

concerning § 5 of the workshop

## Equality before the law, equal rights of men and women, non-discrimination

### Art. 3 Basic Law<sup>1</sup>

- (1) All human beings are equal before the law
- (2) Men and women have equal rights. The state shall promote the actual implementation of equal rights for women and men and work towards eliminating existing disadvantages.
- (3) No one may be disadvantaged or favoured because of his sex, parentage, race, language, homeland and origin, faith or religious or political views. No one may be disadvantaged because of his disability.

### I. Introduction and overview

- Equality, along with freedom, is the second important pillar of human rights and fundamental rights. This is not about free development but *justice*. Equality too is an element of human dignity as autonomous self-determination of *all* people, who are by nature *free and equal*. Therefore, unequal treatment always needs justification.
- These days, this basic understanding appears natural and self-evident to us. Even small children have a pronounced feeling for equality, are sensitive to the smallest differences in treatment. Nevertheless, all human civilizations have initially developed hierarchical social orders. Apart from a few indigenous societies, the postulate of equality is historically only an *achievement of the Enlightenment and modern times*. Some societies may appear modern on the surface but are still characterised, even today, by perceptions incompatible with the fundamental human value of equality, e.g. ideas concerning the role of gender.
- Equality rights are *only directly binding on public authorities*, not on the citizen. However, as objective value decisions of the Constitution they are reflected in the laws and jurisprudence and can thus bind the citizen indirectly in certain areas (see, for example, the General Act on Equal Treatment [Allgemeines Gleichbehandlungsgesetz] on equality in professional life).
- Equality rights do *not* guarantee *equality in illegality*. The citizen cannot demand the same decision as in another comparable case if that decision violated the law (example: no entitlement to an unlawful building permit for a house in the nature conservation area, just because the neighbour has received one).
- Equality in the sense of the fundamental rights means first of all *equal treatment*, that means formally equal rights and duties and formally equal chances of the citizens. This is not the same as the realisation of effective equality, which aims at actually equal or equivalent living conditions and actually equal opportunities. The latter can most effectively be achieved through formally unequal treatment (for example, tax benefits only for the poor, scholarships only for children from poor families, quota systems or other affirmative action). Such unequal treatment is often justified by the *principle of the social state* (art. 20(1) BL) but can also lead to unintended hardship for some individuals and therefore often is controversial. If there are alternative solutions that create equal opportunities and conditions without unequal treatment (for example, free provision of books and equipment at school or university instead of book grants for needy students), from the fundamental rights perspective they are preferable. Often, however, they are unexpedient or too expensive for the state.
- On the systematics of equality rights: In addition to the *general principle of equality* (art. 3(1) BL), the Basic Law also recognizes a number of *special equality rights*, which impose higher standards if certain topics are concerned. These special rights include, first of all, equal rights of men and women (art. 3(2) BL) and the prohibition of discrimination on the basis of sex (art. 3(3) phrase 1 BL), furthermore the other prohibitions of discrimination in art. 3(3) BL and, finally, other equality rights such as the equal opportunities for children born outside of marriage (art. 6(5) BL), the rights of equal citizenship (art. 33 BL) and the right to equal elections (art. 38(1) phrase 1 BL).

### II. The general principle of equality (art. 3(1) BL)

- Despite the narrow wording of art. 3(1) BL, the general principle of equality is understood in a wide sense. It demands equal treatment not only in the application of the law ("equality before the law") but also in the making of the law ("equality of the law"). This makes it one of the most important fundamental rights in practice, especially when it comes to financial regulations.
- The general principle of equality applies only to *measures of the same authority*. The different regulation of equal problems in the different German Länder is not a problem of equality but a natural consequence of federalism.

<sup>1</sup> Underlined text passages contain links to additional Internet resources. These can be called up directly in the PDF file for this introduction (downloadable on my website).

- The general principle of equality requires to treat substantially equal cases equally and substantially unequal cases unequally. It is violated if there is no *objective justifying reason* and, thus, the unequal treatment manifests arbitrary (so-called *prohibition of arbitrariness*). Moreover, for some decades the Federal Constitutional Court requires the compliance with higher standards if different groups of persons are treated unequally (which is often the case). In these cases there must be differences between these groups of such kind and importance that they are important enough to justify the different treatment (so-called "*New Formula*"). That means, the control of arbitrariness is complemented by a second test based on a criterion resembling the principle of proportionality and also requiring a thorough weighing.<sup>2</sup> Not only must there be an objective reason for the unequal treatment, but it must also be of *sufficient weight*.
- In a first step in the equality test, the reference groups need to be worked out: Is there an unequal treatment and between whom or what? In a second step, it must then be examined whether the unequal treatment is justified by an objective reason. If only different constellations of facts are treated unequally (for example, to drive by cars with diesel engine or petrol engine through the city centre), there will only be the classical control of arbitrariness. If, by contrast, groups of persons are treated differently (e.g. school students and university students, civil servants and university professors or parents with high and low income), it is also necessary to examine whether the objective reason for this unequal treatment, when weighed against the constitutional value of equality, has sufficient weight. In this examination all individual aspects must be discussed and weighted rationally and in a transparent way. In most cases, the difficulties do not reside in the legal dogmatics of equality but in their application on details of highly complex constellations in difficult areas of law (pension law, tax law, civil servant remuneration law etc.).

### III. The prohibitions to differentiate according to certain personal characteristics (art. 3(3) BL)

- While the general principle of equality is open to all differentiation criteria, the special prohibitions of discrimination in art. 3(3) BL generally exclude unequal treatment according to certain *personal characteristics* which for the most part have a close connection to human dignity. In principle, these characteristics can neither justify disadvantageous treatment (discrimination) nor preferential treatment (privilege). Only disabled people may be favoured but not disadvantaged (art. 3(3) phrase 2 BL).
- The prohibition to differentiate by gender ("sex") not only guarantees the equality of men and women (see infra, IV.) but also protects transsexuals and persons who do not want to associate with a gender. However, art. 3(3) does not exclude to differentiate by sexual identity (with regard to homosexuals). Against this kind of discrimination only art. 3(1) BL and, below the level of the Constitution, the General Act on Equal Treatment provide protection. In 1949, when the Basic Law was passed, even in Western societies an explicit constitutional protection of homosexuals was out of the question.
- The prohibition of the criterion "parentage" is intended to prevent, in particular, kin liability (collective liability for the crimes or actions of a family member) and nepotism. The prohibition of "racial" discrimination also protects ethnic minorities (e.g. Sinti and Roma). The prohibition of the differentiation according to the "language" prevents discrimination on account of another native language or dialect, but of course it allows to demand knowledge of German language for certain activities. The prohibition of the differentiation according to the "homeland" ["Heimat"] prevents focusing on the identity-forming local and regional origin of the person but not focusing on his nationality; it thus allows the unequal treatment of foreigners. The term "origin" refers to the social descent and rootedness, in particular the social situation of the parents. The prohibition of differentiation according to "faith" and "religious or political views" prohibits to focus on religious or political convictions but allows to focus on certain behaviours that may be a result of them. Moreover, exceptions apply to public servants insofar as the Basic Law requires their loyalty to the state and to the constitution (cf. art. 33(5) BL).
- The prohibitions of differentiation are *not absolute*. The excluded criteria may be used exceptionally, if they are necessary for solving problems which, by their very nature, can only exist for persons of the concerned group, that means if the criterion forms the constituent element of the circumstances of social life that shall be regulated. Such constellations are rare. In addition, it is said that collisions with other constitutional values may justify exceptions, but caution is required since this idea may be easily abused. In any case, any *exception must be imperative*.

### IV. Equal rights of men and women and the prohibition to differentiate by gender (art. 3(2) BL)

- In Germany, equal rights for men and women are a particularly sensitive and controversial issue even 70 years after the entry into force of the Basic Law. Although the Basic Law has forced significant progress, there is still a lot of catching up to do, not only in the opinion of feminists. On the other side of society, there are efforts to roll back the developments of the last decades (criticism of "gender mania"). The debate, like the one about the alleged "refugee crisis", reflects today's brokenness of the German society.
- From the legal perspective, the prohibition of differentiation by gender ("sex") in art. 3(3) phrase 1 BL provides the most important protection of women. It has led to the reduction of the previously existing legal discriminations and prevents them from being reintroduced. However, the focus of the social discussion today is on the equal rights of men and women and their actual implementation in social reality (art. 3(2) BL).

#### 1) The prohibition to differentiate by gender (→ equal treatment)

- When it comes to protection against discrimination, art. 3(3) phrase 1 BL is the relevant fundamental right. In this respect, art. 3(2) BL does not set any special or advanced standards. Art. 3(3) phrase 1 prohibits not only direct differen-

<sup>2</sup> In a recent decision the Federal Constitutional Court even talks about proportionality, cf. BVerfGE 129, 49, 68 f. (Entscheidungen des Bundesverfassungsgerichts [Decisions of the Federal Constitutional Court], vol. 129, p. 49 ff., quoted text passage at p. 68 f.).

tiation according to gender ("sex") but also indirect differentiation by regulations which, although formulated gender-neutral, predominantly affect one of the sexes due to natural differences or social conditions.

- Art. 3(3) phrase allows differentiations by gender ("sex") only if they are imperative (absolutely necessary) for the solution of problems which by their nature may arise only for men or only for women. This is usually only the case if there are biological reasons. Apart from this, unequal treatment can only be legitimized by the way of thorough balancing with colliding other constitutional values.
- Due to art. 3(3) phrase 1 BL *numerous traditional rules* in civil law, in particular in the field of family law, which perpetuated the traditional distribution of roles within the families, *needed to be given up*. An important step was the Law on the Equality of Men and Women in the Area of Civil Law (Equal Rights Act) of 1957. Anything that restricts the autonomy of the woman or that gives the man any pre-eminence, even with regard to the family name, is unconstitutional. By contrast, for example, special health regulations to protect the woman during pregnancy or the man against prostatic cancer are permissible. For a long time, women were denied access to the armed military service in the German Army due to a special clause in the Basic Law, but in 2000 this was changed.

## 2) The obligation of the state to promote *effective* gender equality

- Art. 3(2) goes beyond art. 3(3) phrase 1 BL in so far as it establishes a positive obligation to equal rights and extends it to the social realities. The second sentence, introduced in 1994, even obliges the state to actively *promote the actual implementation of equal rights* and to work towards the elimination of the still existing disadvantages. This entitles the legislator to compensate for actually existing disadvantages, which typically affect women, by favouring regulations. This happens in many ways. For their civil service sectors, including the universities, all Länder and the Federation have adopted gender mainstreaming laws, which are usually called Equal opportunities Act [Gleichstellungsgesetz], Equal Rights Act [Gleichberechtigungsgesetz] or Promotion of Women Act [Frauenförderungsgesetz]. These laws require *Equal Opportunity Officers* [Gleichstellungsbeauftragte] (formerly called women's representatives) in all public authorities and institutions, which must be consulted on all matters relating to gender equality issues (that means, in practice, in almost every matter), in particular before any personnel decision. Gender mainstreaming is an important topic in Germany, also in German development cooperation and as research topic at German universities.
- It is disputed whether and to what extent art. 3(2) phrase 2 BL, as colliding constitutional law, can justify *deliberate discrimination against men* in order to compensate for the general social disadvantage of women. This problem arises especially in professional life when it comes to filling senior positions in the public service. In this context, art. 33(2) BL does not determine the sex but aptitude, qualifications and professional achievements as decisive criterion. It is questionable whether mandatory *quotas for women* or "*reversed discriminations*", requiring to disadvantage better-qualified male applicants and to favour lower-qualified female applicants, would comply with this norm. The Federal Constitutional Court has not yet commented on this but would probably consider permissible qualification-orientated quota arrangements where, until the achievement of a certain quota of women, female candidates must be favoured if they are not less qualified. A tendency, though not strict, to favour female applicants with equal qualifications is already common practice in the public service. In those professions with a large surplus of women (e.g. elementary school teachers or kindergarten teachers) the situation is reverse. In practice, the selection committees avoid the problem by finding arguments, even when the applicants are equally qualified, to present the favoured candidate as better.
- The discussion about quotas for women and "reversed discrimination" distracts from the real reasons for the continuing disadvantages for women in professional life in Germany: the lack of family-friendly infrastructure and the lack of consideration in society for the needs of young families. Insufficient capacities and too short opening times of day care centers and kindergartens, the closure of company kindergartens, the late introduction of all-day schools and the unwillingness of clubs, organisations and institutions to offer their activities for younger children in the after-work hours force the families to withdraw one parent from working life in an age which is important for her/his professional career. This almost inevitably leads to considerable career setbacks - in families where the parents alternate in childcare and professional life even for both parents. Moreover, in Germany exorbitant expectations in society on the role of the mother put a strain on the women and their families. Finally, excessive demands of employers, partners and clients concerning the availability and flexibility in professional life limit the opportunities for women with families to engage in senior positions. To overcome these problems, a constitutional clause on gender equality is nice but not enough.