The Planned German Anti-Discrimination Act: Legal Vandalism? A Response to Karl-Heinz Ladeur

By Viktor Winkler


[1] I agree with Karl-Heinz Ladeur (1) that the recent draft of a German `Anti-Discrimination Law` (2), as presented by the Federal Minister of Justice, Mrs Däubler-Gmelin last November and to be included as §§ 319 a-e Bürgerliches Gesetzbuch (BGB -- German Civil Code), is raising a lot of highly difficult legal questions (see below under A.). As far as I can see, the core of Karl-Heinz Ladeur`s critique has three parts: (a) that the draft is un-constitutional (and therefore illegal), (b) that it does not fit into the liberal German Civil Code, and (c) that it is inconsistent with `common sense`. While I feel incapable of judging the last of these points, I disagree with the first (below under B.) and the second (below C.). Apart from the positivist side of the matter, I believe that from a theoretical viewpoint the draft legislation does not seem very outrageous but rather verifies a known trait of modern Law (below D.).

A. Black sheep among good law?

[2] The proposal for a German `Anti-Discrimination Act` (if it becomes final one day at all),(3) will certainly raise a lot of highly difficult questions.(4) The following are only a few examples. The proposed law creates a discrimination claim based on Behinderung (disability) but does not define it (does `disability` include an impairment of health, i.e. does it include a latent HIV-infection?). The same difficulty applies to the use of the term `religion` in the draft legislation (does this also cover controversial religious groups like Scientology?). More importantly, the reversal in the burden of proof provided by the proposed § 319c BGB seems to bear unpredictable consequences since it is not obvious at all what the provision means by stating that the claimant only has to `glaubhaft machen` (`plausibly demonstrate`) that an act of discrimination has occurred. Of course, this is of highest importance because the burden of proof shifts to the alleged discriminator if the claimant is able to meet this standard (§ 319e BGB). And, to present a final example, the consequences of discriminatory acts, as provided by the proposed § 319e BGB, include Folgenbeseitigungsanspruch (a claim for remedial action). This remedy, of course, has never before been used in German Civil Law. (5)

[3] It seems to me, however, that these difficulties can be overcome. Not because I have any idea how to solve them but because I believe that these are difficulties that necessarily accompany any law, at least any that deals with a new field and that has to regulate a wide range of possible circumstances. This is not only true for law`s infamous Generalklauseln (blanket clauses) but for law in general. The terms presented in the proposed § 319a BGB are not more vague than numerous legal terms of the German Civil Code that are part of lawyers` every-day-use such as `Leistung` (performance), `Verfügung` (disposition), `Unmöglichkeit` (impossibility), `Schaden` (damage), `Schutzgesetz` (provision that aims at protecting individual rights) and many more, all of which never would have meant anything to anybody without an active judiciary doing what we euphemistically call Konkretisierung (substantiation). In this sense the draft does not seem to be any more unclear or vague than many important provisions of the German Civil Code. Maybe it only needs a dedicated academic treatment to become part of the close-knit jurisprudence of the BGB, which, after all, Karl-Heinz Ladeur calls a masterpiece of European legal culture. The same applies for the reversal of the burden of proof: The controlling plausibility standard (glaubhaft machen) is, indeed, vague. But it is already part of the Civil Law, in § 611a BGB, and has undergone ample academic and judicial treatment in that manifestation. Finally, the phenomenon of a claim for remedial action (Folgenbeseitigungsanspruch) might be new to Civil Law, but, again, I cannot see this, alone, as an argument against the draft legislation.

[4] In order to adequately evaluate the draft I suggest that we, for a thoughtful moment, assume that these uncertainties can be overcome and that, for instance, the plausibility standard for shifting the burden of proof actually does lead to the uncovering and identification of acts of discriminations. Then, and only based on this assumption first, is it possible to examine the constitutional issues associated with the proposed `Anti-Discrimination Act`?

B. Unconstitutional?

[5] The main constitutional argument against the proposal is evident. It is freedom, the constitutional freedom of contract and of action. The Grundgesetz (GG -- Basic Law) does not, however, explicitly provide for the `freedom of contract`. Article. 2 GG, where the principle of Privatautonomie (private autonomy) is said to be `located` does not quite speak of a genuine commercial freedom but of `freie Entwicklung der Persönlichkeit` (``free development of personality``). Of course, there are very convincing reasons to assume that development of personality must include
freedom of contract. However, freedom as such is also not the first provision of the most important law code of Germany. That ranking is assigned to Article 1 GG, which also does not speak of freedom of contract but of Würde (dignity) instead. It is, of course, reasonable to argue that nobody knows what that is. More precisely: no one is or ought to be able to define what “dignity” is, after all, that is what dignity is all about. According to the critics of the proposed “Anti-Discrimination Act,” this constitutional protection undermines the anti-discrimination limits the proposed Act places on the freedom to contract. So the argument goes: It is just as much part of my dignity not to be forced to engage with someone that I do not like, not to contract with such a person, and, most importantly from the standpoint of “dignity,” not be required to give account of why I like a person or why I do not.

[6] But that is not the case. Article 1 GG is not just a blank check for any existential orientation. It is a legal norm. It is intended to provide legal consequences and has done so extensively since 1949. In other words: It means something. The starting point of any interpretation can only be the historical foundation, that is, the broader contextual reasons the founders gathered to draft and implement a Constitution, including the dignity provision of Article 1. They meant the provision to be a legal reaction to the crimes committed in the “Third Reich.” And they thought these discriminatory monstrosities had resulted from or at least reflected a contempt of every person’s inherent dignity. Therefore, the protection of personal dignity is undisputedly the highest (legal!) value of the German legal system and, at the same time, the most important mandate to any legal arrangement. If this analysis holds, discrimination that regards personal features as being expressions of individual dignity and that are therefore based on the same structural attitudes as those prevailing in the “Third Reich” are legally unacceptable. The Constitution does not require a person to accept a lesbian as a tenant, it does not demand that people eliminate their disapproving thoughts and does not require me to contract with somebody I “do not like,” but it demands that nobody can be discriminated for his race, skin colour etc. without legal sanctions.

[7] It is important to note how it is that the constitution can play any role in private affairs, as constitutions are typically conceived as a check only on State authority and power. For German legal scholars it has been clear for quite some time that Grundrechte (constitutional basic rights) are not only Abwehrrechte (mere defensive rights as against the State) but they also represent an “Order of objective values” (“objektive Wertordnung”). The basic rights thereby gain a horizontal function, which is to say they have an (indirect) effect on private arrangements forged by Civil Law (mittelbare Drittewirkung). To this very day, however, this insight seems to be overlaid by an incorrect perception of the mere defensive function of basic rights being the “classical” function and the objective/law-changing being a new and somewhat strange invention developed and implemented by an almighty Federal Constitutional Court that has no respect for Civil Law and its uniqueness. From the standpoint of legal history this view is wrong. Neither in Germany nor in France did basic rights originate as mere defensive mechanisms only to develop their objective function afterwards. Instead, in both constitutional cultures, basic rights started out as the latter. It fits the picture that there is a tendency to overly stress the constitutional Rechtsstaatsklausel (provision guaranteeing the rule of law) to the disadvantage of the Sozialstaatsklausel (welfare-state-provision) in order to enforce an alleged constitutional principle of “in dubio pro libertate,” that by the way was not written into the GG. Instead, welfare state and rule of law are eventually equal columns of our Constitution.(7) Of course numerous liberty rights are guaranteed and any interference with them requires special justification. But a look at just the last 12 months of constitutional adjudication is enough to see that these liberties, whether freedom of speech or freedom of contract, have always been restricted by and reflected in the mirror of Germany’s “Third Reich” history. Similarly, the welfare state rights secured by the Basic Law are characterized and reflective of Germany’s unique tradition of Corporatism and Welfare.(8) As a result, I cannot see that there is a virgin part of the Constitution in which any kind of unbound, immaculate freedom would rule.

[8] In this light, it seems implausible to me that a constitutional provision like that which provides protection for the institutions of marriage and family (Article 6 par. 1 GG) could possibly serve as a warrant for discriminating against homosexuals. It may be constitutionally supportable when a landlord privileges “nuclear families,” discriminating against potential tenants only because of their deviant sexual orientation, however, cannot be supported by the constitution. In the past, Article 6 par. 1 GG has often been the focus of attempts to extract a constitutional right from the Basic Law, even if that right is not in there. When the Lebenspartnerschaftsgesetz (Equal Treatment Act regarding homosexual partnerships) was enacted, an important part of the scholarly community regarded it as unconstitutional for homosexuals to join into a partnership because of the “harm” this would do to the special constitutional respect for (heterosexual) marriages and families. Again, there was truly no legal argument against the project. Because of Articles 4 and 140 GG cannot mean a Christian/Catholic heterosexual marriage only,(9) and if its objective is to lend support to families based on the close human connection they represent and generate, there is then no (non-discriminatory) argument for denying a homosexual family the same support (especially since it has not been proved yet that gay relationships are any more fragile than heterosexual ones). This is perhaps only the most obvious recent misuse of Article 6 par. 1 GG for purposes that are genuinely political. Today even the secular bible of German Civil Law jurisprudence, the “Palandt,” cautiously admits that Article 6 par. 1 GG as such does not determine whether the Constitution is against gay marriage but instead that it is a “Wertungsfrage”(10) (question of assessment), whatever that may be.
[9] Finally, Article 3 par. 3 GG is the strongest proof that the Constitution requires equal treatment. While freedom of contract is not explicitly provided by the Constitution, the Constitution does explicitly forbid discrimination based on race, religion etc. And, while it is indeed questionable whether the principle of equal treatment requires compliance in private relations or whether it merely provides protection from public actions, it is hard to see that it should prevent legal action (in this case, legislation) that serves to minimize one of the forms of discrimination identified by Article 3 GG. In any event, the jurisdiction seems to agree upon the (indirect) horizontal effect of Article 3 par. 3 (prohibiting discrimination based on gender, race etc.).(11)

[10] Privatautonomie (private autonomy, comprising "freedom of contract") as it is protected and guaranteed in Article 2 par. 1 GG is the only plausible constitutional argument against the draft legislation. If it is enough to spread out a "liberal theory of rights" (Ladeur) in this context, I may not have to decide. One thing that is rarely considered in the criticism of (an allegedly freedom-destroying) draft "Anti-Discrimination Act" is the constitutional fact that those who are subject to discrimination have a constitutional right of freedom of contract in the same measure as those who would like to invoke their freedom of contract to discriminate against them. Due to the discrimination the freedom of the subjects of discrimination is limited. Viewed this way, a law that aims at restoring this right (to contract free from discrimination) not only violates individual freedom (preventing one from engaging in discriminatory contractual choices) but at the same time restores it.

C. Farewell to a liberal German Civil Code?

[11] The phenomenon of Kontrahierungszwang (imposed obligation to contract) is not an invention of the Anti-Discrimination Act. It is a well-known (even though not very often addressed) institution in German Law. In 1980, Wolfgang Kilian identified at least 33(!) different provisions positively imposing an obligation of contract.(12) Also, German jurisprudence has widely recognized an unwritten obligation of contract due to violation of bona mores / bona fides based on §§ 826, 249 BGB, particularly in cases involving an abuse of a monopoly over products that are essential to life.(13) To state that this consequence could not be applied to discriminatory conduct does not seem to be very plausible. How could racial discrimination not be considered to be against bona mores when an abuse of monopoly is? The blanket clause of "bona mores" as provided in §§ 138, 826 BGB cannot be interpreted as any kind of prevailing social standard based on "custom". Instead the meaning of the standard can only be drawn from the fundamental valuations of the legal system itself: "immorality" means legal immorality.(14) The highest legal entity, of course, is the Constitution. If this is true, then discrimination must violate bona mores because they severely violate constitutional provisions. It must, therefore, be possible to sanction discrimination in the way stated by §§ 826, 249 BGB, eventually leading to obligation of contract.(15)

[12] Of course, this view is not prevalent. In the most extensive commentary on § 826 BGB, out of 188(!) pages there is not a single remark concerning racial or other forms of discrimination as a possible violation of bona mores.816) Since courts have not been unanimous in granting an obligation of contract by way of §§ 826, 249 BGB in such cases, for victims of discrimination there has effectively been no way of pursuing legal actions against discriminatory behaviour, other than a usually unsatisfactory compensation for suffering pain (Scherzensgeld). In the face of these uncertainties, from a constitutional standpoint it is not completely persuasive to state that Article 3 GG imposes a legal obligation (Schutzpflicht) on the parliament to enact an effective Anti-Discrimination Law.(18) As a student, I would also like to remark that it seems rather odd to me that the "threatened" imposition of an obligation to contract as a result of racial or other forms of discrimination has provoked such an outcry in the legal profession, emphatically announcing the end of freedom and private autonomy. Meanwhile, the obligation of contract imposed on German students for many years now by the so-called "Semestertickets", which reside in a legal no-man’s-land (not to say: are illegal), is still being forced upon students with scarce notice.(19)

[13] Why, then, this outrage concerning the proposed "Anti-Discrimination Act"? It is obvious that this is due to a feeling that the once liberal face of the German Civil Code has been deeply infringed by the German Basic Law and its hubristic interpreters at the Federal Constitutional Court. In this view, the BGB was created at the alleged heyday of liberalism in Germany and is the product of a liberal jurisprudence not tainted by social considerations. Usually this perception has been promoted in order to justify social interventions into an overly liberal and socially blind BGB. This time it is apparently to be used to prevent "intrusions" by an illiberal Parliament aiming at destroying the liberal foundations of the BGB. Like the Vandals once destroyed the cultural masterpieces of Rome, the Vandals in Berlin are now seeking to destroy the national treasure that is the BGB.

[14] This perception is based on a myth. The BGB is not the product of socially blind Pandectists who only copied liberal-individualist Roman law and unwaveringly believed in Liberalism. Social considerations were, in fact, so dominant in 19th Century jurisprudence that it is almost impossible to find the term "Privatautonomie" (private autonomy) in legal discourses from that era.(20) The drafters of the BGB widely considered "social issues", and the German Civil Code has embodied these considerations.(21) Its controlling concept has never been untamed
freedom. Nevertheless, this myth, once eloquently introduced by Otto von Gierke’s famous critique of the first draft, has played a central role in legal discourses ever after.

[15] The myth also conceals the fact that there has always been a strong welfare tradition in Germany, ultimately unperturbed by overly liberalist tendencies as proclaimed and performed in England or the USA. Thus social responsibility, public welfare and governmental interference are the key notes of German (legal) history. If we are talking about a "liberal society" we should keep these parameters in mind. But then, where does a "liberal legal theory" (Ladeur) come from? The grounds for it are certainly thinner here than, for example, in the USA, where liberal views have been part of mainstream legal discourses and continue to be. But there is another reason why I believe an "Anti-Discrimination Act" fits into the picture.

D. The hypertrophy of Law

[16] Modern Law is dispersing into more and more areas. This hypertrophy of modern Law is inherent. As transcendent authorities have increasingly lost their power, the Law has increasingly filled the gaps. At the same time, in the face of changing threats to personal freedom, Law is not only protecting but providing human liberties. Today in many respects there is only "constituted freedom" ("konstituierte Freiheit"). Under these circumstances prevention becomes highly important. The draft legislation aims at nothing else: It intends to prevent future discriminations by using a legal sanction. And it interferes with a sphere that was thought to be inviolable as far as "initimate" personal decisions are concerned. Now we know that they are not. They cannot be in the face of Law’s almighty expansion. We may regret this but I do not believe that we can simply change it, at least not by assuming the continued existence of a mere liberal/defensive nature of the Law that it lost a very long time ago.

[17] I agree with Ladeur that "there is a legal rationality which is different from morality". But the draft is not part of social morality. It is a legal provision and (meant to be) hard-boiled Law. The moral issues underlying the Act are not "solved" in any way. Instead they are transposed onto the sphere of Law where they are just put into a different, a legal context. That is why there will be an "Anti-Discrimination Act": The social conflict at the very core of any discrimination cannot be solved on grounds of social morality. It only seems possible to transform it into legal discourses consisting of "Constitutionality," "balancing," "historic-teleological view," etc. This transfer may not be a "solution" but it is inevitable. Without it the conflict could not be solved at all.


(3) Recently, there have been doubts that the proposal will be put into force, at least before the September elections, since Chancellor Schröder presently seems not to be in favor of the proposal. See, e.g., TAZ 13 April 2002.

(4) See the following for the recent critique by H. Wiedemann/G. Thüsing, Fragen zum Entwurf eines zivilrechtlichen Anti-Diskriminierungs gesetzes, DER BETRIEB 2002, p.463.

(5) Wiedemann/Thüsing, id.


(12) W.Kilian, Kontrahierungszwang und Zivilrechtssystem, AcP 180 (1980), at p. 53.


(14) See, only D.Schwab, EINFÜHRUNG IN DAS ZIVILRECHT Margin 586 (2000).


(16) Staudinger-Oechsler, Kommentar zum bürgerlichen Gesetzbuch, commentary to § 826 BGB (1998).


(21) Made clear recently by Schröder/Thiessen, Von Windscheid zu Beckenbauer – die Schuldrechtsreform im Deutschen Bundestag, in: Juristenzeitung (JZ) 2002, p. 325 (on the occasion of the most recent Law reform observably driven by these myths).


