



## European network of legal experts in gender equality and non-discrimination

### FLASH REPORT

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| <b>Country:</b>                   | Germany   |
| <b>Title:</b>                     | Discrimination of a blind person                |
| <b>Date:</b>                      | 6 May 2020                                      |
| <b>Expert:</b>                    | Matthias Mahlmann                               |
| <b><u>Context</u></b>             |   |
| <b>Issue at stake:</b>            | Concept of discrimination and personal autonomy |
| <b>Grounds of discrimination:</b> | Disability                                      |
| <b>Field of application:</b>      | Goods and services                              |
| <b>Source:</b>                    | National court decision                         |
| <b>Applicable law:</b>            | Section 3.3 Basic Law Germany                   |

### **Content**

**Case development:** The case concerns discrimination on the ground of disability. The complainant was a patient of a physiotherapist. She attended her physiotherapy sessions accompanied by a seeing-eye dog/guide dog to access the rooms of the physiotherapist. To access these rooms one could either use a staircase or pass through the waiting rooms of another medical practice. She was allowed to do the latter for several weeks accompanied by her dog. To access the rooms of the physiotherapist with her dog via the staircase was impossible because the dog could not climb the stairs. After some time, in addition, she needed to use a wheelchair. The defendant, the medical practice that she crossed, prohibited the complainant from using this access to the physiotherapy practice with her dog because of hygienic reasons. It argued that it was unnecessary to cross the rooms of the practice with the dog because she could leash the dog in front of the practice and let herself be helped by employees of this practice.

**Decision of the court:** The German Federal Constitutional Court<sup>1</sup> decided that the decision of a lower instance court arguing that the prohibition of the practice to cross its rooms with a dog was unconstitutional. The Constitutional Court argued that the prohibition of discrimination on the ground of disability according to section 3.3 Basic Law was violated. Section 19 AGG prohibiting discrimination on the ground of disability was applicable. The contractual relations of the complainant with the physiotherapist were not excluded from the material scope of section 19 AGG. This contract was "bulk business" in the sense of section 19 AGG that is a contractual relation in which the individual party to the contract is of no significance. Section 19 AGG, the court argued, has to be interpreted in the light of the prohibition of discrimination of section 3.3 Basic Law because of the indirect horizontal effect of section 3.3 Basic Law. The court argued that it did not have to decide whether the prohibition was a direct discrimination on the ground of disability because in any case it formed an indirect discrimination on the ground of disability. The prohibition to be accompanied by the dog to access the physiotherapy formed a disadvantage disproportionately affecting persons with disabilities. There was no objective

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<sup>1</sup> Federal German Constitutional Court, 2BvR 1005/18, 30 January 2020, ECLI:DE:BVerfG:2020:rk20200130.2bvr100518.

reason justifying this indirect discrimination. Given expert opinions on the matter, there were no hygienic dangers for the medical practice because of the dog crossing the rooms on the way to the physiotherapist. The court highlighted that in particular in the light of the UN Convention on the Rights of Persons with Disabilities it was a disproportionate demand to expect the complainant to relinquish her autonomy by leaving her dog outside and by accepting guidance by personnel of the medical practice. The court underlined that the convention was formally federal law but could be used to interpret the rules established by fundamental rights of the Basic Law, thus strengthening its legal force.

**Key points of analysis:** The decision concerns not only an interesting type of discrimination against people with disabilities but it is of legal and constitutional importance because the court underlined the paradigm change in disability law in recent years. The new understanding of the prohibition of discrimination means that persons with disabilities have to be empowered as autonomous agents. These interests can outweigh the interests of a third party, in the concrete case the interests of a medical practice to determine its own organisation.

**Internet link source:**

[https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2020/01/rk20200130\\_2bvr100518.html](https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2020/01/rk20200130_2bvr100518.html).