

## Executive Summary

### Country Report Germany 2011 on measures to combat discrimination

By Prof. Dr. Matthias Mahlmann

#### 1 Introduction

Germany enjoys as other countries a plural society. It has autochthonous minorities, the Danish and the Sorbs, both not very significant in number. The Friesians of German Nationality and the Sinti and Roma of German Nationality are officially recognized as minorities as well. The most important groups of ethnic minorities are, however, immigrants, the so called “Guest workers” and their descendants. There was before the Nazi-Period mostly immigration from Polish people. After 1945 Turks, people from former Yugoslavia, Italians and Greeks form the biggest immigration groups. Accordingly of the 7, 3 million foreigners in Germany (population about 80 million) about 30% are Turks, 9% are from former Yugoslavia, 8.5 % from Italy and about 5 % from Greece. In addition, especially through asylum seekers and refugees, a heterogeneous ethnic community has formed in Germany in the last decades. A micro-census of 2005, the results of which were published in 2006 showed that about 20% of all German inhabitants today have a background of immigration – much more than formerly assumed.

The biggest religious groups in Germany are the Catholic and Protestant Churches with about 26 million members each. Thus, about 32% of the population belong to one of the two main Christian confessions, together about 64%. About 1, 7 million Muslims are living in Germany. This is about 2% of the population. Nearly 100 000 or 0,12 % are Jewish.

Germany’s past is of particular relevance for the principle of equal treatment and anti-discrimination, especially as far as race and ethnic origin are concerned, but as to religion and belief, sexual orientation and disability as well. There is a great amount of awareness today of the horrors of the Nazi Period, the many faceted crimes against people with a certain religion, belief, ethnic origin, sexual orientation or disability, among other characteristics, in all spheres of society. This past creates for many citizens of Germany a sense of responsibility for a firmly protected culture of human rights. This sense of responsibilities manifests itself in many activities of civil society, in education and the actions of the political organs of Germany.

Germany has well developed social system that provides in many dimensions reasonable accommodation for disabled persons, supported by schemes of positive action. A special legal institution has been created to give same-sex partnerships a secure legal framework as an equivalent to marriage for heterosexual partnerships. The reform of the German Nationality Act has liberalised the rules for obtaining German citizenship to foster integration.

Nevertheless, Germany has to deal with severe problems of discrimination as well. Racism and Xenophobia continues to be manifested in many forms, even violence that claimed several dozens of human lives since 1990. A recently uncovered Neo-Nazi terrorist cell responsible for at least nine killings out of racist motives has been a shocking reminder of what racism can bring about. Right wing extremists have had in recent years some political success, however, often short termed.

Though there are little sound empirical studies on the matter, the available data suggest, that characteristics of human beings like religion and belief, disability, sexual orientation and age are also still the cause for ongoing discrimination.

## 2 Main legislation

The Constitution, or Basic Law (Grundgesetz), is of central importance for understanding the German legal framework on discrimination. The German Constitution is, unlike some other constitutions, directly binding on all public authorities. Fundamental rights are part of this directly effective constitutional order. They are binding on the legislature, executive, and judiciary as directly valid law. Under the Basic Law, fundamental rights have become the material core of the legal order in general. They are therefore not only relevant in public law, but permeate other legal spheres as well, such as criminal and private law.

There are several constitutional provisions that protect human equality. Most important is the guarantee of human dignity. The core of this guarantee is the respect of any human being as an end in itself, simply by virtue of his or her humanity, irrespective of other characteristics. Case law of the Federal German Constitutional Court consistently states that each person should be treated not only as an object of state action, but as an end in itself. He or she is, in addition, protected against degrading or humiliating treatment. The guarantee of human dignity is the central value decision of German law, its most important and supreme norm. In consequence, it is an important reference point for anti-discrimination law in Germany, especially as it guides interpretation of the constitutional guarantee of equality and provides normative yardsticks for other areas of law. It is important to note that through the guarantee of human dignity German law authoritatively states that no distinctions are to be made as to the worth of a human being, irrespective of any characteristic. The only question that arises is therefore how, by which concrete technical means, the overarching value of human dignity can be adequately protected through legal channels in various spheres of life.

Other important constitutional guarantees are the guarantee of equality, and special constitutional equality rights concerning children out of wedlock, equality of status and office, and equality of electoral rights.

Germany is a democratic and social federal state under the rule of law. As it is a social state, the State has a duty to promote the welfare of its citizens. In the field of anti-discrimination, the principle of the social state leads to a wide range of

programmes aiming to promote the inclusion of groups that face discrimination. The federal character of Germany causes different regulations in different Länder in some areas where the Länder have legislative competencies, most notably as to education and cultural matters or certain aspects of the law regulating civil servants they employ.

The most important matters in public (with the exceptions mentioned) and private law are, however, still in the competence of the Federation, either as exclusive legislative power, or concurrent legislative power, despite recent reform of the Federal order.

There is in Germany specific anti-discrimination legislation which includes the following: There are various legal provisions which reiterate the fundamental guarantee of equality for areas of public law, including the law of the civil service and other public employees. In labour law, there is a general anti-discrimination clause in the Works Constitution Law (Betriebsverfassungsgesetz) and the fundamental principle of equal treatment of employees has been consistently established by case law. In addition, as regards disability, various legal instruments have been passed aiming to protect against discrimination and increase the social inclusion of disabled persons. In the area of sexual orientation, some new legal regulations have been created that either directly aim at protection against discrimination or do so indirectly by creating options that were not previously open to people with certain sexual orientations, for example, by introducing a legally regulated form of partnership. As to religion, special legal regulations and case law, in addition to the non-discrimination clauses of public law and labour law, deal with the reasonable accommodation of various religious beliefs, including exceptions from general laws. There is a widely held opinion in legal doctrine (which has resulted in some case law) that the general clauses of civil law provide remedies in private contract law and tort law against discrimination on any ground that infringes basic personality rights. These general clauses have to be interpreted in the light of the constitutional order (especially in the light of fundamental rights and most importantly of human dignity) that prohibits discrimination.

August 18, 2006 a antidiscrimination law was enacted, the Gesetz zur Umsetzung Europäischer Richtlinien zur Verwirklichung des Grundsatzes der Gleichbehandlung, BGBl. 2006, 1897. This act encompasses the Allgemeines Gleichbehandlungsgesetz (AGG) (General Equal Treatment Law), the Soldaten und Soldatinnengleichbehandlungsgesetz (SoldGG) (Law on Equal Treatment of Soldiers) and amendments to various legal regulations.

The law reshaped the anti-discrimination of Germany considerably. The general aim of the law is defined to combat discrimination based on grounds of race, ethnic origin, sex, religion or philosophical belief (Weltanschauung), disability, age or sexual identity. The formulation “on grounds of race” (aus Gründen der Rasse) is supposed to indicate that the German legislature does not assume the existence of different human races. It includes labour, civil and parts of public law. As to general civil law, philosophical belief is not part of the forbidden grounds. The law goes therefore in

principle beyond what is demanded by European law. There are, however, various parts of the law that might be found to be in breach of European law.

### 3 Main principles and definitions

The anti-discrimination law defines direct and indirect discrimination, harassment, and instruction to discriminate following closely the definitions in the directives. Discrimination by association is not explicitly covered. A provision deals with multiple discriminations on various grounds. It is stated that any of such discrimination has to be justified independently. Positive action is declared to be admissible if the discrimination serves to overcome existing disadvantages based on any of the grounds listed. There is an exception of dismissal from the application of the anti-discrimination law, which has been rendered without effect through case law.

#### a) Labour Law

Justification of unequal treatment is possible if the treatment forms a genuine and determining occupational requirement. Unequal pay shall not be justified because of the fact that due to one of the grounds listed special duties of protection for the employer exist.

There are further grounds of justification because of the ethos and duty of loyalty as defined by a religious or philosophical belief. There are further justifications for the ground of age if there are objective reasons, and the unequal treatment is appropriate and necessary. Examples are given for this following the rules in the Directive 2000/78/EC.

Employers are under a duty to protect employees against discrimination and prevent its occurrence through organisational arrangements, or the content of vocational training. They have to take appropriate action against such behaviour and to inform the employees about the legal regulations.

In case of discrimination, the victim is entitled to damages for material loss if the employer is liable for wilful or negligent wrongdoing. There is a strict liability for damages for non-material loss. The amount of compensation has to be appropriate. If the discrimination was not causal for the non-employment, the compensation for non-material damage is limited to three monthly salaries.

There is a time limit of two months for any such claim, beginning with the reception of the rejection of a job application or promotion, in other cases the knowledge of the disadvantageous behaviour. The law does not establish a duty to contract, unless such duty is derived from other parts of the law, e.g. tort law. Victimisation is prohibited. The law contains an appeal to the social responsibility of the social partners to realise the aim of non-discrimination. The rules of non-discrimination also apply to professional associations. In case of discrimination in this sphere, there is a duty to admit the person to the association.

## b) Civil Law

In civil law, the discrimination is prohibited for all grounds listed, not only for those prescribed by the directives (race, ethnic origin, sex) with the exception of philosophical belief (Weltanschauung).

In the case of housing, unequal treatment is for all grounds permissible if it serves to maintain stable social relations of inhabitants and balanced patterns of settlement and economic, social and cultural relations.

Unequal treatment is justified for religion, disability, age, sexual identity or sex in case of an objective reason for the treatment. As examples for such objective reason the law lists the prevention of danger and damage, the protection of the sphere of privacy and of personal security, the provision of special advantages without any given objective interest in equal treatment, and the ethos of a religion. In case of insurances, a difference of treatment – with different qualifications for sex and the other grounds – is only permissible if it is based on objective actuarial calculations. In case of a violation of the prohibition of discrimination, the victim has a claim of forbearance and removal of the disadvantage and can sue for an injunction. The discriminator is liable to pay damages for material loss caused for wilful or negligent wrongdoing. There is a strict liability for damages for non-material loss, the compensation for which has to be appropriate. There is a time limit of two months for making any such claims, as in labour law. The burden of proof is shifted both for labour and general civil law.

## c) Public Law

The regulations of the law are applicable to civil servants, judges, and conscientious objectors, giving due consideration to the special legal status of these persons. The Law on the Equal treatment of Soldiers contains regulations similar to those described above, together with existing legal regulations on this matter. Other parts of the law supplement these norms of labour, civil and public law. There are some special rules on reasonable accommodation, especially for severely disabled persons and others of equal status.

## 4 Material scope

### a) General

The constitutional guarantees apply to all state action and through indirect horizontal effect to the relations of private persons. The specialised guarantees apply to their respective field of regulation – public law, labour law, social law, etc.

## b) The AGG

The scope of application of the anti-discrimination law encompasses labour law, social security, social benefits, education and general civil law, including assurance contracts closely following (in part verbatim) the provisions of the directives in this respect. For unfair dismissal the regulations of the laws against unfair dismissal (especially the Kündigungsschutzgesetz) are supposed to take precedent over the anti-discrimination law. Case law, however, has interpreted the respective provision in a way that the prohibition of discrimination fully applies for dismissal.

In civil law, the prohibition of discrimination on the ground of race and ethnic origin extends to all legal transactions, i.e. the provision of goods and services, available to the public.

The prohibition for the other grounds with the exception of belief extends to all legal transactions that are typically concluded in a multitude of cases under comparable conditions without regard to the person (so called Massengeschäfte or bulk business) or to such legal transactions, where the characteristics of the person have only secondary importance. Furthermore, the prohibition of discrimination extends to private insurance.

The prohibition of discrimination does not apply to legal relations of a personal kind or if there is a special relation of confidence between the parties concerned or their relatives. In case of housing this is supposed to be the case if the parties or their relatives live on the same premises. The prohibition of discrimination is supposed not to apply in principle (although exceptions are deemed possible) if the landlord lets not more than 50 flats.

## 5 Enforcing the law

The means of enforcement of the anti-discrimination law are the ones of other areas of law, apart from certain special mechanisms, through the courts. There is a growing amount of case law on various aspects of discrimination. Many aspects have not been settled and some of the case law is contradictory. Whether the AGG establishes patterns of jurisdiction including adequate sanction has still to be seen. Statistical evidence has been allowed in the past and can be used according to the AGG. The former regulation on the burden of proof, now amended by the AGG, has been interpreted along the lines of ECJ jurisdiction. There is no explicit regulation or legal practice yet as to the admissibility of situational testing.

According to the anti-discrimination law, a victim of discrimination is entitled to be supported in legal proceedings by associations dealing with matters of discrimination. They have to have at least 75 members or have to be the association of at least 7 other associations concerned with anti-discrimination.



## 6 Equality bodies

The anti-discrimination law establishes a federal anti-discrimination agency (Antidiskriminierungsstelle des Bundes) from the moment it entered into force in August 2006, though the body started to be operative in 2007. Its mandate covers all grounds listed in the law, notwithstanding, however, the competencies of specialised governmental agencies dealing with related subject matters. The body is organisationally associated with the Ministry of Family, Senior Citizens, Women and Youth. The head of the agency is appointed by the Minister of Family, Senior Citizens, Women and Youth after a proposal by the Government, which has happened for the first time in spring 2007. In 2009 a new head has been appointed. The head is independent and only subject to the law. The tenure of the head of the agency is the same as the legislative period of the Bundestag. The agency has the task of supporting persons to protect their rights against discrimination, especially to inform them about the legal means against discrimination, to arrange legal advice by other agencies, to mediate between the parties, to provide information to the public in general, take action for the prevention of discrimination, produce scientific studies, and – every four years – a report on the issue of discrimination, together with the Commissioners dealing with related matters. These agencies can give recommendations and can commission together scientific studies. The agency can demand a statement of position in case of discrimination from the alleged discriminator, if the alleged victim of discrimination agrees.

Other public agencies have to support the agency in their work. The agency is to co-operate with NGOs and other associations. An advisory body is to be created. The agency has a budget of about € 3 Mio. The agency has started to be present in the public e.g. through conferences, publication and commissioned surveys and studies on particular problems like multiple discrimination, positive action, among others.

In addition, other bodies exist in Germany dealing with issues of discrimination, most importantly the Commissioners for Integration/Foreigners, for Immigrants of German Ethnic Origin (Aussiedler) and National Minorities, and Disabled Persons.