

DISPUTARE NECESSE EST

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FROM EQUALITY TO PRIVILEGE: THE LATE AUSTRIAN EQUAL TREATMENT BILL 2012

I. INTRODUCTION

Equality has become a major principle of political and legal thinking. The equality before the law which was achieved over centuries of liberation movements has turned into equality of all moral choices, equality in numbers of how men and women live, and equality of how individuals treat each other. This understanding is far from the original meaning of equality before the law which we rightly hold on to. Yet, this development remains largely unchallenged. It currently mounts in the adoption of harsh anti-discrimination legislation being debated at the EU – level (especially in the fifth equal treatment directive) and at most national levels.

It was with quite a bit of anger that Rudolf Hundstorfer, the Austrian Minister of Social Affairs, recently withdrew the draft proposal for an equal treatment bill¹ that would have extended the prohibition of un-

¹ http://www.parlament.gv.at/PAKT/VHG/XXIV/ME/ME_00407/index.shtml.

equal treatment due to “religion and belief, age or sexual orientation” to the area of the provision of goods and services including housing.²

Although a similar proposal had been rejected by the Austrian parliament in early 2011, summer 2012 the social-democratic politician put forward the same content to the same parliament in the same legislative period for a second time. It is not surprising that his party comrades cheered the bill. However, the support of the Minister of Economy Dr. Reinhold Mitterlehner and the president of the Austrian Federal Economic Chamber Dr. Christoph Leitl,³ both members of the more conservative Austrian people’s party (ÖVP), remains incomprehensible.

The pressure of entrepreneurs affected by the proposed law and civil society and the clear opposition of the Catholic Church⁴, with the support of liberal forces in the ÖVP, brought about the downfall of the bill.

For now in Austria this issue is off the table. But it is the exact same law that has been on hold as a directive in Brussels since 2008. There it awaits (apparently without any substantial objections from Austria) a change of government in Germany, which is currently not willing to accept such restrictions on personal freedom. The first four EU – equal treatment directives, which are already binding in the entire European Union, contain for the private sector “only” the prohibition of discrimination in the area of employment. The proposed fifth EU – equal treatment directive does not meet approval for good reasons: the extension of the ban on discrimination in the provision of goods and services in the private sector would have dramatic consequences.

² http://www.ots.at/app/presseaussendung/OTS_20121121_OTS0105 and <http://derstandard.at/1353206894097/Gleichbehandlung-Novelle-nun-doch-nicht-im-Ausschuss>.

³ http://www.parlament.gv.at/PAKT/VHG/XXIV/ME/ME_00407_22/imfname_270549.pdf and <http://www.andreas-unterberger.at/2012/10/hundstorfers-marsch-zum-totalitarismus-ij-und-leitl-im-gleichschritt/>.

⁴ http://www.parlament.gv.at/PAKT/VHG/XXIV/ME/ME_00407_20/imfname_270546.pdf. and <http://www.bischofskonferenz.at/content/site/home/article/558.html?SWS=850ab37519cecc34a8929fbb34588c13>.

For Austria it is time to withdraw its support from the fifth EU – equal treatment directive.

II. ENTREPRENEURIAL FREEDOM: THE RULE OR EXCEPTION?

Just like the now buried Austrian draft proposal, the proposal for the fifth equal treatment directive of the European Union is nothing else but an unacceptable patronisation. Especially for small businesses entrepreneurial freedom would turn from rule to exception. Compliance with these rules is expensive and time-consuming, correspondences with customers and new marketing strategies would frequently have to be cleared with attorneys.

The object of discussion is the prohibition of unequal treatment on the grounds of religion or belief, age or sexual orientation concerning the provision of goods and services by the private sector. If such a law were to become reality, a Jewish hotel owner would have to rent out his assembly rooms to a Muslim society, even against his will. A homosexual would not be able to sublet his house to homosexuals only and a private rail traffic company would not be allowed to give exclusive discounts to the elderly. A catholic matchmaking agency specialised in bringing together people who share the same faith, would have to open its doors to people of other faiths. An Eastern European family that had once fled from the communist regime would then have to rent out their apartment to a party official of the Communist Party. A couple, whose daughter had been estranged through the scheming of a radical sect would not be able to deny a member of that sect to rent an apartment from them in their house.

An evangelical graphic designer would have to design an invitation to the celebration of a same-sex union if requested, the Christian photographer would have to take picture there, the pastry chef would have to bring a special cake created for the event, and so on and so forth. Why would a graphic designer, a photographer and a pastry chef not want to work for the celebration of a civil partnership? Not because they reject homosexuals. But because they do not want to support such a marriage-like event for religious and conscientious reasons.

Jean-Jacques Rousseau writes: “I have never thought, for my part, that man’s freedom consists in his being able to do whatever he wills, but that he should not, by any human power, be forced to do what is against his will.”

Differential treatment could be legitimized if a judge deemed it to be “appropriate and necessary.” The consequence would be private entrepreneurship regulated by judges, implying costly lawsuits and a lack of legal certainty, impeding long term business planning. The proposed reversal of the burden of proof contradicts our legal system and brings forth further difficulties. Instead of the “benefit of the doubt” the equal treatment legislation allows for the “benefit of the victim of discrimination” only. Times are hard for small businesses as it is, why impose additional sorrows and constraints? For the government itself, controlling the compliance with these regulations imposes a significant additional effort. All of this in the end paid for by society at large.

A Christian religious high official was recently looking for a secretary. His legal advisor wisely asked the commission for equal treatment before publishing the job advertisement: would they be able to reject a headscarf-wearing Muslim woman? The answer was no. On the basis of the first four equal treatment directives,⁵ European law allows a distinction due to religion in church employment only when there is a “genuine, legitimate and justified occupational requirement”, such as when it comes to preaching to the faithful.⁶

Just imagine a member of this Christian official’s Church entered the office: The obviously Muslim lady in the reception area could create quite a bit of confusion. This particular church dignitary decided not to publish the job advertisement, choosing instead to look for someone unofficially. The many locals qualified for the job who never had the chance to apply paid the price of for the current system of anti-discrimination legislation.

⁵ Cf. Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation.

⁶ Article 4(2) of directive 2000/78/EC.

Extending the prohibition of discrimination to the private sector would have similar consequences. Services that are publically advertised today would seek to reach their customers in less public ways – and others potentially interested would never hear of them. This would cause a rise of prices. The “protected groups” might get shunned due to fear of lawsuits. In the end it is the consumer who pays for this legislation.

Though surprising at first glance it is important that discriminatory behaviour be permissible in the market, despite its possible immorality or social undesirability. Granted, a rejected customer must look for another provider of the service he is seeking. But this hardship ought to be carried in the name of freedom, including the freedom to take wrong or unpleasant decisions. This complies with Voltaire’s notion of tolerance: Being of an entirely different opinion but at the same time defending the other one’s right to their view “until one’s last breath”. With this idea we are all invited to learn to live with imperfect behaviour of other people.

Is it really the government’s job to enforce an alleged advancement of society through educational laws and police force? How much does the governmental legislature believe its citizens to be in need of education? Socially and morally motivated legislation leads to dishonesty and lawlessness. The era of prohibition in the United States, which made the mafia powerful, is a good example.

III. THE HIDDEN BIAS OF ANTIDISCRIMINATION LAW

Equal treatment legislation is phrased in an impartial way. But practice shows that it is very often Christians who are taken to court. Some examples: A Spaniard paid 12’000 Euros of administrative penalties because he was not willing to make his restaurant available for the celebration of a same-sex union.⁷ A couple in Britain running a private bed and breakfast had to pay up to 4’000 Euros of compensation fees

⁷ <http://www.intoleranceagainsthchristians.eu/case/madrid-restaurant-fined-for-refusing-to-host-gay-wedding-reception.html>.

because they denied a double room to a homosexual couple.⁸ A US – Christian dating agency was forced to add the search option “I am a man looking for a man”. Equal treatment laws create irresolvable moral conflicts for Christians by forcing them to choose between their belief and their business. In some countries equal treatment laws foresee administrative penalties, in others compensation fees. Explanatory materials to the laws often advise “painfully high” fines.

Practically, the prohibition of discrimination in the provision of goods and services can cause an insoluble dilemma: to quit one’s job, or one’s religion.

Experience has shown that equal treatment laws lead to strategically motivated lawsuits.⁹ In the UK it is a common occurrence that radical lobbies look for interaction with companies led by people with convictions conflicting with the law – for example practicing Christians – with the plan of launching law suit. Litigation Associations readily come in for support: They receive parts of the compensation fee and use this money to seek further lawsuits – the higher the compensation fees, the more remunerative the role of the victim.

1. Where is the necessity for equal treatment laws?

The great political philosopher Charles de Montesquieu advised that if it was not necessary to make a law, it was necessary not to make one. According to that, laws have to be necessary, adequate and proportionate¹⁰. Despite its egalitarian wording, equal treatment laws create

⁸ <http://www.intoleranceagainstchristians.eu/case/christian-b-b-owners-fined-for-denying-a-room-to-a-homosexual-couple.html>.

⁹ P. COLEMAN, R. KISKA, *The proposed EU “equal treatment” directive: How the UK gives other EU member states a glimpse of the future*, «IJRF» 5.1/2012, p. 113-128.

¹⁰ For more information upon the principle as applied to legislation in different European legal cultures see: A. STĘPKOWSKI, *Zasada proporcjonalności w europejskiej kulturze prawnej. Sądowa kontrola władzy dyskrecyjnej w nowoczesnej Europie*, Warszawa 2010, p. 169-175, 194-200, 265-273, 281-285. http://books.google.pl/books?id=RAuC8UyppUoC&printsec=frontcover&hl=pl&source=gbs_ge_summary_r&cad=0#v=onepage&q&f=false.

privileges for certain groups. Bestowing privileges upon one group of people can be necessary in certain situations – but the reasons have to be very compelling. In the course of the Austrian debate there has been talk of the possibility of a homosexual man being hindered from entering a night club. If this was actually the case, I would show solidarity by not visiting the club any more myself – and I would suggest to my friends to do the same. If our boycott was not successful but instead the problem would spread even more, should we not discuss incentives and disincentives and plan awareness campaigns? Only if the discrimination against a particular group is so widespread and strong that the sole way to get it under control is by making a law, then temporary restrictions must be considered, within the limit of safeguarding freedom of religion. The burden of proof of such a necessity, however, lies with the supporters of equal treatment laws – and until now they have not succeeded.

In people's minds, anti-discrimination laws in the provision of goods and services are often legitimized by imagining a monopoly situation: the only hotel, the only fountain, etc, in the desert. In most legal systems, however, and for sure in the European countries, monopoly situations are already regulated for all customers in a satisfactory manner: no matter what "group" they belong to.

2. On hold in Brussels – Austria in preemptive obedience?

Back to the pigeonholed fifth EU – equal treatment directive¹¹. What is not succeeding at the EU-level, is being tried nationally. The attention of the lobby groups shifts towards what is called "levelling up" – transposing a not-yet agreed upon EU-directive into national law. For the inattentive national decision maker the difference between levelling up and transposing fades away into a common "Brussels wants it". It is crucial to point out, that currently there are no – zero – European

¹¹ Proposal for a Council Directive on implementing the principle for equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation (COM (2008) 426), see http://europa.eu/legislation_summaries/human_rights/fundamental_rights_within_european_union/em0008_en.htm.

Union obligations to adopt an anti-discrimination law in the provision of goods and services for the grounds of religion and belief, age and sexual orientation.

What's the future of the fifth equal treatment directive? Will Austria give its consent? This question touches the core of democracy – there is no national consensus in favour of such equal treatment legislation. Yet, Austria seems to consent to this law in Brussels – which could result in its binding power all over the European Union, including Austria. This decision seemingly depends solely upon the ministry in charge. The ministry is controlled by a particular political party, as agreed upon by the winning parties after an election. Politically motivated civil servants take socio-political decisions of vast dimensions and become more powerful than parliaments. For the most part we do not know their names. There is no public debate on the issue. There is nothing else for us to do but to invoke their sense of responsibility not to consent to something in Brussels which was not agreed upon in Austria. But that's all one can do. This is very worrying.

3. Germany's good reasons against the fifth equal treatment directive

The Association of German Chambers of Commerce and Industry raised its voice against the fifth equal treatment directive¹² saying that it would bring about “additional administrative burdens” and “less legal certainty”. They also mentioned as reasons to oppose the draft directive the restrictions on freedom, the “factual discrimination of people who do not fit the criteria” and simply the lack of a problem significant enough to adopt such a law.¹³

Also the German Umbrella Organisation of Skilled Crafts and Trades objects strongly to the directive: “Massive intrusions in the constitutional freedom of contract and the freedom to conduct a business are

¹² Summary of concerns on <http://www.europeandignitywatch.org/reports/detail/article/the-equal-treatment-directive.html>.

¹³ <http://www.dihk.de/themenfelder/recht-steuern/eu-internationales-recht/recht-der-europaeischen-union/positionen/archiv-positionen-europa>.

bound to occur. In the future the entrepreneur will have to make sure that he and his employees respect the prohibition of discrimination while contacting customers and prospects, from the greeting to information and product offers, the conditions, the counselling interview or the negotiation up to the point of closing the deal. Not only does this create a mass of bureaucratic burdens and legal uncertainty, it can also result in situations where companies avoid legal deals with people who are possible victims of discrimination in order to avoid allegedly imminent legal trials. The intention of the proposed directive to integrate could reverse into the opposite.”¹⁴

The German Centre for European Policy (CEP) fears a general “obligation to enter into contract” as the result of exceptional cases and goes on to talk about a “threatening with state intervention” aimed at a “re-education of society”.¹⁵

IV. A HUMAN RIGHT TO NON-DISCRIMINATION?

Non-discrimination and equal treatment is often discussed as if they were a requirement of human rights. But this is quite far from the truth. One does not have to hold a law degree to detect the political intention, and the patience of human rights is already widely known. The prohibition of discrimination in the Universal Declaration of Human Rights (Art. 2) and in the European Convention on Human Rights (Art. 14) refer only to the rights enumerated in the respective document. This is equivalent to the principle of equality before the law which is essential to our legal systems.

In the International Covenant on Civil and Political Rights (Art. 26), non-discrimination refers to the law in general – but not to the relationship of private people or entrepreneurs amongst each other.

The EU – Charter of Fundamental Rights phrases the principle in a more comprehensive way and the European Court of Justice has not

¹⁴ http://www.biv-kaelte.de/fileadmin/user_upload/schlagzeilen/SZ_08_2008/19082008_Antidiskr_kompakt.pdf.

¹⁵ http://www.cep.eu/fileadmin/user_upload/Kurzanalysen/Gleichbehandlung_ausserhalb_des_Berufs/KA_Gleichbehandlung.pdf.

interpreted Art. 21 yet. But even if Art. 21 had to be understood as a substantial right instead of as a mere principle of interpretation of the pronounced rights, the Charter of Fundamental Rights is not universally applicable: it binds EU – institutions and member states only when they apply EU law.

In a nutshell: nowhere is there to be found a human right to be equally treated by other people.

On the contrary: It is equal treatment laws that restrict human rights: the private autonomy of every person is the foundation of and the reason for human rights. After all, human rights are the fruitful soil of personal freedom. The freedom to conduct one's business emanates from the right to property (whose restrictions need to be necessary, adequate and proportionate). The right to privacy means that the government must not interfere in personal decisions. Equal treatment legislation encroaches furthermore on freedom of religion and conscience: when a businessperson is forced to offer his services in a way that he cannot square them with his religion or conscience.

In the Austrian debate on the equal treatment bill 2012, it was often argued that “the UN recommended” such a law. The alleged argument of UN – recommendations,¹⁶ upon more detailed scrutiny, did not hold what they promised. What was being talked about was the result of the universal periodic review of human rights through the UN Human Rights Council, consisting of 47 countries. Dozens of measures are routinely recommended – but not by “the UN” but by individual countries. Interestingly, only a small number of countries demanded an expansion of the Austrian discrimination ban: Honduras, the UK and Canada, Norway – and the Islamic Republic of Iran. Oh well, Canada and UK have their own political agenda when it comes to anti-discrimination legislation. Both countries have massive issues with and considerable domestic resistance against these laws.

¹⁶ http://www.upr-info.org/database/index.php?limit=0&f_SUR=10&f_SMR=All&order=&orderDir=ASC&orderP=true&f_Issue=All&searchReco=&resultMax=25&response=&action_type=&session=&SuRRgrp=&SuROrg=&SMRRgrp=&SMROrg=&plEdges=RecoOnly and http://www.menschenrechte-jetzt.at/wp-content/uploads/2011/05/Stellungnahme_UPR_Empfehlungen.pdf

Norway and Honduras might want to stand out with great pro-activity, and why shouldn't they? But the Islamic Republic of Iran? Iran needs to stop putting homosexual people in prison before offering to help out Austria!

These alleged UN recommendations are in fact not the opinion of the international community but merely non-binding proposals by individual states, which partly are welcomed, partly ignored by the country concerned. In no way do they dictate contents nor substitute a national parliamentary process.

Recommending equal treatment legislation between private citizens in the name of human rights puzzles the beholder. It was shown above that there is no human rights basis to do so. The question arises whether the UN Human Rights Council oversteps its competency knowingly and deliberately – or in error. Neither interpretation sheds a good light on the council.

V. WHO IS MORE EQUAL?

Behind the slogan “protection from discrimination” hides in fact privileges for the few. Why just them? Equal treatment laws generally privilege the properties gender, race and ethnical origin, religion and belief, handicap, age and sexual orientation. Other groups however, may be discriminated against to the heart's content: for example snow-boarders, redheads, hunters, smokers, ugly people, commoners, the rich or the poor and so on.¹⁷ Why are privileges only bestowed upon a few? Shouldn't everyone be privileged? Or rather no one? Jobs at a bank counter aren't denied to women in general, just to those that do not fit a certain ideal of beauty. Why aren't they protected? One cannot but fear arbitrariness.

How far will equal treatment requirements go? What will be next, after the regulation of the provision of goods and services? Their de-

¹⁷ Cf. J. CORNIDES, *Fiat Aequalitas*, [in:] *Exiting a Dead End Road, A GPS for Christians in Public Discourse*, edited by Gudrun and Martin Kugler, Kairos Publications, 2010. (<http://www.intoleranceagainstchristians.eu/publications/exiting-a-dead-end-road-hardcopy.html>).

mand? Is the Chinese restaurant owner not offended if one always eats Italian? What will the heterosexual hairdresser think if a customer only asks for appointments with his homosexual colleague? When laws seek to educate – why should they stop with the provider?

A highlight of illogic lies in the demand not to discriminate against different grounds of discrimination. Providers of the private sector are at this point only obliged not to discriminate gender and race, which presented a discrimination against other “protected” groups, as critics bemoan. But must all privileged groups really be measured by the same yardstick? Not at all: there are profoundly different causes for difficulties and the necessary political solutions vary. People with special needs for example need assistance to find housing and employment that suit their demands, while people with migration backgrounds might be treated less favourably due to prejudices or a lack of language skills. For women concrete problem might have to do with the ability of child bearing. Older employees might not be considered for jobs due to their higher salary expectations. Children are not welcome in some service providers because they are noisy, Muslims might suffer from media-fuelled prejudices, and so on. For every possible ground of discrimination it is necessary to check where the problems lie and how best to tackle them, and which proceedings are necessary, adequate, and proportionate. That different issues call for different solutions is not a form of unjust discrimination – but an imperative of justice and common sense.

VI. CONCLUSION: A LA RECHERCHE D'ÉGALITE PERDU

Equality has become a largely unquestioned dictum of our time. Equality as a *conditio sine qua non* for social stability and personal tolerance. Those who do not accept limits to thought are called to challenge this perception.

Excessive equal treatment legislation looks like a therapy which generates the very disease: According to a 2009 Eurobarometer poll¹⁸,

¹⁸ http://ec.europa.eu/public_opinion/archives/ebs/ebs_317_en.pdf.

it is the Swedes who feel most and the Turks who feel least discriminated against.¹⁹

It seems that anti-discrimination laws as alleged solution produce bigger problems than the original problems were in themselves. In history, freedom was hard-won. We ought not to give it up so carelessly. There is no doubt: antidiscrimination law promoters will not give up in their efforts to make people feel more discriminated²⁰.

OD RÓWNOŚCI DO PRZYWILEJU. ODRZUCONY AUSTRIACKI PROJEKT USTAWY
O RÓWNYM TRAKTOWANIU

Streszczenie

Przedmiotem artykułu jest kwestia wdrażania piątej dyrektywy UE o równym traktowaniu osób w obszarze usług i handlu. Autor podnosi kwestię odrzucenia w Austrii projektu ustawy rozszerzającego zakaz dyskryminacji w tym zakresie i wyraża przekonanie, że podobne akty prawne powodują ograniczenie wolności jednostki. Przyczyniają się także do wzrostu poczucia bycia dyskryminowanym w społeczeństwach europejskich.

¹⁹ J. CORNIDES, *Three Case Studies on 'Anti-Discrimination'*, «European Journal of International Law» 2/2012, <http://www.ejil.org/article.php?article=2280&issue=111>.

²⁰ It was currently announced, that the social-democratic party has added the „leveling up“ to the 5th equal treatment directive to the agenda of the equality committee of the Austrian parliament for April 2013. Year in, year out, inevitably.