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European Commission against Racism and Intolerance
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COUNCIL OF EUROPE CONSEIL DE L'EUROPE

NATIONAL LEGAL MEASURES TO COMBAT RACISM AND INTOLERANCE IN THE MEMBER STATES OF THE COUNCIL OF EUROPE

GERMANY, Situation as of 31 December 2002

General Overview

Preliminary Note: this table is accompanied by an explanatory note

COUNTRY: GERMANY	Constitutional provisions	Specific legislation	Criminal Law	Civil and Administrative Law	Regional legislation in federal/ regionalised states
Norms concerning discrimination in general	Yes. Art. 3 Cst.	No.	Yes. § 130 Criminal Code.	Yes. See *Beamtenrechtsrahmengesetz, Bundesbeamtengesetz, Ausländergesetz, Betriebsverfassungsgesetz, Versammlungsgesetz*, etc.	Yes.
Norms concerning racism	Yes. Art. 3 Cst.	No.	Yes § 130 Criminal Code. § 220a Criminal Code.	Yes. Refer to the *Betriebsverfas-sungsgesetz.*	No.
Relevant jurisprudence	Yes.	No.	Yes.	Yes.	No.

EXPLANATORY NOTE

GERMANY / GENERAL OVERVIEW

1. Special legislation

In Germany there is no special legislation against racism. A bill introduced in Parliament by the Green Party and the Social Democrats in 1990 was not adopted. A bill introduced by the PDS/Left List at the end of 1993 was rejected, partly because it

was regarded as impossible to implement and partly because a more comprehensive legal solution was planned[1]. A second draft of an Anti-Racism Act introduced by the PDS was likewise rejected in 1997, this time on the ground that the existing constitutional guarantee of non-discrimination already deals with the subject in a satisfactory manner. However, the opposition has called upon the government to elaborate comprehensive anti-discrimination legislation dealing with all forms of discrimination, including in particular racial discrimination. Again in 1998, drafts of legislation against racism were introduced into the lower house of Parliament by the Social Democratic Party[2] and the Green Party (*Bündnis 90/Die Grünen*)[3], but were not further pursued. Directive 2000/43/EG of the Council of 29.06.2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin should, however, force the federal government to create a new legislative framework by July 2003.

The scope of application of the Directive extends to the employment environment, membership of professional organisations, the field of education and to access to publicly available goods and services including housing. Victims of discrimination have a right to legal redress. Following the example set by the rules concerning equality of men and women, the Member States have undertaken an obligation to lighten the complainant's burden of proving the existence of discriminatory conduct.

The German Immigration Commission has recommended the rapid transposition of the EU-Directive implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, so as to make an important contribution to the fight against discrimination. It expects that the law will not only provide legal certainty for the people concerned, but also provide a political statement to the effect that racially motivated discrimination will no longer be tolerated by the State or society in general. Comprehensive explanations of the new rights to the people affected are considered to be necessary[4].

A first discussion draft of a Law to Prevent Discrimination in Civil Law was dated 10 December 2001. The aim was to enact legislation during the summer of 2002, but the draft was withdrawn at the beginning of the summer. In any case, this draft did not foresee a comprehensive anti-discrimination statute and would not have transposed the Directive in its entirety, as it referred only to matters falling directly within the competence of the Federal Interior Ministry. It thus included no rules in the field of employment law or any field of public law and made no provision for the creation of discrimination bureaus. With the commencement of a newly elected legislature, a different approach will now have to be considered. However, according to the Federal Justice Ministry, no new draft has yet been presented.

On the basis of Art. 13 of the EU Treaty, Council Directive 2000/78/EG of 27 November 2000, establishing a general framework for equal treatment in employment and occupation, was passed along with Directive 2000/43/EG of 29 June 2000. In Germany, its transposition has to date been discussed separately from that of the general discrimination directive 2000/43, which has given rise to some criticism.[5]

Germany has been a party to the UN Convention on the Elimination of All Forms of Racial Discrimination since 1969. The German legislature maintains that no specific measures are necessary to ensure the implementation of this Convention. The

legislature considers the constitutional guarantee of equality before the law, provisions against incitement to racial hatred contained in the criminal code and the existing general legal provisions (such as the Statute governing restaurants) sufficient to avoid racial discrimination, including racism practised by individuals in the fields governed by civil law[6].

Following repeated criticism, Germany made a declaration under Article 14 of the Convention for the Elimination of All Forms of Racial Discrimination on 30.08.2001, thereby recognising the competence of the Committee for the Elimination of Racial Discrimination (CERD) to accept individual complaints from Germany.

Germany is also a party to the 1995 Council of Europe Framework Convention for the Protection of National Minorities. Following up on the Declaration[7] of the Federal Republic concerning the application of the Framework Convention, the group of "*Sinti und Roma*" has been accorded the same status as that which had previously been enjoyed by the Danish and Sorb minorities in Germany.

The only measure which has been adopted in Germany in order to implement the Convention is legislation governing the adoption of names in the language of an ethnic minority. The *Minderheiten-Namensänderungsgesetz* (Minorities Name Alteration Act) of 22.7.1997 allows any person belonging to an ethnic minority to change his or her name to the translation of his German name in the language of that minority or to use a phonetical transcript of his name in the language of the minority or to adopt a name which was formerly used in the language of that minority. In 1998, Germany also ratified the Council of Europe's European Charter of Regional and Minority Languages, which entered into force for Germany on 1 January 1999. The minority languages protected in Germany are Danish, Upper and Lower Sorbish, North and Sater Friesian and the "Romane" of the German Sinti and Roma.

In 2002 there was an attempt to reform the law concerning foreign citizens by means of the Immigration Act, intended to essentially enter into force on 1 January 2003.

This legislation passed the upper house of the German parliament in doubtful procedural circumstances, but was nevertheless signed by the Federal President in June 2002. Six *Länder* with conservative governments lodged an invalidation application with the Federal Constitutional Court in July of 2002. On 18 December 2002 the Federal Constitutional Court invalidated the law on constitutional grounds.

Substantively, the Act would have provided for extended immigration by highly qualified workers, the abolition of so-called "tolerance", a stricter enforcement of departure obligations, diverse changes concerning family reunion, certain additional restrictions in asylum law, simplifications for EU-citizens and the introduction of integration courses for immigrants.

2. New legislation

Legislation aimed at supplementing the criminal offences of incitement and use of symbols of unconstitutional organisations was recently passed by Parliament[8] (for details see the explanatory note to Germany/Criminal Law). Additional measures were also taken to ensure effective prosecution of crimes. Most important among

these measures are the granting of wider powers to order remand detention, expedited proceedings and the establishment of a central register of proceedings at the Office of Public Prosecutions. Since our last report, further changes in the criminal law were introduced in the context of the so-called "*Sechstes Gesetz zur Reform des Strafrech*t". This statute, which amends the Criminal Code, entered into force on 1 April 1998; for further details, refer to that part of this report which concerns Criminal Law.

In order to effectively deal with discrimination in employment and occupations, the federal government enacted a new Enterprise Management Act (*Betriebsverfassungsgesetz*[9]) on 28 July 2001. That legislation substantially strengthened the responsibilities of Enterprise Councils (*Betriebsräte*); for further details, refer to that part of this report which concerns Civil and Administrative Law.

3. The *Länder*

3.1. General Remarks

Legislative competences in Germany are distributed between the federation and the states (*Länder*). The states may have their own constitutions, which must, however, reflect the principles of the republican, democratic, social and constitutional state within the meaning of Art. 28 (1) of the German Federal Constitution. Apart from these general conditions, the states are free to design their own constitutions.

Three different types of legislative competence are treated in the German Federal Constitution. Some areas are reserved for federal legislation; in other areas, the federal Parliament may enact framework legislation only; and on a third group of subjects, enumerated in the Constitution, the states may legislate as long as the federal legislature has not exercised its competence. In all the areas not specified in the Constitution, the states are competent.

For the purposes of this opinion, it is interesting to mention two areas in which the federation has framework competence: status of civil servants and universities.

The areas reserved for the states cover schools, media, local government, internal organisation and administration and public safety and order.

In certain spheres, the states conclude agreements with each other, whereby they determine common principles or rules. Such treaties exist with respect to universities and broadcasting, for example.

3.2. Specific provisions

3.2.1. Constitutions

Some state constitutions simply refer to the human rights guarantees stated in the Federal Constitution (e.g. Mecklenburg-Vorpommern and Niedersachsen). Others expressly repeat Art. 3 (3) of the Federal Constitution, i.e. that no one may be disadvantaged or favoured because of his race, parentage, language, homeland, origin, etc. (e.g. Hessen, Sachsen, Saarland, Brandenburg and Bavaria). The Constitution of Thüringen, a relatively recent creation, uses the term "ethnic affiliation" (*ethnische*

Zugehörigkeit) instead of race. In Brandenburg, "nationality" and "language" figure among the criteria not justifying different treatment. However, not all constitutions contain a general provision of equality.

The Constitution of Schleswig-Holstein guarantees that the cultural independence and the political participation of national minorities and ethnic groups will be protected by the State, the municipalities and the districts.

In Berlin and Bavaria, the prohibition of incitement to racial hatred or manifestation of national or religious hatred, has been incorporated into the constitution. The Brandenburg Constitution prohibits public discrimination which violates human dignity.

Furthermore, the Constitution of Berlin also contains a provision specifically directed against national socialism. It applies to persons who abusively attack or endanger fundamental rights, especially in pursuance of national socialist or other totalitarian or belligerent aims. Such persons are deprived of eligibility for public office, of their political rights and of their freedom of association.

3.2.2. Schools

Certain Schools Acts emphasise that schools are open to all children and young persons without regard to their or their parents' nationality, or that the duty to attend school also applies to children and young persons of foreign nationality living in the state (e.g. Berlin and Schleswig-Holstein). The Hessian Schools Act stipulates that no student may be discriminated against because of race, parentage, language, origin, homeland, creed or religion.

The Berlin Schools Act states the principle that students of foreign nationality are to be educated together with German students. However, the percentage of foreign students should not exceed 30 percent or, provided that at least half the foreign students are able to follow classes without language problems, 50 percent. In order to maintain these quotas, foreign students may be sent to other schools or, if this is inconvenient for them, separate classes of foreign students may be formed, their education being basically equivalent to that offered in other classes. Foreign students with a relatively poor command of German may be prepared in special classes for a certain time with the aim of later joining normal classes. In certain types of elementary school, foreign students may be exempted from classes in the first foreign language; they take German classes instead.

The Hessian Schools Act provides for special support of students whose mother tongue is not German, so that they may be educated together with the German students.

Schleswig-Holstein's Schools Act provides that, where a student's mother tongue is not German, it may be acknowledged as a first or second foreign language. In Berlin, the competent minister is empowered to introduce Turkish as a first foreign language.

The Hessian Schools Act guarantees the representation of parents of foreign students in a school's parents' council if the percentage of foreign students at the school attains at least 10%.

Several Schools Acts contain a provision obliging schools to establish religious education for a religious minority of students if this minority reaches a certain percentage of the total. If the minority is smaller than this percentage, the school must provide a room for religious education free of charge. Such provisions exist, for example, in Baden-Württemberg, the Saarland, Niedersachsen and Nordrhein-Westfalen.

3.2.3. Universities

In this sphere, the states have concluded one of the above-mentioned treaties. It contains a provision that citizens of the European Union and other foreign citizens who have passed the German university entrance examination must be treated like German citizens in respect of admission to university.

3.2.4. Media

The Broadcasting Treaty concluded by the states contains a provision prohibiting programmes inciting racial hatred. Certain Broadcasting Acts repeat this prohibition (e.g. Sachsen, Nordrhein-Westfalen, the Saarland, Niedersachsen and Schleswig-Holstein). The programming principles of the Hessian Broadcasting Act are formulated in a broader way, excluding programmes which contain prejudices or disparagements based upon the nationality, race, colour, religion or ideology of an individual or a group. Certain Broadcasting Acts restrict transmission times for programmes which are wholly or in part identical with publications included in the index kept pursuant to paragraph 1 of the Act on the Dissemination of Publications which are Morally Harmful to Youth (refer to the table entitled "Criminal Law: Germany"); even at night time, such programmes are only allowed if the possible harm to youth is not serious (e.g. Schleswig-Holstein).

The Media Services Treaty, concluded by the states at the beginning of 1997, which lays down uniform rules for communication and information services providers, also contains a provision (§ 8 of the Treaty) prohibiting offers of services which incite to racial hatred or defame national, ethnic or religious groups. Relying upon § 8, read together with § 18 of the Media Services Treaty, the administratively competent district authorities at Düsseldorf in February of 2002 issued a blocking order to providers established in the land of Nordrhein-Westfalen, requiring them to block access to two US-based websites with neo-nazi content.[10]

3.2.5. Civil Servants Acts

Most states' Civil Servants Acts repeat the principle laid down in the federal directory statute on the law governing civil servants, which says that appointments must be made without regard to an applicant's sex, race, faith, religious or political opinions, origin or relations.

3.2.6. Holidays

In most states, only Catholic and Protestant holidays are officially acknowledged as religious holidays. In Bavaria, enumerated Israelite holidays are acknowledged as well. In a few other states, employees and students professing other creeds are expressly guaranteed the right to attend religious services on the religious holidays of their respective religions without being subjected to any consequences other than loss of pay for the working hours missed (e.g. Brandenburg, Berlin and Hessen).

3.2.7. Others

The Brandenburg Local Government Act provides that foreigners' councils may be formed. By-laws of local authorities with more than 200 foreign inhabitants shall establish rules for the election of these councils by the foreign inhabitants. The Communities Act further provides that special commissioners may be appointed for the social integration of foreigners.

The Political Parties Act of the former German Democratic Republic banned the foundation and activities of parties which pursue fascist, militarist or anti-humanitarian aims; which express or disseminate religious, racial and ethnic hatred; which discriminate against persons or groups because of their nationality or which try to realise their aims by violence or by threatening violence. The Treaty of German Reunification[11] declares that only two paragraphs of the Act, which do not comprise the aforementioned provisions, shall continue to be applicable in the territory of the former GDR.

The regulation of police activities is in Germany a matter reserved to the *Länder*. However, according to a decision of the Federal Interior Minister, the police forces of the *Länder* may be assisted by members of the Federal Border Protection Authority when fighting right-wing and xenophobic criminality. A noteworthy example of intensive cooperation between Federal and *Länder* authorities in this field is the so-called "*Verstärkungseinheit Niederlausitz*" (Reinforcement Unit in the Niederlausitz Region), which has been allocated since 16 January 2001 to specifically deal with the criminal activities of right-wing circles in Brandenburg. According to the federal government, the necessary investments have paid dividends: right wing circles appear to be shaken in the face of a combination of preventive and repressive measures.[12]

4. *Ausländerbeauftragte*

4.1. The Federal Government's Commissioner for the concerns of foreigners

In 1978, the Federal Government established, by governmental decision, the institution of the "Commissioner for the integration of foreign workers and their family members". In doing so, it recognised that the majority of the so-called "guest workers" admitted to Germany on a temporary basis in previous years had not returned to their home countries, but rather chose to stay in Germany. In 1991, the name was changed to "the Federal Government's Commissioner for the concerns of foreigners", thereby taking into account that foreigners in Germany were not merely migrant workers any more and that their concerns went beyond integration. In 1997, finally, the status and powers of the Commissioner were formally regulated by inserting a new section 8 into the Aliens Act. This step was motivated by a desire to

strengthen the Commissioner's role in public life and to promote his reputation in the eyes of the public[13].

The Commissioner deals with the concerns of almost all foreigners legally residing in Germany, with the exception of applicants for asylum. The Federal Government's Commissioner has 16 staff members. Institutionally, this staff is drawn from the Federal Ministry for Labour and Social Affairs.

The Commissioner assists and advises the government in matters concerning foreigners in Germany. The Commissioner must be involved in relevant legislative initiatives and maintains contacts with politicians working in that field. The Commissioner deals with complaints, requests or suggestions of German and non-German private persons. The tasks of the Commissioner include provision of information and support of initiatives concerning the integration of foreigners. The new provisions of the Aliens Act explicitly refer to the Commissioner's competence to counteract improper discrimination against foreigners. If discrimination is practised by or on behalf of public authorities, the Commissioner may request comments from the relevant authority and lodge a report with a supervisory instance.

Each year, the Commissioner reports on the situation of foreigners in Germany. This report summarises facts, indicates problems and makes recommendations for their resolution. It deals with the social, political and legal aspects of such matters as education, employment, social security, housing, religion, political participation, discrimination by legislation and by private persons, violence against foreigners and the law concerning aliens.

4.2. Other commissioners

Ausländerbeauftragte also exist at the level of the *Länder*. However, not every state has decided to establish such an institution. That of Berlin, one of the oldest and supposedly the biggest institution of that kind, has a staff of 30. Similar commissioners have been introduced by Niedersachsen, Rheinland-Pfalz and Hamburg.

A growing number of municipalities have also nominated commissioners or foreigners' councils. The tasks and competences of all of these non-federal commissioners are defined by the bodies that establish them and they may differ considerably.

At the moment, there are more than 100 of those commissioners in Germany.

5. Accompanying Measures in the field of Racism

Since the previous update of this report, in pursuance of the Coalition Agreement and a Motion[14] by the governing parties, as well as the FDP and the PDS, calling for an umbrella organisation to introduce the measures considered to be necessary in this field, the Federal Ministries of the Interior and of Justice on 23 May 2000 established the so-called “Alliance for Democracy and Tolerance – against Extremism and Violence“. This Alliance, consisting of an office, an advisory council[15] and a support network, has the objectives of contributing to the social reinforcement of the so-called

constitutional consensus and in particular to co-ordinate persons, groups, initiatives and programmes directed against xenophobic, racist and antisemitic tendencies.

"XENOS – Living and Working in Diversity", ENTIMON (a programme for youth), "CIVITAS - Initiative against Right-Wing Extremism in the New *Länder*" and the disengagement programme for members of right-wing circles called "EXIT" are examples of programmes which have already been placed under the roof of this Alliance.

Constitutional Law: Germany

Preliminary Note: this table is accompanied by an explanatory note

Constitutional Provision	Scope	Relevant jurisprudence	Remarks
Art. 2 Free development of personality.	Everyone shall have the right to the free development of his personality.	BVerfG, 13 April 1994, NJW 1994, 1779: Denial of the holocaust would violate the rights of personality of Jews living in Germany.	
Art. 3 (1) and (3) Equality.	(1) All persons shall be equal before the law. (3) No one may be disadvantaged or favoured because of his sex, parentage, race, language, homeland or origin, faith, or religious or political opinions. No one may be disadvantaged because of his physical disability.	BVerfG, 14 February 1968, BVerfGE 23, 98: A racist law passed under the National Socialist regime, the effects of which still persist, violates Art. 3 (3).	
Art. 5 (1) and (2) Freedom of expression.	Everyone shall have the right freely to express and disseminate his opinion in speech, writing and pictures. Freedom of expression,	BVerfG, 13 April 1994, NJW 1994, 1779: A condition imposed on the organiser of a political meeting to ensure that the persecution of Jews by the National Socialist regime	

	information, the press and reporting (guaranteed under Art. 5 (1)) are limited by the general laws, the provisions of law for the protection of youth, and the right to inviolability of personal honour.	would not be denied does not violate the organiser's fundamental right to freedom of expression. Assembly Act § 5 n° 4 (see the report entitled "Civil and Administrative Law: Germany"), a law limiting freedom of expression within the meaning of Art. 5 (2), was held constitutionally valid. Federal Constitutional Court, determination of 6.9.2000 - 1 BvR 1056/ 95 : It is necessary to have regard to the legal requirements for characterising expressions of opinion which may be interpreted in more than one sense. The characterisation of an opinion expressed by a journalist essentially depends upon the fact of whether her description of someone as a Jew was intended to be informative or defamatory. If the title is ambiguous, the text must also be taken into

		account in making that determination.	
Art. 8 Freedom of Assembly	All Germans have the right, which may not be subjected to registration or authorisation requirements, to assemble peacefully and unarmed. This right may be limited by statute or under the authority of a statute as concerns assemblies in the open air.	The Federal Constitutional Court has held as a matter of principle, that extreme right-wing sentiments may not be treated in Deutschland as anything other than opinions. Extreme right-wing sentiments are indeed to be tolerated as long as the criminal law is not infringed. "Citizens are free to question the fundamental values of the Constitution, as long as they do not thereby endanger the rights and freedoms of others". BVerfG v. 24.3.2001, NJW 2001, 2069. By way of exception, the Federal Constitutional Court has however prohibited an assembly on 27 January, Holocaust Memorial Day, BVerfG v. 26.01.2001, DVBl. 2001, 558.	In contrast to the Federal Constitutional Court, other courts and some commentators argue that right-wing extremism is per se incompatible with the Constitution: VGH Kassel v. 17.9.1993, NVWZ-RR 1994,86; OVG Münster v. 23.3.2001, NJW 2001,2111, OVG Münster v. 12.4.2001, NJW 2001, 2113; und OVG Münster v. 29.6.01, NJW, 2001, 2986; Battis/Grigoleit, NVWZ 2001, 122 und 2052ff.
Art. 9 (2) Freedom of association.	Associations, the purposes of which conflict with criminal laws or which are directed against the constitutional order or the concept of		See the table entitled "Civil and Administrative Law: Germany": § 1 *Versammlungsgesetz* (Assembly Act) and § 3 *Vereinsgesetz* (Associations Act).

	international understanding, are prohibited.		
Art. 21 (2) Political Parties.	Parties which, by reason of their aims or the behaviour of their adherents, seek to impair or abolish the free, democratic basic order, shall be declared unconstitutional by the Federal Constitutional Court.	BVerfG, 23 October 1952, BVerfGE 2, p. 1: The Court declared the *Sozialistische Reichspartei*, a party close to the NSDAP, unconstitutional and dissolved it.	So far, only 2 parties have been declared unconstitutional under this Article. On 30 January and 30 March 2001, the federal government and each of the two houses of parliament (*Bundestag* and *Bundesrat*) applied to the Federal Constitutional Court to have the NPD prohibited.
Art. 116 (2) Restoration of German citizenship.	German citizens who, between 1933 and 1945, were deprived of their citizenship on political, racial or religious grounds, as well as their descendants, are entitled to German citizenship on application. Where such persons established their domicile in Germany after 1945, they shall be deemed not to have been deprived of their German citizenship unless they expressed an intention to renounce it.		

EXPLANATORY NOTE

GERMANY / CONSTITUTIONAL LAW

1. Article 3 (3): Equality

1.1. Related case-law: BVerfG, 14 February 1968, BVerfGE 23, p. 98 et seq.

This case is one of the rare constitutional cases, if not the only one, decided on the basis of the racial criterion set out in Article 3 (3). The case dealt with a law enacted under the National Socialist regime and subsequently repealed, which deprived emigrating Jews of their German citizenship. According to that law, a Jewish German citizen lost his citizenship when he emigrated to the Netherlands in 1933. As a result, Dutch succession law, rather than German succession law, applied upon his death. The heirs who would have inherited under German law (but not under Dutch law) argued that the Nazi law violated Article 3 (3) because it discriminated against Jews. The German Constitutional Court found that the Nazi law contradicted the fundamental principles of law, especially the prohibition of arbitrariness as currently expressed in Article 3 (1) and (3). As a result, the Nazi law was declared void. Unless the person who emigrated expressed an intention to give up his German citizenship, he should not be regarded as having lost it under the Nazi law[16].

1.2. Remarks

The first paragraph of Article 3 of the Constitution contains a general equality clause which provides that: "All persons shall be equal before the law". The scope of application of this provision includes cases where discrimination is based on one of the reasons listed in paragraph 3 of Article 3.

It is generally accepted that the term "race" is not to be understood in a specifically scientific sense. It refers to groups with certain hereditary characteristics and is intended especially to prevent discrimination against persons identified by the colour of their skin, people of mixed race, Jews, Roma/Gypsies, etc[17].

The term "race" is not clearly delineated from the other terms set out in Article 3. In particular, there is an overlap between "race" and "parentage". This vagueness has not led to any disputes due to the broad interpretation of these terms by the courts.

2. Article 5 (Freedom of Expression)

2.1. Related case-law: BVerfG, 13 April 1994, NJW 1994, 1779-1781.

In this case the complainant organised an assembly. The main speaker of the assembly was a revisionist historian propagating the theory of the Auschwitz Hoax. The competent authorities required the complainant to take appropriate measures to ensure that no criminal offences would be committed at the assembly, in particular those contained in §§ 130, 185, 189 and 194 StGB. The legal basis for the imposition of these measures is § 5 n° 4 of the Assembly Act. The appellant claimed that this decision violated his right to freedom of expression under Art. 5 (1) of the Constitution. The court held that this was not the case.

First, statements of fact are not protected to the same extent as expressions of opinion. In fact, where these statements are deliberately or demonstrably untrue, they fall outside the scope of the guarantee of freedom of expression.

Where a factual statement and an expression of an opinion are so closely linked that no clear separation can be made, it should in principle enjoy protection under Art.5(1) of the Constitution. However, freedom of expression is not guaranteed without limitation, as is made clear by Art. 5 (2).

§ 5 n° 4 of the Assembly Act contains such a limitation. It is constitutionally valid because it is not directed against certain expressions of opinion but rather complements the limitations contained in the Criminal Code. Accordingly, measures under § 5 n° 4 of the Assembly Act can only be taken when it is likely that offences which are punishable in any case will be committed.

Judicial interpretation and application of § 5 n° 4 of the Assembly Act, read in conjunction with § 185 of the Criminal Code, did not violate the complainant's rights either. In this context, the court confirmed the position consistently taken by the courts, that denial of the persecution of Jews under the National Socialist regime constitutes an insult to Jews living in Germany.

The complainant's right of freedom of expression had to be balanced against the potential injury to their right to protection of their honour. Given the weight of the insult, the authorities were right in ranking the protection of personality before the freedom of expression.

Since this was sufficient to reject the complainant's submission, the court did not treat any issues in the context of paragraphs 189 or 130 of the Criminal Code.

The Court pointed out that the same principles hold true for the relationship between the freedom of assembly and the rights of personality.

3. Article 21 (2): Political parties

3.1. Related case-law: BVerfG, 23 October 1952, BVerfGE 2, p. 1 et seq.

In this decision, the Federal Constitutional Court declared the so-called *Sozialistische Reichspartei* unconstitutional and ordered its dissolution. The Court stated several reasons why the party endangered the "free, democratic basic order". The reasons included the party's fight against a multi-party system, the party's anti-democratic internal structure, which was organised according to the *Führerprinzip*, the party's close relationship to the former NSDAP and the party's attitude towards Jews. With respect to the latter, the Court found that the party, as was shown by the behaviour of its adherents, disregarded fundamental human rights, especially the dignity of man, the right to the free development of personality and the principle of equality before the law. This was demonstrated in particular by the party's efforts to revive antisemitism. Antisemitism was not contained in any of the party's statutes or programmes. On the contrary, the party's statutes stated that a person's race was not the deciding factor for his admission to the party. Nevertheless, it was found that the party's antisemitic attitude was sufficiently demonstrated by a number of Articles and notes published in the party's magazines and letters.

The Court used the decision to establish a definition of "free, democratic basic order" by reference to which racist parties can be qualified as unconstitutional. The Court

included in its definition of a "free, democratic basic order", the respect for human rights as set out in the German Constitution and in particular, the right to life and the free development of the person.

3.2. Remarks

Except for a case concerning the communist party, the case cited above is to date the only decision in which Article 21 (2) was applied.

Criminal Law: Germany

Preliminary Note: this table is accompanied by an explanatory note

Offence	Source	Scope	Sanction	Relevant jurisprudence	Remarks
Continuing on the activities of a political party which has been declared unconstitutional.	§ 84 Criminal Code.	Maintaining the organisational structure as ringleader or supporter. Supporting the organisational structure or engaging in activities as a member.	Imprisonment from 3 months to 5 years. Imprisonment for up to 5 years or a fine.		Objects obtai through or us or designed fo use in the preparation o commission o the crime may confiscated according to § 92b Criminal Code.
Continuing on the activities of an organisation which has been prohibited.	§ 85 Criminal Code.	Maintaining the organisational structure as a ringleader or supporter. Engaging in activities as a member or supporting the organisational structure.	Imprisonment for up to 5 years or a fine. Imprisonment for up to 3 years or a fine.		Objects obtai through or us or designed fo use in the preparation o commission o the crime may confiscated according to § 92b Criminal Code.
Dissemination of propaganda of unconstitutional organisations.	§ 86 Criminal Code.	Covers the dissemination in Germany and the production, storage, importation and exportation for purposes of dissemination	Imprisonment for up to 3 years or a fine. If the offender's guilt is minimal, the	BVerfG, 3 April 1990, NStZ 1990, 333: Satirical depictions do not lose the protection of the freedom of art only because their object is a symbol	Objects relati to the commission o the crime may confiscated according to § 92b. Criminal Code

		in Germany or abroad. Limited to propaganda which is directed against the free, democratic basic order or the concept of international understanding. If the action serves to further civic educational purposes, to protect the public from unconstitutional activities, or to promote the arts and sciences, research and teaching, or the reporting of contemporary events, history or similar purposes, it is exempt from the scope of the offence.	court may refrain from imposing punishment.	of a former Nazi organisation.	The amendm of 28 October 1 extended the scope of § 86 the productio keeping in supply and exportation fo purposes of dissemination abroad.
Use of the symbols of unconstitutional organisations.	§ 86a Criminal Code.	Covers the dissemination and public use of specified symbols in Germany and the production, storage, importation and exportation of objects depicting such symbols for	Imprisonment for up to 3 years or a fine. If the offender's guilt is minimal, the court may refrain from imposing punishment.		Objects relati to the commission o the crime ma confiscated according to 92b. Crimina Code. The extensio symbols whic are similar to might be

		purposes of dissemination or public use in Germany or abroad. Symbols include flags, insignia, uniforms, slogans and forms of greeting as well as symbols which are similar to and might be confused with such symbols. If the action serves to further civic educational purposes, to protect the public from unconstitutional activities, or to promote the arts and sciences, research and teaching, or the reporting of contemporary events, history or similar purposes, it is exempt from the scope of the offence.			confused with "genuine" symbols was introduced by the amendme of 28 October 1994. The sar is true for the extension to production, keeping in supply and exportation fo purposes of dissemination abroad.
Incitement to hatred and violence against segments of the population.	§ 130 Criminal Code.	(1) n° 1: Arousing hatred against segments of the population or fomenting arbitrary or	Imprisonment from 3 months to 5 years.	OLG Celle, 17 February 1982, NJW 1982, 1545: Denying the mass extermination of Jews during the Third Reich	If the action serves to furth civic educatio purposes, to protect the public from unconstitutio

	violent action against them or n° 2: attacking human dignity, by insulting, maliciously degrading or defaming segments of the population in a manner likely to disturb the public peace. (2) Dissemination of publications or broadcasts which incite hatred against segments of the population or against a national, racial, religious or ethnically distinct group, which foment arbitrary or violent action against them or which attack human dignity, by insulting, maliciously degrading or defaming segments of the population or one of the above-mentioned groups. (3) Publicly or in an assembly approving of, denying or playing down, the genocide	Imprisonment for up to 3 years or a fine. Imprisonment for up to 5 years or a fine. Imprisonment for up to 3 years or a fine.	(Auschwitz Hoax) is not *per se* an "attack on human dignity". BGH, 26 January 1983, BGHSt 31, 231 and BGH, 15 March 1994, NJW 1994, 1421: Blaming the Jews for having created the "legend of extermination" is an attack on human dignity and constitutes a crime punishable under § 130 (1) n° 1 (and n° 3 of the old legislation which corresponds to n° 2 of the new legislation) OLG Frankfurt, 8 January 1985, NJW 1985, 1720: A sign in front of a restaurant prohibiting Turks from entering is not an "attack on human dignity" but a mere discrimination against the Turks living in Germany. BGH, 6.April 2000, NJW 2000, 2217; BGH 10.April 2002- 5 Str 485/01: A denial may also take the form of pleadings entered by an attorney at	activities, or t promote the a and sciences, research and teaching, or th reporting of contemporary events, histor similar purpo it is exempt fr the offences i subs. (2), (3) (4). Before the amendment o 28 October 19 an attack on human dignit was also required for th actions descri in subs. (1) n° Before the amendment o 28 October 19 the offence described in subs. (2) was contained in § 131, the sanct being imprisonment up to 1 year o fine. The term "race" used therein was replaced by th new, more general phras Subs. (3) and were introduc by the amendment o 28 October 19 Objects obtai through or us

		committed under the National Socialist regime, in a manner likely to disturb public peace. (4) Dissemination of publications with the contents described in subsection(3).		law. An attorney can only rely upon the right to defend his client if his statements are actually made in defence of the client and not for purposes unrelated to legal representation.	or designed fo use in the preparation o commission o the crime may confiscated according to Criminal Cod
Disturbing the peace of the deceased.	§ 168 Criminal Code.	Desecrating human remains or their sepulchres, or a memorial; destroying or damaging a burial site or a memorial	Imprisonment for up to 3 years or a fine.		Although littl published jurisprudence exists, statisti indicate that i 1993 there we 57 cases of desecrations o Jewish cemeteries.
Insult.	§ 185 Criminal Code.	If committed without violence. If committed with violence.	Imprisonment for up to 1 year or a fine. Imprisonment for up to 2 years or a fine.	BGH 28 February 1958, BGHSt 11, 207 and BGH June 8, 1983, BGHSt 32, 9: An insulting statement about the Jews as a group is punishable under § 185. BGH 18 September 1979, BGHZ 75, 160: Calling the mass extermination of Jews under the Third Reich a "zionist lie" (Auschwitz Hoax) is an insult under	§ 194 Crimin Code: As a ru an insult may prosecuted on upon a forma complaint. However, if t crime was committed in public and if victim, as a member of a group, suffere persecution under Nationa Socialism or other form of despotism or tyranny, no formal compl is required. T victim may, however, obj

			§ 185. BVerfG, 13 April 1994: § 185 does not violate the freedom of expression to the extent that it prohibits denial of the Holocaust. BayObLG, 17.12.1996, NStZ 1997, 283 The simple denial of the mass extermination of Jews can constitute a criminal offence under §§ 185, 189. There are no requirements as to the manner in which the denial was expressed, for example in a dogmatic or apodictic way.	to the prosecution.
Defamation of the memory of the dead.	§ 189 Criminal Code.	Imprisonment for up to 2 years or a fine.	BGH, 15 March 1994, NJW 1994, 1421: The BGH criticised the finding of the lower court that a denial of the mass extermination of Jews constituted a defamation of the dead. The BGH pointed out that a differentiation had to be made: this offence could only be prosecuted *ex officio* in so far as the victims were Jews who died in	§ 194 Crimin Code: As a ru an insult may prosecuted or upon a forma complaint by relative. However, if t crime was committed in public and if deceased lost life as a victi of National Socialism or other form of despotism or tyranny, no formal compl is required. T

				the concentration camps. To the extent that the denial defamed Jews who survived the holocaust and died afterwards, prosecution of the offence would require a formal complaint by a relative of the deceased.	relatives may however, obj to the prosecution.
Murder.	§ 211 Criminal Code.	Killing a human being with a base motive.	Imprisonment for life.	BGH, 7 September 1993, NStZ 1994, 124: "Base motives" include racism. If the killing is not motivated mainly by racism but by an intention to impress a racist group, the offender is considered to have adopted the group's racist motives. As a result, he is considered to have acted with a base motive.	
Genocide.	§ 220a Criminal Code.	Any of the following acts done with the intention of wholly or partially destroying a national, racial, religious or ethnically distinct group as such: 1. killing	Imprisonment for life; in less serious cases falling under numbers 2 to 5, imprisonment for not less than 5 years.		

		members of the group; 2. inflicting serious physical or mental injury on members of the group; 3. subjecting the group to living conditions likely to cause death to all or some of the members; 4. imposing measures designed to prevent births within the group; 5. forcibly transferring children from one group to another.			
Dissemination of publications which are morally harmful to young persons.	§ 21 *Gesetz über die Verbreitung jugendgefährdender Schriften* (Law on the dissemination of publications which are morally harmful to young people).	Offering certain publications outside enclosed shops. While direct offers to supply children and young persons and dissemination in places frequented by children and young persons are specifically prohibited, the law goes on to generally prohibit	Imprisonment for up to 1 year or a fine.		

	dissemination elsewhere than on enclosed business premises. The relevant publications are those which have been proscribed because they stimulate racial hatred, (§ 1) or incite racial hatred as defined by § 130 (2) of the Criminal Code (§ 6).	

EXPLANATORY NOTE

GERMANY / CRIMINAL LAW

1. General Remarks

1.1. Overview

The German Criminal Code contains a provision most directly combating racism: § 130, which penalises criminal agitation and incitement to racial hatred. Another group of provisions protecting the honour of members of a racial group are §§ 185 *et seq*. which prohibit different forms of insult, both verbal and physical. Finally, there are the offences which are mainly intended to combat the revival of National Socialism, but which are formulated in a more general way. Crimes relating to religion and ideology have not been included in the chart, because, if the relevant actions are at the same time directed against those segments of the population which practice particular religions, § 130 alone is applicable, to the exclusion of those subsidiary offences, provided human dignity is violated[18]. Moreover, there is almost no recent jurisprudence on attacks against other religions than Christianity.

1.2. Historical development

After World War II, legislation intended to fight racism was first adopted on the *Länder* level. For example, on 13 March 1946, Bavaria passed an Act prohibiting racial arrogance and hatred against certain segments of the population. A second Act banning the use of symbols of prohibited organisations was passed on 27 March 1952. Similar legislation was passed in Lower Saxony and Bremen[19].

On the federal level, discussions concerning the introduction of a law against incitement began as early as 1950. However, it was only in 1960, after an antisemitic

and Nazi wave of hatred and violence, that the 6th amendment of the Criminal Code was adopted. The amendment modified § 130 (incitement to hatred and violence against segments of the population) and introduced § 86 a (use of symbols of unconstitutional organisations) and § 189 (3) (elimination of the lodging of a formal complaint as a technical prerequisite to prosecutions for defamation of the dead when the deceased was a victim of despotism or tyranny). The corresponding provisions in the statutes of the Länder were abolished.

By the 21st amendment of the Criminal Code, this removal of the need for a formal complaint was extended to all cases of insult where the victim was part of a group persecuted under the National Socialist Regime. It was the legislature's intention "to provide for the prosecution of denials of the wrong committed under National Socialism or other despotisms or tyrannies"[20].

1.3. New legislation

In 1994, Parliament passed legislation[21] extending criminal liability for neo-Nazi, racist and xenophobic attacks.

The legislation amended § 86 (which penalises the dissemination of propaganda of unconstitutional organisations) to cover the exportation of this propaganda as well.

As a reaction to the strict interpretation by the courts[22] of § 86a (use of the symbols of unconstitutional organisations), the legislation introduced a new subparagraph penalising the use of symbols which are similar to, and might be confused with, banned symbols.

The legislation also restructured §§ 130 and 131, concentrating the offences dealing with racism in § 130. Those parts of § 131 which dealt with racial hatred became a second subsection of § 130, and racial hatred was redefined as "hatred against a national, racial, religious or ethnically distinct group". The requirements for punishment under the first subparagraph of § 130 were reduced: An attack against human dignity, which constituted an element of § 130 and often hindered convictions under this Article, is now only required in the case of more severe punishment for insulting, maliciously degrading or defaming segments of the population; inciting hatred against segments of the population or fomenting arbitrary or violent action against them is punishable under § 130 independently of whether human dignity is attacked or not.

In the past the so-called "Auschwitz Hoax" was punishable as an insult, defamation of the memory of the dead or criminal agitation. Under the old legislation, the mere denial of the mass extermination of Jews under the National Socialist regime without accusing the Jews of having invented the mass extermination was not an offence of criminal agitation, but only an insult or defamation subject to a lesser penalty[23]. The new legislation added a subsection to § 130 providing that the denial, approval or playing down, publicly or at an assembly, of the genocide committed under the National Socialist regime, in a manner likely to disturb the public peace, is punishable by imprisonment of up to 5 years or a fine. This also applies to publications with this content.

Finally, not least with respect to violent attacks against aliens, penalties for causing bodily harm were increased.

Further changes, which have at least an indirect link to racism and neo-nazi aggression against foreigners in Germany, were introduced into the Criminal Code in 1998 within the framework of the "*Sechstes Gesetz zur Reform des Strafrechts*". On the one hand, offences involving actual bodily harm are henceforth subject to substantially higher penalties, while on the other hand, attempted causation of actual bodily harm is now generally punishable. The relevant comment of the federal government, in its report under Article 9 of the International Convention for the Elimination of all Forms of Racial Discrimination, is that while these measures are not directly related to criminal offences motivated by right-wing extremism, it is nevertheless also in that context that they emphasise the importance which the federal government gives to the legal right to "physical integrity". Amendments concern also the offences set out in § 127 StGB (formation of armed militia) and § 168 StGB (disturbance of the peace of the dead). As the terms of § 127 StGB have been redrafted and now extend to cover groups with access to dangerous implements other than arms, that provision might now be of relevance to right-wing extremist groups armed with baseball bats, for example. As a result of the extension of the scope of application of § 168 to cover funeral premises and memorials to the dead in general, although they are not burial grounds, grossly improper behaviour, for example in former concentration camps, can constitute an offence even if nothing is damaged or destroyed.

Two of the *Länder*, Brandenburg and Mecklenburg-Vorpommern undertook additional efforts in the year 2000 to bring legislation concerning hate crimes into the upper house of the federal legislature.

The principal aim of the Brandenburg draft[24] was the insertion of a new § 224a StGB. This provision foresaw an offence, punishable by imprisonment for between one and ten years, of inflicting actual bodily harm on the basis of hatred against a part of the population or against a group characterised by nationality, race, religion or ethnicity or some other base motivation. Another purpose of the draft was to ensure that propaganda offences and public incitements to hatred committed by Germans abroad would be punishable regardless of whether that conduct is criminal under the law of the place where it occurred. The essence of Mecklenburg-Vorpommern's draft[25] was to introduce into § 46, para. 2 an independent sentencing guideline for crimes committed on the basis of "hatred or other base motivations against parts of the population or groups characterised by nationality, race, religion or ethnicity".

These drafts did not elicit an enthusiastic reaction on the part of the other *Länder*. The drafts were sent to committees for further examination, but such examination was subsequently adjourned sine diem. Many *Länder* have indicated a desire to carry out studies of practice before further drafts on this subject are tabled in the upper house. Brandenburg and Mecklenburg-Vorpommern have now decided to await the finalisation of the EU Council's Framework Decision on Combating Racism and Xenophobia, which they hope will provide new impetus to German legislative initiatives. The Brandenburg Ministry of Justice and European Affairs has indicated that it will probably not pursue the current draft in its present form. An alternative

might be to introduce racist motivations as a sentencing criterion in § 46 StGB, following the American example.

2. Recent Decisions

The *Bundesgerichtshof* (*BGH*, Federal Court of Justice) has recently dealt with two cases in which the accused denied the mass extermination of Jews in Nazi Germany. This case was decided under the old legislation and illustrates the problems associated with this offence under that legislation.

BGH, 15 March 1994, NJW 1994, 1421-1423[26]

This case was decided under the old legislation and illustrates the problems associated with this offence under that legislation.

The *BGH* concluded that it was not necessary to produce evidence on the mass extermination of the Jews. This was accepted as a proven historical fact.

With respect to § 130 of the Criminal Code, the court repeated that an attack upon human dignity is required, in the sense that the victim's right to live as an equal person in society is denied and that he is treated as an inferior being. The attack must be directed against the very heart of the personality. Simple violations of the rights of personality only constitute attacks upon the person's honour, not upon his human dignity.

The court further pointed out that, according to the facts that had been stated by the lower court, an insult (Criminal Code § 185) had probably been committed against those Jews who were persecuted during the Nazi-regime and who survived and are currently a part of the german population. Likewise it was probable that the defendant was guilty of defamation of the memory of the dead (Criminal Code § 189). However, the BGH pointed out that a differentiation had to be made: this offence could only be prosecuted *ex officio* in so far as the victims were Jews who died in the concentration camps. To the extent that the denial defamed Jews who survived the holocaust and died afterwards, prosecution of the offence would require a formal complaint by a relative of the deceased[27].

BGH, 12 December 2000 [28]

On that date, the German Federal Court of Justice heard a case which has often been cited and which sheds light on the issues arising in connection with racism on Internet. An Australian citizen of German origin wrote an article and a circular letter, in which he denied the attempted extermination of the Jews (*actus reus* of the offence referred to as the “Auschwitz lie”) and published these on the Internet in Australia and in the English language. The Australian citizen was arrested upon entering Germany. The question presented for judicial review by the Federal Court of Justice was whether German criminal law could and should be applied in this case, given that the place of commission was obviously not in Germany, but in Australia.

The offence of public incitement to hatred under § 130, paras. 1 und 3 StGB, which was considered by the Federal Court of Justice, is an example of an offence of

potential endangerment (*potentielles Gefährdungsdelikt*), which is in turn a subcategory under the heading of offences of abstract endangerment (*abstrakte Gefährdungsdelikte*)[29.] There is an unresolved debate in respect of endangerment offences as to whether it is even possible to commit the predicate offence. German criminal law theory distinguishes between endangerment offences and injurious offences (*Verletzungsdelikte*), a substantive element of which is the actual infringement of the protected right or freedom.[30] The particular characteristic of abstract endangerment offences, like the one with which the Federal Court of Justice was concerned in this case, is that they do not involve any substantive requirement of the accused having actually endangered the protected right or freedom. Instead, the legislature has chosen to punish the creation of an abstract danger, because it considers that conduct to be dangerous in itself. Against that background, most of the commentators proceed on the assumption that the successful realisation of the accused's intentions is not an element of an abstract endangerment offence.[31] The Federal Court of Justice came to a different conclusion, however: proceeding from the *ratio legis* of § 9 StGB, it held that German criminal law – even when the *actus reus* is committed abroad and particularly in internet cases – is to be applied whenever an infringement or endangerment, the avoidance of which is the purpose of the relevant provision, occurs within the country. That means, according to the Court, that the meaning of the concept of "successful completion as an element of the offence", as used in § 9 StGB, cannot be determined on the basis of the general definitional principles applicable to criminal offences. In these circumstances, the Court considered that the characterisation of the particular offence as an injurious offence or as a concrete or abstract endangerment offence is not decisive. Instead, each offence must be individually analysed in order to identify the successful completion which corresponds to the particular elements of the offence. According to the Court, the meaning of "successful completion", as that term is used in § 9 Abs. 1 Var.3 StGB, is not limited to the infliction of an injury or the creation of a concrete danger, but may in the context of a particular offence refer to one of the acts of the accused. The offence of public incitement to hatred under § 130 Abs. 1 und 3 StGB, which had to be analysed by the Court in the current proceedings, requires as its *actus reus* some conduct which is concretely capable of disturbing public order. The Court identified that requirement as constituting the necessary element of successful completion in the sense employed in § 9 Abs. 1 Var. 3 StGB.

3. Remarks on Procedure

3.1. Participation of the victim

As previously mentioned, prosecutions of insults are generally dependant upon the lodging of a formal complaint (§ 194 Criminal Code) by the victim. If the victim is dead, this right passes to his close relatives. However, to enable prosecution of insults or defamation of the memory of the dead in cases where the victim, as a member of a group, has suffered persecution under National Socialism or any other form of despotism and tyranny, a formal complaint is not required, provided that the group is part of the population and that the insult is connected with the persecution. Nonetheless, the victim may object to the prosecution.

If the Office of Public Prosecutions decides not to bring a charge, §§ 172-177 of the Code of Criminal Procedure (StPO) gives the victim the right to lodge a motion for a judicial decision to review the public prosecutor's decision.

The German Code of Criminal Procedure contains a whole subchapter on the participation of the victim in the proceedings.

Under §§ 374 et seq. StPO, certain offences may be prosecuted by private charge. These are in particular insults and causation of bodily harm (§§ 185 - 187a, 189, 223, 223a StGB). The persons entitled to press private charges are the victim, the family of the deceased victim or his or her legal representative. The Office of Public Prosecutions may take over the case, but does not have to do so. In any case, it is upon the court to find the facts *ex officio*. To reduce the number of private charges brought, an attempt at reconciliation must be made before an official reconciliation agency prior to the institution of proceedings. Additionally, the complainant is required to make an advance payment of fees to the court (unless he benefits from legal aid [§ 379a StPO]).

In proceedings concerning those offences, as well as in proceedings for attempted manslaughter or murder, intervention by the victim is permissible (§§ 395, 402 StPO). The intervenor's rights are comparable to those of a private prosecutor. His position is even a little better, since he joins and does not replace the public prosecutor.

Other rights of the victim are listed in § 406d- 406h. In particular, they include the right of the victim to be informed of the outcome of proceedings, his right to inspect files (to be exercised by a lawyer only) and the victim's right to be assisted by a lawyer.

3.2. Indemnification of the victim

Paragraphs 403-406c StPO provide a procedure for indemnification of the injured person as an annex to the criminal proceedings. However, for formal reasons, this procedure is not very widely applied. It is more common to bring action for indemnification before a civil court independently of the criminal procedure.

According to the law on indemnification of victims (*Opferentschädigungsgesetz*), the victim may, in case of injury to health, receive (pension) payments from the government for the physical and economic consequences arising from the offence. A 1993 amendment of the legislation deems non-nationals who suffer injury from criminal acts to have essentially the same rights to indemnification as victims of German nationality. In the year 2000, the existing hardship arrangements in respect of injuries inflicted before the date of coming into force was extended to cover foreigners living in Germany, to whom the *Opferentschädigungsgesetz* had applied since 1 July 1990.

3.3. Prosecution on an international level

Generally, the German Ministry of Justice[32] considers the existing instruments of mutual assistance, including extradition, sufficient to combat cross-border and international right-wing extremist activities. However, especially in respect of the

U.S.A., Canada and Denmark, some of the German requests for extradition continue to fail. This is due to the fact that extradition is subject to "double criminality" and that some right-wing extremist actions are punishable in Germany but not in the afore-mentioned countries. An example is a Danish case concerning a German citizen, resident in Denmark, who had published an article in a German newspaper denying the holocaust and blaming Jews for exaggerating the number of Jewish victims in order to receive higher indemnification payments from the German government. In the first instance, the Danish Ministry of Justice agreed to extradition. On appeal, however, the Danish court decided that the denial would not be punishable under Danish law, since freedom of expression prevails over offences of minor importance, such as the one under consideration[33].

3.4. Jurisdiction of the Federal Public Prosecutor

According to the general principles of the German law of criminal procedure, the prosecution of the great majority of crimes motivated by right-wing extremism falls within the jurisdiction of the *Länder*. However, in so far as conduct is calculated to impede the coherence of the federal State or its constitutional principles and could fall within the catalogue of offences cited in § 120 Abs. 2 S. 1 Nr. 3 of the Judicial Organisation Act (*Gerichtsverfassungsgesetz*), the Federal Public Prosecutor is required to pursue the prosecution. According to the jurisprudence of the Federal Court of Justice[34], the exclusion of every kind of violent or arbitrary governance of minorities is to be counted among those constitutional principles. This principle is infringed whenever the culprit would not have attacked the victim if the victim had not been a member of a group characterised by nationality, race or ethnicity.

3.5. Introduction of a New System for the Definition of “Politically Motivated Criminality”

By resolution of the Conference of Interior Ministers held on 3 and 4 April 2001, a new system for the definition of ”Politically Motivated Criminality” (PMK), by reference to federally uniform criteria for recording politically motivated crimes, was introduced with retrospective effect to 1 January 2001, in order to ensure the effective and federally co-ordinated control of such crimes. The previous practice of qualifying offences on the basis of the concept of extremism had actually led to heterogeneous qualifications.[35] Conduct is henceforth to be qualified as politically motivated in particular when the circumstances of the conduct or the attitude of the culprit give reason to believe that the conduct was directed against a person on the grounds of his political stance, nationality, ethnic appartenance, race, colour, religion, beliefs, origins, sexual orientation, handicap or external appearance. The resolution further provides that the preparation of a general overview should be co-ordinated between the Federation and the *Länder* with annotations added to explain unusual elements before publication.

Civil and Administrative Law: Germany

Preliminary Note: this table is accompanied by an explanatory note

Provision	Scope	Consequences of breach	Relevant jurisprudence	Remarks

§ 7 *Beamtenrechtsrahmengesetz* (Federal directory statute on the law governing civil servants).	Appointments must be made without regard to sex, parentage, race, faith, religious or political opinions, origin or relations.			
§ 8 *Bundesbeamtengesetz* (Federal Civil Servants Act).	Positions are to be filled without regard to the applicant's sex, parentage, race, faith, religious or political opinions, origin or relations.			
§ 51 *Ausländergesetz* (Aliens Act).	An alien must not be deported to a country where his life or his freedom is endangered because of his race, religion, nationality, his belonging to a certain social group or his political convictions.			
§ 91a *Ausländergesetz* (Aliens Act).	The Federal Government shall appoint a Commissioner for the concerns of foreigners.			
§ 91b *Ausländergesetz* (Aliens Act).	The Commissioner's duties include: promotion of the integration of the foreign population permanently settled in			

	Germany; assisting the Federal Government in developing its policy of integration ; development of the preconditions for a peaceful co-existence of foreigners and Germans, as well as of different groups of foreigners ; promotion of mutual understanding ; combating xenophobia and unfounded discrimination as against foreigners.
§ 91c *Ausländergesetz* (Aliens Act).	The Commissioner shall be involved at an early stage in legislative projects of the federal government or federal ministries and in all other projects affecting matters for which it is competent. It can make proposals or submit opinions to the federal government. At least

	biannually, the Commissioner shall report on the situation of foreigners in Germany. Upon any allegation that public authorities discriminate against foreigners or fail to respect the rights of foreigners, the Commissioner can take the authority's statement and forward it together with its comments to a supervisory authority. Public authorities are obliged to supply information and to respond to the Commissioner's questions			
§ 23 *Gesetz über die Rechtsstellung heimatloser Ausländer* (Statute on the legal status of aliens without a homeland).	An alien without a homeland must not be deported to a country where his life or his freedom is endangered because of his race, religion or nationality, his belonging to a certain social group or his political convictions.			

§ 17 (3) *Landeswahlgesetz* (Act governing Elections to the Parliaments of the *Länder* on the territory of the former German Democratic Republic).	Parties or other political organisations which pursue fascist, militarist or anti-humanitarian objectives or which demonstrate or disseminate religious or racial hatred or hatred against segments of the population are excluded from elections.			This law of the former G.D.R. continues in force for the five new *Länder*.
§ 43 *Betriebsverfassungsgesetz* (Enterprise Management Act).	The employer is required to regularly inform the enterprise council of progress made in the integration of foreign employees.			
§ 75 *Betriebsverfassungsgesetz* (Enterprise Management Act).	Employers and Enterprise Councils must ensure that all persons working in enterprises are treated in accordance with the principles of law and justice. In particular, persons are not to be treated unequally on the basis of their sex, parentage,			

	religion, nationality, origins, or political or union activities or opinions.			
§ 80 *Betriebsverfassungsgesetz* (Enterprise Management Act).	The general duties of Entreprise Councils include promoting the integration of foreign employees into the enterprise and increasing understanding between foreign and German employees. To this there has been added a specific duty to propose measures combating racism and xenophobia.			
§ 90 *Betriebsverfassungsgesetz* (Enterprise Management Act).	The conclusion of Enterprise Agreements is an additional mechanism for taking measures to combat racism and xenophobia in an enterprise.			
§§99 Abs. 2 Nr. 6, 104 *Betriebsverfassungsgesetz* (Enterprise Management Act).	Enterprise Councils have now been accorded the right to refuse to authorise the engagement of an employee			

	engaged in racist or xenophobic activities, or to require his dismissal.		
§ 1 *Versammlungsgesetz* (Assembly Act).	Parties declared unconstitutional under Art. 21 (2) of the Constitution and associations prohibited according to Art. 9 (2) of the Constitution and persons who intend to support the aims of such parties or organisations do not have the right to organise or participate in public assemblies.		See also the table entitled "Constitutional Law: Germany"
§ 5 *Versammlungsgesetz* (Assembly Act).	An assembly may be prohibited if the person organising it belongs to the persons mentioned in § 1 ... or if there is evidence that the organiser or his adherents will express criminal opinions or tolerate criminal statements.	BVerfG, April 13, 1994, NJW 1994, 1779: A condition imposed on the organiser of a political meeting to ensure that the persecution of Jews by the National Socialist regime would not be denied does not violate the organiser's fundamental rights of freedom of expression and freedom of assembly.	

§ 3 *Vereinsgesetz* (Associations Act).	An association is prohibited within the meaning of Art. 9 (2) of the Constitution only after an administrative authority has stated that its purposes or actions infringe a criminal law or that it is directed against the constitutional order or the concept of international understanding. Where an association has supra-regional activities, it is the Federal Minister for the Interior who has the power to declare it a prohibited association.	The federal government used the power to prohibit associations in the case of the internationally active, neo nazi oriented Skinhead union „Blood and Honour Division Deutschland“ and its youth organisation “White Youth”. The prohibition declaration of 12 September 2000 became unimpeachable upon the entry of a judgment on 13 June 2001, dismissing a claim to invalidate it.	See also the table entitled "Constitutional Law: Germany"
§ 4 (1) n° 1, § 15 (1) and (2) *Gaststättengesetz* (Inns Act).	A licence to operate an inn may be refused or may be withdrawn if there is evidence that the applicant or licencee is not sufficiently reliable.	VG Stuttgart, 17 September 1975, GewA 1976, 27: There may be cases of racism, possibly even without constituting an offence, which evidence the unreliability of an innkeeper. In the case at issue, however, it was not proven that coloured people had been refused access because of	Although the possibility of refusal or withdrawal of a licence to operate a restaurant if the licencee selects his guests in a racist manner is accepted by the commentators, this is - to our knowledge - the only case

			their race, taking into account that they had been admitted to other restaurants owned by the same person.	in which this possibility was considered by a court.
§ 81e *Versicherungsaufsichtsgesetz* ("VAG", Insurance Supervision Act).	Grievances within the meaning of § 81 (2) VAG include the fixing of insurance rates and the calculation of premiums by reference to an insured's nationality or his belonging to an ethnic group.	The Supervisory Authority may take measures appropriate to redress grievances (§ 81 (2) VAG).		Amendment of 21 July 1994.

EXPLANATORY NOTE

GERMANY / CIVIL AND ADMINISTRATIVE LAW

1. Developments in the Field of Administrative Law

The reform of German nationality law which entered into force on 1 January 2000 should be noted here as a relevant core element of the federal government's integration policies. Particular attention should be given to the extension of the principle of descendence by the principle of territoriality. Measures facilitating the grant of German nationality to children born in Germany of foreign parents and the process of naturalisation, such as the shortening of qualification periods of residence, were introduced with the aim of supporting the integration of foreign citizens in Germany[36].

Since 1 September 2000, the Federal Border Protection Service, under a direction given by the Federal Interior Minister, has been operating a nationwide telephone hotline (01805/234566), which has been publicised by a large number of billboard campaigns.

Note
[1] Report by the parliamentarians Steinbach, Sonntag-Wolgast and Lüder of 20 May 1994, *BT-Drucksache* 12/7659, p. 3.
Note
[2] *Bundestagsdrucksache* 13/10081, publicly accessible at: http://dip.bundestag.de/btd/13/100/1310081.pdf

Note

[3] *Bundestagsdrucksache* 13/9706, publicly accessible at: http://dip.bundestag.de/btd/13/097/ 1309706.pdf

Note

[4] Compare the report of the Immigration Commission accessible at: http://www.bmi.bund.de/top/dokumente/Artikel/ix_46876.htm

Note

[5] See the statement of ProAsyl, accessible at: http://www.enar-eu.org/de/national/Pro%20Asyl%20zivilrechtliches%20ADG%202002-02-15.pdf

Note

[6] *BT-Drucksache* V/3960, p. 22, *BT Drucksache* 9/1862, p. 3, *BT-Drucksache* V/4127.

Note

[7] The text of the German declaration of 10.09.1997 is reprinted in BGBl. 1997 II, S. 1418.

Note

[8] The *Verbrechensbekämpfungsgesetz* of 28 October 1994 (BGBl. I 1994 , 3186 et seq.) came into force on 1 December 1994.

Note

[9] Accessible at: http://jurcom5.juris.de/bundesrecht/betrvg/index.html

Note

[10] Order of 6.2.2002, Az. 21.50.30, accessible at: http://www.bezreg-duesseldorf.nrw.de/cat/pdf/39sperrverf_022002.pdf

Note

[11] Treaty on German Unification, Appendix II, Chapter II Section A III.

Note

[12] *Bericht der Bundesregierung zu Rassismus und Fremdenfeindlichkeit*, published as *Bundestagsdrucksache* 14/9519, S. 14.

Note

[13] See statement of reasons, proposal of an amendment to the Aliens Act, BT Drs.13/4948

Note

[14] Refer to the Motion presented by the parliamentary SPD, Bündnis 90/Die Grünen, FDP und PDS parties on 06.03.2001, entitled „*Gegen Rechtsextremismus, Fremdenfeindlichkeit, Antisemitismus und Gewalt*“ and published as *Bundestagsdrucksache* 14/5456.

Note

[15] The Advisory Council consists of the Commissioners for the Concerns of Foreigners appointed by the Federation and the Berlin Senate and of representatives of the federal government and Parliament, industry, the German Council of Trade Unions, the Jewish community and social organisations.

Note

[16] Article 116 (2) of the Constitution grants persons who lost their

German citizenship during the Nazi-regime on racial grounds the right to re-acquire their former citizenship on application. This provision could not be applied because the Jewish German citizen in question had died before 1945. The court held that in this case, an application under Art. 116 (2) was not the only way to regain German citizenship.

Note

[17] von Münch / Kunig, *Grundgesetz*, vol. 1, 4th. ed., Munich 1992, Art. 3 n° 97.

Note

[18] Schönke/Schröder - Lenckner, StGB, § 166 n. 1 and 23.

Note

[19] According to Schafheutle: *Das Sechste Strafrechtsänderungsgesetz*, JZ 1980, 470 et seq.

Note

[20] *BT-Drucksachen* 10/3242 p. 8.

Note

[21] The *Verbrechensbekämpfungsgesetz* of 28 October 1994 (BGBl. I 1994 , 3186 et seq.) came into force on 1 December 1994.

Note

[22] See e.g. BGH, 14 February 1973, BGHSt 25, 128, where the court held that a caricature of a human body distorted into a swastika is not a symbol of a former national socialist organisation, even if the depiction is placed on a poster resembling the swastika flag.

Note

[23] As indicated in OLG Celle, 15 February 1982, NJW 1982, 1546 and in BGH, 15 March 1994, NJW 1994, 1422.

Note

[24] Published as *Bundesrats Drucksache* 577/00 and accessible as a document in PDF format at: http://www.parlamentsspiegel.de/tiffprint/241721038992121.tif.pdf

Note

[25] Published as *Bundesrats Drucksache* 759/00 and accessible as a document in PDF format at: http://www.parlamentsspiegel.de/tiffprint/244351038992211.tif.pdf

Note

[26] The court referred the case back for reconsideration because the findings of fact were not sufficient to support the judgment. Based on the guidelines laid down by the BGH, the lower court found the accused guilty. However, the sentence was surprisingly lenient and its execution was suspended because the court, having assessed the accused as a "strong-minded and responsible personality with clear principles", prognosticated a positive development of the accused in the future. Politicians and representatives of the judiciary reacted with indignation to this reasoning. The public prosecutor has lodged an appeal against the judgment (see *Frankfurter Allgemeine Zeitung*, 10 and 11 August 1994).

Note
[27] Under the new legislation (BGBl 1994, 3186 et seq.), the accused's statement would constitute an independent offence, regardless of who was considered the victim.
Note
[28] The judgment of the Federal Court of Justice may be found at: http://www.jurpc.de/rechtspr/20010038.htm
Note
[29] BGH 12.12.2000, in JurPC, Abs. 41. Refer also to Tröndle/Fischer, *Kommentar zum StGB*, 49. Aufl. München 1999, § 130, Rn. 2.
Note
[30] Refer to Tröndle/Fischer, *Kommentar zum StGB*, 49. Aufl. München 1999, § 13, Rn. 13. Injurious offences by their nature require that the protected right or freedom has been actually infringed and that constitutes the successful conclusion of the offence in the sense of § 9 StGB. The offence is deemed to have been committed at the place at which the infringement occurred. For this purpose, concrete endangerment offences are included within the category of injurious offences, because they involve a requirement, additional to the accused's conduct, of the creation of a real danger to the protected right or freedom, which danger is more likely than not to be realised.
Note
[31] Refer to Tröndle/Fischer, *Kommentar zum StGB*, 49. Aufl. München 1999, § 9 Rn. 3.
Note
[32] Federal Ministry of Justice, Report on the "Suppression of right-wing extremist activities, particularly of a xenophobic and anti-Semitic nature, in the Federal Republic of Germany", Bonn, June 1994.
Note
[33] District court for the Western District of Denmark, *Ugeskift for Retsvaesen* 1988, pp. 788, 789.
Note
[34] BGHST 46, 238-256.
Note
[35] Refer to the *Bericht über die aktuellen und geplanten Massnahmen und Aktivitäten der Bundesregierung gegen Fremdenfeindlichkeit, Antisemitismus und Gewalt gem. Ziff. 21 des Beschlusses des deutschen Bundestages vom 30. März 2001* (Drs. 14/5456), p. 64, accessible at: http://www.bmi.bund.de/Annex/de_21109/Bericht.pdf
Note
[36] Refer to the *Bericht der Bundesregierung über die aktuellen und geplanten Massnahmen und Aktivitäten der Bundesregierung gegen Rassismus, Fremdenfeindlichkeit, Antisemitismus und Gewalt, published as Bundestagsdrucksache* 14/9519.