift für Arbeitsrecht* 2001, p. 254 (258).

(35) Art. 15 Council Directive 2000/43/EC.

(36) For a first reaction see G. Thüsing, Das gleiche Bewußtsein bilden, *Frankfurter Allgemeine Zeitung*, 7 February 2001, p. 11.

(37) BVerfGE 89, 276; R. Nickel, Handlungsaufträge zur Bekämpfung von ethnischen Diskriminierungen in der neuen Gleichbehandlungsrichtlinie 2000/43/EG, in: *Neue Juristische Wochenschrift* 2001, 2668 (2669).