The German Proposal of an "Anti-Discrimination"-Law: Anticonstitutional and Anti-Common Sense. A Response to Nicola Vennemann

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[1] I cannot endorse the positive evaluation of the German Proposal of an Anti-Discrimination Law. On the contrary, I take the view that it is in several respects unconstitutional and incompatible with both common sense and the requirements of the rule of law. (Apart from that it is written in an amateurish non-juridical jargon which in the past was noticeably widespread in sectarian political groups.) That it shall be integrated into the BGB with its clear systematic liberal approach, one of the masterpieces of European legal culture, has to be regarded as an act of legal vandalism.

[2] It is first of all in clear contradiction with the the constitutional principle of protection of marriage and family as legal institutions (Art.6 par.1 GG) inasmuch as it does not allow discrimination, e.g. in the selection of a tenant by a landlord against persons of minority "sexual identity": If the government has the obligation to protect and support families it cannot be constitutional to impose on private persons a duty not to privilege traditional nuclear families and decide against gays and lesbians. The prohibition to discriminate is only acceptable with respect to single persons. From the point of view of a liberal theory of rights, and privacy in particular, it is not acceptable to force private individuals who disapprove of gays and lesbians to accept such persons as tenants. In a liberal sociaety there should be a difference between prosecution of public discrimination against citizens and public invasion of privacy in order to impose "correct" views on citizens. (1)

[3] While, certainly nobody can be in favour of discrimination. However, in a liberal society there is a legal rationality which is different from morality and which cannot be ignored without provoking serious doctrinal and practical problems: the law wants to sanction bad intentions whereas a liberal legal system is based on the assumption that these can only be the object of legal concern in extreme cases. Neglecting simple rules of legal rationality, the proposal even goes so far as to discriminate against the "majority" and to violate the right to equality itself: As a rule, the "majoritarian" *everybody* has to prove the facts from which he or she derives a favourable legal consequence. Pursuant to the new § 319c BGB a person who is protected by the anti-discrimination law has only to make plausible („*glaubhaft* ") the facts which indicate („*vermuten lassen*") a discrimination. This means that protected persons can by a formal declaration *vis-à-vis* a solicitor etc. (affidavit - „*eidesstattliche Versicherung*") provoke the reversal of the normal burden of proof. This is nothing but a legal presumption against the majoritarian everybody: such a reversal of proof is only acceptable if the defendant has some privileged access to facts – this is the case e.g. in environmental law or product liability etc. It might also be acceptable for organized decision-makers but not for the average individual. This is all the more so as it is extremely difficult to prove a "negative" fact – that a decision was not based on discriminatory intentions. To impose such a disadvantage on the average person including the risk of being arbitrarily brought to court is incompatible with the constitutional right to equality, Art. 3 GG.

[4] This is all the more so because many individual contracts are not based on "facts" at all: a landlord may well rent an apartment to persons he just likes without being able or being forced to give reasons – this is the core element of the freedom of contract. The proposal considers this possibility and offers "balancing" („*Güterabwägung*") as a way out and accepts a certain leeway for evaluation. How should one imagine such a balancing procedure in court? Would the judge have a look at the rejected contract partner and decide whether the person could with reason be regarded as "unpleasant", or whether this judgment is simply arbitrary and capricious? Would he decide that the discrimination can only be regarded as racist because the person was in fact "nice"? Control of motives (of individuals – not of organisations which have to standardise contracts) cannot be the legitimate object of a law. Incidentally, the law neglects the difference between substantive and procedural law when it introduces procedural possibilities of proof into civil law: good intentions apparently must not be blocked by formal rules! The law creates a high risk of persons being brought to court arbitrarily.

[5] But there will also be serious problems on the side of the protected groups: how can a man prove that he really is homosexual and not just trying to profit from a privilege? Does he have to tell his potential partners that he is protected as a homosexual? How about discrimination of race or ethnic origin? Do judges define what races are? How about jews who are in fact not religious –do they have to prove that they are?

[6] This problem will only touch the stupid: for the rest the law creates a strong incentive to avoid any contact with protected people right from the outset because the safe strategy is not to give any possibility for protected persons to bring someone to court. It is easy to use new filters (anonymous advertising, requirement of written application and letters of recommendation etc.). It is also recommendable always to have a third person participating in the

bargaining process in order to have a neutral testimony. It is not by chance that good intentions (but bad professional standards) at the end of the day will impose new burdens on protected groups.

[7] The law will also create a lot of problems for owners of discothèques: the authors of the proposal explicitly refer to this case: How can a doorkeeper who rejects a protected person prove that he might be a trouble-maker? Shall a judge decide whether a foreigner is in fact acceptable or not whereas the majoritarian group has to accept arbitrary decisions? The right to get compensation might create the risk of being harassed by criminal gangs.

[8] With respect to organised decision-making (differentiation between groups in insurance tariffs etc.) a new problem comes to the fore. In this case the facts will often be beyond doubt whereas the justification of the difference creates a problem. The authors want to refer this problem to the view of the "average person". But how and why should this kind of judgment be accepted? This is a complex professional problem, and why should a firm be forced to accept the view of the "average person" – which will also be difficult to ascertain. The average person can only be referred to when information or a declaration is addressed to the attention of the public at large. The average person, e.g., does not know the rules of statistical decison-making, why then should he be competent to judge tariffs based thereupon? How could he judge the "objectivity" („Sachlichkeit") of those rules?

[9] The proposal indicates a general problem of modern (social-) democratic governments: the real problems of society become increasingly intractable and escape the reach of public decision-making. As a consequence we are witnessing more and more symbolic and ideological acts of "solidarity" which seem to be costless and which speculate that hypocrisy will dampen opposition because they offer a lot of possibilities for circumvention and stupid persons should blame themselves. Such laws only function as a trap for inexperienced people. Thus they will probably have no consequences at all. But if they do have consequences they will give good argument to the rising right wing populist parties who try to gather more and more "average people" who do not oppose discriminatory practices because they no longer feel their interests are being taken care of by governments.

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(1) Cf. W.A.Galston, Liberal Egalitarianism, in: N.L.Rosenblum/R.C.Post, eds., Civil Society and Government, Princeton University Press: Princeton 2002, p. 111, 115.