FIVE YEARS OF THE GENERAL ACT ON EQUAL TREATMENT: TACKLING RACIAL DISCRIMINATION IN GERMANY

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ABSTRACT

Five years ago in Germany the *Allgemeines Gleichbehandlungsgesetz* (General Act on Equal Treatment, German abbreviation: AGG) entered into force, which contained detailed provisions on the protection from discrimination in the workplace. Although the law substantially improved the legal remedies for victims, it has a number of deficiencies regarding its effectiveness. This article will give an overview of the provisions of the AGG and the developments and initiatives that followed the adoption of the law. In addition, it will describe the role of anti-discrimination offices and NGOs as well as the barriers for victims of discrimination in accessing their judicial rights. Furthermore, the article will discuss initiatives of the government that address unemployment inequality.

INTRODUCTION

After a controversial political debate, the *Allgemeines Gleichbehandlungsgesetz* (General Act on Equal Treatment, German abbreviation: AGG) came into force in August 2006. The AGG implements four main European Union Equal Treatment Directives in German Law.[1] Because the General Act on Equal Treatment improved the legal remedies for victims substantially and contains detailed provisions on the protection from discrimination in the employment sphere, it is perceived to be a milestone in German anti-discrimination policy.

However, according to the Migrant Integration Policy Index (MIPEX 2011), Germany performs below average on anti-discrimination compared to 31 EU countries, the United States and Canada. The authors of the Index note that the AGG may in fact be ineffective against discrimination, although it formally goes beyond the EU minimum requirements (MIPEX 2011, 49). On the occasion of the fifth anniversary of the AGG, several anti-discrimination associations emphasized that the judicial barriers are still too high and the institutional framework for non-discrimination remains too weak.

On the other hand, structural barriers that prevent labor market integration of immigrants – for example, the recognition of foreign qualifications—are discussed, shifting the political debate from a deficiency focused perspective to a resource focused perspective. Furthermore "soft" approaches to equality, like Diversity Management, have burgeoned since the adoption of the AGG.

The first part of this article will give an overview of the provisions of the AGG. In the second part, I will describe the role of anti-discrimination offices and NGOs as well as the barriers for victims of discrimination in accessing their judicial rights. In the third part, I will discuss initiatives of the government that address employment inequality.

THE GENERAL ACT ON EQUAL TREATMENT

The objective of the AGG is to prevent and stop discrimination on the grounds of race or ethnic origin, gender, religion or belief, disability, age or sexual orientation. It regulates the claims and legal consequences in cases of discrimination in the employment sphere and in civil law and provides the possibility of positive action. On the basis of the EU directives the AGG defines five forms of discrimination:

- direct discrimination
- indirect discrimination
- harassment/ mobbing
- sexual harassment
- instructing others to discriminate

Employers are obliged to adopt necessary measures to protect employees from discrimination. They shall inform employees that discrimination and harassment are prohibited and, if applicable, should train their staff to prevent discrimination. Furthermore, the law provides financial compensation for victims in cases of discrimination. In the employment sphere, compensation can be paid for up to three month's salary. The amount of financial compensation is therefore relatively low and criticized as not being "dissuasive" enough. Claims have to be made within a very short notification period of two months, which can negatively affect the access to justice for victims of discrimination. The law contains a few problematic exemption clauses – for example, article 9, which allows different treatment for religious communities and their organizations on grounds of religion or belief. As the Christian welfare organizations *Diakonie* and *Caritas* are not only the largest welfare organizations but also the largest private employers in Germany, this exemption clause can effectively exclude persons in certain regions from access to work in the social sector.

Under certain conditions, anti-discrimination associations may support victims in court proceedings by acting as a counsel *(Beistand)* in public hearings. However, neither do they act on behalf of the person, nor does the AGG contain the possibility of collective claims, which makes it difficult to address the problem of structural discrimination. The *AGG* also regulates the establishment of the Federal Anti-Discrimination Agency *(Antidiskriminierungsstelle des Bundes)* as an equality body. While the head of the FADA is politically independent its period of office is bound by the legislative term, something which could have a negative effect on its independence. The Agency is primarily responsible for counseling victims. However, the Agency has neither the competence to investigate nor to initiate proceedings. In addition, the Agency conducts research and takes measures to increase rights awareness. The budget of the Agency amounted & 2.64 million Euro in 2010.

A labor court survey conducted by the Freie Universität Berlin shows that the number of cases with reference to the AGG is very small, and only 5% of them were on grounds of racial discrimination (Rottleuthner, Mahlmann 2011). One reason for this may be that awareness of the AGG is still very low, as a representative study of the European Union Fundamental Rights Agency (FRA) suggests. In this study, 61% of the Germans of Turkish origins interviewed were not aware of a law that forbids discrimination in the workplace (Agentur der Europäischen Union für Grundrechte, 2009).

ROLE OF ANTI-DISCRIMINATION OFFICES AND NGOS

According to the Migrant Integration Policy Index, the AGG may be ineffective because of weak equality policies and institutions (MIPEX 2011). Since the adoption of the AGG, new stakeholders—governmental and non-governmental – have emerged. These new stakeholders contributed to the specialization and establishment of anti-discrimination as a policy field. Furthermore, they are engaged in strengthening the horizontal approach in anti-discrimination policy, an approach that considers multidimensional forms of discrimination and gives no precedence to one characteristic of discrimination, for example gender.

Similar to the Federal Anti-Discrimination Agency, discussed earlier, in 2007, the federal state government established an anti-discrimination office in Berlin. Like the FADA, the *Landesstelle für Gleichbehandlung – gegen Diskriminierung* (Federal State Office for Equal Treatment – against Discrimination, German abbreviation: LADS) follows the horizontal approach. The LADS advises public authorities in Berlin on implementing the AGG and develops legislative initiatives to improve the legal remedies in the public service sphere. Another anti-discrimination office was established in the Federal State of Hamburg in 2009, but was closed down in 2011 due to a new government. There are also other public institutions that are relevant to anti-discrimination policy, for example, the Commissioners for Migration, Refugees and Integration. However, most of these public institutions have no expertise in anti-discrimination and do not follow any explicit anti-discrimination approach. Since Germany consists of 16 federal states, the governmental framework for anti-discrimination policy can be considered relatively weak.

The Anti-discrimination Association in Germany (German abbreviation: advd) was founded in May 2007 as an umbrella organization of 10 NGOs and advice centers. The advd is a voluntary organization and lacks meaningful resources. However, despite this challenge, the advd has an important monitoring role and has contributed to the professionalization of anti-discrimination work in Germany—for example, by developing standards for the counseling of victims. Another non-governmental initiative is the "Bündnis gegen Diskriminierung" (Alliance against Discrimination), a network of organizations working with migrants, people with disabilities, women, LGBTI individuals and senior citizens. The Alliance against Discrimination was founded in 2010 and also functions on a voluntary basis.

To support the development of NGO networks on a local level, in February 2011 the FADA introduced the support program, "Networks Against Discrimination." The objective of this program is to improve the development of advice services for victims. The program amounts to 1.2 million Euro, but is currently threatened by a possible budget cut. The program is of great importance since only a small number of specialized advice centers exist in Germany. For instance, there are only a dozen organizations—concentrated in the cities of Berlin, Hamburg and in the Federal Sate of North Rhine-Westphalia—that can advise victims in cases of racial discrimination.

To fuel the mobilization of anti-discrimination rights, the *Deutsches Institut für Menschenrechte* (German Institute for Human Rights) began the project, "Non-discrimination: competencies for associations," in January 2009. Its objective is to motivate anti-discrimination associations to take legal action against cases of discrimination and to support victims of discrimination by providing counsel *(Beistand)* in court proceedings. Furthermore, anti-discrimination associations are encouraged to use strategic litigation as an instrument to fight discrimination, especially structural forms.

INITIATIVES FOR EQUAL EMPLOYMENT OPPORTUNITY

More than 16 million people—roughly 19.6% of the German population—have migrant backgrounds.[2] The migrant population has more than twice the risk of living in poverty (26%) than the population without a migrant background (12%). The unemployment rate of the migrant population is also twice as high (12.7% compared to 6.2%) (Statistisches Bundesamt, 2010). Motivated by a discussion of the insufficient legal framework for the recognition of foreign qualifications—which is perceived as a "labyrinth" and has resulted in "brain waste" (Engelmann, Müller, 2007)—a change in integration policy has been brought about. While integration policies mostly address the "deficits" of immigrants—for example, language skills—the debate about "brain waste" leads to the identification of institutional barriers and considers the potentials and resources of immigrants. To prevent "brain waste," the German Bundestag adopted the Law on the Improvement of the Recognition of Foreign Qualifications at the federal level in September 2011. The law greatly extends the right to an assessment of foreign professional qualifications, and seeks to establish a standardized and transparent procedure. However, as many qualifications must be recognized at the federal state level, similar laws still need to be developed.

"Soft approaches" to equality, like Diversity Management, have gained increasing attention in recent years. For example, the federal government established a dialogue forum for public authorities to discuss initiatives that promote diversity in the public service. Currently, only 4% of public servants come from migrant backgrounds (Statistisches Bundesamt, 2011). The voluntary agreements established through the dialogue forum will be part of the National Action Plan for the Integration of Immigrants. While migrant associations demand a quota for applicants with migrant backgrounds, public authorities voice strong reservations about this demand. Nevertheless, the campaign "Berlin needs you!," an initiative of the Federal State of Berlin, is noteworthy in this regard. The campaign aims to motivate young people to apply for an apprenticeship with the public service. Since the start of the campaign, the percentage of apprentices with migrant backgrounds doubled from 8.6% in 2006 to 19.5% in 2009 (Senatsverwaltung, 2010). Furthermore, federal programs, like the *Netzwerk "Integration durch Qualifizierung"* (Network Integration by Training) and *XENOS – Integration und Vielfalt* (XENOS – Integration and Diversity), promote diversity management.

Companies have also increased their commitment to diversity. In 2007, the federal government initiated the campaign, *Charta für Vielfalt* (Charta for Diversity), which aims to promote tolerance, fairness, and diversity in the workplace. The Charta was signed by more than 1,000 companies and organizations. However, its vague commitments have not yet been reviewed. In September 2010, companies like Deutsche Telekom, Deutsche Bahn and BP Europe founded the organization *Charta für Vielfalt e.V.* (Charta for Diversity) to continue the campaign.

CONCLUSION

The General Act on Equal Treatment is a milestone in German anti-discrimination policy. The law substantially improved the legal remedies for victims. However, as previously described, the Act has a number of deficiencies regarding its effectiveness. Judicial barriers, like the short notification period of two months, the limited legal role of NGOs and the FADA in court complaints proceedings, and low compensation negatively affect access to justice for individuals as well as the mobilization of anti-discrimination rights in general.

A further challenge for German anti-discrimination policy is the weak institutional framework. Although new stakeholders have emerged that have contributed to the establishment and specialization of anti-discrimination policy, without sufficient political support they lack meaningful resources to fight discrimination effectively.

Finally, although diversity management programs have increased and initiatives like the Law on the Improvement of the Recognition of Foreign Qualifications address institutional forms of discrimination, "hard" approaches to equality, like quotas, should be considered in the integration debate.

NOTES

[1] Directives 2000/43/EC, 2000/78/EC, 2002/73/EC and 2004/113/EC.

[2] According to the definition of the Federal Statistic Office the population with a migrant background compromises both Germans with a migrant background and foreigners.

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Edited by J.S. Frideres & John Biles

At the outset of the second decade of the twenty-first century, more migrants are moving to a wider range of countries than ever before. While much of this movement has occurred in the absence of a strong or explicit policy framework, it is increasingly evident that—unlike migration-- integration and inclusion are less likely to simply "occur," and certainly not in the short-term. This volume brings together contributions from countries with various levels of experience with both integration and inclusion. A wide range of approaches are considered, a number of promising practices are uncovered, and the case studies illuminate many of the key strategic policy questions surrounding integration and inclusion. The volume will be of use to researchers interested in international approaches to integration and inclusion as well as to policy makers and practitioners who are tasked with developing strategies to facilitate the integration and inclusion of newcomers and minorities.

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