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Obligation to Contract and the German General Act on Equal Treatment (*Allgemeines Gleichbehandlungsgesetz*)

By Joachim Wiemann[*]

A. Introduction

The German General Act on Equal Treatment (*Allgemeines Gleichbehandlungsgesetz,* AGG)[1] has been in force for four years now. Academic discussion has so far mainly focused on the scope of anti-discrimination provisions for non-state actors, i.e. on whether there should be private anti-discrimination legislation, what conduct the statute should prohibit, and what exceptions it should allow.[2] In order to fully understand the effects and relevance of anti-discrimination provisions in a legal system, their remedies and sanctions have to be taken into account as well. This article focuses on the remedies provided for in the AGG and, more specifically, on obligations to contract. The issue of whether there is

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[1] For a full English version of the AGG, see the translation of the *Antidiskriminierungsstelle des Bundes* (Federal Anti-Discrimination Agency), *available at* http://www.antidiskriminierungsstelle.de/ADS-en/Service/downloads,did=129628.html (last accessed 16 October 2010).

[2] For discussions on the AGG and previous drafts of a German anti-discrimination statute, see Andreas Engert, *Allied by Surprise? The Economic Case For an Anti-Discrimination Statute*, 4 GERM. L.J. 685 (2003), http://www.germanlawjournal.com/index.php?pageID=11&artID=290; Karl-Heinz Ladeur, *The German Proposal of an "Anti-Discrimination"-Law: Anticonstitutional and Anti-Common Sense. A Response to Nicola Vennemann*, 3 GERM. L.J. (2002), *at* http://www.germanlawjournal.com/index.php?pageID=11&artID=152*;* Eduard Picker, *Anti-discrimination as a Program of Private Law?,* 4 GERM. L.J. 771 (2003); Florian Stork, *Comments on the Draft of the New German Private Law Anti-Discrimination Act : Implementing Directives 2000/43/EC and 2004/113/EC in German Private Law*, 6 GERM. L.J. 533 (2005), http://www.germanlawjournal.com/index.php?pageID=11&artID=574; Nicola Vennemann, *The German Draft Legislation On the Prevention of Discrimination in the Private Sector,* 3 GERM. L.J. (2002), http://www.germanlawjournal.com/article.php?id=137; Viktor Winkler, *The Planned German Anti-Discrimination Act: Legal Vandalism? A Response to Karl-Heinz Ladeur,* 3 GERM. L.J. (2002), http://www.germanlawjournal.com/article.php?id=158.

and whether there should be an obligation to contract has – as regards remedies – been the most controversial issue in the academic discussion so far.[3]

The article will answer the following question: Is there an obligation to contract as a remedy when the conclusion of a contract has been denied based on one of the prohibited grounds of discrimination under the AGG? After a brief description of the AGG and its European background (B.), the article will start with an analysis of the text, the legislative history, and the implications of the EU directives on which the German law is based (C.). The analysis shows that the AGG should be interpreted as comprising an obligation to contract.

This will be followed by a more abstract analysis which will address the fundamental question of whether an obligation to contract constitutes an appropriate remedy (D.). The article will highlight fundamental principles for the assessment and focus on a variety of assessment criteria. As regards the assessment of remedies, this article argues that there are two separate and distinguishable levels when anti-discrimination provisions are designed. This excludes certain arguments from the assessment of the remedial provisions. The article also addresses the question of the objective of the AGG, providing convincing evidence from the German and EU legislative materials showing the intention is not merely to protect the victims' dignity.

Finally, the article will address the implications of German constitutional law (E.). It identifies the constitutional framework of the issue and highlights the importance of the findings on the appropriateness of an obligation to contract for the balancing test as part of the proportionality requirement.

B. The AGG and its European Background in a Nutshell

The AGG entered into force on 1 August 2006. It prohibits discrimination on grounds of race, ethnic origin, sex, religion, disability, age, and sexual orientation. Unlike the equal protection clauses in the German *Grundgesetz* (Basic Law), the AGG does not require state or government action but applies to private conduct. The AGG draws a basic distinction between protection against discrimination in the field of employment (§§ 6-18 AGG) and "Under Civil Law" (§§ 19-21 AGG), i.e. general civil law provisions that apply to non-employment contracts. This paper addresses obligations to contract for non-employment contracts only; for employment contracts, § 15 (6) AGG explicitly states that there is no

[3] *See*, *inter alia*, Gregor Thüsing & Konrad von Hoff, *Vertragsschluss als Folgenbeseitigung: Kontrahierungszwang im zivilrechtlichen Teil des Allgemeinen Gleichbehandlungsgesetzes,* 60 NEUE JURISTISCHE WOCHENSCHRIFT (NJW) 21 (2007); Christian Armbrüster*, Kontrahierungszwang im Allgemeinen Gleichbehandlungsgesetz,* 60 NJW 1494 (2007); Christian Armbrüster, *Antidiskriminierungsgesetz – ein neuer Anlauf,* 38 ZEITSCHRIFT FÜR RECHTSPOLITIK (ZRP) 43 (2005); Dagmar Schiek, *§ 21*, *in* ALLGEMEINES GLEICHBEHANDLUNGSGESETZ (AGG) (Dagmar Schiek ed., 2007) margin number 8; Jörg Neuner, *Diskriminierungsschutz durch Privatrecht*, 58 JURISTENZEITUNG (JZ) 57 (2003).

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obligation to contract. §§ 19-21 AGG do not cover all private contracts but only apply in certain situations, the most important being "bulk business," i.e. contracts which "typically arise without regard of person in a large number of cases under comparable conditions" (§ 19 (1) No 1 AGG). As regards the prohibited grounds of discrimination, the prohibition is the strictest and the scope of application is the largest for discrimination based on race or ethnic origin.[4]

The adoption of the AGG has been highly controversial both in the political discussion and in legal academic analysis. A large number of legal academic contributions have addressed the question of whether anti-discrimination legislation for non-state actors is appropriate.[5] This academic discussion was strongly influenced by traditional German legal thinking distinguishing between private law and public law and their leading principles: equal protection as regards state action and freedom of contract for private actors.[6]

The AGG is based on four European Community directives, two of which are relevant for the general civil law part: Directive 2000/43/EC[7] covering discrimination based on race and ethnic origin, and Directive 2004/113/EC[8] on gender based discrimination. These directives constitute legislative acts of the European Community (now the European Union)[9] that are binding on the Member States as to the result to be achieved but leave the choice of form and method to the Member States[10] when the Member States transpose them into national law. Under Directive 2000/43/EC, there "shall be no direct or indirect discrimination based on racial or ethnic origin" (Art. 2) in specifically enumerated fields (Art. 3), such as healthcare, education, and "access to and supply of goods and services which are available to the public, including housing." Directive 2004/113/EC

[4] The scope of application is extended for discrimination based on race or ethnic origin (§ 19 (2) AGG) and—unlike for the other grounds—the AGG does not provide for justifications under § 20 (1) AGG.

[5] *See, inter alia, supra* note 3. For the assumptions made for this article as regards prohibitions of discrimination, see below D. I. 1.

[6] See also the arguments for different treatment of state and non-state action in Matthias Mahlmann, *Die Ethik des Gleichbehandlungsrechts*, *in* GLEICHBEHANDLUNGSRECHT 33, 48 (Beate Rudolf & Matthias Mahlmann eds., 2007).

[7] Council Directive 2000/43/EC of 29 June 2000, O.J. 2000 L 180/22 (implementing the principle of equal treatment between persons irrespective of racial or ethnic origin), *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2000:180:0022:0026:en:PDF (last accessed 16 October 2010).

[8] Council Directive 2004/113/EC of 13 December 2004, O.J. 2004 L 373/37 (implementing the principle of equal treatment between men and women in the access to and supply of goods and services), *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2004:373:0037:0043:EN:PDF (last accessed 16 October 2010).

[9] The European Union replaced and succeeded the European Community with the entry into force of the Treaty of Lisbon (Art. 1 (3) (3) Treaty on European Union (TEU)). This contribution therefore uses the term "EU Directive."

[10] *See* Art. 288 (3) Treaty on the Functioning of the European Union (TFEU).

covers gender-based discrimination in the provision of goods and services available to the public.[11]

C. Obligation to Contract—Interpretation of the AGG

I. Text of the AGG

In the German original, § 21 (1) (1) AGG reads: "Der Benachteiligte kann bei einem Verstoß gegen das Benachteiligungsverbot [...] die Beseitigung der Beeinträchtigung verlangen." This has been translated as "Where a breach of the prohibition of discrimination occurs, the disadvantaged person may […] demand that the discriminatory conduct be stopped."[12] The AGG does not explicitly state that there is an obligation to contract. If the discrimination consists of the refusal to conclude a contract, however, the discriminatory conduct can only be stopped by concluding this contract,[13] so that there is a strong textual argument in favor of an obligation to contract.

In academic writing, there has been little focus so far on permanent preventive injunctions for future possible breaches (*Unterlassungsanspruch*, § 21 (1) (2) AGG). However, they can serve as a legal basis for an obligation to contract in future situations. A case in point is a civil action by a person who was refused entry to a restaurant and who has the intention to return in the future. It remains unclear what else could be the content of a preventive injunction if not that the owner has to serve the respective person, which constitutes an obligation to contract.

II. Legislative History

It has been argued that the legislative procedure shows that an obligation to contract was not intended.[14] The first draft of the Act contained a provision addressing an obligation to contract[15] that was deleted later. However, the above-mentioned section only contained certain restrictions as to when there is an obligation to contract. Those arguing in favor of an obligation to contract have always derived this obligation from the provision

[11] See below C. III. for the requirements of the directives for remedies under national law.

[12] Translation of the Antidiskriminierungsstelle des Bundes (see *supra,* note 1).

[13] Sonja Haberl, *Antidiskriminierungsrecht und Sanktionensystem: Die Konkretisierung gemeinschaftsrechtlicher Mindestvorgaben,* 6 ZEITSCHRIFT FÜR GEMEINSCHAFTSPRIVATRECHT (GPR) 202, 205 (2009); Schiek, *supra* note 3, § 21, margin number 9.

[14] *See* Gregor Bachmann, *Kontrahierungspflicht im privaten Bankrecht,* 18 ZEITSCHRIFT FÜR BANKRECHT UND BANKWIRTSCHAFT (ZBB) 257, 266 (2006).

[15] § 22 (2) ADG-E, BT-Drucks 15/4538.

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corresponding to § 21 (1) (1) AGG,[16] not from the deleted paragraph. The legislative materials to the draft also support this interpretation.[17] The deletion of the provision containing restrictions as to obligation to contract therefore does not imply that an obligation to contract was no longer intended.[18]

This article argues that the legislative history is, in fact, undetermined and does not provide a clear result.[19] This can be explained by the fact that the legislation was highly controversial and that the parties wanted to agree on a compromise and therefore left controversial issues open.[20] This is a phenomenon that can be seen regularly in all kinds of negotiations; the parties avoid addressing controversial issues because they want the negotiations to be successful. Moreover, one has to be very careful when interpreting legislative history, in particular when legislation is discussed controversially. It can easily happen that statements of individual persons in the legislative process are misinterpreted as statements of the legislative institutions. As regards the AGG, it has even been argued that statements of politicians outside of the legislative process would show that an obligation to contract was not intended.[21] However, these are only singular opinions and not the general opinion of the legislature.[22]

III. EU Directives

As outlined above (B.), the AGG has a European background and is based on several EU directives, which are binding for all EU Member States, as to the result to be achieved, and which had to be transposed into national law. If there is no strong indication to the contrary, it can be assumed that the German parliament did not intend to breach its obligation under public international law.[23] This is why the directives have to be considered for the interpretation of § 21 (1) (1) AGG. In addition, the principle of sincere

[16] § 22 (1) ADG-E, BT-Drucks 15/4538.

[17] BT-Drucks 15/4538, 43; Florian Stork, *Das Gesetz zum Schutz vor Diskriminierungen im Zivilrecht,* 8 ZEITSCHRIFT FÜR EUROPARECHTLICHE STUDIEN (ZEuS) 49 (2005).

[18] *See* Thüsing & Hoff, *supra* note 3, at 22; *see also* Schiek, *supra* note 3, § 21, margin number 8.

[19] *See* Christian Armbrüster, *Der allgemein-zivilrechtliche Teil des Allgemeinen Gleichbehandlungsgesetzes, in* GLEICHBEHANDLUNGSRECHT 257, 316 (Beate Rudolf & Matthias Mahlmann eds., 2007).

[20] *Id.* at 315.

[21] *See* Bachmann, *supra* note 14, at 266.

[22] Gregor Thüsing, *§ 19 AGG, in* MÜNCHENER KOMMENTAR ZUM BÜRGERLICHEN GESETZBUCH, margin number 22 (Franz Jürgen Säcker & Roland Rixecker eds., 2007).

[23] For an interpretation in conformity with the European Convention on Human Rights, see Bundesverfassungsgericht, [BVerfG – Federal Constitutional Court], Case No. 2 BvR 1481/04, 14 October 2004, BVerfGE 111, 307.

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cooperation between the Member States and the European Union (Art. 4 (3) TEU) requires the Member States to interpret national law implementing European law in conformity with EU law.[24]

However, the two relevant directives are rather open. The core provisions as to remedies in both Directive 2000/43/EC (Art. 15 (2)) and Directive 2004/113/EC (Art. 14 (2)) state that the sanctions shall be "effective, proportionate and dissuasive."[25]

One could think of placing a lot of weight on every aspect of this provision and interpreting the directives in a way that they require the Member States to provide specific sanction. An example of this could be that "dissuasive" requires the Member States to provide punitive damages.[26] As regards fault requirements for damages, the European Court of Justice's case law in interpreting directives on equal treatment in the field of employment has indeed been relatively strict.[27] However, the directives are generally interpreted as leaving the Member States a great deal of discretion—in particular as regards an obligation to contract—and the opportunity to provide sanctions that fit well into the national system of remedies.[28] This interpretation of the directives is convincing because it takes into account the differences in the legal systems of the Member States. Given this diversity, the EU institutions would have had to use unambiguous language if they had intended to require specific sanctions. In conclusion, it can be said that the EU directives do not set strict requirements with regard to remedies and, therefore, do not provide much guidance for the interpretation of the AGG.[29]

IV. Systematic Comparison: The Explicit Exclusion of an Obligation to Contract in Employment Law

From a systematic point of view, § 21 (1) (1) AGG can be contrasted with the remedial provisions for employment law. § 15 (6) AGG states explicitly that there is no obligation to contract as far as employment contracts are concerned.[30] If the German parliament states

[24] *See also* ECJ, Case C-397/01, Bernhard Pfeiffer et al. v. Deutsches Rotes Kreuz, 2004 E.C.R. I-8835, para. 114.

[25] The EU legislative materials also do not address obligations to contract.

[26] The German federal government, in the legislative materials, interprets the directives as *not* to require punitive damages. BT-Drucks 16/1780, 46.

[27] ECJ, Case C-177/88, Dekker v. Stichting Vormingscentrum voor Jong Volwassenen (VJV-Centrum) Plus, 2004 E.C.R. I-3941; Case C-180/1995, Draehmpaehl v. Urania Immobilienservice OHG, 1997 E.C.R. I-2195.

[28] *See* Armbrüster, *supra* note 3, at 1494 (arguing that there is general agreement that the EU directives leave it to the Member States whether to provide an obligation to contract).

[29] *See*, *inter alia*, Thüsing & Hoff, *supra* note 3, at 22.

[30] A similar explicit statement could be found in former § 611a (2) Bürgerliches Gesetzbuch [Civil Code - BGB].

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explicitly that there is no obligation to contract in one field of law and it does not state the same for the other fields of law, it intends different legal consequences.[31]

V. The Obligation to Contract under the AGG and Specific Performance

As regards text, legislative history, European background, and systematic comparison, the arguments in favor of an obligation to contract outweigh the arguments against an obligation to contract. Therefore, the AGG should be interpreted as comprising an obligation to contract. This does not only mean that the person discriminated against can bring a suit for the conclusion of a contract. It also means that he or she can then, in the case of a breach of the contract, bring a suit for specific performance because specific performance is available for breach of contract as a default remedy under German law.

D. The Appropriateness of an Obligation to Contract

This part of the contribution takes the argumentation to a more abstract level: Does an obligation to contract make sense as a remedy for violation of anti-discrimination provisions?

I. Fundamental Aspects

1. The Relevant Assessment Criteria to Assess an Obligation to Contract—Assumptions for a Remedy-focused Analysis

This article argues that the assessment criteria for the appropriateness of an obligation to contract as a remedy are criteria that specifically assess remedies. This means that there are two separate and distinguishable levels when anti-discrimination provisions are designed. On the first level, the question is: Should there be a prohibition of a certain kind of discrimination? If this question is answered in the affirmative, the question on the second level is: What should the remedies be for a violation? This article does not focus on the first level; it assumes that there are prohibitions of discrimination. It solely focuses on the second level and tries to assess the appropriateness of a specific remedy for given prohibitions of discrimination. Admittedly, there exists interdependence between the two levels,[32] but the analysis becomes much clearer if the two levels are distinguished. In academic writing, this separation has not been emphasized sufficiently.

[31] *See* Christian Armbrüster, *Bedeutung des Allgemeinen Gleichbehandlungsgesetzes für private Versicherungsverträge,* 57 VERSICHERUNGSRECHT (VERSR) 1297, 1303 (2006); Thüsing & Hoff, *supra* note 3, at 22.

[32] *See* RICHARD POSNER, ECONOMIC ANALYSIS OF LAW 566 (7th ed., 2007) (discussing the possibility of a compromise in the legislative proceedings where opponents might have had enough influence to limit the remedies in a statute to a less than optimal level).

For its analysis, this paper makes a second assumption. It does not only assume that there is a statute that prohibits specific types of discrimination, it also assumes that this prohibition is appropriate and constitutional. This means, in particular, that the prohibitions are justified limitations of freedom of contract. The reason for this second assumption is that the question of how unconstitutional or inappropriate legislation should best be enforced would ultimately be irrelevant.

From the above follows that there has to be a very strong argument—and an argument that specifically applies to the obligation to contract as a remedy[33]—as to why an obligation to contract should not be appropriate or should not be constitutional because the second assumption implies that freedom of contract does not go so far as to include the refusal of the conclusion of a contract based on certain grounds. The second assumption precludes the mere reference to the principle of freedom to contract as an argument against an obligation to contract because this principle has already been taken into account in the decision made on the first level that there should be prohibitions of specific types of discrimination.[34]

2. What is the Objective of the AGG?

The determination of the objective of the AGG plays an important role for the assessment of its remedies. The fundamental debate is whether the AGG only protects a person's dignity or, in addition, also intends to guarantee that a person has access to certain goods and services.[35] It has often been argued that the AGG protects only the first interest.[36] However, the second interest has been expressly mentioned, and supported by examples, in the legislative materials of the AGG.[37] Moreover, the European Commission, in its proposal for Directive 2000/43/EC, stated that "the exclusion of individuals from access to the goods or services of their choice is at best damaging to their self-esteem and may lead in the worst cases to compounding social exclusion."[38] This is convincing because

[33] The situation for the violation of anti-discrimination provisions is not identical to the situation of a breach of contract, but there are some similarities. To a certain extent, therefore, the argumentation in this paper relies on the principle under German law that specific performance is available for breach of contract as a default remedy and that the plaintiff is not generally restricted to damages only.

[34] The argument in Schiek, *supra* note 3, § 21, margin number 9 appears to go in the same direction.

[35] *See* Beate Rudolf, *Gleichbehandlungsrecht und Öffentliches Recht, in* GLEICHBEHANDLUNGSRECHT 186, 192 (Beate Rudolf & Matthias Mahlmann eds., 2007). Some scholars have also seen the primary objective in the protection of dignity and the access to goods and services only as a less important, secondary, objective. *See* Thüsing & Hoff, *supra* note 3, at 22 (with reference to the legislative materials, BT-Drucks 16/1780, 20, 33, and 46).

[36] *See* Armbrüster, *supra* note 3, at 1494; Neuner, *supra* note 3, at 64.

[37] BT-Drucks 16/1780, 23-25.

[38] COM (1999) 566 final, 25 November 1999, 5, *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:1999:0566:FIN:EN:PDF (last accessed 16 October 2010).

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examples like race discrimination in education facilities in the U.S.[39] or discrimination in the field of employment[40] clearly show that discrimination does not exclusively affect a person's dignity. In these fields, discrimination clearly affects opportunities in life in the form of lack of access to jobs or university education.[41] Thus, both the German and the EU legislator have expressed their intentions to guarantee access to goods and services. The AGG therefore—at least in some circumstances—also protects this interest.

3. Why some Violations do not Trigger Sanctions, and the Implication for the Selection of Remedies

All remedies under the AGG require that the victim of the discrimination brings a legal action. It is obvious that not all violations of the AGG lead to a law suit (or to a settlement in order to avoid a law suit). In many instances violations of the AGG therefore do not have any consequences because victims do not bring a law suit for a variety of reasons (legal costs, lack of time, lack of knowledge, inconvenience, *etc*.). If the AGG provided for public enforcement, not all instances of discrimination would trigger sanctions either. Many instances of discriminatory conduct would go undetected and the available resources of enforcement authorities naturally would restrict the authority's enforcement activity. It also appears probable that in the field of anti-discrimination laws, victims are less likely to bring suits, because victims often belong to socially disadvantaged groups that lack the knowledge, the resources, and the confidence to assert their rights.[42]

All this has so far received relatively little attention by academic discussions on appropriate sanctions. The most important implication is that sanctions have to be designed in a way that takes into account the fact that they will not be triggered by every single violation of the provision. Lack of enforcement of the law in some instances is, in essence, a strong argument for powerful sanctions.[43] This can be exemplified by looking at compensatory damages from an individual and from an aggregate perspective. Compensatory damages do compensate the individual plaintiff for his or her individual harm. However, they are not paid for every violation. The consequence is that aggregate harm done to all individuals is much higher than aggregate compensatory damages paid by violators.[44]

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[39] *See*, *inter alia*, Brown v. Board of Education, 347 U.S. 483 (1954); United States v. Fordice, 505 U.S. 717 (1992).

[40] BT-Drucks 16/1780, 24.

[41] For housing discrimination and its results (segregation, lack of educational opportunities, *etc*.), see WERNER HIRSCH, LAW AND ECONOMICS 334 (3rd ed., 1999).

[42] BT-Drucks 16/1780, 23.

[43] *See* STEVEN SHAVELL, FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW 479 (2004).

[44] For the effect on incentives, see SHAVELL, *supra* note 43, at 244.

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II. Individual Assessment Criteria

1. Compliance: The Incentive to Comply with the Anti-discrimination Provisions

An important assessment criterion is to what degree the remedies constitute an incentive for people to comply with the anti-discrimination statute, i.e. not to discriminate. This criterion, which focuses on influencing behavior, is emphasized by economic analysis of law,[45] but it is also taken into account in traditional legal analysis.[46] Obviously, sanctions need a certain power in order to achieve compliance with the provisions. This is true in particular because of the fact that sanctions are not always applied because it lowers the expected costs of non-compliance.[47]

One argument is that violators pay a fair price for discrimination if they pay damages that compensate the victim for the harm done. If they make the victim whole and value discrimination high enough to pay damages, why should they be forced into a contract? The reason is that there is a substantial lack of sanctions or enforcement of sanctions—in many instances, the violators do not have to pay, so a large percentage of victims go uncompensated.[48]

Creating an incentive to comply with the anti-discrimination provisions is not a formal argument for an obligation to contract. Analyzing the incentives does show, however, that there is great danger in having too little incentive to comply, and that powerful remedies are necessary to achieve the desired result. Therefore, the risk of noncompliance supports the appropriateness of an obligation to contract as an additional remedy to other given remedies.

2. Compensation of the Victim

From the point of view of compensation of the victim, it has often been argued that compensatory damages to make the victim whole are as good as an obligation to contract, or even better.[49] Compensatory damages are available under § 21 (2) AGG and are

[45] *See* POSNER, *supra* note 32, at 25; for an analysis of anti-discrimination provisions in private law and reasons for discrimination see Engert, *supra* note 2.

[46] *See*, *e.g.*, the case law of the Bundesgerichtshof [Federal Court of Justice - BGH] on the relevance of preventive aspects for the determination of the amount of damages available for violations of the victim's personality rights (*Allgemeines Persönlichkeitsrecht*), BGH NJW 1995, 861.

[47] *See supra* D. I. 3.; SHAVELL, *supra* note 43, at 479.

[48] On this argument and on the fact that even the optimal level of deterrence is characterized by under-deterrence so that the fair market price argument does not apply see SHAVELL, *supra* note 43, at 488.

[49] *See* Armbrüster, *supra* note 3, at 1496.

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generally the alternative to an obligation to contract, which the German discussion focuses on.[50] However, from the victim's perspective, having the choice between damages and the obligation to contract is preferable.[51] Admittedly, there might be more situations in which damages are superior, preferred by the victim, and sought by the victim in court,[52] but this does not show why the victim should not have the choice between a contract and damages. It is evident that there may be situations where a contract is a better form of compensation.

If, for example, the magnitude of harm done is hard to establish, damages cannot make the victim whole and the victim might prefer an obligation to contract. The argument for an obligation to contract is stronger when the objective of the respective statute is seen not only as the protection of dignity,[53] but also as a guarantee that a person receive certain goods or services. Damages are limited to providing the victim with the money equivalent, and are not a real equivalent for lost goods or services.

3. Proportionality

Proportionality as an assessment criterion plays a role in several respects. On the one hand, proportionality can serve as a principle for the relation between the harm done to the victim and his compensation. On the other hand, proportionality can be a principle for the relation between harm done and the sanction for the violator. The basic conflict between the criterion of proportionality and the criterion of optimal compliance incentive is caused by the fact that sanctions are not applied for every violation. Since this lowers the expected sanction for a violator, the principle of proportionality calls for lower sanctions than would be necessary to create an optimal compliance incentive.[54]

Proportionality would only constitute an argument against an obligation to contract if the obligation to contract subjected the violator to a sanction so severe that it could not be outweighed by the objectives of the statute. This argument has been made based on the

[50] There is remarkably little discussion about the appropriateness of public enforcement in German academic discussion (*e.g.* civil penalties like in the U.S. Americans With Disabilities Act, Title III, 42 U.S.C. § 12188 (b) (2) (C)).

[51] *See* Haberl, *supra* note 13, at 205.

[52] *See* Jan Busche, *Effektive Rechtsdurchsetzung und Sanktionen bei Verletzung richtliniendeterminierter Diskriminierungsverbote*, in: DISKRIMINIERUNGSSCHUTZ DURCH PRIVATRECHT, 159, 174 (Stefan Leible & Monika Schlachter eds., 2006); HABERL, *supra* note 13, at 205.

[53] The argument that damages are more appropriate than an obligation to contract is often based on the interpretation that the AGG only protects the victim's dignity and that the insult cannot be compensated for by the conclusion of the contract. *See* Thüsing, *supra* note 22, § 21, margin number 34.

[54] *See* SHAVELL, *supra* note 43, at 483.

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abstract value of freedom of contract.[55] However, this article argues that the abstract value of freedom of contract stands against the abstract value of equality and non-discrimination and that the legislator balanced those two interests when designing the anti-discrimination provisions (level I decision[56]). Therefore, an argument against an obligation to contract as a remedy (level II decision) would require evidence of concrete and distinct hardship for the violator, not the mere reference of the value of freedom of contract.

4. Certainty

Legal uncertainty is an argument often brought against an obligation to contract. Specific terms of the contract, it goes, are often difficult to determine.[57] However, in some instances, the amount of damages can also be extremely difficult to calculate, whereas contractual terms might be easy to ascertain (*e.g.* if a company uses general terms and conditions and always offers the same type of contract to the public).[58]

This paper argues that it is not possible to claim that either damages or contractual terms are easier to determine in all cases because this issue depends on the individual circumstances of each situation. Because the general civil law part of the AGG covers very different types of contracts, there is a huge variety in possible contractual situations, and this heterogeneity makes a generalization impossible.

5. Practical Problems: Complications of Forced Contracts?

It has been argued that a forced contract will most probably lead to complications.[59] Whether this is true or not depends on individual circumstances, and it is clear that contractual situations vary considerably. It makes a huge difference whether a highly emotional confrontation is involved or whether the situation concerned is rather anonymous. If an insurance company, *e.g.*, is required not to decline the conclusion of a contract based on certain grounds and is forced into a contract, it might try to make the most out of the business relationship. It might be in the insurance company's interest to avoid conflicts during the duration of the contract instead of discriminating against the person whenever it has the opportunity. Therefore, a general statement that damages are always superior as regards practical problems cannot be made. One should not forget that

[55] *See, inter alia*, Armbrüster, *supra* note 3, at 1496.

[56] On the two level model see supra D. I. 1.

[57] *See* the examples in BT-Drucks 15/4538, 44; Busche *supra* note 52, at 173.

[58] *See* Thüsing, *supra* note 22, § 21, margin number 29 and 30.

[59] *See* Busche, *supra* note 52, at 174.

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awarding damages can also be highly problematic. In particular the assessment of damages can be extremely difficult and can produce high litigation costs.

E. Obligation to Contract and German Constitutional Law

I. Policy Arguments, the Constitutional Framework, and the Assumptions for a Remedy-focused Analysis

Constitutional texts tend to be very broad and leave considerable room for policy arguments. This is particularly true of fundamental rights issues under the German *Grundgesetz*, which most often (and also for the obligation to contract) come down to a balancing test as part of the proportionality analysis. All arguments discussed above have to be taken into account in the balancing test. In order to emphasize and make explicit the crucial importance of the balancing test, this article has concentrated on the arguments before identifying the constitutional framework.

As a general rule, EU legislation—and, as a consequence, national law transposing an EU directive—is not subject to German constitutional law restrictions.[60] Instead, EU legislation has to conform to the fundamental rights that the European Court of Justice has recognized as part of the general principles of the Union's law (Art. 6 (3) TEU) and, since the entry into force of the Treaty of Lisbon, to the Charter of Fundamental Rights of the European Union (Art. 6 (1) TEU). Because the EU directives do not require the national legislator to provide for an obligation to contract,[61] however, this sanction is not based on the EU directives and is therefore subject to German constitutional requirements.[62]

There are two common constitutional arguments regarding the obligation to contract: (1) the argument that an obligation to contract is unconstitutional;[63] and (2) the argument that the *Grundgesetz* favors an interpretation of the AGG so that it does not contain an obligation to contract.[64] As described above (D. I. 1.), one of the underlying assumptions of the remedy-focused analysis in this paper is that the anti-discrimination prohibitions as such are constitutional. This implies, as also shown above, that the restrictions of the

[60] ECJ, Case 11/1970, Internationale Handelsgesellschaft v. Einfuhr- und Vorratstelle für Getreide und Futtermittel, 1974 E.C.R. 1125; Bundesverfassungsgericht, Case No. 2 BvR 197/93, 22 October 1986, BVerfGE 73, 339 (*Solange II*).

[61] *See* supra C. III.

[62] *See* Stork, *supra* note 17, at 50.

[63] Eduard Picker, *Antidiskriminierungsgesetz – Der Anfang vom Ende der Privatautonomie?*, 57 JZ 880 (2002); Katharina von Koppenfels, *Das Ende der Vertragsfreiheit?,* 56 WERTPAPIER-MITTEILUNGEN (WM) 1489, 1491 (2002).

[64] *See* Armbrüster, *supra* note 3, at 1497.

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freedom of contract that necessarily accompany the anti-discrimination prohibitions are constitutional as well.

II. Constitutional Rights Involved and the Protective Function of Constitutional Rights

The person who refuses to conclude the contract can invoke his freedom of contract. Freedom of contract is a constitutionally protected right under Art. 2 (1) of the *Grundgesetz*, which contains the principle of general freedom to pursue any lawful activity (*Allgemeine Handlungsfreiheit*). Freedom of contract includes the right not to conclude a contract.[65] As regards certain types of contracts, freedom of contract can also be guaranteed by more specific fundamental rights provisions.[66]

In regard to the person who wants to conclude the contract, the situation is more complicated. The legislative materials focus on the state's duty to protect (*Schutzpflicht*).[67] Under the *Grundgesetz*, the state has—under certain circumstances—a duty to protect fundamental rights against private interference (protective function of fundamental rights).[68]

As to the specific fundamental rights that protect the interest of those willing to enter into a contract, one is the freedom of contract of those willing to enter into contracts.[69] The existence of this fundamental right, in conjunction with the protective function, is also an argument that the AGG probably also has the objective to provide access to goods and services. The focus on this right, however, is problematic if the persons discriminated against can obtain the goods or services from a different provider.[70]

The anti-discrimination provisions in the *Grundgesetz*, in particular Art. 3 (2) and (3), are a second option. The *Bundesverfassungsgericht* held that they can create a duty to protect for the state.[71] This approach easily captures situations that only involve the victim's dignity. What is problematic about this approach—as well as about the concept of a state's duty to protect in general—is that, in principle, these provisions apply only to the

[65] *See* Thüsing & von Hoff, *supra* note 3, at 25.

[66] See the examples in the legislative materials, BT-Drucks 16/1780, 39.

[67] BT-Drucks 16/1780, 40.

[68] Bundesverfassungsgericht, Case No. 1 BvR 409/90, 6 May 1997, BVerfGE 96, 56, 64; Case No. 1 BvF 1,2,3,4,5,6/74, 25 February 1975, BVerfGE 39, 1, 45.

[69] *See* Bundesverfassungsgericht, Case No. 1 BvR 26/84, 7 February 1990, BVerfGE 81, 242.

[70] *See* von Koppenfels, *supra* note 63, at 1492.

[71] Bundesverfassungsgericht, Case No. 1 BvR 258/86, 16 November 1993, BVerfGE 89, 276, 285.

state, not to private actors (Art. 1 (3) of the *Grundgesetz*). The relationship between state action doctrine and duty to protect is, in large part, an unsolved fundamental legal problem.

III. Legitimate State Interest and Balancing Test

Whether there is a duty to protect, however, is not the crucial point. Under German constitutional law, the state can restrict most fundamental rights and in particular Art. 2 (1) if, in essence, (1) the restriction is provided for by a statute, (2) it pursues a legitimate interest, and (3) it is proportional. The legitimate interest requirement means that there has to be a *right to protect*—a constitutional *duty to protect* is not required[72] although, admittedly, it makes the case stronger. Prevention of discrimination based on the grounds prohibited by the AGG is generally regarded as a legitimate interest.[73]

In regard to the balancing test that forms part of the proportionality analysis, all the arguments from the analysis above regarding the appropriateness of an obligation to contract as a remedy must be taken into account. It is clear that the arguments in favor of an obligation to contract prevail.

F. Conclusion and Perspectives

This article has shown that § 21 (1) (1) AGG should be interpreted as comprising an obligation to contract as a remedy. It has also been demonstrated that an obligation to contract is an appropriate remedy in the light of the objective of the AGG and of the EU directives to make goods and services available to individuals, to protect opportunities, and to prevent social exclusion. Given the framework under German constitutional law—where the ultimate decision comes down to a balancing test—and given the appropriateness of an obligation to contract as a remedy, there is no convincing argument why an obligation to contract should be unconstitutional.

As has been shown, the assessment of an obligation to contract as a remedy becomes much clearer if two decision-making levels are distinguished and assumptions are made as to the existence, the appropriateness, and the constitutionality of the prohibitions of discrimination (level I decision). In particular, this approach makes clear that the mere reference to the principle of freedom of contract cannot serve as an argument against an obligation to contract because freedom of contract has already been taken into account in the decision that there should be prohibitions of specific types of discrimination.

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[72] *See* Olaf Deinert, *§ 21*, *in* ALLGEMEINES GLEICHBEHANDLUNGSGESETZ, margin number 81 (Wolfgang Däubler & Martin Bertzbach eds., 2nd ed., 2008).

[73] This aspect is often seen as self-evident and not even expressly mentioned in many publications. For the EU legal order see also Art. 3 (3) (2) TEU and Art. 8 and 10 TFEU.

While the focus of this article lies exclusively on the obligation to contract under the AGG, it is apparent that a remedy-focused analysis can be conducted for other remedies as well. The fact that EU Member States have adopted a variety of different implementation measures of the EU directives provides for interesting opportunities to compare legislative approaches to the fight against discrimination. In regard to constitutional law analyses in the field of anti-discrimination law, the questions of how the constitutions of the various Member States and how the EU's new fundamental rights regime[74] address both prohibitions of discrimination and remedies for their breach remain fascinating inquiries.

[74] *See* Art. 6 TEU and the Charter of Fundamental Rights of the European Union.

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