



Labour Market Discrimination and Legal Challenges in Germany

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Introduction

On the 18th of August 2006 the German General Equal Treatment Law (AGG)¹ came into force – more than three years after the deadline for transposition of the EU Race Equality Directive. The run-up to the adoption of the law had seen a long-lasting debate in both the German government and the media. The process was characterised by strong opposition to the transposition of the EU-directives against discrimination. The AGG is the first comprehensive law in Germany that is aimed at preventing and sanctioning discrimination on the grounds of ‘race’² or ethnic origin, gender, religion or worldview, handicap, age and sexual identity or orientation.

In this study, in accordance with the EMILIE-project aims, the main focus is concentrated on the issue of discrimination in the labour market and at the work place on the grounds of ‘race’, ethnic background, or religion. In the first chapter, the awareness of discrimination in society and the empirical evidence of different types of discrimination are discussed. After a sketch of the laws intended to inhibit discrimination preceding the AGG (chapter 2), the third chapter investigates the role of the state, the private sector and NGOs in anti-discrimination politics. The fourth chapter explores the process of the transposition of the EU-directives, the main arguments against and in favour of the law as well as the contents of the law in its final version. Finally, on the basis of interviews with protagonists in the field of anti-discrimination politics, we attempt to evaluate the relevance of the AGG a year and a half after being put into force. As it is still too early to soundly examine the impact of the law, we will focus on the preliminary assessments of these experts. In addition the information available on court cases relevant to the AGG is presented.

The study is based on secondary literature, statistical data gathered up to April 2008 and ten expert interviews conducted between January and March 2008. The main protagonists come from the field of anti-discrimination practice, in particular staff members from the national and the Berlin State anti-discrimination offices, representatives of the Confederation of German Employers’ Associations (BDA), the Confederation of German Trade Unions (DGB) and its Educational Institute as well as from NGOs active in anti-discrimination politics and consultancy, both on the federal level and with regional focus (Berlin and North-Rhine Westphalia). The regional focus was chosen because the respective NGOs might be considered good practice examples.

1 Awareness and Dimensions of Discrimination

1.1 Awareness of Discrimination

The concept ‘discrimination’ is relatively new in dominant German discourse and still used very reluctantly (Butterwegge/Hentges 2006). Phenomena like discrimination, racism or right-wing extremism have been played down as they conflicted with the self image of Germany as a democratic state that had learnt from its National Socialist past. As elaborated in work packages 1 and 2 of the EMILIE project, Germany did not develop comprehensive integration policies until the end the 1990s adhering to the idea that migrants would only stay in the country temporarily meaning that integration did not need to be politically managed. In the dominant discourse migrants and there descendants were not perceived as equal members of

¹ The General Equal Treatment Law represents the main part (Article 1) of the Law for the Transposition of European Directives on the Realisation of the Principles of Equal Treatment (AGG 2006).

² The term ‘race’ is put in quotation marks nearly all publications on the issue in Germany to emphasise the fact that ‘race’ is a biologist construct and refers to ascriptions.

society but considered as ‘foreigners’ even if they were born in the country. There was almost no perception of discrimination against people with a migration background³ and specific policies or legislation was not considered necessary. In comparison to other European countries, awareness of discrimination due of ethnic origin in Germany is quite low, although Germans seem to have a higher awareness of this than they do of other types of discrimination: In 2006 in Germany about 48 % believed that discrimination on the grounds of ethnicity was “widespread” compared to 64 % in the EU; 32 % thought that discrimination due to religion/belief as widespread compared to 44 % in the European member states (European Commission 2007: 36, 69). Moreover, in 2003 in East-Germany only 68 % and in West-Germany 71 % regarded discrimination because of ethnicity, religion, physical or mental disability, age or sexual orientation as “always or usually wrong”⁴ – which was the lowest percentage compared to the then 15 EU member states where on average 82 % agreed with this statement (European Commission 2003). On the side of people of colour or with a migration background the perception of experienced discrimination seems to have risen. Whilst in 1999, 65 % of 1,000 inhabitants of the federal state (*Land*) North Rhine-Westphalia (NRW) of Turkish origin said they had experienced unequal treatment, in 2004 77% reported unequal treatment (ZfT 2006). However, the question is whether this development is a result of growing sensitivity among migrants or a factual increase of discrimination. A survey by the ‘Anti-discrimination Network Berlin of the Turkish Union in Berlin-Brandenburg’ (*Antidiskriminierungsnetzwerk Berlin der Türkischen Union Berlin-Brandenburg* – ADNB of the TBB) revealed that about 57 % of nearly 500 interviewed migrants and people of colour had experienced discrimination in the area of job seeking during the last four years, which means that this social field is most vulnerable (ADNB of the TBB 2005a: 24ff). This figure was significantly higher than that presented in the Eurobarometer by the European Commission (2003). The difference may be explained by the different research design: in contrast to the Eurobarometer the ADNB of the TBB also questioned migrants from non-EU-countries, and not only about their experiences in the last two but four years.⁵ Generally, there is some evidence to support the fact that a very significant and possibly even the highest rate of perceived discrimination (between 23 and 52 % of the respective respondents) occurs in the sphere of employment (EUMC 2006; ZfT 2006). Some counselling organisations report of relatively few complaints related to work and employment (up to 13 % of their consultants), which may be explained by the profile of these organisations or by alternative possibilities of complaint within a company (e.g. Anti-Discrimination Office in Cologne (*AntiDiskriminierungsBüro Köln*), see Interkultureller Referat et al. 2006; Division for Intercultural Affairs Hanover (*Referat für interkulturelle Angelegenheiten Hannover*), see e.g. Landeshauptstadt Hannover 2002; ADNB of the TBB 2005a).

³ Describing a person as having ‘a migration background’ or ‘history’ refers to individuals who themselves or one or both of their parents have migrated to Germany. This concept is an attempt to overcome the category of citizenship as a basis for statistics. Applying the category of citizenship is misleading when for example, children of migrants born in Germany who do not acquire German citizenship count as ‘foreigners’. On the other hand, ‘ethnic German’ migrants from Eastern Europe (*Aussiedler*) are guaranteed German citizenship and are therefore not recorded as ‘migrants’ as is the case with naturalised migrants.

⁴ In the German questionnaire the terms “wrong/right” were translated as “unjust/just” which have a more legalistic connotation and may partly explain the differences between EU-countries, see Marsh/Sahim-Dikmen 2002: 34ff.

⁵ The huge difference also applies to the other social fields investigated.

1.2 Data Collection and Empirical Evidence of Discrimination

There is no systematic official registration of cases of discrimination.⁶ Aside from the generally low awareness of discrimination in society, a further reason for the lack of data is the reluctance among the various persons or institutions involved to document and collect data according to categories like ethnic origin, 'race' or religion as it might foster stereotypes and be reminiscent of racist and anti-Semitic categorisations in Nazi-Germany.⁷ Companies were opposed to collecting data as a means of monitoring the internal integration of different groups because it was too much bureaucratic and financial effort (I. 3). Several lobby groups for migrants and people of colour insist that data collection provides an important instrument in shedding light on discriminative practices. They stress that any ascription to a particular category should be done by the individuals themselves (I. 5, I. 8). In the following passage, we mainly rely on academic research, some surveys and reports from NGOs and anti-discrimination offices offering counselling at the municipal level. Aside from mental attitudes⁸ we differentiate between institutional, structural and direct forms of discrimination in the field of employment (Wrench 2007).⁹

1.2.1 Institutional Discrimination

Institutional discrimination is viewed as being caused by legislation, directives and institutional practices that may be directly aimed at a certain group, such as migrants, or seem neutral but have indirect effects on the group in question. The most significant form of employment-related institutional discrimination is constituted by the immigration law and regards access to the legal labour market.

Only Germans, so-called 'privileged foreigners' (*bevorrechtigte Ausländer*) with a special work permit, and citizens from EU-countries or the European Economic Area have free access to the labour market. Third-country-nationals can obtain such permission after having worked for five years as employees liable for social insurance or after six years of permanent legal residence or if they have a permanent residency permit. Other third-country-nationals can only obtain a work permit for a certain job if there is no according job applicant from one of these groups.¹⁰ The evaluation follows the hierarchy: Germans, 'privileged foreigners' followed by job seekers from EU-countries. Even when a migrant holds an unlimited work contract it must be evaluated whether there is any 'privileged job seeker' when the duration of their work permit has ended and is due for renewal. Applicants for asylum and 'tolerated' refugees (rejected asylum-seekers who may not be deported for humanity reasons), are generally prohibited from working during their first year in Germany; 'tolerated' refugees who have often been subjected to a chain of 'tolerance' (*Duldung*) are further prohibited from work, e.g. if they are suspected of hiding their identity to prevent their deportation (Genge/Juretzka 2008). Migrants without legal documents are generally excluded from legal work. Finally, 'foreigners' – in a legal sense meaning: individuals holding passports other

⁶ With the Federal Office for the Protection of the Constitution (*Bundesamt für Verfassungsschutz*) Germany focuses its data collection procedures on the activities of left and right extremist groups and associated acts that (might) violate the constitution; these data include details about violent racist offences (see e.g. EUMC – RAXEN 2005).

⁷ This criticism is especially expressed by Sinti and Roma who were persecuted in the *Third Reich*. Supporters of data collection argue that these categories could be left out of a data collection.

⁸ For instance, a recent survey revealed that about 35 % of respondents agreed with the statement that 'foreigners' should be sent home if jobs became scarce in Germany (Decker/Brähler et al. 2006; see also Heitmeyer 2006).

⁹ We include the category of 'legal discrimination' as suggested by Wrench into the category of 'institutional discrimination'; and we consider 'opportunistic discrimination' as part of 'direct' and respectively 'structural discrimination', see Wrench 2007: 115-122.

¹⁰ AufenthG 2008, Art. 39.

than the German passport – are excluded from certain jobs requiring German citizenship, such as in the civil service.

The fact that certain qualifications from other countries are formally not recognised by German authorities is an example of indirect institutional discrimination against migrants. Further, allegedly neutral offers of further training often exclude migrants as their specific skills, abilities and difficulties are not taken into account (I. 6). Similarly, certain application tests in some selective procedures indirectly disadvantage migrants, when, for example, questions are asked about figures particular to German history, despite this knowledge being totally irrelevant for the intended employment (Hönekopp et al. 2002).

The ban on displaying any religious symbols as a public servant (in professions involving a more general public) in several federal states (*Länder*) is an example of seemingly neutral legislation, which particularly concerns Muslim women wearing a headscarf. As a result it excludes numerous Muslim teachers from working in their profession (Gerlach 2007).

1.2.2 The Structural Dimension

There is a huge body of literature on discrimination inherent to the structures of society and the labour market. Heckmann (1981) analysed the phenomenon of the incorporation of ‘guest workers’ at the lowest level of the labour system that has facilitated the social mobility of native workers (*ethnische Unterschichtung*). Structural economic change and globalisation have intensified the processes of segmentation in the labour market. On one end there are the kind of monotonous and arduous jobs, that often involve health hazards, require few qualifications and have few or minimal social and legal rights; the majority of workers within this segment are migrants, women and low-skilled. In contrast, the other end of the scale is characterised by stable employment relationships, higher incomes, upward mobility etc. and is reserved for high-skilled personnel and mainly native German men. The poor positioning in the labour market of people with a migration background is often explained by their insufficient educational level (Hönekopp et al. 2002). However, lack of human capital does not explain the phenomenon of de-skilling of certain groups of migrants upon their arrival in the host country. Additionally students with a migration background are disadvantaged in the German system of school education and vocational training (see EMILIE report WP 3). While we only present a very rough sketch of the segmented labour market concept (e.g. Kreckel 2004), it must be acknowledged that migrants have also been able to successfully follow professional careers and are not simply victims of socioeconomic structures.¹¹ Despite the limits of official statistical data¹² labour market statistics reflect the dimension of structural discrimination. The unemployment rate among non-Germans increased from 17.1% in 2000 to 25.5% in 2005 (Bosch/Peucker 2007b: 17; see also Hernold/von Loeffelholz 2002; Hönekopp et al. 2002). In 2005, the unemployment rate of ‘foreigners’ was higher by 13.5 percentage points than the general unemployment rate (Bosch/Peucker 2007b: 17). The poverty rate of people with a migration background¹³ has increased from 22.3 % in 1998 to 27.9 % in 2003 compared to a general poverty rate of 13.2 % resp. 15.4 %. (Bosch/Peucker 2007a: 14)

1.2.3 Direct Discrimination

Individuals can be directly discriminated against by employers, fellow-employees, work councils or customers in the fields of job seeking and recruitment procedures, allocation of work, further training and promotion, dismissals, as well as by harassment or bullying in the

¹¹ On theories of human capital and ethnic discrimination on the labour market, see e.g. Granato 2003.

¹² Official labour market statistics solely differentiate between German and non-German citizens, and hence, give no specific information about naturalised migrants or *Aussiedler* (‘ethnic Germans’).

¹³ According to micro census data which include the category of individuals ‘with a migration background’.

workplace. Several surveys indicate that people with a migration background and people of colour are often rejected in search for an apprenticeship or a job because of their ‘foreigner’ status, their names or their clothes (headscarves, hijabs). Especially people of Turkish background, blacks and women wearing headscarves were significantly affected by this form of discrimination (efms 2001; EUMC 2006; BMA 2002; Hönekopp et al. 2002; ADNB of the TBB 2005b; Senatsverwaltung 2008).¹⁴ In a study carried out by the International Labour Organisation applying a method of controlled experiments, applicants with German and ‘foreign’ sounding names and identical qualifications applied for the same vacancies. ‘Germans’ were significantly more frequently invited to job interviews than those with ‘foreign’ names (Mourinho/Goldberg 1995 and Goldberg/Mourinho 2000). A recent similar survey on a small-scale basis included applications from women wearing headscarves. The survey showed that these women were rejected most frequently (Akman et al. 2005). Interviews with personnel managers revealed that their decisions are not only guided by factors like education, qualification and work experience, but also by certain cultural stereotypes and prejudices (Gestring/Janssen/Polat 2006). This evidence is even more dramatic since it is often difficult to prove discrimination in the recruitment process; moreover, trade unions and work councils have very limited possibilities of interfering at this stage of pre-employment (I. 5, I. 6).

At the workplace employees with a migration background and people of colour suffer from verbal abuse by co-employees, employers and customers, and from unfair allocations of work (e.g. are more often assigned to cleaning and other menial tasks). They have lower prospects of promotion, are disadvantaged in further-education programmes and are dismissed sooner than native employees. Yet it seems that people with Muslim backgrounds or those of African origin are especially affected (efms 2001).

The situation is worsened by many well-meaning fellow-employees, work councils and representatives insensitive to discrimination, who often unconsciously legitimise unequal treatment, for example regarding promotion, by pointing to allegedly insufficient language skills among workers with a migration background (Brüggemann/Riehle 2000).

2 Legislation before August 2006

In general, up until the implementation of the AGG, legal protection against discrimination has been insufficient and not at all encompassing. Basic Law, article 3, constitutes the principle of equal treatment irrespective of one’s “sex, parentage, race, language, homeland and origin, faith, or religious or political opinions (...) (or) disability”. The law refers to the relationship between the state and its citizens. As it does not explicitly affect the sphere of civil or labour law its direct and even indirect impact on these legal spheres is disputed.

With respect to single attributes, the furthest reaching legislation implemented regards gender equality. Since 1980 German Civil Code prohibits discrimination on the ground of gender in the field of employment (BGB 1980, Art. 611a). The strategy of gender mainstreaming is politically supported and is in the process of being implemented in the public sector. The Code of Social Law stipulates the “rehabilitation and participation” of people with disabilities (SGB IX 2001). Concerning protection against discrimination on the grounds of ethnic origin, ‘race’ or religion, victims can refer to international conventions which like the International Convention on the Elimination of All Forms of Racial Discrimination New York (1966)¹⁵, to the European Convention of Human Rights (1950), the European Social Charta (1961/1996)

¹⁴ Generally, members of the Jewish, Muslim, Roma, and Sinti communities as well as visible minorities are particularly vulnerable to Anti-Semitic, xenophobic and racially motivated violence and discrimination in Germany, ECRI 2004.

¹⁵ The convention went into force in West-Germany in May 1969

or to the Conventions of the International Labour Organization. Also, article 13 of the EU Treaty of Amsterdam (1997), which stipulates that the EU “may take appropriate action to combat discrimination”, and the EU-directives on Race Equality and Employment Equality provided legal reference (e.g. Schroedter 2007). But in fact, these conventions and directives were insufficient, since third country nationals were not included in these frameworks. (Treichler 2004). Moreover, the individuals affected and apparently many lawyers were not aware of these often intricate possibilities (I. 7).

In terms of specific social fields, the furthest reaching legal protection from discrimination in employment was provided by the private sector with the Industrial Relations Act (*Betriebsverfassungsgesetz*) from 1952 and especially with its amendment in 2001.¹⁶ Already in its early version the act manifests the principle of equal treatment in a company irrespective of the employees’ “descent, religion, nationality and (ethnic) origin, political or trade union activities or opinions, or sex/gender or age” (BetrVG 1952, Art. 75 I) (and since 2001: sexual identity). One significant amendment occurred in 1972 when ‘foreigners’ were allowed to run for office in work councils¹⁷. In addition, the “incorporation of foreign employees into the company” (BetrVG 1972, Art. 80 I No. 7) has been added to the list of the work councils’ general duties. With the amendment of the Industrial Relations Act in 2001, the task of suggesting “measures to combat racism and xenophobia in the company” was added to this list of work councils’ duties (BetrVG 2001, Art. 80 I No. 7). The employer has to report at least once a year on the status of the integration of foreign employees in the company (ibid. Art. 43 II). The work council can block the recruitment of new employees if it is concerned that the job applicant might interfere with the company’s working atmosphere “through racist or xenophobic behaviour” (ibid. Art. 99 II No. 6). Another important amendment is the legal provision enabling the creation of ‘Voluntary Industrial Relations Agreements’ between work councils and employer (ibid. Art. 88 No. 4). The aim of such agreements is to corporately deal with the “integration of foreign employees” and to “fight racism and xenophobia in the company” (Akin et al. 2004). The dominant view regarding labour market integration is that companies hold a huge integrative potential. The fact that ‘foreigners’ are equal to German citizens in collective labour agreements and social policies counts as a basic requirement for equal treatment in the work place (I. 4, I. 5; Heckmann 2003; see also below).

3 Anti-Discrimination Politics

As a consequence of the poor awareness of discrimination and insufficient legal protection in Germany, both anti-discrimination politics and the infrastructure of legal assistance to victims of discrimination are poor. This refers to the actions of the state and the status quo in numerous companies. At the same time on the level of regional state politics, in some companies and NGOs some progressive and ambitious activities are apparent.

3.1 The State

In the past, state activities related to the abolishment or prevention of discrimination against people with a migration background focused on a) establishing commissioners for specific

¹⁶ For the public sector see the Federal Personnel Representation Act (*Bundespersonalvertretungsgesetz*) and the Federal Civil Service Law (*Bundesbeamtengesetz*).

¹⁷ A work council (*Betriebsrat*) is the legal organ elected by employees in private companies with at least five employees. It represents the interests of the company’s workforce rights and has to be involved in major corporate decisions (codetermination). The equivalent in the public sector is the Employee Committee (*Personalrat*).

affairs, b) founding of alliances and project funding and c) the gradual ‘intercultural opening’ of the public sector.

Commissioners for Specific Affairs

In 1978 the Federal Government installed the first ‘Commissioner for Foreigner's Affairs’ (*Ausländerbeauftragte*), which is now called the ‘Office of the Commissioner for Immigration, Refugees and Integration’, affiliated with the chancellery. Similar commissioners exist on the individual state and municipal levels. Although their tasks include to taking up migrant issues and presenting their demands to state institutions, they only have an advisory function on the political level.¹⁸ The institution of the Immigrants’ Commissioner displays the patronizing, controlling and administrating relationship between authorities and migrants (Bade 1994, Schönwälder 2001; Schiffauer 2006 95).

Alliances and Project Funding

A political instrument installed by different governments in an attempt to deal with right-wing extremism, racism or integration issues has been to create alliances between the government and relevant protagonists. As a response to increasing numbers of racist attacks in the 1990s and within the context of the ‘European Year against Racism’, in 1997 Chancellor Helmut Kohl (Christian Democratic Union, CDU) initiated the dialogue between state institutions and what is meanwhile about 50 NGOs. This round table has continued its activities as the ‘Forum against Racism’ (*Forum gegen Rassismus*) under the auspices of the Federal Ministry of the Interior.¹⁹ Although still active under this name, in contrast to other later initiatives, it is barely known and its objectives are not communicated to the public (I. 9). Similar, in reaction to an attack on a synagogue and in the context of further racist attacks, in 2000 Chancellor Gerhard Schröder (Social Democratic Party, SPD) launched the ‘Uprising of Respectable People’ (*Aufstand der Anständigen*), symbolising a well-fortified democracy. Subsequently he founded the ‘Alliance for Democracy and Tolerance’ (*Bündnis für Demokratie und Toleranz*), also under the under the auspices of the Ministry of the Interior. The government launched funding programmes to support civic projects against right-wing extremism, xenophobia and anti-Semitism (Meyer et al. 2004).²⁰ In addition, the EU-programme EQUAL was launched nationwide between 2000 and 2007, in order to overcome discrimination in the labour market.²¹ Nevertheless, these programmes do not provide an infrastructure for continuous anti-discrimination work of these projects.

The coalition between the Conservatives(CDU) and Social Democrats(SPD), in power since November 2005, have declared they give top priority to integration issues. Chancellor Angela Merkel (CDU) has initiated the ‘Integration Conference’, a forum of representatives of the government, different migrant communities and other institutions. The conference is affiliated with the chancellorship, it convened in September 2006 and July 2007 when it presented a national integration programme. In addition, in 2006 the Ministry of the Interior launched a ‘German Islam Conference’, which first met in September of 2006. It aims to create a

¹⁸ Since the 1970s several municipalities have an Advisory Council for foreign Citizens (*Ausländerbeirat*), a forum of migrants for counsel in local politics. Federal government commissioners further include the Commissioner for Disability Affairs and the Commissioner for Emigrants and National Minorities. The Commissioner for Human Rights at the Ministry of Justice represent Germany before the European Court of Human Rights and at the Ministry of Foreign Affairs, the Commissioner for Human Rights Policy and Humanitarian Aid follows international human rights developments and provides policy advice to the Government (Commissioner for Human Rights 2007).

¹⁹ http://www.bmi.bund.de/cln_028/nn_165152/Internet/Content/Themen/Innere__Sicherheit__allgemein/DatenundFakten/Forum_gegen_Rassismus.html

²⁰ Such as *Entimon*, *Civitas*, *Xenos* – two of the programmes were nearly abolished by Chancellor Angela Merkel (CDU) but finally continued within a reduced capacity.

²¹ <http://www.equal.de/Equal/Navigation/programm.html>

‘dialogue’ between the state and ‘Muslims’ about the integration of the latter, the prevention of violent Islamism and “the segregation of Muslims in Germany”.²²

The aforementioned initiatives seem to be relatively disconnected from each other. These alliances have shifted their focus from at least the verbal aim to ‘fight racism’ to the re-insurance of ‘democracy and tolerance’ and further to the ‘integration of migrants’. The latest initiatives – which have attracted the most media attention – point to the political guideline that migrants are asked to contribute towards their integration whilst the state provides some infrastructure for better integration. The latest conferences hardly refer to racism or discrimination at all.

The State as an Employer and Supplier of Services and Anti-discrimination Politics on the Regional Level

In the National Integration Plan (2007) the governments on the national and federal state levels committed themselves to the ‘intercultural opening’ of their institutions, including mandatory training programmes for staff in some federal states. For some years several municipalities have adopted agreements ‘on partnership in the workplace’, ‘against xenophobia and anti-Semitism’, or in order ‘to prevent bullying, discrimination and sexual harassment’.²³ Still the implementation of a ‘non-discriminatory climate’ seems far from being realised (I. 2, I. 8, I. 10). Moreover, the public sector aims to raise the percentage of employees with a migration background – an aim that in Berlin, for example, is constrained by a principal hiring freeze due to budget restrictions.

Some *Länder* and municipalities installed departments for intercultural and anti-discrimination issues before the implementation of the AGG.²⁴ For instance, since April 1999 the Division for Intercultural Affairs (*Referat für interkulturelle Angelegenheiten*) in the municipality of Hanover offers counselling regarding discrimination on the grounds of one’s origin, language, nationality or religion (Landeshauptstadt Hannover 2000) and The Body for Complaints of Discrimination (*Beschwerdestelle für Diskriminierungsfälle*) within the municipal administration of Munich was initiated in August 2003.²⁵ Similarly, a working group on anti-discrimination has been established at the Intercultural Department of the city of Cologne (*Arbeitskreis Antidiskriminierungsarbeit in Köln*) cooperating with an NGO and a charity organisation (Interkulturelles Referat et al. 2006).²⁶ In Berlin, in 2005 the ‘Co-ordinating Office for Discrimination on the Grounds of Ethnicity, Religion and Belief’ (*Leitstelle gegen Diskriminierung aus ethnischen, religiösen und weltanschaulichen Gründen*) was founded as part of the Berlin Office for Integration. It has been replaced in 2006 by the ‘Berlin Land Office for Equal Treatment – Against Discrimination’ (*Berliner Landesstelle für Gleichbehandlung – gegen Diskriminierung*) which is concerned with all criteria of discrimination named in the AGG.²⁷ Its main tasks are a) raising awareness through public relations and supporting of preventive projects (in schools, police etc.); b) abolishing structural discrimination through the development of guidelines and policy recommendations; and c) development and governance of an efficient counselling infrastructure, e.g. through networking and project funding (I. 2). In addition, the Berlin anti-discrimination state policy

²² http://www.bmi.bund.de/cln_028/nn_165152/Internet/Navigation/DE/Themen/Deutsche_Islam_Konferenz/deutscheIslamKonferenz__node.html__nnn=true . On the concept of dialogue, see Tezcan 2006.

²³ For the Berlin municipalities, see Abgeordnetenhaus Berlin 2006.

²⁴ About ten German cities, among which is Berlin, have joined the European Coalition of the Cities Against Racism, Xenophobia and Discrimination, see http://portal.unesco.org/shs/en/ev.php-URL_ID=10629&URL_DO=DO_TOPIC&URL_SECTION=201.html

²⁵ <http://www.muenchen.de/Rathaus/dir/antidiskriminierung/149416/grundgesetz.html> (28.03.2008).

²⁶ http://www.bildung.koeln.de/regionale_projekte/antidiskriminierungsarbeit/

²⁷ Operating under the umbrella of the Berlin Senate for Integration, Labour and Social Affairs.

includes a funding programme “against right-wing extremism, anti-Semitism and xenophobia”²⁸ out of which, for instance, the NGO ADNB of the TBB is financed (see below). Aside from the *Land* Berlin only the *Land* Brandenburg has implemented an anti-discrimination body.

3.2 The Private Sector: Employers and Trade Unions

Employers

In 1995 German employers’ organisations and trade unions within the “European Social Dialogue” adopted the „Joint Declaration on the Prevention of Racial Discrimination and Xenophobia and Promotion of Equal Treatment at the Workplace” (Declaration of Florence).²⁹ However, employers seem rather reluctant to meet legal anti-discrimination provisions. Employers’ associations present themselves open to voluntary agreements and diversity strategies but especially oppose the state applying any obligatory anti-discrimination measures. Moreover, they are convinced that discrimination does not take place in German companies to a relevant degree (I. 3; BDA 2006a and 2006b). For example, the Federal Association of Medium-sized Enterprise (*Bundesverband mittelständischer Wirtschaft*) launched an initiative called the “Medium-sized Businesses Open-Minded – Against Discrimination” (*Mittelstand weltoffen – gegen Diskriminierung*) (2004),³⁰ which is based on the voluntary commitment of enterprises to the principles of equal treatment and a discrimination-free working environment. The rather low number of subscribers to this declaration indicates that the principle of voluntary commitment of employers is not very effective (Bosch/Peucker 2007a).

More recent initiatives, such as the ‘Charter of Diversity’ (*Charta der Vielfalt*), initiated in late 2006 by German companies, and the campaign ‘Diversity as Opportunity’ (*Vielfalt als Chance*), launched by the Federal Commissioner for Migration, mainly focus on diversity as a management and profit maximising strategy. Meanwhile, an increasing number of major multinational German companies, and some middle-sized enterprises, have adopted diversity management concepts (estimated at around 50 companies in 2005, Peucker/Bosch 11/07; see also Stuber 2006; Vedder 2005). The impact of this diversity management on the actual situation facing employees from different groups, particularly in the lower levels of company hierarchy, would need further investigation. (On the debate of the diversity concept see also below, chapter 5.2.)

Another instrument that sometimes goes hand-in-hand with diversity management is the aforementioned ‘Voluntary Industrial Relations Agreements’ on anti-discrimination and equal opportunities. Trade unions consider these agreements stronger and as achieving farther-reaching policies, as they are the result of mutual negotiations between work councils and management. Apparently, an increasing number of companies adopt such voluntary agreements (e.g. Ford, Preussag AG, Opel, Thyssen, Volkswagen). The DGB knows of 80-90 such agreements, and “there are certainly many more” (I. 5; see also Akin et al. 2004).

Trade Unions and Work Councils

Since the ‘guest worker’ recruitment in the 1950s, trade unions established mentors/secretaries for foreign labourers who offered support in different languages (*Sprachensekretariate*), which on the whole followed quite a patronizing approach reflecting state politics at that time. In 1994 the DGB ceased directly mentoring its members and closed

²⁸ <http://www.berlin.de/lb/intmig/themen/rexpro/index.html>

²⁹ http://migration.verdi.de/nichtdiskriminierung_im_betrieb/data/teil_3_vereinbarungen.

³⁰ <http://www.mittelstand-weltoffen.de/>

these 'language secretariats'. The decision to enforce German as the common language gave rise to some conflicts and a loss of trust among migrant workers. In the late 1990s the DGB realised that a language sensitive strategy was necessary "not because migrant workers did not understand German but to show respect and win their confidence" (I. 5).

As pointed out above, migrant workers have been eligible for office on work councils since 1972. Migrant workers' participation began on a significant scale in the mid 1970s. Currently, the percentage of trade union representatives with foreign citizenship in the service sector was estimated at 5 %, which was considered as "not too bad" (I. 4). The experts interviewed emphasised the fact that employees were generally not easily encouraged to participate, but that they had also tried to activate more employees with a migration background, e.g. by providing information in different languages (I. 5). Regarding the relationship between employees and employers, trade unions stressed the positive effect of the aforementioned 'Voluntary Industrial Relations Agreements' and support their members in this regard by providing information and consultancy.

As mentioned above, trade unions and work councils contribute – often unconsciously – to the exclusion of and discrimination against migrant workers by harbouring unconsidered perceptions through decision-making structures (Brüggemann/Riehle 2000; see also Yurdakul 2007). The representative of the DGB believed that "this has changed in the last eight years. Work councils are more open to this nowadays." (I. 5) In 2006, the Federal Conference of the DGB decided to attach more importance to anti-racism and migration topics by establishing new posts in the main unions. Trade unions are requested to implement 'cultural mainstreaming' and 'intercultural orientation'. In some branches, including the service sector union since 2007, migrants have been given the same status of other relevant pressure groups (I. 4). Despite this new emphasis on cultural diversity, trade union representatives emphasised that cultural or religious differences were barely relevant in the work place. In most cases internal company conflicts had "more to do with their internal structures" and "specific occupational groups" rather than any divisions into ethnic or religious groups (I. 5; see also Schmidt 2006). If, nevertheless, conflicts related to religion or ethnicity occurred, the best way of dealing with it was to keep it outside the company. For instance, at the time of the civil war in Yugoslavia this strategy would have deescalated the situation in companies with large numbers employees from the former Yugoslavia (I. 4, I. 5). Similarly, after 9/11 2001 when in a mining company Muslim workers demanded separate washrooms because they felt increasingly stigmatised as Muslims, the company management and work councils agreed to explicitly ethnically mix the work shifts so as not to foster separation. According to the interviewee, in the end this strategy contributed to de-escalation (I. 5). One interviewee very principally declared that religion does not comply with the German labour system. For example, accommodation for prayers during the normal work shift was not possible because of the historical development of the organisation of labour (I. 4).³¹ Interviewees maintained that although it was important to be aware of cultural differences, one should not make it an issue. Instead, companies and work council should detect the abilities of employees and support them (I. 5). One interviewed trade unionist concludes:

"Discrimination is not being paid enough to live on. It doesn't matter if the worker is a Turkish, German or Italian. We don't make issues of ethnicity out of social problems." (I. 4)

³¹ The interviewee exemplified this by pointing to a case of coach drivers in the 19th century who had to abstain from attending Christian Mass on Sundays because of work requirements. Nevertheless, in some exceptional cases there were such accommodations of religious needs in companies today (I. 4). Specific dietary needs are also met in several companies (I. 5).

In-depth studies in companies would be necessary to evaluate how employers and work councils from different ethnic and religious backgrounds perceive such conflicts and conflict-solving strategies.

3.3 NGOs

Some NGOs have been active in politics for years trying to fight discrimination against people with a migration background and people of colour. NGOs are active in the networking with other institutions and organisations, counselling, training and public relations aimed at two main target groups: the ‘majority’ that they aim to sensitise to discrimination through diversity training; and migrant communities which they try to “empower” (I. 7; ADNB of the TBB 2003). NGOs’ spheres of influence have been restricted due to a weak legal framework surrounding discrimination issues and even more restricted by limited financial resources and political support. In the context of the EU-directives on Race Equality and Employment Equality and their prospective transposition some were able to acquire more continuous public funding and become more professionalized. In May 2007 numerous NGOs organised a federal network in Germany (*Antidiskriminierungsverband Deutschland – advd*).³²

In July 2003, the ‘Anti-discrimination Network Berlin of the Turkish Union in Berlin-Brandenburg’ was founded and is funded by the Berlin Commissioner for Integration and Migration (although with only three part time posts). Along with networking and public relations work it offers counselling in different languages, mainly in Turkish, Spanish, English and German; the ADNB of the TBB mentors about 90 consultants per year, the majority of which have a Turkish background (I. 7; ADNB of the TBB 2003). Other NGOs based in Berlin are the ‘Anti-discrimination Office Berlin’ (*Anti-Diskriminierungsbüro Berlin – ADB*), founded 1995 (ADB 2005), and the ‘Alliance Against Ethnic Discrimination in the Federal Republic of Germany’ (*Bund gegen ethnische Diskriminierung in der Bundesrepublik Deutschland – BDB*), which has been active for about ten years – although without any funding since 2002 (I. 8). The current focus of the BDB is training programmes in intercultural competence for the administration staff of the police, or Job Centres (unemployment offices), as well as lobbying activities and counselling of concerned individuals, which amounts to about two cases per month.

Apparently one of the most professional NGOs in the field of anti-racist politics is the ‘Anti-Racism Information Centre North Rhine-Westphalia’ (*Anti-Rassismus Informations-Centrum – ARIC-NRW*) in Duisburg, founded in 1998 and financed by the *Land* of North Rhine-Westphalia, (currently three part time posts). It is active on local, federal and European levels, provides information material in various languages, and has – with other NGOs – established a fund for financial support for the victims of discrimination who go to court. ARIC-NRW supports about 50-60 consultants per year in German, Turkish or English. In addition it provides an online-questionnaire for individuals subject to discrimination that is used by 200-300 persons per year.³³ The NGO has developed specific software for documenting cases of discrimination for all anti-discrimination institutions in NRW. According to the interviewee of ARIC-NRW, the *Land* NRW has not yet made use of these data analysis possibilities (I. 10).

³² <http://www.antidiskriminierung.org/?q=taxonomy/term/24>, also for further information on several NGOs active in anti-discrimination politics.

³³ <http://www.aric-nrw.de/>; ARIC is affiliated with similar organisations in the Netherlands.

4 The General Equal Treatment Law

4.1 The Process of Transposition

The first attempts to introduce anti-discrimination legislation were in 1986 when the Green Party unsuccessfully tried to introduce a bill regarding gender equality, and then again in 1998 when they tried to introduce equal treatment legislation as it is demanded by Art. 3, Basic Law (see above). After the EU passed the Race Equality Directive 2000/43/EC in June 2000 and the Employment Equality Directive 2000/78/EC in November 2000, the German government submitted a draft law to transpose the Race Equality directive in the area of civil law that was withdrawn again in March 2003 – as it was supposedly too far reaching in relation to the requirements of the EU directive. Meanwhile, the EU-commission had given notice that they intended to file lawsuits against Germany for not having transposed the two directives in time – the deadlines were 19 July 2003 resp. 2 November 2003. This finally resulted in sanctions because of the infringement, sentenced by the European Court of Justice, in July 2003 and February 2006. At the end of 2004 the German government agreed on a new draft which was submitted for the first reading in January 2005. It was – like the previous drafts – massively criticised by conservatives and employers’ associations, whilst some NGOs argued in favour of a further reaching transposition of the directives. In July 2005 the Upper House of Parliament (*Bundesrat*) committed the bill to the conciliation committee (*Vermittlungsausschuss*) of the Upper and Lower Houses (*Bundestag*). However, this was not decided upon because of early federal elections in September 2005.

In early 2006, parties from the new opposition launched further draft laws. Finally, in May 2006 the grand coalition of CDU and SPD submitted a new bill of an Anti-discrimination law. Still, it needed further parliamentary debate and significant changes³⁴ until – under the threat of further severe penalties from the EU-commission – the law was adopted. Interestingly enough, the former title of the law – “Anti-discrimination Act” – was changed to General Equal Treatment Law (*Allgemeines Gleichstellungsgesetz*) thus avoiding the term ‘discrimination’.

The main arguments against an Anti-discrimination law to have been brought forward, mainly by Conservatives, Free Democrats and employers’ lobby groups – who in some points certainly differed – were the following:³⁵

- Generally, an anti-discrimination law is not necessary because there is no relevant discrimination in Germany that cannot be sanctioned by existing legislation (e.g.: „The reality is that discrimination is not an issue in business“, BDA 2006b).
- Rather than creating equality the law will provide minorities with privileges.
- The state should not act as an educator. In fact, the law seduces employers to act dishonestly because they were forced to try to find ways to circumvent the law. The law constrains the creativity and voluntary activities of employers in fostering equal treatment.

³⁴ Most of these late changes undertaken in June 2006 have been already criticised by the EU-commission (see below). The changes included a) restricting the right of NGOs’ to participate in legal proceedings to defend victims of discrimination as well as restricting the right of work councils and trade unions to file suit against the wishes of the employees concerned, unless it relates to a case of ‘gross violations’ of the law; b) the deadline for lodging a complaint having been reduced from 3 to 2 months; c) exception from the AGG regarding treatment of those seeking housing; d) the regulation concerning the burden of proof weakening the position of victims; e) protection against dismissals being excluded from the AGG (for the history of the transposition and related documents, see <http://baer.rewi.hu-berlin.de/wissen/antidiskriminierungsrecht/allgemeinesgleichbehandlungsgesetz/>).

³⁵ See the parliamentary debates and e.g. BDA 2006a and 2006b, Personalmagazin 2006; contributions in www.fazjob.net; see also critically Joppke 2007; Bielefeldt/Follmar-Otto 2005.

- Anti-discrimination legislation constricts the principle of contractual freedom and interferes with private/individual autonomy.
- The law constitutes an “overregulation of society” (Maria Eichhorn, CDU/CSU, Deutscher Bundestag 2005: 14260).
- The law imposes superfluous bureaucracy, financial burden³⁶ and legal uncertainty on employers. The consequence of all this is the paralysis of economy and progress in Germany.
- The AGG unnecessarily exceeds the EU-directives, particularly in applying six discrimination criteria rather than simply ‘race’, ethnic origin and gender as required by the EU-commission not only to labour but also to civil law, as well as to the responsibilities of the anti-discrimination body.
- Further, single aspects were criticised and some of which were changed in the final version of the AGG according to the opponents’ aims, like – in opponents’ view – the deadline to lodge a claim being too long, the regulation of burden of proof, and concerning unclear concepts.

On the other side the protagonists of SPD, Green Party, Left Party as well as trade unions and NGOs put forward the following arguments in favour of the law:³⁷

- Freedom from discrimination is a basic right.
- The law secures a human right.
- Legal principles valid between the state and its citizens (as stipulated in the German Constitution) must also be valid between citizens. The state has to interfere in private relationships.
- Anti-discrimination is mandatory in the sense of “decency” (e.g. Olaf Scholz, SPD, Deutscher Bundestag 2005: 14257), legal justice and responsibility (Renate Gradistanac, SPD, *ibid.* 14271-72)
- It is a step forward in the “modernisation of society” (Schewe-Gerigk, Green Party, *ibid.* 14257)
- Anti-discrimination legislation is not a restriction of freedom, but guarantees more freedom for those who are disadvantaged in society.

4.2 The AGG – An Overview

The AGG is the first comprehensive German law to have the sole objective of supporting equal opportunity and preventing and sanctioning discrimination. It aims to bring legislation in line with Article 13 of the EU Treaty, which stipulates that the EU “may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.” (Treaty of Amsterdam 1997, Art. 13) In fact, with this single law Germany intended to transpose not only the 2000 Racial Equality Directive, 2000/43/EC and the 2000 Employment Equality Directive, 2000/73/EC but also the 2004 Directive on Equal Treatment between Men and Women in the Access to and Supply of

³⁶ The Institute for the German Economy, Cologne, as well as an economist in Dortmund calculated the immense costs to German companies of informing their employees about the AGG (through training programmes, seminars or intra-net) and of implementing structural changes, no author 2007, Budras/Schwenn 2007. The methodology of these calculations is quite contentious.

³⁷ See also chapter 5, and Bielefeldt/Follmar-Otto 2005.

Goods and Services, 2004/113/EC, and the 2002 Directive on Equal Treatment of Men and Women in Matters of Employment and Occupation, 2002/73/EC.

The articles of the general part (Art. 1 to 5 AGG) are very similar in their wording to the corresponding EU directives. The aim of the law is “to prevent or abolish any discrimination on the grounds of ‘race’, ethnic origin, gender, religion or ideology, handicap, age and sexual identity or orientation (Art. 1). Art. 2 relates to labour and civil law. Art. 3 of the AGG makes a distinction between several forms of discrimination. It defines *direct discrimination* as being when an individual is treated less favourably than another person in a comparable situation due to one of the characteristics mentioned in Art. 1. *Indirect discrimination* is described as “allegedly neutral legal norms or institutional mechanisms and attitudes within the sphere of public institutions” that result in discrimination against individuals unless these norms and rules are “factually justified by a legal aim” (Art. 3 (2)). *Harassment* is any form of unwanted and unwelcome behaviour aimed at, or resulting in the violation of a person’s dignity, creating an environment of humiliation and insult. Harassment is termed *sexual harassment* if the unwanted behaviour is linked to one’s gender or sexual orientation. Sexual harassment is only referred to the area of labour and employment. Finally, the AGG defines the *instruction to discrimination* especially related to working life as when someone instructs a person in a way which leads to the discrimination of an employee on the grounds named in Art. 1.

Articles 6 to 18 AGG refer to discrimination in the employment sector ranging from advertising a post, employment procedure, working conditions, access to further education or membership in employees’ associations.³⁸ The AGG makes use of the possible exceptional provision allowing unequal treatment when a necessary feature of a job is regarded as, for example, “an essential and decisive” job requirement (Art. 8); due to the special status of churches or other organisations based on a specific ethos or belief (Art. 9); or on the grounds of age under certain circumstances (Art. 10). The interpretation of the exception clause for churches has already been the subject of a court case (as will be elaborated below) and has been criticised by the EU-commission. Certain positive action measures are also allowed, for example for women, to compensate for existing disadvantages (Art. 5).

The AGG defines dismissals as being governed by the stipulations in the Employment Protection Act (*Kündigungsschutzgesetz*).

Employees have a right to complain about instances of unjustified discrimination (Art. 13). Such claims must be raised within two months of the incident occurring. Trade unions and work councils are allowed to take court action in cases of an employer “severely violating” Art. 1 (Art. 17 (2)).

Employers are obliged to take “suitable and necessary action” in order to protect their staff from discrimination (Art. 12). Such action includes preventive measures such as making the AGG known by putting it up or making the relevant information available via the Intranet. Furthermore, anti-discrimination training and further education are considered to have a preventive effect. In case of violation of the ban on discrimination, employers are obliged to take action appropriate to the individual case (such as a warning, posting, or dismissal) and, if necessary, appropriate action to protect the employee targeted. Although violations of the discrimination ban do not entitle the persons discriminated against to employment, vocational training or further career opportunities, ban incursions may entitle claimants to damages or compensation payments. Finally, employers are obliged to specify a responsible office within the organization or authority to which employees may submit their complaints (Art. 13). The partners of collective labour agreements – employers, employees and their representatives – are “requested” to contribute to the realisation of the aim of Art. 1 “within the scope of their responsibilities and possible course of action” (Art. 17 (1)).

³⁸ The rules of the AGG also refer to employment in the public sector (Art. 24).

Articles 19 to 21 AGG prohibit discrimination in the sphere of civil law and exceed the minimum requirements of the directive 2000/78/EC by expanding the grounds of discrimination. Discrimination on the grounds of ‘race’ or ethnic origin, sex, religion, disability, age or sexual identity – though not belief – is prohibited provided the respective civil law contract is concluded without respect to the individual person (‘mass businesses’).³⁹ Moreover, discrimination on the grounds of ‘race’ or ethnic origin is also prohibited in respect to the conclusion of other civil law contracts (Art.19 (2)).

Unequal treatment in the access to housing is permitted if it aims to establish or maintain socially stable housing structures and a “balanced mixture concerning the economic, social and cultural composition of a neighbourhood” (Art. 19 (3)).

Differing from the wording of the directives the AGG remains quite vague regarding the facilitation of burden of proof and assigns a significant part of the burden of proof to the claimant: If the one party “proves pieces of circumstantial evidence which give rise to the supposition” that discrimination has happened, the other party has to prove that no violation of the pertinent equality provisions has occurred (Art. 22).

Art. 23 defines an Anti-discrimination organisation as having a minimum of 75 members and non-profit status. The law limits the right of anti-discrimination associations to participate in legal proceedings to defend victims of discrimination.

The sixth section, articles 25-30 stipulate the implementation of a Federal Anti-discrimination Authority (*Antidiskriminierungsstelle des Bundes* – ADS), its legal position, duties and capacities, the cooperation with NGOs and other institutions as well as the installation of an Advisory Board (see below, chapter 5.2).⁴⁰

4.3 Infringement Procedure 2008

After the EU-Commission had already claimed that several aspects within the AGG were not consistent with the EU-directives in 2007,⁴¹ the EU-Commission started an infringement procedure against Germany on the 31st of January, 2008 – among eleven other member states – for failing to implement equal opportunities legislation correctly (EU-Commission 2008). It demanded higher standards on the following issues:

- Equal rights for homosexual couples.
- Dismissal protection. The AGG refers to the Employment Protection Act, which does not give explicit directives regarding protection against discrimination on the grounds of ethnic origin or ‘race’.⁴²
- Special rights for religious communities. Churches can currently insist upon only hiring members of their own religious community as staff. Art. 4 (2) EU-directive 2000/78/EC states that “a difference of treatment based on a person's religion or belief shall not constitute discrimination where, by reason of the nature of these activities or

³⁹ E.g. ‘mass business’ regarding housing is defined as when someone rents out more than 50 flats (Art. 19 (5) AGG).

⁴⁰ In late November 2007 several minor technical amendments to the AGG and related laws were implemented (Bosch/Peucker 2007b: 7/8).

⁴¹ After an informal letter to the Federal Ministry of the Exterior on the 24th of January, 2007, the EU-Commission formally requested that the German government comply with the EU-directives, see EU-Commission 2007.

The German government responded to the first letter on the 7th of March, 2007 but did not introduce the required amendments.

⁴² See also the decision of the Labour Court Osnabrück, 5.2.2007, which argues that the AGG is not compatible with the EU-directive (ArbG Osnabrück 2007).

of the context in which they are carried out, a person's religion or belief constitute a genuine, legitimate and justified occupational requirement, having regard to the organisation's ethos." In contrast, the AGG stipulates that unequal treatment by churches or other public or private organisations with an ethos based on religion or belief, is legitimate only because of their right to self-determination – even without any evaluation of the character of the job. While the EU-directive demands that the criterion – religion or belief – has to be an “essential and decisive occupational requirement” according to the AGG it only has to be a “legitimate occupational requirement” (Art. 9 (1) AGG).

- Better job protection for people with disabilities.
- Protection against age discrimination. The exception to the ban on age discrimination does not contain any of the conditions required by the EU-directive.
- The deadline for lodging a complaint. Two months to lodge a claim as stipulated in the AGG is too short.
- The status of NGOs. The limitation of NGOs' right to participate in legal proceedings to defend victims of discrimination contradicts the directive. The definition of Anti-discrimination organisations (minimum of 75 members, non-profit making status) is not reasonable.
- Liability of employers. In terms of liability of employers in cases of discrimination, the AGG has included the requirement of fault by the employer.⁴³ The directive does not require the fault of the employer to apply sanctions. Moreover it does not comply with the EU-directives that state that an employer is only liable for discriminating collective rules if he/she acts in a way that is “grossly negligent” (Art. 17, EU-directive 2000/78/EC).

5 The Implementation of the AGG and its Relevance

Generally, the interviewees from NGOs and trade unions deemed the AGG an important instrument capable of strengthening the legal position of people subject to discrimination. The possibility that trade unions or work councils can lodge a claim, the fact that indirect discrimination can be tackled and that job seekers are protected by the AGG was thought to be a significant step forward (I. 4, I. 5, I. 6). Most involved parties interviewed agreed that there are some vague legal concepts in the AGG and that some stipulations conflict with other national laws or the EU-directives. Some of these deficiencies have been criticised by the EU-commission and have to be addressed by the German state. Other nebulous areas can only be clarified through legal action and court decisions in the course of time.

In addition to the criticisms raised by the EU-Commission further principal criticism of the law has come from NGOs, trade unions, some lawyers and representatives from political opposition:

- the relatively weak position of the Federal Antidiscrimination Authority
- insufficient support of a counselling network
- the fact that ‘language’ is not included as a category of discrimination as it is not clearly an element of the category ‘ethnic origin’. A claim of discrimination because of language resp. ethnicity has already been rejected by a court. The claimant had argued that his job application for a gardening job was put down because he was not fluent in German; this was not regarded as discrimination because of ethnicity (ArbG Berlin 2007; I. 8; advd 2007)

⁴³ This even implies a downgrading of the existing legislation in Germany regarding gender discrimination.

- weak protection against discrimination in education
- the burden of proof regulation, since discrimination is considered to be characterised by an imbalance of power and availability of information. Neither the victims themselves, the independent or municipal counselling offices, nor the ADS are given any entitlement to access data from either local or state authorities, or from private companies (ibid.)
- the legitimate discrimination in the housing market in order to maintain socially stable housing structures

In contrast, the Confederation of German Employers' Associations still considers the AGG unnecessary and as being a financial and bureaucratic burden for employers (I. 3; BDA 2006a, 2006b).

Beyond the assessment of purely legal aspects of the transposition, the aim of this study is to provide a preliminary evaluation of the potential and the impact of the AGG on the basis of interviews with different stakeholders in the field of policy in anti-discrimination and the labour market. As an analytical framework we examined the following questions:

1. What effect does the AGG have in terms of concrete cases?
2. What role does the Federal Anti-discrimination Authority (ADS) play? How reasonable is the ADS strategy of 'equal treatment as added value'?
3. What do job-seekers, employees and employers know about the AGG? Where do they get information?
4. Does the AGG contribute to an increased awareness or sense of empowerment? What relevance does the 'horizontal approach' have?
5. How is the category of discrimination on the grounds of religion dealt with?
6. What are the limitations of the AGG?

5.1 Effects of the AGG in Terms of Concrete Cases

It is common sense that neither the 'deluge' of lawsuits nor the disturbance of the peace in a company initially feared by opponents of the law proved to be valid (Lueg 2007). Also the phenomenon of so-called 'AGG-hoppers'⁴⁴ seems to be insignificant (ibid.). However, there is no comprehensive data collection on AGG-cases.

The first figures concerning all court cases in one *Land* during the first eight months of the AGG being in effect, were published by the Labour Court of the *Land* Baden-Wuerttemberg regarding the period from the 18th of August, 2006 to the 18th of April, 2007 (Landesarbeitsgericht 2007). All together there were 109 cases that applied to the AGG, which make up approximately 0.3 % of all cases before the labour courts in the first instance. The most frequent criterion of discrimination was age (36 %), followed by sex (28 %), disability (18 %), and ethnic origin (11 %). 73 % of these cases referred to direct discrimination, the other 27 % to indirect discrimination.

In July 2007 the ADS inquired about AGG-cases in all 16 Federal Labour Courts, to find that only 11 were able to provide data. In total they dealt with 393 cases (of which a significant number in Lower Saxony referred to one case of mass dismissals because of presumed age discrimination). Only Baden-Wuerttemberg, Lower Saxony and Bavaria specified the cases according to criteria of discrimination. The criteria age and sex are most frequently brought to

⁴⁴ The term refers to people who apply for a job for the sole purpose of claiming compensation when they are rejected. They openly mention their age or disability in the application and afterwards argue that they were discriminated against because of these attributes. Some lawyers and the BDA keep a record of such cases.

court, while cases related to the criterion ethnic origin or 'race' only account for 2 % to 14 % of court cases (table 1). Those related to religion or worldview are even more marginal. Often the AGG is only referred to as an additional argument to other aspects of a case. The relatively low numbers of cases may be a result of the still weakly pronounced consciousness of these forms of discrimination and lack of the necessary sense of empowerment in potential victims as will be discussed below.

Table 1: Court Cases

| Federal Labour Court | Cases with AGG-relevance | Based on the grounds of: | |
|----------------------------|--------------------------|--------------------------|--------------------|
| | | Ethnic Origin/'Race' | Worldview/Religion |
| Baden-Württemberg | 109 | 14 % | 1 % |
| Lower Saxony | 130 | 2 % | 2% |
| Bavaria | 70 | 13 % | -- |
| Total of 11 Federal States | 393 | ? | ? |

Source: ADS, inquiry from 31 July 2007, unpublished data (I. 1)

In addition, there is an unknown number of cases possibly related to discrimination that are judged, for instance, when a dismissal is invalid because of formal irregularities or other reasons without the issue of discrimination being part of the proceedings (I. 5). Finally, there are several cases that were solved out of court (I. 7, I. 10; ADNB of the TBB 2005a).

5.2 The Role of the Federal Antidiscrimination Authority and the Strategy of 'Equal Treatment as Added Value'

The Legal Position and Duties of the ADS

According to the AGG the Federal Government is obliged to install a Federal Antidiscrimination Authority (AGG, Art. 25-30). The ADS is concerned with discrimination on the grounds of 'race' and ethnicity, sex, religion or belief, disability, age, or sexual orientation. Following the 'horizontal approach' these criteria are regarded equal in relevance. The Authority is required to provide counselling and support of (potential) victims of discrimination. Further, its tasks are public relations, prevention of discrimination, and research, as long as these duties do not conflict with the responsibilities of the Commissioners of the Federal Government, such as the Commissioner of Migration and Integration, the Commissioner for *Aussiedler* (ethnic Germans) and National Minorities, or the Commissioner for the Disabled. The ADS is required to cooperate with these Commissioners, NGOs and other institutions in the field of anti-discrimination.

The director of the ADS is nominated by the Federal Minister for Family Affairs, Senior Citizens, Women and Youth; the ADS is organisationally affiliated with this Ministry, but independent from it. In a draft of the law, the director of the ADS was supposed to be nominated by the Federal President, which would have emphasised the exclusive and independent position of the Authority.⁴⁵ The German Association of Female Lawyers (*Deutscher Juristinnenbund* – DJB) and others argue that the ADS was downgraded to a department of this Ministry and will have difficulties cooperating with the Commissioners of the Federal Government as equals (DJB 2006).⁴⁶ My interview partners from the ADS

⁴⁵ For similar reasons the nomination of the advisory board by the Ministry instead of the parliament is criticised (DJB 2006: 11).

⁴⁶ On the question of the independence of the ADS, see also Hühn 2007.

maintained that initial difficulties in cooperating with the other institutions were part of a “normal process”. As a new authority the ADS has had to define its position within an already existing constellation of institutions which have “critically observed” it (I. 1). The interviewed representatives of NGOs voiced their impression that the ADS is somehow caught between the political resistance against it and its declared independence (I. 5, I. 8). In contrast, the BDA still deems the ADS as redundant bureaucracy and claims that its duties could have been overtaken by the Federal Commissioners (I. 3).

The ADS term of office depends on the legislative period of four years, which critics say is too short to effectively operate against discrimination (DJB 2006: 10). The ADS is not allowed to act as an advocate for individuals. Rather, the AGG determines its role as being able to “inform, arrange counselling through further institutions and to follow an objective of amicable agreement of the parties” (Art. 27 (2)). NGOs and lawyers claim that determining an aim of compromise restricts the independence of the ADS. The ADS should be free to decide as to which counsel it provides individuals – be it to initiate a precedence court case or not (I. 8; DJB 2006: 11). The access rights of the ADS to data are limited to other Federal authorities (Art. 28 AGG). The ADS may only request an item of written comment from the involved parties, like employers.

Aside from these restrictions, the ADS is further limited by insufficient financial and personal resources.⁴⁷ NGOs claim that these insufficient resources mean that the ADS is incapable of fulfilling its intended role, in particular of offer competent counselling throughout the country (I. 7, I. 8.). During the interviews with ADS staff members one got the impression that, although quite committed, the staff's activities are restricted by low personnel and specific skills.

The ADS in Practice

The ADS began operating the day the anti-discrimination legislation came into effect. During the first few months the Ministry supported the ADS by providing its own specialists for answering inquiries by phone or e-mail regarding the AGG (I. 1). In February 2007, Ms Martina Köppen (CDU), formerly a political representative of the German Conference of Catholic Bishops on the European level, was nominated director of the ADS. Since September 2007 the body is complete with 20 members of staff who work in three divisions: a) public relations; b) counselling research; and c) reports and recommendations. On 25 October 2007 the Advisory Board was installed. It is composed of 16 figures from politics and administration, sciences, economy and NGOs, the DGB and BDA.

On 9 November 2007 the ADS launched its website that has since been gradually developed.⁴⁸ It offers guidelines for employers and an online form for those affected by discrimination to lodge a complaint. The website provides general information about the ADS and anti-discrimination legislation. So far information on this website is only available in German. The only printed information the ADS provides is a small brochure with the AGG text. In this brochure the ADS is named as a contact point but gives no further details such as telephone number or opening hours. Independent organisations criticise the fact that the ADS has not yet “translated the AGG or the job description of the Authority into Turkish” (I. 10).

The ADS has no right of advocacy and in terms of personnel is not directly capable of offering counselling. Therefore, it puts focus on developing an encompassing data base of all counselling organisations and institutions in Germany in order for ADS councillors to be able

⁴⁷ The annual budget is estimated at 5.6 million Euro (Deutscher Bundestag 2006: 3). In contrast, in 2008 the anti-discrimination body in France HALDE has 11 million Euro at its disposal which is concerned with a smaller number of residents but certainly has more specific skills, tasks, and personnel (see Cleff Le Divellec/Merx 2008: 22, see also the report France of the EMILIE-project).

⁴⁸ <http://www.antidiskriminierungsstelle.de/>

to name reliable contact persons. The director of the ADS refers to a “multitude of counselling centres” and “very well developed regional and local structures and above all NGOs and charities” – an assessment not shared by activists in the field who state a need for more support in this respect (Köppen 2007a: 3, 5; I. 7, I. 8, I. 10).

Counselling by the ADS itself mainly takes place via telephone or email (see table 3). Barriers inhibiting personal contact with the ADS are quite high, especially for a person lacking sufficient German language skills or with inhibitions towards authorities. The ADS offices are in the Ministry of Family building on the sixth floor. One has to register with reception at the entrance and personal counselling is only offered by appointment. My interviewees stated that counselling in languages other than German has not been asked for until now but also admitted that this might have something to do with the lack of accordant offers.⁴⁹

The ADS has evaluated a total of 3,742 ‘counselling contacts’ between 31 July 2006 and 20 December 2007 and presented the following data (tables 2-4). These figures merge all sorts of contacts – be they of individuals affected by discrimination, employers who need information about their general obligations according the AGG, journalists or academics. The interviewed members of the ADS explained that the differentiation of statistics was currently one of their main tasks. Based on earlier statistics, in November 2007 the director of the ADS revealed that only 15 % (in table 4: 14 %) referred to “‘race’/ethnic origin” (Köppen 2007a: 5). She explained this low percentage with the good counselling infrastructure that already exists on the local level. On the other side, addressing this category would especially require encompassing public relations and the ADS plans to “do what is necessary in this respect” (ibid.). These plans were still open at the time of the interview (I. 1). Generally, Köppen deems the ‘horizontal approach’ of discrimination categories very reasonable (on the horizontal approach see below).

Table 2: Contacts between 31 July 2006 and 20 December 2007

| | |
|-------------------|----------------------------|
| Contacts in total | Of which multiple contacts |
| 3,742 | 1,120 |

Table 3: Medium of contact

| | | | | |
|--------|-----------|-----|--------|-------|
| E-mail | Telephone | Fax | Letter | Visit |
| 44 % | 29 % | 6 % | 20 % | 1 % |

Table 4: Related criteria of discrimination

| | | | | | |
|------------|------|------|----------------------|-----------------|--------------------|
| Disability | Sex | Age | ‘Race’/Ethnic Origin | Sexual Identity | Worldview/Religion |
| 27 % | 25 % | 24 % | 14 % | 5 % | 4 % |

Source tables 2-4: ADS, unpublished data (I. 1)

One intention of the ADS is to develop a more significant system of data processing. Although preliminary discussions have taken place in this respect it seems that the huge expertise of one NGO in particular – who have developed accordant computer software – have not yet been sufficiently utilised (I. 1, I. 10). A further aim is to evaluate the situation in Germany; therefore, the ADS initiated a survey on opinions among the population about anti-

⁴⁹ Counselling in English or French would be possible (I. 1).

discrimination politics and protection from discrimination. Apart from that the first activity report (mandatory every fourth year) is planned for 2009.

According to this strategy the ADS agreed on a “pact with business” (Köppen 2007a: 10). She launched a temporary interdisciplinary scientific commission on “Ethical Standards in Society as an Economic Advantage” that calculate the advantages of sustainable and ethical economic activities (ibid; I. 1).

Political guideline: “I want to inspire an appetite for diversity because it makes sense economically.” (Köppen 2007b)

The ADS declares it a main objective to relate the issue of “equal treatment – a human right” to the public (Köppen 2007a: 6). In the context of the 2007 ‘European Year of Equal Opportunities for All’ the first national conference was held on 29/30 November 2007. Participants from business, NGOs, politics and sciences gathered under the motto “Equal opportunities as added value”.⁵⁰ A second conference was organised on 23 April 2008, titled “Ethical Standards in Society as an Economic Advantage”.⁵¹ Köppen argues that equal opportunities and diversity implies “added value” for the individuals affected by discrimination, companies, and society. Equal treatment as a human right did not mean “new restrictions on society” but was “indispensable to a liberal society” (Köppen 2007a: 7). Despite this general approach, the conference titles and hitherto activities indicate the primary target of the awareness raising strategy of the ADS – namely the economy. Köppen explains: “If we want to anchor equal treatment as a common aim (...) we need to win over all important parts of society. One such part is the economy.” (ibid.) She sees the economy as the key to equal treatment in society: “If equal treatment is reality in companies, it has reached the centre of society.” (ibid. 9)

The director of the ADS gives business people the argument that equal treatment as added value means the welfare of the employees; and that ecological and social criteria were increasingly required in company reports. Companies would profit from diversity when they sought “new talented employees” as well benefiting from the “diverse talents of their staff” (ibid. 8). “Demographic change, shortage of skilled personnel and globalisation require creative management of knowledge and equal treatment in labour recruitment.” (ibid. 9) According to this strategy the ADS agreed on a “pact with business” (ibid.). She launched a temporary interdisciplinary scientific commission on “Ethical Standards in Society as an Economic Advantage” that calculate the advantages of sustainable and ethical economic activities (ibid. 10; I. 1).

Although Köppen stresses the principle of equal treatment as a human right, she apparently does not reflect the fact that her main rationale for equal treatment, namely “added value” may conflict with the principle of human rights. As long as companies follow market principles and the aim of profit maximising, the idea of diversity as enrichment may reach its limit when employees do not correspond to the assumed ‘enriching attributes’. The question of whether the strategy of “equal treatment as added value” as is discussed in the literature under the label of ‘diversity management’ (e.g. Vedder 2005, Wrench 2007) is compatible with a human rights and the social movement approach was one issue raised in the interviews for this study. Most of the interviewees from NGOs and trade unions said that, although these strategies are not mutually compatible on a principal level, on a practical level they go together quite well – for example, when in a company the work councils and management have to negotiate a Voluntary Industrial Relations Agreement on “Integration of Foreign Employees” or the “Fight against Racism and Xenophobia in the Company” (I. 5). Some dealt

⁵⁰ <http://www.antidiskriminierungsstelle.de/bmfsfj/generator/ADS/pressemitteilungen,did=104006.html>

⁵¹ <http://www.antidiskriminierungsstelle.de/bmfsfj/generator/ADS/pressemitteilungen,did=108890.html>

quite “pragmatically” with the issue, stating “I am pragmatic. (...) There is something happening in the companies and it does result in more equal opportunities.” (I. 7) As the claim for equality and anti-discrimination policies was still barely accepted in society, the interviewees saw a chance to win business people over by speaking their language:

“Generally, one has to give the issue a positive connotation which is always a problem for us.” (I. 10)

“The trade union represents the equality approach, but I have to admit that ‘diversity’ is an argument that opens many doors.” (I. 6)

In a way the interviewees showed respect for Ms Köppen’s approach and her courage to address the most reluctant part of society (I. 10). On the other hand they criticised the ADS for having lost a balance in its work by doing little to support both the counselling infrastructure and the NGOs.

Others feared that the position of NGOs and the human rights argument is weakened by the diversity management strategy. Moreover, it would manifest stereotypes:

“One is a bit sceptical and also angry, because they pretend nobody else has talked about diversity before.” Companies with diversity managers and “the Commissioner for Integration ... fight for leadership in opinion within the discourse on anti-discrimination.” (I. 9)

“It is clearly a contradiction. Participation does not play a role. (...) And it results in ascriptions to certain groups.” (I. 10)

“Why do I – as a person with a migration background – have to have a specific value? Why am I not colleague x like my colleague y? Why do I have to represent this economic value? What happens if I don’t do it as migrant?” (I. 6)

A trade unionist pointed out that diversity management was imposed from above. In contrast, a Voluntary Industrial Relations Agreement was the result of a critical discussion within a company which “makes much more sense” (I. 4).

In summary, the legal position and the specific skills of the ADS are generally considered insufficient. As for ADS practice, the slow implementation process was criticised, which is probably a result of the weak political support of the Authority. The ADS strategy of focussing on business in anti-discrimination awareness raising is regarded as reasonable and pragmatic, but at the same time, the limits of the approach of ‘equal treatment as added value’ are pointed to and the lack of support for an anti-discrimination network and of concerned individuals was severely criticised.

5.3 The Dispersion of Information about the AGG

According to the Eurobarometer in 2006 only 27 % of the population in Germany know their rights in the event of being subject to discrimination (European Commission 2007: 35).

Within the scope of this study it is not possible to evaluate what job-seekers, employees and employers know about the AGG and their related new rights and duties. The only evaluation mechanism available is on the basis of interviews with representatives of the different protagonists in the field of employment (and related publications).

The interviewed experts had no means of evaluating if and how employers fulfil their obligations of informing their employees about the AGG and whether they nominate an ombudsperson. The BDA supports its members with training, information leaflets, lectures and counselling. With respect to training the interviewee highlighted the fact that employers are not obliged to offer employee training. The advantage of an employer offering anti-

discrimination training can be that it may count as a positive indicator in favour of the employer in case of a discrimination claim. Therefore a company may calculate the costs of training of all its employees – for instance in a firm of 10,000 employees training would correspond to 10,000 working hours – in relation to the risk of a complaint of discrimination (I. 3).⁵²

The DGB has raised criticism concerning the ombudsperson being nominated by the employer without any involvement of the work councils. As this function may also be conducted by a member of the personnel division, the question is posed as to whether they are always able to gain the trust and act on the side of the people targeted by discrimination. Moreover, according to the people interviewed there is some doubt as to whether these ombudspersons are sufficiently trained (I. 6, I. 10).⁵³ One interviewee from an NGO recalled a case of discrimination in a municipal administration where no ombudsperson had been nominated (I. 10). Again, the mutual agreement on a Voluntary Industrial Relations Agreement was regarded as a more adequate instrument, as it may also include the implementation of an arbitration board, with equal representation of the parties from the company in question (I. 6, I. 5, I. 4).

Trade Unions and the Educational Institute of the Confederation of German Trade Unions published some brochures and checklists with information on the AGG. They organise conferences and training programs about the AGG mainly for work councils who are required to act as disseminators for their respective companies (I. 5, I. 4, I. 6). According to the interviews, work councils and union workplace representatives seem very interested in these training programs although some, especially those who have been active in equal treatment for some time on the basis of the Industrial Relations Act, asked what they need another law for (I. 6). Another positive effect of the AGG is seen in the fact that the trade union department for collective bargaining agreements is starting to evaluate collective agreements (I. 4).

NGOs complained that work councils have not been able to impart their knowledge to employees as conceived. The trade unions had not even managed to provide a brief information bulletin for all union members or a Turkish version of the AGG. One secretary of an NGO claims that rising numbers of clients required advice in the field of discrimination in the work place and assumes that these clients did not get sufficient support from work councils and trade unions (I.10). Other NGOs expressed their disappointment in the trade unions although union representatives had been very active in supporting the transposition of the EU-directives into German law (I. 7, I. 8, I. 10). Representatives of the DGB and its educational institute point out that trade unions are no exception to other sections of society when it comes to being “interculturally open” and sensitive to discrimination (I. 6, also I. 5).

Moreover, some interviewees complained about the reluctance of lawyers and judges to engage with the new law and respective cases. Further training for legal experts is considered of vital importance.

Despite these shortcomings on the side of employers, trade unions, work councils, and lawyers the AGG and most notably the huge media debate about it seem to have raised awareness about discrimination, especially among potentially concerned individuals, as will be shown in the next chapter.

⁵² Resistance of companies as reported by NGOs show that they are not willing to fully adopt the law (I. 10).

⁵³ With respect to the Berlin public administration my interviewee was convinced that training of ombudspersons was sufficient (I. 2).

5.4 Raising Awareness and Empowerment through the AGG and the Relevance of the Horizontal Approach

Regarding the possible role of the AGG as a means of awareness raising representatives of the employers' confederation principally argue that the state should not act as an educator of society. Moreover, the interviewee of the employers' organisation claims that the law had rather a negative effect on the behaviour of personal divisions, employers and the atmosphere in a company. Company representatives would now choose their words very carefully in order to avoid legal vulnerability. In the end job interviewees would become less lively and informative. If the state wanted to raise awareness of discrimination it should choose alternative means, such as campaigning (I. 3). In contrast, most interviewees from NGOs, trade unions and also from the 'Berlin *Land* Office for Equal Treatment – Against Discrimination' deemed the aim of consciousness-raising through means of a law as being legitimate and reasonable. In fact, they saw the main effect of the AGG on more general, awareness raising or symbolic levels, rather than on the level of concrete court cases. This regards a) individuals who may become subject to discrimination, b) interest groups and institutions active in anti-discrimination politics and c) society in general and the media, to which we only briefly refer to.

Individuals who are Subject to Discrimination

As indicated above some NGOs said they receive more inquiries regarding labour market discrimination since the AGG has been adopted, although they still see a gap between the dimensions of discrimination in the work place and the number of individuals who claim their cases (as revealed in the study of the ADNB of the TBB 2005a, see above; I. 7, I. 10). Even more the case is that individuals are reluctant to filing a law-suit. The reasons for this reluctance are seen in various barriers that particularly pertain to people with a migration background and people of colour. First, interviewees pointed to the psychological barriers that many people with migration background have to overcome. Especially since those subjected to discrimination have often experienced discrimination all their lives and therefore perceived discrimination as 'normal' (advd 2007; I. 7, I. 8, I. 10). These so-called 'biographies of discrimination' were said to lead to "strategies of avoidance and isolation" (I. 7, I. 10). In the past, NGOs observed resignation among individuals towards acting against discrimination (ADNB of the TBB 2005a). Persons concerned would often need a certain period of time to realise that what happened to them was discriminatory. Against this backdrop the deadline to lodge a claim of only two months was unrealistic. Second, victims of discrimination need time to gather information about their rights, to consult experts as to how to behave etc.⁵⁴ Third, financial barriers would restrain individuals subject to discrimination from going to court – who because of the structural dimension of discrimination often belong to lower social strata.

Despite these barriers NGOs observe a growing self-consciousness among people with a migration background over the last few years. They seem to be starting to realise their own "discrimination tradition" and the fact that they have legal rights that they can lay claim to (I. 7, I. 10, I. 6). The EU-directives and to an even greater degree the national law, have provided an "empowering" instrument for migrants (I. 7). This change of consciousness is still quite fragile because the issue of anti-discrimination and the AGG is hardly supported by the political parties and the media. Members of minorities felt that "there is a law I can rely on but it is not politically wanted" (I. 10). Further, the lack of broad jurisprudence and precedence court cases makes people hesitate before lodging a claim.

⁵⁴ In some cases the short time line prevented the parties from solving the problem amicably because the opponent, after having received the written complaint, immediately delegated the case to a lawyer (advd 2007).

Interest Groups and Institutions Active in Anti-Discrimination Politics – the ‘Horizontal Approach’

The German AGG follows the ‘horizontal approach’ of discrimination criteria. The six criteria are regarded equal in relevance, therefore cases involving multiple types of discrimination may come into focus and single criteria are not prioritised over others. Nevertheless, legal experts demur that the obligation under the ADS to forward certain cases to the respective Federal Commissioners (AGG, Art. 27 (2) conflicts with the idea of a horizontal approach (Hühn 2007).

The ADS regards one of its task as being to activate NGOs who traditionally only represent a single concerned group to cooperate with each other and to broaden their horizons. Anti-discrimination NGOs and institutions have organised themselves to form several networks on the local and state level. Participants of these networks report that the horizontal approach forces pressure groups to open up and sensitise to other forms of discrimination. Cases in point most frequently cited were homophobia within migrant organisations and vice versa racism and Islamophobia within gay/lesbian/bisexual/transgender lobby groups (I. 7, I. 8, I. 10, I. 2).⁵⁵ Most of the interviewees experienced the need to think ‘outside the square’ of their traditional clientele and having to cooperate with other organisations as being quite positive and enriching. In addition, multiple discrimination – e.g. as a Muslim and a woman – was quite frequent and could be dealt with according to the approach of intersectionality.

On the other hand the notion of the horizontal approach was criticised for several reasons. First, it was argued that the approach of six equal criteria of discrimination played down racism as a structural phenomenon. This opinion correlates to the fear that anti-racist groups would lose funding and support, which was even more problematic for them than with other lobby groups who were better established. Moreover, the secretary of an anti-racist NGO doubted whether single interest groups would be able to deal with all types of discrimination. Different lobby groups had different traditions and cultures which were not easily overcome and there was also discrimination between groups (I. 10.) Moreover, the legal framework for migrants was far more restrictive than that of, for instance, of people with disabilities. He underlined the necessity of expert knowledge that might vanish if one applied the horizontal approach. Referring to concrete considerations about assigning the function of a general anti-discrimination office to the hitherto communal commissioners for migration and integration or for gender equality, he feared that expert knowledge and funding would be reduced (I. 10). Finally, the expert on migration issues from the service sector trade union pointed to the problem that mutual sensitising reaches its limits very fast “when it comes to the distribution of negative effects”, i.e. mass layoffs, and simply lead to the question of “passing the buck” (I. 4).⁵⁶

Society and Media

Generally, the lack of an “anti-discrimination culture” in German society sketched in the beginning of this paper – in contrast to Anglo-Saxon countries – was as a major obstacle to broadly implementing anti-discrimination policies (I. 8). One interviewee criticised the fact that mainstream society was “not willing to share rights” (I. 10). Nevertheless, the interviewees shared the general impression that the broad media coverage during the phase of transposition of the anti-discrimination law contributed to a broader awareness of discrimination in society. On the other hand, many of those interviewed found it regrettable

⁵⁵ The TBB was one of the first organisations to tackle the issue with the implementation of the ADNB project.

⁵⁶ On the ambiguities of the horizontal approach see also Treichler 2004, pp. 89-92.

that the media coverage of the AGG was negative in most cases;⁵⁷ there was no positive campaign accompanying the implementation of the law.

5.5 Discrimination on the Grounds of Religion and the Question of Multiple Discrimination: the Case of *Diakonisches Werk Hamburg*

Discrimination on the grounds of religion is sanctioned by the AGG. The banning of discrimination on religious grounds, and especially anti-Semitism, is considered a moral matter-of-fact and a historical commitment. Already before the implementation of the AGG, the Federal Labour Court judged in favour of a Muslim saleswoman who had been dismissed because she had declared she would be wearing a headscarf after her return from maternity leave (BAG 2002). Nevertheless, it is striking that public debate rarely revolves around religious discrimination and examples specifically concerning the Islamic religion are barely quoted.⁵⁸ On the other hand, NGOs and for instance the ‘Berlin *Land* Office for Equal Treatment – Against Discrimination’, speak of a significant number of discrimination cases. A large number of these were concerning women wearing headscarves who were, for example, not invited to job interviews, bullied by a senior work colleague, or dismissed (I. 2, I. 10). As illustrated above cases related to religion seldom enter the courts. The awareness of this type of discrimination seems poor.

This lack of consciousness may partly be explained by the general increase of Islamophobic attitudes in society (e.g. ADNB 2005b). Moreover, certain juridical regulations provide a legal setting that seems to make raising awareness about the discrimination facing Muslims quite difficult. First, the ban on headscarves (and other religious symbols) in certain parts of the public sector in several states – e.g. in NRW and Berlin – seems to contribute towards the reluctance of private sector employers to employ women with headscarves (I. 2, I. 10). The Berlin *Land* Office for Equal Treatment conducts public relations on this issue and considers an investigation into the law banning the display of religious symbols (*Neutralitätsgesetz*) and its compatibility with the AGG before the Constitutional Court (I. 2; Senatsverwaltung 2008).⁵⁹

Second, the aforementioned clause in the AGG, which exempts the Christian churches from the main requirements of the AGG (Art. 9 (1), see chapter 2) contributes to a climate in which discrimination against Muslims is not acknowledged as such. Yet this issue has been under debate since February 2008 when the Labour Court Hamburg ordered one of the main charity organisations of the Protestant Church in Germany, *Diakonisches Werk* in Hamburg, to pay compensation of 3,900 Euro (three monthly earnings) to a complainant according to the AGG (Arbeitsgericht Hamburg 2007, also on the following). The complainant, a non-practicing Muslim woman, had applied as a supervisor/mediator for integration (*Integrationslotsin*) within an EU-funded project (*EQUAL*) that aims to support migrants in job seeking. Months after submitting her application, the employer declared that the applicant had to be a Christian and asked the plaintiff if she was willing to convert to Christianity. She replied that for practical reasons she was willing but questioned whether it would be in accordance with their ethics to have her convert for purely pragmatic reasons (Khue Pham/Musharbash 2007). Subsequently her application was denied with a standard letter. The plaintiff felt discriminated against – directly because of her religion and indirectly because of her ethnic origin. The

⁵⁷ To quote an example from the tabloid press: the court case described in the following paragraph was reported of under the heading “Three monthly earning for zero work” (*3 Gehälter für null Arbeit*), no author (2008).

⁵⁸ A significant case in point is the opening session of the second conference of the ADS, 23 April 2008, where the issue of discrimination on the grounds of religion had hardly been mentioned (own observation).

⁵⁹ Similarly, the ARIC-NRW is planning a leaflet on the issue (I. 10).

Charity defended its decision referring to the clause exempting churches from the AGG (Art. 9 (1)).

The case is highly interesting for two reasons: first, because the court agreed with the claim of discrimination on the grounds of religion and, second, because it rejected the claim of multiple discrimination. The court argued that article 9 (1), AGG, was too general and not consistent with the EU-directive 2000/78/EC. The court claimed that one has to differentiate from employment closely related to the Christian annunciation and others that do not, arguing that the function of an integration supervisor is not one necessarily concerning Christian annunciation. The case is regarded as a precedence case: If it is not revised in the next level of jurisdiction, (the *Diakonie* has already announced its decision to appeal against the judgement), it may have decisive consequences on the employment practices of Christian organisations.⁶⁰

Second, the plaintiff argued that there was an issue of indirect discrimination on grounds of ethnicity since the condition that the applicant should belong to a Christian Church adversely and disproportionately affects the part of the population which is almost exclusively of non-German origin. The Turkish (non-Christian) population constitutes the largest ethnic and religious minority. The court rejected the claim of simultaneous discrimination on the grounds of religion (direct) and ethnicity (indirect). Instead the court argued ethnic discrimination would only be the case if the *Diakonie* had only pretended not to employ the plaintiff because of her religion but in fact did not want her because of her ethnicity. So in a way the court ignores the possibility of the convergence of multiple types of discrimination – as it is stated in the AGG (Art. 5) and underlined by the ADS.

Moreover, the court accepted the argument of the Protestant Church that since the church eventually employed a woman born in India meant that the employer's decision was free of discrimination on the grounds of ethnicity. This line of argument, however, implies that 'ethnicity' is a homogenous category, meaning anybody 'not German'. In fact, the further line of argument of the *Diakonie* reveals that it immanently differentiates between certain ethnic groups. It says:

“The aim of the project ‘supervisor/mediator for integration’ was not that the assigned employee – on the grounds of his/her own person [in the sense of biography, FM] – should have a specific relatedness/ closeness with the target group of migrants. It is precisely the objective of the project to accompany the integration of migrants into society; this can regularly only be accomplished by a person not coming from the migrant group to be supervised.” (Arbeitsgericht Hamburg 2007: 6)

From this argument we can assume that migrants of Turkish background constitute one main target group for the integration supervisor. Furthermore, the *Diakonie* indirectly brings forward the argument that social workers from the same ethnic group contribute to parallel lives, ghettoisation etc., irrespective their specific skills and abilities in social work. The *Diakonie* not only refutes the approach of social work that supports social workers with a migration background from the target group and with intercultural abilities as they may access the people more successfully. In contrast, it precisely concludes from the attribute of being of Turkish origin that the applicant would lack skills; even more the *Dikaonie* suggests that an applicant of Turkish origin would have negative effects on the integration task.⁶¹

⁶⁰ On the case, see e.g. Humanistischer Pressedienst 2008; Khue Pham/Musharbash 2007.

⁶¹ On multiple discrimination see also the case of a Turkish-German woman who claims being discriminated against by an insurance company because of ethnicity, religion and gender. She could not return to her former position after pregnancy leave. The case might also become a precedent because she is claiming the comparably high compensation sum of 500,000 Euro. The judgement will be announced on 18 December 2008 (Preuß 2008; Hawley 2008; ArbG Wiesbaden 2008).

5.6 Limitations of the AGG

Aside from critique regarding the full transposition of the EU-directives, some interviewees commented critically on the potential and effectiveness of the AGG. One trade unionist interviewed generally supported the law and deemed it necessary, but thought one should be realistic about its ramifications (I. 4) since the current law was not able to tackle structural discrimination. In fact, the law would not help the increasing numbers of employees in insecure employment relationships, or in small firms where employees were not represented by working councils or trade unions. In practice, the AGG would be only relevant for those who already had social rights, insurance etc. Firms acting outside this framework would not implement required procedures and practices and employees would not dare complain for fear of losing their jobs; the pressure to keep their jobs and earn money was far greater than the importance of making a stand against discrimination – this refers especially undocumented migrants, since they have little chance of claiming their rights (I. 4, I. 5). Moreover, the trade union representative pointed to the effects of the European adjustment of the labour market. The EU-requirements as agreed upon in the Treaty of Amsterdam (1997) to privatise parts of the public sector had contributed to the social downgrading of numerous employees in Germany, such as in the transport, cleaning and care branches. The requirement of social standards in EU calls for tenders would be a more successful anti-discrimination policy (I. 4). Others pointed out that the aforementioned lack of an anti-discrimination culture in society could not be tackled by the AGG alone (I. 7, I. 8, 10).

Summary and Concluding Remarks

In this report we traced and analysed the process of the transposition and implementation of the anti-discrimination EU-directives in Germany. Moreover, on the basis of expert interviews with main protagonists from fields relevant to the application of anti-discrimination legislation with respect to the labour market, we aimed to preliminarily assess the relevance of the AGG at this – admittedly very early – stage of having been in force for a year and a half.

Germany has transposed the EU-directives on Race Equality and Employment Equality significantly late, finally under the threat of severe penalties from the EU-Commission. The fact that the legislator chose the title of ‘German General Equal Treatment Law’ instead of the former version of ‘Anti-Discrimination Law’ just highlights the prevailing attitude regarding the issue of discrimination in Germany. Awareness of discrimination in society is poor; discriminatory structures and institutional settings as well as direct discriminatory behaviour are quite often not perceived as such but regarded as ‘normality’. Nevertheless, there is significant evidence of institutional, structural and direct discrimination on the grounds of ethnicity or ‘race’, religion or belief (and other categories we did not focus on in this report) in the labour market and at the work place. Still, data is insufficient, which itself is a consequence of poor awareness of discrimination; in addition to which data collection according to certain categories is a quite controversial issue. In the past anti-discrimination policies have only been implemented on a small scale and mainly by NGOs or single municipalities.

The proposition of confronting discrimination with comprehensive legislation was met by significant resistance from representatives of the Conservative Party (CDU), the Free Democrats (FDP) and employers’ organisations. The main arguments brought forward were

that the law would impose unnecessary bureaucracy, financial burden and legal uncertainty on employers, constrict the principle of contractual freedom and interfere with private autonomy, provide minorities with privileges, exceed the EU-directives, and that the law was unnecessary since there was no relevant discrimination in Germany that could not be sanctioned by existing legislation. In contrast, supporters of the law argued that freedom from discrimination is a basic right, that the law secures a human right and that anti-discrimination legislation does not restrict freedom, rather it guarantees more freedom for those who are disadvantaged in society.

The AGG itself partly goes beyond the requirements of the EU-directives. This refers in particular to the adoption of the ‘horizontal approach’, meaning the inclusion of all six criteria of discrimination (‘race’/ethnic origin, gender, religion/worldview, handicap, age, sexual identity/orientation) not only into labour law, but also into civil law, as well as applying all of these criteria to the responsibility of the Federal Antidiscrimination Authority.

At the same time, the law is deficient and imprecise in parts, some of which may be the result of the time pressure under which the law was eventually adopted. Other shortcomings are the incompatibilities with the EU-directives – something already criticised by the EU-Commission. NGOs, trade unions and lawyers’ organisations share this critique but are even more critical in their assessment of the law. The main critique regarding labour law focuses on: short deadlines to lodge a claim, the limitation of NGOs’ right to participate in legal proceedings to defend victims of discrimination, the burden of proof regulation, the fact that ‘language’ is not included as a category of discrimination as it is not clearly an element of the category ‘ethnic origin’, insufficient support of a counselling network, and the limited specific skills and equipment of the ADS.

It is still too early to conclusively answer questions concerning the implementation and relevance of the AGG. However it does seem that the AGG carries little relevance in court cases where there are almost no precedents that might have ramifications on the behaviour of employers or colleagues. This may be a result of a similarly low level of awareness among both lawyers and judges as well individuals affected by discrimination. On the other hand, several experts share the opinion that the AGG and the – even prevalingly negative – media coverage during the parliamentary process of its transposition contributed to a growing consciousness and sense of empowerment among discriminated since they now have a legal instrument to utilise against discrimination. Be that as it may, relevant agents such as the ADS itself, private and public employers, trade unions, work councils, lawyers and judges, have to improve awareness training both in society as well as between themselves and their employees while addressing the task at hand of fostering support for individuals who might be subject to discrimination.

When investigating the political strategy the ADS has developed so far, it is doubtful whether this strategy is appropriate for achieving the aim of effectively implementing the AGG and an anti-discrimination culture in society. The ADS mainly focuses on business and argues that diversity management is economically advantageous, seeing ‘equal treatment as added value’. This is accompanied by a human rights approach without convincingly reflecting upon the potential conflict between these two approaches. NGOs criticise the fact that in practice the ADS does not significantly engage in the development of an encompassing support infrastructure. Several representatives of NGOs and trade unions are quite pragmatic about the arguments for diversity management as a means to convince those who oppose a straight anti-discrimination policy. In fact, in individual companies these opposing strategies seem to go together quite well – which incidentally, was already the case before the AGG through the creation of Voluntary Industrial Relations Agreements based on the Industrial Relations Act. On the other hand, NGOs and some trade unionist point to the limitations of the diversity management approach as being that it is more oriented towards economic benefits than equal

rights. Questionable is then how cases posing high costs can be legitimised on the grounds of the diversity management argument. Moreover, the diversity management approach potentially strengthens stereotypes.

Second, this so-called horizontal approach often stressed by the director of the ADS as being a crucial AGG element in tackling cases of multiple discrimination, actually appears to be quite ambiguous. The ability of the ADS to deal with cases of simultaneous multiple types of discrimination seems to be restricted by the legal obligation to forward certain cases to the respective Federal Commissioners, instead of keeping them within its own sphere of responsibility. Second, individual legal court cases showed the reluctance or even resistance of judges in acknowledging the possibility of multiple discriminations. Interestingly enough, here the ADS seems to focus on the work of NGOs who could benefit from thinking 'outside the square' of their traditional clientele and encouraging them to cooperate with other organisations. Several NGOs and other protagonists appreciate this approach as enriching and sensitising. On the other hand some fear the loss of group-specific skills. Even more, the horizontal approach potentially downplays discrimination on the ground of 'race' or ethnicity and Islamophobia making it even harder to raise substantial support against it.

On a more general level, the limitations of anti-discrimination legislation have to be recognised since the task of raising awareness cannot be accomplished by simply creating a new law. A state or media campaign in favour of anti-discrimination policies has not taken place. Moreover, the law is relatively ineffective in those segments of the labour market characterised by a substantial lack of social rights and highly insecure employment relationships.

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Interviews

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- I. 2 Deputy Director of the Berlin Land Office For Equal Treatment – Against Discrimination (*Berliner Landesstelle für Gleichbehandlung – gegen Diskriminierung – LADS*), Berlin female, 17 March 2008
- I. 3 Member of the division Labour Law, Confederation of German Employers’ Associations (*Bundesvereinigung der Deutschen Arbeitgeberverbände – BDA*), Berlin, 31 January 2008
- I. 4 Head of division Migration Politics/Foreign Labour, federal trade union for the service sector (*ver.di. Vereinigte Dienstleistungsgewerkschaft, Bundesverband*), Berlin, female, 21 February 2007
- I. 5 Head of division Migration and Antiracism Politics, Confederation of German Trade Unions, Federal Board (*DGB Bundesvorstand*), Berlin, male, 22 January 2008
- I. 6 Head of the division Center of Excellence Law, Educational Institute of the Confederation of German Trade Unions (*DGB-Bildungswerk*), Düsseldorf, male, 29 February 2008
- I. 7 Project manager of the Anti-discrimination Network Berlin of the Turkish Union Berlin-Brandenburg (*Antidiskriminierungsnetzwerk Berlin des Türkischen Bundes Berlin-Brandenburg – ADNB of the TBB*), Berlin, male, 16 January 2008
- I. 8 Member of the Alliance Against Ethnic Discrimination in the Federal Republic of Germany (*Bund gegen ethnische Diskriminierung in der Bundesrepublik Deutschland e.V. - BDB*), Berlin, female, 18 January 2008
- I. 9 Secretary of the Anti-Racist Intercultural Information Centre Berlin (*Antirassistisch-Interkulturelles Informationszentrum - ARIC Berlin*), member of Forum Against Racism (*Forum gegen Rassismus*) and Network Against Racism (*Netz gegen Rassismus*), Berlin, female, 04 February 2008

I. 10 Secretary of the Anti-Racism Information Centre North Rhine-Westphalia (*Anti-Rassismus Informations-Centrum – ARIC-NRW*), Duisburg, male, 29 February 2008

Abbreviations

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|--------------------|---|
| ADB | <i>Anti-Diskriminierungsbüro Berlin</i> |
| ADNB of the TBB | <i>Antidiskriminierungsnetzwerk Berlin der Türkischen Union Berlin-Brandenburg</i> Anti-discrimination Network Berlin of the Turkish Union in Berlin-Brandenburg |
| ADS | Antidiscrimination Body of the Federal Government (<i>Antidiskriminierungsstelle des Bundes</i>) |
| advd | <i>Antidiskriminierungsverband Deutschland</i> – (Anti-Discrimination Alliance Germany) |
| AGG | German General Equal Treatment Law (<i>Gesetz zur Umsetzung europäischer Richtlinien zur Verwirklichung des Grundsatzes der Gleichbehandlung – Allgemeines Gleichbehandlungsgesetz</i>) |
| ArbG | <i>Arbeitsgericht</i> (Labour Court) |
| ARIC | Anti-Racism Information Centre (<i>Anti-Rassismus Informations-Centrum</i>) |
| Art. | Article |
| AufenthG | Residence Act (<i>Gesetz über den Aufenthalt, die Erwerbstätigkeit und die Integration von Ausländern im Bundesgebiet – Aufenthaltsgesetz</i>) |
| BAG | Bundesarbeitsgericht (<i>Federal Labour Court</i>) |
| BDA | Confederation of German Employers' Associations (<i>Bundesvereinigung der Deutschen Arbeitgeberverbände</i>) |
| BetrVG | Industrial Relations Act (<i>Betriebsverfassungsgesetz</i>) |
| BGB | <i>Bürgerliches Gesetzbuch</i> (Civil Code) |
| BGBI. | <i>Bundesgesetzblatt</i> |
| CDU | Christian Democratic Union |
| DGB | Federation of German Trade Unions (<i>Deutscher Gewerkschaftsbund</i>) |
| DJB | German Association of Female Lawyers (<i>Deutscher Juristinnenbund</i>) |
| Drs | <i>Drucksache</i> (printed matter) |
| efms | european forum for migration studies |
| EU | European Union |
| EUMC | European Monitoring Centre on Racism and Xenophobia |
| F.A.Z. | <i>Frankfurter Allgemeine Zeitung</i> |
| I. | Interview |
| ILO | International Labour Organisation |
| NFP | National Focal Point |
| NGO | non-governmental organisation |
| NRW | North Rhine-Westphalia |
| SPD | Social Democratic Party |
| TBB | <i>Türkischer Bund in Berlin-Brandenburg</i> |
| WP | Work package |
| ZfT | Center for Studies on Turkey (<i>Zentrum für Türkeistudien</i>) |