

# Transposition Strategy and Political Time in the Europeanisation of Social Norms: Comparing Transposition of the Anti-discrimination Directives in Germany and Austria

Ryosuke AMIYA-NAKADA  
Meijigakuin University  
r.amiya-nakada@nifty.com

Paper prepared for delivery at the fourth General Conference of the European Consortium for Political Research, September 6 - September 8, 2007 in Pisa.

## Abstract

EU-level rule-making on social norms has been increasing since the 1990s, whose transposition sometimes has political repercussions. As a case study of such Europeanisation of social norms, this paper examines the transposition of anti-discrimination directives in Germany and Austria.

Through the comparison of these two examples, based on the "most similar" case design, this paper contends that domestic political processes should be given more weight in the Europeanisation studies.

Specifically, this paper highlights two factors influencing the Europeanisation. The one is the transposition strategy of the government, which is strategically determined in view of the electoral payoff. The choice of strategy influences transposition success or failure, and the legislative outcome. The more the government utilizes the European input for galvanizing its core constituencies, the higher the risk of transposition failure becomes.

The other is the time constraint on the Member States. Whether the European input becomes asset or liability depends not only on the nature of the issue or the "goodness of fit" but also on the timing the issue is raised. One of the difficulties the governments face in the Europeanisation process is that political time management is constrained by the transposition deadline. Sometimes the governments have to choose between electoral misfortune and transposition delay.

Further, the paper also illustrates how an attempt to legitimize further integration causes the collision of norms. This would suggest the difficulty of eliminating democratic deficit at a brush, e.g. by the constitution.

# Transposition Strategy and Political Time in the Europeanisation of Social Norms: Comparing Transposition of the Anti-discrimination Directives in Germany and Austria

Ryosuke AMIYA-NAKADA (Meijigakuin University)

## 1. Introduction

While the European Union has expanded its action radius throughout the 1990s beyond the construction of the international market, the study of European integration has taken notice of the profound change of the political in the Member States. Thus Europeanisation studies have become one of the most studied research topics since 1990s.

These Europeanisation studies have firstly put their focus on the "goodness of fit". According to this proposition (Börzel and Risse 2000; Cowles, Caporaso and Risse 2001), the greater the difference between policy chosen at the European level and the existing policy in a Member State is, the harder the Member State is pressed to change the policy, and the greater the difficulty facing the Member State is. Seen from this perspective, it is expected that the Member States fails or delays the transposition of the directives of the European Union, when the "fit" is worse.

Acknowledging its value as a first step and an initial stimulation for the Europeanisation studies, it has become also commonplace to point out its analytical and empirical weaknesses and to illuminate the way forward[1]. This paper also starts from the standard "goodness of fit" viewpoint and compares transposition of anti-discrimination directives in Germany and Austria, based on "most-similar-case" design. Through this comparison, the paper aims to show two kinds of lacunae in the "goodness of fit" model.

First, most studies of Europeanisation have chosen "policy" level as the empirical foundation. Several scholars like Vivien A. Schmidt also try to examine the Europeanisation at the "polity" level. But fewer works have been conducted on the Europeanisation of "politics". This paper tries to fill the gap, specifically showing that domestic political time is now constrained by the European-level political time and the incumbent is forced to deal with the issues which they otherwise want to shelve (cf. Ekengren 2002).

Second, the "goodness of fit" does not explain the different transposition record of anti-discrimination directives in Germany and Austria. Contrary to the usual expectation, the German "left" red-green government failed to transpose the directives, while the Austrian "right" blue-black government including the right-populist Freedom Party has transposed them with less delay. To explain this puzzle, we should incorporate "politics" dimension in the analysis, especially political time and the transposition strategies of the governments (cf. Treib 2003). In other words, domestic actors do not simply react to the Europeanisation pressure on the economic or technical cost-benefit calculations. Rather, the Europeanisation pressure sometimes serves as political resource and this complicates the domestic process of the Europeanisation.

In the following section, I briefly review why and how the anti-discrimination directives were

enacted at the European level. Then, I examine the "failure" of transposition under the Schröder red-green coalition government (1998-2005) in the third section, which forms the main part of the paper. In the fourth section, I give a shorter analysis of the transposition process in Austria. Throughout the comparative reconstruction of the political processes of transposition, special attention is paid to how the government locates the directives in their overall political strategies. In the last section, I summarise the empirical evidence and the arguments.

## **2. The emergence of the "anti-discrimination policy field" at the European level**

In June 1997, the Treaty of Amsterdam was signed, which revised the Treaty on the European Union (Maastricht Treaty) and came into effect on May 1, 1999. This treaty marked significant advance in the social policy domain, mainly by incorporating the Social Protocol, which was agreed and signed by all the Member States except United Kingdom during the Maastricht Treaty negotiation.

One of the most notable change is found in anti-discrimination policy. The Article 13 of the Consolidated Version of Treaty Establishing the European Community (97/C 340/03) now conferred the Union competence prohibiting discrimination, stating;

"Without prejudice to the other provisions of this Treaty and within the limits of the powers conferred by it upon the Community, the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation."

This article was an innovation in the European social policy, for it not only expanded the European level social policy competence beyond the Maastricht Treaty, but also far exceeded the Social Protocol, which covered merely "equality between men and women with regard to labour market opportunities and treatment at work" (Article 2 of the protocol on social policy) and specifically obliged the eleven Member States to "ensure equality between men and women with regard to labour market opportunities and treatment at work" (Article 6).

Based on this newly endowed competence, the European Commission issued a package of anti-discrimination policy proposals. This package consists of a Communication introducing the proposals (COM(1999) 564 final), a proposal for a Council Directive establishing a general framework for equal treatment in employment and occupation (COM(1999) 565 final), a Proposal for a Council Directive implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (COM(1999) 566 final) and a proposal for a Council Decision establishing a Community Action Programme to combat discrimination 2001-2006 (COM(1999) 567 final). These proposals were quickly handled and two directives were already adopted within a year. The Racial Equality Directive (2000/43/EC) was signed on June 29th, the Employment Equality Directive on November 27th.

Among these policy proposals, the Racial Equality Directive was so important as Bell (2002: 384) says, "[i]t does not seem an overstatement to describe this instrument as one of the most significant pieces of social legislation recently adopted by the European Union." In addition, it is also noteworthy that the directive had quickly passed through the complicated EU legislative machinery, which is remarked as "world-record adoption" by Geddes and Guiraudon (2004: 334).

Why was it possible? There were several factors leading to swift adoption (Geddes and Guiraudon, 2004). First, it was enacted when the democratic value of the Union was questioned by the participation of the Austrian Freedom Party (FPÖ), headed by Jörg Haider, in the Government. The other fourteen Member States warned Austria by declaring that they would not accept any bilateral official contacts at political level with an Austrian government integrating the FPÖ, which had no effect on coalition formation. In addition, the French, Belgian and Italian Ministers issued a joint position paper calling for the swift adoption of the Commission anti-discrimination proposals. Given the issue linkage between the anti-discrimination directives and the Austrian populist right, it was not politically possible for the Austrian and the German red-green governments to slow down the legislative process, and France became a motor of the legislation, although the "fit" between the proposal and her own policy paradigm was bad. It should also be added that the composition of the Council was exceptionally "left"-leaning at that time (Manow, Schäfer and Zorn 2004), after the establishment of the British Blair Government (May 1997), electoral victory of the *Parti socialiste* in the 1997 election of the French National Assembly (June 1997) and the end of the sixteen-year-long Kohl Government and its succession by the Schröder red-green coalition government (October 1998).

Second, the Non-governmental Organisations (NGOs) has played an important role in pushing for and framing the anti-discrimination directives. Among them, the Starting Line Group (SLG), a network of more than 250 pro-migrant NGOs with strong Anglo-Dutch intellectual influences, was active in the Amsterdam Treaty negotiation for the inclusion of the anti-discrimination article. On the contrary, the French and the German pro-migrant organisations are said to have had little interest in the EU-level developments. Thus, the arguments pressing for anti-discrimination policy proposals at the EU level drew their inspirations and lessons and mainly from British and Dutch experiences.

Third, although these directives were legislative acts exploring the new area, it was possible to make use of existing policy asset (Tyson 2001). The Equal Treatment Directive of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions (Council Directive 76/207/EEC), the Burden of Proof Directive (Council Directive 97/80/EC) and the case-law of the Court of the European Commissions (ECJ) had served as a solid basis of negotiation and clarified several conceptual problems in advance. The Member States could negotiate with technically accustomed terms and arguments.

Still, legislation of this magnitude was not an easy one. One of the controversial issues was

the material scope of application (Tyson 2001, 207-209). There was broad agreement on the need of anti-discrimination regulations concerning employment relations, but the proposal further dealt with other areas usually covered by the Civil Code. Especially debated was the article 3 concerning provision and access to the goods and services. Some noted that Community competence was limited to transnational situations, Others insisted that the directive should not cover situations such as a person privately selling a bicycle to a neighbour. This problem was solved through the COREPER (Committee of Permanent Representatives) negotiation, by limiting the application to those goods and services "which are available to the public". As will be shown below, this clarification did not suffice to prevent the attack in the German transposition process.

The legislative process reviewed above illuminates two points. First, for the anti-discrimination directives were framed under Anglo-Dutch influences, "fit" between the directives and the existing policies was not good either in Germany or in Austria. Second, such European legislation was possible with exceptional political moment concerning the political situation in Austria.

These points lead us to expect difficulty in transposition, both in Germany and in Austria. The next two sections examine actual legislative processes and the results of transposition.

### **3.Transposition "failure" in Germany**

3-1. Contextual background of German domestic politics: red-green initiatives on minority protection and their political repercussions

#### (1) Policy positions of the Government Coalition

As is shown above, the anti-discrimination directives was modelled on British legislations. In Germany, gender equality had been an important issue both politically and legally, but other types of discrimination was rather neglected and received no specific legal or political treatment. Except for a few clauses in the Works Constitution Act (*Betriebsverfassungsgesetz*), it is covered only by the general clauses in the Civil Code, based on the Article 3 of the German Basic Law stipulating equality before the law (EIRO 2004a). It prohibits discrimination on other grounds than gender, stating "[n]o 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." It means that the transposition of the directives had to break new ground in the system of German laws.

The directives was to be transposed under the Schröder red-green government, which had defeated the Christian Democrats - Free Democrats alliances in the September 1998 Election and took over the office. It can be called the first "leftist" government in Germany, composed of the Social Democrats and the Greens, in comparison with the previous Social Democrats-led governments with the Free Democrats as the junior partner.

If we consider general ideological affinity of the directives and party-political composition of

the governments, the leftist governments is, *ceteris paribus*, supposed to be better suited for implementing such policy. In fact, both parties presented a proposal on minority protection in 1998. To analyse the political process of transposition, however, we have to determine actual policy positions at that moment. So, we first examine the electoral programme of both parties.

The Electoral Programme of the Social Democrats (Arbeit, Innovation und Gerechtigkeit“ . SPD-Programm für die Bundestagswahl 1998) had its emphasis on the need to revitalise the economy, as is shown by the title "Work, Innovation and Justice" . As for anti-discrimination policy, it merely touched upon gender equality. In addition, a section was dedicated to the immigration issue, declaring that "the core of successful integration policy is the enactment of modern citizenship law."

In contrast, the Greens paid more attention to the issues. In her Electoral Programme entitled "Green is the Change" (Programm zur Bundestagswahl 98. Grün ist der Wechsel), a section "Self-determination" dealt with the issue. Here, not only gender equality, but also equal treatment of the disabled people, foreign nationals and asylum seekers were aimed, based on the principle of self-determination in one's life. Under the heading of "empowering minorities" , discrimination against homosexuals were criticised and introduction of the same-sex marriage or equal treatment of non-marriage partnership were proposed. And the need for a specific anti-discrimination law was explicitly stated, anticipating development at the European level.

All in all, it is safe to say that the anti-discrimination was the Green's issue. Then, how was it reflected in the policy of the red-green Coalition Government?

The Coalition Agreement on October 20, 1998, reflected the stance of the Greens. In the Chapter 9 "Security for All, Empowering Citizenship", the revision of the citizenship law was agreed with concrete conditions acquiring citizenship (Section 7). Further, the chapter had a separate section on "Minority Rights" (Section 10), where it was declared that;

We will set out a law against discrimination and to encourage equal treatment (especially by introduction of the legal instrument of registered life-partnership with right and obligations). The recommendations of the European Parliament for the equal treatment of lesbian and gay is given consideration.

It is remarkable that anti-discrimination issue beyond gender equality was formally recognised as a task for the new government. Moreover, the link to the European-level policy development is clearly stated here.

The Agreement showed the Green's influence in this field. Nevertheless, the post of Minister of Justice dealing with the issue fell in the hand of a Social Democrat, Herta Däubler-Gmelin, who was seconded by another Social Democrat as state secretary.

## (2) "Trauma" of citizenship law reform

As is expected from the analysis of electoral programme and the Coalition Agreement, the new government first tackled the issue of the citizenship law among minority protection issues(Hell

2005). The draft revision of citizenship law, released from the Ministry of Interior, was path-breaking. First, it gives German citizenship to the German born children from non-German parents, which means the departure from the *jus sanguine* principle continued since 1913. Second, with the introduction of the *jus soli* principle, the draft revision officially accepted dual-citizenship for the first time.

The Christian Democrats, now going to the opposition bench and anticipating this move, had already made a proposal in the Federal Council (Upper House) on restricting the number of immigrants in November 1998. Against the proposal from the Government and with a view to electoral exploitation of the issue in the approaching *Hesse* state election (February 1999), the Christian Democrats launched a massive signature campaign against the revision proposal, which was quite exceptional for the Christian Democrats generally hesitant to such "direct democratic" methods. They focussed their attack on the dual-citizenship issue and gathered 400 thousands of signatories in three weeks.

The result of the election on February 7 was literally shocking. The opinion polls at the last minute had predicted 41~2% for the Social Democrats and 8.5%~10% for the Greens, against 36~9% for the Christian Democrats and 5.5%~8% for the Free Democrats, which meant clear victory for the incumbent red-green Government Coalition. Nevertheless, the Christian Democrats obtained 43.4% of the vote and formed a coalition government with the Free Democrats, which have barely exceeded the electoral threshold with 5.1% of the vote. The Social Democrats with 39.4% gained 1.2% against the previous election, but the Greens suffered heavy loss of 4% to 7.2%. This election was shocking not only by its unexpected result, but also for its implication for federal politics. With the turnover of government in *Hesse*, the Schröder Government had lost the majority in the Federal Council only after four months since its investiture. Now the government had to solicit the assent of the state government including the opposition parties at the federal level.

In the case of the Citizenship Law, the Government decided to negotiate with the Free Democrats, which formed a coalition government with the Social Democrats in *Rhineland-Palatine*. In concession to them, the "option model" was introduced, which obliges the holders of dual-citizenship to choose one by their 23th birthday. Through this concession, non-recognition of dual-citizenship was maintained and the practical impact of the reform was halved. The revised law was adopted with the vote of the Social Democrats, the Greens, a part of the Democratic Socialists and the Free Democrats.

The reform of the citizenship law should become the first innovation of the new Government showing its distinctiveness to the previous Kohl Government. It was also expected that non-Germans, mainly Turks, who acquired newly citizenship would become the reservoir of the left voters. In the end, however, both calculation went wrong. The defeat in *Hesse* was a severe blow to the Government both symbolically and substantially. With this negative lesson, the Social Democratic handling of the minority protection issue, agreed in the Coalition Agreement, became

more cautious.

### (3) The "same-sex marriage" issue

The next issue the Government tried to resolve was the problem of the same-sex marriage. In line with the Coalition Agreement, the Minister of Interior Däubler-Gmelin had already announced in September 1999, that the legislative proposal would be released soon. Because of intra-coalition negotiation, the actual submission of the proposal to the Federal Diet was delayed until July 2000.

Against this proposal, the Central Committee of the German Catholics declared that the proposal was unconstitutional in trespassing the special protection of marriage and family, stipulated in the Article 6 of the Basic Law. The Christian Democrats made clear their intentions to appeal to the Federal Constitutional Court against the constitutionality of the law. The law was divided into two parts, one part of which required assent of the Federal Council and the others not, and both parts passed through the Federal Diet in November 2000. But the Federal Council majority refused to give assent to the bill, and the conciliation commission of both Houses could not strike an agreement.

The other part of the law, now called the "Life-partnership Law", came into effect in August 2001. The three Christian Democrats-led State Governments, namely Bavaria, Saxony and Thuringia, had questioned its constitutionality to the Federal Constitutional Court. But the Court rejected the appeal in July 2002 and declared the bill constitutional.

These two cases of minority protection legislations revealed politically sensitive nature of the issue. Both minority protection initiatives were politicised by the opposition, partly defeated or forced concession by the veto of the Federal Council. Furthermore, it became clear that the minority protection issues could become political liability rather than asset in electoral terms. So, subtle handling and scheduling of the issue was needed for the Government.

### 3-2. Lacking political time and avoidance of legislative acts: The first Schröder Government

As is shown above, two initial minority protection initiatives by the Schröder Government faced sheer opposition by the Christian Democrats and took long time for the settlement of the issues. Political time left for further initiatives in this area, namely transposition of anti-discrimination directives, was already scarce. It was all the more so because the anti-discrimination issue would arouse intense opposition from the Christian Democrats and the Churches with high probability and political complication was almost unavoidable.

The first draft of the anti-discrimination law by the Ministry of Justice was distributed in December 2001. This draft was ambitious one going beyond mere implementation of the directives in applying the regulation of the Racial Equality Directive to other grounds of discrimination than the race or the ethnic origins. By this expansion, the draft aimed to respond to criticism against the



directive itself.

The draft was heavily criticised by the lawyers[2]. For example, Franz-Jürgen Säcker, Law Professor of the Free University of Berlin, wrote an article entitled "Reason instead of Freedom: The Republic of Virtue by the Jacobins". There, he stated that securing the civic liberties through the separation of the State and the Society was one of the most important achievements of the Modern Western Civilisation and attacked the draft law as an intrusion in the freedom of contract, which reminded him of the "new puritan regime of virtue". Concretely, he raised several hypothesised questions. Is a muslim family allowed to rent a room to the other muslims by way of newspaper inserts? Can a believer of a religion prohibiting homosexuality refuse to rent a house to a homosexual? Citing these examples, he criticised the draft law as an intervention in the "plurality of the life styles and traditions" (Säcker 2002). In the same vein, Eduard Picker, Professor of the University of Tübingen, criticised that the draft poured moral into law and that a certain degree of "discrimination" was inevitable as the other side of private autonomy (Picker 2003). Further, Karl-Heinz Laduer, well-known post-modernist public law Professor, made an attack saying that the draft discriminate against the "majority" by ignoring legal rationality of the liberal society and that it was not only unconstitutional but also against the common sense and the rule of law (Laduer 2002).

The common thread running through these criticisms is an attack on the directive itself, although they attacked the expanded scope of application by the German government on a surface. Although the extension aimed by the Government was, first, personal scope of application, which included discrimination based not only on race but also religion and sexual orientations, and, second, the responsibility of the employer in case of discrimination of a employee, most of fundamental criticisms was directed at such points as shifting the burden of proof, intervention of support groups in legal actions and state intervention in the sphere of the Civil Code itself. But these elements were already included in the original Racial Equality Directive. In fact, critics like Picker explicitly attacked the directive itself, saying, "against such directive that sticks to the legislation of a certain law under the hegemony of Europe, we should counter with all legal measures," and "the people who get accustomed to appeal to the Federal Constitutional Court in case of unwanted legislation, should not train themselves in fatalism to the European directives, which do not suit them" (Picker 2003) [3].

Picker was an extreme case but the reason why most German lawyers reactions were negative rooted in the bad "fit" of the directives in the system of German laws. In their understanding, the anti-discrimination *problematique* can be properly handled by the existing laws and judgements, as Picker wrote, "Special legislation for anti-discrimination is, in fact, unnecessary for the German Civil Code. European criteria are already achieved in Germany, in the proper interpretation of laws." They thought that the legal instrument of indirect application of the basic rights clauses in the German Basic Law sufficed. Further, the cognitive schema of the state-society division, in which "society" is the sphere of freedom logically prior to the state, has been influential

in the German legal thoughts. With this schema, it is only natural that the lawyers sensed a discomfort at the state intervention in the sphere of the Civil Code.

The critical climate of the lawyers played a role in the opposition to the anti-discrimination law. Main opposition came from the employers and the Churches. Especially, Both Catholic and Evangelical Churches objected actively, as they saw the law infringe the self-determination rights of the Churches ([http://www.ekd.de/aktuell\\_presse/news\\_2002\\_05\\_17\\_2\\_antidiskriminierung.html](http://www.ekd.de/aktuell_presse/news_2002_05_17_2_antidiskriminierung.html); [http://www.ekd.de/aktuell\\_presse/news\\_2002\\_05\\_27\\_5\\_antidiskriminierung.html](http://www.ekd.de/aktuell_presse/news_2002_05_27_5_antidiskriminierung.html)). They had a practical reason, too. They feared that they could not give priority to the believers in hiring workers at the church-related organisations and institutions under the anti-discrimination law.

After all, the first draft could not be put on the cabinet agenda before the Schröder Government finished the first term. Actually, the Minister of Justice prepared the second draft in February 2002. And some in the Government still expected the enactment before the 2002 Election, by deleting the ground of discrimination like age, world-view or religion from the scope of the law. But the opposition was so fierce (*taz*, 18.03.2002; *SZ*, 09.04.2002; Stork 2005).

In addition, federal politics was in turmoil concerning another minority issue, namely the handling of the immigration law reform. Following the report drawn up by the Government Consultative Committee ("Süssmuth-Commission") in July 2001, the Government issued a draft bill in August and struck a cabinet-level agreement in November. Both the content, which aimed at change in immigration regime by systematically introducing highly-skilled labour, and the decision process, in which the head of the Consultative Committee was deliberately chosen from the opposition, had been controversial from the start. Furthermore, the Social Democrats dared a high-handed act at the vote in the Federal Council, which caused further criticisms from the opposition. No more controversial bill was possible under these circumstances.

In view of the approaching 2002 Federal Diet Election, the Social Democrats gave up to send the bill to the Federal Diet and transposition of the anti-discrimination directives were postponed (Pressemitteilung Nr. 297 der Bundestagsfraktion Bündnis 90/ Die Grünen; *SZ*, 09.04.2002 )

### 3-3. Hesitation of the Social Democrats: The second Schröder Government

In the Federal Diet Election in September 2002, the Social Democrats barely maintained the position of the largest party by the margin of three seats, six thousand in votes, against the Christian Democrats, and the red-green coalition also secured the majority of the Federal Diet. So the second Schröder Government was to continue the effort to transpose the directives during the fifteenth legislative period (2002-2006). The new Coalition Agreement, entitled "Renewal, Justice and Sustainability," also included a corresponding clause, stating: "Based on the preparation in the fourteenth legislative period, the Government Coalition will send the anti-discrimination law to the Diet and transpose the EU directives" (Koalitionsvertrag 2002-2006: Erneuerung - Gerechtigkeit - Nachhaltigkeit).

The Greens were still committed to the issue. In their Election Programme, there was a

section "removing discrimination", where their intention to legislate an anti-discrimination law using the directives was clearly discernible in the following: "We want a comprehensive anti-discrimination law. With its help, those who suffered can defend themselves against every-day discriminations by means of a civil case" (Grün wirkt! Unser Wahlprogramm 2002-2006).

To the contrary, the Electoral Programme of the Social Democrats placed the minority issue not as an agenda of the next period, but as one of the achievements in the previous period. While the same-sex life-partnership, the new citizenship law and the immigration law was proudly referred to as an evidence of their reform capacity, only the gender equality issue was cited as one of the next aims. Now the minority protection issue was politically almost finished for them.

Reflecting this stance, the newly designated Minister of Justice, Brigitte Zypries, was more negative to the anti-discrimination law than her predecessor, Däubler-Gmelin. In March 2003, Zypries was reported by one of the quality papers to be negative to legislate an anti-discrimination law (*FAZ*, 07.03.2003). In fact, she reiterated such statements as "the Civil Code is the land of private autonomy" or "civic freedoms in the liberal state includes ...making distinctions and treating unequally " in official occasions (Zypries 2003a; 2003b; 2004).

Thus the legislative work proceeded only grudgingly. While the Ministry of Family and the Ministry of Economy were pushing for transposition, a substantial part of the Social Democrats and , more than all, the Ministry of Justice were negative (Edathy and Sommer 2004).

In addition, the immigration law still occupied the political time table. In December 2002, the Federal Constitutional Court annulled the March vote in the Federal Council and therefore the law itself. The Government had to begin again from the start. After the draft was agreed in the cabinet in January 2003, the Federal Diet passed the bill, but the Federal Council vetoed again, and the negotiation began in October 2003. The law was finally enacted in July 2004.

In the meantime, the due date for transposition, 19 July 2003 for the Racial Equality Directive, 2 December 2003 for the Employment Equality Directive, had passed. Although the Ministry of Justice issued the new bill in May 2004 and the Government Coalition agreed on their final bill in December, the European Commission began an infringement procedure and sued Germany in the ECJ (EIRO 2004b; 2004c).

The Diet debate began in January 2005. The bill still expanded the scope of application, which was in line with the Greens' policy. The Parliamentary Group of the Greens convened an expert conference entitled "Tailwind from Europe" and saw the directives as providing an opportunity for developing German anti-discrimination policy.

But the attack from the Opposition was still frontal. They criticised the bill as posing an uncalculated risk to the employers and making undue state intervention possible with the slogans like "intervention in the freedom of contract" or "unnecessary bureaucratic monster". Their principled opposition was backed up by the business and the conservative press (*FTD*, 21.1.2005; *FAZ*, 21.1.2005). The Federal Association of Employers held a symposium entitled "Secure the freedom of contract !" inviting Picker as a speaker (BDA 2005). The conservative newspaper

*Frankfurter Allgemeine Zeitung* attacked the bill as pushing for the "leading culture (*Leitkultur*) of the left" (*FAZ*, 20.1.2005).

And the Government was still divided on this issue. Renate Künast, the Minister of Consumer Protection from the Greens, defended the bill, insisting that the bill was already minimum realisation of the requests from the EU and that further delay would invite substantial penalty from the EU. To the contrary, some Social Democratic Ministers were reluctant to the enactment itself and ready to revise the bill incorporating the request from the Opposition (*FTD*, 4.3.2005; 5.3.2005).

Here again, electoral concern played a role. From the largest state of Germany, North Rhine - Westphalia, where the election of the State Diet was due in May 2005, came harsher criticisms. The Social Democratic Minister President of the State, Peer Steinbrück, suggested he would not vote for the bill in the Federal Council, saying that it would do harm on the competitiveness of the firms in his State (*FTD*, 5.3.2005). Harald Schartau, the Chairman of the State Social Democratic Party and the Minister of Social and Labour Affairs, also argued against the bill; pointing out "Currently, the main concern of the people is the insecurity of the jobs and whether they have the chance to find a new job...[the anti-discrimination law] would not help our electoral campaign but damage us" (*Die Zeit*, 8.3.2005, 10/2005).

Thus, the heated debate was inevitable and smooth passage of the bill was unlikely. But then, the political situation in Germany had dramatically changed. The Social Democrats lost the State Diet Election, and the coalition of the Christian Democrats and the Free Democrats took over the State Government, as was expected. Then, Schröder opted for a gamble. After an hour, he declared at the press conference that he decided to trigger dissolution of the Federal Diet and an early election. This decision was made personally by Schröder, and only a few leaders of the Coalition, namely Steinbrück, Vice Chancellor and the Foreign Minister Joschka Fischer, and the Federal Chairman of the Social Democrats Franz Müntefering, were noticed before the press conference.

The focus of the public opinion shifted. Admissibility of the dissolution was first debated, and then economic issues like unemployment, economic reflation and budget deficit became the central theme of the electoral campaign. The anti-discrimination law totally disappeared from the political foreground.

Now it was possible for the Social Democrats and the Greens to pass the bill without fear that they might lose the voters of the centre. Rather, they should care about the interest of core constituencies of both parties. Therefore, the Government Coalition passed the bill at the Federal Diet with some amendment incorporating the objections from the Churches in June. The Federal Council vetoed the bill in July and the Conciliation Committee was held. Both sides were not prepared to make concessions and the negotiation was stopped in September. The anti-discrimination directives were not transposed again.

The ECJ recognised German breach of the treaty obligation and ordered to pay the cost, for

the Racial Equality Directive on 28 April 2005 (*Commission Press Release*, IP/05/502), for the Employment Equality Directive on 23 February 2006 (OJ C 131/23, 3.6.2006). After nine months since the installation of the new Grand Coalition Government led by Angela Merkel, General Law on Equal Treatment (*Allgemeines Gleichbehandlungsgesetz*) was finally enacted on 14 August 2006.

#### **4. Transposition "success" in Austria**

Just the same as in Germany, there had been no special anti-discrimination law in Austria. Only the Federal Constitution prohibited discrimination based on religion or disability in Article 7 (EIRO 2004a).

In contrast to Germany, the transposition of the anti-discrimination directives was born by the rightist Government, composed of the Christian-conservative People's Party and the right-populist Freedom Party. After the 1999 Election of the National Council, the People's Party leader Wolfgang Schüssel ventured to embrace the Freedom Party. Since 1980s, the Freedom Party turned right under the populist leader Jörg Haider, and took an anti-immigrant stance. Thus, we can say that the ideological affinity between the directives and the Austrian government was rather low.

Before the transposition of the directives was put on the agenda, the anti-discrimination issue had been already discussed in a certain circle (Krickler 2003; Solla 2003). The UN year of human rights in 1998 accelerated the activity of the NGOs and the six main NGOs including the Ludwig Boltzmann Institute for Human Rights began drafting of the anti-discrimination law, which resulted in the comprehensive legislative proposal in March 2001.

But the Austrian Government totally ignored the NGO-draft. Their own bill was one of minimum transposition, with several articles literally adopted from the directives. Although a special committee was established in the National Council, the Government Coalition was said to retard the discussion (ECHO 2003). The final Government bill was issued only four days before the deadline of transposition, as if it were an alibi, and sent to the Parliament on 11 November 2003. This retardation reflected the intention of the government to minimise the politicisation and to put the Opposition under the severe time-constraint and make fundamental revision impossible. Against this tactics, NGOs, the Social Democrats and the Greens protested.

At the same time, the Government was flexible enough to incorporate some of the criticisms of the Opposition and to break the force of an objection. Among eleven points of request posed by the Social Democrats, the Government accepted seven points, and partly incorporated two points. For example, there was no clause in the original bill, concerning the intervention of the NGOs in the law suits. Responding to the request from the Opposition and the NGOs, a special umbrella organisation called "the Litigation Association of NGOs against Discrimination" was established and admitted legal intervention (<http://www.klagsverband.at/news.php?nr=3890>). This flexibility was partly explained by the fact that a part of the bill required constitutional amendments, for which

two-thirds majority was necessary. The Government needed the assent of the Social Democrats.

Based on these concessions, the Government Coalition urged the Social Democrats to vote for the bill. The Social Democrats insisted that eleven points was the minimum requirement for the complete transposition of the directives and further requested the expansion of legal intervention by the NGOs and more complete shift in the burden of proof. Although they kept its position and voted against the bill, they were made defensive. This is partly because the Vienna City Government, governed by the Social Democrats, passed its own anti-discrimination law, which was also minimum transposition of the directives. So a homosexual NGOs in Vienna criticised the Social Democrats as untrustworthy ([http://hosiwien.at/?page\\_id=102](http://hosiwien.at/?page_id=102)). In sum, the tactics of the Government was very effective, at least against the Social Democrats.

Although the deadline was not met, the Federal Anti-discrimination law was passed in May 2004. Still, because of the delay of the State-level legislation implementing the directives, Austria was sued by the Commission, too. But Austria can avoid the blame for the lack of transposition of the Employment Equality Directive.

## **5.Comparative Assessment and Theoretical Implications**

Transposition of the anti-discrimination directives was "failed" in Germany and relatively "successful" in Austria, in the sense that the federal level measures were taken with a little delay. How can we explain these results?

In the case of Germany, three factors were important. First, the mismatch of the directives and the existing legal system contributed to the "failure". Because of the mismatch at the fundamental level, the lawyers made a frontal attack on the transposing bills and the Opposition took a firm stance. Thus the transposition became politically difficult.

Second, the mismatch was amplified by the transposition strategy of the Government. The Government, ideologically close to the directives, mainly pushed by the Greens, tried to take the giant step using the opportunity of transposition, which made the confrontation more intense.

Third, given the political explosiveness of the issue and head-on confrontation, relatively long negotiation was inevitable. But the political timetable was overcrowded and already occupied by other minority protection issues like the citizenship law or same-sex marriage. The Social Democrats could not find the timing when they did not need to care about the trauma of the Hesse Election.

In the case of Austria, there was objectively the mismatch. Because of common legal traditions, the fundamental legal culture was similar to Germany, and any specific anti-discrimination legislation was also lacking in both countries. But this was not politicised.

This was because the Austrian Government, ideologically distant to the directives but unable to refuse them, chose the strategy of minimum transposition and made tactical concessions to the opposition flexibly. Thus putting pressure for expansive transposition was difficult for the

Opposition. Further, the Government controlled the political timetable skilfully, and made fundamental revision difficult for the transposition deadline was already due.

Now we move on to comparative assessment. First, we should examine the factors raised by the standard Europeanisation models, focussed on the structural variables. The "goodness of fit" was low both in Germany and Austria, at the fundamental level (legal culture) and the concrete level (lack of any anti-discrimination law). General ideological affinity was high for Germany (leftist government) and low for Austria (rightist government). Another structural variable, which measures relative ease of policy change, is the number of veto points (cf. Tsebelis 1995). According to the veto-player index by Schmidt (2000), both countries scored very high (Germany:8, Austria:9). Thus we expect from the structural variables that transposition is easier in Germany than in Austria.

Actually, the transposition results were quite the contrary. Here, political variables have their parts. The "goodness of fit" variable alone does not suffice to predict political difficulty of transposition. It should be considered in combination with the transposition strategy of the Government, which is determined not only by policy consideration but also by electoral concern.

In addition, Europeanisation of political time has its independent effect. In the case of Germany, the Social Democrats was torn between the transposition deadline and the domestic agenda scheduling. To the contrary, the Austrian Government Coalition utilised the transposition deadline as an asset, forcing the Social Democrats to choose the minimum transposition or (further) transposition delay.

The result of comparative assessment is summarised in the table 1 below.

Table 1. Summary Score of Variables and Results

		Germany	Austria
Structural Variables	goodness of fit	low	low
	ideological affinity	high	low
	veto points	high (8)	high (9)
Political Variables	transposition strategy	expansive	minimum
	political time	scarce (the government cannot find the proper timing for fear of electoral loss)	controlled (the government can strengthen time constraint to minimise the opposition)
Transposition Results		failure	success

This paper was a preliminary attempt to include the "politics" dimension in the "Europeanisation" research. Further research including more countries and more cases is necessary to evaluate the impact of European Integration on the "politics" in Europe.

\* An earlier version of the paper was presented at the 2005 Annual Meeting of the Japanese Political Science Association, and the modified version was published in Japanese.

## Notes

[1] For survey of existing research, see Mastenbroek (2005) and Mastenbroek and Kaeding (2006).

[2] For the arguments against the anti-discrimination laws, see Ladeur (2002), Picker (2003), Reichhold (2003), Säcker (2002), Schieck (2003), Wiedemann (2002). Positive responses include Baer (2002), Stölting (2003), Vennemann (2002) and various articles in *Loccumer Protokolle*, 40/03 (2003), 71/03 (2003), 79/04 (2004). See also the discussion at the 2004 Congress of the German Public Law Scholars (*Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer*, 64(2005), 298-435).

[3] Herms and Meinel (2004) wrote "The fundamental problem in Germany lies in the collision of the implementation of European laws and the highly differentiated labour law. ...For the he nature of the draft law is rooted the criteria of the European laws, those who insist on the mitigation of anti-discrimination regulations can only raise their voice to influence the political institutions at the European level."

## Newspapers

FAZ: Frankfurter Allgemeine Zeitung

FTD: Financial Times Deutschland

SZ: Süddeutsche Zeitung

taz: tageszeitung

## Bibliographie

Baer, Susanne, 2002. "Ende der Privatautonomie" oder grundrechtlich fundierte Rechtsetzung? Zur deutschen Debatte um Antidiskriminierungsrecht. *Zeitschrift für Rechtspolitik*, 35(7), 290-294.

BDA (Bundesvereinigung der Deutschen Arbeitgeberverbände), 2005. *Vertragsfreiheit Bewahren! Antidiskriminierung und deutsches Recht*. Symposium der BDA zum Entwurf eines Antidiskriminierungsgesetzes, Berlin, 24.02.2005.

Bell, Mark, 2002. Beyond European Labour Law? Reflections on the EU Racial Equality Directive. *European Law Journal*, 8(3), 384-399.

Börzel, Tanja A., and Thomas Risse, 2000. When Europe Hits Home: Europeanization and Domestic Change. *European Integration online Papers (EIoP)*, 4 (15).

Chopin, Isabelle, Janet Cormack and Jan Niessen (eds.), 2004. *The Implementation of European Anti-Discrimination Legislation: Work in Progress*. Brussels: Migration Policy Group. [<http://www.migpolgroup.com/multiattachments/2476/DocumentName/antiworkprog.pdf>]

CEC (Commission of the European Communities), 2004. *Critical Review of Academic Literature Relating to the EU Directives to Combat Discrimination*.

Cowles, Maria Green, James Caporaso and Thomas Risse, 2001. *Transforming Europe: Europeanization and Domestic Change*. Ithaca: Cornell University Press.

DJB (Deutscher Juristinnenbund), 2001. *Stellungnahme zum Diskussionsentwurf eines Gesetzes*



*zur Verhinderung von Diskriminierungen im Zivilrecht.*

- ECHO (Verein ECHO zur Unterstützung Jugendlicher) 2003. Der Countdown läuft. [<http://www.latzinator.com/grr/echo/resources/Antidiskriminierung.pdf>]
- Edathy, Sebastian, and Bernd Sommer, 2004. Das unterschätzte Projekt. *Berliner Republik*, 2/2004
- EIRO (European Industrial Relations Observatory), 2003a. Thematic Feature - Implementation of the EU Framework Equal Treatment Directive (Germany). <http://www.eiro.eurofound.ie/2003/08/tfeature/de0308101t.html>
- EIRO, 2003b. Thematic Feature - Implementation of the EU Framework Equal Treatment Directive (Austria). <http://www.eiro.eurofound.ie/2003/08/tfeature/at0308204t.html>
- EIRO, 2004a. Overview of the Implementation of the Framework Equal Treatment Directive. <http://www.eiro.eurofound.ie/2004/02/study/tn0402102s.html>
- EIRO, 2004b. Commission Launches Proceedings for Non-Implementation of Anti-Discrimination Directives. <http://www.eiro.eurofound.ie/2004/08/inbrief/eu0408202n.html>
- EIRO, 2004c. Commission Issues Equality and Non-Discrimination Report. <http://www.eiro.eurofound.ie/2004/09/feature/eu0409204f.html>
- Ekengren, Magnus, 2002. *The Time of European Governance*. Manchester: Manchester University Press.
- Featherstone, Kevin and Claudio M. Radaelli, 2003. *The Politics of Europeanization*. Oxford: Oxford University Press.
- Geddes, Andrew and Virginie Guiraudon. 2004. Anti-discrimination Policy: The Emergence of a EU Policy Paradigm Amidst Contrasted National Models. *West European Politics*, 27(2), 334-353.
- Haverland, Markus, 2000. National Adaptation to European Integration: The Importance of Institutional Veto Points. *Journal of Public Policy*, 20(1). 83-103.
- Hell, Matthias, 2005. *Einwanderungsland Deutschland? Die Zuwanderungsdiskussion 1998-2002*. Wiesbaden: Vs Verlag für Sozialwissenschaften.
- Herms, Sascha and Gernod Meinel, 2004. Verboten einer neuen Ära: Das geplante Antidiskriminierungsgesetz. *Der Betrieb*, 57(44). 2370-2373.
- Krickler, Kurt, 2003. Diskriminierung beim Schutz vor Diskriminierung. *Stimme von und für Minderheiten*, 48.
- Kurzer, Paulette, 2001. *Markets and Moral Regulation: Cultural Change in the European Union*. Cambridge: Cambridge University Press.
- Ladeur, Karl-Heinz, 2002. The German Proposal of an "Anti-Discrimination"-Law: Anticonstitutional and Anti-Common Sense. A Response to Nicola Vennemann. *German Law Journal*, 3(5). <http://www.germanlawjournal.com/article.php?id=152>
- Manow, Philip, Armin Schäfer and Hendrik Zorn, 2004. European Social Policy and Europe's Party-Political Center of Gravity, 1957–2003. *MPIfG Discussion Paper*, 04/6.
- Mastenbroek, Ellen, 2005. EU Compliance: Still a 'Black Hole'?. *Journal of European Public Policy*, 12(6), 1103-1120.
- Mastenbroek, Ellen and Michael Kaeding, 2006. Europeanization Beyond the Goodness of Fit: Domestic Politics in the Forefront. *Comparative European Politics*, 4(4), 331-354.
- Niessen, Jan, 2003. Making the Law Work: The Enforcement and Implementation of Anti-Discrimination Legislation. *European Journal of Migration and Law*, 5(2), 249-257.
- Olsen, Johan P., 2002. The Many Faces of Europeanization. *Journal of Common Market Studies*, 40(5), 921-952.
- Picker, Eduard, 2003. Antidiskriminierung als Zivilrechtsproblem? *Juristenzeitung*, 58(11), 540-545.

- Reichhold, Hermann, 2003. Sozialgerechtigkeit versus Vertragsgerechtigkeit - arbeitsrechtliche Erfahrungen mit Diskriminierungsregeln. *Juristenzeitung*, 59(8), 384-393.
- Säcker, Franz-Jürgen, 2002. "Vernunft statt Freiheit!" - Die Tugendrepublik der neuen Jakobiner. *Zeitschrift für Rechtspolitik*, 35(7), 286-290.
- Schieck, Dagmar, 2003. Diskriminierung wegen "Rasse" oder "ethnischer Herkunft" - probleme der Umsetzung der RL 2000/43/EG im Arbeitsrecht. *Arbeit und Recht*, 51(2), 44-51.
- Schmidt, Manfred G., 2000. *Demokratiethorien: Eine Einführung*, 3. Auflage. Opladen: Leske + Budrich.
- Schmidt, Vivien, 2005. Theorizing the Impact of Europeanization on National and Sectoral Policymaking Processes. Paper presented at the annual meeting of the American Political Science Association Marriott Wardman Park, Omni Shoreham, Washington Hilton, Washington, DC, 2005-09-01
- Smismans, Stijn, 2005. How to Be Fundamental with Soft Procedures? The Open Method of Coordination and Fundamental Social Rights. *URGE Working Paper*, Unità di Ricerca sulla Governance Europea (URGE) della Fondazione Collegio Carlo Alberto, 2/2005.
- Solla, Maria Fernanda Perez, 2003, Ein Antidiskriminierungsgesetz für Österreich? Nein, Danke. *Stimme von und für Minderheiten*, 48.  
<http://www.initiative.minderheiten.at/stimme/stimme48c.htm>
- Stölting, Carsten, 2003. Warten auf Antidiskriminierungsgesetz. *Forum Recht Online*, 4/2003, 128-130.
- Stork, Florian, 2005. Comments on the Draft of the New German Private Law Anti-Discrimination Act : Implementing Directives 2000/43/EC and 2004/113/EC in German Private Law. *German Law Journal*, 6(2). <http://www.germanlawjournal.com/article.php?id=574>
- Treib, Oliver, 2003. Die Umsetzung von EU-Richtlinien im Zeichen der Parteipolitik: Eine akteurzentrierte Antwort auf die Misfit-These. *Politische Vierteljahresschrift*, 44(4), 506-528.
- Tsebelis, George, 1995. Decision Making in Political Systems: Veto Players in Presidentialism, Parliamentarism, Multicameralism, and Multipartism. *British Journal of Political Science*, 25(3), 289-325.
- Tyson, Adam, 2001. The Negotiation of the European Community Directive on Racial Discrimination. *European Journal of Migration and Law*, 3(2), 199-229.
- Vennemann, Nicola, 2002. The German Draft Legislation on the Prevention of Discrimination in the Private Sector. *German Law Journal*, 3(3).  
<http://www.germanlawjournal.com/article.php?id=137>
- Winkler, Viktor, 2002. The Planned German Anti-Discrimination Act: Legal Vandalism? A Response to Karl-Heinz Ladeur. *German Law Journal*, 3(6).  
<http://www.germanlawjournal.com/article.php?id=158>
- Wiedemann, Herbert, 2002. Fragen zum Entwurf eines zivilrechtlichen Anti-Diskriminierungsgesetzes. *Der Betrieb*, 55(9), 463-470.
- Zypries, Brigitte, 2003a. Vortrag Bundesministerin Zypries - Kammerversammlung des OLG Celle.  
[http://www.bmj.de/enid/Mai/Hannover\\_\\_21\\_05\\_2003\\_-\\_Die\\_rechtspolitischen\\_Vorhaben\\_der\\_Bundesregierung\\_ez.html](http://www.bmj.de/enid/Mai/Hannover__21_05_2003_-_Die_rechtspolitischen_Vorhaben_der_Bundesregierung_ez.html)
- Zypries, Brigitte, 2003b. Rede Bundesjustizministerin - Zentralverbandstag der Deutschen Haus-, Wohnungs- und Grundeigentümer. [http://www.bmj.de/enid/Juni/Bonn\\_\\_20\\_06\\_2003\\_-\\_Die\\_Garantie\\_des\\_privaten\\_Eigentums\\_im\\_Lichte\\_der\\_Gesetzgebung\\_f7.html](http://www.bmj.de/enid/Juni/Bonn__20_06_2003_-_Die_Garantie_des_privaten_Eigentums_im_Lichte_der_Gesetzgebung_f7.html)
- Zypries, Brigitte, 2004. Bundesjustizministerin Zypries: Diskriminierungsschutz mit Augenmaß.  
[http://www.bmj.bund.de/enid/3d796b3191e5ca80039b364c559e8247,55a304092d09/Juni/Berlin\\_\\_24\\_06\\_2004\\_-\\_Antidiskriminierung\\_in\\_Deutschland\\_\\_Bilanz\\_und\\_Perspektiven\\_der\\_Rechtspol\\_nh.html](http://www.bmj.bund.de/enid/3d796b3191e5ca80039b364c559e8247,55a304092d09/Juni/Berlin__24_06_2004_-_Antidiskriminierung_in_Deutschland__Bilanz_und_Perspektiven_der_Rechtspol_nh.html)