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Equality v. non-discrimination

Different understandings of a basic philosophical concept in law

I. Equality as a constitutional concept – different approaches

What is equal and what is unequal is not only a legal, but above all a political question. Whether we are arguing about the opportunities in life of the poor in comparison to the rich, about the chances of women to be elected to Parliament in comparison to men or about the legal status quo of homosexual couples in comparison to heterosexual couples - the slogan "more equality" can always be invoked and filled with different political demands. "Equality is nothing but an abstraction of the given inequality" - this is the famous formula developed by the German philosopher Gustav Radbruch. It means that, if something is considered as “equal” it just means that all existing differences are ignored.

In law, equality is a very basic concept closely linked to justice. Equality is also the basis of modern human rights law. We find it in the slogans of the French Revolution: freedom, equality and fraternity.

In the German Basic Law, the legal framework for the constitutional regulation of equality is very complex. Interestingly, different approaches are squeezed into one article of the constitution, the famous article 3. It was not drafted in one go, but at different times. And there are still many proposals for changes and amendments. Article 3 is a major playing field for legal theoreticians, philosophers, politicians and activists. And at the same time, it is of utmost practical relevance. Almost in every second judgment of the Constitutional Court in human rights cases we find an assessment of the compatibility with Article 3.

Let’s first look at the wording of the provision:

> (1) All persons 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 take steps to eliminate disadvantages that now exist.
>
> (3) No person shall be favoured or disfavoured because of sex, parentage, race, language, homeland and origin, faith or religious or political opinions. No person shall be disfavoured because of disability.

What are the new provisions? The new provisions are the following:

- The state shall promote the actual implementation of equal rights for women and men and take steps to eliminate disadvantages that now exist.
- No person shall be disfavoured because of disability.

They were integrated into the Basic Law in 1993 after reunification. Both new provisions reflect political aims: the "actual implementation of equal rights for women and men" and the protection of the disabled. Obviously, for these two groups the general equality clause was not seen as sufficient.

Let's look at the other differences between all the provisions contained in Article 3.

"All persons are equal before the law" is semantically empty, it does refer to the relationship between persons, but does not in any way specify what "equal" means and which is the criterion used for comparison.

On the contrary, the discrimination clause is concrete and reflects historical disadvantages, setbacks and injustices. Obviously, some reasons for unequal treatment in the past have been identified that must not be used to differentiate between persons: sex, parentage, race, language, homeland and origin, faith or religious or political opinions. These notions are not semantically empty, but we can interpret them easily.

Let's also have a look at the sentence concerning men and women: "Men and women have equal rights". This is an interesting wording. It seems not to be a normative statement ("shall have equal rights"), but just a statement of reality ("have equal rights")

So, we have basically five different legal techniques for regulating equality in the Basic Law:

- A general principle ("equality before the law")
- A prohibition of treating better or worse because certain characteristics (the discrimination clause)
- A factual statement on the existing equality between men and women
- A political demand to eliminate the differences between men and women and
- A protective clause in favour of disabled people who must not be treated worse than others, but can be treated better.

What it is all about: "more equality" or "less inequality" between different groups of the population and factual constellations.

The use of a more abstract or more concrete wording grants the Constitutional Court different degrees of control, depending on the issue at hand. The Constitutional Court uses the margin of manoeuvre given to it in an extensive manner. Most of the judgments of the Court that have shaped and changed society were based on Article 3: the judgment on the "third gender", for example, or the judgment on the equal treatment of homosexual and heterosexual couples which eventually led to opening up marriage to all.

In the following, I want to analyse the different approaches to equality and their potential for far-reaching Court decisions. In my view, Article 3 is the most important constitutional lever for changing society.

II. Equal rights of men and women – a game changer in the Basic Law

In the late 1940s, when the Basic Law was drafted, equality between men and women was an unfulfilled wish. Not only one, but two norms were dedicated to this concern in the Basic Law. On the one hand, we have the already mentioned statement that "men and women have equal rights", on the other hand, we have the discrimination clause prohibiting discrimination on the basis of sex. We might think that this is the same idea, once stated in the positive sense ("are equal"), and once stated in the negative sense ("must not be discriminated"). For a long time, that was the general perception. Therefore, the two provisions were considered redundant, yet only until the very moment when the Constitutional Court discovered that "sex" and "gender" are not the same. But I will talk about that later.

Let's first go back to the late 1940s. To be sure, in the reality of the 1940s there was no equality between men and women at that time. Women were not allowed to work without the permission of their husbands, men were exclusively responsible for the financial means of the family, the women took the name of the husband and whenever there was a controversy, the man would decide. The whole family law was built not only on the idea that men and women have different roles in public and private life, but also that the men should always have the last word. My mother – like many young people at the time – had to help pick up the rubble of the bombed houses after the war. They formed long human chains and passed on the rubble from one to the next one, they all took the same rubble in their hands. But men got paid more for that than women. Men and women were legally and factually unequal.

The drafters of the Constitution were reluctant to incorporate the sentence "men and women have equal rights" in the text of the Constitution, as, most obviously, they did not want to state something this was obviously not true. Yet, there was one famous woman, one of the few "mothers of the Basic Law", Elisabeth Selbert who fought hard to integrate the equality clause in the Basic Law. She had the brilliant idea to introduce a transitional clause with the following wording:

> (1) Law which is inconsistent with paragraph (2) of Article 3 of this Basic Law shall remain in force until adapted to that provision, but not beyond 31 March 1953

Elisabeth Selbert's proposal "saved" the equality clause as it allowed to reject the accusation that the inclusion of such a provision would have the effect of making a large part of the Civil Law unconstitutional. Article 117 GG thus represented a compromise by allowing all the laws that contradicted the principle of equal rights between men and women to continue to apply for a period of four years - despite the fact that the legislative, executive and judiciary were bound by the whole constitution including the equality clause.

But, what happened?

The legislator failed to act and did not make – or was not able to make – the necessary adjustments of all the laws within the required time. Four years is a short time to change legislation made during decades or even centuries; basically, the whole family law had to be revised. Yet, the mechanism built in the Constitution was automatic. Thus, a large number of regulations lost their validity by the specified deadline. For the Federal Constitutional Court, this put an end to the acceptance of the compromise. In a landmark decision in 1953, it stated that once the transitional period expired, the courts were called upon to fill the newly created gaps. It opposed the view that the equality clause of men and women was merely a "programmatic norm" or a "political promise", recognised the term 'equality' - in contrast to 'equivalence' and 'egalitarianism' - as having a 'precise legal meaning'**.** It argued that the "filling of gaps in the modern constitutional state" by the courts would not lead to "legal chaos" and also not to a reorganisation of the entire marriage and family law, but rather to the application of the current law insofar as it was compatible with the equality clause."

Yet, filling the gaps was not as easy and obvious as the Constitutional Court pretended it to be. Rather, it was a Herculean task to fundamentally change a patriarchally structured society in a very short period of time on the basis judge-made law.

As a matter of fact, the Federal Constitutional Court initially chose a cautious approach to adaptation and did not utilise the radical potential of the term "equality". In the aforementioned landmark decision, it confirmed the existence of a prohibition of unequal treatment of men and women in law, but did not regard this prohibition as absolute. Instead, it granted a wide range of exceptions at the legislative level. Thus, the Federal Constitutional Court wrote:

> "It hardly needs to be pointed out that in the area of family law, special legal regulation is permitted or even necessary with regard to the objective biological or functional (division of labour) differences according to the nature of the respective living conditions (e.g. all provisions for the protection of the woman as mother, differentiation of the type of contribution to the family community). Nobody seriously denies this. This understanding is the basis for many of the demands made for the realisation of equal rights."

The concept of "equal rights" prescribed by the Constitution was thus interpreted in the context of the existing conditions at that time – in the 1950s – and not as overcoming them.

Even after the adoption of the General Act on Equal Treatment in 1957, it took a very long time before unequal treatment in law was abolished and exceptions to equal rights were no longer seen as justifiable on the basis of biological and functional arguments.

How did the Basic Law function, how did the methodological approach work? The Basic Law contained a sentence "Men and women have equal rights" that contradicted the reality. Yet, its existence in the Basic Law made a major contribution in furthering legal equality between men and women, even if it

was a long and protracted process in which the legislator and the judiciary were equally involved. Two factors were decisive for its ultimate success: on the one hand, the radical nature of the break with the past due to the tight deadline for adapting the law, which the Constitutional Court took literally, and, on the other hand, the changing interpretation of "equality", which reduced possible exceptions to a minimum.

Nevertheless, this simple, but effective sentence was not considered to be sufficient, even if it was open to dynamic development. Political actors insisted on an additional constitutional instrument. They were impatient; for them the process of changing not only the law, but also the structures of society was too slow. Opinions differed widely and continue to differ if an additional “political” constitutional clause was necessary. Those who argued that it was necessary referred to the role of the Federal Constitutional Court which had shown that the equal rights requirement of Art. 3 para. 2 GG could be interpreted in such a way as to extend to changes in the social reality. Seen in this light, the new addition of a special clause in 1994 had only a confirming and reinforcing function. Others argued that a clear social reform mandate was necessary. Yet, obviously, there was a tension between such a mandate and the general idea of equality – can you grant privileges in order to achieve a certain social status for a specific part of the population while at the same time demanding equal treatment and excluding privileges?

III. Prohibition of discrimination

1) The notion of discrimination – not treating worse, not treating better?

Even if "discrimination" is usually colloquially equated with a negative attitude, with contempt and disregard, the prohibition of discrimination, based on the Latin word "discriminare" (to distinguish), basically only implies a "prohibition of distinction" and thus excludes disadvantages as well as preferential treatment.

In the Basic Law, the two-fold approach is explicitly stated; in international texts, this is not necessarily clear in the same way. The clause concerning disabled persons was deliberately formulated differently so that only disadvantageous, but not preferential treatment of persons with disabilities, is excluded.

2) Catalogues of “prohibited” criteria – open or restricted?

From a comparative law perspective, it is striking that the same criteria are repeatedly included in human rights catalogues, whether in constitutions or international treaties. They can thus be seen as a kind of "canon", which is not static, but is constantly evolving. The typical recourse of human rights standardisation in the 20th century to sex, descent, race, language, homeland, origin, faith, religious or political views reflects past experiences of discrimination, particularly in Germany during the Nazi era.

At the end of the 20th century, sexual orientation and age were added as further prohibited criteria - also in many other legal systems and at supranational level.

However, it is questionable to what extent catalogues of discrimination based on past experiences or reflecting the zeitgeist are also open to the future and can therefore be used as an element that shapes society.

Such a canon could have a restrictive effect, especially if it were a *numerus clausus* and the identification of further criteria were excluded. In contrast to the Basic Law, the wording of the ECHR precludes such a narrow interpretation, as Art. 14 ECHR contains an opening clause and refers to discrimination based on "other status". According to the wording, the catalogue contained in Art. 3 paragraph 3 sentence 1 GG is exhaustive, so that the prevailing opinion assumes that analogies are excluded. The new criterion of disability was not included in the catalogue, but was added in a second sentence in order to emphasise that only discrimination, but not preferential treatment, is excluded.

However, the case law of the Federal Constitutional Court has developed an interpretation of this provision of the Basic Law that allows for analogous application beyond the limits of the wording. As early as the 1990s, the court chose a formulation that derives a general principle from the criteria listed. It makes it clear that discrimination is only inadmissible when it concerns "person-related characteristics". This means that analogies to situation-related circumstances are not possible," while the door is open to a broader understanding of the characteristics enumerated in the provision. Personality-related characteristics would mean e.g. age or citizenship, situation-related characteristics would mean e.g. work place, living area etc. While not explicitly opening up the catalogue of “forbidden criteria” the Constitutional Court treats other person-related characteristics in the same way and demands very weighty reasons for justifying differential treatment. This applies above all to sexual orientation, a criterion not to be found in the catalogue and never inserted into it by any reform.

The Constitutional Court thus interprets the provision as if the wording had been changed – although a change had been fiercely debated as many wanted to include “sexual orientation in the catalogue”, but this had not been accepted. Therefore, the Constitutional Court is criticized of being activist and going beyond its mission to interpret the Constitution by reforming the text of the Constitution.

However, the Federal Constitutional Court rightly contradicts this criticism by referring to the previously established case law; it was precisely this case-law that was decisive for the rejection of a reform to the constitution, as it would have been superfluous "symbolic politics".

As a result of the Federal Constitutional Court’s case-law the seemingly static catalogue of Art. 3 para. 3 sentence 1 is dynamised. This is possible because, according to the Federal Constitutional Court's interpretation, the latter may require not only an arbitrariness review, but also a proportionality review. The dynamic of development inherent in Art. 3 para. 1 GG is thus also fruitfully utilised for the interpretation of Art. 3 para. 3 GG. I will come back to that.

3) Absolute or relative prohibition?

However, the prohibition of discrimination on the basis of the relevant criteria is not understood as absolute, but only as relative. It is possible to attach different consequences to persons of one group having the specific characteristics – e.g. sex, language, origin and homeland, yet the distinction has to satisfy a strict proportionality test. What does that mean? Let's explain on the basis of examples. A pregnant woman can be treated differently from a man allowing her to stop working six weeks before and eight weeks after giving birth. Either you might argue that a pregnant woman and a man are not comparable at all. But, as a matter of fact they are comparable and a distinction is made between them on the basis of sex. As this is generally prohibited, a very weighty reason has to be given to still justify the different treatment. In the example I have mentioned the justification would not be difficult – the health of the mother and the baby are undeniably very weighty reasons for the differentiated treatment. But let's take a more difficult example. In the army men have to cut their hair whereas women are allowed to have long hair. This is a different treatment, attached to sex. Should that be prohibited as a discrimination based on sex? Or is there a good justification? Are there very weighty reasons for treating men and women differently in this way? There is a good reason to doubt that.

But let us go back to the restrictive catalogue of criteria based on which, as a rule, a distinctive regulation is not allowed.

4) Extended interpretation of the catalogue of protected criteria

The Constitutional Court's extended interpretation of the catalogue of Article 3 and the inclusion of criteria such as "age" and "nationality" creates tensions with other constitutional provisions. Distinctions based on these criteria are made in the Basic Law itself. Thus, certain rights are granted only to citizens, not to others. This applies to the freedom of assembly, to freedom of association, freedom of movement, as well as occupational freedom. Distinctions based on age are foreseen in the Basic Law for the President of the Republic (minimum age: 40 years) and for judges at the Constitutional Court (minimum age: 40 years). It would be strange to consider these limitations enshrined in the Constitution itself as unconstitutional age discrimination. This would lead to the famous questions if provisions of the Constitution can be unconstitutional.

In any case, due to the jurisprudence of the Constitutional Court the distinction between the criteria contained in the catalogue of Art. 3 para. 3 sentence 1 and other criteria has become blurred. I would be very much interested if there are similar problems in Japanese constitutional law. In international law, as I have said before, the problem does not arise insofar as the relevant catalogues are open and include also the criterion "other status".

In so far as Germany is concerned the original emphasis on the importance of protection against specific forms of discrimination has been qualified, but at the same time adapted to current developments. Insofar

as the *de facto* extension of Art. 3 para. 3 sentence 1 GG to sexual orientation and age is concerned, this also corresponds to the EU Charter of Fundamental Rights.

However, not everyone considers the Federal Constitutional Court's move to extend the catalogue of discriminatory characteristics to be satisfactory from a socio-political perspective, as a recent motion by the FDP, Die Linke and Bündnis 90/Die Grünen parliamentary groups shows. Although the motion refers to the progressive case law of the Federal Constitutional Court, it nevertheless states that including the characteristic of "sexual identity" as a special prohibition of discrimination would "remove this area from the disposition of the legislator". Even if this argument is not convincing, as the Federal Constitutional Court as a supervisory authority guarantees a corresponding constitutional safeguard via Art. 3 Para. 1 GG, it must be conceded that the current legal situation - unlike in a number of other state constitutions - is not documented, not visible. Clear constitutional provisions can have an additional protective function, particularly in the case of such sensitive issues as discrimination against minorities who have suffered long-term disadvantages.

2. Problems in interpreting the "forbidden discrimination criteria"

a. Descent, language, homeland and origin

If the compilation of the criteria contained in the catalogue of Art. 3 is explained by history, there is a risk that, as past experiences of discrimination might lose their relevance in the future, the constitutional provisions have the wrong targets and do not offer protection where needed. This is true for some of the criteria contained in the catalogue, for example insofar as they are aimed at the elimination of aristocratic privileges or at the elimination of unequal treatment of displaced persons. If the corresponding historical constellation has been overcome, the criterion relating to it is inapplicable. Obviously, the constitutional provision "discrimination based on descent" responded to the historical experience of the 19th Century with a society divided in a small aristocratic elite and the bourgeois majority; that is a distant past for the society of today. The same applies to the unfavourable treatments of refugees from the East after World War II which was constitutionally sanctioned by the prohibition of the "discrimination on the basis of homeland and origin." This as well is an experience known only to the grand grandparents, if at all.

However, it seems possible to detach these criteria from their historical context and to transfer them to new typical situations of discrimination.

This is true for example for the prohibition of discrimination based on the "homeland and origin" (Heimat und Herkunft). This criterion refers to the "local origin by birth or residence". It is not the same as nationality, so that it cannot be used to protect foreigners against unequal treatment in general. Yet, it could be used to protect those who are German citizens but were not born in Germany from unequal treatment. This is a big discussion nowadays as the "Law on Citizenship" was changed and is constantly

undergoing further changes. While in former time dual citizenship was avoided, by now there are many of those who have two passports. Their German citizenship should not be considered “second class”. In this context the discrimination criterion “homeland and origin” could provide efficient protection. On the contrary, for people whose parents have migrated from another country, but who were already born in Germany, this provision could not be applied. They might have what is called a "migration background". But that is not the same as “origin and homeland” – the provision would be stretched too far.

According to case law, origin refers to "permanent social origin and roots". However, since Art. 3 para. 3 sentence 1 of the Basic Law is formulated "symmetrically" and excludes both preferential treatment and discrimination, this does not provide a starting point for positive discrimination against those who have a more difficult position in society due to their family's social status. Rather, the starting point for compensatory measures is the principle of the welfare State (Sozialstaatsprinzip), which can justify unequal treatment as a conflicting constitutional right.

"Descent" refers to birth and the connection to parents and ancestors. As the Federal Constitutional Court defined "descent" in 1959 as the "natural biological relationship of a person to his or her ancestors", it will be possible to extend this approach and include non-natural forms of descent in the present. As a “forbidden” criterion "descent" can thus also be used fruitfully for the prohibition of unequal treatment of children from "traditional" families and children from families that deviate from the traditional pattern, such as children from surrogate motherhood, even if surrogate motherhood remains prohibited.

Yet, here as well we can see that discrimination based on descent cannot be interpretated as an absolute, but only as a relative prohibition. Otherwise, the whole inheritance law which privileges those who have wealthy parents would be unconstitutional. Taken literally, the provision could have an explosive, revolutionary meaning. But, nobody argues like that on the basis of the German Basic Law.

Regarding the criterion of "language", difficult problems arise in connection with disadvantages for those who do not speak German. This applies, for example in cases where sufficient knowledge of German is made a prerequisite for family reunification. According to the Federal Administrative Court, such a regulation has to be seen as an integration requirement, which makes sense and can be considered justified. The refusal of a residence permit in such as case is not linked to the fact that someone speaks a certain language, but to the fact that he or she does not have a basic knowledge of the German language. This jurisprudence is also confirmed by the Federal Constitutional Court.

But let us compare this case to another case where a foreigner was refused to be included in a waiting list for an operation due to a lack of language skills. This was based on the assumption that the medical treatment would not be promising as the patient would not be able to follow the doctor’s advice. This was considered to be a discrimination based on language that could not be justified by very weighty

reasons; the arguments about the post-operation care were not accepted. In those cases the importance of the German language as the national language is recognised and taken into account as a primary factor. Yet, the cases show that it is quite uncertain what to consider as “very weighty reasons” justifying a different treatment even based on a “forbidden” criterion such as language. The best solution is to rely on the existence of conflicting constitutional values such as the right to health in the case with the life-sustaining operation. In a balancing exercise they have to be given more weight.

These examples are intended to show that the criteria contained in the catalogue of Art. 3 para. 3 sentence 1 GG, even if they reflect problems of the past, are nevertheless useful and could play a greater role in case law in the future.

b. Gender and Race

The contemporary debates on identity politics are linked to gender and race, although it is disputed whether this is genuinely a constitutional discourse or whether it is politics. There is loud critique arguing that the reference to Article 3 in the context of “identity politics” is an "ideological use" of a constitutional norm.

As already mentioned, the term discrimination based on "sex" was introduced into the Basic Law as a confirmation of the sentence that women and men have equal rights. But, while this sentence refers explicitly to two sexes – men and women – the wording on the “prohibition on the basis of sex” is open, not based on an “either-or”- vision of human beings. This allowed the Constitutional Court in its famous judgment in 2017 to open up the understanding of the Basic Law for a third option, a third gender, understood as neither man nor woman. The discrimination clause is then read as not allowing an unequal treatment of those who are neither man nor woman in comparison to men and in comparison to women.

In this context, the Constitutional Court stressed the importance of gender identity "for individual identity under the given conditions". It was explained that gender identity "typically occupies a key position both in a person's self-image and in how the person concerned is perceived by others."

Based on this, however, it is being discussed whether the categorisation of gender should be subjective or objective. However, a subjective understanding of criteria such as "male" and "female", which were originally understood as objectively determinable, would put in question the basic idea of the obligation to promote equality between men and women, since "the main reasons for disadvantages are not to be seen in a person's own categorisation, but in existing or ascribed characteristics of a person and in socially shaped understandings of roles." (Judith Froese)

The socio-political discussion on Article 3 goes even further. It is explicitly used for a new vision of society that is, however, no longer compatible with the Basic Law as it stands. This applies, for example, to the interpretation of gender not as a sign of hierarchy and dominance**,** which must be eliminated. The

understanding of the equality clause is thus no longer individual, but collective; it conveys a right of empowerment to those disadvantaged, and those disadvantaged are understood to be discriminated against because of their gender and race.

This reading is, however, incompatible with the clear wording of the text of the Constitution that expressly excludes not only discrimination, but also giving privileges. Furthermore, the prohibition of unequal treatment applies clearly to the individual - and not to a specific group. There is no State goal to eliminate all potentially existing structural inequalities, and Article 3 cannot be used in this context.

As a matter of fact, such a reading would undermine the very idea of the prohibition of discrimination on the basis of race and gender – it would then require deciding everything based on race and gender, but in the inverse direction of what happened in the past. Interpretation of constitutional texts can be far-reaching. But it cannot require to do what is considered to be forbidden.

Let me hint at another problem where it would also be interesting for me how you see it in Japanese law. Human rights are meant to protect individuals from infringements of the State, that is the basic idea. Yet, the question is in how far they can also be applied in the relationship between private individuals? This question is especially interesting regarding equality. Is it forbidden to discriminate in private relations? The answer based on the philosophy of civil law is: no. Everyone is free to conclude or not to conclude a contract. You do not have to sell your car to everybody, but you may choose to whom you want to sell it. You can give more of your inheritance to your son than to your daughter. You can accept someone as a tenant or not. But – what if acceptance or non-acceptance is based on discrimination? If those you have a certain race or a certain origin are not accepted as tenants? There is a huge bulk of ant-discrimination law in the EU concerning mainly labour relations. But when we interpret Article 3 of the Basic Law – does it also apply to private individuals?

We do have very concrete cases in this regard, e.g. when someone who has an extremist right wing political conviction is not allowed to rent a room in a hotel. Is this a violation of Article 3? Up to now, the Constitutional Court has developed a cautious approach. It applies Article 3 not to private individuals, but to companies who monopolies a certain area of public life. This was the case, for example, for soccer associations excluding some from watching soccer games.

While some consider this approach as too far-reaching and not compatible with human rights philosophy, others want to enlarge the application of the prohibition on the basis of gender and race to all private relationship. There as well we see what we might call a “cultural clash” between a liberal and an egalitarian approach.

At the same time, the criterion of race contained in the catalogue of Article 3 is up for discussion. It is denied that something like "race" exists. The idea of distinguishing between races is seen as nothing but the reflection of "racist" attitudes.[1] For this reason, there are calls for the criterion of "race" to be removed from the Basic Law. However, this is rejected with the argument that the protection intended by the

provision would then be removed"' as well. The present government advocated a deletion of the criterion and replacement with a wording alluding to racist attitudes. But by now it has given up the plan whereas in France the same initiative was successful. I think it is highly problematic as it would indeed remove an important element of protection. Furthermore, “race” figures in many international treaties and discrimination based on race is a reality.

At the same time, the criterion of "race" has recently been used to condemn "racial profiling" in the work of the police, e.g. when identity controls are based on a person’s appearance and skin colour.

c. Disability

The prohibition of discrimination on the basis of disability, which was only included in Art. 3 para. 3 sentence 2 GG in 1994, has a special status. It is not a symmetrical but a deliberately asymmetrical provision that not only allows for, but also intends, preferential treatment. There is also potential for development in this characteristic, as "age" can also be subsumed under it, at least if it is associated with frailty. The inclusion of special forms of illness that are often associated with stigmatisation, such as apostasy, is also being discussed.

On the basis of the prohibition of discrimination of handicapped people the Constitutional Court demanded the legislator to adopt a law making sure that healthy people are not prioritized in medical treatment in case of corona.

Overall, the specific prohibitions of discrimination show that, despite their historical roots, they are still important in the present and are actively used to shape and transform society.

IV. Promotional obligations

As explained in the beginning of my talk, there are different approaches to equality hidden in Article 3. Up to now we have talked about the prohibition of treating better or worse because of certain characteristics, about the protective clause in favour of the disabled and about the factual statement about the existence of equal rights of men and women.

What is the function of inserting a concrete political aim into the Constitution? The aim of “more equality”? We have such a statement in favour of children born out of wedlock; we wanted to have one in favour of minorities, but no political compromise could be found, thus there is none. Yet, we have, as already mentioned a clause promoting the “real” equality between men and women. The insertion of this clause in 1994 was the constitutional response to the public perception that women continued to be disadvantaged in many areas of social life .

According to the explanatory memorandum to the 1994 constitutional amendment, the new sentence in Art. 3 para. 2 GG does not create a subjective right, but only a mandate for the State to act and to eliminate disadvantages. An appropriate policy promoting women (as the disadvantaged gender)" has to be implemented without giving the women the power to request specific measures on the basis of the constitutional provision alone. The idea is to "" further reinforce women's rights. Interestingly, the wording of the new version is largely based on the principles developed by the case law of the Federal Constitutional Court. The innovative potential of the newly introduced provision is therefore controversially discussed; for some it is too much, for others not enough.

It should be noted that the new provision is meant to have two different effects. On the one hand, it refers to the "actual implementation of equal treatment" and thus describes a "forward-looking future effect", on the other hand, it focuses on the "elimination of existing disadvantages" and thus has a retrospective compensatory effect.

However, both can be used in different ways, depending on the socio-political agenda. The wording is very open. The classic, cautious interpretation emphasises the individual-rights-approach and focuses on existing factual (not legal) inequalities in individual cases that result in different opportunities in social life and work. So, preferential treatment for women is called for. It is seen not to violate the prohibition of discrimination based on sex as it is justified by the constitutional aim of factual gender equality. Thus, for example a promotional measure would be justified in case of a statistically proven structural inequality if it cannot be remedied by other measures.

Such an individual-oriented understanding could be replaced by a collective-oriented understanding. This could justify quotas intended to equalise statistical inequalities. That would mean that disadvantaging men would be constitutionally permissible until a 50% quota of women in achieved in all areas of social life.

In this context we can discuss the political demand to change election rules in order to enhance women's participation in parliamentary work. The idea to introduce quotas for women on voting lists was introduced in some Länder, yet without success – the relevant courts struck them down; the Constitutional Court has not yet made a final decision, but has shown that it views the constitutionality of such an approach very sceptically. It has considered it at least justifiable to give the legislator room for manoeuvre in the implementation of specific measures despite the obligation to promote equality between men and women. The under-representation of women is not necessarily seen as a structural disadvantage for women in politics. The reasons why women are not interested in running for Parliament might be manifold. Proposals for radical changes reducing the choice of voters do therefore not find general approval, this all the more so as they would be incompatible with the basic rules of equality in elections.

The Federal Constitutional Court's interpretation of the promotional clause in Article 3 is – perhaps surprisingly and contrary to what is demanded by some authors in the literature - rather restrained. So far there has not been an attempt to live up to the far-reaching demand to achieve not only de facto equality, but also to compensate for potential structural discrimination suffered in the past by women in general. History cannot be repaired on the basis of Article 3.

V. Equal treatment?

The greatest potential for shaping society lies in the general principle of equality ("All persons are equal before the law"). This is also shown by the development of the case law of the Federal Constitutional Court.

The first step was to stress that the formula "before the law" does not only bind the judge, but also the legislator. "Before the law" could also be understood in a narrow sense allowing the legislator to differentiate wherever this is seen to be apt. But already during the Weimar Republic this discussion was brought to an end – it was clear that an only judge-related interpretation of the equality would be too narrow.

The second step was taken by the German Constitutional Court in the year 1980 when it introduced the so-called "new formula" for interpreting Article 3. After almost half a century this formula is no longer "new", yet it is still called the "new formula". What does it mean?

In the beginning the general understanding was that the Constitutional Court's power of control of legislation on the basis of the equality principle was limited to the question of arbitrariness. If the legislator decided to differentiate between two situation – e.g. between short-term ill people and long-term ill people, or between people with managerial functions in an enterprise and "ordinary" employees, or between people living in cities and people living on the countryside – he was free to do so. Yet, such a differentiation must never be arbitrary. Thus, whenever there was good reason for a differentiation, this was sufficient. Constitutional control would not go beyond that point – just demand for a rational explanation for differentiating.

Yet, in 1980 the Constitutional Court decided that in some situations it would not be enough to give a reason for differentiation, but the reason had to be convincing and adequate; it had to be a good reason. This meant that the Constitutional Court would use the proportionality principle – the more sensitive a differentiation, the weightier the reason - a for it would have to be. For many years there was a debate – and even a divergence in the jurisprudence of the two senates of the German Federal Constitutional Court - about where to use the new "proportionality control" and where to use the old "arbitrariness control". By now, the Constitutional Court has defined what is called a sliding scale: "However,

differentiations must always be justified by factual reasons that are appropriate to the objective and extent of the unequal treatment. A gradual constitutional standard of review based on the principle of proportionality applies here, the content and limits of which cannot be determined in the abstract, but only according to the different factual and regulatory areas affected in each case." (BVerfGE 138, 136 Rn. 121). In practice, the Constitutional Court checks three criteria: the possibility of the individual to have influence on a situation (e.g. it is not possible to change the age); the similarity to the forbidden discrimination criteria such as gender and race, and the relevance of liberty rights. As you can see this jurisprudence is quite difficult. It has been refined over the decades, but does not necessarily lead to predictable results.

The inclusion of "equality" in the constitution therefore allows the interpreter to assess if legislation is "justifiable" and "just". The Federal Constitutional Court has used this possibility in almost every second case it has to decide.

Ultimately, in Germany the question of how much equality and how much inequality is permissible under constitutional law is decided in the interplay between the legislator and the constitutional court. It is unmistakable that the zeitgeist influences the answers to the question of "more equality".

In history there were revolutions for having more equality. Nowadays, revolutions are no longer necessary as it is possible to turn to the Constitutional Court which will decide if the legislation is "equal" enough.