

**ANALYSIS ON NATIONAL MEASURES TO COMBAT DISCRIMINATION OUTSIDE
EMPLOYMENT AND OCCUPATION**

**Mapping study on existing national legislative measures - and their impact in - tackling
discrimination outside the field of employment and occupation on the grounds of sex,
religion or belief, disability, age and sexual orientation, VT/2005/062**

**GERMANY
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1. Introduction

To what extent does anti-discrimination law cover fields outside employment and occupation. Does this apply for all grounds of discrimination (that is, gender, religion or belief, disability, age and sexual orientation) or for particular of these grounds (if so which)?

Please indicate

- whether anti-discrimination legislation is ground specific, or 'field of application specific' (for example, access to services, health education and other outside employment etc.), or a combination of the two?
- whether or not legal and non-legal measures are adopted as complementary or alternative measures (such as codes of conduct, voluntary charters, etc.)?

Please, specify briefly the grounds covered (explicitly and implicitly) and the material scope of the relevant provisions. Do they apply to all the areas of gender, religion or belief, disability, age and sexual orientation? Do they cover all discrimination on these grounds outside the fields of employment and occupation?

- Are these constitutional, civil or administrative law provisions?
- Are constitutional anti-discrimination provisions directly applicable, i.e., can they be relied upon in the courts?
- In particular, where a constitutional equality clause exists, can it (also) be enforced against private actors (as opposed to public authorities)?

The Constitution, or Basic Law (*Grundgesetz*), is of central importance for understanding the German legal framework on discrimination. The German Constitution is, unlike some other constitutions, directly binding on all public authorities.

There are several constitutional provisions that protect human equality. Most important is the guarantee of human dignity.¹ The core of this guarantee is the respect of any human being as an end in itself, simply by virtue of his or her humanity, irrespective of other characteristics. Case law of the Federal German Constitutional Court consistently states that each person should be treated not only as an object of state action, but as an end in itself.² He or she is, in addition, protected against degrading or humiliating treatment.³ The guarantee of human dignity is the central value decision of German law, its most important and supreme norm. In consequence, it is an important reference point for anti-discrimination law in Germany, especially as it guides interpretation of the constitutional guarantee of equality and provides normative yardsticks for other areas of law.

Another important constitutional guarantee is the guarantee of equality.⁴ The guarantee of equality provides, first, for equality before the law,⁵ which has been interpreted by the Federal

¹ Article 1.1 Basic Law (*Grundgesetz*): Human dignity is inviolable. To respect and protect it is the duty of all state authority.

² Settled case law, see recently Federal Constitutional Court (Bundesverfassungsgericht) , 1 BvR 357/05, 15 February 2006, para 121.

³ Ibid.

⁴ Article 3 Basic Law (*Grundgesetz*).

⁵ Article 3.1 All humans are equal before the law.

German Constitutional Court as going beyond the equal application of law and as giving the right to the creation of law that respects the principle of equality in treating essentially equal things equally and essentially unequal things unequally.⁶ The guarantee of equality contains, second, special protection against discrimination on the ground of sex,⁷ parentage, race, language, homeland and origin, faith, or religious or political opinions.⁸ There is a prohibition against disadvantaging somebody because of his or her disability, which implies the admissibility of positive action.⁹ The same applies to sex. It is explicitly stated that the State should support the effective realization of the principle of equality for women and men and works towards abolishing current inequalities.¹⁰

The equality provision of the German Constitution thus combines a broad open-textured guarantee of equality with special prohibitions of discrimination on certain enumerated grounds and certain explicit regulations on positive action.¹¹ The broad open-textured guarantee of equality makes it possible to extend protection against unjustified unequal treatment to grounds not explicitly covered in the special prohibitions. Most notably, sexual orientation was therefore included among the forbidden grounds of discrimination though not explicitly listed in the guarantee of equality. Age is without doubt another characteristic covered, though there is so far no differentiated jurisdiction of the German Constitutional Court on age discrimination. As directly binding law, the guarantee of equality is the central anti-discrimination clause for the whole public law. Any administrative act or regulation by whatever authority is subject to this guarantee.

In addition, there are special constitutional equality rights concerning children out of wedlock,¹² equality of status and office,¹³ and equality of electoral rights.¹⁴ The constitutions of the Länder echo these equality provision.

The equality guarantees of the German Constitution have no direct horizontal effect. There is a widely held opinion in legal doctrine (which has resulted in some case law) that the general clauses of civil law provide remedies in private contract law and tort law against discrimination on any ground that infringes basic personality rights. These general clauses have to be interpreted in the light of the constitutional order (especially in the light of fundamental rights and most importantly of human dignity, which have thus indirect horizontal effect) that

⁶ Settled case law, BVerfGE (Decisions of the Federal Constitutional Court) 49, 148 (165); 98, 365 (385).

⁷ Article 3.3 and Article 3.2 Basic Law (*Grundgesetz*): Men and women are equal.

⁸ Article 3.3 sentence 1 Basic Law (*Grundgesetz*).

⁹ Article 3.3. sentence 2 Basic Law (*Grundgesetz*).

¹⁰ Article 3.2. sentence 2 Basic Law (*Grundgesetz*).

¹¹ There are other provisions, e.g. Article 9.3 sentence 2 Basic Law (*Grundgesetz*) makes null measures directed at impeding the activities of unions and its members.

¹² Article 6.5 Basic Law (*Grundgesetz*): Children born out of wedlock by law have to be provided with the same conditions for physical and mental development and accorded the same place in society as legitimate children.

¹³ Article 33.1 Basic Law (*Grundgesetz*): Every German in every State (*Land*) has the same political rights and duties.

Article 33.2 Basic Law (*Grundgesetz*): Every German is equally eligible for any public office according to his aptitude, qualifications, and professional achievements.

Article 33.3 Basic Law (*Grundgesetz*): Enjoyment of civil and political rights, eligibility for public office, and rights acquired by public service are independent of religious denomination. No one may suffer disadvantage by reason of his adherence or non-adherence to a denomination or philosophical persuasion.

Article 140 Basic Law (*Grundgesetz*) in conjunction with Article 136.1 and 136.2 Weimar Constitution reiterates the equality of status and office independent of religious denomination.

¹⁴ Article 38.1 sentence 1 and Article 38.2 Basic Law (*Grundgesetz*).

prohibits discrimination,¹⁵ most importantly the general provisions on bona fide and equity.¹⁶ Specifically, it is widely held that the value decision embodied in the guarantees of human dignity and equality leads to an interpretation of these norms that prohibits certain kinds of discriminatory behaviour in private law. A contract implying discrimination on the base of race is, for example, widely held to be null and void. The same reasoning applies in principle to other grounds as well. The case law in this respect is, however, limited.¹⁷ There is therefore a wide, though not uncontested perception, that specialised legislation is needed to provide protection against discrimination outside the field of employment and occupation.

¹⁵ Especially as to race and ethnic origin, see T. Bezenberger, *Ethnische Diskriminierung, Gleichheit und Sittenordnung im bürgerlichen Recht*, *Archiv für die civilistische Praxis* 196 (1996), 395 et. seq.

¹⁶ BVerfGE 7, 198, settled case law.

¹⁷ Examples from recent case law (see also above): The practise of a taxi control center to offer "German taxi drivers" was regarded to violate the equality guarantee which was held to apply indirectly to the legal relationship between the taxi driver and the taxi control center, making a resolution of a cooperative to this respect nil and void, cf. OLG Düsseldorf, 14 U 238/98; Landgericht Karlsruhe, 11 August 2000, 2 O 243/00: Violation of Sec. 826 Civil Code (Bürgerliches Gesetzbuch) through exclusion of gay singing club by association of such clubs.

2. Definitions

2.1.1 Restrictions

Are there any restrictions related to the scope of 'age' as a protected ground outside the fields of employment and occupation (e.g. a minimum age below, or a maximum age above, which aspects of any anti-discrimination law does not apply)?

Please include case-law where relevant as well as legislation, providing a list of any important case-law on the definition of grounds which has relevance to discrimination outside the fields of employment and occupation. All references to case-law, whether in this section or elsewhere, should take the following format:

- a. Name of the court*
- b. Date of decision and reference number (or place where the case is reported). If the decision is available electronically, provide the address of the webpage.*
- c. Name of the parties*
- d. Brief summary of the key points of law (no more than several sentences)*

There are many statutory age limits in German law. Not all of them have been the subject of review in courts. In many cases, such age limits have been upheld as objectively justified in the light of the relevant anti-discrimination provision. Thus, anti-discrimination law (as far as it exists) applies, but it does not rule out the differentiation in the interpretation of the court.¹⁸

2.1.2 Definition of unlawful discrimination

To what extent, if at all, do the definitions of discrimination used by national law /case-law in relation to discrimination on grounds of gender, religion or belief, disability, age and sexual orientation, outside the fields of employment and occupation, differ from those which apply in relation to:

- a. racial or ethnic origin outside the fields of employment and occupation;*
- b. gender, religion or belief, disability, age and/or sexual orientation in the fields of employment and occupation?*

In answering each of these questions, please specify whether any existing prohibition on discrimination on grounds of gender, religion or belief, disability, age and/or sexual orientation incorporates concepts of direct discrimination, indirect discrimination, harassment and reasonable accommodation.

¹⁸ Hesse *Land* Social Security Court (*Hessisches Landessozialgericht*), 15 December 2004, L 7 KA 412/03 ER: age limit of 68 for contractual psychotherapist or doctor according to Section 95.7 Social Code V (*Sozialgesetzbuch V*): in material scope of Directive, not excluded by Article 3.3., but the time limit for transposition has not yet expired; Federal Social Security Court (*Bundessozialgericht*) 27 April 2005: same matter (here dentist), transposition period has not expired; Marburg Social Security Court (*Sozialgericht Marburg*), 23 November 2005, S 12 KA 38/05: same issue, age limit not discrimination in the light of Mangold-decision; Lower Saxony *Land* Labour Court (*Landesarbeitsgericht Niedersachsen*), 28 May 2004, 10 Sa 2180/03: higher level of protection by social security systems for employees older than 55 (e.g. as regards unemployment benefits) constitutes an objective reason for simplified redundancy procedures; Federal Labour Court (*Bundearbeitsgericht*), 18. May 2004, 9 AZR 250/03: Directive not applicable because transposition period not yet expired, no other legal effects; *Verwaltungsgericht Köln*, 11. February 2004: age limit of 35 for entry into the civil service acceptable.

Apart from the guarantee of equality of the Basic Law, and of public law concerning civil servants and public employees, there are prohibitions of discrimination in labour law. These definitions are not explicitly reiterating the standard definitions of discrimination, but are uniformly interpreted along the line of the jurisdiction developed by the ECJ, therefore encompassing direct and indirect discrimination.

The – explicitly defined - concept of harassment is contained in laws against discrimination on the base of sex on the Federal and State level. Germany enjoys a strong protection of personality rights through tort law. Many instances of harassment can constitute a violation of these laws and give rise to a claim to damages because of tortious liability.

Even though definitions of discrimination might not explicitly include reference to an equivalent to the idea of reasonable accommodation, it is part of anti-discrimination law as it stands in Germany. As to religion, for example, special legal regulations and case law, deal with the reasonable accommodation of various religious beliefs, including exceptions from general laws. Much of this is legally conceptualised through the interpretation of the guarantee of freedom of religion in the Basic Law and its impact on statutory law, not through the interpretation of equality clauses. As a result, as far as religion is concerned, public authorities are under a duty to take the special needs of religious communities and the individuals that form these communities into account.¹⁹ Employers have to pay due consideration to the fundamental right to freedom of religion.²⁰

In addition, as regards discrimination on the ground of disability, various legal instruments have been passed aiming to protect against discrimination and increase the social inclusion of disabled persons. The most important one is the Law on the Equality of the Disabled (*Behindertengleichstellungsgesetz*). This act contains not only a prohibition of discrimination for all public bodies but an obligation to provide hindrance-free access (public buildings, public transport, public streets, means of communication / right to use sign language / Braille, and so on). There are various provisions stipulating that reasonable accommodation should be made to allow disabled persons to communicate with public authorities and in court. Severely disabled people (suffering from a severe lack of mobility or orientation) are granted free local and regional transport including free transport for an escort on long distance journeys (train)²¹ and other aspects of mobility, to name just a few examples.²²

¹⁹ See Federal Constitutional Court (*Bundesverfassungsgericht*) 1 BvR 1783/99, 15.1.2002 that held: If a non-German butcher who is a pious Muslim wants to slaughter animals without stunning them (ritual slaughter) in order to facilitate to his customers, in accordance with their religious conviction, the consumption of the meat of animals that were ritually slaughtered, the constitutionality of this activity is to be examined in accordance with Article 2.1 in conjunction with Articles 4.1 and 4.2 of the Grundgesetz (GG, Basic Law). In the light of these constitutional norms, § 4a.1 in conjunction with § 4a.2, number 2, part 2 of the *Tierschutzgesetz* (Animal Protection Act) is to be interpreted in such a way that Muslim butchers can be granted an exceptional permission for ritual slaughter.

²⁰ Cases include religious dress codes, e.g. Mala (*Land Labour Court (Landesarbeitsgericht)* Düsseldorf, 22 March 1984, 14 Sa 1905/83), turban of Sikhs (*Labour Court (Arbeitsgericht)* Hamburg, 3 January 1996, 19 Ca 141/95), or the headscarf (*Federal Labour Court (Bundesarbeitsgericht)*, 10 October 2002, 2 AZR 472/01; *Labour Court (Arbeitsgericht)* Dortmund, 16 January 2003, 6 Ca 5736/02), though it is constitutional to prohibit a teacher in a public school from wearing a headscarf (*Federal Constitutional Court (Bundesverfassungsgericht)*, 2 BvR 1436/02; *Federal Administrative Court (Bundesverwaltungsgericht)*, 2 C 45/03, 24.6.2004). Other cases concern breaks for prayers (*Land Labour Court (Landesarbeitsgericht)* Hamm, 18 January 2002, 5 Sa 1782/01).

²¹ Section 145-147 Social Code IX (*Sozialgesetzbuch IX*)

²² See Section 7 – 11 Disabled Equality Law (*Behindertengleichstellungsgesetz*) and the corresponding regulations in *Land laws on disability*, on a special regulation on mobility, e.g. Section 9 of the Berlin Law on the Promotion of Equality of People with and without Disabilities (*Berliner Gesetz über die Gleichberechtigung von Menschen mit und ohne Behinderung*); on communication with public authorities and in court see also e.g. Section 17.2 Social Code I

Section 554a Civil Code (*Bürgerliches Gesetzbuch*) sets down the rule that a disabled person has the right to demand consent to changes in rented property that are necessary for his or her adequate use. The landlord can refuse consent if his or her interest in the unchanged status of the property carries more weight than the interest of the disabled person.²³ A special regulation of general contract law allows for valid contracts with mentally disabled persons.²⁴ There are special regulations for disabled persons in civil law relating to their special needs.²⁵ Employers have duties for reasonable accommodation, private service providers through some statutory regulations – e.g. to provide barrier free access to restaurants and bars.

The *Länder* have passed laws on building standards which relate to the reasonable accommodation of public buildings at Land level for the disabled, older people and people with small children.²⁶

The social security system has the general aim of integrating disabled persons into society through individual help and accommodation to their needs²⁷ and establishes claims to material means of integration.²⁸ The German social agencies provide support for participation in the working life.²⁹ This support encompasses support for obtaining employment, including vocational training, special medical and psychological support for participation in working life, housing near the work place, transport or the creation of housing adequate for the disabled persons, to name some examples.³⁰

As to education, there are several dimensions to the question of integrated education. The general aim is not to separate disabled children from their social background and to educate them with children without disabilities.³¹ In the leading case concerning integrated schooling, the German Federal Constitutional Court held that the decision to put a child in a special school for disabled persons against the will of the parents constituted a breach of Article 3.2 sentence 2 if it was possible for the child to attend an ordinary school without special pedagogical help, if his or her special needs could be fulfilled using existing means and other interests worthy of protection, especially of third parties, did not weigh against integrated schooling.³² Higher education in universities should take account of the needs of the disabled.³³

(*Sozialgesetzbuch I*); Section 57 Social Code IX (*Sozialgesetzbuch IX*); Section 19.1 sentence 2 Social Code X (*Sozialgesetzbuch X*); Section 186, 191a *Gerichtsverfassungsgesetz*; Section 483 Code of Civil Procedure (*Zivilprozessordnung*); Section 66, 259.2 Code of Criminal Procedure (*Strafprozessordnung*); Section 22 et seq. Law on Authorisation (*Beurkundungsgesetz*) on notarial instruments; Section 2233.2 Civil Code (*Bürgerliches Gesetzbuch*).

²³ Section 554a Civil Code (*Bürgerliches Gesetzbuch*). Case law has underlined that the claim of the disabled tenant does not suppose extreme sacrifices on his side, see Regional Court (*Landgericht*) Hamburg, April 29, 2004, Az: 307 S 159/03.

²⁴ See Section 105a Civil Code (*Bürgerliches Gesetzbuch*).

²⁵ Section 305.2 Nr. 2 Civil Code (*Bürgerliches Gesetzbuch*) establishes for example the duty to pay due regard to the needs of disabled persons when general terms and conditions are included in a contract; on other matters see Section 138.6 Social Code IX (*Sozialgesetzbuch IX*); Section 5.11 *Heimgesetz*.

²⁶ See e.g. Section 51 Berlin Regulation on Construction (*Bauordnung Berlin*). On minimum standards of homes: Regulation on Home Building (*Heimmindestbauverordnung*).

²⁷ Section 10 Social Code I (*Sozialgesetzbuch I*).

²⁸ Section 4 et seq. Social Code IX (*Sozialgesetzbuch IX*); 53 et seq. Social Code XII (*Sozialgesetzbuch XII*). Special regulations for blind people: Section 72 Social Code XII (*Sozialgesetzbuch XII*).

²⁹ Section 97 et seq. Social Code III (*Sozialgesetzbuch III*), Section 104 *Sozialgesetzbuch IX* (Socialcode IX).

³⁰ See e.g. Section 33 Social Code, Part IX (*Sozialgesetzbuch IX*), Support Measures for Participation in Working Life (*Leistungen zur Teilhabe am Arbeitsleben*).

³¹ Section 4.3. Social Code IX (*Sozialgesetzbuch IX*). The school laws of the *Länder* contain detailed regulations on the matter.

³² See BVerfG 96, 288.

³³ Section 2.4 sentence 2 University Framework Law (*Hochschulrahmengesetz*) and corresponding regulations at the Land level.

There are special regulations in the pension law, including a lower minimum age for severely disabled persons for collecting state pensions.³⁴

³⁴ Section 37 Social Code VI (*Sozialgesetzbuch VI*).

3. Personal and material scope

3.1 Personal scope

3.1.1 Natural persons and legal persons

Does national law distinguish between natural persons and legal persons, either for purposes of protection against discrimination or liability for discrimination outside the fields of employment and occupation on grounds of gender, religion or belief, disability, age and/or sexual orientation?

Most protections against discrimination are only applicable to natural persons – accordingly only these are protected, e.g. through the guarantee of equality against discrimination on the ground of age. Others apply to legal persons as well, most importantly according to settled case law of German Constitutional Court, to religion. As far there is any protection against discrimination outside employment and occupation, this is provided by the general rules of civil law. Here the general rules of liability apply, encompassing legal persons.

3.1.2 Scope of liability

What is the scope of liability for discrimination (including harassment and instruction to discriminate) outside the fields of employment and occupation on grounds of gender, religion or belief, disability, age and/or sexual orientation? Specifically, can service-providers (e.g. landlords, schools, hospitals) be held liable for the actions of employees? Can they be held liable for actions of third parties (e.g. tenants, clients or customers)? Can the individual harasser or discriminator (e.g. co-worker or client) be held liable? Can trade unions or other trade/professional associations be held liable for actions of their members?

The general rules of liability apply: the perpetrator of a discrimination can be liable him or herself. The general liability for action of third parties is regulated by Sec. 31, 278, and 831 of the Civil Code (*Bürgerliches Gesetzbuch*). Sec. 31 of the Civil Code (*Bürgerliches Gesetzbuch*) creates the liability of associations (e.g. Unions) for the actions of their agents. Sec. 278 of the Civil Code (*Bürgerliches Gesetzbuch*) establishes for all contractual relations the vicarious liability of the principal for persons employed performing an obligation. Section 831 of the Civil Code (*Bürgerliches Gesetzbuch*) creates vicarious liability for agents with respect to tortious liability.

3.2 Material Scope

3.2.1 Social protection, including social security, social assistance and healthcare

- a. *Does national legislation and/or case-law regulate all discrimination on grounds of religion or belief, disability, age and/or sexual orientation in relation to social protection, including social assistance, social security and healthcare? By using the terms 'social assistance' and 'social security' we mean to capture both contributory and non-contributory benefits/ payments.*

Public law is regulating the greatest part of these areas. Consequently, the guarantee of equality of the Basic Law applies, ruling out discrimination on the grounds listed. There are some special norms to this respect, e.g. in Social Security Law. Healthcare can be based on private contracts. In consequence, the rules of general law outlined above apply to these contracts. As far as

insurance is concerned, special rules exist. Insurance premiums must not be calculated on the basis of nationality or ethnic origin.³⁵

- b. *Does national legislation and/or case-law regulate all discrimination on grounds of gender in relation to social protection, excluding social security and social assistance insofar as they consist of statutory schemes which provide protection against the risks of sickness, invalidity, old age, accidents at work and occupational diseases and unemployment?*

Art. 3.2 Basic Law prohibits discrimination on the base of sex. Social security is part of public law. Therefore any discrimination on the ground of sex is directly prohibited by this constitutional guarantee.

3.2.2 Social advantages

Does national legislation and/or case-law regulate all discrimination on grounds of gender, religion or belief, disability, age and/or sexual orientation in relation to social advantages? 'Social advantages' cover a broad category of benefits that may be provided by either public or private actors granted to people because of their employment or residence status, for example, e.g. reduced rate train travel for large families, child birth grants, funeral grants and discounts on access to municipal leisure facilities.

It may be difficult to give an exhaustive analysis of whether this category is fully covered in national law, but you should indicate whether national law explicitly addresses the category of 'social advantages' or if discrimination in this area is likely to be unlawful.

There is no specialised regulation on "social advantages" in this broad sense. There is some case law on these matters, arising in the context of labour law. Here the non-discrimination clauses of labour law are applied, as the constitutional provisions have no direct horizontal effect. It has been, for example, held³⁶ that it is lawful as far as employment benefits are concerned to treat married partners better than civil servants living in a *Lebenspartnerschaft* (registered partnership for same sex couples) because of the special protection for marriage provided by the Basic Law³⁷ and not infringing the equality guarantee of the Basic Law.

3.2.3 Education

- a. *Does national legislation and/or case-law regulate all discrimination on grounds of gender, religion or belief, disability, age and/or sexual orientation in relation to education? 'Education' covers all aspects of education, including all types of schools. Please also consider cases of segregation in schools on grounds of religion or belief and disability in particular, and the existence of special education or legislation on education for children with special needs. If these cases exist, please refer also to relevant legal/political discussions that may exist in your country on the issue.*

Education is mostly dealt with by the *Länder*, though there are some Federal regulations as well.³⁸ Most education in Germany is public, and so bound by the guarantee of equality.³⁹ *Land*

³⁵ Section 81 (e) Insurance Supervision Law (*Versicherungsaufsichtsgesetz*).

³⁶ Federal Administrative Court 2 C 43.04, January 1 2006.

³⁷ Article 6 Basic Law (*Grundgesetz*).

³⁸ See University Framework Law (*Hochschulrahmengesetz*).

school laws on education contain special provisions against discrimination and set out the aims of the educational system with respect to values such as human dignity.⁴⁰ Private schools, possibly with a religious or philosophical ethos, have a right to equal treatment as regards state support.⁴¹ There is an explicit prohibition in the Basic Law (*Grundgesetz*) on discrimination according to income by private schools that function as a substitute for public schools.⁴²

There are special regulations for autochthonous minorities in Germany, which provide special protection of cultural identity, and the use of language in schools.⁴³

b. *What, if any, particular exceptions from any prohibition on grounds of religion or belief, disability, age and/or sexual orientation apply in relation to education?*

Beyond the prohibition of discrimination on the base of income, the organisation responsible for a private school has the right to select pupils freely, e.g. according to confession. Such discrimination on other grounds is, however, only permissible, if the pupil can attend without unreasonable difficulty another school, which is not based on any ethos. If this is not the case, she has to be admitted to the first school.

There are rules on reasonable accommodation for disabled children.⁴⁴ Any differentiation on the base of age would have to satisfy the strict scrutiny test of proportionality developed by the Federal German Constitutional Court (*Bundesverfassungsgericht*). The same applies to sexual orientation. There is no case reported where any different treatment on this ground has been justified and hardly any unequal treatment could be thought to be justified in this respect. Denial of admission, e.g. would be clearly unjustifiable. As indicated in before, one has to bear in mind, that most schools in Germany are public schools, where the constitutional equality guarantee directly applies.

³⁹ Segregation is therefore not an issue in the German public school system.

⁴⁰ See e.g. Article 7 North Rhine – Westfalen Constitution (*Landesverfassung Nordrhein-Westfalen*), Section 1 North Rhine-Westfalen School Law (*Schulgesetz Nordrhein-Westfalen*): no discrimination on base of economic status, origin or sex.

⁴¹ BVerfGE 75, 40.

⁴² Article 7.4 sentence 3 Basic Law (*Grundgesetz*).

⁴³ For *Land* laws, e.g. Law on the Rights of the Sorbs (Wends) in the *Land* of Brandenburg (§ 10 *Gesetz zur Ausgestaltung der Rechte der Sorben (Wenden) im Land Brandenburg*); Brandenburg / Saxony: State Agreement on the Foundation of a "Foundation for the Sorbian People" (*Staatsvertrag über die Errichtung der "Stiftung für das sorbische Volk*), Date: 09.12.1998, Sächsisches Gesetz- und Verordnungsblatt 1998, 629; Saxony: Law on the Rights of the Sorbs in the Free State of Saxony (*Gesetz über die Rechte der Sorben im Freistaat Sachsen*), Date: 31.03.1999, Sächsisches Gesetz- und Verordnungsblatt 1999, 161; Schleswig-Holstein: Law on the Promotion of Freisens in the Public Sphere (*Gesetz zur Förderung des Friesischen im öffentlichen Raum*), Date: 13.12.2004, Gesetz- und Verordnungsblatt 2004, 481; Schleswig-Holstein: Schleswig-Holstein School Law (*Schleswig-Holsteinisches Schulgesetz*), Gesetz- und Verordnungsblatt 1990, 451, last amendment: GVOBl 2005, 168; Law on the Legal Status and Financing of Fractions in the Schleswig-Holstein Parliament (*Gesetz zur Rechtsstellung und Finanzierung der Fraktionen im Schleswig-Holsteinischen Landtag*), Date: 18.12.1994, Gesetz- und Verordnungsblatt 1995, 4, Electoral Law for the Schleswig-Holstein Parliament (*Wahlgesetz für den Landtag Schleswig-Holstein*), Date: 07.10.1991, Gesetz- und Verordnungsblatt 1991, 442, last amendment: Gesetz- und Verordnungsblatt 2003, 278.

⁴⁴ See Introduction, above.

3.2.4 Access to and supply of goods and services which are available to the public

- a. *Does national legislation and/or case-law regulate all discrimination on grounds of religion or belief, disability, age and/or sexual orientation in relation to access to and supply of goods and services?*

There is no specialised regulation on the prohibition of discrimination as to the supply with goods and services, apart from some single-issue regulations, e.g. as to insurance.⁴⁵ The Law on the Transport of Persons (*Personenbeförderungsgesetz*) requires that a company must be reliable in order to receive a license, and establishes the duty to provide services to anybody who abides by the transport regulations.⁴⁶ Telecommunication and postal service regulations require companies with a dominant market position to offer their services to everybody on the same conditions.⁴⁷ The Licensing Law (*Gaststättengesetz*) makes authorisation to establish a restaurant dependent on the provision of rooms that reasonably accommodate the needs of disabled persons.⁴⁸ The license itself can be denied in cases of discriminatory behaviour. There is some case law in this area.⁴⁹

The service of public authorities is regulated by the equality guarantee of the Basic Law, ruling out discrimination.

Beyond these regulations, the general rules of civil law apply, especially through interpretation of the general clauses of civil law. In case of monopoly, these rules can lead – according to common opinion – to a duty to contract.

- b. *By "services" we mean to include, for example:*

- *access to transportation*
- *access to buildings*
- *the provision of healthcare*
- *access to banking or insurance, grants, loans, credit or finance*
- *accommodation in a hotel or similar establishment*
- *access to entertainment, recreation or refreshment*
- *the services of a profession or trade*
- *the services of any public authority*

Please detail the services, if any, in relation to which national legislation and/or case-law regulates discrimination on grounds of religion or belief, disability, age and/or sexual orientation.

⁴⁵ Section 81 (e) Insurance Supervision Law (*Versicherungsaufsichtsgesetz*).

⁴⁶ Section 22 Law on the Transport of Persons (*Personenbeförderungsgesetz*). Disabled persons are consequently included. Consequently, e.g. a wheelchair has to be transported.

⁴⁷ Section 2 Regulation on the Protection of Telecommunications Customers (*Telekommunikations-Kundenschutzverordnung*); Section 2 Regulation on the Postal Service (*Postdienstleistungsverordnung*).

⁴⁸ Section 4 Nr. 2a Licensing Law (*Gaststättengesetz*). The licensing acts provide that the required licence will not be granted or may be withdrawn if the applicant is not reliable. This can be the case for incidents of discrimination

⁴⁹ Schleswig-Holstein Administrative Court (*Schleswig-Holsteinisches Verwaltungsgericht*) 27 September 2000, 12 B 81/00: no denial of license for restaurant on basis of political belief (Neo-nazi) if no crime committed; Stuttgart Administrative Court (*Verwaltungsgericht Stuttgart*), 4. October 2004, 3 K 3198/04: homosexual man of Turkish background possibly harassed, background for events leading to his dismissal from voluntary fire fighters.

See a)

- c. *Does the law distinguish between goods and services available to the public (e.g. in shops, restaurants, banks) and those only available privately (e.g. limited to members of a private association)? If so, explain the content of this distinction.*

There is no explicit regulation and therefore no such explicit distinction.

- d. *What, if any, particular exceptions from any prohibition on grounds of religion or belief, disability, age and/or sexual orientation apply in relation to goods and/or services?*

If the general rules of private law are applied, the bona fide and equity clauses leave room for the justification of discrimination, because they imply a weighing and balancing exercise. There is, however, no settled case law on any such principles.

3.2.5 Housing

Does national legislation and/or case-law regulate all discrimination on grounds of gender, religion or belief, disability, age and/or sexual orientation in relation to housing? To which aspects of housing does the law apply? Are there any exceptions?

Housing law is part of general contract law to which the principles apply that have been outlined above. The denial to let a flat to somebody on the ground listed could be regarded as violating bona fides norms and thus being null and void. It has been argued that this is the case for discrimination on the base of race and ethnic origin. For other grounds there is less of a consensus in legal science. In both cases there is no clarifying case law on the matter.

There is a special clause enabling registered partners (*Lebenspartner*) to succeed in rental contracts.⁵⁰ On reasonable accommodation of disabled tenants see above.

3.2.6 Other discrimination outside the fields of employment or occupation

Does national legislation and/or case-law regulate discrimination on grounds of gender, religion or belief, disability, age and/or sexual orientation outside the areas mentioned in 3.2.1 – 3.2.5 above? (Such areas might include, for example, media/ advertisements but do not include in your answers discrimination on grounds of gender in relation to social security or access to services.

The guarantee of equality of the Basic law, as mentioned, permeates all of public law. The compulsory military service for men only is directly regulated in the constitution. In theory, all areas of private law, even if none of the mentioned specialised legislation applies can be the subject of a prohibition of discrimination derived from general clauses.

⁵⁰ Section 563.1 sentence 2 Civil Code.

4. Exceptions

4.1 Service providers etc. with an ethos based on religion or belief

- a. *Does national law and/or case-law provide an exception for providers of services, healthcare, housing, etc with an ethos based on religion or belief? If so, does the exception apply to discrimination on grounds of gender, religion or belief, disability, age and/or sexual orientation? And does it apply to all discrimination outside the fields of employment and occupation?*

There is an elaborate system of exceptions from general rules for religious communities and such of philosophical belief. Some landmark decisions by the Federal Constitutional Court have elaborated the nature of this autonomy⁵¹ The church is autonomous in organisation and administration. This is not only limited to the internal organisation of churches but extends to all institutions related to the church, regardless of their legal form. The only precondition is an inner relationship to the religious mission of the church. Whether such an inner relationship exists is not to be determined by state institutions, most importantly by the courts. It is solely up to the churches to determine the scope and limit of its religious mission. For example, for Christian churches it is accepted that due to the principle of charity, all charitable activities (such as running kindergartens, hospitals etc.) are encompassed by the religion mission of the Christian faith. Acts concerning the internal workings of a church are not acts by public authorities and thus not regulated by public law.

According to Article 140 Basic Law and Article 137.3 Weimar Constitution, the autonomy of a church is limited by the laws applicable to all. This provision has been narrowly interpreted by the Federal Constitutional Court. These laws are understood as laws that have the same meaning for a church as for everybody else. There is considerable case-law on the matter, following the lines developed by the Federal Constitutional Court.

The legal autonomy of the churches is limited by the laws applicable to all (for example the laws regulating the termination of contracts) but these laws are interpreted in the light of their autonomy.

However, the Federal Constitutional Court set important limits on this regulatory autonomy of the churches. It does not allow arbitrariness, the violation of *bona fide* principles and the *ordre public*, including the application of fundamental rights.⁵²

It should be noted that this privilege is not limited to Christian churches, but open to any other religion.

- b. *Are there any specific provisions or case-law in this area relating to conflicts between the rights of organisations with an ethos based on religion or belief and other rights to non-discrimination?*

There are such cases, most prominently from the area of labour law, e.g as to the dismissal of an employee due to a behaviour contrary to the ethos of the organisation.

⁵¹ BVerfGE 46, 73 (Application of the Work Constitutions Law to a Catholic hospital); 57, 220 (Access of Unions to religious institutions); 70, 138 (Dismissal on the basis of a breach of the duty of loyalty in religious institutions).

⁵² Ibid. p. 168.

4.2 Social security benefits

- a. *Does national law and/or case-law provide for social security payments entitlement to which turns on married status? Or for social security payments which are payable only to opposite-sex couples?*

Through the Law on Registered Partnerships (*Lebenspartnerschaftsgesetz*), the status of same sex partnerships and married opposite sex couples has been equalised in most respects of social security law.⁵³

- b. *Does national law and/or case-law provide for social security payments entitlement to which turns on age and/or disability? If so, what criteria are used as regards age and/or disability?*

The German Social Security Law contains a differentiated set special provisions on disability and age providing for the special needs of these persons for the integration in society, see above.

4.3 Health and safety

Are there exceptions to the prohibition on discrimination on grounds of age or disability outside the fields of employment or occupation in relation to disability and health and safety?

Are there exceptions outside the fields of employment or occupation relating to health and safety law in relation to other grounds, for example religion, where there may be issues of dress or personal appearance (turbans, hair, beards, jewellery etc)?

The various areas of law – public and private – covered by the prohibition of discrimination of a different nature admit for exceptions, that roughly speaking will have to meet a test of proportionality, which is a general principle of German Law. Any special dress in particular will be the subject of the implied exercise of weighing and balancing the interests and rights involved.

4.4 Exceptions related to discrimination on the ground of age

- a. *Is it possible, generally, or in specified circumstances, to justify direct discrimination on the ground of age? If so, what is the test for justification?*

The possibility exists. The test would be a test of proportionality. This is e.g. applied in the case law on the permissibility of age limits for certain professions. It is asked whether these limits serve a legitimate aim, are suitable to achieve their aim, necessary, and to not impose any unnecessary burden on the person concerned.⁵⁴

- b. *Are there any special conditions set by law for older or younger persons or for persons with caring responsibilities in order to ensure their protection (for example in relation to access to healthcare or to social advantages)? If so, please describe these.*

There are various of such provision, e.g. as to meeting the special needs of older persons or persons with children in Social Security Law.

⁵³ Cf. for example Section 19.1. Social Code Part XII (*Sozialgesetzbuch XII*). Lacunae concern some privileges of married couples in the public health system.

⁵⁴ See above footnote 18.

- c. *Are there exceptions permitting minimum and/or maximum age requirements in relation to access to healthcare, social advantages or other matters outside the fields of employment and occupation?*

There are such regulations, e.g. maximum age for entering the public healthcare system after being privately insured (notwithstanding the protection of any person in need through Social Security). The whole system is now under intense debate.

- d. *Is there a state pension age, at which individuals must begin to collect their state pensions? Can this be deferred if an individual wishes to work for longer, or can an individual collect a pension and still work?*

The normal state pension age is 65. Special, more advantageous rules apply to severely disabled persons, and for a transitory period for women of some age groups. There is no restriction to work while collecting the state pension.

4.5 Public security, public order, criminal offences, protection of health, protection of the rights and freedoms of others

Does national law regulating discrimination on grounds of gender, religion or belief, disability, age and/or sexual orientation outside the fields of employment and occupation include any exceptions based on public security, public order, criminal offences, protection of health or the protection of the rights and freedoms of others?

The prohibition of discrimination in public law is based on the guarantee of equality of the Basic Law. This norm establishes the prohibition of discrimination on certain grounds, among them sex, religion or belief, and disability. Furthermore it contains an open-textured equality guarantee in the ambit of which covers discrimination on the ground of age and sexual orientation. It is contentious, whether as far as the explicit prohibitions are concerned, any exceptions can be justified, but a convincing interpretation will allow for this and apply a strict test of proportionality.⁵⁵ As far as the open-textured norm is concerned, this test applies, accounting for any possible collision with other values and rights.

4.6 Any other exceptions

Please mention any other exceptions to the prohibition of discrimination on grounds of gender, religion or belief, disability, age and/or sexual orientation outside the fields of employment and occupation provided in national law.

See 4.5.

⁵⁵ For this, see: Gubelt in: v. Münch/Kunig, GGK I, Article 3 para 104; Ebsen, in: *Handbuch des Verfassungsrechts*, 2. ed. 1994, § 8, para 23; Osterloh in: Sachs, GG, Article 3 para 241 et. seq., 254; against: Sachs, in: Isensee/Kirchhof, HStR V, § 126 para 52 et seq.

5. Positive action

- a. *What scope does national law provide for taking positive measures to promote equality in practice in respect of gender, religion or belief, disability, age and/or sexual orientation outside the fields of employment and occupation? (Examples of positive action might include, for example, the targeting of educational advantages to persons disadvantaged by reason of their gender or disability, or the adoption of special measures in relation to transportation, healthcare or accommodation for the young, the aged or the disabled).*

Please refer to any important case-law or relevant legal/political discussions on this topic.

Positive action by public authorities including legislation has to be reconcilable with the constitutional guarantee of equality.⁵⁶ Explicit regulations make permissible positive action promoting the equality of men and women and disabled persons.⁵⁷ As to sex, there are proposals to extend quota system to the public sphere, which do not command much public interest. There are practices of this kind by political parties. There is debate over whether positive action is permissible within the scope of the guarantee of equality for other written and unwritten grounds of discrimination (the latter cover for example sexual orientation).⁵⁸ This has not been authoritatively clarified by the Federal Constitutional Court.

Social security law foresees a range of measures to foster the inclusion of disabled and older people in society.

There are various initiatives and schemes to promote the social position of women in many spheres of life, e.g. through special programs of their promotion in school and university education.

There are provisions on positive action, including institutional arrangements for autochthonous minorities, the promotion of their language, the protection of their territory etc., constitutionally buttressed by basic policy clauses of the constitutions of the *Länder*.⁵⁹ There are some attempts to promote the integration of the population of immigrants, for example through improved language skills.

The issue of quotas is highly contentious, especially as far as rigid quota systems are concerned. It has been extensively discussed regarding discrimination on the ground of sex. There has been no comparable debate regarding other grounds and other areas outside of employment, especially not anything like the affirmative action programs, e.g. in education, in other countries.

⁵⁶ Article 3, 33.2 and .3 Basic Law (*Grundgesetz*).

⁵⁷ Article 3.2 sentence 2, Article 3.3. sentence 2. The disability law provides for the explicit admissibility of positive action, see Section 7 Disabled Equality Law (*Behindertengleichstellungsgesetz*).

⁵⁸ See above footnote 55.

⁵⁹ Cf. for example Brandenburg *Land*: Constitution of Brandenburg (*Verfassung von Brandenburg*):

Article 17: Rights of the Sorbs (Wends) (*Rechte der Sorben [Wenden]*).

Law on the Definition of the Rights of the Sorbs in the *Land* of Brandenburg (*Gesetz zur Ausgestaltung der Rechte der Sorben (Wenden) im Land Brandenburg* (GBl 1994, 294)): Sec 1: Right to national identity; Section 2: No disadvantage because of commitment to ethnic group; Section 5: Council for Sorbian affairs; Section 10: Education, see 3.2.8; Schleswig-Holstein: Danes, Frisians: Article 5 Constitution of Schlesweig Holstein: *Minderheiten und Volksgruppen*.

- b. *Does national law and/or practice make any distinction, in this context, between (permitted) 'positive action' and (prohibited) 'positive discrimination' outside the fields of employment and occupation?*

There is no explicit distinction of this kind, but there are legal limits to positive action programs. Promoting girls in school, for example, still has to respect the equal right to education of boys. *In answering the questions above please refer to measures taken in respect of all 5 grounds. In particular, please mention any quotas or other measures concerning access by disabled persons to areas other than employment and/or occupation.*

6. Draft legislation and policy debates

- a. *Is new legislation drafted which aims to expand protection against discrimination on grounds of gender, religion or belief, disability, age and/or sexual orientation outside the fields of employment and occupation?(e.g. which ground and which fields of application)*

The German government has presented a bill in May to transpose the directives 2000/43/EC, 2000/78/EC, 2002/73/EC, and 2004/113/EC. This bill is supposed to be adopted by parliament before the summer break. The bill would create a comprehensive system of anti-discrimination law in Germany.

The prohibition of discrimination extends beyond the field of employment and occupation. The prohibition of discrimination on the ground of sex, religion or (philosophical) belief, disability, age and sexual identity (the German term used for sexual orientation) is (like the prohibition of discrimination on grounds of race and ethnic origin) – according to this bill, applicable to general civil law as well. The prohibition of discrimination extends thus to the provision of all goods and services which are the subject of private law contracts. Non of these grounds are further defined.

The material scope is, however, limited to qualified legal transactions. Only so called “mass transactions” (*Massegeschäfte*) are covered. These mass transactions are defined as those transactions that are concluded in a plurality of cases under similar circumstances without regard to the person of the contracting party. The same holds for such transactions, where the person of the contracting party is of minor importance. In addition to these transactions, private insurance falls within the ambit of the prohibition.

There is a general rule on exceptions in civil law. Unequal treatment is permissible if there are objective reasons for this treatment, specified by some exemplary groups of cases, for example the prevention of danger or the protection of the sphere of privacy, or actuarial calculations. Special consideration is paid to unequal treatment on the grounds of religion and belief. Here unequal treatment can be admissible if it is justified in the light of freedom of belief, when paying due regard to the ethos of the religious community or community of philosophical belief and its right to self-determination.

Furthermore, there are special exceptions. For housing unequal treatment is permitted if it serves a culturally and socially balanced population. Contractual relations which pertain to the private sphere of one party or his or her relatives are exempted. For housing this is assumed to be the case if the house to be let is on the same premise where the landlord or his or her family lives.

The Bill includes various changes of other statutes. Among them is the explicit prohibition of discrimination in social security law on the grounds of race and ethnic origin and disability and a prohibition on all other grounds as well for measures of reintegration into the labour market. Given the scope of the general guarantee of equality, these regulations are declarative.

- b. *Are there any national or other standards in place which are relevant to access for persons with disabilities to buildings, information (for example, by means of IT standards), education, and/or other services?*

As mentioned above, recently a bill, the Disabled Equality Act (*Behindertengleichstellungsgesetz*), has been passed establishing the general principle of hindrance free access for disabled persons, not only to public buildings but to any service or institution of the state. According to the Disabled Equality Act, organisations and social partners are to conclude agreements (*Zielvereinbarungen*) to provide for reasonable accommodation.⁶⁰ On other measures of reasonable accommodation see above.

- c. *Are there national debates on the necessity and opportunity to expand protection against discrimination on grounds of gender, religion or belief, disability, age and/or sexual orientation outside the fields of employment and occupation?*

Since 2001 there is a intensive debate about the issue of the extension of the prohibition of discrimination to fields outside of employment and occupation. In that year, a first draft was presented by the German Government to implement the directives 2000/43 and 2000/78, extending the prohibition of discrimination for all grounds covered by these directives to general civil law as well. The next draft passed parliament in 2005, but was blocked in the Bundesrat, contained the same provisions. The draft now presented is based on this latter draft and is the product of a compromise of the governing political parties, SPD and CDU/CSU.

The extension of the prohibition of discrimination has created harsh criticism and much political resistance in legal science, by associations of employers, the Christian churches, and other groups.

- d. *Are legal and non-legal measures adopted as complementary or alternative measures? Please, describe briefly the non-legal measures and explain how they relate to legal measures. Detail, in particular, any authoritative Codes of Practice, ordinances, guidance etc, together with an explanation of their legal significance. Detail also any measures such as requirements for the provision of information concerning access to (for example) service provision by the disabled, or ethnic minority clients, in company reports, auditing standards, etc.*

There are various non-legal measures to combat discrimination, like codes of practices and the like. An new instrument are the agreements in disability law (*Zielvereinbarungen*). This instrument is based on the idea, that such mutually negotiated agreements serve the aim of integration better. They have been criticized as lacking efficiency because the failure to conclude such agreements does not lead to any sanctions.

⁶⁰ Section 5 Disabled Equality Law (*Behindertengleichstellungsgesetz*).