

Michaela Fries, Die Bedeutung von Artikel 5 (f) der Rassendiskriminierungskonvention im deutschen Recht

Summary

The Meaning of Article 5 (f) of the International Convention on the Elimination of All Forms of Racial Discrimination under German Law

Discrimination by private actors through denial of access to restaurants and bars

The present analysis focuses in its first part on the requirements which article 5 (f) of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) imposes on its member states, putting emphasis on the question whether the requirements of the ICERD with respect to this article can only be met by a special anti-discrimination law which prohibits racial discrimination by denial of access to restaurants and bars.

Article 5 (f) ICERD states that member states have to “prohibit and to eliminate racial discrimination in all its forms” and “to guarantee without distinction as to race equality before the law”, in the enjoyment of the right to access to any place or service intended for use by the general public, such as transport, hotels, restaurants, cafés, theatres and parks. Race is defined in article 1 alinea 1 ICERD in a very wide manner and has to be understood in a sociological sense, thus including cultural, ethnical, traditional or historic components. The right to determine whether a racial group exists and who forms part of this group belongs to the racial group itself and to the rest of the society as well as to the individual concerned, but not to the state party. In the case of access to public services, the service providers, the owners of a restaurant or bar themselves decide to whom they will offer service. They decide in effect which racial group may enter the restaurant, bar or discotheque and who is part of this group.

Discrimination includes intentional, direct and indirect distinctions based on racial criteria that cannot be justified by adequate and proportional reasons. Such justification is impossible to conceive for intended or directly racially motivated denial of access to bars, restaurants and other services. Indirect distinctions however need to be justifiable in order to allow necessary differentiations. Differentiations of state actors have to take into account the negative impact such neutral measures have on the integration of different racial groups and can only be justified by an adequate and proportional reason. Private actors, whose behaviour is also comprised by the scope of the Convention, are generally free to choose criteria for their access policy. The only exception to this rule is if the aim of the Convention is undermined — this is the case if a criterion in fact leads to the result that members of one racial group are always excluded. In this event, the acceptance policy of a restaurant owner has to be modified in such a way that at least some members of this racial group can enter.

Whereas discrimination by private service providers of bars and restaurants falls under the scope of the Convention, the Convention does not create rights or duties for them. Addressees of the obligations are only the state parties, not individuals. The scope of the Convention is not limited to the nationals of the respective State Party but applies to all individuals within its jurisdiction. Article 1 alinea 2 ICERD, which foresees differentiation based on nationality, cannot serve as justification for differentiation in the service sector of private actors since the entry to a restaurant or a discotheque does not rely on the special state-citizen relationship which is the legal ground behind this exemption.

The term “access” in article 5 (f) ICERD does not only comprise access itself to the restaurant or bar, but the conclusion of a contract to enjoy the service under the same conditions as everybody else. The services mentioned in alinea (f) are not exhaustive. They are characterized by the fact that the individuality of the person, which makes use of the service, is only secondary due to the short nature of the service, the standardized contract relations, services and payment conditions and the immediate fulfilment of all contractual obligations. However, the services that article 5 (f) ICERD comprises are limited to those that are open to the public, which has to be read as an equivalent to the term “public life” used in article 1 alinea 1 ICERD. Public in this sense is any service that is not offered in a strictly private context. This private sphere includes especially the right to choose one’s spouse and is extended to close personal social relationship. Private clubs and societies are part of this “private life” excluded from the scope of the Convention if its

members live out their close personal relationships within these clubs. Whenever this is not the case, the Convention, and thus article 5 (f) ICERD is applicable. Discotheques, restaurants, cafés and even private dance clubs address themselves to a changing public and do not serve to live out the individuality of their users in the sense described above.

The State Parties' obligation concerning the access to restaurants and bars are divided into the prohibition of discrimination and the guarantee of equality. The prohibition of racial discrimination by state actors is addressed by article 2 alinea 1 (a) and (c) ICERD. These alineas foresee notably that the State Parties and any of its officers, agents and representatives may not discriminate themselves and must undertake the necessary measures to ensure this prohibition. This includes the prohibition of a state actor to give effect to a discriminating private contract, for example a service contract with higher prices for a certain racial group. In addition, State Parties have to review their policies and control any law or regulation as to whether it has a discriminating effect.

Discrimination by private actors is regulated in article 2 alinea 1 (b) and (d) ICERD. Article 2 alinea 1 (b) stipulates that State Parties are prohibited to support racial discrimination by any persons or organizations. That includes the prohibition to grant or not to withdraw a permission to run a restaurant or bar to a person that denies access to its service on racial grounds. Article 2 alinea 1 (d) obligates the State Parties to prohibit and bring to an end discrimination on racial grounds by private actors, including legislation as required by circumstances. Contrary to a wide-spread tendency among authors, this alinea does not impose on the member states to enact a specific anti-discrimination law concerning article 5 (f) ICERD. Effective measures do not necessarily have to be taken through legislation in a formal sense but can also be based on judge-made law and customary law, as has been accepted by the Court of the European Convention on Human Rights with respect to Common Law.

The requirements that such prohibitions have to meet are concretised in more detail by article 6 ICERD. State Parties have to foresee effective remedies, especially by national courts, for each racially motivated access denial. They must provide an effective way to compensate the suffered damages and to prevent that the same person will again deny access to a restaurant or bar on racial grounds. This can take place via civil or any other form of sanction — including pecuniary compensation. In addition, the burden of a proof must be embellished in a way that the proof of discrimination is possible. Therefore easements of the burden of proof are necessary.

The measures to be taken by the State Parties in order to prevent private discrimination according to article 5 (f) and 2 alinea 1 (d) are in their discretion — as long as they are effective and comply with the requirements of article 6. Legislation is only required if all other measures have failed, in which event the discretion of the State Party is reduced to one measure: the enactment of an anti-discrimination law concerning article 5 (f) ICERD. In a country governed by the rule of law, like Germany, each obligation for a citizen must be founded on formal legislation. From this results that no special legislation is necessary to prohibit discrimination; yet the prohibition itself must in some way be founded on statutory legislation.

The guarantee of equality before the law is the second obligation concerning article 5 (f) ICERD. Everybody has the same rights and duties with respect to the law and administration and courts have to apply the law which relates to services like restaurants etc. regardless of the race of a person. In addition, even though not expressly stipulated in article 5 ICERD, State Parties also have to guarantee equality through the law. Whenever a member states introduces a law that might affect article 5 (f) ICERD, they must ensure that this law does not directly or indirectly lead to a discrimination on racial grounds. The legislature is not restricted to equality in a formal sense but can aim for factual equality within the frame of article 2 alinea 2 ICERD.

The second part of the analysis deals with the question what influence article 5 (f) ICERD has on German law and what legal measures exist to put the requirements of this article into effect. The reception of article 5 (f) ICERD takes place via article 59 alinea 2 of the Basic Law (GG). The approval of the legislature to the ratification of the Convention serves the second purpose to incorporate the Convention into German law (“law of approval”). With its unlimited consent to the ratification of the ICERD, the legislature gave effect to its stipulations. Article 5 (f) ICERD is part of the law and statutes (“Recht und Gesetz”) according to article 20 alinea 3 GG. From this results a binding effect for the legislative, executive and judicative power. However, there is no enforceable duty for the legislature to enact any specific law. The execution of the conventional duties are in the exclusive competence of the legislature, which therefore cannot be obliged to enact a specific anti-discrimination law — even if article 5 (f) ICERD would require such a law.

Article 5 (f) ICERD in relation with the “law of approval” shares the status of statutory law enacted by the national legislature. This implies that the rule “lex posterior derogat legi priori” applies. The effect of this

rule is weakened by the “public international law friendly interpretation” of laws. This implies *inter alia* that unless expressly stated otherwise by the legislature, a legislative act has to be interpreted in a way that the conventional rule is not impaired. Due to the fact that article 3 alinea 3 sentence 1 GG expressly prohibits racial discrimination, the risk that legislation would expressly impair the stipulation of article 5 (f) ICERD can be excluded. The stipulations of article 5 (f) ICERD do not form part of customary international law and therefore do not enjoy a higher status than national statutory law through incorporation via article 25 GG.

Neither the guarantee of equality nor the prohibition of racial discrimination concerning the access to services open to the public are self-executing with the consequences that article 5 (f) ICERD is not a “protection law” according to § 823 alinea 2 of the Civil Code (BGB), that its trespassing does not result in “nullity” of the respective contract according to § 134 BGB, and that it does not directly grant rights and duties to service providers and clients. However, the stipulations are indirectly applicable and can enter into the German legal system via broad legal terms such as the “good morality” (*gute Sitten*) in § 138 BGB and § 826 BGB. In addition, article 5 (f) ICERD is even able to influence the interpretation of the German Basic Law, especially article 3 alinea 3 sentence 1, article 3 alinea 1, and article 2 alinea 1 GG. This indirect influence of article 5 (f) ICERD has to be taken into account not only by the Bundesverfassungsgericht, but by all law enforcement bodies of the German State.

The Bundesverfassungsgericht has the right to control whether the executive and judiciary have respected this indirect influence of article 5 (f) ICERD, via its right to control whether the application of the law by the ordinary courts is not arbitrarily done and via the interpretation of article 3 alinea 3 sentence 1 GG. If an ordinary court does not respect the influence article 5 (f) ICERD has on article 3 alinea 3 sentence 1 GG and thus comes to a conclusion that is contrary to the Convention, it violates article 3 alinea 3 sentence 1 GG.

Chapter 5 and 6 of the analysis focus on the legal norms that prohibit racial discrimination in the sector of bars and restaurants in German law. The equality guarantee of article 5 (f) ICERD is covered by article 3 alinea 1 GG. Since the Committee has never questioned this guarantee, the analysis of the German legislation focuses on the prohibition of racial discrimination in article 5 (f) ICERD. The prohibition of racial discrimination is contained in article 3 alinea 3 sentence 1 GG according to which nobody shall be favoured or disadvantaged *inter alia* because

of race, language or national origin. Mainly the term “ethnic origin” of article 1 ICERD does not find a correlate in this norm; this lack can however be avoided by defining the term “race” no longer with a biological connotation, which is actually still the case, but with a sociological one.

Unlike article 1 alinea 1 ICERD, article 3 alinea 3 sentence 1 GG prohibits solely racial discrimination that is intentional or directly based on racial grounds. Indirect discrimination that does not intentionally circumvent the prohibition is covered by the “general equality provision” of article 3 alinea 1 GG. Since article 3 alinea 3 sentence 1 GG also prevents favorizing because of race, positive measures cannot be based on this article, but are only possible “in spite of” article 3 alinea 3 sentence 1 GG. In the event that it is inevitable to found a positive measure on race, article 3 alinea 3 sentence 1 GG does not prevent this measure-finding its limits in other constitutional rights (“praktische Konkordanz”). The measure itself is based on article 1 alinea 1 GG (guarantee of human dignity) and article 20 alinea 3 GG (principle of social justice) in close connection with the aim of article 3 alinea 3 sentence 1 GG.

The Grundgesetz applies directly only to public bodies. The primary effect of article 3 alinea 3 sentence 1 GG in the fields of article 5 (f) ICERD is therefore that the executive, judicial and legislative powers are prevented from discriminating with regard to the access to services like restaurants itself and may not encourage discrimination in any form. In addition, the article creates “protectional obligations” (Schutzpflichten) for the legislature, administration and judiciary which include especially the obligation for the legislature to ensure that the law protects against racial discrimination by private actors and a corresponding obligation for administration and judiciary to enforce the law accordingly. The legislature enjoys a great margin of appreciation hereby; its duties are fulfilled if a minimum standard of protection norms exist. Even though there is no explicit provisions against racial discrimination in penal, public (except the Basic Law) or civil law, this minimum requirement is fulfilled by the implicit prohibitions in §§ 138, 823, 826 BGB (German civil law), §§ 130, 185 StGB (penal law) and §§ 15, 4 GastG (law of bars and restaurants).

The main responsibility to enforce the protectional obligations of article 3 alinea 3 sentence 1 GG remains for the executive and judiciary who have to apply the laws in a way that takes into account the objective values article 3 alinea 3 sentence 1 GG sets for the whole legal system. In civil law, this influence of article 3 alinea 3 sentence 1 GG is — as already mentioned with respect to article 5 (f) ICERD — exercised

via broad legal terms. Contracts that foresee higher prices for services in a restaurant from persons of a specific racial group are contrary to the “good morality” according to § 138 BGB. Because the discrimination constitutes a violation of personality rights and an intentional breach of the “good morality” (§§ 823 alinea 1 and 826 BGB), the discriminated person can ask for reparation of his or her damages, which include reparation for immaterial damage. However, so far German courts have a tendency to grant low damage payment for immaterial damage. In addition, according to the opinion of the author, courts have the possibility to oblige the service provider to conclude a contract with the discriminated person; thus forcing them to grant access because of the breach of § 826 BGB.

In cases where denial of access is not directly or intentionally based on race, article 3 alinea 1 GG applies. This basic right prohibits differentiations without reasonable justification. The more a criteria used as a differentiation comes close to the criteria of race, the more difficult a justification gets. If a differentiation relies on the status of a person, he or she has hardly any possibility to influence the applicability of the measure. If this criteria approaches the racial criteria or leads to an underrepresentation of a certain racial group, justification depends on very important reasons which have to be in strict proportionality to the aim of the differentiation. In addition the negative effect of the measure on racial integration has to be taken into account. Justification of status-based measures are hardly conceivable in the field of access to services like restaurants etc. If the differentiation is based on behaviour-based criteria, justification levels are also very high. Behaviour-based are access policies that demand, e.g., short skirts for women or prohibit hats for men — with the effect that individuals that for traditional reasons are under the obligation to wear turbans or long skirts are excluded. The closer these criteria get to status criteria, the higher the requirements for justification get. If differentiation is based on neutral criteria that lead to the result that the impact on a racial group concerning the right to access services is a mere side effect, a reasonable justification is sufficient, like for example the price level of a restaurant. The effects of article 3 alinea 1 GG are the same as stated above: prohibition for the state with a relating subjective right for the victim of a discrimination and protectional obligations that mainly rely on the impact via the broad legal terms (“Ausstrahlungswirkung”). However, as far as differentiations by private actors are concerned, comparable to the situation of the ICERD, differentiation with merely factual consequences are generally justified by the freedom of the restaurant owner to make its

own commercial decision — with the same exception as mentioned for the ICERD.

In addition, any discrimination because of race or a similar criteria prohibited by article 3 alinea 3 sentence 1 and alinea 1 GG may constitute a violation of the right of self-fulfilment and of the personality right which are guaranteed in article 2 alinea 1 GG. At the same time the victim's ability to participate in social life is impaired. The effects of this article on state actors and indirectly via the "Ausstrahlung" on private actors, as well as its limits are generally the same as already mentioned for article 3 alinea 3 sentence 1 and alinea 1 GG.

The last part of the analysis deals with the indirect application of article 5 (f) ICERD and the impact of article 3 alinea 3 and 1 GG on the laws of danger prevention (Gefahrenabwehrrecht).

The police has the right to enter into action according to the general police clause (polizeiliche Generalklausel) if there is a danger to public security or public order. Part of the protected public security is all legislation that serves the purpose to protect individual or public values. Article 5 (f) ICERD together with its "law of approval" is part of the protected laws. In fact, by ratifying the ICERD without limitation the legislature has demonstrated its willingness to accept this norm as one of its own. Thus whenever a provider of a restaurant denies access to somebody on racial grounds, the police has not only the right, but the duty to undertake the necessary measures in order to prevent this breach of law.

In addition, the objective requirements of §§ 130 and 185 StGB and of §118 OWiG (law against irregularities of public order) may be fulfilled if a service provider refuses access on racial grounds. This breach of penal law also constitutes a threat to public security according to the "general police clause". § 130 StGB prohibits incitement of the public. The objective requirements of this norm are generally fulfilled by a racially motivated denial of access to services, no matter whether the denial of access has been made public by a sign or has only been addressed to the victim itself. In fact, the denial of access can in today's context of racially motivated aggression during the last years only be understood as an aggression to human dignity and not only as a personal unease of the restaurant or bar owner towards individuals of an unknown ethnical group. If the victim of discrimination is addressed in an individualized manner, he also suffers an insult in the sense of § 185 StGB. Besides that the public order in the meaning of § 118 OWiG is violated by all discrimination that is noticeable by third persons. Finally, the violation of individual rights, especially as set forth in article 3 alinea 3 sentence 1

and alinea 1 GG, are considered to be a threat to public security in the sense of the general police clause therefore allowing and requiring preventive police action.

The second foundation for police measures is opened via the law of restaurants and bars (*GaststättenG*). In order to receive and to keep a permission for a restaurant, café, discotheque etc., the owner has to be “reliable” according to §§ 15, 4 *GaststättenG*. Reliability includes notably to respect the “public security” in the sense of the “general police clause”. Therefore, a denial of access also leads to the conclusion that the discriminating restaurant owner is unreliable if his or her behaviour in the past leads to the conclusion (or the likelihood) that the restaurant owner will continue with the discriminatory access denial. However, the possibility of withdrawing a restaurant permission depends on a strict proportionality requirement since the freedom of profession of the shop owner guaranteed by article 12 GG is heavily affected by such a withdrawal. Therefore, before the final withdrawal can take place, the competent authority has to warn the service provider, which includes to clearly draw the consequences of another racially motivated access refusal to his or her attention. Because of their obligation to respect article 5 (f) ICERD and articles 3 and 2 GG, the authorities are obliged to effect such a warning and later to withdraw the permission. The preventional measures of the police stated above can take place in addition to this measure — as long as their measures do not have the effect of a withdrawal of permission.

Summarizing, German law offers a wide range of measures for dealing effectively with racial discrimination with regard to denial of access to bars and restaurants and is able to meet all requirements which article 5 (f) lays upon the German State. However, the legal means have not been effectively enforced in the every-day life of courts and administration. In the administrative field, especially the “*Ausländerbeauftragte*”, persons in charge of the needs of foreigners, have lived up to the duties of the ICERD and the GG by trying to create tolerance, informing victims of discriminations about their rights and bringing restaurant and discotheque owners and discriminated groups around one table in order to reduce prejudices and hostility.

However, (relying on the relevant literature and legal journals as principal source of information) the permission to open a restaurant, discotheque or pub has so far never been withdrawn because of racially motivated denial of access; penal actions remain exceptions and civil actions have so far not been raised in order to prevent denial of access. In fact only one court has ever relied on the ICERD to found a judgment

— in more than 30 years since the Convention has been ratified. This unsatisfactory situation is due to a lack of knowledge about ICERD by law enforcing officials and a lack of information or unwillingness by the victims of discrimination to start costly and tiring proceedings.

This discrepancy between the legal and the factual situation can be resolved by the enactment of an anti-discrimination law that explicitly prohibits racial discrimination regarding access to bars, restaurants and other services. Such legislation is now on its way, not because of article 5 (f) ICERD, but in order to fulfil the Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin of the EU. Yet, already an amplified information policy and regular training could be sufficient to positively influence administration and courts to rely on article 5 (f) ICERD. Anti-discrimination laws may be the safest but not the only way to effectively deal with racially motivated access denial to restaurants, bars and other services.