RAPHAEL WON-PIL SUH*
RICHARD BALES†

German and European Employment Discrimination Policy

OUTLINE

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* Bachelor of Laws, University of Cologne (Universität zu Köln). Mr. Suh currently is a Graduate Assistant at the Institute of Insurance Law of the University of Cologne (Institut für Versicherungsrecht, Universität zu Köln) under Prof. Dr. Dr. h. c. Ulrich Hübner, and a Visiting Scholar at Northern Kentucky University, Salmon P. Chase College of Law. Mr. Suh is writing his Ph.D. thesis on "Employment Practices Liability Insurance in the USA and in Germany." The author would like to thank his family for their support and for giving him the opportunity to conduct his research.

† Professor of Law, Northern Kentucky University, Salmon P. Chase College of Law. Special thanks to Lois Houchins for her secretarial assistance and to Dean Gerard St. Amand for making it possible to invite Mr. Suh to Chase as a Visiting Scholar.

INTRODUCTION

German employment discrimination law is in considerable flux. German law does not protect private-sector employees from discrimination on the basis of race, ethnic origin, religion, or sexual orientation, and it provides only limited protection from sexual harassment and discrimination on the basis of sex, disability, and age. The European Union (EU), however, has issued two anti-discrimination directives requiring EU member states to offer protection from employment discrimination far greater than the protection currently afforded by German law. Recent political instability in Germany has impeded the reform of German employment discrimination law, leaving tremendous uncertainty about what the future will bring.

The United States has a long history of prohibiting employment discrimination, at least in comparison to most other countries. In 1964, the United States Congress passed Title VII of the Civil Rights Act (Title VII),[1] prohibiting employment discrimination in both the public and private sector based on race, color, religion, sex, and national origin. Congress enacted the Age Discrimination in Employment Act[2] (ADEA) in 1967 and the Americans with Disabilities Act[3] (ADA) in 1990. These acts ban employ-

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[1] Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e (2000).
[2] The Age Discrimination in Employment Act, 29 U.S.C. § 623 (2000).
[3] The Americans with Disabilities Act, 42 U.S.C. § 12101 (2000).

ment discrimination on the basis of age and disability. State statutes and common law decisions provide additional protection to American employees.[4] Employers who discriminate often pay high damage awards as the price for non-compliance with anti-discrimination laws.[5] Thus, the United States offers employees a high degree of protection from discrimination in the workplace compared to Germany.

The European Union has taken dramatic steps over the last decade to equal—and with regard to sexual orientation to surpass—the anti-discrimination protection available in the United States. The EU is founded, "on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law,"[6] principles that are common to all member states. Moreover, the right to equality before the law and the protection of all people from discrimination, together with the respect for and promotion of the rights of minorities, is essential to the proper functioning of democratic societies.[7] Therefore, strategies and activities to combat racism, xenophobia, and anti-

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[4] R. Bales, *A New Direction for American Labor Law: Individual Autonomy and the Compulsory Arbitration of Individual Employment Rights*, 30 HOU. L. REV. 1863, 1876-78 (1994); Clyde W. Summers, *Labor Law As the Century Turns: A Changing of the Guard*, 67 NEB. L. REV. 7, 13 (1988).

[5] A study by *Betterly Risk Consultants, Inc.* indicated that the average employment practices award was $458,997 with the median award being $96,500. The awards ranged from $6,400 to $4,500,000. If defense costs are added, the average cost to businesses would be nearly $1,000,000. Richard S. Betterly, *The Betterly Report*, *in* EMPLOYMENT PRACTICES LIABILITY INSURANCE MARKET SURVEY 2004, *available at* http://www.betterley.com/adobe/EPLI04_nt.pdf.

[6] Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts, Oct. 2, 1997, 1997 O.J. (C 340) 1, art. 6.1, para. 1 [hereinafter EC Treaty].

[7] *See* Rudolf Streinz, Europarect, 5th ed. (2001).

semitism form an integral part of the European Union's work on equality, justice, and social inclusion.[8]

Although the European Union and its Member States do not grant individuals a legally enforceable right to redress, international agreements such as the UN Covenant on Civil and Political Rights, the UN Covenant on Economic, Social and Cultural Rights (1966),[9] and the European Convention on Human Rights and Fundamental Freedoms (1950),[10] exemplify the commitment of the international and European communities to guarantee freedom from discrimination.

Since the European Convention on Human Rights and Fundamental Freedoms was signed, support at the European Community level to combat discrimination has been expressed through a variety of joint declarations, charters, resolutions, and legislation related to the promotion of equal opportunities and equal treatment of men and

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[8] Council Regulation 1035/67, 1997 O.J. (L 151) 1 (establishing the European Monitoring Centre on Racism and Xenophobia (EUMC)). The Centre's primary task is to "provide the Community and its Member States with objective, reliable and comparable information and data on racism, xenophobia, islamophobia and anti-Semitism at the European level in order to help the EU and its Member States to establish measures or formulate courses of action against racism and xenophobia."

[9] International Covenant on Civil and Political Rights, 999 U.N.T.S. 171 (1966); International Covenant on Economic, Social and Cultural Rights, 993 U.N.T.S. 3 (1966).

[10] Convention for the Protection of Human Rights and Fundamental Freedoms, 213 U.N.T.S. 221 (1950). The European Court of Human Rights and the European Commission of Human Rights sit in Strasbourg and individuals, as well as Member States, may take complaints of human rights violations directly before the court. Jurisdiction over Member States is compulsory. All Member States of the European Union have ratified the Convention. The European Court of Human Rights is separate and apart from the European Court of Justice and the other mechanisms of the EU, such as the European Commission and the Council.

women.[11] In 1997, the fifteen (now twenty-five) Member States of the European Community approved unanimously the Treaty of Amsterdam.[12] Article 13 of that treaty grants the European Community the power to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age, and sexual orientation. On this basis, the European Community enacted two directives in 2000 that broadly prohibited employment discrimination. The first directive, the *Racial Equality Directive*,[13] protects people in the EU from being discriminated against on the basis of race and ethnic origin. The second directive, the *Employment Framework Directive*,[14] provides protection on the basis of religion, belief, disability, age, and sexual orientation. These two anti-discrimination directives collectively provide a set of principles offering everyone in the European Union a common minimum level of legal protection against discrimination.[15]

Both anti-discrimination directives were unanimously agreed to by the European Union governments, including Germany. All EU Member States were required to transpose the directives into national laws by the end of 2003.[16]

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[11] *See e.g.*, Proposal for a Directive of the European Parliament and of the Council on the Implementation of the Principle of Equal Opportunities and Equal Treatment of Men and Women in Matters of Employment and Occupation, COM (2004) 279, *available at* http://europa.eu.int/scadplus/leg/en/cha/c10940.htm.

[12] *See* EC Treaty, *supra* note 6.

[13] Council Directive 2000/43/EC, 2000 O.J. (L 180) 22 (implementing the principle of equal treatment between people irrespective of racial or ethnic origin), [hereinafter Racial Equality Directive].

[14] Council Directive 2000/78/EC, 2000 O.J. (L 303) 16 (establishing a general framework for equal treatment in employment and occupation), [hereinafter Employment Framework Directive].

[15] Racial Equality Directive, *supra* note 13, paras. 16, 19; *see also id.* at para. 29.

[16] The Racial Equality Directive had to be transposed into national law by July 19, 2003, Racial Equality Directive, *supra* note 13, art. 16; the implementation of the Employment Framework Directive was due by

This process, however, has not been completed uniformly in the EU countries. For those that did not meet the deadlines for compliance and have not requested an extension period, the European Community has now initiated infringement procedures to ensure that transposition occurs.[17]

Dec. 2, 2003, Employment Framework Directive, *supra* note 14, art. 18.

[17] If the European Commission believes that a Member State has breached Community law, *e.g.*, the non-transposition of a directive on time, it is entitled to initiate an "infringement procedure" under Article 226, EC Treaty. Then, one of two, or even both, preliminary processes described below will be launched by the European Commission aiming to resolve the issue as quickly as possible with the Member State in question. The European Commission declares the procedure as follows:

> These two processes are:
>
> 1. "Non-communication," where a Member State will be notified that it has failed to communicate to the European Commission its national measures implementing the EC legislation by the required deadline for transposition. The Member State will initially be given a 2-month phase to communicate its reasons.
> 2. "Non-conformity," where a Member State will be notified by the European Commission that its national measures do not conform with the Directive(s) in question. The Member State will be given a reasonable time by the European Commission to put its legislation in conformity.
>
> If the procedure is not settled during the preliminary stages of the infringement procedure process and the European Commission is of the reasoned opinion that a Member State is still in breach of Community law, the European Court of Justice (ECJ) will be called on to pronounce on the matter. If the ECJ upholds the case, it may impose a financial penalty on the Member State in question under Article 228 EC Treaty, if the Member State does not comply with the judgment.

EUROPA, European Commission, Employment and Social Affairs, Anti-Discrimination and Relations with Civil Society, *available at*

Germany is one of the non-compliant countries.[18]

This article contrasts current German anti-discrimination law with the EU anti-discrimination directives and, finding that German law falls short, urges German legislators to speedily bring Germany into compliance. Part I describes the current status of German anti-discrimination law. Part II describes the EU legislative process of issuing directives generally, describes the anti-discrimination directives specifically, and compares German law to the requirements of the anti-discrimination directives. Part III presents the steps taken thus far by the German government to transpose the directives into national law. Part IV recommends that German legislators act quickly to effect such a transposition and to significantly expand German legal protection against workplace discrimination.

I
GERMAN ANTI-DISCRIMINATION LAW

A
Federal Constitution

The cornerstones of current German anti-discrimination law are the anti-discrimination clauses of the German Constitution. Article 3, [19] in particular, is notable for providing

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http://europa.eu.int/comm/employment_social/fundamental_rights/legis/lginfringe_en.htm.

[18] Failed enactment is not solely a German phenomenon; other European countries also have experienced difficulties embracing the new laws. For an overview on the progress of transposition among the EU Member States, see http://europa.eu.int/comm/employment_social/fundamental_rights/public/pubst_de.htm.

[19] Article 3 states:

(1) All persons shall be equal before the law.

that all persons shall be equal before the law. Article 3.1 states that "no one may be favored or disfavored because of sex, parentage, race, language, homeland and origin, faith or religious or political opinions."[20] Similarly, Article 3.3 provides that "no person shall be disfavored because of disability," and Article 3.2 requires equality between men and women. A victim suffering from a discriminatory act by any public body can invoke Article 3 before an administrative court or seek a legal remedy from the Federal Constitutional Court.[21] Decisions of the Federal Constitutional Court are legally binding on any public authority, including courts.[22]

The fundamental rights of the German Constitution have no horizontal effect on citizens in their private sphere, but instead are civil rights of the citizens against intrusions of state power.[23] The basic right to equal treatment, conse-

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> (2) Men and women shall have equal rights. The state shall promote the actual implementation of equal rights for women and men and take steps to eliminate disadvantages that now exist.
> (3) No one shall be favored or disfavored because of sex, parentage, race, language, homeland and origin, faith, or religious or political opinions. No person shall be disfavored because of disability.

Grundgesetz für die Bundesrepublik Deutschland (federal constitution), GG, art. 3 (1949) [hereinafter German GG].

[20] A summary of the German legal situation in 1990 is given by Rüdinger Wolfrum, *Das Verbot der Rassendiskriminierung im Spannungsfeld zwischen dem Schutz individueller Freiheitsrechte und der Verpflichtung des einzelnen im Allgemeininteresse*, *in* KRITIK UND VERTAUEN, FESTSCHRIFT FÜR PETER SCHNEIDER ZUM 70, 515 (1990).

[21] The common way to do this is by filing an appeal on an institutional issue (Verfassungsbeschwerde), GG, *supra* note 19, art. 90.

[22] *See* Bürgerliches Gesetzbuch [BGB] [Civil Code] Mar. 12, 1951, Reichsgesetzblatt [BGBl] I 243, § 31 (Federal Constitution Court Act).

[23] There are a few exceptions from this general rule. An example of a right also binding on private parties is the guarantee of human dignity contained in Article 1.1. Article 9.3. of the German Constitution states

quently, is directly binding only on the executive bodies of the state, *i.e.*, the authorities representing the legislative, executive and judicial branches of government.[24] However, since the judiciary is bound to the rules of the German Constitution, all judges must interpret and apply the national laws in light of the German Constitution.[25] Thus, Articles 3.1 and 3.3 have "limited indirect horizontal effect" according to German constitutional doctrine. In other words, the constitutional anti-discrimination clauses must be applied by civil law judges in the context of interpreting general clauses in civil law.[26]

In the legal hierarchy under the German Constitution, specific federal laws cover certain, but not all, forms of workplace discrimination.

B

Works Constitution Act, Section 75

According to Section 75 of the Works Constitution Act,[27] employers and works councils must ensure that all employees are treated in conformity with the principles of

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that any "agreements that restrict or seek to impair this right shall be null and void." GG, *supra* note 19, art. 9(3).

[24] Bundesverfassungsgericht [BVerfG] [federal constitutional court] 1995 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 198 (F.R.G).

[25] *Id.*; *Selbmann*, 2 European Yearbook of Minority Issues (2002/03), 675; *Ress*, DÖV 1994, 489.

[26] This legal issue is similar to the situation in which a European directive has not been implemented on time. The directive has no direct effect on the citizens of the European Union, but if it comes to a case, the national judges have to interpret the national law in light of the EC directive (*europarechtskonforme Auslegung nationaler Vorschriften*), in detail see Part II, Section D.

[27] Betriebsverfassungsgesetz [Works Constitution Act], Jan. 15, 1972, BGBl. I at 13 (F.R.G.) [hereinafter Works Constitution Act].

law and fairness, and, in particular, that nobody is discriminated against because of his or her religion, nationality, origin, political or trade union activities or opinions, gender, or sexual orientation.[28] However, the Works Constitution Act applies only to private-sector companies in which a works council must be founded, *i.e.*, a company with at least five permanent employees.[29] Furthermore, Section 75 of this Act does not apply to discrimination in recruitment; it only applies to discriminatory *treatment* of *current* employees.[30] Finally, the Act does not apply to enterprises and organizations which are "directly and predominantly of a political, coalitional, confessional, charitable, educational, academic or artistic nature or which serve to report information or express an opinion, in as much as this would conflict with the nature of the said enterprise or organisation."[31] A discriminated-against employee falling into one of these broad exemptions has only one legal recourse: to invoke the employer's general obligation to take care of the employer's employees.[32]

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[28] Disability is not covered under the Works Constitution Act.

[29] Works Constitution Act, *supra* note 27, § 1.1.

[30] For further details see *Klevemann*, Ausländische Arbeitnehmer und Betriebsrat, Arbeitsrecht im Betrieb 1993 at 529.

[31] Works Constitution Act, *supra* note 27, § 118.1.

[32] According to §618 Civil Law Code, Bürgerliches Gesetzbuch, Aug. 18, 1896, Reichsgesetzblatt [RGBl] 195, every employer has a general duty to take care of his employees, i.e. he has to provide a work environment that prevents the employees from any harm to their health and life. If an employer fails to fulfill his duty of care, tort law applies according to §618.3 Civil Law Code.

C
Gender Discrimination

In 1976, the European Commission issued the gender-equality directive[33] to strengthen the rights of women in the workplace. It obligated the Member States of the European Union to implement laws prohibiting gender discrimination in employment.[34] Pursuant to this directive, the German Parliament enacted Civil Law Code Section 611(a), prohibiting employers from discriminating on the basis of sex. However, as discussed below, Section 611(a) is a weak anti-discrimination law, providing little protection to women in the German workplace.

1) Indispensable Requirement

Section 611a of the German Civil Law Code expressly permits an employer to discriminate on the basis of gender if it is an "indispensable requirement" for the job. Since the establishment of Section 611(a) in the Civil Law Code in 1985, the German courts have not established a uniform definition of the "indispensable requirement."[35] However, it generally can be said that the indispensability must result from the employment itself, meaning that a person of the other sex could not perform the intended employment.[36] An obvious example is when the authentic per-

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[33] Council Directive 76/207, 1976 O.J. (L 309) 40 (EC), on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions.

[34] *See Steindorff* RdA 1988 at 129.

[36] Peter Hanau *in* Festschrift für Lüderitz (2000) at 248; Hans Putzo *in* Palandt, § 611a BGB 11; Müller-Glöge *in* MünchKomm, § 611a BGB 26.

formance of a job depends on a typical sex,[37] such as an actor/actress or model. Indispensability also exists—and discrimination is permitted—if the employer can show that "business necessity" outweighs the equal treatment interest of the employee.[38] An employer can make this showing by demonstrating that its customers or other persons with whom the employer has contact either expect or demand that the job position will be filled by a person of a specific gender. Thus, customer preference can justify gender discrimination if non-discrimination would substantially endanger the existence of the business.[39] Moreover, gender discrimination is permitted for those positions that service customers of only one sex and the gender of the employee is related to job performance.[40] Finally, gender discrimination is permitted if decency requires employees of one particular sex.[41]

2) Sanctions

Initially, Section 611(a) Article 2 of the German Civil Law Code stated that an employer's penalty for gender discrimination was limited to the employee's out-of-pocket

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[37] Gregor Thüsing, *Zulaessige Ungleichbehandlung weiblicher und maennlicher Arbeitnehmer – Zur Unverzichtbarkeit i.S. des § 611 a Abs. 1 Satz 2 BGB*, RdA 2001 at 319.

[38] Burgerliches Gesetzbuch [BGB] [Civil Code] 1985, 53, as amended, §611; *Richardi/Annuß*, in Staudinger.

[39] For example, the Cologne Court of Appeals ruled that it is indispensable for an advisor of women's lingerie in a mall to be a woman. *See also* Franz Gamillscheg, *in* FESTSCHRIFT FLORETTA 178 (1983): "Technically, it is possible for a man to advise on lingerie, but if he would rather chase the female customers away is another question."

[40] Burgerliches Gesetzbuch [BGB] [Civil Code] 1989 69, as amended, § 611; *Pfarr/Bertelsmann*, Gleichbehandlungsgesetze.

[41] Burgerliches Gesetzbuch [BGB] [Civil Code] 2000 12, as amended, § 611; *Hanau*, in Erman.

losses caused by her "reliance on trustworthiness." Thus, the employer has to pay the plaintiff the amount which he invested by trusting on the conclusion of the contract. This amount is called *negatives Interesse*. For example, if a female applicant spent three euros to mail her application form to the employer, the employer denied her the job because of her gender, and she sued the employer and won her case, her only remedy would be for the employer to reimburse her the three euros.[42] The European Court of Justice declared this rule of sanction as insufficient.[43] In 1994, the German Legislature amended Section 611(a) to provide that damages for discriminatory denial of a job should be equal to three times the monthly salary of the job applied for.[44] However, the European Court of Justice subsequently declared that this did not conform to the demands of Directive 76/207/EEC.[45] The German legislature again amended the statute, which now provides for an undetermined amount of compensation in cases of gender discrimination.[46]

3) Burden of Proof

Section 611(a) Article 1.3 of the German Civil Law Code establishes the burden of proof for employment discrimination cases. This rule complies with the European Community's burden of proof directive of 1980.[47] The initial burden is on the plaintiff to present credible evidence

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[42] This rule, therefore, was called the "Portoparagraph."
[43] EuGH NZA 1984, 157; see also BAG NZA 1990, 21, 24.
[44] *See* LIEB, ARBEITSRECHT 30 (8th ed. 2002).
[45] EuGH NZA 1997, 645.
[46] According to GBG § 611(a)1.3, the sanction shall only be limited to the amount of three-months salary if the employer can prove that the job applicant would not have gotten the job even absent discrimination.
[47] Council Directive 97/80, 1997 O.J. (L 014) 6 (EC) (discussing the burden of proof in cases of discrimination based on sex).

that sex discrimination occurred.[48] The burden of proof then shifts to the employer to prove that the employment decision at issue was not discriminatory.

4) Disparate Impact

The European Court of Justice (ECJ) created the doctrine of disparate impact on the basis of Article 119 of the Treaty of the European Community.[49] An employment criterion has a disparate impact when the criterion is facially neutral in respect to sex, but has a discriminatory impact on either one of the sexes, because it requires characteristics that refer either to the male or female sex.[50] Discriminatory intent is not required.[51] In the *Bilka* case, the Federal Labour Court of Germany evaluated a company's policy granting retirement benefits to any employee who worked full-time for twenty consecutive years on disparate impact grounds.[52] A female employee who worked full-time for ten years and part-time the next ten years brought a claim against the company for retirement benefits.[53] The Federal Labour Court found that the full-time requirement had a disparate impact on women because the requirement, though formulated in facially neutral language, disproportionately excluded women, who comprised the majority of the part-time workers in the company.[54]

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[48] So called "*Glaubhaftmachung.*" *See* ZivilprozeBordnung [ZPO] [Civil Procedure Statute] Sept. 12, 1950, BGBl. I at 533 § 294 (F.R.G).
[49] EuGH NZA 1994, 609.
[50] Adopted by Bundesarbeitsgericht (BAG, Federal Labor Court) in 3 AZR 557/00 on 19 June 2001.
[51] BAG NZA 1993, 257, 258; BAG NZA 1993, 933; EzA Nr. 15 to § 611a German Civil Code.
[52] BAG AP Nr. 3 to Art. 119 EWG-Vertrag, Bilka; EuGH NZA 1986, 599.
[53] BAG NZA 1987, 445, BVerfG NZA 1993, 213; *see also Pfarr* NZA 1986, 585.
[54] LIEB, *supra* note 44, at 32.

5) Deadline for Filing Claim

According to Section 611(a)(4) Of the German Civil Law Code, the employee must file a claim of employment discrimination within two months.[55]

D
Sexual Harassment

Sexual harassment in the German workplace has been an increasingly important topic of concern over the last twenty years.[56] Approximately 25% of female German employees have experienced sexual harassment in some way.[57] For this reason, the German government in 1994 passed the "Employees Protection Act"[58] to fight sexual harassment in the workplace.

1) Definition

Section 2 of the Employees Protection Act defines sexual harassment as "any intentional sexually[-]determined behaviour which [sic] violates the dignity of employees at

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[55] *See* Treber, *Arbeitsrechtliche Neuerungen durch das "Gesetz zur Änderung des Bürgerlichen Gesetzbuches und des Arbeitsgerichtsgesetzes*, NZA 1998 at 856.

[56] For a short summary of the remedies in cases concerning sexual harassment in the EU member states, see Eur. Parl. Ass., *Measures to Combat Sexual Harassment at the Workplace*, Series W-2, Doc. No. EN/DV/245/245696 (1994).

[57] Survey of the Department of the Interior of North-Rhine Westfalia 31 (circa 1996); INFAS-Umfrage bei *Plogstedt/Bode*, Übergriffe at 88.

[58] Beschäftigtenschutzgesetz [Employees Protection Act], June 24, 1994, BGBl. I Nr. 39 at 1406 (F.R.G.) [hereinafter Employees Protection Act], *available at* http://www.gesetze-im-internet.de/cgi-bin/htsearch.

the workplace."[59] Sexual harassment expressly includes sexual acts and behaviour punishable under the German Criminal Code, as well as sexually-determined touching and sexual remarks.[60] In 1996, the Federal Administrative Court also decided that the sending of obscene letters within a company constitutes sexual harassment.[61] If the employer is not taking any clear and effective measures to stop sexual harassment in the company, the harassed employees have the right to stop their work without any loss of salary to avoid the sexual harassment.[62]

2) Criticism

The Employees Protection Act has been strongly criticized because of its ineffectiveness.[63] The primary problem is ambiguity in the Act's definition of sexual harassment. Victims of harassment often will not report or act upon the harassment due to uncertainty over whether the law will protect them. Second, the law provides no catalogue of sanctions for sexual harassment.[64] The statute itself only requires the employer to protect employees from sexual harassment and to take measures against the harasser.[65] The statute nowhere provides that a harassed em-

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[59] *Id.*

[60] Id. § 2.2.1.

[61] Bundesverwaltungsgericht [BVerwGE] [highest administrative court] Der Betrieb 596, 1996 (F.R.G).

[62] Employees Protection Act, *supra* note 58, § 4.2.

[63] *Mästle*, § 2 Beschäftigtenschutzgesetz als Schutzgesetz i.S. von § 823 II BGB, NJW 2001 at 3317; *Herzog*, Sexuelle Belästigung am Arbeitsplatz, 1997 at 246; *Hohmann/Moors*, Kritische Justiz 1995 at 151.

[64] An early draft of the Employees Protection Act contained a damage clause providing up to 100,000 DM (€51,129.19). *See* BT-Dr. 12/5717 at 14.

[65] Employees Protection Act, *supra* note 58, § 2.1.

ployee has any right of action against an employer who fails to protect the employee from sexual harassment. Thus, there is no financial motivation for employers to follow the law[66] and the Employees Protection Act provides little protection to German employees.

E
Disability

Disability discrimination in Germany is expressly prohibited by federal constitutional and federal statutory law as well as by state constitutional and state statutory law. Altogether there are eleven constitutional laws and eleven statutory laws on disability discrimination.

1) German Constitution, Article 3.3.2

The German Constitution prohibits disability discrimination in Article 3.3.2, which provides that no person shall be disfavored because of disability.[67] This constitutional amendment was adopted in 1994.[68] It was supposed to be a plain signal for the German public, to set a focus on disability-based discrimination in everyday life.[69] With respect to employment, the provision binds the state and its agencies

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[66] *Mästle*, § 2 Beschäftigtenschutzgesetz als Schutzgesetz i.S. von § 823 II BGB, NJW 2001 at 3317.

[67] *See Schmidt-Bleibtreu/Klein*, GG, *supra* note 19, art. 3 para. 42a; *Jarass/Pieroth*, GG, art. 3 at 80.

[68] Grundesetz fürdie Bundesrepublik Deutschland (federal constitution), 1994, BGBl. at I 3146.

[69] *See* BTDrucks. 12/6323, 11 (documenting the legislative intent). On the history of Art. 3.3.2 of the German Constitution see Miles-Davis, *Initiativen und Mühen, das Diskriminierungsverbot im Grundgesetz zu verankern, in* SONDERPÄDAGOGIK FÜR NICHTBEHINDERTE II (Begemann & Krawitz eds., 1994).

when acting as an employer.[70] In addition, Article 3.3.2 of the German Constitution binds private employers via an "indirect horizontal effect."[71]

2) Social Law Code, Book Nine

The most important federal act applicable to private-sector disability discrimination in employment is the Ninth Book of the Social Law Code (SLC IX).[72] The SLC IX revised the whole German rehabilitation law, which had been scattered over several statutes. The new SLC IX summarizes the main rehabilitation law rules in one act.[73] This reform process took more than thirty years, and replaced the Severely Disabled Act[74] and Uniform Rehabilitation Act,[75] which are now abandoned. According to the legislature's intent, the new rehabilitation law is no longer based on care and charity but on self-determination and equal participation of disabled persons in the community.[76]

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[70] It is well established that the fundamental rights in the German Constitution do not apply directly to the private sphere of citizens; they do not have "direct horizontal effect" (*direkte Drittwirkung*). However, these rights lay down an objective value system which influences the legislative, executive, and judicial authorities, see Part II, Section A.

[71] Thus, Art. 3.3.2 of the German Constitution does not bind the private employer directly, but judges must interpret the general clauses of Civil Law in light of the German Constitution (*verfassungskonforme Auslegung von Generalklauseln*).

[72] Sozialgesetzbuch [SGB][Social Insurance Code] June 19, 2001, BGBl. I 1046 [hereinafter Social Insurance Code].

[73] However, the fragmented system has not been abandoned. Rehabilitation benefits are scattered over several statutes.

[74] Schwerbehindertengesetz [Severely Disabled Act], Aug. 26, 1986, BGBl. I at 1421 (F.R.G).

[75] Gesetz üeber die Angleichung der Leistungen zur Rehabilitation [Uniform Rehabilitation Act], Aug. 7, 1974, BGBl. I at 1178 (F.R.G).

[76] *See* BTDrucks 14/2913 (Entschließung des Bundestages zur Integration behinderter Menschen) and Social Insurance Code, *supra* note 72:

Rehabilitation benefits are now called Benefits for Participation.

Section 81.2 of SLC IX contains the anti-discrimination provision.[77] It is comparable to similar provisions in employment law relating to gender discrimination.[78] As mentioned above, Section 611(a) of the Civil Law Code provides that employers may not discriminate against employees on the basis of gender. Section 81.2 of SLC IX was modelled on Section 611(a), so the texts of both codes are almost identical.[79] Both provide damages in case an employer violates the anti-discrimination provisions, but they vary with respect to defenses. Section 611(a) permits an employer to discriminate on the basis of gender if a certain gender is an "indispensable requirement" for the job.[80] In contrast, Section 81.2 of SLC IX permits an employer to discriminate on the basis of disability if a physical, mental, or psychological functional capacity is "a significant and determining occupa-

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> Section 1 Selbstbestimmung und Teilhabe in der Gesellschaft (SGB IX)Behinderte oder von Behinderung bedrohte Menschen erhalten Leistungen nach diesem Buch und den für die Rehabilitationsträgern geltenden Leistungsgesetzen, um ihre Selbstbestimmung und gleichberechtigte Teilhabe am Leben in der Gesellschaft zu fördern, Benachteiligungen zu vermeiden oder ihnen entgegenzuwirken. Dabei wird den besonderen Bedürfnissen behinderter und von Behinderung bedrohter Frauen und Kinder Rechnung getragen.

[77] Christian Rolfs & Derk Pascke, *Die Pflichten des Arbeitgebers und die Rechte schwerbehinderter Arbeitnehmer nach § 81 SGB IX*, *in* BETRIEBS-BERATER 1260 (2002).

[78] Compare this section with Part I, Section C.

[79] Gregor Thüsing & Donat Wege, *Das Verbot der Diskriminierung wegen einer Behinderung nach § 81 Abs. 2 Satz 2 Nr. 1 SGB IX*, *in* FA 2003 at 296.

[80] *See* Civil Code § 611a(1).

tional requirement."[81] Thus, Section 611(a) affords a stronger protection against discrimination.[82]

(a) Definition of Disability

According to the general definition of disability, disabled persons are persons whose physical functions, mental capacities, or psychological health are highly likely to deviate for more than six months from the norm typical for that person's age, and whose participation in the life of society is therefore restricted.[83] The ban on employment discrimination stated in Section 81 of SLC IX only covers severely disabled persons.[84] These are defined as persons whose degree of disability is at least a 50% deviation from the norm, and who either lawfully stay in Germany, have their ordinary legal residence in Germany, or who legally work in Germany.[85]

(b) Reasonable Accommodation

Severely disabled employees have a substantive right to be reasonably accommodated by their employer.[86] This

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[81] Employment Framework Directive, *supra* note 14, art. 4.1.
[82] *Compare ErfK-Schlachter*, § 611(a) BGB, 22.
[83] Social Insurance Code, *supra* note 72, IX, § 2.1.
[84] *See* Thüsing & Wege, *Das Verbot der Diskriminierung wegen einer Behinderung nach § 81 Abs. 2 Satz 2 Nr. 1 SGB IX*, FA 2003 at 296.
[85] Social Insurance Code, supra note 73, IX, §§ 2.2., 2.3. However, the Employment Framework Directive does not differentiate between disabled and severely disabled persons. Thus, the German government will have to normalize the SGB IX with the standards demanded by the directive, as we discuss in Part II, Section C.4.
[86] According to SGB IX, § 71.1., employers with more than 20 employees have to fill every 20th job with a disabled person (a quota-duty of 5%). If not, the employer must pay an equalization levy. *Id.* § 77.

includes the right to be employed in a way that fully utilizes and improves upon the employee's capacities and knowledge.[87] The place of work, the work site, machines and tools, the design of the job, the work environment, the organisation of work, and the time of work must be modified to fit the needs of the severely disabled employee, with special consideration to the danger, if any, of accidents.[88] The right to be accommodated is subject to two major limitations. The first is that an employer need not offer an accommodation if the accommodation would impose an undue burden on the employer. The second limitation is that an employer need not offer an accommodation if the accommodation conflicts with safety or other civil service laws. The employer is supported by the labor office and integration office in meeting its accommodation duties. Financial burdens are usually subsidized. Money comes from a federal fund that is nourished by levies which employers must pay if they do not fulfil their quota duties.[89]

The law is not clear as to whether the denial of reasonable accommodation constitutes disability discrimination. The ban on discrimination and the right to reasonable accommodation are regulated in the same section, Section 81 SLC IX, but in two different paragraphs of that section. Only severely disabled persons who are employed have a right to reasonable accommodation; the right to an accommodation does not extend to job applicants. While the denial of reasonable accommodation may be classified as indirect discrimination by the courts,[90] there have not been any cases on that issue yet.

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[87] Thüsing & Wege, *supra* note 84, at 296.
[88] Social Insurance Code, *supra* note 72, IX § 81.4.
[89] *Id.* § 77.
[90] *Id.*

F

Exemption for Churches and Church-Run Institutions

German churches are legally privileged.[91] The anti-discrimination laws described above do not apply to the churches and church-run institutions, whether these are kindergartens, schools, or hospitals.[92] Article 140 of the German Constitution, together with Article 136 of the Weimar Constitution,[93] gives churches a broad right to self-determination. This constitutional privilege has significant implications for the legal relationship between the church and private persons, such as the churches' employees.[94]

The Federal Constitutional Court has defined what churches' "own affairs" are and the contours within which the churches and their institutions are free from governmental interference.[95] For example, the Court has ruled that churches in Germany may reject job applicants who belong to a different religion and may even dismiss church employees due to a violation of their duty of loyalty to the body of beliefs of the respective church, *e.g.*, by leaving the

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[91] The biggest religious groups in Germany are the Catholic and Protestant Churches with about 26 million members each; together they encompass 64% of the German population. Hence, the voice of the two Christian churches is heard when their representatives formulate opinions on matters of German social and political life.

[92] Both churches are major employers in Germany and provide a wide range of goods and services. Together they employ nearly one million people.

[93] The Weimar Constitution came into force in Aug. 14, 1919 and was Germany's first democratic constitution. Parts of it are still retained in the German Constitution.

[94] *See* BAG 21 February 2001, 2 AZR 139/00; *Joussen*, Die Folgen der europäischen Diskriminierungsverbote für das kirchliche Arbeitsrecht, RdA 2003 at 32.

[95] *See* Bundesverfassungsgericht [BVerfG] [federal constitutional court], 70 Entscheidungen des Bundesverfassungsgericht [BVerfGE] 138 (F.R.G).

church while being employed by it or by marrying a divorced man or woman.[96] Moreover, according to the Federal Constitutional Court, it is irrelevant whether the employee performs church-specific tasks, such as a priest or minister, or whether the employee performs tasks in which her or his religion does not play a major role, such as a doctor or orderly in a church-owned hospital.[97] There is ample case law on this matter.[98] In a decision handed down in 1997, to take just one example, the Labour Court of Appeal of Rhineland-Palatinate explicitly reaffirmed that an employee of the Protestant Church who left the church, in a "spiritual" sense, while employed there acted illegally and could therefore be dismissed without prior notice.[99] The employee was a social education worker who had been employed by a church-run advice center for families.

G

Administrative Agencies

In the United States, the Equal Employment Opportunity Commission is the administrative agency charged with administering, and to some degree enforcing, federal anti-discrimination law in the employment setting.[100] Germany

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[96] *See id.* (admissible dismissal because of leave of church); *See* Bundesarbeitsgerichte [BAG] [supreme labor court] Apr. 24, 1997, 2 Entscheidungen Bundesarbeitsgerichts [BAGE] 268 (96) (F.R.G.) (admissible dismissal because of adultery).

[97] Bernd Rüthers, *Wie kirchentreu müssen kirchliche Arbeitnehmer sein?* NJW 1986 at 356.

[98] *See* Ingo v. Münch & Philip Kunig-Hemmrich, GRUNDGESETZKOMMENTAR III art. 140, No 20a.

[99] *See* Landesarbeitsgericht Rheinland-Pfalz, Urteil vom Sep. 1, 1997 – 11 Sa 428/96 (F.R.G).

[100] 42 U.S.C. § 2000(e)(4). For a general discussion of the history and powers of the EEOC, see Richard A. Bales, *Compulsory Employment Arbitration and the EEOC*, 27 PEPP. L. REV. 1 (1999).

has no similar agency charged with implementing or enforcing the principle of equal treatment. Various institutions, however, are concerned with this matter.[101] The Commissioners for Foreigners on the federal and regional level are monitoring and actively fostering the principle of equal treatment.[102] Special offices dealing with discrimination have been established; their primary task is providing people with information about discrimination. [103]

II
EUROPEAN UNION ANTI-DISCRIMINATION LAW

A
European Legislation through Directives

There are two primary types of legislative acts of the European Community: directives and regulations.[104] Regulations are similar in form to administrative regulations commonly found in the US. Such regulations apply directly to all citizens of the European Community. Directives, on the other hand, establish EU policy and are binding upon each Member State to whom they are addressed.[105] It is then left to the Member States to imple-

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[101] *See e.g.* "*Netzwerk Artikel 3 – Verein fuer Menschenrechte und Gleichstellung*", http://www.netzwerk-artikel-3.de.

[102] The Federal Commission for Foreigners was established by Switzerland. It supports the Government in migration and equality matters, *see also* http://www.integrationsbeauftragte.de/.

[103] See especially the "*Office of Antidiscrimination*" in Cologne, Germany; For more information about this department, see http://www.oegg.de/index.php

[104] *See* Treaty of Rome, art. 249 III, Mar. 25, 1957, 298 U.N.T.S. 3.

[105] By signing the European Contract each Member State is bound to the policy issued by the European Union. *See* MATTHIAS HERDEGEN, EUROPARECHT 278 (7th ed. 2005).

ment the directive in whatever way is appropriate to their national legal system.[106] This may require a new statute, a presidential decree, an administrative act, or even a constitutional amendment. Sometimes it requires no action at all. As Article 249 of the Treaty of Rome, the founding document of the Community, indicates, a directive is, "binding as to the result to be achieved" but "leaves to the national authorities the choice of form and methods."

All directives contain time limits for national implementation.[107] The more controversial the policy, the longer the likely allotment of time. Individual citizens are given rights and are bound by the legal act when the directive has been transposed into national law.[108] Thus, directives must be effected in the form of binding national legislation, which fulfils the requirements of legal security and clarity, and establishes a cause of action for individuals.[109] Legislation that has been adopted or adapted to EC directives may not subsequently be amended contrary to the objectives of those directives.

B

The Two EC Anti-Discrimination Directives

Article 13 of the Treaty of Amsterdam extended the powers of the European Union in the field of combating discrimination. It gave rise to two directives intended to implement the principle of non-discrimination across the

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[106] *See* RUDOLPH STREINZ, EUROPARECHT (5th ed. 2001).

[107] *See* Racial Equality Directive, *supra* note 13, art. 16 (E.g. The Council of the European Union gave the Member States three years to implement the anti-discrimination directives into national law).

[108] Gregor Thüsing, *Richtlinienkonforme Auslegung und unmittelbare Geltung von EG-Richtlinien im Anti-diskriminierungsrecht*, NJW 2003 at 3441.

[109] *See* STREINZ, *supra* note 106.

European Union: Directive 2000/43/EC and Directive 2000/78/EC.[110]

1) The Racial Equality Directive

The racial equality directive[111] deals with potential discrimination only on the bases of "race" and "ethnic origin." Other grounds for discrimination such as age, belief, sexual orientation, or similar matters are not covered.[112] The directive comprises almost all areas of life, however, and prohibits discrimination in the areas of vocational training and employment, social protection, and access to and provision of goods and services available to the public including housing.[113]

The directive is divided into four chapters. Chapter 1 contains general provisions such as the definitions of direct and indirect discrimination (*i.e.*, disparate treatment and disparate impact). It defines sex discrimination as including sexual harassment.[114] Chapter 2 codifies remedies and enforcement.[115] Chapter 3 obligates the Member States to "designate a body or bodies for the promotion of equal

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[110] *See* Gregor Thüsing, *Der Fortschritt des Diskriminierungsschutzes im Europäischen Arbeitsrecht – Anmerkungen zu den Richtlinien 2000/43/EG und 2000/78/EG*, ZfA 2001 at 397; *see also* Alexius Leuchten, *Der Einfluss der EG-Richtlinien zur Gleichbehandlung auf das deutsche Arbeitsrecht*, NZA 2002 at 1254.

[111] This directive was adopted first. For the negotiation process, see A. Tyson, The Negotiation of the European Community Directive on Racial Discrimination, 3 EUR. J. MIGRATION & L. 199, 199-229 (2001).

[112] The Commission intended to stress the importance of the directives in issuing two separate directives.

[113] *See* Racial Equality Directive, *supra* note 13, art. 3.1 (Implementing the Principle of Equal Treatment Between Persons Irrespective of Racial or Ethnic Origin).

[114] *Id.* art. 2.3.

[115] *Id.* art. 13.1.

treatment of all persons without discrimination on the grounds of racial or ethnic origin."[116] In Chapter 4, Member States are expressly authorized to impose sanctions in the form of compensation to victims.[117]

2) Employment Framework Directive

The employment framework directive, on the other hand, covers all grounds for discrimination named in Article 13 of the Treaty of Amsterdam (with the exception of "gender", because a special directive already exists on this subject[118]). The categories in question are race, ethnic origin, religion, belief, disability, age, and sexual orientation. However, this comprehensive approach is coupled with a limited area of application. Unlike the racial equality directive, the employment framework directive only deals with access to employment and occupation, promotion and vocational training, occupational and working conditions, and membership in certain associations.[119] The regulations provided by the authors of the directive are largely identical to those in the racial equality directive; the structure and content of the directives are therefore comparable.[120] For example, the employment framework directive includes largely identical provisions on definitions of discrimination and harassment, the prohibition of instruction to discrimi-

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[116] *Id.*

[117] *Id.* art. 15. For further details see Part III, Section C.7.

[118] Council Directive 2002/73, 2002 O.J. (L 269) 15 (EC) (Amending Council Directive 76/207 on the Implementation of the Principle of Equal Treatment for Men and Women as Regards Access to Employment, Vocational Training and Promotion, and Working Conditions).

[119] Employment Framework Directive, *supra* note 14, at 19.

[120] Jobst-Hubertus Bauer, *Berliner Etikettenschwindel: Der neue Gesetzesentwurf zur Umsetzung der Europäischen Antidiskriminierungsrichtlinien*, BB 2006 at 2672.

nate and victimisation,[121] on positive action,[122] rights of legal redress,[123] and the sharing of the burden of proof.[124] Moreover, here too, the Member States are obligated to establish penalties for discriminatory practices.[125] These penalties can also expressly include the payment of compensation to victims.[126]

C
Current Discrepancies between German and EU Discrimination Law

1) Generally

German and EU discrimination law differ substantially.[127] Under German law, the prevailing principles are those of freedom of contract and the employer's discretionary power to select employees.[128] Provisions regulating discrimination can generally be found in German law, but do not apply in the contractual relationship between employer and employee, except those regarding gender discrimination.[129] In fact, the current legal system does not grant any explicit protection from discrimination by private

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[121] Employment Framework Directive, *supra* note 14.
[122] *Id.* art. 7.
[123] *Id.* art. 9.
[124] *Id.* art. 10.
[125] *Id.* art. 17.
[126] For further details see Part II, Section C.7.
[127] *See* Bauer, *supra* note 120.
[128] Gerland Wisskirchen & Christopher Jordan, American Bar Association, Anti-discrimination and Anti-Sexual Harassment Law in Germany and the EU (2004) at 2, *available at* http://www.bna.com/bnabooks/ababna/annual/2004/wisskirchen.doc
[129] § 611(a) of Civil Code, *available at* http://bundesrecht.juris.de/bgb/611a.html; see Part I, Section C.

entities.[130] The citizen must rely on general clauses of the civil law to be interpreted by the judge in the light of the constitutional equality provisions.[131] Contrarily, the EU directives provide a wide range of discrimination protection in both the public *and* the private sectors. Thus, European and German discrimination law provide different levels of protection from discrimination, as will be explained in more detail in the following paragraphs.

2) Religion, Race, Ethnic Origin, and Sexual Orientation

Current German law provides no protection against discrimination on the basis of religion, racial or ethnic origin, or sexual orientation.[132] The EU directives, however, provide protection on all these grounds in both the public and private sectors.[133] The German legislature is required to find an appropriate way to merge these provisions into German national law.

3) Sexual Harassment

The current German protection against sexual harassment in the workplace, which is codified in the Employees Protection Act, defines sexual harassment as, "any deliber-

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[130] Compare Part I, Section A. No direct horizontal effect of the constitutional equality provisions.

[131] The so-called doctrine of "indirect horizontal effect" (*mittelbare Drittwirkung von Grundrechten*).

[132] Wisskirchen & Jordan, *supra* note 128, at 6.

[133] The Racial Equality Directive covers race and ethnic origin on the public and private sector. The Employment Framework Directive provides protection against discrimination - on the grounds of religion and sexual orientation among other things. *See* Employment Framework Directive, *supra* note 14.

ate, sexually intended behavior which [sic—should be "that"] injures the dignity of employees at the workplace."[134] In addition to this general definition, that Act provides some examples of what constitutes sexual harassment, including sexual acts or demands, physical contact, or pornographic representations, as well as sexual comments. However, these descriptions remain vague so that the classification of a particular act as sexual harassment is often difficult.[135] Especially difficult is proving the harasser's invidious intent. The directive, however, defines sexual harassment as unwanted conduct that "takes place with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment."[136] This definition—which relies on objective criteria and does not require proof of intent—simplifies proving sexual harassment and therefore provides far more extensive protection for employees.[137]

According to Article 2.3 of the anti-discrimination directives, sexual harassment is a subset of sex discrimination.[138] Current German law is entirely inconsistent with this approach. However, through the adaptation of sexual harassment to discrimination, the German legislature could provide the sexually harassed employee with the same pro-

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[134] Employees Protection Act, *supra* note 58, § 2; Also see Part I, Section D.

[135] ULRICH HERZOGEN, SEXUELLE BELÄSTIGUNG AM ARBEITSPLATZ 246 (1997); Harald Hohmann & Chirstiane Moors, Kritische Justiz 1995 at 151.

[136] Employment Framework Directive, *supra* note 14, art. 2.3.

[137] Hadeler, *Die Revision der Gleichbehandlungsrichtlinie 76/207/EWG – Umsetzungsbedarf für das deutsche Arbeitsrecht*, NZA 2003 at 77.

[138] The European Commission justifies this step with the fact that the Member States have not paid enough attention on this subject; *see* Begründung des Kommissionsentwurfs (Justification of the Draft of the Commission), KOM (2000) 334 endg. at 5.

tections, burden of proof, and remedies as discrimination under Section 611(a) of the German Civil Code.[139]

4) Disability

As mentioned above, the disability protections in SLC IX extend only to severely disabled persons, not to mildly or moderately disabled persons.[140] The directives, however, do not limit protection based on the degree of disability.[141] Therefore, German disability law must be expanded significantly to include every degree of disability.[142] German employers have hitherto been permitted to ask applicants whether they have a disability that would impose an additional financial burden on the employer. Such a question is likely impermissible under the directives, which require employers to provide accommodations sufficient to enable disabled persons to be admitted to employment.[143]

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[139] Compare Part I, Section C.

[140] Section 81.2.2. SLC IX, see Part I.E.2)(a). *See* http://www.gesteze-im-internet.de/cgi-bin/htsearch.

[141] Employment Framework Directive, *supra* note 14, art. 5. The directive speaks only of "disability." Thus, the European Council intended all degrees of disability to be covered.

[142] European Commission on Non-Discrimination, Country Report, *Executive Directive, State of Play in Germany*, (March 2004) (prepared by Theresia Degener), *available at* http://europa.eu.int/comm/ employment_social/fundamental_rights/pdf/aneval/disab_de.pdf

[143] Sozialgestzbuch [SGB] [Social Insurance Code] 2003, *Thüsing/Wege*, Das Verbot der Diskriminierung wegen einer Behinderung nach § 81 II 2 Nr. 1, Fachanwalt für Arbeitsrecht (FA), 296.

5) Age

Even if the directives prohibit age discrimination, it is unclear what the term "age" means.[144] The directives could merely aim to protect older employees or generally establish that age may not play any role in the decision-making process of the employer. On the one hand, German law favors older employees with regard to redundancies,[145] but on the other hand, the age of an employee sometimes has a negative effect on severance pay, with older employees often receiving less.[146] It is doubtful whether this practice complies with the directives. General age limits likely remain valid, as the employer has an interest in a uniform age structure and continuous personnel planning by hiring a sufficient number of young people. Even age limits for certain professions will probably be justified as a legitimate goal,[147] if they aim to secure the health of the employees and other persons.[148] Age limits when hiring people will be void in the future, unless they are an indispensable requirement for the job. An unjustified refusal to hire or employ elderly employees is likely to result in a damage judgement for the rejected employee against the employer.[149]

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[144] *Linsenmaier*, RdA 2003, (extra sheet 5) at 22. Unlike other personal characteristics addressed in the directives, aging is a continuous process.

[145] Kündigungsschutzgesetz [Act on Protection Against Unfair Dismissal] Aug. 10 1951 BGBl. I at 499, § 1 (F.R.G). The employer has to dismiss the younger of two workers in business-related redundancies. The employees' length of service and obligation to pay maintenance are also criteria of the so-called "social selection."

[146] German social plans do not always provide for an increase in severance payments, but they do allow for a decrease of severance payments at a certain age.

[147] *See* Employment Framework Directive, *supra* note 14, art. 6.

[148] E.g. age limits for pilots.

[149] *See* Employment Framework Directive, *supra* note 14, art. 17.

6) Burden of Proof

The provisions for the burden of proof are of great practical importance.[150] Contrary to the principle that the plaintiff bears the burden of proof, in the case of discrimination, it is the defendant who is obligated to prove that there has been no violation of the principle of equal treatment.[151] The requirement for the reversal of the burden of proof is, however, that the person who feels discriminated against has to present credible evidence that would allow the assumption that discrimination has taken place.[152]

7) Sanctions

According to the anti-discrimination directives, sanctions, "which may comprise the payment of compensation to the victim, must be effective, proportionate and dissuasive."[153] Many voices in the German legal literature have predicted that the requirement that sanctions be "dissuasive" will effectively require the availability of punitive damages.[154] The German law of damages, however, is purely monistic, *i.e.*, damages are strictly restricted to com-

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[150] Bauer, *supra* note 120, at 2672.

[151] *See* Employment Framework Directive, *supra* note 14, art. 10.

[152] ZivilprozeBordung [ZPO] [Civil Procedure Statute] Sep. 12, 1950, Bundesgesetzblatt I 455, § 294, *available at* http://www.juris.de.

[153] *See* Racial Equality Directive, *supra* note 13, art. 15; Employment Framework Directive, *supra* note 14, art. 17.

[154] *Compare* Stellungnahme des Deutschen Anwaltsvereins durch den Ausschuss Arbeitsrecht zu der Umsetzung der Antidiskriminierungsrichtlinien in das deutsche Arbeitsrecht [Opinion of the German Bar of Lawyers Department of Labor concerning the implementation of the anti-discrimination directives into German Employment Law], March 2004, http://www.anwaltverein.de/03/05/2004/11-04.pdf.

pensation.[155] Punishment of the tortfeasor is not a legitimate function of damages. "German civil law and criminal law are separate."[156] "Punitive damages are punishment, and, while a wrongdoer may be punished exclusively under the concept of criminal law, by no means is such punishment allowed under the concept of civil law."[157] Thus, the German legislature must solve a dogmatic problem in reforming German law to comply with the requirement of the directives that sanctions be dissuasive.

D
Consequence of Non-Transposition

The European Member States were obligated to enact the two anti-discrimination directives into national law no later than the end of 2003.[158] That period of transposition has expired, and the German government has not yet enacted a compliant German anti-discrimination law.

As discussed in Part II, Section A, an EU directive itself generally does not apply directly to EU citizens; directives first must be transposed into national law by a citizen's national government before the citizen can claim the rights

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[155] Klaus J. Beucher & John Byron Sandage, *United States Punitive Damages Award(s?) in German Courts: The Evolving German Position on Service and Enforcement*, 23 VAND. J. TRANSNAT'L L. 967, 970-971 (1991).

[156] Volker Behr, *Punitive Damages in American and German Law—Tendencies Towards Approximation of Apparently Irreconcilable Concepts*, 78 CHI.-KENT L. REV. 105, 106 (2003).

[157] *Id.*

[158] Directive 2000/43/EC had to be transposed by 19 July 2003, *see* Racial Equality Directive, *supra* note 13, art. 16; Directive 2000/78/EC had to be transposed by 2 December 2003, *see* Employment Framework Directive, *supra* note 14, art. 18.

derivative from it.[159] The European Court of Justice, however, has ruled that individual provisions of a directive may, exceptionally, be directly applicable in a member state without requiring an act of transposition by that member state beforehand where:

> (1) The period of transposition has expired and the directive has not been transposed or has been transposed inadequately;
>
> (2) The provisions of the directive are imperative as to their substance; and
>
> (3) The provisions of the directive confer rights on individuals.[160]

Accordingly, if these requirements are fulfilled, individuals may cite the provisions of the directive against all agencies in which State power is vested.[161]

Such agencies include organisations and establishments which are subordinate to the state, *i.e.*, public bodies, or on which the state confers rights that exceed those arising from the law on relations between private persons.[162] The agencies must then automatically comply with the applicable provisions of the directive.[163] But even when the provision concerned does not seek to confer any rights on the individual and only the first and second requirements are fulfilled, the European Court of Justice has ruled that the

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[159] Gregor Thüsing, *Richtlinienkonforme Auslegung und unmittelbare Geltung von EG-Richtlinien im Anti-diskriminierungsrecht*, NJW 2003 at 3441.

[160] The so-called "doctrine of direct-effect," *see* Case 41/74, Van Duyn. v. Home Office, 1974 E.C.R. 1337 (year?); Case 8/81, Becker v. Finanzamt Münster-Innenstatdt, 1982 E.C.R. 53 (year?).

[161] Usually referred to as the "vertical direct effect" of directives.

[162] CALLIES & RUFFERT, EUV/EGV, Art. 249, 69 (2nd ed. 2002).

[163] EuGH, Slg. 1982, 53 in NJW 1982 at 499; Slg. 1997, I-2719 in EuZW, 1998 at 48.

Member State authorities have a legal duty to comply with the un-transposed directive.[164]

Private corporations, however, are another matter. Individuals who believe they have been discriminated against based on prohibitions stated in the anti-discrimination directives cannot invoke the provisions of the directives against their employer in court if the employer is a privately-owned company.[165] Thus, it is said that directives do not have horizontal direct effects.[166] The rationale for this rule is that the directives are addressed to Member States—it is the state that has the obligation to implement the directives into national law.[167] Because individuals (and individual companies) have no part in that process, it would be unfair to allow them to be taken to court and held liable for a directive that the German legislature failed to enact. However, the European Court of Justice held that in applying national law, national courts and tribunals are required by Article 10 of the Treaty of Rome to interpret their law in light of the wording and purposes of all EU directives [*europarechtskonforme Auslegung nationaler Vorschriften*].[168] National law must be interpreted in light of regional directives even if such directives have not yet been

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[164] EuGH, Slg. 1982, 53 in NJW 1982 at 499; Slg. 1997, I-2719 in EuZW 1998 at 48.

[165] EuGH, Slg. 1994, I-3325 in EuZW 1994 at 498; Slg. 1986, I-1281 in EuZW 1996 at 236; Slg. 1998, I-4799 in EuZW 1998 at 563.

[166] Gregor Thüsing, *Richtlinienkonforme Auslegung und unmittelbare Geltung von EG-Richtlinien im Anti-diskriminierungsrecht*, NJW 2003 at 3441.

[167] EC Treaty, *supra* note 6, art. 249.

[168] *See* Case 14/83 Von Colson v. Land Nordrhein-Westfalen, 1984 E.C.R. 1891 (year?); Case 190/87 Oberkreisdirektor des Kreises Borken v. Moormann, 1988 E.C.R. 4869; Litser v. Forth Dry Dock & Eng'g Co., [1990] 1 A.C. 546 (H.L. 1989). This legal issue is similar to the situation in which a German judge has to define national law in light of the German Constitution, i.e. "indirect horizontal effect" of the Constitution between citizens, see Part I, Section A.

implemented.[169] Thus, it is unclear whether German private-sector employers currently may be held liable for employment discrimination prohibited by EU directives not yet part of German law.

III
GERMAN TRANSPOSITION OF THE ANTI-DISCRIMINATION DIRECTIVES

During the last four years, Germany has drafted two bills to implement the EU anti-discrimination directives into national law. The bills were drafted in 2002 and 2004 respectively, and if they had become law, they would have been known as the German Act Against Discrimination (GAAD). Neither bill, however, was successfully enacted. An enactment is expected to occur in fall 2006.

A
First Draft Bill, 2002

After the European Commission issued the two anti-discrimination directives in 2000, the German governing political parties, the Social Democrats (SPD) and the Greens (Bündnis 90/Grüne), circulated a draft bill for the prevention of discrimination in civil law in 2002.[170] With this draft bill the government intended to transpose the racial equality directive with respect to general contract law and access to occupational associations. Employment law

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[169] Marleasing SA v. La Comercial Internacional de Alimentacion SA 1 Eur.Comm.Rep. 4135 (1990). *Compare* Duke v. GEC Reliance Systems Ltd., 1 Eng. Rep. 626 (House of Lords, 1988).

[170] Diskussionsentwurf eines Gesetzes zur Verhinderung von Diskriminierungen im Zivilrecht, ZAG 17 February 2002, *available at* http://www.netzwerk-artikel-3.de/wsite/adg-de.htm.

was explicitly excluded because it was to be regulated in later legislation.[171] The draft bill contained an anti-discrimination clause relating to general contracts[172] and introduced contract compliance into public subsidies and public contracts.[173] The anti-discrimination clause was broad in scope, covering religion or belief, age, disability, gender, race, ethnic origin, and sexual identity, all classifications protected by both directives.

One criticism of the bill was that it failed to differentiate properly among the different protected classifications.[174] In particular, the "religion" classification raised concern. The Catholic and Protestant Churches in Germany feared losing their freedom as tendency enterprises [*Tendenzbetriebe*].[175] As *tendenzbetriebe* they are exempted from part of the labor law.[176] For example, a preschool run by a church[177] can require teachers to be members of that church and can preferentially admit children of that particular religion. The bill was also criticized for going beyond the scope demanded by the anti-discrimination

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[171] See Wiedemann & Thüsing, *Fragen zum Entwurf eines zivilrechtlichen Anti-Diskriminierungsgesetzes*, DB 2002 at 463.

[172] General contracts in this context mean contracts in private law which are entered in public. That is, the offer to the contract is addressed to the general public.

[173] Public subsidies or public contracts in this context mean government subsidies or government contracts that are given out to private enterprises.

[174] *See* Stellungnahme des Deutschen Anwaltsvereins durch den Ausschuss Arbeitsrecht zu der Umsetzung der Antidiskriminierungsrichtlinien in das deutsche Arbeitsrecht (Opinion of the German Bar of Lawyers Department of Labor Concerning the Implementation of the Anti-discrimination Directives into German Employment Law), Mar. 2004, http://www.anwaltverein.de/03/05/2004/11-04.pdf.

[175] Tendency enterprises are those which follow directly mainly political, confessional, academic or similar goals.

[176] See Part I, Section F.

[177] Many social enterprises are run by churches in Germany, e.g. preschools, hospitals, etc.

directives and for excessively curtailing private autonomy.[178]

Eventually, the bill died when the Federal Minister of Justice, Däubler-Gmelin, feared that such a controversial bill would jeopardize the governing coalition's chances in the upcoming election. In 2002, the governing parties were re-elected. However, a new federal minister of justice came into office.

B

Second Draft Bill, 2004

At the end of 2004, the new Federal Minister of Justice, Brigitte Zypries, submitted a new draft bill to the federal Parliament, where it was debated on January 21, 2005.[179] The bill has been referred to expert hearings, which took place in March 2005.[180] It covers race or ethnic origin, gender, religion or belief, disability, age, and sexual identity and is composed of three articles.

Article 1 presents an "anti-discrimination law," which states the goal of the law, grounds for legislation, and types of discrimination generally. Section 2, subsection 6-19, covers employment; Section 3, subsection 20-22, covers contracts; Section 4, subsection 23, 24, covers burden of

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[178] Picker, *Antidiskriminierungsgesetz - Der Anfang vom Ende der Privatautonomie?*, JZ 2002 at 880; Säcker, *"Vernunft statt Freiheit!" Die Tugendrepublik der Jakobiner - Zum Referentenentwurf eines privatrechtlichen Diskriminierungsgesetzes*, ZRP 2002 at 286; Neuner, *Diskriminierungsschutz durch Privatrecht*, JZ 2003 at 57; Baer, *"Ende der Privatautonomie" oder grundrechtlich fundierte Rechtsetzung?*, ZRP 2002 at 290; Schmerlz, *"Vernunft statt Freiheit!" – Die Tugendrepublik der neuen Jakobiner*, ZRP 2003 at 67.

[179] BTDrucks 15/626, "Entwurf eines Gesetzes zur Umsetzung europäischer Antidiskriminierungsrichtlinien", *see* www.spdfraktion.de/rs_datei/0,,4395,00.pdf.

[180] BTDrucks 15/4538.

proof and litigation; Section 5 declares the law to be applicable to public employees and civil servants; and Section 6, subsection 26-31, establishes an independent body to control the compliance with the anti-discrimination law. Article 2 contains anti-discrimination rules applicable to the military. Article 3 presents amendments to existing law, in particular the law of procedure in the labour courts and social courts, the laws on collective representation at the workplace, the laws on the selection of civil servants and soldiers, and the laws on social security.

This second draft anti-discrimination bill has been strongly criticized on basically the same grounds as the first bill. The conservative parties, the Christian Democratic Union (CDU) and the Christian Social Union (CSU), campaigned strongly against the bill.[181] They asserted that the regulations in the new draft would impose costly bureaucratic burdens by effectively requiring employers to document every employment decision (such as hiring, firing, promoting, etc.).[182] They argued that freedom of contract, which is guaranteed in the German Constitution, would be unnecessarily restricted if an employer is not allowed to choose the applicant the employer favors but must instead follow the anti-discrimination policy.[183]

The States of the Federation [*Bundesländer*] must also enact legislation for their jurisdictions, but have been waiting for the Federal Parliament to act first.

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[181] See debate in the Bundestag, http://www.bundestag.de/dasparlament/2005/25-26/titelseite/002.html.

[182] Some voices of the opposing parties talked of the new draft to be a "monster of bureaucracy;" compare debate in the Bundestag.

[183] However, the draft bill explicitly states in § 15.5. that an obligation to contract does not exist.

C
Current Status

In June 2005, the new draft bill was debated and approved by the *Bundestag*, which is one of the two legislative bodies of the German legislature.[184] To become law, however, the bill also must be approved by the *Bundesrat*, which is the German legislative body representing the sixteen federal states of Germany.[185] Currently, Germany's two conservative parties, CDU and CSU dominate the *Bundesrat*. In July 2005, the *Bundesrat* rejected the anti-discrimination bill.

In Germany, when the two houses of Parliament cannot reach an agreement, a mediation committee [*Vermittlungsausschuss*] must be convened, which in most cases is able to work out a compromise.[186] The mediation committee, however, did not have the chance to consider the anti-discrimination bill due to a chain of political events that prevented the bill from being discussed and passed. In the summer of 2005, the SPD and the Greens suffered a string of defeats in regional elections,[187] diminishing significantly the political strength of these parties as well as their ability

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[184] Members of the *Bundestag* are elected in general, direct, free, equal, and secret elections. They are representatives of the whole people and are not bound by any instructions, only by their consciences; *see* GG, *supra* note 19, art. 38.1.

[185] The *Bundesrat* participates in the legislative process and administration of the Federation, and participates in EU matters. In contrast to the senatorial system (like in the U.S. or Switzerland) the *Bundesrat* does not consist of elected representatives of the people but of members of the state government or their representatives; *see id.* art. 50.

[186] The *Vermittlungsausschuss* is composed of members of both chambers; *see id.* art. 77.2.

[187] Most importantly North Rhine-Westphalia, the last state of Germany which was dominated by the governing parties (SPD and Greens), which lost the national government election to the CDU in May 2005.

to push through passage of the bill. Thereafter, Chancellor Schröder requested the dissolution of Parliament, which President Köhler confirmed.[188] The election of the new federal parliament—originally scheduled for 2006—was brought forward to Sept., 18, 2005. This did not provide sufficient time for the mediation committee to convene and discuss the anti-discrimination bill.

According to the German principle of discontinuity, federal bills from a former parliament may not be carried forward, but must be re-introduced in the newly-elected parliament.[189] Thus, Germany remains noncompliant with the EU anti-discrimination directives, and there is no imminent prospect of becoming compliant.

IV
MOVING FORWARD

Current German law prohibiting employment discrimination is woefully inadequate. This article has described the German anti-discrimination laws that currently apply to prevent discrimination in the workplace. Ambiguity in the scope of the law, coupled with insufficient sanctions for violating the law, has resulted in an almost complete failure of enforcement. The EU has issued directives obligating its member states to implement anti-discrimination principles into their national laws, but Germany has failed to do so.

EU directives normally do not apply directly to EU citizens. However, because the deadline for German enactment of the EU anti-discrimination directives has passed, German judges are obligated to interpret German laws con-

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[188] In such a case, the parliament stops all the bills which are in the legislative procedure.

[189] The "principle of discontinuity" of the parliament derives from the constitutional limitation of a legislative period.

sistently with the directives, thus giving the directives indirect horizontal effect. The legal indeterminacy thus created is exacerbated by considerable political uncertainty emanating from the recent parliamentary elections. The clear losers amidst all the confusion are German workers, who have no effective protection from workplace discrimination. The new German Parliament should act quickly to rectify this unfortunate situation by passing workplace anti-discrimination laws comporting with the EU anti-discrimination directives.