

Anti-discrimination as a Program of Private Law ?

By *Eduard Picker*

I. The State of Opinion and the State of Strategy*

The controversy over the planned anti-discrimination laws in Germany, specifically the new provisions in private law to be discussed here,¹ rages on unabated. Publications on this planned law are numerous. And, whether Pro or Contra, they turn out notably more engaged and heated than is suited to the lawyers' traditional temperament.² The fact that the formal discussions and rounds of debate, which were long ago extended to non-lawyers, continue to multiply³ shows symptomatically to just what extent the topic is now able to get experts and laypeople alike worked up. The principle of equality of human beings, for centuries "one of the pillars of European democracies",⁴ is about to gain currency in new fields of significance: it now aims beyond the binding of states, to bind their citizens as well.

* The original German version of this article first appeared in German in 57 JURISTENZEITUNG 540-545 (2003) and was translated by *Morag Goodwin* and *Betsy Röben*, Editors for Legal Culture and International Law of GERMAN LAW JOURNAL. A shorter version was published in German in the FRANKFURTER ALLGEMEINE ZEITUNG on 7 July 2003. Professor Picker's article is a welcome contribution to the continued coverage by GERMAN LAW JOURNAL of the intensive debate concerning the planned and, meanwhile failed, law against discrimination in the private sphere, launched by the Federal Government in 2001 (see note 1, *infra*). See already the contributions by *Nicola Vennemann*, *Karl-Heinz Ladeur* and *Viktor Winkler* in 2 GERMAN LAW JOURNAL Nos. [3, 5 and 6], and by *Andreas Engert*, in 4 GERMAN LAW JOURNAL No. 7 (1 July 2003), available at <http://www.germanlawjournal.com>, and by *Susanne Baer*, *Matthias Mahlmann* and *Rainer Nickel* in 1 ANNUAL OF GERMAN & EUROPEAN LAW (Russell Miller/Peer Zumbansen eds. 2003, *forthcoming*), Berghahn Books: Oxford & New York.

¹ See Bundesministerium der Justiz, Diskussionsentwurf eines Gesetzes zur Verhinderung von Diskriminierungen im Zivilrecht, [Federal Ministry of Justice, Discussion Draft of a Law for the Prevention of Discrimination in Private Law], 10 December 2001, p. 2 ff.

² See e.g. *Adomeit* NJW 2002, 1622 f.; *Baer* ZRP 2002, 290 ff.; *Braun* JuS 2002, 424 ff.; *Fahr* JuS 2002, 727; *Globig* ZRP 2002, 529 f.; *Montag* ZRP 2003, 18 ff.; *Neuner* JZ 2003, 57 ff.; *Picker* JZ 2002, 880 ff. = *Anwaltblatt* 2003, 198 ff.; *Rainer* JuS 2002, 726 f.; *Säcker* ZRP 2002, 286 ff.; *Stünker* ZRP 2003, 17 f.; *Urlesberger* ZAS 2001, 72 ff.; *Wiedemann/Thüsing* DB 2002, 463 ff.

³ See, as *pars pro toto*, the preceding footnote.

⁴ *Urlesberger* ZAS 2001, 72 points correctly to this.

The current state of opinions and recommendations also evidences a pattern typical to controversies whose object “gets under the skin” of the general public: here, too, one finds the usual opposing camps, both of which imagine themselves to have a monopoly on the truth – the one with *Manchester*-like insensitivity to what are portrayed as unfamiliar situations of urgent need, the other with an ideologically motivated urge to create a better world.⁵ And here, between these self confident and worldly antagonists, the majority of those reflecting and doubting, also struggles to be heard: in a remarkable split between moral scruples and real-life misgivings as to actual consequences, this majority swings between supporting and rejecting the new law. For it abhors all discrimination and for that reason it is ready to oppose its manifestations. Yet it nonetheless suspects a strict and strictly monitored prohibition of discrimination in the area of private law as well. For it fears that such a morality-enacting encroachment into these zones of original self determination could sooner or later transform the state – founded on individual freedom – into a virtue-based state suppressive of liberty.⁶

It appears as though such concerns have since begun to bother even their originator: recently the press has reported conspicuously often on political placating. The Federal Ministry of Justice recently evaluated the comprehensive anti-discrimination law it inherited with the assessment that “everyone would then be protected against everything”. And presumably this evaluation could also be an allusion to the opposite conclusion: that nobody is then any longer protected against anything. In any event, it was expressly made clear that the realization of this plan would “annul private autonomy in broad areas”.⁷ Thus clearly, the core problem with the proposed revision is met increasingly with cognizance, and even recognizance.

⁵ The first catch, which understandably is barely ever communicated in writing, appears not infrequently at the mentioned formal discussions. As evidence at least for the general direction of the latter position, one can point to the piece by *Baer* ZRP 2002, 290. There, not only is personal liberty in the original sense of freedom to “Will-Kür”- that is, to act arbitrarily or by will - almost never considered as its own value and object of legal protection (see on this point *Globig* ZRP 2002, 530). Also especially tangibly evident is the specifically persuasive association with the basic dilemma of every anti-discrimination, which by necessity always discriminates differently (the rather unlikely situation for German circumstances, described by *Urllesberger* ZAS 2001, 75, is clear). The certainty, free from gnawing doubt, is clear that the deciding party *knows* which part of the population to benefit and which to disadvantage (see e.g. *Baer* ZRP 2002, 293)

⁶ This concern is the consistent tone of the works named in Fn. 2 above, specifically those of *Adomeit*, *Braun*, *Globig*, *Picker*, *Säcker* and *Urllesberger*.

⁷ Cited according to the FRANKFURTER ALLGEMEINE ZEITUNG (FAZ) of 8 March 2003 [“Die Privatautonomie in weiten Bereichen aushebeln”], p. 12; also see Fn. 15 below.

Thus it can no longer be entirely precluded that this perfectionist German betterment of the world, which was originally foreseen as “modern societal politics”, will cease to be a desirable goal.⁸ It is nevertheless advisable to continue to direct critique at the draft published to date.

For one, it has since become notorious, that Berlin’s announced innovations are not always implemented “one to one” – not even the announcements of changes to such announcements! And further, according to recent empiricism, it does not even appear to make sense to have an investigative committee establish later how honest the announcement was meant to be in each case. In addition, the new modesty with which one henceforth – perhaps! – will approach this difficult problem does not always dispel concerns. Indeed, an anti-discrimination program that is only partially defused does not appear to clarify sufficiently the pivotal problem. And finally it is enough to recognize the leading “spirit” at present, to see the plans which after all prospered into *draft* laws, which thus were decisively *volitional* and which prevent only the coincidence of altered proportional representation of parties – still perchance and possibly only initially. For a social-political impetus of such missionary conviction, once set loose, does not lose its élan overnight. This also makes contemporary political voices graphically clear.⁹

II. Critique of the Proposed Law

1. The amalgamation of law and morality

The planned law declares war on a particularly ugly social phenomenon. For this reason, the idea of anti-discrimination can be assured of the widest support. But inconveniently, for any idea to make a difference, it first has to be implemented in reality. And this is often more complicated and intricate than the realm of ideas. Because the real world by no means always coincides with the world which all responsible and just people imagine as “will and vision”. It does not even give way to the ideal of a lawmaker bent on improving the world. Rather, realities often let “the good” be reduced to “the well meant”, especially by intervention in the market

⁸ *Stünker* ZRP 2003, 18.

⁹ Thus, the programmatic position statements of *Stünker* ZRP 2003, 18, and *Montag* ZRP 2003, 19, both members of the German Bundestag, know nothing of the curtailment of the original plans. And, at a conference of the Federal Bar Association (Bundesrechtsanwaltskammer) on 20 March 2003 in Berlin, Member of Parliament *Schewe-Gerigk* announced for the Green Party a decided opposition to such intentions.

which, as is known, in our bleak but indeed real world not infrequently means “the bad”.¹⁰

This fact, certainly hardly encouraging, cannot be overlooked in connection with the planned anti-discrimination legislation. And outside the circles of those who are occupied with it and those into whom it is breathing new life, one also appears at the least to sense it. For as already mentioned, the planned law – exceptionally – is not only criticized by professionals. It also gives rise to society-wide concerns and even fears, that threatening consequences lurk beyond the promised noble and good effects: one widely distrusts an amalgamation of law and morality. And one therefore fears a danger to liberty in this prescribed new humanity, either intuitively or reflectively.

With this, and thinking historically, the legislative project appears to revive a basic experience for which humanity has to thank in particular the Jacobites and their countless reincarnations: it calls back to life the empiricism, that a state which requires public virtue of its citizens, which thus suspends precisely the classic separation of law and morality and thus of state and society as the guarantor of individual liberty, encroaches directly into the sphere of personal liberty of the individual as the core domain of the person. It stirs up the fear that this conflict threatens the variety of individual shapes, styles and forms of life. It thus establishes more firmly the concern that it disposes with that pluralism in which the most diverse human preferences or reservations, and sympathies or antipathies, especially their desire for closeness or distance, for sociability or solitude, can develop peacefully and to the fullest extent, because precisely such a pluralism balances these opposites as in a market.¹¹ And thus at the deepest level the planned law awakens in the collective public consciousness a living fear, that the state that can be expected from it will in the natural course of things sooner or later develop into a totalitarian state.¹²

¹⁰ *Fastricht*, RdA 2000, 81, states aptly „obligations of equal treatment, as interventions in the market, have in common with other market interventions the problem that the desired effects often do not correspond to the intentions“. See also *Globig* ZRP 2002, 530.

¹¹ *Adomeit* NJW 2002, 1623, says rightly that it is a “comfort” for the injustice of many individual decisions, that “on the average the hundreds of thousands of contracts made daily balance everything out”.

¹² Also see on this point above all the works cited in Fn. 6 above. *Baer* ZRP 2002, 292, Fn. 23 identifies to this extent encouraging impartiality that the “fascist legal theory” rejected freedom of contract and instead decreed obligations.

2. Goals and means of fighting discrimination as limits on private autonomy

a) Indeed, the new law does give occasion for such concern. This is evidenced even in the moral pressure to which it owes if not its coming into being, at least its organization.

The German implementation of the European specifications through Directive 2000/43/EG of 29 June 2000¹³ planned until now appears clearly to exceed the Directive's goals. It wants to be more "European" than "Europe".¹⁴ For it decisively affirms the question, which is by no means determinative, of whether there is still any need at all for special rules, or whether German legislation, together with the highest judicial law, does not already sufficiently ensure the specified targets. And – in keeping with the tendency to German thoroughness – it far exceeds the requirements from Brussels: It extends the prohibition of discrimination beyond the scope of "race" or of "ethnic origin" to also include "sexual identity", "handicap" and – here things begin to get shaky¹⁵ – to those of "religion", of "*Weltanschauung*" and "age" of human beings. In substance it thereby adopts the much broader scope of application of Directive 2000/78/EC of 27 November 2000¹⁶ establishing a general framework for equal treatment in employment and occupation: it has the goal, in an appropriate manner of also securing "access and provision of goods and services that are available to the public, including living space".¹⁷ In keeping with its socio-political goals it thereby strives – always in the version to date – for a seamless equal treatment and placement of all those participating in private law: it sees in this the command by a basic maxim that has been transferred from morality into law.

¹³ Official Journal EC, Nr. L 180 of 19 July 2000, also printed as insert to NJW Vol. 37, 2001; to be implemented by 19 July 2003.

¹⁴ Because there was no agreement between the Member States, but also notably because it did not recognize any necessity, the Directive refrained from adopting the immediately approved material named in the text, which is also seen as being in need of regulation for labor law, see *Schwarze/Holoubek*, EU-Kommentar, 2000, Art. 13 Annotation 6; *Säcker ZRP* 2002, 287, Fn. 11; see in comparison the Discussion Draft by the Federal Ministry of Justice [BMJ] (*supra* Fn. 1), p. 22 ff.

¹⁵ See on this point the news reports e.g. in *Der Spiegel*, Nr. 12, 2002, p. 18.

¹⁶ Official Journal EG, Nr. L 303 of 2 December 2000, also printed in NJW Vol. 37, 2001, to be implemented by 2 December 2003.

¹⁷ See Discussion Draft of the Federal Ministry of Justice [BMJ] (*supra* Fn. 1), p. 1 [„den Zugang und die Versorgung mit Gütern und Dienstleistungen, die der Öffentlichkeit zur Verfügung stehen, einschließlich von Wohnraum“].

b) In addition, this impulse to fulfil a German *Übersoll* or super-goal also comes to light in the *means* that are chosen:

aa) This is evident in the painstaking and voluminous yet nonetheless in many cases extremely vague prohibited elements, which attempt to catalogue comprehensively the “direct” and “indirect” disadvantages as well as any kind of “harassment” (§§ 319a et seq.). It is further made evident in the rules of evidence, which impose the *probatio diabolica* on the “suspect” to disprove the suspicion of discrimination, which thus does not require his conviction but rather his self-dismissal from every suspicion (§ 319c). And last but not least it illustrates the legislator’s over-eagerness, when it places not only requirements of omission and of “disadvantage-free treatment” on the actual or merely suspected delinquent, but when it in fact obligates him to provide an appropriate monetary compensation (§ 319e), – when it thus opens for the potentially discriminated party the chance quasi of extra income, which he will rarely reject.

But finally, and above all, the virtuous fervour and regulatory frenzy of the law’s architects in their planning comes to light in the pursuit of the stated goals – to be sure, until now only in the case of entrepreneurs – through the right of legal action taken by an association (*Verbandsklagerecht*) under the law on applications for an injunction.¹⁸ From now on the defence against discrimination or suspicion of discrimination shall not only be incumbent upon the victim. As early as the investigative stage, it can be carried out professionally by associations. And indeed, here a high level of professionalism can be expected. For precisely because these professional pursuers derive both the justification and guarantee of their existence from yet-to-be-discovered attempts to discriminate, it can be predicted without any prophetic talent that they will proceed with the commensurate readiness to detect. And moreover: it is in addition no less surely predictable, that in this detective work they will not always exactly respect the boundaries of the potential victim’s intimate sphere. For, because the law requires corresponding plausibility, as just shown, they must not only investigate external facts but by necessity the victim’s disposition as well.

In order completely to comprehend the significance of this regulation, one must also consider that these associations will have at their disposal *their own right of complaint*.¹⁹ They shall thus be able to proceed independently of the victim’s will. As

¹⁸ See the Discussion Draft of the Federal Ministry of Justice [BMJ] (*supra* Fn. 1), p. 12 f., 59 ff. The extension also to non-entrepreneurs was “considered” (p. 60). The limitation to “practices . . . , which should broadly and generally be suppressed”, should not change any of the concerns set out in the text.

¹⁹ See the Discussion Draft of the Federal Ministry of Justice [BMJ] (*supra* Fn. 1), p. 13, 59 f.

a result, they shall be authorized to prosecute discrimination even when the victim does not feel he is being discriminated against. And, in the case of success, that is, there where the suspect cannot adequately and convincingly show the lack (!) of intent to discriminate, they shall even be able to effectuate his being sentenced to a prison term.²⁰ In brief, what is imminent is: that monitoring and inquisition committees of truly *Robesperrian* character shall guarantee the new morality in private law.

bb) One example can perhaps illuminate the consequences of this situation²¹: even someone who advertises for tenants in the harmless form of a want ad in a newspaper is subject to the new law. He must for this reason basically accept the otherwise “discriminated” applicant who, for example, wants to rent an apartment in the same two-story house in which the landlord dwells: the landlord cannot decline to contract with him on the grounds that he does not wish to share his narrow personal sphere of existence with a cohabitant who possesses the characteristics named in the law. But equally little can this landlord deny the same applicant an apartment in a distant high-rise which he owns as an investment property. He may not rely on the apprehension that with such a tenant the “milieu” would be changed and thus also the attractiveness of the object and with his level of income. Also the reference to the fact that –completely randomly – in the interests of a new social reason, a high special fee could possibly be demanded of him, would as a result of this new condemnation authority thus no longer be accepted.

cc) The perplexity of the law’s addressee can be seen by bluntly exaggerating the consequences for the sake of clarity: if the group of otherwise generic applicants includes, for example, a handicapped female transvestite of foreign origin, advanced in age and of a non-Christian belief and who, in addition, indulges in an esoteric philosophy. To reject her co-offer would exceed the limits of foolhardiness. Under the new law, her complaint and its success would be as good as assured. And also the recently announced concession that *Einliegerwohnungen* (a separate apartment built into a one-family house) are likely to be excluded from the law’s application,²² will bring much further disagreement in light of the creative capacities of architects but scarcely any greater liberty.

²⁰ See the Discussion Draft of the Federal Ministry of Justice [BMJ] (*supra* Fn. 1), p. 13, 61 f.

²¹ Notable further examples in *Neuner* JZ 2003, 62 f.; *Säcker* ZRP 2002, 288 f.; *Urlesberger* ZAS 2001, 75; rather less voluntarily in *Baer* ZRP 2002, 293.

²² According to state secretary *Hartenbach* of the Federal Ministry of Justice at the conference referenced in Fn. 9 above.

c) The *practical relevance* of this legislative reform thus cannot be overestimated: the amendment will effect the “large” as well as the “small” members of the legal community, the private individual as much as the businessman. It will have consequences even in the intimate sphere. And it will determine legally relevant behaviour in ordinary daily situations: it will inspire those predisposed to complain. And it will have the effect of pushing all potential discriminators wishing to conclude a contract from the outset into busily documenting all conceivable evidence against them – at least in fields touching upon employment law whole filing-cabinets will be filled. Above all, the reform will thus emphatically encourage those members of the legal community permanently under suspicion of discriminating to camouflage their capabilities, to deliberately develop deceptions and dishonesty in the future. The Federal Minister of Justice understands this issue correctly when she doubts “that one [is able] to change a society through legal policy (*Rechtspolitik*)” and when she fears that “that leads only to false excuses and rather will be made ridiculous”.²³ However, she sees the likely effects perhaps still as too relaxed and harmless, as negative consequences are more likely than absurdity, that this mandated virtue is likely to prepare the field for society-piercing lies and deceptions: to lies and deceit as self-defence in the maintaining freedom!

3. Incompatibility with the existing order

In order that the decisive objections are made clear:

a) The aims that the reform strives for – which is newly stressed here as an unambiguous concession alongside however their restrictions and most important objections²⁴ – the aims appear as such undoubtedly an overly individual value system. They are therefore to be recognised and welcomed as the correct and indisputable limits for the conduct of the State. It is doubtful, however, whether the State is allowed to impose its “official” moral values upon the conduct of private citizens as well. To phrase the question more concretely, whether private, and in particular, *civil* law as the legal realm in which free individuals are free and thus act together in the literal meaning of the word arbitrary (“*will-kürlich*”), is the proper place in which to achieve the sought-after morally “better world”. For if the established aims were enacted in civil law, an obligation upon all would be created in these areas – as in state conduct – towards equality and equal treatment of all. The authority of the freedom to act according to one’s will alone would then be superseded: civil law would thus no longer set merely the legal boundaries for the citizen’s actions. It would provide him with the content as well. In particular, the law

²³ Quoted from the *FAZ*, at footnote 7; the first quote is indirect and the second is directly reproduced.

²⁴ See already *Picker*, JZ 2002, 880.

here under discussion in fact weakens the last bastion of contractual self-determination. It is not satisfied any more with stipulations ordering the content but determines more or less the actions of the contractual partners as such. Thereby, it almost entirely narrows and suppresses private autonomy with regard to self-determination in private law. As noted, private autonomy stands, however, as nothing other than a legal synonym for *freedom*. And freedom is always the freedom of the individual, his life to live and to direct according to his personal and purely subjective particular interests and preferences: “Stat pro ratione voluntas” – will, not reason determines the action –, this is the traditional basic organising principle of private autonomy and freedom!²⁵

b) This prioritising of the subjective will over an “objective” one, even a state-decreed “reason”, is however not some expression of individual extravagance and social decay. It does not turn liberalness into libertinage. Rather the opposite, that it is anthropologically, legally and economically founded:

The principle authority to regulate the actual details of one’s legal position by self-determination and *Willkür*, springs from the primeval human will. This is, as mentioned, manifested in the multiplicity of individual ways of life, from phenomena ranging from sharing an apartment (*Wohngemeinschaft*) through to a *Szene-Café* or a *club*. Thus, private autonomy respects only the fundamental principle of humanity. Accordingly, this authority of the people is assigned through the constitution as well as by ordinary law. It thus forms the basis of the existing order as fundamental value decision and at the same time also precedes it. Moreover, freedom is legitimated not only by self-determination but also economically. For, human experience has shown that nothing can mobilise the strength and abilities, the creativity and the innovativeness of a population so enduringly as the vision of gaining freedom and thereby allowing for the maximisation of profits.

c) All these elemental bases and aims of freedom in the private realm are threatened by the planned laws. If this is the case, a simple comparison at the end demonstrates this:

One puts in the place of incriminated actions merely the following words: he who proclaims his conviction that Germany takes too many foreigners, that “the boat” is “full”, might display behaviour of little virtue or moral standing. Nonetheless, the expression of his opinion through his *freedom* of opinion is protected by the constitution: the Basic Law (*Grundgesetz*) embraces the idea that, in the consciousness that there is not a single, objective truth, progress is made by the struggle over the “correct” solution, even by the undesired, the “politically incorrect”, and indeed

²⁵ See hereto only *Flume*, Allgemeiner Teil des Bürgerlichen Rechts, Vol. 2, Das Rechtsgeschäft, 4th Ed. 1992, p. 6; *Picker*, JZ 2002, 880; *Säcker*, ZRP 2002, 286 f.

morally reprehensible comments. It allows the pointed political and ideological statement – up to despicable and libellous polemic, even including the incitement to boycott.²⁶

The planned new law on the other hand denies this freedom. It, if enacted, indirectly but radically neuters Article 5 *Grundgesetz*. It wants to compel those citizens expressing such undesirable opinions to precisely the opposite behaviour. Thus, it forbids the citizen to live out his personal beliefs, which remain to be protected by his freedom of opinion, in his private realm: it thus treats him if he makes such statements as guilty of discrimination. The law thereby forces him only to enter into a contract with those that he – legally protected – might not favour as his fellow citizens. The intended reform therefore threatens to render the exercise of the freedom of opinion punishable by connecting it with a duty to contract (*Kontrahierungszwang*). It removes therefore the congruence of word and action in enacting freedom. And it renders itself thereby legally and otherwise *ad absurdum*.

III. Rudiments of a Solution

1. The necessity of a reduction of freedom in private law

With this critique the direction in which a solution to the difficult problematic must be sought is, admittedly, at the same time at least recognisable in principle. While it is worth on the one hand to safeguard the described freedom, so it is on the other hand – and no less so! – worth heeding the following basic reality:

No freedom – and also no private autonomy – exists without limitations. Rather, private autonomy has precisely the heteronomy of the legal order as correlation to its condition. So long as there are more than one person, freedom consequently must always be conceived within certain boundaries. Freedom and responsibility are like “soup and salt”: too much of either waters down or ruins the entire product. It thus depends on the ideal mixture! The problem raised by the Anti-discrimination Bill is indeed that of finding the appropriate measure.

2. The basic facts of the matter

a) In reality, and we can in the following merely indicate the direction of our argument, there are basically two fields where the legal order is called upon to draw a limit to the otherwise granted freedom in private law to act according to one’s free will (“*Will-Kür*”). It must be noted, however that we are in neither field

²⁶ This is correctly underlined by *Säcker*, ZRP 2002, 288. In contrast hereto, *Baer*, ZRP 2002, 294, fails to see this point because she does not draw a distinction between political-state and personal-private (autonomous) action.

concerned with rendering a moral objective into a binding rule. Instead, we ought to be concerned with either safeguarding the ethical minimum of a civilized living together or, the (effective) confrontation of market failures.

b) The first area is concerned with cases in which otherwise tolerated unequal treatment - because of special circumstances or conditions - *offends accepted norms* ("*gute Sitten*"). It concerns also those cases in which because of the insulting or the inciting character of the act, it meets the particular conditions of sections 138 and 826 of the German Civil Code (*Bürgerliches Gesetzbuch - BGB*). The clear cut example might be provided, say, by a sign on the restaurant door stating, "foreigners not welcome here!". An example, which might even be aggravated if we imagine the sign to read that foreigners would be admitted only because of the anti-discrimination legislation.²⁸

c) The second area of unacceptable discrimination even in private law is demonstrated by an example in which in a situation of restricted resources, there is *rationing of certain goods*. This, in other words, concerns situations in which because of a war or an emergency, a monopoly or a similar position of power, the certain interests cannot be realized on the marketplace at all or find themselves reduced to an unacceptable level. We are thus concerned with situations that might require the assessment of special exceptions, in which an - always government-directed distribution - perhaps in the form of a duty to enter into a contract (*Kontrahierungszwang*) - or a duty to balance the ownership of resources - seem appropriate or unavoidable. Paradigmatic in such situations is the necessity of providing housing for certain groups in the population. Depending upon the level of social development, it will be particularly difficult to legally assess those actually existing conditions where the law is called upon to open up equal market opportunities for those groups that are actually or constitutionally disadvantaged: we may think of those in search of an occupation, those of the disabled or of women. Precisely these problematic areas are legally dogmatic and technically difficult to regulate, because they are so difficult to grasp in their social dimension from a legal perspective. The amount of literature on these issues already illustrates this point.²⁹ This exceptionality, however, speaks against rather than for the intended law. Such social and economic conditions, exceptional in their nature and at the same time existential, may only be treated appropriately within an arrangement that allows to adequately address the so numerous as well as complex and difficult factors that are in constant change and that need to be perceived in their interrelationship. What is

²⁸ This example is taken from *Neuner*, JZ 2003, 65.

²⁹ See recently, e.g., *Neuner*, *Privatrecht und Sozialstaat*, 1998; see also *Neuner's* arguments in JZ 2003, 59 ff.; *Busche*, *Privatautonomie und Kontrahierungszwang*, 1999, each with comprehensive references.

needed therefore is an method of ordering which is adequate in relation to this complexity: such an arrangement can in fact not be gained by those providing laws or guidelines that readily wish to jump at cutting Gordian knots. Justice here cannot be served by a sweeping, politically-motivated act of legislative action. It requires rather the tentative, constantly newly tested search for a solution. It requires therefore those forms of regulation that ensure the sensitive registering of changes and the apt correction of mistakes or outdated elements.

3. Fundamental consequences

Critique and typical conceptions can therefore be summed up under three basic outcomes:

a) Firstly, it is necessary to recognize and accept: freedom-orientated societal and economic systems are inherently discriminatory! The freedom to engage in unequal treatment then, is in the case of choosing one's partner to a contract as an expression of private autonomy a basic principle of private law. Prohibiting discrimination within private law thus introduces – in contrast to those cases addressed by public law – an alien concept endangering the system. They are therefore only to be put forward in exceptional situations of need, i.e. concretely in cases of clear violation of public order ("*gute Sitten*") and in the context of compulsion of the rationing of restricted resources.

b) Secondly: As exceptional and emergency situations these cases elude secure planning. They are also, in accordance to their nature, subject particularly to continual change with respect to values. Less than with other issues, solutions to these cases can be clear cut from the outset. They can therefore not sensibly be regulated by casuistic facts. Instead, the task consists in identifying the appropriate solution each time from within the specific facts of the case at hand. The approach taken by the *BGB*, in its sections 138 and 826, of addressing these issues by general clauses is thus more adequate than the enactment of individual norms – an approach that had in fact been taken at the early planning stages of the Anti-Discrimination Act.³⁰

Such an arrangement would admittedly have placed the concrete decision to a large extent in the hands of judges. But this would be more an advantage than a disadvantage in this particular field. It is worth remembering not only the still valid justification by the First Commission for the stipulation of Section 138 *BGB*, whereby "in light of the conscientiousness of the German judicial official ... it can be trusted unthinkingly, that by and large the regulations will be applied only

³⁰ See, e.g., *Gitter*, NJW 1982, 1568 ff.; *Coester-Waltjen*, ZRP 1982, 217.

within the meaning in which they had been given.”³¹ It is of particular importance to recall at this point that Judges are specifically suited to take such decisions. For even where one does not deny the educational function of norms, that is where embraces the fundamental interdependence of law and legal consciousness, the following is necessary to understand: according to the prevailing maxim of private law, the law itself (i.e. the written norm) should not authoritatively decide questions regarding the alleged contravention of the public order (“*gute Sitten*”) or, even less, arbitrate the eventual incompatibility of a situation with a “good social state of affairs”.³² Rather, “current social consciousness”, as it were, should be statistically authoritative. This sub-legal value structure should render concrete the “blanket law” that is expressed in the general clauses. The judge himself is called upon – *ex professo* – to reach a decision, because only he is in the position to interpret the established “current social consciousness” in a case-by-case approach as a measure stick for his judgments. Only the judge can transform the hereby established moral data into binding law. This wise competence order is, however, turned into its opposite by the procedure adopted in the anti-discrimination draft: its advocates attempt to ordain a never before developed “current social consciousness” by way of legislative decrees. They do not want thus to “observe” moral understanding, but to create it themselves.

c) Finally, the third category remains to be spelled out: all of the general clauses – adequate as such –, are as written and unwritten principles always already inherent to law. As a consequence, anti-discrimination legislation is thus in truth unnecessary in German private law: if interpreted appropriately, this law is already fulfilling the European demands in this respect!

One should therefore in the future try to confront a respective Directive by legal means if prior attempts to amend or to altogether avoid this European hegemonic legislation failed. Individual experiences of little or no success in this regard should not dampen readiness in the future: a nation which is proficient in bringing its undesired laws without delay before the German Constitutional Court (*Bundesverfassungsgericht* – *BVerfG*) should not suddenly in the face of European Directives, that it finds undesirable in both form and substance, exercise forms of fatalism alien to its own mentality.

Taken together, these observations allow for a decisive conclusion as to the motives and aims of the so far officially planned Anti-discrimination legislation:

³¹ See MOTIVE, Vol. I, 1896, 211 f.

³² See the adequate description by *Dernburg*, *Die allgemeinen Lehren des bürgerlichen Rechts des Deutschen Reiches und Preußens*, Vol. I, 3rd Ed. 1906, § 125 II, p. 421; see the critique raised e.g. by *Planck/Flad*, *BGB*, Vol. I., 4th Ed. 1913, § 138 Annotation I 1 a, which only addresses the limitation to this definition.

this reform, which – as we have seen – reflects a striking ignorance of the state of current law as well as of its normative capacities, and moreover, which goes well beyond the actual requirements erected by European legal measures, in reality wants *more*: it desires in its regulating furore, to replace the free individual with the “good” one. In the interest of basic societal and economic freedom, for the protection of the basic constitution of the current order, it is thus necessary to warn against the realisation of these legislative plans.