Articles

Symbiosis of Freedom and Equality - Why Private Autonomy Benefits from Anti-Discrimination Law

Gesa Schlömer[*]

The enduring existence of discrimination prompts the consideration of state intervention through the enactment of anti-discrimination legislation, which serves, in part, to uphold human dignity. The German Basic Law and the General Equal Treatment Act seek to guarantee protection against discrimination by instituting prohibitions on discriminatory conduct. Its enforcement necessitates private individuals undergoing a laborious judicial process. Nonetheless, the realization of equal freedom mandates the legislator to proactively address prevailing disparities. This can be achieved through the implementation of affirmative legal provisions aimed at bolstering marginalized groups.

This article takes a reasoned position on the effects of curtailing private autonomy through legislative measures in anti-discrimination law. At present, efforts are being made to resolve the supposed contradiction between freedom and equality, which is based on an overly formal conception of freedom, at the expense of equality. Instead, achieving equilibrium between freedom and equality necessitates the pursuit of substantive equality in anti-discrimination law. By reinforcing the self-determination of the individual, private autonomy is consequently strengthened.

While the reversal of the burden of proof outlined in § 22 of the General Equal Treatment Act alleviates the evidentiary challenges faced by the plaintiff, it is not in itself sufficient to ensure the efficacious enforcement of substantive equality. This necessitates legislative intervention on the part of both European and German legislators.

[*] Law student, HHU Düsseldorf. Student Assistent, Chair of German, European and International Private and Procedural Law (*Lehrstuhl für deutsches, europäisches und internationales Privat- und Verfahrensrecht*, Prof. Dr. Lugani). Thanks are due to Dr. Tristan Rohner and Vivienne Essig for their valuable feedback.

I. Introduction 4

II. The necessity of anti-discrimination law 5

III. The relationship between freedom and equality 7

IV. Private autonomy and the need for exceptions 10

V. The General Equal Treatment Act and the reversal of the burden of proof 12

1. Design of the reversal of the burden of proof 13
2. The ruling of the Federal Labour Court 14
3. Burden of proof as a solution to the discrimination problem? 15

IV. Conclusion/Outlook 17

I. Introduction

"Liberty, equality and fraternity", under this quote democratic ideas developed in Europe during the French Revolution, some of which are still enshrined in the Constitution today as fundamental building blocks of our idea of democracy.[1] Article 3 of the Basic Law, whose prohibition of discrimination in paragraph 3, according to the then Federal Constitutional Court judge Helmut Simon, "leads a strange shadowy existence"[2],was for a long time an article of little practical relevance; its existence did not change the fact that until 1958 the husband's guardianship of the wife existed[3] and only since 1977 have women been allowed to sign employment contracts themselves[4]. What might be the reason for this? Possibly the word fraternity, from the quoted saying of the French Revolution, tells us that equality should not be about all people, but about the equality of a specific group among themselves. Today we would call them white cis men. This may have been a significant step for the time as status equality, but it only forms a new, larger, privileged group. That is not equality.[5] Nor is it freedom.

Nevertheless, this idea of equality has a meaning for today as well. The concept of equality

[1] So also Jörg-Detlef Kühne, '150 Jahre Revolution von 1848–49 – ihre Bedeutung für den deutschen Verfassungsstaat' (1998) 21 NJW 1513, 1515; See also UDHR art 1.

[2] BVerfG, 08.03.1983, 1 BvR 1078/80, BVerfGE 63, 266, 303, dissenting opinion Simon.

[3] Senta Gekeler, 'Diese Rechte haben Frauen in den letzten 100 Jahren errungen' (*Human Resources*, 5 March 2019) <https://www.humanresourcesmanager.de/arbeitsrecht/diese-rechte-haben-frauen-in-den-letzten-100-jahren-errungen/> accessed 24 July 2023.

[4] ibid; Anke Dembowski, 'Kommentar: Frauen im deutschen Recht – Keine 50 Jahre ist es her…' (*Fonds Frauen*, March 2018) <https://fondsfrauen.de/frauen-im-deutschen-recht-keine-50-jahre-ist-es-her/> accessed 24 July 2023.

[5] Explaining further what this "equality" means: Anna Katharina Mangold, *Demokratische Inklusion durch Recht* (Mohr Siebeck 2021) 182 ff.

was formulated in a general and indeterminate way. When equality becomes a principle, inequality requires legal justification.[6] This means as soon as discriminated groups invoke the principle of equality, reasons must be given as to why they are not equal. In those days, this was a forward-looking promise.[7] Today it is a promise based on the rule of law.[8] However it must be permanently claimed, because otherwise equality only applies to a certain group.

The two regulations above on matrimonial guardianship and women's employment contracts have in common that their effect had unfolded in private law. No doubt everyone is relieved that these discriminatory norms have been removed. That the state may not discriminate is indisputable. However, the socially established discriminatory structures lead to discrimination by private individuals.[9] Whether and in what way the state should interfere in this relationship is highly controversial. This article, intends to take a reasoned position on this question. This will be done taking into account the current legal situation, especially with regard to § 22 of the General Equal Treatment Act (German abbreviation: AGG), the reversal of the burden of proof.

In order to establish why the state should regulate anti-discrimination more strongly, an introductory consideration is taken at why an anti-discrimination law is necessary. It then reviews at the relationship between freedom and equality and examines whether anti-discrimination legislation can have a positive effect on society. For this purpose, the thesis that freedom and equality do not have to be in constitutional contradiction to each other, but can strengthen each other, is first examined. Subsequently, the relationship between freedom and equality is transferred to private law. On the basis of an analysis of freedom of contract, it is assessed whether freedom of contract and equality in the sense of anti-discrimination law can also complement each other. Finally, it is evaluated how concretely the current design of anti-discrimination law, especially with regard to the burden of proof, in contract law does justice to this relationship and a conclusion is drawn as to whether there is a need for change.

II. The necessity of anti-discrimination law

First, the necessity of anti-discrimination law will be justified. This will be done on a factual and on a legal level.

In view of the previously mentioned examples of discrimination against women on the

[6] ibid 184.

[7] ibid 184; similar Mathias Hong, 'Grundwerte des Antidiskriminierungsrechts: Würde, Freiheit, Gleichheit und Demokratie' in Anna Katharina Mangold and Mehrdad Payandeh (eds), *Handbuch Antidiskriminierungsrecht* (Mohr Siebeck 2022) 86.

[8] See also GG art 3 para 3.

[9] Mangold (n 5) 186.

basis of matrimonial guardianship and the impossibility of concluding employment contracts, it may seem obvious to claim that discrimination is a thing of the past, that today such laws no longer exist and that individuals are not subject to discrimination. Unfortunately, this is not the case.[10] Discrimination affects different parts of life. Examples of private law would be worse chances and conditions in job applications, housing or credit contracts, examples of criminal law motives behind a crime, such as anti-Semitism or racist motives. At this point it is important to mention that none of this should be an accusation against individuals. Discrimination is not always ill will, but the product of a social habit that must be overcome.[11] In particular, it is important to first raise awareness in order to question habits.

Now, the state could simply accept the discrimination. However, the compatibility of this with the state-binding constitution must be questioned. In principle, there are three possible grounds for anti-discrimination law: equality, freedom and human dignity. Anti-discrimination law is essentially a right to equality that can be based on Article 3 (3) of the Basic Law.[12] It is intended to combat the discrimination that exists in our society in order to enable the equal treatment of all people. Through the equal treatment of all people, equal participation in social life can also develop. Participation includes, for example, signing contracts to meet one's needs. If one has more participation possibilities, the possibilities to conclude different contracts increase. That means the actual exercise of participation promotes freedom.[13]

Therefore, equal treatment of people also leads to equal freedom. In this sense, anti-discrimination law is also tangential to freedom. Mangold speaks of a freedom-enabling function.[14]

That human dignity is violated can even be discussed. As the first Article of the Basic Law, Human dignity is the most important fundamental right. That is why a violation of human dignity cannot be justified. Consequently, it is a particularly important legal asset. If a person is classified in a group merely because of an unchangeable or unreasonably

[10] Steffen Beigang and others, 'Diskriminierungserfahrungen in Deutschland – Ergebnisse einer Repräsentativ- und einer Betroffenenbefragung' (*Antidiskriminierungsstelle des Bundes*, 2017) <https://www.antidiskriminierungsstelle.de/SharedDocs/downloads/DE/publikationen/Expertisen/expertise_diskriminierungserfahrungen_in_deutschland.pdf?__blob=publicationFile&v=6>; Sachverständigenrat deutscher Stiftungen für Integration und Migration, 'Diskriminierung am Ausbildungsmarkt – Ausmaß, Ursachen und Handlungsperspektiven' (*Robert Bosch Stiftung*, 2014) <https://www.bosch-stiftung.de/sites/default/files/publications/pdf_import/SVR-FB_Diskriminierung-am-Ausbildungsmarkt.pdf> accessed 18 July 2023; Ulrike Wieland and Ulrich Kober, 'Diskriminierung in der Einwanderungsgesellschaft – Wahrnehmungen und Einstellungen in der Bevölkerung' (*Bertelsmann* Stiftung, 25 April 2023) <https://www.bertelsmann-stiftung.de/de/publikationen/publikation/did/diskriminierung-in-der-einwanderungsgesellschaft> accessed 18 July 2023.

[11] Mangold (n 5) 186.

[12] ibid 354; more detail on the context at193.

[13] ibid 352; similar Hong (n 7) 107.

[14] Mangold (n 5) 353.

changeable[15] characteristic, they are not regarded as an individual but as part of this group.[16] If particularly positive or negative characteristics are associated with this group, this leads to a stigmatisation of the person concerned, which they cannot influence themselves.[17] This circumstance contradicts precisely the human dignity guarantee, which recognizes the human being as a self-responsible personality.[18] Human dignity can hence be violated, depending on the severity of the discrimination.[19] And if human dignity is violated, the discrimination cannot be justified. The very absoluteness of human dignity, however, jeopardises the supporting function of the legitimacy of anti-discrimination law by placing high demands on the violation.[20] However, the close connection between human dignity and stigmatisation on the basis of the discrimination criteria of Article 3 (3) of the Basic Law means that a violation of human dignity is potentially possible in every case of discrimination.[21] This circumstance requires the state to pay more attention to preventing discrimination on the part of private individuals as well. In addition to the indirect third-party effect of Article 3 (3) of the Basic Law, the state also has a duty to protect under Article 1 (1) sentence 2 of the Basic Law in the case that human dignity is affected. The effect of fundamental rights vis-à-vis private individuals normally only arises from the fact that the judge, as part of the state apparatus, is obliged to abide by fundamental rights in accordance with Article 1(3) of the Basic Law. However, Article 1 (1) sentence 2 of the Basic Law specifically regulates an obligation to protect human dignity. For this reason, human dignity is particularly strongly protected.

Anti-discrimination law can therefore be constitutionally based not only on equality rights, but also in part on freedom rights and human dignity. It cannot hence simply be denigrated as idealistic wishful thinking or a political demand. Moreover, anti-discrimination law has also been strengthened by EU law, especially the European Directives that lead to the German General Treatment Act.

It can thus be stated that there is a need to implement anti-discrimination law. The need not to be discriminated against is a right that can be claimed in principle.

III. The relationship between freedom and equality

Article 2 (1) of the Basic Law and the other fundamental rights to freedom in the Basic

15 Robert Uerpmann-Wittzack, 'Gleiche Freiheit im Verhältnis zwischen Privaten: Artikel 3 Abs. 3 GG als unterschätzte Verfassungsnorm' (2008) 68 ZaöRV 359, 365.

16 Mangold (n 5) 349.

17 Mangold (n 5) 349-50; Uerpmann-Wittzack (n 15) 365.

18 BVerfG, 05.02.2004, 2 BvR 2029/01, BVerfGE 109, 133, 171; BVerfG, 21.06.1977, 1 BvL 14/76, BVerfGE 45, 187, 228.

19 Uerpmann-Wittzack (n 15) 361-62.

20 Mangold (n 5) 350; Uerpmann-Wittzack (n 15) 367-68.

21 Mangold (n 5) 349; also noting the connection: Hong (n 7) 89.

Law allow us to do almost anything we want. But who are we? Freedom in a constitutional state means egalitarian freedom.[22] In contrast to an illiberal state, a state based on the rule of law is characterised by the fact that as many people as possible are equally entitled to freedom and not just an elite group. Membership of such a group can be constructed on the basis of many visible or invisible characteristics. There are examples in the past and present of illiberal states that have actively pursued this grouping and such evaluation of people on the basis of characteristics.[23] Instead of freedom for limited groups of people, freedom under the rule of law must consequently be understood as equal freedom.[24] This means freedom for all equally.

This raises the question of the relationship between freedom and equality as fundamental values of democracy[25]. As Hong has noted, there is a tendency to place oneself in one of two sides, either as an advocate of the most limitless freedom possible or the most limitless equality possible.[26] However, freedom and equality, as fundamental values of democracy, both have a legitimate claim to validity. This is also accepted a certain extent for equality by the existence of Article 3 (3) of the basic law; there is consent that freedom cannot be the preserve of just one section of the population.[27] So everyone has freedom within the framework of the law, and in this respect, people are equal to each other.

The absolute claim to freedom of the individual, however, reaches its limit where it encounters the justified claim to freedom of another. At the point where the claim to freedom collides, it is limited because the other person is also entitled to freedom, i.e. because they are treated equally. Depending on how far this equality is understood, the extent to which the freedom of the individual may go until it collides with the freedom of the other also changes. In this principle, equality is absolutely necessary to define freedom. Freedom and equality must consequently be thought of, weighed and applied together, instead of each claiming absolute validity as competing principles.

Thus, in order to define the freedom of the individual, the extent of equality must first be established. In order to seemingly maximise freedom, the solution was, and in some cases

---

22 ibid 105.

23 In particular, of course, reference should be made here to National Socialist Germany. There, people were extremely discriminated against because of their religion, disabilities or for any racist reasons. A contemporary example is Iran's theocracy, where there is strong discrimination based on gender and religion.

24 Hong (n 7) 73; this is also required by Arthur Ripstein, *Force and Freedom* (Harvard University Press 2009) 238; Florian Rödl, *Gerechtigkeit unter freien Gleichen* (Nomos 2015) 434 ff; Susanne Baer, '„Ende der Privatautonomie“ oder grundrechtlich fundierte Rechtsetzung? Die deutsche Debatte um das Antidiskriminierungsrecht' (2002) 7 ZRP 290, 292.

25 Christian von Coelln, '§ 46' in Bruno Schmidt-Bleibtreu, Franz Klein and Herbert Bethge (eds), *Bundesverfassungsgerichtsgesetz Kommentar. Band 1* (62nd edn, C.H. Beck January 2022) paras 20 and 22.

26 Hong (n 7) 73.

27 Martin Gebauer and Stefan Huber, 'Freiheit und Gleichheit im Privatrecht: eine Einführung' in Martin Gebauer and Stefan Huber (eds), *Freiheit und Gleichheit im Privatrecht* (Mohr Siebeck 2022) 1.

still is, to minimise the restrictive claim to equality as much as possible.[28] This was done by reducing equality to a formally equal permission to make use of freedom rights. The word permission was deliberately chosen here instead of the word enabling. A person who does not have the preconditions to negotiate in the market will therefore only be able to use the permission to exercise their liberty rights in a very limited way.[29] These preconditions are particularly about financial possibilities, but other factors also play a role. Such factors are unfortunately often discriminatory characteristics. If, for example, a person is classified as unreliable by a potential contract partner because of their gender, they cannot conclude the desired contract or can only do so under more difficult conditions. This in turn potentially leads to fewer financial opportunities, especially if, for example, an employment or loan contract is affected. This restricts the freedom of the discriminated person beyond the concrete contract with regard to their participation possibilities. In contrast, the contractual partner of the discriminated person is free to decide whether and how the contract is to be concluded. This is particularly the case since the person concerned often lacks alternatives in a discriminatory structure. If the contract is positive for the

contractual partner, they benefit from the discrimination. If a potentially profitable contract is rejected, the contractual partner acts as a prisoner of their own prejudices. The minimised claim to equality can thus strengthen the freedom of individuals in the sense of unjust enrichment. In contrast, a broader understanding of equality, i.e. material equality[30], can strengthen the freedom of a large mass in a fundamental way. The minimised, formal equality consequently does not maximise the freedom of all.

If one pursues the goal of the most comprehensive actual freedom possible, it is therefore not enough to understand freedom as equal in a formal respect. In order to enable actual free participation in life, material equality must for this reason also be created instead of formal equality, which enables equal participation in life as actual equality, as provided for in anti-discrimination law.[31] Freedom that is only formally understood as equal leads to the claim to equality being reduced to an absolute minimum under the rule of law. Already existing societal discrimination structures and merely formally non-discriminatory laws,

---

28 Reducing equality to a formal minimum: Horst Dreier, 'Vorbesprechung zu Art. 1 GG' in Horst Dreier (ed), *Grundgesetz Kommentar. Band 1* (Mohr Siebeck 2013) para 76; seeing no place for equality in private law: Werner Heun, '§ 34' in Detlef Merten and Hans-Jürgen Papier (eds), *Handbuch der Grundrechte in Deutschland und Europa* (C.F. Müller 2006) 470-71; critical to this problem: Jörg Neuner, 'Pro libertate? – Zur Freiheitsbegünstigung durch Recht und Methodik' (2022) 3 ZfPW 257, 272-73, 284.

29 In terms of monetary assets: Florian Rödl, 'Gleiche Freiheit und Austauschgerechtigkeit' in Michael Grünberger and Nils Jansen (eds), *Privatrechtstheorie heute* (Mohr Siebeck 2017) 180; similarly: Stefan Arnold, *Vertrag und Verteilung* (Mohr Siebeck 2014) 239.

30 Alex Baumgärtner, 'AGG § 1' in Dirk Looschelders (ed), *BeckOKG AGG* (C.H. Beck 2023) paras 17-18.

31 Hong (n 7) 105-06; at least there is a fundamental right to a decent minimum subsistence in order to ensure such participation, see: BVerfG, 27.07.2016, 1 BvR 371/11, BVerfGE 142, 353-388; 23.07.2014, 1 BvL 10/12, BVerfGE 137, 34-103; 09.02.2010, 1 BvL 1/09, BVerfGE 125, 175-260.

such as the marital splitting[32], lead, with a formal understanding of equality, to groups continuing to be discriminated against, which is why a substantive understanding of equality is necessary.[33] Beyond the limited equality, the freedom of the persons concerned is also restricted to a considerable extent.

That is why, both principles are not satisfied and their democratic potential is not maximized.

It should be noted that in the mutually dependent relationship between freedom and equality, an imbalance to the disadvantage of equality also restricts freedom. That is why, in order to fully utilise the democratic potential, there is a responsibility to constantly optimise this relationship.[34]

IV. Private autonomy and the need for exceptions

Anti-discrimination law was initially treated as a threat to the principle of private autonomy in civil law.[35] But if private autonomy were really incompatible with anti-discrimination law, this would not be an argument against anti-discrimination law, but a sign that private autonomy was not an expression of equal freedom. However, this paper aims precisely to show that this is not the case. In order to determine a balanced relationship, private autonomy must allow itself to be questioned. Here, private autonomy is understood in particular as freedom of contract.[36]

An absolute understanding of contractual freedom in the sense that contractual partners, content, circumstances and conditions can be chosen completely freely must be rejected. It would lead to an enormous preferential treatment of the "powerful", the rich, the owners of essential goods, adults, etc.[37] For this reason, exceptions, i.e. mandatory law, are urgently needed.[38] Nevertheless, as Neuner aptly points out, the need to create a law that restricts freedom first of all leads to the powerful in society having an advantage in enforcing their interests, while those affected have to actively campaign or wait for a law to protect them.[39] The exact form of freedom of contract is hence based on the rule-exception relationship. These exceptions have very different objectives, but essentially

---

[32] Ute Sacksofsky, 'Steuerung der Familie durch Steuern' (2000) 27 NJW 1896, 1896-97; Margarete Schuler-Hams, 'Ehegattensplitting und (k)ein Ende?' (2012) 7 FPR 297, 300.

[33] Mangold (n 5) 186.

[34] So also Michael Grünberger, *Personale Gleichheit* (Nomos 2013) 57.

[35] Tilman Repgen, 'Antidiskriminierung; die Totenglocke des Privatrechts läutet' in Josef Isensee (ed), *Ver tragsfreiheit und Diskriminierung* (Duncker & Humblot 2007) 11, 14-15; Franz-Jürgen Säcker, ' „Vernunft statt Freiheit!" — Die Tugendrepublik der neuen Jakobiner"' (2002) 7 ZRP 286.

[36] According to Jan Busche, *Privatautonomie und Kontrahierungszwang* (Mohr Siebeck 1999) 63, this is the most important manifestation.

[37] So also Arnold (n 29) 236; Gebauer and Huber (n 27) 2.

[38] So also Arnold (n 29) 239; Mangold (n 5) 202; Baer (n 24) 291.

[39] Neuner (n 28) 267-68.

aim to protect the contracting parties. This protection often serves to compensate for the superiority of one party, which gives it an equal rights character. It is therefore also evident in civil law that the equality rules define freedom.

In this context, the question arises as to the purpose of freedom of contract. The goal should be the self-determination of the person instead of the greatest possible individual capacity to act.[40] Rödl justifies this correctly by saying that the individual capacity to act between the contracting parties would lead to a zero-sum game of freedom and could hence not be the goal.[41] There would thus be no possibility of actually maximising freedom if the freedom of one only meant the unfreedom of the other. Moreover, the increased freedom of individuals could compensate for the lack of freedom of a large group without conflicting with the goal. Self-determination, on the other hand, is a desirable goal for two reasons. Firstly, it is related to the general right of personality and human dignity[42] and therefore fits well into the constitutional understanding of fundamental rights. Secondly, in contrast to individual agency, it can be maximised. By limiting individual agency somewhat, the self-determination of many can be strengthened. In this way, imbalances between the contracting parties can be evened out, allowing the weaker party a much greater degree of self-determination than the stronger party lacks in individual capacity to act.

In limiting contractual freedom through exceptions, it is therefore important that these exceptions create a relationship in which there are approximately equal conditions between the legal subjects, so that everyone can make equal use of contractual freedom. Of particular importance here are, for example, the consumer rights created by the EU, which adjust the relationship between the consumer and the entrepreneur in order to protect consumers from the de facto superiority of businesses.[43]

Restrictions on private autonomy can consequently not simply be dismissed with the argument that they would endanger private autonomy.[44]

When it comes to the protection of certain groups, legislative intervention is required in order to achieve actual, i.e. equal, freedom. Adaptation should therefore also be

---

[40] Anna Verena Lauber, *Paritätische Vertragsfreiheit durch reflexiven Grundrechtsschutz* (Nomos 2010) 42; Rödl (n 29) 180-81; Rödl (n 24) 296.

[41] Rödl (n 29) 181.

[42] On the relationship with general personal rights: Mario Martini, 'Das allgemeine Persönlichkeitsrecht im Spiegel der neueren Judikatur des Bundesverfassungsgerichts' (2009) 12 JA 839, 840-41; on the relationship with human dignity: Matthias Herdegen, 'Art. 1 Abs. 1' in Günter Dürig, Roman Herzog and Rupert Scholz (eds) *Grundgesetz Kommentar* (100th edn, C.H. Beck January 2023) para 28; Tobias Linke, 'Die Menschenwürde im Überblick: Konstitutionsprinzip, Grundrecht, Schutzpflicht' (2016) 10 JuS 888, 890; Henning von Olshausen, 'Menschenwürde im Grundgesetz: Wertabsolutismus oder Selbstbestimmung?' (1982) 40 NJW 2221, 2222 f.

[43] Baer (n 24) 293; further information: Liu Qingwen, 'Die Vertragsfreiheit und ihre Grenzen bei Verbraucherverträgen' in Marco Haase (ed), *Privatautonomie* (Nomos 2015) 205-216.

[44] Also Mangold (n 5) 202-03.

understood as an opportunity to enable private autonomy for more people in more situations. Equality is expressed here particularly in anti-discrimination law, which as an exception to private autonomy, i.e. freedom of contract, limits it in theory, but actually expands and protects it for many people,[45] in the sense of not only formal, equal freedom. This means freedom as participation in society and fundamental freedom.[46] The regulation of private autonomy thus benefits it itself. And taking into account the principle that the freedom of one ends where the freedom of the other begins, private autonomy must be restricted in order to strengthen the content of the freedom of all.

In summary, it can be stated that a restriction of private autonomy by no means leads to its end, but rather shapes it and has the potential to expand it.

V. The General Equal Treatment Act and the reversal of the burden of proof

What is the current regulatory situation regarding anti-discrimination law in private law? For a long time, only Article 3 (3) of the Basic Law existed as a protection against discrimination, but today there are further regulations in German and EU law. Particularly important is the General Equal Treatment Act, which came into force on 18 August 2006. It is based on the European Directives 2000/43/EC and 2000/78/EC.

Is the General Equal Treatment Act suitable for creating a balance between freedom and equality? A comprehensive assessment would go beyond the scope of this paper. Therefore, the focus will be on analysing a specific part of the current regulatory situation, namely the reversal of the burden of proof in section 22 AGG. Because discrimination is so widespread and difficult to prove, "members" of non-privileged groups, society and its prejudices, often find themselves powerless. Discriminatory experiences are so pervasive that they often become part of their lives. The effect is not only that others deal with them in a discriminatory way, but also that the discriminated persons become accustomed to it and even attribute any negative characteristics to themselves. This does not only have an effect in civil law. However, there is the pattern, that social prejudices in the mind of the potential contract partner lead to unequal treatment in individual cases. Many individual cases lead to a clear restriction of the freedom of the discriminated group; this does not mean equal freedom, which is why individual case inequality must not be tolerated. Rules are needed to prevent individual case inequality; these rules form further exceptions to private autonomy. This is particularly difficult because discrimination is an internal motivation which, until it is revealed, is difficult to identify.[47] The discriminating person can always claim that the competitor was more convincing in a personal interview. The

---

[45] Lauber (n 40) 89-90.
[46] Similarly Mangold (n 5) 352.
[47] Mangold (n 5) 211.

person could even say that they are not interested in concluding a contract with the specific person for private reasons. In this way, discrimination can be practised largely unhindered. At least this was the case as long as only Article 3 of the Basic Law with the indirect third-party effect would prohibit discrimination. The reversal of the burden of proof under Section 22 AGG is intended to solve this problem. The extent to which it succeeds and how it influences the relationship between freedom and equality will be analysed in the following.

That is why, for a long time, one problem discriminated people had in enforcing their rights was to prove in court that prohibited discrimination had occurred. After the AGG was introduced to implement the European Directives, this changed, at least in theory. In order to understand the effects of the reversal of the burden of proof, this article first explains the principle of the reversal of the burden of proof. In a second step, it incorporates the much-discussed ruling of the Federal Labour Court, which was decided in February this year, and discusses its implications. It was decided that the statement that a better negotiation had been conducted was not in itself sufficient to defuse the suspicion of discrimination in the form of a lower salary. Lastly, an assessment of the reversal of the burden of proof is made against the background of the relationship between freedom and equality and considers whether it is sufficient to strike a balance between these two principles.

1. Design of the reversal of the burden of proof

If something existing is impossible to prove, the burden of proof has to be changed. And discrimination is almost always impossible to prove.[48] According to section 22 AGG, the party alleging a prohibited discrimination under section 1 AGG must prove circumstantial evidence and the other party must thereupon prove that no such discrimination exists.

At first, this reversal of the burden of proof may give the impression of placing too great a burden on the opposing party by requiring it to convincingly defend itself against all allegations. However, this is deceptive. The conditions that must exist for the opposing party to be in a position to defend itself are high. First, differential treatment must be proven.[49] Then there must be circumstantial evidence to show that prohibited discrimination is a probable reason for the difference in treatment.[50] For this reason,

[48] Thorsten Beck in Wolfgang Däubler and Thorsten Beck (eds), *Allgemeines Gleichbehandlungsgesetz* (Nomos 2022) 957; Christian Wörl, *Die Beweislast nach dem Allgemeinen Gleichbehandlungsgesetz* (Nomos 2009) 17-18, with reference to the following ECJ judgment: Case C-127/92 *Enderby v Frenchay Health Authority and Secretary of State for Health* [2003] ECR I-05535, para 4.

[49] Olaf Muthorst, 'Beweisrecht' in Anna Katharina Mangold and Mehrdad Payandeh (eds), *Handbuch Anti diskriminierungsrecht* (Mohr Siebeck 2022) 817; Stephan Serr, 'AGG § 22' in Julius von Staudinger (ed), *Kommentar BGB* (De Gruyter 2020) para 8.

[50] Muthorst (n 49) 817, 825; Sebastian Overkamp, 'AGG § 22' in Maximilian Herberger and others (eds), *jurisPK-BGB* (juris 1 February 2023) para 3.

precisely because the opposing party must prove the bona fide reason for the unequal treatment, there are first requirements for the applicant. Not only do they have the full burden of proof for the circumstantial evidence, but they also have to provide evidence for a different treatment. Only the requirements for the standard of proof of the circumstantial evidence are lowered.[51] Of course, the opponent has the possibility to present facts before the court that make the court doubt the different treatment or the circumstantial effect.[52] If this is not successful, the opposing party only has to explain and prove the (non-discriminatory) reason for this different treatment.[53] One cannot actually speak of a reversal of the burden of proof, but rather of a shift of part of the burden of proof.

In the event that the opposing party should nevertheless have problems proving this, this could be facilitated in part with comprehensive documentation of, for example, the hiring process, including the reasons. Of course, this does not change the fact that the shifting of the burden of proof is a certain burden for the defending party. However, as Baer described it, a burden of proof on the side of the complaining party would be possible in a society where discrimination is the exception, not in ours.[54] Moreover, a shift in the burden of proof is not uncommon. When a fact favourable to one party is considered by the legislator to be the normal case, the burden of proof is regularly shifted.[55] We must therefore assume that some differential treatment arises from (unconscious) discrimination. If there is additional circumstantial evidence, this is the legislative normal case.

Due to characteristics that the person concerned cannot change, or which they cannot reasonably be expected to change[56], contractual partners show them more or less sympathy and trust. This has a decisive influence on whether and how the contract is concluded. Precisely for this reason, if the unequal treatment and the indications of suspected discrimination have been proven, a high requirement in the form of full proof must be placed on the justification of the contractual partner.[57]

2. The ruling of the Federal Labour Court

If instead unequal treatment could already be justified by the fact that it is an individual

---

[51] Overkamp (n 50) para 3; Serr (n 49) para 15.
[52] Muthorst (n 49) 829; Overkamp (n 50) para 16.
[53] Overkamp (n 50) paras 22, 23; Holger Wendtland, 'AGG § 22' in Wolfgang Hau and Roman Poseck (eds), *BeckOK BGB* (C.H. Beck 2023) para 4.
[54] Baer (n 24) 294.
[55] BGH, 21.02.1990, VIII ZR 216/89, para 25; Muthorst (n 49) 809.
[56] Uerpmann-Wittzack (n 15) 365.
[57] Opposing party must provide full proof, see: BAG, NJW 2020, 2289, 2292; BAG, NZA 2022, 638, 641; Muthorst (n 49) 830; Overkamp (n 50) para 23.

case of private negotiation, a large amount of discriminations would be excluded from registration.[58] The prohibition of discrimination as an exception to the principle of freedom of contract would be rendered meaningless by the discriminating persons invoking their freedom of contract; this would be circular.[59] This would allow contracts to continue to be freely concluded without taking discrimination into account. For this reason, the surprise[60] when the Federal Labour Court announced its judgement was not entirely understandable. It merely stated that a male employee's better negotiating skills were not the sole reason for the significantly higher salary for the completely same job compared to a female employee under section 22 of the AGG. If the employer is under great pressure to fill a position, this can be a reason in the context of individual negotiations.[61] However, if a significantly higher demand is granted without a justifiable reason, the presumption of discrimination is not invalidated.[62] Employers must be able to justify why different workers earn more or less and the better negotiation outcome cannot be used as a justification in the future.

So what are the concrete effects of this? How this will affect salary negotiations remains to be seen. One way for employers to protect themselves from lawsuits is to be more transparent about salaries and, for example, to signal in the negotiation process that they are willing to negotiate and disclose the salaries of other employees.[63] This would, of course, take away some of the employers' privileged position in terms of oversight and control over the salaries and value of workers. However, it would lead to workers being aware of the value placed on their work and what they can demand so that there are fair conditions in salary negotiations. This would help all workers, whether they belong to a discriminated group or not. Their private autonomy would not only be strengthened in terms of negotiating their work, but also in other contractual relations due to the potentially increased income. This is because more financial opportunities allow them to conclude more contracts or those with a larger financial volume, which improves their position in the market. On the one hand, the reversal of the burden of proof has the potential to curb discrimination. But it also has the potential to strengthen freedom. This is where it becomes apparent how freedom and equality benefit from each other.

3. Burden of proof as a solution to the discrimination problem?

The reversal of the burden of proof has thus simplified the realisation of anti-

---

58 BAG, 16.02.2023, 8 AZR 450/21, paras 56 and 57.

59 Similarly ibid para 57.

60 Noted by Jens Günther, 'Anmerkung zu BAG, 8 AZR 450/21' (2023) 29 FD-ArbR 458529; regarded as unfounded by: Hans-Peter Löw, 'Gender Pay Gap - Paukenschlag aus Erfurt?' (2023) 11 DB M14, M15.

61 BAG, 16.02.2023, 8 AZR 450/21, para 51.

62 BAG, 16.02.2023, 8 AZR 450/21, para 56.

63 BAG, 16.02.2023, 8 AZR 450/21, para 58 indicates this as well.

discrimination law in private law. However, the expected rush to the courts has failed to materialise.[64] In addition to the fact that a heavy burden of proof still rests on the complaining party, there is also a high hurdle for going to court at all. The woman in the above-mentioned judgement had to fight her way through all instances until she got justice. The chances of success in lawsuits under the AGG are considered low.[65]

The question therefore arises as to whether the distribution of the burden of proof is sufficient as an instrument for the enforcement of anti-discrimination law. Apart from a duty to cooperate on the part of the opposing party, there is little scope to improve the plaintiff's position in court. However, the problem in the ruling discussed was not that the plaintiff could not prove the facts presented, but that the previous instances had accepted the justification. This social acceptance of private bargaining as a reason for unequal salaries that harms discriminated groups is one of many problems that discriminated groups face. The solution to these problems lies with its victims, the discriminated persons, who must painstakingly fight for their rights through lawsuits. Always with the risk of losing and having to bear the legal costs in addition to the unequal treatment. While contracting parties at best adapt to the latest state of the law in order not to risk sanctions. That is why, the relationship between freedom and equality in private law develops only slowly into a balance. Decisive are the decisions of the courts, which determine on the basis of the burden of proof which treatment is permitted and which is not. Thus, equality of all people, if secured by prohibitions of discrimination, continues to be a promise for the future.

This grievance argues for the need for anti-discrimination law in private law that goes beyond the prohibitions of discrimination. One possibility would be to enact laws that promote discriminated groups. For example, that people with disabilities are given preferential treatment when applying for the (limited) jobs where they can work. The so-called "positive discrimination", has the advantage that the legislator enacts binding regulations to combat discrimination. The structural disadvantages of certain population groups are compensated by artificial advantages in order to enable de facto equality.[66]

The constitution imposes a certain obligation on the relationship between men and women in Art. 3 (2) sentence 2 GG. Its design and the concept of positive discrimination are highly controversial. However, such a measure has the potential to create a level playing field where equal treatment would otherwise have to be laboriously fought for.

[64] Christian Rolfs, 'AGG-Hopping' (2016) 10 NZA 586, 586.

[65] Sigrid Boysen, 'Art. 3 GG' in Ingo von Münch and Philip Kunig (eds), *Grundgesetz-Kommentar. Band 1* (C.H. Beck, 7th edn 2021) para 134; Rolfs (n 64) 586.

[66] Similar Christian Friedrich Majer and Arne Pautsch, '„Positive Diskriminierung" – Verfassungsrechtliche Zulässigkeit von „Migrantenquoten" und Bevorzugung wegen Migrationshintergrundes beim Zugang zum öffentlichen Dienst' (2020) 11-12 ZAR 414, 415.

From the perspectives of freedom, equality and human dignity discussed earlier, effective anti-discrimination law should be a high priority. For this reason, if possibilities for affirmative action exist, they should be exhausted. And such possibilities do exist. Article 3 (2) sentence 2 of the Basic Law enables the state to promote women with regard to actual equality. The legislature could shape this and also enact provisions for other discriminated groups. Although the majority of people consider promotion for other discriminated groups to be a violation of a discrimination prohibition itself, these violations can be justified in order to compensate for disadvantage and to secure freedom.

The AGG and especially the reversal of the burden of proof are important steps, but they are only based on European legislation. Both European and, in particular, German legislators should continue to work on the relationship between freedom and equality, which includes minimising discrimination.

IV. Conclusion/Outlook

Freedom and equality complement each other in constitutional terms and in their manifestations as freedom of contract and anti-discrimination law in civil law. The current legal situation takes anti-discrimination law into account. Thus, there is a legal situation that can be approximately described as a certain balance between freedom and equality. However, the aim must always be to further develop this balance so that the highest possible democratic potential can be achieved.

In the current situation, one cannot yet speak of a balance; too many people are discriminated against. Although the reversal of the burden of proof and the AGG itself have led to improvements, further changes must follow. Possibly a form of positive discrimination could change the situation. Of course, it would depend on how it was designed, but favouring discriminated groups to compensate for real inequalities has potential. Creating actual, i.e. material equality through equalisation would equalise opportunities for participation and thus also create equal freedom. This would bring us one step closer to a balanced relationship between freedom and equality.