Zero Tolerance in the Name of Tolerance: Non-Discrimination
Legislation as a Shift from Equality to Privilege

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The understanding of freedom as well as policies affecting our attitude to family and family life have undergone a dramatic shift. What was unthinkable in recent history has become standard today. Still, for now, if everyone may do whatever he feels like doing, it follows that the one who does not want to do a certain thing for moral reasons should not be forced to do it. In Europe, however, this bastion of withdrawal stands on thin ice. Soon, from family policy to personal decisions, what is not affirmative of any random choice or lifestyle will no longer be acceptable. In legal development, we are at this turning point.

Equality has become a major principle of political and legal thinking. Equality before the law, which was achieved over centuries of liberation movements, has turned into equality of moral choices (especially in the area of sexuality and family), gender equality, and equality of treatment. These understandings deviate quite far from the original meaning of equality before the law (which we rightly hold on to), and they all have a strong bearing on family life. The right of Christian family businesses to refuse to engage in business that is contrary to their beliefs, the right of churches to refuse to “marry” homosexuals, the right of all of us to speak of “marriage” and “family” in their original (natural) senses—all are threatened by the language of equality. Yet, this development in the
meaning of “equality” remains largely unchallenged. And it is currently seen in harsh anti-discrimination legislation proposed both at the EU-level and at the level of many individual European countries.

Such legislation was recently debated in Austria but failed to get final approval. In the end, Rudolf Hundstorfer, the Austrian Minister of Social Affairs, angrily withdrew a draft proposal for an equal treatment bill that would have extended the prohibition of unequal treatment due to “religion and belief, age or sexual orientation” to the area of the provision of goods and services, including housing.

A similar proposal had been earlier rejected by the Austrian Parliament in 2011, but in the summer of 2012, Hundstorfer, a Social-Democrat, put forward the same bill to the same Parliament in the same legislative period for a second time. His party, of course, cheered the bill. But how it managed to also receive the support of the Minister of Economy, Dr. Reinhold Mitterlehner, and the President of the Austrian Federal Economic Chamber, Dr. Christoph Leitl—both members of the more conservative Österreichische Volkspartei (Austrian People’s Party or ÖVP)—remains incomprehensible.

In the end, however, pressure from Austrian entrepreneurs who would have been affected by the proposed law, as well as resistance from civil groups, clear opposition from the Catholic Church, and opposition from certain liberal forces within the ÖVP, brought about the downfall of the bill. For now in Austria the issue is off the table. But Hundstorfer’s bill is exactly the same as the law that has been on hold as a directive in Brussels since 2008. There, apparently without any substantial objections from Austria, it awaits a change of government in Germany, which is currently not willing to accept such restrictions on personal freedom.

The first four EU Equal Treatment Directives, which are already binding for the entire European Union, prohibit discrimination in the area of employment—“only” for the private sector. The proposed fifth EU Equal Treatment Directive, which would extend the ban on discrimination to the provision of goods and services in the private sector, has not yet been met with approval—and for good reason: It would have dramatic consequences. It is time for Austria to withdraw its support from the fifth EU Equal Treatment Directive.
Entrepreneurial Freedom as the Exception?
Just like the now-buried Austrian draft proposal, the proposal for the EU’s fifth Equal Treatment Directive is nothing but unacceptable patronization. If implemented, entrepreneurial freedom, especially for small businesses, would turn from the rule to an exception. Compliance with such a directive would be expensive and time-consuming, and correspondence with customers and new marketing strategies would frequently have to be cleared with attorneys.

The main point of contention is the prohibition of unequal treatment in the provision of goods and services by the private sector—on the grounds of religion or belief, age or sexual orientation. If such a law were to become reality, a Jewish hotel owner, for example, would be obliged to rent out his assembly rooms to a Muslim society; a homosexual would not be able to sublet his house only to homosexuals; and a private rail traffic company would not be allowed to give exclusive discounts to the elderly. In addition, a Catholic dating agency that specialized in bringing together people who share the same faith would have to open its doors to people of other faiths; an Eastern European family that had once fled from a Communist regime might have to rent out their apartment to a Communist Party official; and a couple whose daughter had been estranged through the scheming of a radical sect would not be able to reject a member of that sect as a renter of an apartment in their house.

There are further examples: An evangelical graphic designer would have to design an invitation for the celebration of a same-sex union if requested; in addition, a Christian photographer would have to take pictures, a Christian pastry chef would have to bring a special cake created for the event, and so on.

Why would a graphic designer, a photographer, and a pastry chef not want to be involved in the celebration of a civil partnership? Not because they reject homosexuals but because they do not want to support such a marriage-like event due to religious beliefs and reasons of conscience. Even Jean-Jacques Rousseau has written, “I have never thought, for my part, that man’s freedom consists in his being able to do whatever he wills, but that he should not, by any human power, be forced to do what is against his will.”

Differential treatment could be legitimized if a judge deemed it “appropriate and necessary.” The consequence would be private entrepreneurship regulated by judges, implying costly lawsuits and a lack of legal certainty, impeding long-term business planning and family autonomy and entrepreneurship. Such a proposed reversal of the burden of proof contradicts our legal system and presents further difficulties. Instead of the “benefit of the doubt,” the equal treatment legislation would allow only for the benefit of the victim of “discrimination.” Times are hard enough for small businesses, so why impose additional constraints? Even for the government itself, ensuring compliance with these regulations imposes a significant additional effort. And, in the end, all of this would be paid for by society at large.

**The Consequences of Prohibition**

A recent incident is illustrative. A Christian religious high official was looking for a secretary. His legal advisor wisely asked the Commission for Equal Treatment before publishing the job advertisement: Would they be able to reject a headscarf-wearing Muslim woman? The answer was “no.” On the basis of the first four Equal Treatment Directives, European law allows a distinction due to religion in church employment only when there is a “genuine, legitimate and justified occupational requirement,” such as when it comes to preaching to the faithful. But just imagine if a member of this Christian official’s church entered his office: The obviously Muslim lady in the reception area could create quite a bit of confusion. In the end, this particular church dignitary decided not to publish the job advertisement, choosing instead to look for someone unofficially. The many local people qualified for the job who never had the chance to apply paid the price for the system of anti-discrimination legislation.

Extending the prohibition of discrimination to the private sector would have similar consequences. Services that are publically advertised today would seek to reach their customers in less public ways—and other potential customers would never hear of them. This would cause a rise in prices, and “protected groups” might get shunned due to fear of lawsuits. It is the consumer who would ultimately pay for such legislation.
Though it may sound surprising at first, it is important that discriminatory behaviour be permissible in the market, despite its possible immorality or social undesirability. Granted, a rejected customer must look for another provider of the service being sought. But this hardship ought to be borne in the name of freedom—including the freedom to take wrong or unpleasant decisions. This complies with Voltaire’s notion of tolerance: being of an entirely different opinion but at the same time defending the other’s right to his or her view “until one’s last breath.”

It is with this idea that we are all encouraged to learn to live with the imperfect behaviour of other people. Is it really the government’s duty to enforce an alleged advancement of society through educational laws and a police force? How much education and guidance does the legislature believe its citizens need? Regardless of the response, too often, socially and morally motivated legislation leads to dishonesty and lawlessness.

**Business or Belief**

Equal treatment and anti-discrimination legislation is usually phrased in an impartial way, but practice shows that it is very often Christians who are taken to court under such laws. Some examples: A Spaniard paid €12,000 in administrative penalties because he was not willing to make his restaurant available for the celebration of a same-sex union; a couple in Britain running a private bed and breakfast had to pay up to €4,000 in compensation because they denied a double room to a homosexual couple; a Christian dating agency in the U.S. was forced to add the search option, “I am a man looking for a man.” (Notice that all of these pertain to homosexual unions or behavior and are an attack on natural marriage and family.)

Equal treatment laws thus create irresolvable moral conflicts for Christians by forcing them to choose between their belief and their business. In some countries, equal treatment laws carry administrative penalties; in others, they impose compensation fees. Explanatory materials accompanying such laws often warn of “painfully high” fines. Thus, in practice, the prohibition of discrimination in the provision of goods and services can cause an insoluble dilemma: to quit one’s job or one’s religion.

Experience has shown that equal treatment laws also lead to strategically motivated lawsuits. In the UK, it is a common occurrence
that radical lobbies look for interaction with companies led by people with convictions conflicting with the law—for example, practicing Christians—with the plan of launching lawsuits. Litigation associations readily provide support: They receive part of the compensation fees and use this money to seek further lawsuits. The higher the compensation fees, the more remunerative the role of the victim.

**Are Equal Treatment Laws Necessary?**
The great political philosopher Charles de Montesquieu advised that if it was not necessary to make a law, it was necessary not to make one. According to that principle, laws should be necessary, adequate, and proportionate. This is not the case with equal treatment laws. Despite their egalitarian wording, they create privileges for certain groups. Of course, bestowing privileges upon one group of people can be necessary in certain situations, but the reasons must be very compelling.

In the course of the debate in Austria, there was talk of the possibility that a homosexual man might be hindered from entering a night club. If this were actually the case, one could show solidarity by not visiting the club anymore—and by suggesting that others do the same. If such a boycott was not successful but, instead, the problem spread even more, should we not then discuss incentives and disincentives, and plan public awareness campaigns? Only if discrimination against a particular group is so widespread and strong should temporary restrictions be considered—and then, only within the limit of safeguarding freedom of religion. The burden of proof of such a necessity, however, lies with the supporters of equal treatment laws.

In people’s minds, anti-discrimination laws in the provision of goods and services are often legitimized by imagining a monopoly situation: the only hotel, the only fountain, etc., in the desert. In most legal systems, however, and certainly in European countries, monopoly situations are already regulated for all customers in a satisfactory manner—no matter what “group” they belong to.
On Hold in Brussels

Back to the curtailed fifth EU Equal Treatment Directive: What is not succeeding at the EU-level is being tried nationally. The attention of lobbying groups has shifted towards what is called “leveling up”—transposing a not-yet agreed upon EU-directive into national law first. For the inattentive national decision-maker, the difference fades away into a vague but common “Brussels wants it” mentality. It is important to point out that currently there are no European Union obligations—zero—to adopt an anti-discrimination law in the provision of goods and services on the grounds of religion and belief, age and sexual orientation.

What is the future of the fifth Equal Treatment Directive? Will Austria give its consent? This question touches the heart of democracy, and there is no national consensus in favor of such equal treatment legislation. Yet Austria seems prepared to give its consent to this law in Brussels—something which could result in the law having binding power over the entire European Union. The decision seems to depend solely upon the ministry in charge.

Thus, politically-motivated civil servants take socio-political decisions of vast dimensions and become more powerful than national parliaments. For the most part, we do not know their names. There is no public debate on the issue. There is nothing else for us to do but to invoke their sense of responsibility not to consent to something in Brussels which was not agreed upon in Austria. But that is all one can do, and this limitation is very worrying.

Against the Fifth Equal Treatment Directive

The Association of German Chambers of Commerce and Industry recently raised its voice against the EU’s fifth Equal Treatment Directive, saying that it would bring about “additional administrative burdens” and “less legal certainty.”2 They also mentioned as reasons to oppose the Directive the restrictions on freedom, the “factual discrimination of people who do not fit the criteria,” and the simple lack of a problem significant enough to require such a law.

Further, the *Zentralverband des Deutschen Handwerks* (Central Association of the German Skilled Crafts Trades or ZDH) objects strongly to the directive:

Massive intrusions in the constitutional freedom of contract and the freedom to conduct a business are bound to occur. In the future the entrepreneur will have to make sure that he and his employees respect the prohibition of discrimination while contacting customers and prospects, from the greeting to information and product offers, the conditions, the counseling interview or the negotiation up to the point of closing the deal. Not only does this create a mass of bureaucratic burdens and legal uncertainty, it can also result in situations where companies avoid legal deals with people who are possible victims of discrimination in order to avoid allegedly imminent legal trials. The intention of the proposed directive to integrate could reverse into the opposite.³

Germany’s *Centrum für Europäische Politik* (Centre for European Policy or CEP) similarly fears a general “obligation to enter into contract” as the result of exceptional cases and goes on to talk about a “threatening with state intervention” aimed at a “re-education of society.”⁴

**A Human Right to Non-Discrimination?**

Non-discrimination and equal treatment are often discussed as if they were requirements of human rights, but this is quite far from the truth. The prohibition of discrimination in the Universal Declaration of Human Rights (Art. 2) and in the European Convention on Human Rights (Art. 14) refer only to the rights enumerated in the respective documents. This is equivalent to the principle of equality before the law, which is essential to our legal systems. In addition, in the International Covenant on Civil and Political Rights (Art. 26), non-discrimination refers to the law in

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general—but not to the relationship of private people or entrepreneurs amongst each other.

The EU Charter of Fundamental Rights (Art. 21) phrases the principle in a more comprehensive way. The European Court of Justice has not yet interpreted Art. 21, but even if it were understood as a substantial right instead of as a mere principle of interpretation of the pronounced rights, the Charter of Fundamental Rights is not universally applicable: It binds EU institutions and member states only when they apply EU law.

In a nutshell: Nowhere is there to be found a human right to be treated equally by other people. On the contrary, it is equal treatment laws that restrict human rights. The private autonomy of every person and family are the foundation of—and the reason for—human rights. After all, human rights are the soil in which are embedded personal freedoms. The freedom of a family to conduct its business, for example, emanates from the right to property (whose restrictions need to be necessary, adequate, and proportionate). Furthermore, equal treatment legislation encroaches on freedom of religion and freedom of conscience by requiring a businessperson or family business to offer their services in a way that cannot be squared with religion or conscience.

In the Austrian debate on the 2012 equal treatment bill, it was often argued that “the UN recommended” such a law. The argument of alleged “UN recommendations,” however, could not stand close scrutiny. What was being talked about was the result of the universal periodic review of human rights through the UN Human Rights Council, consisting of 47 countries. Dozens of measures are routinely recommended—not by “the UN” as a whole but by individual countries. Only a small number of countries had demanded an expansion of the Austrian discrimination ban: Honduras, Canada, the United Kingdom, Norway—and the Islamic Republic of Iran.

Of course, Canada and the United Kingdom each have their own political agendas when it comes to anti-discrimination legislation. Honduras and Norway, in turn, might want to stand out by taking a proactive stance. The Islamic Republic of Iran, however, is a surprise. Perhaps Iran should stop putting homosexual people in prison before offering anti-discrimination advice to Austria.
Thus, the alleged UN recommendation is, in fact, not the opinion of the international community but merely non-binding proposals by certain individual states. In no way do they dictate legislation, nor are they a substitute for a national parliamentary process. The question then arises whether the UN Human Rights Council oversteps its competency knowingly and deliberately—or in error. Regardless of the response, neither sheds a good light on the Council.

*A la Recherche d’Égalité Perdu*

Equality has become a largely unquestioned dictum of our time: equality as a *conditio sine qua non* for social stability and personal tolerance. Those who do not accept limits to thought are called to challenge this perception.

According to a 2009 Eurobarometer poll, it is the Swedes who feel most—and the Turks who feel least—discriminated against.⁵ Excessive equal treatment legislation looks like a therapy which generates the very disease it purports to treat, and seems to produce bigger problems than the original problems were in themselves. That in itself is reason enough to reject them.

There can be no doubt: The promoters of anti-discrimination laws will not give up their efforts to create more “victims” of discrimination. In the process, they will slowly erode our freedoms until we have lost them all. Historically, such freedoms were hard-won. We ought not give them up so carelessly.

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