

**Occasional Paper Series**

**Memory Laws in Germany:  
How Remembering National Socialism Is Governed through Law**

Paula Rhein-Fischer and Simon Mensing





# **Memory Laws in Germany: How Remembering National Socialism Is Governed through Law**

**Paula Rhein-Fischer and Simon Mensing**

**2022  
Torkel Opsahl Academic EPublisher  
Brussels**

A case study by the Research Consortium ‘The Challenges of Populist Memory Politics and Militant Memory Laws (MEMOCRACY)’ (University of Cologne, T.M.C. Asser Institute, Polish Academy of Sciences and University of Copenhagen).

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***Front cover:** The upper section of the page uses an image of doves of peace in flight. It has been there since the start of TOAEP’s Occasional Paper Series. From No. 11 onwards in the Series, the lower section of the page shows the ancient wrought iron-work above the entrance of the CILRAP Bottega in Florence, which also serves as the office of TOAEP.*

***Back cover:** The image on the back cover shows a segment of the age-old terracotta floor of the CILRAP Bottega in Florence. The Bottega premises have been used for various purposes over the centuries, including as a leather bottega for decades.*



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**ISBN: 978-82-8348-131-0.**

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## Introduction

Those who demand an end [of remembrance], not only suppress the catastrophe of war and Nazi dictatorship. [...] [T]hey deny the very essence of our democracy.<sup>1</sup>

These words, spoken by German Federal President Frank-Walter Steinmeier on the seventy-fifth anniversary of the end of World War II underline the significance that the commemoration of the Nazi dictatorship and its atrocities, first and foremost the Shoah, has had in shaping the German national identity. This report seeks to capture how Germany's coming to terms with its history has translated into a variety of laws which form the legal framework governing how the past is to be remembered today, whether directly through explicit mnemonic legislation or indirectly through their application by courts.

The horrors of the National Socialist regime stand out as historical point of reference for mnemonic governance in Germany. This is reflected in the fact that 'explicit' memory laws – that is, those that refer to a specific historical event – exist only with regard to the German Nazi past. It is for this reason that the present study focuses on the legal governance of memory of this period. Whilst the reception of German colonialism<sup>2</sup> and the Socialist Unity Party ('SED') regime in the former German Democratic Republic ('GDR')<sup>3</sup> increasingly preoccupies parliamentarians and judges, their commemoration by legal means requires a separate study. Thus, they are only referred to here where it appears instructive to do so.

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<sup>1</sup> Frank-Walter Steinmeier, "Federal President Frank-Walter Steinmeier on the 75th anniversary of the liberation from National Socialism and the end of the Second World War in Europe at the Central Memorial of the Federal Republic of Germany to the Victims of War and Tyranny", *Bundespräsidialamt*, 8 May 2020.

<sup>2</sup> See, for instance, the Herero and Nama peoples of Namibia bringing a class action claim against the German government for property robbed in the late nineteenth century, United States, Court of Appeals for the Second Circuit, *Rukoro v. Federal Republic of Germany*, Judgment, 24 September 2020 (<https://www.legal-tools.org/doc/pk4iti/>).

<sup>3</sup> See, for instance, the parliamentary debate on the proposed amendment of the Federal Archives Act, the Stasi Records Act and the establishment of a SED Victims' Commissioner, Meeting of the Bundestag, 30 October 2020, Plenary Protocol 19/187, pp. 23628 ff.

## Memory Laws in Germany

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Following introductory remarks regarding the socio-legal context in which German memory governance of the Nazi era operates (Section 1.), this report will present the most relevant German memory laws (Section 2.) and test them against European standards (Section 3.). The report will then conclude with a presentation of the particularities arising in relation to German memory culture and memory laws as compared to other countries (Section 4.).

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## Socio-Legal Context of Memory Laws in Germany

In order to understand the socio-legal context in which German memory laws focused on the Nazi era were adopted, there is a need to briefly retrace German efforts dedicated to ‘working through the past’ (‘Vergangenheitsbewältigung’),<sup>4</sup> specifically in relation to atrocities committed by Germany under Nazi rule. Outlining these efforts is also helpful for understanding the German approach to freedom of speech (sometimes described as ‘dignity-based’ approach), which is often seen to be in sharp contrast to the liberal approach<sup>5</sup> followed, in particular, by the United States (‘US’). Though there have been significant efforts by Germany during recent decades to deal with the past, this must not obscure the fact that it took many years for this process to begin.

In West Germany, denazification attempts carried out by the Allied forces lost steam quickly due to the emergence of the Cold War which led to a reshuffle in pre-existing hostilities and alliances. The measures also met with a strong resistance in the population. Public officials exonerated each other or were reinstated after denazification ended.<sup>6</sup> For most of the 1950s, the Holocaust was practically silenced as matter of public debate,<sup>7</sup> and anti-democratic and antisemitic attitudes persisted within society.<sup>8</sup> Personal guilt and collective responsibility were brushed aside as part of the widespread wish within society to ‘draw a line’ under the past (‘Schlussstrichmentalität’), the majority considered themselves as having been seduced by

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<sup>4</sup> For a definition of ‘Vergangenheitsbewältigung’, see Eckhard Jesse, “Geschichtspolitik und Vergangenheitsbewältigung”, Bundeszentrale für politische Bildung.

<sup>5</sup> See, for example, Guy Carmi, “Dignity versus Liberty”, in *Boston University International Law Journal*, 2008, vol. 26, pp. 278–373; for a critical assessment see Angelika Nußberger, “Kommunikationsfreiheiten”, in Matthias Herdegen, Johannes Masing, Ralf Poscher and Klaus Ferdinand Gärditz (eds.), *Handbuch des Verfassungsrechts*, 2021, § 20 Kommunikationsfreiheiten, para. 1.

<sup>6</sup> Edgar Wolfrum, “Die beiden Deutschland”, in Volkhard Knigge and Norbert Frei (eds.), *Verbrechen erinnern*, C.H. Beck, Munich, 2002, p. 134.

<sup>7</sup> Aleida Assmann, *Das neue Unbehagen an der Erinnerungskultur*, 3rd ed., C.H. Beck, Munich, 2020, pp. 42 ff.

<sup>8</sup> Wolfrum, 2002, p. 136, see above note 6.

Hitler's rhetoric and thus, as victims of unjust accusations.<sup>9</sup> Important figures from within the Nazi regime as well as ideological sympathisers maintained or ascended to relevant positions in the judiciary or administration.<sup>10</sup> Furthermore, Eastern communist regimes were equated with the Nazi dictatorship.<sup>11</sup>

The general mindset of suppressing the past was challenged at the end of the 1950s, when a wave of antisemitic incidents and swastika graffiti laid bare the upsetting deficits in political education.<sup>12</sup> In 1958, the West German states established the Central Office for the Investigation of National Socialist Crimes in order to coordinate the prosecution of Nazi perpetrators.<sup>13</sup> A series of trials in the late 1950s and early 1960s attracted widespread media coverage and raised awareness regarding the perspectives and experiences of victims and survivors. Such trials included the Ulm 'Einsatztruppen' trial in 1958 (which focused on the mass murder of Jews in the German-Lithuanian border region), the Eichmann trial in Jerusalem in 1961, and the Frankfurt Auschwitz trials from 1963 to 1965.<sup>14</sup>

In the mid-1960s, West German states prioritised the subject of the Nazi regime in history classes<sup>15</sup> and former locations of state terror which had been left to decay were recognised as places of learning and commemoration.<sup>16</sup> The student movement of 1968 confronted the parental generation with its role in the past and denounced the 'bourgeois' Federal Republic as a continuation of National Socialism.<sup>17</sup> From 1969, the government of Willy

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<sup>9</sup> *Ibid.*, pp. 136 f.

<sup>10</sup> See, for example, the biography of former Constitutional Court judge, Wiltraut Rupp-von Brünneck, covering her early career in the ministry of justice until 1945 as a responsible for "Aryanisation" of Jewish property: Fabian Michel, *Wiltraut Rupp-von Brünneck (1912-1977): Juristin, Spitzenbeamtin, Verfassungsrichterin*, Campus, Frankfurt, 2022; see also Klaus Wiegrefe, "Die Nazi-Vergangenheit einer Verfassungsrichterin", in *Der Spiegel*, 8 April 2022.

<sup>11</sup> Franziska Augstein, "Deutschland.", in Knigge and Frei (eds.), 2002, p. 228, see above note 6; for a critical analysis of the phrase "the two German dictatorships", see Assmann, 2020, pp. 112 ff, see above note 7.

<sup>12</sup> For an overview of the events see Werner Bergmann, "Antisemitismus als politisches Ereignis", in Werner Bergmann and Rainer Erb (eds.), *Antisemitismus in der politischen Kultur nach 1945*, Westdeutscher Verlag, Opladen, 1990, pp. 253–275; for the legislative impact of these events, see below note 45 and accompanying text.

<sup>13</sup> Wolfrum, 2002, p. 137, see above note 6.

<sup>14</sup> Assmann, 2020, p. 181, see above note 7; Wolfrum, 2002, p. 138, see above note 6.

<sup>15</sup> Wolfrum, 2002, p. 137, see above note 6.

<sup>16</sup> *Ibid.*

<sup>17</sup> Assmann, 2020, p. 50, see above note 7.

## 1. Socio-Legal Context of Memory Laws in Germany

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Brandt, who himself had been a Nazi dissident, made it a priority to develop a new understanding of the past, however, this choice was met with deep-seated scepticism within society. Brandt's foreign policy sought to bring about a 'change through rapprochement' with Germany's Eastern neighbours. However, his recognition of Poland's Western border resulted in him being considered by some to be a traitor of the German people.<sup>18</sup>

Despite this progress, knowledge about the past remained marginal until 1979, when the broadcasting of the US television series 'Holocaust' evoked emotional reactions and sparked debates on the topic not only amongst the public but also within families.<sup>19</sup> From 1986 to 1987, the role of 'Vergangenheitsbewältigung' for the country's identity was fiercely debated in the (first) 'historians' dispute' ('Historikerstreit') between liberal and conservative academics who disagreed on the singularity and the lessons of the Holocaust.<sup>20</sup>

Memory culture in former East Germany differed from that in West Germany.<sup>21</sup> In its Constitution of 1974, the GDR proclaimed to "have eradicated German militarism and Nazism."<sup>22</sup> If denazification had been carried out more diligently than in the West, according to the state propaganda, it had to cut off all ties to the National Socialist past.<sup>23</sup> As fascism was portrayed as being rooted in capitalism, the Federal Republic was deemed to be its successor and the sole debtor of reparations.<sup>24</sup> The externalisation of guilt was complemented by a narrative that victimised East Germans.<sup>25</sup> The display of anti-communism was presented as a main feature of National Socialism, largely disregarding the antisemitic racism.<sup>26</sup> The former Buchenwald concentration camp was turned into a memorial symbolising heroic communist

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<sup>18</sup> "Ein Stück Heimkehr", in *Der Spiegel*, 13 December 1970.

<sup>19</sup> Assmann, 2020, pp. 54 f., see above note 7.

<sup>20</sup> *Ibid.*, p. 100.

<sup>21</sup> See on the shortcomings: Augstein, 2002, p. 229, see above note 11; see also: Heribert Blens, Meeting of the Bundestag, 8 October 1992, Plenary Protocol, 12/110, pp. 9398 f.

<sup>22</sup> German Democratic Republic, Verfassung der Deutschen Demokratischen Republik, 7 October 1974, Article 6(1) (<https://www.legal-tools.org/doc/a53yc5/>).

<sup>23</sup> Wolfrum, 2002, p. 142, see above note 6.

<sup>24</sup> *Ibid.*, p. 143.

<sup>25</sup> *Ibid.*, p. 144.

<sup>26</sup> *Ibid.*, p. 143.

resistance.<sup>27</sup> The antizionism practiced by the GDR regime correlated with latent antisemitism in East German society.<sup>28</sup>

The reunification of Germany brought about new challenges. Not only did a self-critical memory culture of the Nazi past have to be established in East Germany, a ‘second totalitarian past’ of Germany also needed to be integrated without relativising the atrocities committed under Nazi rule. With the Stockholm Holocaust Conference of 2000, the commemoration of the Holocaust gained an additional European dimension. Since the 2000s, German efforts to deal with its past have been met with widespread recognition. At the commemoration of the sixtieth anniversary of D-Day, German Chancellor Gerhard Schröder found himself in the circle of the former allies.

Still, major shortcomings of a truthful memory policy remain and can only in part be repaired. This is the case, for example, in relation to the half-hearted reparation payments that, for a long time, included Israel and Western European but not Eastern European states.<sup>29</sup> Another major deficit is the almost complete failure of the German judiciary to criminally prosecute Nazi perpetrators. Despite proceedings between 1945 and 1949, based on the Allied Control Council Law No. 10, the number of trials subsequently declined with the founding of the Federal Republic.<sup>30</sup> In 1960, many relevant offences under the German Criminal Code became time barred. The time limit for murder was prolonged by the Bundestag in a milestone debate in 1965,<sup>31</sup> later prolonged again and finally abolished.<sup>32</sup> However, in 1968, a legislative change pertaining to sentencing for aiding and abetting had the effect that aiding murder under the Nazi regime was suddenly time-barred, even trials at an advanced stage had to be terminated.<sup>33</sup> Though there is disagreement

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<sup>27</sup> *Ibid.*, pp. 143 f.

<sup>28</sup> *Ibid.*, p. 145.

<sup>29</sup> See Cord Pagenstecher, “Der lange Weg zur Entschädigung”, in *Bundeszentrale für politische Bildung*, 2 June 2016.

<sup>30</sup> Sanya Romeike, “Transitional Justice in Germany after 1945 and after 1990”, in International Nuremberg Principles Academy (ed.), *Occasional Paper No. 1*, 2016, p. 15.

<sup>31</sup> Meeting of the Bundestag, 10 March 1965, Protocol, pp. 8503 ff.

<sup>32</sup> “Das Ende der ‘Verjährungsdebatte’ – Warum Mord nicht verjährt”, in *Bundeszentrale für politische Bildung*, 1 July 2019.

<sup>33</sup> This change, also referred to as ‘cold amnesty’, resulted from the introduction of an obligatory mitigation in the sentencing of an aider where he or she did not possess a personal characteristic on which the criminal liability of the perpetrator is based (§ 50(2) of the former Criminal Code that essentially corresponds to today’s § 28(1) of the Criminal Code): Germany,

## 1. Socio-Legal Context of Memory Laws in Germany

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about whether this change was the result of an (arguably quite unlikely) mistake or whether it was deliberate, the fact remains that this decision had great consequences, as the Federal Court of Justice qualified most of the persons involved in the Nazi murders as aiders of such acts as opposed to perpetrators.<sup>34</sup> Though the Court later based the conviction of aiders to murder on a different ground so that the time-limit no longer applied,<sup>35</sup> the Court required a specific act of aiding the killing of a specific person, for example, by their selection, which as a result excluded a significant number of personnel in concentration camps.<sup>36</sup> It was not until 2011 that the regional court of Munich,<sup>37</sup> confirmed by the Federal Court of Justice in 2016,<sup>38</sup> gave up this position, ruling that service in the concentration camp itself was sufficient to constitute aiding murder, as the existence of an organised killing machinery equipped with obedient subordinates had been a precondition for the mass murders. Since then, the German judiciary has focused on prosecuting the relatively few last living perpetrators of the National Socialist regime, including camp guards or office assistants.<sup>39</sup>

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Strafgesetzbuch in the version of 13 November 1998, Federal Bulletin (*BGBI.*), Part I, p. 3322 (hereinafter often referred to as the ‘Criminal Code’) (<https://www.legal-tools.org/doc/ecd810/>), last amended by Article 1 of the Law of 11 July 2022, Federal bulletin (*BGBI.*), Part I, p. 1082; this lowering of the sentence reduced the time limit that, at that time, depended on the concrete threat of penalty, see Thomas Fischer, “Oskar Gröning und die Beihilfe”, in *Zeit Online*, 21 July 2015.

<sup>34</sup> For it applied a subjective criterion for their distinction, see, for example, Federal Court of Justice, Judgement, 19 October 1962, 9 StE 4/62, in *Neue Juristische Wochenschrift*, 1963, p. 355 (‘*Staschynskij*’); for a critical view see Fischer, 21 July 2015, see above note 33.

<sup>35</sup> Instead of the “subjective” characteristic for murder of “otherwise base motives” to which the obligatory reducing of the sentence applied, it used the “objective” characteristics “perfidiously” and “cruelly” to which this reducing did not apply, see, for example, Federal Court of Justice, Judgement, 15 August 1969, 1 StR 197/68, in *Neue Juristische Wochenschrift*, 1969, p. 2105; Hermann Wichmann, “Die Entwicklung der Strafverfolgung von NS-Verbrechen”, 2 March 2020.

<sup>36</sup> See, for example, Federal Court of Justice, Judgement, 20 February 1969, 2 StR 280/67, in *Neue Juristische Wochenschrift*, 1969, pp. 2056 f.

<sup>37</sup> Regional Court of Munich II, Judgement, 12 May 2011, 1 Ks 115 Js 12496/08, BeckRS 2011, 139286 (‘*Demjanjuk*’).

<sup>38</sup> Federal Court of Justice, Order, 20 September 2016, 3 StR 49/16, in *Neue Juristische Wochenschrift*, 2017, p. 498 (‘*Gröning*’) (<https://www.legal-tools.org/doc/4abce8/>).

<sup>39</sup> See, for example, Christoph Richter, “Die letzten NS-Prozesse in Deutschland, von später Aufarbeitung und schlafender Justiz”, in *Deutschlandfunk*, 6 January 2022.

Despite 77 years having passed since the liberation of Auschwitz, the shaping and renegotiation of German memory culture has not yet come to an end. Rather, it is increasingly being criticised by different camps that call for new or more diversified approaches<sup>40</sup> or which consider the German approach to freedom of speech as being overly restrictive.<sup>41</sup> The mnemonic legal framework, however, still primarily reflects the traditional approach to German memory culture with a focus on the Shoah. It is this legal framework on which the present report wishes to provide an overview, without intending to be exhaustive. In doing so, it focuses on the memory laws still in force today.

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<sup>40</sup> See below Section 4.2.

<sup>41</sup> Carmi, 2008, pp. 337 f., see above note 5; Ronald Krotoszynski, “A Comparative Perspective on the First Amendment: Free Speech, Militant Democracy and the Primacy of Dignity as a Preferred Constitutional Value in Germany”, in *Tulane Law Review*, 2004, vol. 78, pp. 1577–1583; similarly, Winfried Brugger, “The Treatment of Hate Speech in German constitutional Law”, in Eibe Riedel (ed.), *Stocktaking in German Public Law*, Nomos, Baden-Baden, 2002, pp. 117 ff., republished in *German Law Journal*, 2019, vol. 4, no. 1, pp. 29–38.

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## German Memory Laws Related to the Nazi Regime

The term ‘memory law’ is being used here to describe legal norms of any rank which “enshrine state-approved interpretations of crucial historical events and promote certain narratives about the past”.<sup>42</sup> Said norms may be classified into three different categories: memory laws that prescribe a certain way of remembering a specific historical event may either be accompanied by the threat of criminal sanctions (‘explicit memory laws of punitive character’) (Section 2.1.) or be non-punitive (‘explicit memory laws of non-punitive character’) (Section 2.2.). These relatively few provisions should be distinguished from the larger number of laws which can be summarised in a third category of ‘quasi-memory laws’, that is, laws that promote a certain collective memory of the historical event in a less explicit and more indirect way, resorting again to criminal or non-criminal means (Section 2.3.). Relevant court decisions, which are sometimes referred to as a separate category, will be taken into account directly in the context of the respective laws mentioned above. These decisions are particularly relevant for the category of quasi-memory laws as some of them are only turned into memory laws through their interpretation.

### **2.1. Explicit Memory Laws of Punitive Character**

#### **2.1.1. Holocaust Denial and Glorification of Nazi Rule (§ 130(3) and (4) of the Criminal Code)**

The two most relevant provisions containing punitive measures in relation to explicit memory governance are contained in § 130 of the Criminal Code. Section 3 sanctions “whoever publicly or in a meeting approves of, denies or downplays” an act of genocide<sup>43</sup> “committed under the rule of National Socialism in a manner which is suitable to disturb the public peace”.

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<sup>42</sup> See Council of Europe (‘CoE’), “‘Memory Laws’ and Freedom of Expression”, Thematic Factsheet, updated in July 2018.

<sup>43</sup> The wording of the provision contains a reference to the crime of genocide under § 6(1) of the German Code of Crimes against International Law, 26 June 2002 (hereinafter often referred to as ‘Code of Crimes against International Law’) (<https://www.legal-tools.org/doc/a56805/>).

Section 4 criminalises the public disturbance of public peace through the approval, glorification or justification of the tyranny and arbitrary rule of National Socialism in a manner which violates the dignity of the victims. Since these provisions constitute the core of German memory laws, and are the most far-reaching within the German legal order, their drafting history, scope and implementation will be presented in more detail below.

### **2.1.1.1. Drafting History**

#### **2.1.1.1.1. Judicial Improvising: Denialism between Defamation and Hate Crime**

These two provisions have a long drafting history. The decision to integrate them into § 130 of the Criminal Code was not made coincidentally, the pre-existing §130(1) criminalised the incitement to hatred<sup>44</sup> and had been introduced in 1960, after a wave of antisemitic incidents in Germany.<sup>45</sup> However, this provision did not explicitly criminalise denial of the Holocaust. Its qualification as incitement to hatred most often failed as the courts were unable to find that an “attack on human dignity” had been established as required under § 130(1). Nonetheless, the provision was applied to certain cases of Holocaust negation. An attack on human dignity, namely that of the Jewish community, was affirmed if the defendant was found to identify with National Socialist ideology.<sup>46</sup> On this basis, the jurisprudence developed a differentiation between so-called ‘qualified’ and ‘simple’ Auschwitz-denial, with only the former amounting to an incitement to hatred.<sup>47</sup> Subsequently, the courts extended the qualified Holocaust denial to cases where the

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<sup>44</sup> See on this offence, below Section 2.3.1.1.1.

<sup>45</sup> For an overview of the events see Bergmann, 1990, pp. 253–275, see above note 12; see Konrad Adenauer, Meeting of the Bundestag, 22 January 1959, Plenary Protocol 03/056, p. 3069.

<sup>46</sup> Federal Court of Justice, Judgement, 11 November 1976, 2 StR 508/76, in *Wolters Kluwer*, para. 12.

<sup>47</sup> For the mention of the term ‘qualified Auschwitz-denial’, see Federal Court of Justice, Order, 16 November 1993, 1 StR 193/93, in *Neue Zeitschrift für Strafrecht*, 1994, p. 140 (‘Remer-Depesche’); rejecting the requirement of a “qualified denial” for insult, see Higher Regional Court of Bavaria, Judgement, 17 December 1996, 2 St RR 178/96, in *Neue Zeitschrift für Strafrecht*, 1997, p. 285; for a diverging view see Brugger 2019, p. 33, see above note 41; the alternative German title for the offence “Auschwitzlüge” (Auschwitz lie) has been criticised as it had originally been used by the deniers themselves, see Fischer, 21 July 2015, see above note 33.

## 2. German Memory Laws Related to the Nazi Regime

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Holocaust was portrayed as a lie “fabricated by a Jewish conspiracy” and “intended to extort and exploit the German people”.<sup>48</sup>

The ‘simple Holocaust denial’, in contrast, fell into the category of insult to the detriment, not only of the survivors of the Shoah, but of every person of Jewish decent living in Germany, even if born after 1945.<sup>49</sup> In 1994, the Federal Constitutional Court upheld this reasoning, ruling that demonstrably incorrect factual assertions fell outside the scope of freedom of speech. Only if such statements were inseparable from the expression of an opinion, could freedom of expression be applied, but a restriction was more easily justified than if the statement of fact was not proven to be untrue.<sup>50</sup> The Federal Court of Justice had recognised in 1976 that essential historical facts surrounding the persecution of Jews by National Socialists were generally known.<sup>51</sup> In light of this, the Court later abandoned the requirement of an expert witness.<sup>52</sup> In its 1994 judgement, the Federal Constitutional Court then affirmed that the denial of the “persecution of Jews in the Third Reich was a factual assertion which, according to countless eyewitness accounts and documents, the findings of courts in numerous criminal proceedings and the findings of historical scholarship, was demonstrably untrue.”<sup>53</sup>

After the student movement of 1968 and the broadcasting of the American TV series ‘Holocaust’ in 1979, confrontation with the past culminated

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<sup>48</sup> Initially established in the context of the offence of “racial hatred” under § 131 of the Criminal Code, former version, by Federal Court of Justice, Judgement, 14 January 1981, 3 StR 440/80 (S), in *Neue Zeitschrift für Strafrecht*, 1981, p. 258; confirmed for the revised version of § 130 of the Criminal Code (incitement to hatred) by Federal Court of Justice, Judgement, 15 March 1994, 1 StR 179/93, in *Neue Zeitschrift für Strafrecht*, 1994, pp. 390 ff. (‘*Deckert I*’).

<sup>49</sup> Federal Court of Justice, Judgement, 18 September 1979, VI ZR 140/78, in *Neue Juristische Wochenschrift*, 1980, p. 46 (‘*Persecution fate*’); for more details see below Section 2.3.1.1.2.

<sup>50</sup> Federal Constitutional Court, Order, 13 April 1994, in *BVerfGE*, vol. 90, pp. 247 f. (‘*Auschwitz lie*’).

<sup>51</sup> Federal Court of Justice, Judgement, 11 November 1976, para. 11, see above note 46.

<sup>52</sup> *Deckert I*, see above note 48: “[It was] rightly assumed that the mass murder of the Jews, committed primarily in the gas chambers of concentration camps during the Second World War, was an obvious historical fact and that it was therefore superfluous to hear evidence on it.”, referring to the established jurisprudence by Federal Court of Justice, Judgement, 18 September 1979, pp. 45 ff., see above note 49; Federal Court of Justice, Judgement, 26 January 1983, 3 StR 414/82, in *Neue Juristische Wochenschrift*, 1983, p. 1205 and by the Higher Regional Court of Cologne, Judgement, 28 October 1980, 1 Ss 650-651/80, in *Neue Juristische Wochenschrift*, 1981, p. 1281; Higher Regional Court of Celle, Order, 17 February 1982, 1 Ss 616/81, in *Neue Juristische Wochenschrift*, 1982, p. 1545.

<sup>53</sup> *Auschwitz lie*, p. 249, see above note 50.

in Federal President Weizsäcker's acknowledgement in 1985 that 8 May was a "day of liberation",<sup>54</sup> marking a turning point in German memory culture.<sup>55</sup> In this context, the opposition attempted for the first time in 1982 and a second in 1984 to introduce a separate criminal offence for Holocaust denial.<sup>56</sup> The accompanying parliamentary debate illustrated an unease about inscribing into law any interpretation of the past, an unease that would resurface in later controversies.<sup>57</sup> Opponents warned of a "fatal impression that there is a judicial competence in the field of historical fact-finding" and argued that it was the task of politics, history and education to uphold historical truths.<sup>58</sup> As Holocaust denial bans were still relatively novel internationally at the time,<sup>59</sup> critics also claimed that it would set a dangerous precedent that would seem extreme even in totalitarian regimes.<sup>60</sup>

#### 2.1.1.1.2. Political Compromise: Prosecution *ex Officio*

Though the aforementioned project was rejected by the liberal-conservative government, these efforts nevertheless led to a reform of the provisions on insult and defamation in 1985. The requirement for survivors or their relatives to request the prosecution of deniers of their suffering was deemed unreasonable.<sup>61</sup> Accordingly, the new provision allowed prosecution *ex officio* "if the victim was persecuted as a member of a group under the National Socialist or another tyrannic and arbitrary regime if this group is part of the population and the insult is connected with this persecution" and if the insulting content was disseminated in public (§ 194(1), Sentence 2 of the

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<sup>54</sup> Richard von Weizsäcker, "Speech during the commemorative event in the plenary hall of the Bundestag on the 40th anniversary of the end of the Second World War in Europe", 8 May 1985.

<sup>55</sup> Tim Schleinitz and Constantin Hühn, "Erlösung durch Erinnerung?", in *Deutschlandfunk*, 10 May 2020.

<sup>56</sup> Bundestag Doc. (BT-Drucks.) 9/2090, 10 November 1982; Bundestag Doc. (BT-Drucks.) 10/891, 10 January 1984.

<sup>57</sup> See, in particular, the manifesto of French historians in opposition to the so-called *lois mémorielles*, Pierre Nora et al., "Liberté pour l'histoire", in *Liberation*, 13 December 2005.

<sup>58</sup> Karl Miltner, Meeting of the Bundestag, 14 March 1985, Plenary Protocol 10/126, p. 9318.

<sup>59</sup> They existed, for example, already in Israel (since 1986), France (since 1990), and Austria (since 1992).

<sup>60</sup> "Absurder Entwurf", in *Frankfurter Allgemeine Zeitung*, 1 March 1985, p. 1.

<sup>61</sup> Karl Miltner, Meeting of the Bundestag, 14 March 1985, p. 9319, see above note 58.

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Criminal Code).<sup>62</sup> This provision, though slightly adjusted, is still in force today. However, by continuing to deal with cases of ‘simple denial’ as a matter of insult, the legal interest protected was not the public peace – as had been envisaged by proposals for a specific offence of Holocaust denial – but rather the personal honour of members of the persecuted groups.

By extending the prosecution *ex officio* to victims of other tyrannic regimes, Christian democrats sought to equally protect the memory of ethnic Germans who during their flight from Central and Eastern European countries at the end of World War II had become victims of state-approved human rights violations.<sup>63</sup> The head of the German Association of Judges criticised this as a “despicable mentality of offsetting”<sup>64</sup> crimes against each other; other commentators called it a “rotten compromise”.<sup>65</sup>

With the emphasised singularity of the Holocaust,<sup>66</sup> the debate about the defamation reform used a terminology that was set to define the crossroads of a culture war which would break out in the following year of 1986 and become known as the ‘Historikerstreit’ (historians’ dispute).<sup>67</sup> This dispute centred on the question of whether the Holocaust was unique in nature or whether it was comparable to other crimes, in particular, with atrocities committed under Stalin’s rule in the Soviet Union and the subjugated States. The

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<sup>62</sup> See § 194(1) of the Criminal Code.

<sup>63</sup> See interjection by Alfred Dregger (“Crimes are crimes”), Meeting of the Bundestag, 14 March 1985, see above note 58.

<sup>64</sup> Marqua, in *Deutsche Richterzeitung*, 1985, p. 226.

<sup>65</sup> “Ins Irrenhaus”, in *Der Spiegel*, 17 March 1985.

<sup>66</sup> Schmidt, Meeting of the Bundestag, 14 March 1985, p. 9317, see above note 58: “The historical uniqueness of the National Socialist genocide must not be called into question”; Kleinert, *ibid.*, p. 9323: “[...] begin a conversation between the victims of these singular events, which continue to defy description, and the successors, the heirs - in several senses of the word - of the perpetrators”.

<sup>67</sup> The debate was sparked by the historian Ernst Nolte according to whom the Holocaust was a consequence of the Gulag by the Bolsheviks and raised the question of whether the dealing with Nazism could ever be allowed to cease (see in particular his article “Vergangenheit, die nicht vergehen will”, *Frankfurter Allgemeine Zeitung*, 6 June 1986; especially Jürgen Habermas who saw in this a historical revisionism and a relativisation of German culpability; the claims by the Nolte camp (these include especially Andreas Hillgruber, Michael Stürmer and Klaus Hildebrand) were eventually rejected; see on this debate Peter Borowsky, “Der Historikerstreit”, in Rainer Hering and Rainer Nicolaysen (eds.), *Schlaglichter historischer Forschung*, Hamburg University Press, 2005, pp. 63–87; Konrad Jarausch, “Removing the Nazi Stain? The Quarrel of the German Historians”, in *German Studies Review*, 1988, vol. 11, no. 2, pp. 285–301).

argument of singularity has since become a recurrent dictum in court decisions on Holocaust denial.<sup>68</sup>

#### **2.1.1.1.3. A Court Ruling as Instigator for Reform**

The plea for a distinct crime of Holocaust denial returned to the spotlight in 1994, when the Federal Court of Justice repealed a verdict of incitement to hatred against the leader of the neo-Nazi party National Democratic Party of Germany ('NPD'). The defendant had organised a public discussion in which an American participant claimed that his own "research" had revealed that the "purported" gas chambers in Auschwitz, Birkenau und Majdanek had been mere disinfection facilities. The defendant had translated the participant's talk and added commentaries of his own. The Court ruled that the necessary identification with Nazi ideology was not sufficiently established and referred the case back for retrial.<sup>69</sup>

While the Court had applied its earlier jurisprudence, observers viewed the decision as an acquittal<sup>70</sup> and criticised the detailed requirements for qualified denial as a "manual for legal loopholes".<sup>71</sup> Although the district court convicted again for incitement to hatred, its judgement provoked public outcry as it recognised, as a mitigating factor, the fact that the defendant had "acted altruistically [...] motivated by his endeavour to strengthen the forces of resistance among the German people against the Jewish claims derived from the Holocaust. The fact that [...] some fifty years after the end of the war, Germany is still exposed to far-reaching claims [...] arising from the

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<sup>68</sup> Federal Court of Justice, Judgement, 12 December 2001, 1 StR 184/00, in *Neue Zeitschrift für Strafrecht*, 2001, p. 309 ('Internet'): "Due to the singularity of the crimes committed against the Jews under the rule of National Socialism, the offence of § 130(3) of the Criminal Code has a special relationship to the Federal Republic of Germany"; Federal Court of Justice, Judgement, 15 December 1994, in *Neue Juristische Wochenschrift*, 1995, p. 341 ('Deckert II'): "The singularity of the mass murder of Jews committed by the German state during the Second World War thus prohibits the resulting consequences from being assessed as mitigating factors, especially in criminal proceedings on the incitement to hatred against Jews and their insult and disparagement".

<sup>69</sup> *Deckert I*, see above note 48.

<sup>70</sup> For example, Gregor Gysi, Meeting of the Bundestag, 18 May 1994, Plenary Protocol 12/227, p. 19670.

<sup>71</sup> Heribert Prantl, "Gnadenlose Gleichgültigkeit der Richter", in *Süddeutsche Zeitung*, 19 March 1994, p. 9; Helmut Kerscher, "Die Lüge bleibt eine Lüge", in *Süddeutsche Zeitung*, 23 June 1994, p. 3; in contrast, see the criticism of "artificial energies of enraged", Günter Bertram, "Entrüstungsstürme im Medienzeitalter - der BGH und die 'Auschwitzlüge'", in *Neue Juristische Wochenschrift*, 1994, p. 2004.

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persecution of the Jews, while the mass crimes of other peoples have gone unpunished, was not disregarded [...].<sup>72</sup> In the aftermath of the decision, two of the presiding judges were temporarily suspended.<sup>73</sup>

The resulting debate about the need for an independent offence for Holocaust denial<sup>74</sup> was reignited following a series of xenophobic incidents in the early 1990s associated with the deficient dealing of the past in former Eastern Germany.<sup>75</sup> Unlike the reform efforts a decade earlier, ambitions in 1994 were supported by a large consensus in Parliament. Former sceptics were appeased by the Federal Constitutional Court's ruling that freedom of speech did not extend to factual assertions proven to be incorrect.<sup>76</sup>

The agreement was underpinned by the growing understanding of the Nazi past as the ‘negative founding narrative’ of the Federal Republic. The denial of the Holocaust was no longer perceived as purely an attack on the dignity of Jews, but rather, more broadly as questioning the legitimacy of the democratic order.<sup>77</sup> One parliamentarian drew a straight line to the Nuremberg Trials, asserting that “those who speak of the ‘Auschwitz lie’ [...] seek to mobilise the political power by means of which, sooner or later, the judgments on German crimes against peace and against humanity can be overruled and thus one of the basic prerequisites of our democracy can be destroyed.”<sup>78</sup> Another parliamentarian pointed to the negative effects for Germany’s international reputation, stating that denying the Holocaust “is not only insulting the dead and the relatives [...], but is also insulting the dignity of our people by [...] once again making us look contemptible for being without decency.”<sup>79</sup> Others underscored the educational value of candidly facing the past by fighting resurgent racism<sup>80</sup> and fostering peaceful

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<sup>72</sup> Regional Court of Mannheim, Judgement, 22 June 1994, 5 KJs 2/92, in *Neue Juristische Wochenschrift*, 1994, p. 2498.

<sup>73</sup> Ronald Dworkin, “Krasse Provokationen”, in *Tageszeitung am Wochenende*, 17 June 1995, p. 13 according to which the justification used was “long-term illness”.

<sup>74</sup> Wolfgang Ullmann, Meeting of the Bundestag 18 May 1994, Plenary Protocol 12/227, p. 19665.

<sup>75</sup> Kondrad Weiß, *ibid.*, p. 19607, see above Section 1.

<sup>76</sup> See Jörg van Essen, *ibid.*, p. 19669.

<sup>77</sup> Hans de With, *ibid.*, p. 19668.

<sup>78</sup> Wolfgang Ullmann, *ibid.*, p. 19665.

<sup>79</sup> Dietrich Mahlo, *ibid.*, p. 19667.

<sup>80</sup> Hans de With, *ibid.*, p. 19668.

international coexistence.<sup>81</sup> However, these comments, revealing different shades of reasoning, illustrate that eventually the protected interest remained uncertain.

§ 130(3) of the Criminal Code, the specific offence for Holocaust denial, came into effect on 1 December 1994; since then it has remained essentially untouched.<sup>82</sup> Today, it refers to “acts committed under the rule of National Socialism of the kind indicated in Section 6(1) of the German Code of Crimes against International Law [the crime of genocide]”. The provision encompasses the Shoah and the genocide of the Sinti and Roma as a whole, as well as associated individual actions.<sup>83</sup> Besides the *denial* of genocide under the National Socialist rule, § 130(3) also incriminates its downplaying or approval. The inclusion of ‘approval’ was originally seen as preventing a possible dystopia where right-wing extremists, in order to rehabilitate their ideology, would no longer need to deny but rather proudly glorify the crimes of National Socialism.<sup>84</sup> In fact, these alternative modalities forestalled efforts to circumvent the prohibition of denial.<sup>85</sup> The additional requirement of denial, downplaying or approval being uttered in a manner suitable to disturb the public peace has resulted in a separate scope of application for insult remaining in cases where no potential public disturbance exists.<sup>86</sup>

Developments did not stop here. In 1999, the parliamentary debate on the construction of the Memorial to the Murdered Jews of Europe further contributed to the understanding that the Holocaust constituted “one of the founding dates of this republic”.<sup>87</sup> In line with this reasoning, in 2005, the announcement of a right-wing march through the Brandenburg Gate,

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<sup>81</sup> Sabine Leutheusser-Schnarrenberger, *ibid.*, p. 19671.

<sup>82</sup> Verbrechensbekämpfungsgesetz, 28 October 1994, Federal Bulletin (*BGBL.*), Part I, p. 3186; amended by Federal Bulletin (*BGBL.*), Part I, 2002, p. 2254; now referring to the German Code of Crimes against International Law for the definition of genocide.

<sup>83</sup> Stephan Anstötz and Jürgen Schäfer, in Volker Erb and Jürgen Schäfer (eds.), *Münchener Kommentar zum StGB*, 4th ed., C.H. Beck, Munich, 2021, vol. 3, § 130, para. 85.

<sup>84</sup> See Gregor Gysi, Meeting of the Bundestag 18 May 1994, Plenary Protocol 12/227, p. 19670.

<sup>85</sup> See Higher Regional of Court Hamm, Order, 1 October 2015, III-1 RVs 66/15, juris, para. 12 (‘Metro song’).

<sup>86</sup> Anstötz and Schäfer, 2021, § 130, para. 86, see above note 83; to this effect see Higher Regional Court of Saarbrücken, Judgement, 8 March 2021, Ss 72/20 (2/21), para. 31 (‘Jewish Star’), however for the rejection of insult, see below note 194.

<sup>87</sup> Norbert Lammert, Meeting of the Bundestag, 25 June 1999, Plenary Protocol 14/48, p. 4090; on this memorial see below Section 2.3.2.1.

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visually alluding to Hitler's takeover on the sixtieth anniversary of the end of World War II, was perceived as discrediting the foundation of democracy.<sup>88</sup> However, as it did not contain any denial, downplaying or approval of the Shoah itself, it did not fall under the existing § 130(3) of the Criminal Code. In astonishing speed,<sup>89</sup> the Parliament passed an amendment to § 130 of the Criminal Code introducing Section 4 which attributed criminal responsibility to those who "publicly or in a meeting disturbs public peace by approving of, glorifying or justifying National Socialist tyranny and arbitrary rule in a manner which violates the dignity of the victims".<sup>90</sup> However, like § 130(3) of the Criminal Code, it does not apply if the act is carried out to serve civic information, to prevent unconstitutional activities, to promote the arts or science, research or teaching, to report about current or historical events, or similar purposes.<sup>91</sup>

In the aforementioned parliamentary debate, whilst opposing liberals emphasised the importance of the freedom of speech and assembly for democracy,<sup>92</sup> proponents highlighted the fatal weaknesses of democratic institutions in the pre-war Weimar Republic<sup>93</sup> and the *topos* of 'militant democracy',<sup>94</sup> arguing that these freedoms "reach [their] limits where the inhuman ideas of Nazism threaten to take hold again."<sup>95</sup> By contrast, no mention was made of the historic precursor in the criminal code of the GDR whose § 106(1), No. 1 penalised the glorification of fascism and militarism.<sup>96</sup> Debate on the similarity between § 130(4) of the Criminal Code and this

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<sup>88</sup> See Wolfgang Bosbach, Meeting of the Bundestag, 18 February 2005, Plenary Protocol 15/158, p. 14809.

<sup>89</sup> See Ralf Poscher, "Neue Rechtsgrundlagen gegen rechtsextremistische Versammlungen", in *Neue Juristische Wochenschrift*, 2005, p. 1316: "in a legislative process of barely three weeks".

<sup>90</sup> Gesetz zur Änderung des Versammlungsgesetzes und des Strafgesetzbuches, 24 March 2005.

<sup>91</sup> § 130(7) of the Criminal Code in connection with § 86(4) of the Criminal Code.

<sup>92</sup> See Max Stadler, Meeting of the Bundestag, 11 March 2005, Plenary Protocol 15/164, p. 15352.

<sup>93</sup> See Sebastian Edathy, *ibid.*, p. 15347.

<sup>94</sup> See *ibid.*, p. 15347; Wolfgang Bosbach, *ibid.*, p. 15349; Cornelia Sonntag-Wolgast, *ibid.*, p. 15354; see on this concept below Section 4.1.

<sup>95</sup> Erwin Marschewski, Meeting of the Bundestag, 11 March 2005, Plenary Protocol 15/164, p. 15361.

<sup>96</sup> See, for example, Akademie für Staats- und Rechtswissenschaft der DDR *et al.* (eds.), "Strafrecht der Deutschen Demokratischen Republik", Potsdam, 1987, pp. 282 ff.

political offence existing in a dictatorship might have resulted in a more critical perception of the new legislation.

To date, there is a distinct lack of any provisions, criminal or otherwise, prohibiting the denial of crimes committed under the SED regime. Such a prohibition had previously been discussed in 2009–2010, however, in light of constitutional concerns legislators did not pursue this idea any further.<sup>97</sup>

### **2.1.1.2. Jurisprudence on § 130(3) and (4) of the Criminal Code**

#### **2.1.1.2.1. Constitutionality**

The Federal Constitutional Court confirmed that § 130(3) of the Criminal Code was in line with freedom of expression under Article 5(1) of the Basic Law. Referring to its judgement of 1994,<sup>98</sup> the Court repeated that factual assertions proven incorrect were not covered by Article 5(1) of the Basic Law. Discussions regarding to what extent factual assertions inextricably linked to an opinion could be protected were ultimately cut short as the Court had found that there was no such link in the case at hand.<sup>99</sup>

The Federal Constitutional Court has held that conviction for denial for a mere exchange of writings between two persons without third persons taking notice violates the freedom of expression, as such an approach would lead to the criminalisation of the mere expression of an opinion without requiring any harm of legal interests, in particular, the public peace.<sup>100</sup> However, in a more recent decision, the Court has found that “the constituent elements of the offence of approval and denial indicate a disturbance of public peace”: thus, this element does not need to be established independently.<sup>101</sup> For public approval of the Nazi genocide “crosses the

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<sup>97</sup> See, for example, Opinion of the Research Services of the Bundestag, “Zur Frage der Verfassungsmäßigkeit eines Straftatbestands der Leugnung von DDR-Unrecht”, 1 July 2010, WD 3-3000-275/10.

<sup>98</sup> *Auschwitz lie*, pp. 247 ff., see above note 50; an earlier, more hesitant view was expressed by former Federal Constitutional Court judge Wolfgang Hoffmann-Riem, who questioned that § 130(3) of the Criminal Code was effectively protecting human dignity as intended by the legislator; he added that if he were the legislator, he would not incriminate Holocaust denial, see Frank Jansen, “Holocaust-Leugner nicht bestrafen”, in *Der Tagesspiegel*, 10 July 2008.

<sup>99</sup> Federal Constitutional Court, Order, 25 March 2008, 1 BvR 1753/03, juris, para. 43.

<sup>100</sup> Federal Constitutional Court, Order, 9 November 2011, 1 BvR 461/08, in *Neue Juristische Wochenschrift*, 2012, p. 1500.

<sup>101</sup> Federal Constitutional Court, 22 June 2018, 1 BvR 673/18, in *Neue Juristische Wochenschrift*, 2018, p. 2860, para. 31.

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boundaries of peaceful public discourse”<sup>102</sup> and its denial “endangers the peaceful political discourse not least because these crimes particularly targeted certain groups of persons or groups within society, and the denial of these events can and has been used, openly or insidiously, as a code to instigate hostile actions targeting these very groups.”<sup>103</sup> In contrast, ‘trivialisation’ has been considered not to automatically endanger public peace, so it remains that this element must be established.<sup>104</sup>

While the Federal Constitutional Court’s jurisprudence on § 130(3) of the Criminal Code fit within its settled case law on Article 5 of the Basic Law, the Court’s landmark decision in the *Wunsiedel* case on § 130(4) of the Criminal Code in 2009<sup>105</sup> took many observers by surprise. To grasp the importance of this decision, it is necessary to understand that under Article 5(2) of the Basic Law, the freedom of speech can only be restricted by ‘provisions of general laws’ and in situations relating to the protection of young persons or the right to personal honour. The Court found that § 130(4) of the Criminal Code was not a ‘general law’ since it criminalised the expression of specific political views and “deliberately does not aim at the approval, glorification and justification of the rule of arbitrary force of totalitarian regimes as a whole [...].”<sup>106</sup> According to the Court, § 130(4) of the Criminal Code also could not be based on the right to personal honour, for example, the dignity of the victims, because the other grounds for interference must also be interpreted as not allowing the prohibition of specific opinions.<sup>107</sup> Nonetheless, in

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<sup>102</sup> *Ibid.*, para. 32.

<sup>103</sup> *Ibid.*, para. 33.

<sup>104</sup> Federal Constitutional Court, Order, 22 June 2018, 1 BvR 2083/15, in *Neue Juristische Wochenschrift*, 2018, p. 2862, para. 23, finding the sole claim “that the mass murder that took place in Auschwitz and in other places had not been committed in the scope recognised by history [...] is not sufficient to establish that the threshold from which a statement is [...] jeopardising a peaceful discourse has been reached. [...] Criminal sanctions as a limit to the freedom of expression may only be imposed where the statements can no longer be considered non-violent in nature”, *ibid.* paras. 29 ff.

<sup>105</sup> Federal Constitutional Court, Order, 4 November 2009, 1 BvR 2150/08, in *BVerfGE*, vol. 124, p. 300 (*‘Wunsiedel’*).

<sup>106</sup> *Ibid.*, p. 325.

<sup>107</sup> *Ibid.*, p. 326 f., as otherwise, the constitutional “protection against discrimination linking to specific opinions and political views [...] as required by the rule of law” would be undermined.

an “unexpected twist”,<sup>108</sup> the Court did not hold § 130(4) of the Criminal Code unconstitutional. Instead, it developed a unique exception to the ban on criminalising a specific opinion:

In view of the injustice and the horror which National Socialist rule inflicted on Europe and large parts of the world, defying general categories, and of the establishment of the Federal Republic of Germany which was understood as an antithesis of this, an exception to the ban on the special legislation for opinion-related laws is inherent in Article 5 [...] Basic Law for provisions which impose boundaries on the propagandistic condonation of the National Socialist Regime [...]. The deliberate discarding of the tyrannical regime of National Socialism was historically a central concern of all the powers participating in the establishment and passing of the Basic Law. [...] In Germany, favouring [the Nazi] rule constitutes an attack on the internal identity of the community and has a potential to pose a threat to peace. In this regard, it is not comparable with other expressions of opinion, and ultimately it can also trigger profound disquiet abroad.<sup>109</sup>

Legal literature criticised the exception, which has no explicit basis in the constitutional text, as amounting to a constitutional amendment.<sup>110</sup> However, the Court emphasised that the exception was to be understood narrowly. Strikingly, it held that “the Basic Law does not have a general anti-National Socialist fundamental principle”,<sup>111</sup> seemingly contradicting its preceding findings to some extent.<sup>112</sup> In conclusion, it emphasised that the provision did not “aim to ensure that protective measures are taken towards impacts of

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<sup>108</sup> Mathias Hong, “§ 15(2) Versammlungsgesetz”, in Michael Breitbach and Dieter Deiseroth (eds.), *Versammlungsrecht*, 2nd ed., Nomos, Baden-Baden, 2020, § 15, para. 386.

<sup>109</sup> *Wunsiedel*, pp. 327 ff., see above note 105.

<sup>110</sup> Franz Schemmer, in Volker Epping and Christian Hillgruber (eds.), *Grundgesetz-Kommentar*, 3rd ed., C.H. Beck, Munich, 2020, Article 5, para. 99.3.

<sup>111</sup> *Wunsiedel*, p. 330, see above note 105.

<sup>112</sup> For the claim of inconsistency, see Uwe Volkmann, “Die Geistesfreiheit und der Ungeist – Der Wunsiedel-Beschluss des BVerfG”, in *Neue Juristische Wochenschrift*, 2010, p. 419; in favour of an inherent anti-National Socialist fundamental principle within the constitution, see Lorenz Leitmeier, “Das antinazistische Grundgesetz”, in *Neue Juristische Wochenschrift*, 2016, p. 2553; rejecting the criticism of inconsistency, see Johannes Masing, “Meinungsfreiheit und Schutz der verfassungsrechtlichen Ordnung”, in *JuristenZeitung*, 2012, pp. 589 f.

specific expressions of opinion that remain purely intellectual.”<sup>113</sup> Rather, public peace needed to be interpreted restrictively so as to take into account the fundamental importance of the freedom of opinion in a democracy that “trusts that society can cope with criticism”.<sup>114</sup> Hence, on this basis, § 130(4) of the Criminal Code was held to be constitutional.

#### 2.1.1.2.2. Interpretation by Criminal Courts

There is rich case law by criminal courts on § 130(3) and § 130(4) of the Criminal Code, providing disturbing illustrations of strong persisting anti-semitism in German society. The relevant decisions closely link legal reasoning with historical references.

For instance, the so-called ‘underground song’ (“We build an underground railway from Jerusalem to Auschwitz”) that football fans sang after a match has been qualified as Holocaust ‘approval’. The adjudicating court emphasised that the train connection between ‘Jerusalem’ and ‘Auschwitz’ was a direct reference to the transportation of Holocaust victims to extermination camps. Even if the persons involved did not seriously have the construction of a subway in mind, the lyrics of the song symbolically presented a possible repetition of the transports and thus, the singers were seen to be expressing the view that the injustice of the Holocaust had been limited and that repetition of these events was considered reasonable.<sup>115</sup>

Another example of ‘approval’ involved a tattoo depicting the gate of Auschwitz and the words ‘To each his own’ (‘Jedem das Seine’)<sup>116</sup> on a defendant’s back.<sup>117</sup> In view of the settled case law that ambiguous statements may only entail criminal sanctions where non-criminal interpretations can be excluded on reasonable grounds,<sup>118</sup> the Court emphasised that the

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<sup>113</sup> Wunsiedel, p. 332, see above note 105.

<sup>114</sup> *Ibid.*, p. 334: “[a]n understanding of public peace which aims to protect against subjective disquiet being caused to citizens through the confrontation with provocative opinions and ideologies or to conserve social or ethical views which are seen as fundamental is not tenable for the justification of encroachments on the freedom of opinion”.

<sup>115</sup> *Metro song*, juris, para. 19, see above note 85.

<sup>116</sup> Inscription at the gate of the Buchenwald concentration camp; see the Buchenwald and Mittelbau-Dora Memorials Foundation’s web site.

<sup>117</sup> Higher Regional Court of Brandenburg, Order, 12 April 2017, (1) 53 Ss 17/17 (13/17), in *Neue Zeitschrift für Strafrecht – Rechtsprechungsreport*, 2017, p. 206 (‘Tattoo’).

<sup>118</sup> See Federal Constitutional Court, Order, 6 September 2000, 1 BvR 1056/95, in *Neue Zeitschrift für Strafrecht*, 2001, p. 26, juris, para. 36 (‘Designation as Jew’).

combination of the picture and the text could not be understood as anything but an endorsement of the Holocaust.<sup>119</sup>

The offence of ‘downplaying’, for example, is committed by questioning the number of victims of the Holocaust, unless the statement merely concerns small differences at the margins of the historically established scope.<sup>120</sup> Therefore, judges must take into account the state of historical science. However, the distinction between punishable and unpunishable conduct can pose difficulties. Thus far, prosecutors have refused to charge the portraying of abortions as ‘babocaust’ and as an increased cruelty compared to the Holocaust, as downplaying of the Holocaust, and have limited charges to insult of physicians.<sup>121</sup> This offence has gained new relevance in the wake of protests against measures to curb the spread of the coronavirus. Opponents of the vaccination campaign who wore yellow badges with the word “Jew” replaced by “unvaccinated” have been prosecuted for ‘downplaying’.<sup>122</sup> In this regard, a disputed question is whether the symbol of the Yellow Star refers primarily to the deprivation of rights and societal exclusion of Jews in Nazi Germany and the occupied territories, or, whether it also symbolises the genocide, for only in the latter case can the abuse of this symbol be subsumed under § 130(3) of the Criminal Code. The appellate court of Saarbrücken has confirmed an acquittal on the grounds that the limits of the freedom of expression were not yet exceeded, as even statements that were difficult to bear in principle must not be countered by bans but rather through public debate.<sup>123</sup> However, the appellate court of Bavaria has ruled differently, having affirmed a conviction for Holocaust denial in a comparable case.<sup>124</sup> The

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<sup>119</sup> *Tattoo*, p. 207, see above note 117.

<sup>120</sup> Federal Court of Justice, Judgement, 22 December 2004, 2 StR 365/04, in *Neue Juristische Wochenschrift*, 2005, p. 691.

<sup>121</sup> Christian Rath, “Ist ‘Babycaust’ eine Volksverhetzung?”, in *Legal Tribune Online*, 15 February 2022; for the charge of insult in these cases see below note 205.

<sup>122</sup> Annelie Kaufmann, “Ist das Tragen von ‘Ungeimpft’-Sternen strafbar?”, in *Legal Tribune Online*, 2 March 2022.

<sup>123</sup> *Jewish Star*, para 21, see above note 86.

<sup>124</sup> Higher Regional Court of Bavaria, Judgement, 25 June 2020, 205 StRR 240/20 on the public showing of a poster with a Yellow Star with “1933–1945” and the logo of the party “Alternative für Deutschland” with the year “2013–?”; also, some Land ministers have issued internal decrees (Erlasse) to persecute the abuse of the Yellow Star at demonstrations, see “‘Unerträglich’: Pistorius geht gegen ‘Ungeimpft’-Sterne vor”, in *Norddeutscher Rundfunk*, 10 February 2022 (on Lower Saxony); similarly “‘Judensterne’ auf Corona Demos: NRW-

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Prosecutor General's Office for Schleswig Holstein has indicted a critic of the Covid-19 vaccination campaign due to his description of the campaign as a "Final Solution" and a "second Holocaust".<sup>125</sup> Another indictment concerns comparisons of doctors administering Covid-19 vaccinations with Josef Mengele, the infamous physician in the Auschwitz concentration camp.<sup>126</sup>

### **2.1.2. Reform on Denial of Other Genocides, Crimes against Humanity and War Crimes**

On 20 October 2022, the German Parliament considerably expanded the pre-existing explicit memory laws by adopting a new provision, future § 130(5) of the Criminal Code. This offence, which at the time of writing has not yet entered into force and could still be modified after a possible intervention of the Bundesrat, criminalises the condoning, denial and gross trivialisation of genocide, crimes against humanity and war crimes directed against national, racial, religious, or ethnic groups, parts of the population or members of these groups, wherever the statement is likely to incite hatred or violence against these persons and disturb public peace.<sup>127</sup> The reform was adopted, without opportunity for any prior public debate, as an amendment to another legislative package. This procedure allows to combine different laws which, in isolation, might fail to receive the necessary majority. It is primarily used for mainly technical or urgent changes.

The government justified the reform with its obligation to implement the European Union ('EU') Framework Decision on Racism and Xenophobia ('2008 FD')<sup>128</sup>. This instrument obliges Member States to introduce a general ban of public condoning, denial or gross trivialization of genocide, crimes against humanity and war crimes under the Statute of the International Criminal Court ('ICC Statute') when the conduct is likely to incite to violence or hatred against a relevant protected group (Article 1(1)(c)). In December 2021, the European Commission opened an infringement

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Innenminister Reul hält das Tragen für strafbar", in *Redaktionsnetzwerk Deutschland*, 11 February 2022 (on North Rhine-Westphalia).

<sup>125</sup> "Generalstaatsanwaltschaft klagt Sucharit Bhakdi wegen Volksverhetzung an", in *Legal Tribune Online*, 12 May 2022.

<sup>126</sup> "Querdenken-Wortführer Bodo Schiffmann angeklagt", in *Der Spiegel*, 13 April 2022.

<sup>127</sup> Bundestag Doc. (BT-Drucks.) 20/4085, 19 October 2022, p. 11.

<sup>128</sup> Framework Decision on combating certain forms and expressions of racism and xenophobia by means of criminal law, 28 November 2008, 2008/913/JI.

proceeding against Germany for not “fully or accurately” transposing the 2008 FD.<sup>129</sup> The German legislator now chose to not use the option provided for by Article 1(4) of the 2008 FD to make the criminalization of denial and gross trivialization dependent on an international or national court ruling. In the government’s view, it would have been inconsistent to introduce such a hurdle for the denial and gross trivialisation, but not for condoning.<sup>130</sup> Similarly, the Bundestag slightly exceeded the 2008 FD by extending the criminalisation to statements made in (non-public) assemblies, in order to avoid inconsistencies with the existing ban on condoning of certain crimes (§ 140 No. 2 of the Criminal Code).<sup>131</sup>

The reform has been perceived mainly critically by scholarship. Critics argue that the new denial ban interferes too heavily with the freedom of expression,<sup>132</sup> and that the legislator should have used the option to make the criminalisation of denial and gross trivialisation dependent on an international court decision on the historical crime.<sup>133</sup> Critics have also argued that the reform compromises the singularity of the Holocaust.<sup>134</sup> Other voices have defended the legislative change.<sup>135</sup>

The German Bundesrat, the organ with representatives of the Länder, could still ask for a modification of the reform, but if the Parliament maintains its position, it can overrule the Bundesrat.

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<sup>129</sup> European Commission, “December infringement package: key decisions”, press release, 2 December 2021.

<sup>130</sup> Bundestag Doc. (BT-Drucks.) 20/4085, p. 15, see above note 127.

<sup>131</sup> *Ibid.*, p. 16.

<sup>132</sup> Marlene Grunert, “Ein erheblicher Eingriff in die Meinungsfreiheit”, *Frankfurter Allgemeine Zeitung*, 27 October 2022.

<sup>133</sup> Elisa Hoven, “Wie der Bundestag ohne Not das Strafrecht politisiert”, *Libra*, 1 November 2022; Paula Rhein-Fischer, “Regieren der Erinnerung durch Recht”, *Verfassungsblog*, 31 October 2022.

<sup>134</sup> Marlene Grunert, “Ein erheblicher Eingriff in die Meinungsfreiheit”, *Frankfurter Allgemeine Zeitung*, 27 October 2022.

<sup>135</sup> Michael Kubiciel, “Welcher Skandal?”, *Verfassungsblog*, 27 October 2022; see also Thomas Fischer, “Stil und Sicherheit”, *Spiegel*, 28 October 2022.

### **2.1.3. Dissemination of Propaganda Material and Use of Symbols of former Nazi Organisations (§§ 86(1), No. 4, 86a of the Criminal Code)**

The dissemination of propaganda material related to unconstitutional organisations is criminalised by § 86(1) of the Criminal Code. § 86(1), No. 4 of the Criminal Code explicitly incriminates the dissemination, production, stocking, import or export of propaganda material, the content of which is intended to further the activities of a former National Socialist organisation. Thus, this provision can be classified as an explicit memory law of punitive character. The legislature, adopting § 86 of the Criminal Code in 1968, was primarily worried about inflowing propaganda from Eastern Germany, the outlawing of neo-Nazi material appeared to be an accessory matter.<sup>136</sup>

Unlike the other numbers of the provision,<sup>137</sup> the application of § 86(1), No. 4 of the Criminal Code does not depend on the organisation being formally declared unconstitutional. However, the mere capability of the propaganda being a medium for promoting the National Socialist regime or its ideology on its own is not sufficient.<sup>138</sup> Relevant former National Socialist organisations in this context are Hitler's National Socialist German Workers' Party ('NSDAP') or the Schutzstaffel ('SS').<sup>139</sup> The Wehrmacht (armed forces of Nazi Germany) has not been included since, according to the Federal Court of Justice, "particularly strong attempts after the resistance plot of 20 July 1944 to turn the Wehrmacht into a real National Socialist organisation ultimately failed due to the beginning collapse [of the regime]."<sup>140</sup>

Referring, *inter alia*, to prohibited Nazi organisations under § 86(1), No. 4, the provision of § 86a of the Criminal Code targets the dissemination of Nazi symbols, including flags, insignia, uniforms, slogans and forms of

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<sup>136</sup> See Written Report of the Special Committee on Criminal Law Reform, Bundestag Doc. (BT-Drucks.) V/2860, 9 May 1968, p. 8.

<sup>137</sup> For these numbers, see below Section 2.3.1.2.1.

<sup>138</sup> Federal Court of Justice, Judgement, 23 July 1969, 3 StR 326/68 in *Neue Juristische Wochenschrift*, 1969, p. 1973 ('Führer Headquarters').

<sup>139</sup> Federal Court of Justice, Judgement, 24 August 1977, 3 StR 229/77, in *BeckRS*, 1977, 287.

<sup>140</sup> *Führer Headquarters*, p. 1973, see above note 138, referring to Federal Constitutional Court, Judgement, 26 February 1954, 1 BvR 371/52, in *Neue Juristische Wochenschrift*, 1954, p. 466.

greeting, as well as related preparatory acts.<sup>141</sup> According to the jurisprudence, the provision serves to prevent the actual revival of a Nazi organisation and to protect the public peace by countering any impression in, or outside of Germany that such intentions would be tolerated,<sup>142</sup> its function thus being to create a “communication taboo”.<sup>143</sup> Parts of the legal literature also emphasise that it contributes to the identity-forming of the German state.<sup>144</sup> In view of the restrictive wording of the provision, the use of slogans that appear associated with National Socialist organisations but which are invented or deviate from the original to such an extent that a potential confusion is excluded is not punishable.<sup>145</sup>

The prohibition of Nazi propaganda and Nazi symbols again contains exceptions in relation to acts that serve civic information, to prevent unconstitutional activities, research or teaching, reporting about current or historical events or similar purposes (§§ 86(4), 86a(3) of the Criminal Code). Beyond this, the courts have exempted uses which do not contravene the provision’s purpose or are even supposed to reinforce its purpose,<sup>146</sup> that is, to prevent the revival of prohibited organisations and their unconstitutional ideologies, and to protect the public peace.<sup>147</sup>

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<sup>141</sup> For examples of prohibited Nazi symbols, see Sascha Ziemann, in Klaus Leipold, Michael Tsambikakis and Mark Alexander Zöller (eds.), *Anwaltkommentar StGB*, 3rd ed., C.F. Müller, Heidelberg, 2020, § 86a, para. 5.

<sup>142</sup> Federal Court of Justice, Judgement, 18 October 1972, 3 StR 1/71 I, in *Neue Juristische Wochenschrift*, 1973, p. 107 ('NS symbols'); Federal Constitutional Court, Order, 23 March 2006, 1 BvR 204/03, in *Neue Juristische Wochenschrift*, 2006, p. 3052, para. 18.

<sup>143</sup> Federal Constitutional Court, Order, 1 June 2006, 1 BvR 150/03, in *Neue Juristische Wochenschrift*, 2006, p. 3050, para. 18.

<sup>144</sup> Gabriele Klett-Straub, “Das Verwenden nationalsozialistischer Kennzeichen”, in *Neue Zeitschrift für Strafrecht*, 2011, p. 605; for an overview on potentially protected interests, see Detlev Sternberg-Lieben, in Adolf Schönke and Horst Schröder (eds.), *Strafgesetzbuch Kommentar*, 30th ed., C.H. Beck, Munich, 2019, § 86a, para. 1.

<sup>145</sup> Federal Court of Justice, Judgement, 28 July 2005, 3 StR 60/05, in *Neue Juristische Wochenschrift*, 2005, p. 3225.

<sup>146</sup> Federal Court of Justice, Judgement, 15 March 2007, 3 StR 486/06, in *Neue Zeitschrift für Strafrecht*, 2007, p. 466; such an exemption was, however, rejected for a poster showing the former chancellor Merkel in an NSDAP uniform and a swastika held by a person protesting against her Euro politics during the Euro crisis, see Christian Rost, “3000 Euro Strafe für Merkel-Plakat mit Hakenkreuz”, in *Süddeutsche Zeitung*, 21 March 2013.

<sup>147</sup> *NS symbols*, p. 107, see above note 142.

## **2.2. Explicit Memory Laws of Non-Punitive Character: Prohibition of Assemblies at Memorials for Victims of the Nazi Regime (§ 15(2) of the Assembly Act)**

At the same time as § 130(4) of the Criminal Code was introduced, the Parliament amended § 15(2) of the Assembly Act, which enables authorities to prohibit or restrict open air assemblies in case of threats to public security or public order.<sup>148</sup> The amendment permits the prohibition or restriction of assemblies that are set to take place at “a memorial of historically outstanding, supra-regional significance, commemorating the victims” of the National Socialist regime, provided that the dignity of the victims will likely be disturbed.<sup>149</sup> The Memorial to the Murdered Jews of Europe in Berlin is explicitly defined as a *locus* in this sense. The Länder have declared further localities, in particular memorial sites of former concentration camps, as also falling under this category.<sup>150</sup>

Similar to § 130(4) of the Criminal Code, § 15(2) of the Assembly Act was a reaction to a planned neo-Nazi march in Berlin and an annual event in the Bavarian town of Wunsiedel commemorating Hitler’s deputy within the NSDAP, Rudolf Heß.<sup>151</sup> The Federal Constitutional Court had previously upheld an order to postpone a right-wing demonstration originally scheduled to take place on the Holocaust Remembrance Day as it was considered to endanger the public order under § 15(1) of the Assembly Act.<sup>152</sup> However, it remained uncertain whether that provision could serve as a reliable legal basis for other restrictions of neo-Nazi marches. In particular, in a remarkable controversy,<sup>153</sup> the Federal Constitutional Court repeatedly overruled the

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<sup>148</sup> Gesetz zur Änderung des Versammlungsgesetzes und des Strafgesetzbuches, 24 March 2005, see above note 90.

<sup>149</sup> See § 15(2) of the Assembly Act, 15 November 1978, BGBl. I S. 1789 (hereinafter often referred to as ‘Assembly Act’) (<https://www.legal-tools.org/doc/i9ygyf/>).

<sup>150</sup> For an overview, see: Hong, 2020, § 15, para. 528, see above note 108.

<sup>151</sup> See Recommendation for a decision and report of the Committee on Internal Affairs, Bundestag Doc. (BT-Drucks.) 15/5051, 9 March 2005, p. 6.

<sup>152</sup> Federal Constitutional Court, Order, 26 January 2001, 1 BvQ 9/01, in *Neue Juristische Wochenschrift*, 2001, p. 1410 (‘Holocaust memorial day’); for more details on this jurisprudence see below Section 2.3.1.3.

<sup>153</sup> For the perspective of the first Chamber of the first Senate of the Federal Constitutional Court, see Wolfgang Hoffmann-Riem, “Die Luftröhre der Demokratie”, in *Frankfurter Rundschau*, 11 July 2002, p. 14, finding that neo-Nazis, too, will prevail with a constitutional complaint in case of “evidently incorrect decisions” of the administrative courts involved; for the position of the Higher Administrative Court of North Rhine-Westphalia see Michael Bertrams,

Higher Administrative Court of North Rhine-Westphalia,<sup>154</sup> refuting that court's assessment that an assembly professing National Socialism was not protected by the constitution, given that it ran counter to the values of the Basic Law.<sup>155</sup>

As § 15(2) of the Assembly Act addresses a specific political ideology, namely right-wing extremism, it is again not a 'general law' as required by Article 5(2) of the Basic Law for restrictions of the freedom of expression. The provision therefore attracts similar concerns as § 130(4) of the Criminal Code.<sup>156</sup> In addition, the freedom of assembly under Article 8(1) of the Basic Law must also be taken into account. In view of this, as for the concept of 'public peace' under § 130(4) of the Criminal Code, scholars call for a narrow reading of the 'disturbance of the dignity of victims' under § 15(2), Sentence 2, No. 2 of the Assembly Act, as requiring an imminent danger for human dignity.<sup>157</sup>

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"Demonstrationsfreiheit für Neonazis?", Higher Administrative Court of North Rhine-Westphalia, press release, 15 July 2002, accusing Hoffmann-Riem of "dubious speculations" and "patterns of argumentation which disqualify themselves".

<sup>154</sup> Higher Administrative Court of Münster, Order, 12 April 2001, 5 B 492/01, in *Neue Juristische Wochenschrift*, 2001, p. 2113: "According to assessment by the Federal Constitutional Court, the public appearance of neo-Nazis and the dissemination of National Socialist ideas in public meetings and demonstrations, as long as they do not exceed the threshold of punishability, also fall under the protection of the Basic Law. The deciding senate does not share this opinion and considers the consequences associated with it to be problematic"; Higher Administrative Court of Münster, Order, 25 January 2001, 5 B 115/01, in *BeckRS*, 2001, 20583; Higher Administrative Court of Münster, Order, 23 March 2001, 5 B 395/01, in *Neue Juristische Wochenschrift*, 2001, p. 2111; Higher Administrative Court of Münster, Order, 30 April 2001, 5 B 585/01, in *Neue Juristische Wochenschrift*, 2001, p. 2114.

<sup>155</sup> Federal Constitutional Court, Order, 24 March 2001, 1 BvQ 13/01, in *Neue Juristische Wochenschrift*, 2001, p. 2069 ('Protest march'); Federal Constitutional Court, Order, 12 April 2001, 1 BvQ 19/01, in *Neue Juristische Wochenschrift*, 2001, p. 2075; Federal Constitutional Court, Order, 1 May 2001, 1 BvQ 22/01, in *Neue Juristische Wochenschrift*, 2001, p. 2076; these verdicts have been called into question by the Federal Constitutional Court's 2009 *Wunsiedel* ruling, which replicates the Higher Administrative Court's understanding of the Basic Law as an antithesis of the National Socialist rule; see Volkmann, 2010, pp. 417 f., see above note 112; for more details, see below Section 2.3.1.3.

<sup>156</sup> Hong, 2020, § 15, para. 510, see above note 108; this is at least the case where § 15(2) operates as legal basis for interferences with the freedom of expression, and not only the freedom of assembly; regarding the concerns in the context of § 130(4) of the Criminal Code, see above Section 2.1.1.2.1.

<sup>157</sup> Hong, 2020, § 15, para. 523, see above note 108.

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Beyond right-wing extremism, authorities seek to protect the adequate remembrance of past atrocities. Bilateral treaties with Russia, as well as Ukraine, oblige the German government to guarantee the protection and care of Soviet war graves in Germany. In an effort to prevent violent confrontations between rivalling protesters in the context of the Russian war in Ukraine, officials in Berlin prohibited the display of Russian and Ukrainian flags around Soviet monuments on 8 and 9 May 2022, citing the need to preserve “the act of remembering [...] against the backdrop of Russia’s current war of aggression in Ukraine.”<sup>158</sup> It should be noted that Article 139 of the Basic Law could also be analysed as an explicit non-punitive memory law, however, this provision will be set out in the context of the concept of militant democracy.<sup>159</sup>

### 2.3. Quasi-Memory Laws

The category of quasi-memory laws can be distinguished from those that govern explicitly the collective memory of a specific historical event. Quasi-memory laws foster a certain collective memory more indirectly. On the one hand, this category includes laws that (like the explicit memory laws set out above) attach legal consequences to the expression or the putting into action of a certain view on the Shoah and the Nazi regime. However, this is done not by referring explicitly to these historical events, rather, by protecting an abstract – that is, non-specifically history-related, although not completely ideology-neutral – legal value such as the ‘free democratic order’ (‘freiheitlich-demokratische Grundordnung’) or the honour of a person. It is primarily through the interpretation by the courts that these laws become mnemonic. In the following, these laws are grouped according to the legal value they protect and the mnemonic effect they create (Section 2.3.1.). On the other hand, the term ‘quasi-memory laws’ is utilised here to refer to laws that do not relate to the mindset or statements of individuals, but which aim at rooting this memory in society by means affecting the public, such as the naming of streets or school curricula (Section 2.3.2.).

It is not the aim of this section to set out the entire legislation pertaining to German transitional justice after 1945 aimed at liberating the legal order

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<sup>158</sup> Police Department of Berlin, press release, 6 May 2022 (available on its web site); the prohibition was confirmed by the Higher Administrative Court of Berlin-Brandenburg, Order, 9 May 2022, OVG 1 S 35/22; it is, however, unclear on which legal basis the measure was grounded.

<sup>159</sup> See below Section 2.3.1.2.

from Nazi influence or legislation that, in any other way, was a reaction to this historical experience. Rather, the analysis is limited to those laws which, in their result, specifically contribute to how this event is remembered today, whether by outlawing the expression or putting into action of Nazi ideology that promotes a positive reminiscence of the ‘Third Reich’ in any form. Still, in some places, especially in relation to the militant democracy principle, the line to the non-specifically mnemonic, but more general ‘anti-Nazi legislation’ is narrow. This illustrates that, ultimately, there is no concise objective criteria determining where the category of quasi-memory law effectively ends.

### **2.3.1. Non-Specifically History-Related Laws Turning Mnemonic through Interpretation**

#### **2.3.1.1. Criminal Laws Protecting Public Peace, Human Dignity and Personal Honour**

The way that non-specifically history-related laws result in the outlawing of a certain (factually false or atrocity-glorifying) memory is most evident in the criminal provisions protecting public peace, human dignity and personal honour that German courts have used in order to penalise the denial and glorification of the Holocaust (other than the mentioned § 130(3) and (4) of the Criminal Code which incriminate the latter explicitly).<sup>160</sup> Whilst these other provisions were much more relevant before an explicit offence of Holocaust denial and approval existed, they are still applied today and thus, remain relevant in this context.

##### **2.3.1.1.1. Incitement to Hatred (§ 130(1) and (2) of the Criminal Code)**

The most important norm in this regard is the above-mentioned § 130(1) of the Criminal Code. In its No. 1, it criminalises, *inter alia*, the incitement to hatred against a national, racial, religious group or a group defined by their ethnic origin, parts of the population or individuals for their belonging to one of these groups (first alternative) or the call for violent or arbitrary measures against them (second alternative). In No. 2, it criminalises the violation of “human dignity of others by insulting, maliciously maligning or defaming”

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<sup>160</sup> For a comprehensive analysis of how Holocaust denial is criminalised, see Thomas Wandres, *Die Strafbarkeit des Auschwitz-Leugnens*, Duncker & Humblot, Berlin, 2000; Matthias Leukert, *Die strafrechtliche Erfassung des Auschwitzleugnens*, Tübingen, 2005.

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one of these groups or individuals. All variants must be committed in “a manner suitable to disturb the public peace”. While it is generally deduced from this that these offences aim at protecting the public peace,<sup>161</sup> there is disagreement surrounding whether human dignity is also a protected interest.<sup>162</sup> Both provisions are assumed to be far-reaching limitations on public speech which would be considered overly broad by American jurisprudence<sup>163</sup> and to be illustrative of the German dignity-based approach to freedom of speech.<sup>164</sup>

Courts have assumed an ‘incitement to hatred’ under No. 1 in its first alternative, in particular in cases of the ‘qualified’ Auschwitz denial, that is, the denial of the mass murder of Jews where it is linked to an identification with the Nazi race ideology or the claim that this “assertion” served the gagging and blackmailing of Germany.<sup>165</sup> Beyond this, courts have applied the provision, for example, to the shouting of the slogan “Foreigners out!” (“Ausländer raus”) together with “Sieg Heil!” deeming them to be an expression of the Nazi mindset,<sup>166</sup> the presentation of the antisemitic Nazi propaganda film ‘Jud Süß’<sup>167</sup> and graffiti on a car stating “Perish the Jew” (“Juda verrecke”) together with swastikas, as each expressed claims from the Nazi period.<sup>168</sup> Further examples include the adding of the word ‘Jew’ at an election poster as this expressed the Nazi claim that Jews should be excluded

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<sup>161</sup> *Deckert II*, p. 341, see above note 68; Anstötz, Schäfer, 2021, § 130, para. 2, see above note 83; for a diverging view, see Knut Jacobi, *Ziel des Rechtsgüterschutzes bei der Volksverhetzung*, pp. 231 ff. (in particular p. 252, holding that they only protect individual values, namely, human dignity).

<sup>162</sup> In favour Federal Constitutional Court, Order, 22 June 2006, 2 BvR 1421/05, in *BeckRS*, 2006, 24381; *Deckert II*, p. 341, see above note 68; Anstötz, Schäfer, 2021, § 130, para. 3, see above note 83.

<sup>163</sup> Brugger, 2019, p. 29, see above note 41.

<sup>164</sup> See above Section 1.

<sup>165</sup> *Internet*, p. 307, see above note 68, confirming earlier case law (for example, *Deckert I*, see above note 48; ‘Remer-Depesche’, see above note 47 and accompanying text for the distinction between qualified and simple Auschwitz denial).

<sup>166</sup> Higher Regional Court of Brandenburg, Judgement, 28 November 2001, 1 Ss 52/01, in *Neue Juristische Wochenschrift*, 2002, p. 1441 (‘Millenium celebrations’).

<sup>167</sup> Federal Court of Justice, Judgement, 25 July 1963, 3 StR 4/63, in *Neue Juristische Wochenschrift*, 1963, p. 2034, holding that “after the historic experience it requires no further explication that this film is likely to disturb public peace”.

<sup>168</sup> Higher Regional Court of Koblenz, Judgement, 11 November 1976, 1 Ss 524/76, in *Monatsschrift für Deutsches Recht*, 1977, p. 334, juris, para. 15.

from the public life,<sup>169</sup> the claim that “a people that has been persecuted for 2000 years must have done something wrong”,<sup>170</sup> or the election posters “Stop Zionism! Israel is our misfortune [...]” (“Zionismus stoppen! Israel ist unser Unglück”), and “We don’t only hang posters” (“Wir hängen nicht nur Plakate”).<sup>171</sup> However, the offence has been rejected in cases of ‘simple’ Holocaust denial,<sup>172</sup> including the use of the German Reich war flag<sup>173</sup> or the slogan “Never again Israel” (“Nie wieder Israel”).<sup>174</sup> The courts have affirmed a ‘call for violent or arbitrary measures’ (No. 1 in its second alternative) in relation to the graffiti “Jews out” (“Juden raus”) together with a swastika, as in view of the historical past of the Nazi persecution of Jews this could only be understood as encouraging a violent expulsion, though this argument could not be successfully applied to the slogan “Foreigners out”.<sup>175</sup> Other examples for this variant are pogroms and hounding<sup>176</sup> or calls for boycott such as “Don’t buy from the Jews”.<sup>177</sup> The qualified Auschwitz denial has also

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<sup>169</sup> Federal Court of Justice, Judgement, 15 November 1967, 3 StR 4/67, in *Neue Juristische Wochenschrift*, 1968, p. 310.

<sup>170</sup> Higher Administrative Court of Münster, Order, 14 May 2018, 15 B 643/18, in *BeckRS*, 2018, 11920, para. 18 (‘Israel’).

<sup>171</sup> As the slogan alluded to the Nazi slogan “The Jews are our misfortune”, Higher Regional Court of Karlsruhe, Order, 9 February 2022, 1 Ws 189/21, still rejecting the complaint against the closing of investigations as the perpetrators could not be identified.

<sup>172</sup> Federal Court of Justice, Judgement, 14 January 1981, see above note 48, p. 258; *Deckert I*, see above note 48.

<sup>173</sup> Higher Administrative Court of Bremen, Order, 16 October 2020, 1 B 323/20, in *Zeitschrift für öffentliches Recht in Norddeutschland*, 2021, p. 246 (‘Reichskriegsflagge’); see already Higher Administrative Court of Münster, Order, 22 June 1994, 5 B 193/94, in *Neue Juristische Wochenschrift*, 1994, p. 2909; Administrative Court of Würzburg, Order, 29 March 2013, S 5 S 13.264, in *BeckRS*, 2013, 49236.

<sup>174</sup> *Israel*, paras. 15 f., see above note 170; in Germany, the term “never again” commonly refers to the idea that the Holocaust and National Socialism should never happen again, see Daniel Wolff, “‘Nie wieder’ als Argument”, in *Jahrbuch des öffentlichen Rechts der Gegenwart*, 2021, vol. 69, no. 1, pp. 117–153.

<sup>175</sup> Federal Court of Justice, Judgement, 14 March 1984, 3 StR 36/84, in *Neue Juristische Wochenschrift*, 1984, p. 1632; for a more nuanced view, see Federal Constitutional Court, Order, 25 March 2008, pp. 2908 f., see above note 99; *Millenium celebrations*, p. 1441, see above note 166; for a different view see Anstötz, Schäfer, 2021, § 130, para. 49, see above note 83.

<sup>176</sup> See Federal Court of Justice, Order, 28 July 2016, 3 StR 149/16, in *Neue Zeitschrift für Strafrecht – Rechtsprechungsreport*, 2016, p. 370.

<sup>177</sup> Higher Regional Court of Munich, Judgement, 2 October 2014, 4 OLG 14 Ss 413/14, in *BeckRS*, 2014, 100227, paras. 8 ff.; Anstötz, Schäfer, 2021, § 130, para. 47, see above note 83; for other examples see also Karsten Altenhain, in Holger Matt and Joachim Renzikowski

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been subsumed under No. 2, as it infringes on human dignity in that it aims at provoking hostile feelings against Jews, thereby “insulting” this group.<sup>178</sup> Another example of this offence is identification with the Nazi race ideology,<sup>179</sup> expressed, for example, by the claim that non-Jewish parts of the population would be of higher value and that Jews were raised to commit “malice”, to tell “lies”, and to strive for the “domination of the world” as well as being defined by a proclivity for “hatred, robbery and murder”.<sup>180</sup> The same applies for the expression of an antisemitic Nazi ideology through the claim that Jews would approve of sexual abuse of children and would not be worthy to construct synagogues which the Court deemed, in view of the historical systematic destruction of synagogues, to have affected the core of the personality of Jews.<sup>181</sup>

§ 130(2) of the Criminal Code supplements these offences by incriminating the dissemination (No. 1) or, *inter alia*, creation, purchase or offering (No. 2) of discriminatory content in the sense of § 130(1) of the Criminal Code but without requiring a likely disturbance of the public peace.<sup>182</sup> For instance, some courts have held that this provision applies to the offering of the book ‘Mein Kampf’ on the internet.<sup>183</sup> The ‘civic use exception’ of

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(eds.), *Strafgesetzbuch Kommentar*, 2nd ed., Verlag Franz Vahlen, Munich, 2020 § 130, para. 7.

<sup>178</sup> *Internet*, p. 307, see above note 68 p. 307.

<sup>179</sup> See *Designation as Jew*, p. 28, see above note 118.

<sup>180</sup> Higher Regional Court of Brandenburg, Judgement, 17 March 2014, 1 Ws (Vollz) 192/13, in *BeckRS*, 2014, 6933 (on the former § 130(2) of the Criminal Code, however transferable to today’s § 130(1) No. 2 of the Criminal Code).

<sup>181</sup> Federal Court of Justice, Judgement, 15 December 2005, 4 StR 283/05, in *Neue Zeitschrift für Strafrecht – Rechtsprechungsreport*, 2006, p. 306; for more examples, see Anstötz, Schäfer, 2021, § 130, para. 58, see above note 83; § 130(1) Nos. 1 and 2 of the Criminal Code were also affirmed for the claim “This Jew in the concentration camp and we have peace [...] I cannot stand it, everywhere this scum” (“Diesen Juden ins KZ und ruhe ist... Ich kann nicht mehr, überall dieses gesocks”), Higher Regional Court of Jena, Judgement, 27 September 2016, 1 OLG 171 Ss 45/16, in *BeckRS*, 2016, 128466.

<sup>182</sup> Legal literature sees within this provision a general anti-discrimination offence; see Peter König, Helmut Seitz, “Die straf- und strafverfahrensrechtlichen Regelungen des Verbrechensbekämpfungsgesetzes”, in *Neue Zeitschrift für Strafrecht*, 1995, p. 3; Anstötz, Schäfer, 2021, § 130, para. 62, see above note 83; Altenhain, 2020, § 130, para. 15, see above note 177.

<sup>183</sup> Administrative Court of Aachen, Order, 5 February 2003, 8 L 1284/02, in *BeckRS*, 2003, 18864, para. 10; the question of how to legally assess a possible dissemination of ‘Mein Kampf’ became more acute in 2016 when the copyrights of Bavaria, that had previously prevented its reprint, ended 70 years after Hitler’s death. The Federal Court of Justice held in

§ 86(3) of the Criminal Code, however, once again applies where the act serves civic information, to prevent unconstitutional activities, to promote arts, science, research, teaching or reporting (§ 130(7) of the Criminal Code). This is why the selling of a scientifically commented edition of ‘Mein Kampf’ is exempt from the offence.<sup>184</sup>

### **2.3.1.1.2. Insult, Malicious Gossip, Defamation, and Disparaging the Dignity of the Deceased (§§ 185, 186, 187 and 189 of the Criminal Code)**

The offences of insult (§ 185), malicious gossip (üble Nachrede) (§ 186), and defamation (§ 187 of the Criminal Code) seek to protect the personal honour of living persons,<sup>185</sup> disparagement of the dignity of the deceased (§ 189 of the Criminal Code) aims at protecting that of deceased persons. These offenses are relevant in two dimensions here, first, in protecting groups prosecuted by the Nazis and second, in protecting persons placed in the realm of the Nazi regime or ideology.

As regards the first dimension, the offence of insult (§ 185 of the Criminal Code) has, since the introduction of § 130(3) of the Criminal Code, lost its gap-filling function for ‘simple Auschwitz denial’ in cases where no identification with Nazi ideology or no claim that Germany is being ‘gagged’ and ‘blackmailed’ could be established. However, insult is still applied in case of ‘simple’ denial of the National Socialist genocide of Jews, such denial now

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1979, based on a formalist reasoning, that the public offering of the book did not constitute a dissemination of propaganda material under § 86(1), No. 4 of the Criminal Code as it had been written before 1949 and could not be “directed against the free democratic order”, Federal Court of Justice, Judgement, 27 July 1979, 3 StR 182/79 (S), in *Neue Juristische Wochenschrift*, 1979, p. 2216; confirmed by LG Arnsberg, Order, 17 November 2016, 2 StVK 77/16, in *BeckRS*, 2016, 121380. However, legal scholars hold that the dissemination is in principle likely to constitute an incitement to hatred under § 130(2) of the Criminal Code, see, for example, Christian Bickenbach, Interview, “Helfen Gesetze gegen ‘Mein Kampf’?”, in *Bundeszentrale für politische Bildung*, 14 December 2015.

<sup>184</sup> *Bundeszentrale für politische Bildung*, 14 December 2015, see above note 183.

<sup>185</sup> The difference between these provisions is that § 187 of the Criminal Code protects against the allegation of untrue and degrading facts about a person *vis à vis* a third person, § 186 of the Criminal Code against such allegation of degrading facts the truth of which is not proven, and § 185 of the Criminal Code against the allegation of untrue and degrading facts *vis-à-vis* the person concerned as well as the expressing of degrading value judgements both *vis-à-vis* the person concerned and third persons, § 189 of the Criminal Code protects both against degrading and unproven facts and value judgements.

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fulfilling both provisions.<sup>186</sup> While courts generally consider collectives to be protected against insult only when they are limited in size, the collective of Jews is protected irrespective of their number as “in view of their unusually difficult fate, imposed on them by National Socialism, they appear as a defined group”.<sup>187</sup> On this basis, jurisprudence initially limited the quality of being injured by Holocaust denial to Jews actually persecuted during the Nazi regime and living in Germany today.<sup>188</sup> However, in the 1990s, the courts extended this protection to persons of Jewish descent, including those born after 1945.<sup>189</sup> In the course of civil proceedings, the Federal Court of Justice explained this idea quite clearly, noting that:

If the statement was limited to accusing the historiography of untruth, the plaintiff would not be injured. [...] But the defendant does not limit itself to a particular understanding of history. By calling the racial murder by National Socialism an invention, the defendant denies the Jews the inhuman fate to which they were subjected solely because of their ancestry. [...] [S]uch a statement [...] directly attacks the personality of the people who were particularly marked by the persecution of the Jews in the ‘Third Reich’. This unique fate shapes the right to respect of each of them, especially vis-à-vis the citizens of the state on which this past weighs. The significance of this event for the person goes beyond the personal experience of discrimination and persecution by the National Socialists. The historical fact itself that people were segregated according to the descent criteria of the so-called Nuremberg Laws and robbed of their individuality with the aim of extermination assigns Jews living in Germany a special personal relationship to their fellow citizens; in this relationship, these events are also present today. It is part of their personal self-image to be understood as

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<sup>186</sup> See in this sense, *Internet*, p. 308, see above note 68; *Jewish Star*, para 28 f., see above note 86; see also above note 47; both offences remain equally visible in the verdict ('Idealkonkurrenz'), see Detlev Sternberg-Lieben, Ulrike Schittenhelm, in Schönke and Schröder (eds.), 2019, § 130, para. 27, see above note 144.

<sup>187</sup> Federal Court of Justice, Order, 28 February 1958, 1 StR 387/57, in *Neue Juristische Wochenschrift*, 1958, p. 599.

<sup>188</sup> *Ibid.*

<sup>189</sup> *Auschwitz lie*, pp. 251 f., see above note 50; on a civil proceeding see *Persecution fate*, see above note 52; see also *Deckert I*, see above note 48; Jörg Eisele, Ulrike Schittenhelm, in Schönke and Schröder (eds.), 2019, Preliminary remarks, § 185, paras. 7b, 8, see above note 144.

belonging to a group of people singled out by fate, towards whom all others have a special moral responsibility, and which is part of their dignity. Respect for this self-image is for each of them virtually one of the guarantees against a repetition of such discrimination and a basic condition for their life in Germany. Anyone who tries to deny these events denies each and every one of them this personal dignity to which they are entitled.<sup>190</sup>

Hence why today any person of Jewish descent living in Germany can request prosecution in relation to non-qualified Holocaust denial and other antisemitic insults. However, the requirement to disclose and prove one's Jewish ancestry or affiliation creates evident problems.<sup>191</sup>

The same principles apply to other forms of incitement to hatred that can be qualified at the same time as insult.<sup>192</sup> Additionally, relativisations of the Shoah by drawing comparisons to it have in some cases been qualified as insult. The animal protection campaign 'The Holocaust is on your plate'

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<sup>190</sup> *Persecution fate*, see above note 52; however, the application of § 185 of the Criminal Code to the denial of suffering and the Holocaust denial in particular is still disputed in literature, see Eisele, Schittenhelm, 2019, § 185, para. 3, see above note 189.

<sup>191</sup> For example, the Federal Court of Justice, in order to answer whether the plaintiff was "a Jew" and hence belonged to the injured collective, applied the Nuremberg Racial Laws, as the Court was hypothetically asking whether he would have been persecuted as well, *Persecution fate*, see above note 52; Sebastian Cobler described this practice as a reversal of the Aryan certificate, see "Die Strafjustiz als Selbstbedienungsladen", in *Der Spiegel*, 28 April 1985.

<sup>192</sup> See, for example, Regional Court of Bielefeld, Judgement, 10 October 2019, 011 Ns-216 Js 396/16-39/18, in *BeckRS*, 2019, 31231, paras. 25–42 on the expression "brazen Jewish official" ("frecher Judenfunktionär"), which fulfilled both § 130(1) No. 1 Var. 1 and § 185 of the Criminal Code; the judgement was confirmed by the Higher Regional Court of Hamm, Order, 28 January 2020, 3 RVs 1/20, in *BeckRS*, 2020, 1399 and the constitutional complaint was not accepted for decision, Federal Constitutional Court, Order, 7 July 2020, 1 BvR 479/20, in *Neue Juristische Wochenschrift*, 2021, p. 297; the designation as 'Jew' as such has not been considered as degrading (Federal Court of Justice, Judgement, 29 November 1955, 5 StR 322/55, in *Neue Juristische Wochenschrift*, 1956, p. 312, but it is under particular circumstances, especially when the author of the statement identifies itself with the Nazi race ideology, see *Jude*, p. 28, see above note 118).

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serves as an example.<sup>193</sup> However, in the context of the Covid-19 pandemic, courts have so far shown reluctance in this regard.<sup>194</sup>

Holocaust denial is also subsumed under the offence of disparaging the dignity of the deceased under § 189 of the Criminal Code<sup>195</sup> which protects the personal honour of the deceased, whether as a continuing honour or an autonomous *post-mortem* personality right.<sup>196</sup> This offence has also been affirmed for the defiling of persons that belonged to the resistance movement.<sup>197</sup>

In principle, a formal request for prosecution is necessary both for §§ 185 and 189 of the Criminal Code, unless the injured person was personally persecuted under the Nazi regime and the offence has been committed publicly (§ 194(1), Sentence 2, (2), Sentence 2 of the Criminal Code).<sup>198</sup>

As regards the second dimension, the protection of persons placed in the context of the Nazi regime, § 185 of the Criminal Code is especially relevant for comparisons to Nazi representatives and actions likely to be qualified as value judgements and not as untrue statements of facts. Only the latter is

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<sup>193</sup> Federal Constitutional Court, Order, 20 February 2009, 1 BvR 2266/04 and 1 BvR 2620/05, in *Neue Juristische Wochenschrift*, 2009, pp. 3090 f., confirmed by the ECtHR, *PETA Deutschland v. Germany*, Judgement, 8 November 2012, Application No. 43481/09 (<https://www.legal-tools.org/doc/4lk6ag/>); although the case concerned an injunction claim, the German courts qualified the campaign as “insult” to justify the civil claim under § 823(2) of the Civil Code, 1 January 1990 (in conjunction with § 1004(1), Sentence 2 of the Civil Code and §§ 185 ff. of the Criminal Code).

<sup>194</sup> See, for example, the above-mentioned (see above note 86) judgement *Judenstern*, paras. 28 f. on the picture of four yellow stars where the word “Jew” was replaced by the words “not vaccinated”, “AfD voter”, “SUV driver” and “Islamophobic” that did neither find insult nor incitement to hatred; for a divergent decision and the current discussions on this aspect see above note 124.

<sup>195</sup> *Deckert I*, see above note 48; in that sense also *Persecution fate*, see above note 52; *Internet*, p. 309, see above note 68; leaving the question open *Auschwitz lie*, p. 254, see above note 50.

<sup>196</sup> See Brian Valerius, in Bernd von Heintschel-Heinegg (ed.), *Beck'scher Online-Kommentar StGB*, 51st ed., C.H. Beck, Munich, January 2021, § 189, para. 1.

<sup>197</sup> Regional Court of Bonn, Judgement, 9 September 2013, 25 Ns 555 Js 94/12 – 113/13, in *Neue Zeitschrift für Strafrecht – Rechtsprechungsreport*, 2014, p. 79 (designation of the Nazi dis-senter Dietrich Bonhoeffer as “state traitor”); Regional Court of Berlin, Judgement, 18 March 2013, (574) 231 Js 2310-11 Ns (145/12), in *BeckRS*, 2014, 1141 (designation of a member of the SED resistance group ‘Kampfgruppe gegen die Unmenschlichkeit’ who was executed in the GDR, but rehabilitated in 2005, as “bandit”).

<sup>198</sup> See on the drafting history of this provision above Section 2.1.1.1.2.

likely to fall outside the scope of freedom of expression from the outset.<sup>199</sup> The jurisprudence establishes, in part, broad boundaries to the freedom of expression, especially when the comparison addresses public authorities, and the author of the claim is personally affected by a measure. For instance, the legal category of insult was rejected for a comparison of a judge with the president of the ‘Volksgerichtshof’ Roland Freisler;<sup>200</sup> or of judges more generally with National Socialist courts and jurisprudence as there was a factual link to the proceeding;<sup>201</sup> the designation of the Higher Regional Court of Nuremberg as ‘Reich Party Congress Court’ (‘Reichsparteitags-OLG’);<sup>202</sup> the claim that the immigration authority applied “methods of the Gestapo”;<sup>203</sup> the comparison of two police officers sanctioning a traffic offence with the Nazi regime.<sup>204</sup> However, courts have been more restrictive with regard to comparisons that address non-public persons. For instance, they have qualified as insult comparisons of medical doctors practicing abortion to persons responsible for the Holocaust, as this exceeded the boundaries of freedom of expression.<sup>205</sup> The same has been affirmed for the designation of a former

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<sup>199</sup> See above note 50.

<sup>200</sup> Higher Regional Court of Munich, Order, 31 May 2017, OLG 13 Ss 81/17, in *BeckRS*, 2017, 112292, arguing that judges are obliged by their profession to tolerate even over-pointed criticism.

<sup>201</sup> Federal Constitutional Court, Order, 14 June 2019, 1 BvR 2433/17, in *Neue Juristische Wochenschrift*, 2019, p. 2600; Higher Regional Court of Karlsruhe, Judgement, 4 November 2019, 2 Rv 34 Ss 714,19, in *BeckRS*, 2019, 28239.

<sup>202</sup> Federal Constitutional Court, Order, 8 July 1993, 2 BvR 1576/92, in *Neue Juristische Wochenschrift*, 1994, p. 1149 on the rejected transmission of a letter by a prison inmate on the ground that it contained a “serious insult” under the Prison Act (Strafvollzugsgesetz), 13 March 1976.

<sup>203</sup> Federal Constitutional Court, Order, 5 March 1992, 1 BvR 1770/91, in *Neue Juristische Wochenschrift*, 1992, p. 2815.

<sup>204</sup> Federal Constitutional Court, Order, 23 August 2005, 1 BvR 1917/04, in *Neue Juristische Wochenschrift*, 2005, p. 3274.

<sup>205</sup> See Federal Constitutional Court, Order, 24 May 2006, 1 BvR 49/00, in *Neue Juristische Wochenschrift*, 2006, pp. 3770 f. on the designation of the doctor as “killing specialist for unborn children” and of his practice as a “Babycaust”; the judgement was only reversed with regard to the conviction to the detriment of the medical centre; see also on injunction claims in this respect Federal Constitutional Court, Order, 8 June 2010, 1 BvR 1745/06, in *Neue Juristische Wochenschrift*, 2011, p. 47; Federal Court of Justice, Order, 1 April 2003, VI ZR 366/02, in *Neue Juristische Wochenschrift*, 2003, p. 2011; Federal Court of Justice, Judgement, 30 May 2000, VI ZR 276/99, in *Neue Juristische Wochenschrift*, 2000, p. 3421 (for the diverging view that the slogan “formerly: Holocaust – today: Babycaust” was to be tolerated

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doctor in the GDR as the “Mengele of the GDR doping system” by a doping victim.<sup>206</sup> Furthermore, calling a person a “Nazi”,<sup>207</sup> “old Nazi” (“alter Nazi”)<sup>208</sup> or “young fascist” (“Jungfaschist”)<sup>209</sup> has been qualified as insult. Things are different, however, when there is a sufficient substantial relationship to the context in which the statement is made so that the statement does not merely aim at insulting the person.<sup>210</sup>

The offence of malicious gossip (§ 186 of the Criminal Code) has been applied to unproven factual statements in this context, for example, that a person profited from the Nazi regime,<sup>211</sup> shared the Nazi ideology<sup>212</sup> or tried to imitate acts committed under the Nazi regime<sup>213</sup> when these facts were not proven. Only in exceptional cases will freedom of expression prevail with regards to unproven facts: the author must have diligently researched whether they were true, and the case must concern a matter of public

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by the clinic); on the case law of the European Court of Human Rights in this regard see below note 546.

<sup>206</sup> Federal Constitutional Court, Order, 24 May 2006, 1 BvR 984/02, in *Neue Juristische Wochenschrift*, 2006, p. 3266 (on compensational claims, however, it can be deduced from the reasoning that the statement was also punishable); see on this jurisprudence Friedhelm Hufen, “Persönlichkeitsverletzung durch Nazi-Anspielung”, in *Juristische Schulung*, 2007, p. 571; Josef Mengele was chief physician at the Auschwitz-Birkenau concentration camp and responsible for the selection and inhuman medical experiments with inmates.

<sup>207</sup> Higher Regional Court of Düsseldorf, Judgement, 29 July 1947, 4 U 131/47, in *Neue Juristische Wochenschrift*, 1947/1948, p. 386.

<sup>208</sup> Higher Regional Court of Düsseldorf, Judgement, 5 March 1970, 1 Ss 24/70, in *Neue Juristische Wochenschrift*, 1970, p. 905.

<sup>209</sup> Higher Regional Court of Karlsruhe, Judgement, 13 May 1976, Ss 215/75, in *Monatsschrift für Deutsches Recht*, 78, p. 421.

<sup>210</sup> See, for example, Regional Court of Stuttgart, Judgement, 29 June 2015, 11 O 80/15, in *BeckRS*, 2016, 10677 on the designation “known Neo Nazi” in an article on demonstrations of the right-wing movement ‘Pegida’.

<sup>211</sup> Regional Court of Cologne, Judgement, 4 October 2006, 28 O 235/06, in *BeckRS*, 2008, 17687 (‘Beneficiaries’).

<sup>212</sup> Administrative Court of Cologne, Judgement, 10 December 1981, 6 (13) K 3721/79, in *Neue Juristische Wochenschrift*, 1983, p. 1214 (‘Brecht’), confirmed by the higher instances (see Federal Administrative Court, Judgement, 14 March 1984, 1 B 166/83, the constitutional complaint was not accepted for decision, Federal Constitutional Court, Order, 15 July 1987, 1 BvR 520/84).

<sup>213</sup> Higher Regional Court of Munich, Judgement, 17 September 2003, 21 U 1790/03, in *BeckRS*, 2003, 30328394.

interest.<sup>214</sup> If untrue or unproven statements concern persons already deceased, § 189 of the Criminal Code applies.<sup>215</sup>

Insulting or defaming statements have also led to the acceptance of injunction claims.<sup>216</sup> However, courts are, at least today, more reluctant with regards to injunctions when the freedom of the arts is impacted as is the case, for example, with injunctions against the publication of novels.<sup>217</sup>

The legacy of antisemitic and defamatory statements which have sometimes persisted over centuries in works of art and monuments proves difficult. In a highly publicised judgement, the Federal Court of Justice dismissed a Jewish man's lawsuit to remove an antisemitic thirteenth century relief at the side of a church in Wittenberg.<sup>218</sup> It depicts a so-called 'Jewish sow', a medieval antisemitic trope that shows Jewish people suckling on a pig and a rabbi lifting its tail. The Court ruled that through the contextualisation of an information board and the installation of an opposing artwork, the sculpture

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<sup>214</sup> Federal Court of Justice, Judgement, 30 January 1996, VI ZR 386/94, in *Neue Juristische Wochenschrift*, 1996, p. 1133; Federal Constitutional Court, Order, 28 June 2016, 1 BvR 3388/14, in *Zeitschrift für Urheber- und Medienrecht*, 2016, p. 860, both in application of § 193 of the Criminal Code that provides for a justification in case of "legitimate interest".

<sup>215</sup> See, for example, *Brecht*, 1983, p. 1214, see above note 212.

<sup>216</sup> See, for example, *Beneficiaries*, 2006, see above note 211.

<sup>217</sup> See, for example, Higher Regional Court of Frankfurt, Judgement, 15 October 2009, 16 U 39/09, in *Zeitschrift für Urheber- und Medienrecht*, 2009, p. 952, holding that the intensity of harm to the post mortal personality right of a person depended on the similarity of the novel character to the concerned person, the nature of its presentation, and the degree of how much this presentation corresponded to reality; the court mostly rejected the injunction claim as it considered the post mortal personality right of the actress, model for the novel character, was not affected, and only prohibited the claim in a passage that the actress had possessed a Nazi shrine which had not been the case; for a more restrictive approach see Federal Constitutional Court, Order, 24 February 1971, 1 BvR 435/68, in *Monatsschrift für Deutsches Recht*, 1971, p. 821 ('*Mephisto*'), confirming the prohibition of the novel '*Mephisto*' on a character corresponding to the actor Gustav Gründgens who made his career under the Nazi regime, on the grounds that the author Klaus Mann had painted a "negatively-falsified portrait" of Gründgens and a "diatribe in novel form"; although the case is still considered a landmark decision on the freedom of the arts, its outcome is today generally considered as wrong, see Thomas Henne, "Alles schon mal dagewesen? Parallelen zwischen den '*Mephisto*'-Entscheidungen der deutschen Gerichte und der Debatte um Walsers Tod eines Kritikers", in *Neue Juristische Wochenschrift*, 2003, p. 641.

<sup>218</sup> See media coverage: Dietmar Hipp, "Vom Schandmal zum Mahnmal", in *Spiegel Online*, 14 June 2022; Aaron Labaree, "A German Jew Vows to Fight on to Remove Anti-Semitic Sculpture after Court Defeat", in *National Public Radio*, 8 February 2020.

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had turned from a monument of shame into a memorial bearing testimony to a centuries-long antisemitic mentality within Christian institutions.<sup>219</sup>

### 2.3.1.1.3. Disturbance of Peace of the Deceased (§ 168 of the Criminal Code)

Another provision of mnemonic significance is the offence of disturbance of peace of the deceased (§ 168 of the Criminal Code) which protects the feelings of relatives and the dignity of the deceased.<sup>220</sup> It incriminates whoever destroys or damages a burial site or a public memorial for the dead or commits defamatory mischief on them (§ 168(2) of the Criminal Code). In creating this provision, the legislator had in mind the protection of memorial sites for victims of the Nazi regime from defamatory slogans or swastika flags as well as protection against the holding of Nazi ideology inspired speeches, the singing of Nazi songs or performances that would not fall under other criminal provisions.<sup>221</sup> Debate about the need for this provision was sparked, *inter alia*, by an incident at the Buchenwald memorial site in 1994, where adolescents in brown shirts took photos of each other holding fire hooks, symbolising that the memorial site should be lit.<sup>222</sup>

### 2.3.1.1.4. Defamation of Religious Faiths (§ 166 of the Criminal Code)

The defamation of religious faith (§ 166 of the Criminal Code) seeks to protect public peace and thus, is also relevant in this context. For example, jurisprudence stemming from this provision has been applied to the designation of the Jewish religion as “fascist”, as this defamation was deemed to be perfidious in view of the fact that the Nazi regime and the racist ideology to which this term referred had precisely sought the extermination of Jews.<sup>223</sup> However, § 166 was also applied to a defendant who distributed pamphlets pleading that one should leave the Christian Church and designating it as

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<sup>219</sup> Federal Court of Justice, Judgement, 14 June 2022, VI ZR 172/20.

<sup>220</sup> Michael Heuchemer, in Bernd von Heintschel-Heinegg (ed.), *Beck'scher Online-Kommentar StGB*, 52nd ed., C.H. Beck, Munich, February 2022, § 168, para. 1.

<sup>221</sup> See Bundestag Doc. (BT-Drucks.) 13/8587, 25 September 1997, p. 23; see also Nikolaus Bosch, Ulrike Schittenhelm, in Schönke and Schröder (eds.), 2019, § 168, para. 13, see above note 144.

<sup>222</sup> Draft, BT-Drucks. 13/8587, p. 23, see above note 221.

<sup>223</sup> Higher Regional Court of Berlin, Order, 15 March 2000, (5) 1 Ss 33/98 (19/98), in *BeckRS*, 2014, 2697, para. 37.

“one of the greatest criminal organisations in the world” referring, *inter alia*, to the perpetration of genocides and religious wars as well as the persecution of witches and Jews. The Court found this designation to be defamatory, even though the Church had actually committed serious injustices in the past, given that the pamphlet falsely suggested that these crimes were still being committed today.<sup>224</sup> A defamation of religious faith by the assertion of facts hence requires that the facts cannot be proven as true.<sup>225</sup>

#### **2.3.1.1.5. Approval of Offences (§ 140 No. 2 of the Criminal Code)**

The approval of certain acts committed under the Nazi regime further constitutes an ‘approval of offences’ under § 140, No. 2 of the Criminal Code which incriminates the public approval of, *inter alia*, genocide<sup>226</sup> or wars of aggression<sup>227</sup> in a manner likely to disturb the public peace. However, the offence of Holocaust approval under § 130(3) of the Criminal Code is *lex specialis* in that it precedes § 140, No. 2 of the Criminal Code and thus, the latter does not appear in the verdict of a conviction due to Holocaust denial.<sup>228</sup> The provision has been discussed with regard to the use of the letter ‘Z’, which has become a symbol for Russia’s war of aggression against Ukraine.<sup>229</sup>

#### **2.3.1.1.6. Racist and Antisemitic Motives as Aggravating Factors for Sentencing (§ 4(2) of the Criminal Code)**

§ 46(2), Sentence 2 of the Criminal Code provides that, *inter alia*, “racist, antisemitic or other motives evidencing contempt for humanity” may be considered as aggravating factors during sentencing. The word ‘antisemitic’ was only added in 2021 in order to “reflect the special historical responsibility of

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<sup>224</sup> Higher Regional Court of Celle, Judgement, 8 October 1985, 1 Ss 154/85, in *Neue Juristische Wochenschrift*, 1986, pp. 1275 f.

<sup>225</sup> See Brian Valerius, in Bernd von Heintschel-Heinegg (ed.), 2022, § 166 para. 9, § 90a para. 4, see above note 220.

<sup>226</sup> See § 140 in conjunction with § 126(1), No. 3 of the Criminal Code, § 6 of the Code of Crimes against International Law.

<sup>227</sup> See § 140 in conjunction with § 138(1), No. 5, last variant of the Criminal Code.

<sup>228</sup> Federal Court of Justice, Order, 26 February 1999, 3 StR 613-98, in *Neue Juristische Wochenschrift*, 1999, pp. 1561 f.

<sup>229</sup> For an analysis see Ulrich Stein, “Wann das ‘Z’ als Symbol jetzt strafbar ist”, in *Legal Tribune Online*, 16 March 2022; Paula Rhein-Fischer, “Z-Symbol, russische Flagge und Georgsbund”, in *Verfassungsblog*, 27 April 2022.

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Germany with regards to the National Socialist regime of violence and arbitrariness” as well as “the current developments of antisemitic hate crimes”.<sup>230</sup> Prior to this, antisemitism had been subsumed under the catch-all category of ‘motives evidencing contempt for humanity’. Thus, the legislative change did not bring about any substantial changes, rather, its introduction held symbolic value.<sup>231</sup>

### 2.3.1.2. Laws Protecting the ‘Free Democratic Basic Order’ or ‘Constitutional Order’

Similarly, the way in which Nazi atrocities are remembered today has been legally influenced by the large number of provisions that protect the ‘free democratic order’<sup>232</sup> or the ‘constitutional order’.<sup>233</sup> The German Basic Law uses both terms as synonym at least in some places.<sup>234</sup> Structurally, this protection roots in specific norms of the Basic Law that together form the expression of the ‘militant democracy’ concept, which the drafters of the Basic Law decided to anchor in the Constitution following the experience of National Socialism and World War II.<sup>235</sup> Some of these constitutional provisions have been translated into parliamentary laws and supplemented by criminal sanctions as well as provisions of police and security law. Although these provisions are not limited to Nazi ideology since they extend to other extremist ideologies that question the Basic Law’s liberal democratic order, the outlawing of Nazi ideology (including the glorification of its atrocities) was the core aim of these provisions and is a relevant field of their application. Court decisions illustrate that their interpretation is strongly influenced by

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<sup>230</sup> Governmental Draft of the Law to fight right-wing extremism and hate crimes (Gesetz zur Bekämpfung des Rechtsextremismus und der Hasskriminalität), 19 February 2020, pp. 19 f.

<sup>231</sup> Bernd von Heintschel-Heinegg, in Bernd von Heintschel-Heinegg (ed.), *Beck'scher Online-Kommentar StGB*, 51st ed., C.H. Beck, Munich, November 2021, § 46 para. 36.

<sup>232</sup> ‘Freiheitlich-demokratische Grundordnung’.

<sup>233</sup> ‘Verfassungsmäßige Ordnung’.

<sup>234</sup> For example, this is the widely shared view for Basic Law for the Federal Republic of Germany, Article 9, Section 2 (hereinafter often referred to as ‘Basic Law’) (<https://www.legal-tools.org/doc/91a339/>); Federal Court of Justice, Judgement, 9 March 1956, 6 StR 125/55, in *Neue Juristische Wochenschrift*, 1956, p. 879; see also Federal Administrative Court, Judgement, 6 February 1975, II C 68/73, in *Neue Juristische Wochenschrift*, 1975, p. 1141 (on Article 2(1) of the Basic Law); however, the Federal Constitutional Court underscores that both terms do not mean the same, Federal Constitutional Court, Judgement, 17 January 2017, 2 BvB 1/13, in *BVerfGE* vol. 144, p. 20, para. 531 (‘Prohibition of the NPD’).

<sup>235</sup> For more details on this concept see below Section 4.1.

Germany's historical experience and its ongoing efforts to preserve the memory of the Shoah, National Socialism and World War II.

### **2.3.1.2.1. The Core Triad of ‘Militant Democracy’: Prohibition of Unconstitutional Political Parties, Associations and Forfeiture of Rights**

The ‘militant democracy’ concept, according to the Federal Constitutional Court, “aims at preventing the revival of National Socialism”.<sup>236</sup> The core of the concept consists of a set of three constitutional provisions: *first*, the possibility to declare political parties unconstitutional “that, by reason of their aims or the behaviour of their adherents, seek to undermine or abolish the free democratic basic order” (Article 21(2) of the Basic Law) or to exclude parties that are at least “oriented towards an undermining or abolition of the free democratic basic order” from state financing (Article 21(3) of the Basic Law); *second*, the possibility to prohibit “associations [...] that are directed against the free democratic basic order” (Article 9(2) of the Basic Law); and, *third*, the forfeiture of certain basic rights (freedom of expression, of assembly, of association, the privacy of correspondence, posts and telecommunications, the rights of property and of asylum) for persons “abusing” these rights “in order to combat the free democratic basic order” (Article 18 of the Basic Law).

The first and second elements have been translated into ordinary laws and accompanied, in part, by criminal sanctions. Accordingly, the Act on the Federal Constitutional Court<sup>237</sup> specifies the requirements for declaring a political party unconstitutional or excluding it from state financing (§§ 13, No. 2, 2a, 43–47 of this Act), whilst the Parties Act contains specifications about the enforcement of such declaration (§ 32 of this Act). Only the Federal Constitutional Court is competent to make these decisions (Article 21(5) of the Basic Law). Similarly, § 3 of the Association Law<sup>238</sup> specifies the legal requirements for, and consequences of, the prohibition of an association. The competent body for pronouncing the prohibition is generally the ministry of the interior of the federal state or the ‘Land’.<sup>239</sup> § 9(1) of the Association Law

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<sup>236</sup> See, for example, *Protestmarsch*, p. 2070, see above note 155.

<sup>237</sup> ‘Bundesverfassungsgerichtsgesetz’.

<sup>238</sup> ‘Vereinsgesetz’.

<sup>239</sup> Depending on whether the association operates beyond the borders of a Land, § 3(2), Sentence 1 of the Association Law.

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bans the public use of symbols of prohibited associations. This includes not only flags and badges, but also pieces of uniforms and greetings (both physically and verbally) (§ 9(2) of the Association Law).

The Criminal Code attaches criminal sanctions to the maintenance of the organisational structure of a party declared unconstitutional or its substitute organisation (§ 84(1) of the Criminal Code) or of an association banned for being directed against the constitutional order or declared to be a substitute organisation of a prohibited party (§ 85(1) of the Criminal Code). The Criminal Code further incriminates the dissemination of propaganda material of such parties and associations (§ 86(1), No. 1 and 2) as well as the dissemination, public use, producing, import or export of their symbols (§ 86a(1)). While § 86a(1) is most relevant in the present context with regard to the aforementioned symbols of former Nazi organisations that are prohibited under the explicitly mnemonic § 86(1), No. 4 of the Criminal Code,<sup>240</sup> the prohibition of symbols of other prohibited associations in the sense of § 86(1), No. 2 of the Criminal Code is also of great practical importance.<sup>241</sup> Again, the civic use exemption applies to the prohibition of propaganda and of symbols.<sup>242</sup>

So far, the Federal Constitutional Court has only declared two political parties unconstitutional, both at an early stage in its history: the Socialist Reich Party ('Sozialistische Reichspartei', 'SRP') as successor of Hitler's NSDAP in 1952, and the Communist Party of Germany ('KPD') in 1956. As regards the SRP, the Court strongly insisted on the historical experiences of 1933 to 1945<sup>243</sup> and the Nazi tyranny,<sup>244</sup> deducing from the strong similarities

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<sup>240</sup> See above Section 2.1.3.

<sup>241</sup> Prohibited are, for example, the 'Wolfsangel' (symbol of the prohibited 'Jungen Front'), the 'Odalrune' (symbol of the prohibited 'Wiking-Jugend' and 'Bund nationaler Studenten') or the Celtic cross (symbol of the prohibited 'Volkssozialistische Bewegung Deutschlands/Partei der Arbeit'), unless as old Celtic cross, see Ziemann, 2020, § 86a, para. 5, see above note 141; see also Higher Regional Court of Jena, Judgement, 17 February 2015, 1 OLG 181 Ss 107/14 (296), in BeckRS, 2015, 5440 on the name of the prohibited organisation "Blood & Honour" in old German letters and replacing the '&' with the swastika-like 'Triskele'.

<sup>242</sup> §§ 86(4), 86a(3) of the Criminal Code, see above Section 2.1.3.

<sup>243</sup> Federal Constitutional Court, Judgement, 23 October 1952, 1 BvB 1/51, in *BVerfGE*, vol. 2, p. 23 ('SRP').

<sup>244</sup> *Ibid.*, pp. 19 f: characterising the system created by the NSDAP as marked by the doctrine of the totalitarian state and the race as well as the hierarchical structure of leadership and following. The "strong antisemitic stance" is mentioned earlier, *ibid.*, p. 18.

between the SRP and the NSDAP<sup>245</sup> that the SRP was unconstitutional as “there remains no doubt” that the “NSDAP would be unconstitutional in the sense of Article 21(2) of the Basic Law” today.<sup>246</sup>

Subsequent attempts to declare the extreme right-wing NPD unconstitutional, in contrast, failed twice. In 2003, the Federal Constitutional Court found that the NPD leadership was too heavily influenced by informants and hence not free of state influence.<sup>247</sup> In 2017, the Court accepted that the NPD sought to abolish the free democratic order,<sup>248</sup> holding that the party’s similarity with National Socialism indicated that it was pursuing anti-constitutional aims,<sup>249</sup> however, the criterion of ‘seeking’ in the sense of Article 21(2) of the Basic Law was deemed not to be met since the achievement of the aims in fact did not seem possible.<sup>250</sup> It is worth noting that whilst the right-wing populist Alternative für Deutschland (‘AfD’) was re-elected in the Bundestag for a second time in September 2021, it has been classified in its entirety as a party ‘suspected’ of pursuing activities against the free democratic order by the federal domestic intelligence service.<sup>251</sup> In March 2022, the administrative court of Cologne confirmed this classification, though the judgement is not yet final.<sup>252</sup> This classification allows intelligence services to observe the party under the Federal Protection of the Constitution Act.<sup>253</sup> The road to a successful prohibition proceeding before the Federal Constitutional Court has previously been discussed,<sup>254</sup> but remains long.

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<sup>245</sup> *Ibid.*, pp. 23–68.

<sup>246</sup> *Ibid.*, p. 70.

<sup>247</sup> Federal Constitutional Court, Order, 18 March 2003, 2 BvB 1, 2, 3/01, in *BVerfGE*, vol. 107, p. 339.

<sup>248</sup> *Prohibition of the NPD*, para. 633, see above note 234.

<sup>249</sup> *Ibid.*, headnote No. 7a.

<sup>250</sup> *Ibid.*, para. 633.

<sup>251</sup> The intelligence services of certain Länder had already done so for the respective Land associations of the AfD, see “Verfassungsschutz, Die AfD und der Verdachtsfall”, in *Deutschland-funk*, 6 March 2021; for a recent judgement confirming this classification at the Land level see Administrative Court of Magdeburg, Judgement, 7 March 2022, 9 B 273/21 MD.

<sup>252</sup> Administrative Court of Cologne, Judgement, 8 March 2022, 1.13 K 326/21.

<sup>253</sup> ‘Bundesverfassungsschutzgesetz’; this is because §§ 4(1) Sentence 3, 3(1), 8(1) of that Act require “factual evidence” for anti-constitutional activities in order for the services to be entitled to collect and analyse information.

<sup>254</sup> See Franziska Brandmann, “Schnell gefordert, schnell missglückt”, in *Welt*, 17 December 2020.

The prohibition of associations has been used much more frequently than that of parties. Cases include, though are not limited to, prohibitions of right-wing extremist associations upholding the Nazi ideology.<sup>255</sup> For instance, the Federal Administrative Court upheld the prohibition of the ‘Wiking-Jugend’, arguing that an association pursues anti-constitutional aims if “its program, world of ideas and overall style show similarities with National Socialism in that it professes its allegiance to Hitler and other leading NSDAP functionaries and, like them, disparages the democratic form of government, propagates a racial doctrine [...] and strives for overcoming the constitutional order”.<sup>256</sup> With this reasoning in mind, the courts have proceeded to accept many other prohibitions of extreme right-wing associations.<sup>257</sup> Legal literature suggests that an association also aims at removing

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<sup>255</sup> Of the overall 164 prohibitions pronounced by the federal state between 1964 and June 2021, 20 prohibitions concerned right extremist associations, see Ministry of the Interior, “Vereinsverbote” (available on its web site); for an exhaustive list of prohibitions in the Länder until 2013 see Christian Baudewin, “Das Vereinsverbot”, in *Neue Zeitschrift für Verwaltungsrecht*, 2013, pp. 1052 f.

<sup>256</sup> Federal Administrative Court, Order, 21 April 1995, 1 VR 9/94, in *Neue Juristische Wochenschrift*, 1995, p. 2505, Headnote 2 (on interim measures) and Federal Administrative Court, Judgement, 13 April 1999, 1 A 3/94, in *Neue Zeitschrift für Verwaltungsrecht – Rechtsprechungsreport*, 2000, p. 71 (on the merits); see on this principle also Christian Baudewin, “Das Vereinsverbot”, in *Neue Zeitschrift für Verwaltungsrecht*, 2021, p. 1023.

<sup>257</sup> See, for example, Federal Administrative Court, 25 March 1993, 1 ER 301/92, in *Neue Juristische Wochenschrift*, 1993, p. 3215 (on interim measures) and Federal Administrative Court, Notice, 6 August 1997, 1 A 13.92, in *BeckRS*, 1997, 31305284, under 3 a) (on the merits) on ‘Nationalistische Front’; Federal Administrative Court, Judgement, 30 August 1995, 1 A 14/92, in *Neue Zeitschrift für Verwaltungsrecht*, 1997, p. 67 on ‘Deutsche Alternative’; Federal Administrative Court, Judgement, 5 August 2009, 6 A 3/08, in *Neue Zeitschrift für Verwaltungsrecht*, 2010, p. 446, Headnote 3 on ‘Collegium Humanum’; Federal Administrative Court, Judgement, 1 September 2010, 6 A 4/09, in *Neue Zeitschrift für Verwaltungsrecht – Rechtsprechungsreport*, 2011, p. 15 on ‘Heimattreue Deutsche Jugend’; Federal Administrative Court, Judgement, 19 December 2012, 6 A 6/11, in *Neue Zeitschrift für Verwaltungsrecht*, 2013, p. 871 on ‘Hilfsorganisation für nationale politische Gefangene und deren Angehörige’; Federal Administrative Court, Order 21 September 2020, 6 VR 1.20 (6 A 5.20), in *BeckRS*, 2020, 26434, para. 17 (on interim measures) on ‘Combat 18’; Higher Administrative Court of Mannheim, Judgement, 11 April 1994, 1 S 1909/93, in *Neue Zeitschrift für Verwaltungsrecht – Rechtsprechungsreport*, 1995, p. 198, Headnotes 1 and 2 on ‘Heimattreue Vereinigung Deutschlands’, accepting similarity to National Socialism notably if the association uses its “forms and language, professes to be associated with important representatives of National Socialism, propagates a racially based hatred of foreigners and if leading functionaries have a positive attitude towards National Socialism”; Higher Administrative Court of Munich, Judgement, 4 August 1999, 4 A 96.2675, in *Neue Zeitschrift für Verwaltungsrecht – Rechtsprechungsreport*, 2000, p. 498 on ‘Skinheads Allgäu’; Higher

the free democratic order if it pursues the reintroduction of a ‘democracy’ which mirrors the Soviet or GDR model.<sup>258</sup>

The practical relevance of the forfeiture of rights under Article 18 of the Basic Law is, in turn, very limited with the provision being considered to have mainly a symbolic and warning value.<sup>259</sup> The Federal Constitutional Court that has been charged with declaring forfeiture has, to date, never reached this conclusion. Four applications have been rejected after lengthy proceedings.<sup>260</sup>

### **2.3.1.2.2. Other Provisions Protecting the Free Democratic Order**

There are other constitutional and ordinary law provisions that protect the free democratic order or constituents of it. They are sometimes referred to as part of the militant democracy provisions in the broader sense<sup>261</sup> and may well be seen as expression of an ‘antithesis’ to Germany’s National Socialist past, influencing the legal frame of how this past is remembered today.

#### **2.3.1.2.2.1. Overview**

These provisions include the rather symbolic<sup>262</sup> right to resist “against any person seeking to abolish the constitutional order” which has practically little relevance (Article 20(4) of the Basic Law) and the so-called ‘guarantee of eternity’ (Article 79(3) of the Basic Law) that protects essential components of the free democratic order from amendment, namely, the inviolability

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Administrative Court of Berlin-Brandenburg, Judgement, 27 November 2013, OVG 1 A 4.12, in *BeckRS*, 2013, 58797 on ‘Widerstandsbewegung in...’.

<sup>258</sup> Baudewin, 2021, p. 1023, see above note 256.

<sup>259</sup> Hans-Jürgen Papier and Wolfgang Durner, “Streitbare Demokratie”, in *Archiv des öffentlichen Rechts*, 2003, p. 350.

<sup>260</sup> Federal Constitutional Court, Order, 25 July 1960, 2 BvA 1/56, in *BVerfGE*, vol. 11, p. 282 on Otto Ernst Remer, former Wehrmacht officer and second chairman of the ‘SRP’; Federal Constitutional Court, Order, 2 July 1974, 2 BvA 1/69, in *BVerfGE*, vol. 38, p. 23 on Gerhard Frey, editor-in-chief and publisher of the right-extremist and antisemitic ‘Deutsche National-Zeitung’; Order, 18 July 1997, 2 BvA 1/92 and 2 BVA 2/92 on the right-wing extremists Thomas Dienel and Heinz Reisz (without the reasons for the decision); the proceedings took between four and five years, see Martin Pagenkopf, in Michael Sachs (ed.), *Grundgesetz*, 9th ed., C.H. Beck Munich, 2021, Article 18, para. 7, fn. 12; however, Anna-Bettina Kaiser, *Ausnahmeverfassungsrecht*, Mohr Siebeck, Tübingen, 2020, pp. 292 f. underscores that Article 18 of the Basic Law had the effect of factually silencing the applicants during the proceedings.

<sup>261</sup> See, for example, Papier and Durner, 2003, p. 353, see above note 259.

<sup>262</sup> Michael Sachs, in Michael Sachs (ed.), 2021, Article 20, para. 168, see above note 260.

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of human dignity (Article 1(1) of the Basic Law) and the principles of, *inter alia*, democracy and the rule of law. Further, Article 5(3), Sentence 2 of the Basic Law states that the freedom of teaching shall not release any person from loyalty to the constitution. Article 10(2), Sentence 2 of the Basic Law exempts state authorities from informing a person subject to telecommunication police measures if these measures serve to protect the free democratic order.<sup>263</sup> In the case of threat to this order, the freedom of movement may also be restricted (Article 11(2) of the Basic Law), a Land may call upon the police of other Länder or the federal state (Article 91(1) of the Basic Law) or, if necessary, even the armed forces for support (Article 87a(4) of the Basic Law). Indirectly, Article 28(1), Sentence 1 and (3) of the Basic Law also protects the free democratic order in that it obliges the federal state to guarantee that the Länder conform their constitutional order to, *inter alia*, the principle of a democratic state governed by the rule of law.<sup>264</sup> Arguably, an anti-fascist stance can also be seen in Article 139 of the Basic Law according to which the provisions for the “Liberation of the German People from National Socialism and Militarism” shall not be affected by the provisions of the Basic Law. Even if this stipulation originally served as a mere transitional provision to ensure that the allied rules on denazification remained unaffected, the fact that it was not abrogated after denazification ended indicates the intention to continuously reflect a clear break with National Socialism.<sup>265</sup> In that sense, it could even be categorised as an explicit non-punitive memory

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<sup>263</sup> While it was only introduced in the context of replacing the control rights of the Allies (Christoph Gusy, in Hermann von Mangoldt, Friedrich Klein and Christian Starck (eds.), *Grundgesetz*, 7th ed., C.H. Beck, Munich, 2018, Article 10, para. 95; Joachim Wolf, “Der rechtliche Nebel der deutsch-amerikanischen ‘NSA-Abhöraffäre’”, in *JuristenZeitung*, 2013, pp. 1044 f., it is put in the context of militant democracy as it protects the free democratic order, see Gusy, above, para. 98; Papier and Durner, 2003, p. 354, see above note 259.

<sup>264</sup> See Papier and Durner, 2003, p. 355, see above note 259; sometimes, also the prohibition of wars of aggression under Article 26 of the Basic Law is analysed under the angle of militant democracy.

<sup>265</sup> In this sense Ulrich Battis and Klaus Joachim Grigoleit, “Neue Herausforderungen für das Versammlungsrecht?”, in *Neue Zeitschrift für Verwaltungsrecht*, 2001, p. 124; Jochen Frowein, in *Archiv des öffentlichen Rechts*, 1980, vol. 105, p. 182, fn. 70; against this reading Getrude Lübbe-Wolff, “Zur Bedeutung des Art. 139 GG für die Auseinandersetzung mit neonazistischen Gruppen”, in *Neue Juristische Wochenschrift*, 1988, p. 1294; Ulli Rühl, “‘Öffentliche Ordnung’ als sonderrechtlicher Verbotstatbestand gegen Neonazis im Versammlungsrecht?”, in *Neue Zeitschrift für Verwaltungsrecht*, 2003, pp. 533 ff., however, the latter rejecting more actual legal consequences than a potential symbolic value.

law.<sup>266</sup> Article 139 is the only article in the Basic Law that explicitly alludes to the Nazi era. While the first draft preambular of the Basic Law had begun with the sentence “The National Socialist coercive regime [“Zwingherrschaft”] deprived the German People of their freedom; war and violence plunged humanity into misery and hardship”,<sup>267</sup> the preambular was ultimately completely revised and a reference omitted.<sup>268</sup>

The protection of the free democratic order and the constitutional order continues at the level of ordinary laws. This is the case in relation to other criminal norms on the protection of the state such as high treason (§§ 81, 82 of the Criminal Code); offences of subversive terrorism (§§ 89a, 89b, 129a, 129b of the Criminal Code);<sup>269</sup> dissemination of propaganda of terrorist organisations and the use of their symbols (§§ 86(2), 86a(1) of the Criminal Code). The competences of the intelligence services (especially of the domestic intelligence services) anchor, *inter alia*, in the Federal Protection of the Constitution Act,<sup>270</sup> the respective laws of the Länder, the Right-Wing File Law,<sup>271</sup> and the Law on Restrictions of Communication Rights (‘Article 10 Law’),<sup>272</sup> can be analysed under this angle.<sup>273</sup>

### **2.3.1.2.2. Disparagement of the State and Its Symbols (§ 90a of the Criminal Code)**

A provision of particular mnemonic relevance is § 90a of the Criminal Code, which incriminates the disparagement of the state and the denigration of

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<sup>266</sup> See above Section 2.2.

<sup>267</sup> *Jahrbuch des öffentlichen Rechts der Gegenwart*, vol. 1, 1951, p. 24.

<sup>268</sup> The deletion of the passage was requested with the words “The less one can see or hear about these things, the better”, *ibid.*, p. 27; see for more details Rühl, 2003, p. 533, see above note 265.

<sup>269</sup> See on the parallels regarding the protected interest of these provisions Sigrid Hegmann, Frank Stuppi, Volker Erb and Jürgen Schäfer (eds.), *Münchener Kommentar zum StGB*, 4th ed., C.H. Beck, Munich, 2021, vol. 1, preliminary remarks § 81, para. 8; for the right-wing extremist groups that have been qualified as terrorist organisations in the sense of § 129a, see Anstötz and Schäfer, § 129a, para. 55, see above note 83.

<sup>270</sup> ‘Bundesverfassungsschutzgesetz’.

<sup>271</sup> ‘Rechtsextremismus-Gesetz’.

<sup>272</sup> ‘Gesetz zur Beschränkung des Brief-, Post- und Fernmeldegeheimnisses’ (‘Artikel 10-Gesetz’ or ‘G10’).

<sup>273</sup> See Papier and Durner, 2003, pp. 358–362, see above note 259.

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symbols, the protected interest being again the free democratic order.<sup>274</sup> This offence has been affirmed, for example, in relation to a statement that the Federal Republic was “the most sad and unworthy period of German history and should be replaced with the Third Reich as soon as possible”.<sup>275</sup> According to the Federal Court of Justice, the same could be assumed for the claim that the Federal Republic was an ‘unlawful state’, especially when it stemmed from “a person who glorified a system aimed at the systematic elimination of all safeguards of the rule of law”: the defendant in this case was a member of a successor organisation of the prohibited SRP.<sup>276</sup> The Federal Constitutional Court, however, rejected a denigration of the German flag for the designation “black-red-mustard” as it doubted that the population today was still aware of the fact that right extremists had protested against the free democratic Weimar Republic under this slogan.<sup>277</sup> Likewise, the similar offences of disparagement of the Federal President (§ 90), of symbols of the EU (§ 90c) or the ‘anti-constitutional disparagement’ of other constitutional organs (§ 90b of the Criminal Code)<sup>278</sup> have mnemonic potential. Still, it is rare that comparisons to National Socialism, for example, amount to a disparagement of constitutional organs as they rarely meet the requirement of § 90b of the Criminal Code, namely, that the disparagement is made “in a

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<sup>274</sup> Federal Court of Justice, Judgement, 22 September 1954, 6 StR 137/54, in *Neue Juristische Wochenschrift*, 1954, p. 1818 (on the former and corresponding § 96(1) No. 1 of the Criminal Code); Brian Valerius, in Bernd von Heintschel-Heinegg (ed.), *Beck'scher Online-Kommentar StGB*, C.H. Beck, Munich, November 2021, § 90a, para. 1.

<sup>275</sup> Federal Court of Justice, Order, 15 October 2002, 3 StR 270/02, in *Neue Zeitschrift für Strafrecht*, 2003, p. 145 that affirmed § 90a(1), No. 1 of the Criminal Code in the variant of maliciously disparaging the Federal Republic and its constitutional order, qualified by the fact that the perpetrator had intentionally supported activities directed against the continued existence of the Federal Republic or its constitutional principles under § 90a(3) of the Criminal Code.

<sup>276</sup> Federal Court of Justice, Judgement, 7 January 1955, 6 StR 185/54, in *BeckRS*, 1955, 31193522; however, the call for an “overthrow” at a party congress of the right-wing NPD did not suffice for a disparagement of the state, Federal Court of Justice, Order, 7 February 2002, 3 StR 446/01, in *Neue Zeitschrift für Strafrecht*, 2002, p. 593.

<sup>277</sup> Federal Constitutional Court, Order, 15 September 2008, 1 BvR 1565/05, in *Neue Juristische Wochenschrift*, 2009, p. 909, para. 16; for a diverging view see Mareike Preisner, “‘Schwarz-Rot-Senf’ – Aufregung angebracht?” in *Neue Juristische Wochenschrift*, 2009, p. 898; Sternberg-Lieben, 2019, § 90a, para. 11, see above note 144.

<sup>278</sup> Unlike §§ 90, 90a and 90c of the Criminal Code, § 90b requires *inter alia* an intentionally supporting of activities directed against the existence of the Federal Republic of Germany or its constitutional principles; this difference is reflected in the addition of the word “anti-constitutional” in the offence’s title.

manner that tarnishes the reputation of the state, and that the perpetrator intentionally supports activities directed against the existence of the Federal Republic of Germany or its constitutional principles". Also, the scope of the freedom of speech in this regard within public discourse is quite wide.<sup>279</sup> Similarly, a statement that, to the contrary, criticised the departure from Nazism by calling the state organs "traitors of the people" has not been subsumed under § 90b of the Criminal Code.<sup>280</sup> There is no provision under German Law that incriminates the disparagement of historical figures.

### **2.3.1.2.2.3. Ban on Uniforms in Public or at Assemblies (§ 3 of the Assembly Act)**

In the same vein, the prohibition against wearing uniforms in public or during assemblies under § 3 of the Assembly Act,<sup>281</sup> violations of which are criminally sanctioned (§ 28 of the Assembly Act), can be seen as expression of the militant democracy principle, influencing the memory of the Nazi regime. This provision was introduced in view of the experiences of the Weimar Republic where, according to the 'Bundesrat', the public wearing of uniforms to express a political mindset "had significantly radicalised the [...] political debate, fed militant tendencies and provoked the population in an intolerable manner".<sup>282</sup> In line with this rationale, today the prohibition regarding uniforms is interpreted restrictively to only apply to clothes of a "suggestive militant effect of an intimidating uniform militancy" in order to not interfere too severely with the freedom of expression.<sup>283</sup> Hence, uniforms that do not create the impression of a readiness to acts of violence are not covered, even if they express a radical mindset, pursue communicative goals

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<sup>279</sup> This is why, for example, plain comparisons of the former chancellor Merkel to Hitler during the Euro crisis have generally not been considered as disparagement, see *Süddeutsche Zeitung*, 21 March 2013, see above note 146, on a case where not the Hitler beard of Merkel, but only the prohibited symbols were prosecuted.

<sup>280</sup> See Federal Court of Justice, Order, 4 May 2016, 3 StR 392/15, in *BeckRS*, 2016, 13022.

<sup>281</sup> Some Länder have their own assembly acts all of which include a – although in part different – uniform prohibition (see Michael Breitbach and Friederike Wapler, in Michael Breitbach and Dieter Deiseroth (eds.), *Versammlungsrecht*, 2nd ed., Nomos, Baden-Baden, 2020, § 3, para. 11); those that have no such law still apply the federal act that is referred to here.

<sup>282</sup> Zimmer, Meeting of the Bundesrat, 22 May 1953, BR-Protocol 108, p. 242.

<sup>283</sup> Federal Court of Justice, Order, 27 April 1982, 1 BvR 1138/81, in *Neue Juristische Wochenschrift*, 1982, p. 1803 ('Uniform'); Breitbach, Wapler, 2020, § 3, para. 19, see above note 281.

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and are likely to have suggestive effects on masses.<sup>284</sup> Still, it is prohibited to circumvent the uniform ban, for example, by wearing civilian clothes that have evident similarities to historically known militant groups.<sup>285</sup>

### 2.3.1.2.2.4. Impeachment of Judges and Constitutional Loyalty of Civil Servants and Judges

If a judge infringes “the principles of the Basic Law or the constitutional order of a ‘Land’”, the Federal Constitutional Court may order that the judge be transferred, retired or (in case of intentional breach) dismissed from service (Article 98(2), (5) of the Basic Law). This instrument of impeachment has never been applied in practice but was recently discussed with respect to Jens Maier, a former parliamentarian of the right-wing AfD who has been qualified as right-wing extremist by the Saxonian intelligence service and who was one of the leaders of the former extreme-right AfD section ‘Flügel’. After failing to receive a new mandate, he returned to his post as a judge. Again, the impeachment mechanism was not applied,<sup>286</sup> and instead he was preliminarily suspended on another basis.<sup>287</sup> Of greater practical relevance is the ‘increased loyalty to the constitution’ – understood as the duty to actively

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<sup>284</sup> Breitbach and Wapler, 2020, § 3, para. 25, see above note 281.

<sup>285</sup> *Uniform*, p. 1803, see above note 283.

<sup>286</sup> See “Rechtsextremer AfD-Richter / Die Causa Jens Maier”, in *Deutschlandfunk*, 11 February 2022.

<sup>287</sup> The Saxonian Ministry of Justice instead requested to retire *Maier* to prevent a “serious impairment of the administration of justice” under § 31 German Judiciary Act, 19 April 1972 (hereinafter referred to as the ‘Judiciary Act’) (<https://www.legal-tools.org/doc/d6aoe6/>) (see Markus Sehl, Annelie Kaufmann, “Jens Maier soll in den Ruhestand versetzt werden”, in *Legal Tribune Online*, 12 February 2022); on 25 March 2022, the Judicial Service Court (Dienstgericht für Richter) in Leipzig granted an interim measure and suspended *Maier* preliminarily under § 35 German Judiciary Act (Order, 24 March 2022, 66 DG 1/22, see “Jens Maier darf vorerst kein Richter sein”, in *Legal Tribune Online*, 25 March 2022); before, the Regional Court of Dresden had introduced a disciplinary proceeding against *Maier* for breach of his duty of constitutional loyalty, see Antonetta Stephany and Markus Sehl, “Disziplinarverfahren am ersten Arbeitstag”, in *Legal Tribune Online*, 14 March 2022; former AfD parliamentarian *Birgit Malsack* also returned to her post as judge, see Joachim Wagner, “AfD-Politikerin wird in Berlin wieder Richterin”, in *Legal Tribune Online*, 23 March 2022; in the wake of the controversy, civil rights groups have pushed for the establishment of an independent institution which should assess complaints against allegedly right-wing judges and prosecutors and implement disciplinary measures if needed, see “Organisationen fordern Maßnahmen gegen rechte Richter”, in *Legal Tribune Online*, 20 April 2022.

uphold and identify with the free democratic order<sup>288</sup> – that is expected from civil servants and judges as part of the ‘traditional principles of the professional civil service’ (Article 33(5) of the Basic Law) and as an entry requirement for the position (in the sense of Article 33(2) of the Basic Law).<sup>289</sup> This constitutional loyalty duty is also codified in ordinary laws (see § 60(1), Sentence 3 of the Act on Federal State Officials,<sup>290</sup> § 33(1), Sentence 3 of the Act on the Status of Länder State Officials).<sup>291</sup> The Federal Constitutional Court has held that this duty “does not contain an obligation to identify with the aims or specific politics of the respective government” and “does not exclude the right to criticise manifestations of this state and support a change of the existing conditions – within the framework of the constitution and the means provided for by it”. However, it is indispensable for the civil servant “to avow himself to the state – irrespective of its shortcomings – and the constitutional order as it stands, recognise them as worthy of protection [...] and actively stand up for them”.<sup>292</sup> The same principles apply to lay judges<sup>293</sup> and soldiers.<sup>294</sup>

In 1972, the federal government and governments of the Länder agreed on the so-called ‘Radikalenerlass’ (radicals decree), according to which the provisions on constitutional loyalty of state officials were binding and as such, each applicant for the civil service had to be examined individually

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<sup>288</sup> Federal Constitutional Court, Order, 22 May 1975, 2 BvL 13/73, in *BVerfGE*, vol. 39, pp. 347 f. (‘*Radicals decree*’); Federal Labour Court, Judgement, 12 May 2011, 2 AZR 479/09, in *Neue Zeitschrift für Arbeitsrecht – Rechtsprechungsreport*, 2012, p. 43, para. 27.

<sup>289</sup> See, for example, *Radicals decree*, p. 346, see above note 288; Federal Constitutional Court, Order, 6 May 2008, 2 BvR 337/08, in *Neue Juristische Wochenschrift*, 2008, p. 2568, para. 17 (‘*Rock band*’).

<sup>290</sup> ‘Bundesbeamtengesetz’.

<sup>291</sup> ‘Beamtenstatusgesetz’. For judges, this provision applies according to the reference in § 71 of the German Judiciary Act; also, § 9, No. 2 of the German Judiciary Act explicitly provides that who is appointed as a judge must uphold the free democratic order.

<sup>292</sup> *Radicals decree*, pp. 347 f., see above note 288; *Rock band*, p. 2568, para. 17, see above note 289.

<sup>293</sup> *Rock band*, see above note 289; still, the Federal Minister of Justice has announced in March 2022 to clarify this explicitly in § 44a of the German Judiciary Act, see Markus Sehl, “Gefahr durch extremistische Schöffengerichter?”, in *Legal Tribune Online*, 24 March 2022.

<sup>294</sup> See, for example, Federal Administrative Court, Judgement, 18 May 2001, 2 WD 42/00, 43/00, in *BVerwGE*, vol. 114, p. 258, holding that a soldier who was an active member of the political party ‘Die Republikaner (REP)’ did not violate his duty to constitutional loyalty as it was not sufficiently proven that the party pursued anti-constitutional aims.

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which, in turn, resulted in a standard request to domestic intelligence services.<sup>295</sup> Membership in an organisation with anti-constitutional aims indicated doubts about the constitutional loyalty of an individual.<sup>296</sup> Ultimately, the decree had practical consequences primarily for persons from the left political spectrum.<sup>297</sup> The Federal Constitutional Court, in its ‘extremists order’ of 1975,<sup>298</sup> later joined by the Federal Administrative Court,<sup>299</sup> found that the requirement for candidates to uphold the free democratic order was constitutional, however mentioning the radicals decree only ambiguously.<sup>300</sup> The decree was abolished in 1979<sup>301</sup> and, in 1993, the European Court of Human Rights (‘ECtHR’), citing the radicals decree, found in *Vogt v. Germany*, that the removal of a teacher for her active membership in the German Communist Party violated Article 10 of the European Convention on Human Rights (‘ECHR’) (freedom of expression) and Article 11 of the ECHR (freedom of assembly and association).<sup>302</sup>

Whilst it is still settled case law in Germany that state officials or judges who “put into action”<sup>303</sup> an anti-constitutional attitude (such as a National Socialist position) must be removed from service as they commit a

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<sup>295</sup> “Vor 50 Jahren: ‘Radikalenerlass’”, in *Bundeszentrale für politische Bildung*, 26 January 2022.

<sup>296</sup> Ministerialblatt of North Rhine-Westphalia, 1972, p. 324.

<sup>297</sup> *Bundeszentrale für politische Bildung*, 26 January 2022, see above note 295

<sup>298</sup> *Radicals decree*, p. 334, see above note 288.

<sup>299</sup> See, for example, Federal Administrative Court, Judgement, 29 October 1981, 1 D 50/80, in *Neue Zeitschrift für Verwaltungsrecht*, 1982, p. 191; Federal Administrative Court, Judgement, 10 May 1984, 1 D 7/83, in *Neue Juristische Wochenschrift*, 1985, p. 503.

<sup>300</sup> *Radicals decree*, pp. 365 f., see above note 288, referring to the summary of the decree of 3 February 1972, Federal Bulletin (*BGBI.*), No. 15, p. 142; on this Court order, see the opinion of the Research Services of the Bundestag, WD 3 - 3000 - 125/17, “Der sogenannte ‘Radikalenerlass’ in der deutschen und europäischen Rechtsprechung”, pp. 3 f.

<sup>301</sup> However, the check of constitutional loyalty especially of judicial candidates is currently again under debate. Some Länder have reintroduced a standard request at the domestic intelligence services (for example, Bavaria and Mecklenburg-Vorpommern), see Markus Sehl, “Wie die Justiz gegen Verfassungsfeinde aufrüstet”, in *Legal Tribune Online*, 17 May 2021.

<sup>302</sup> ECHR, 4 November 1950 (hereinafter often referred to as ‘ECHR’) (<https://www.legal-tools.org/doc/8267cb/>); ECtHR, *Vogt v. Germany*, Judgement, 26 September 1995, Application No. 17851/91 (<https://www.legal-tools.org/doc/6df4f3/>); for more details on the ECtHR case law see below Section 3.16.

<sup>303</sup> ‘Betätigen’, Federal Administrative Court, Judgement, 17 November 2017, 2 C 25/17, in *Neue Juristische Wochenschrift*, 2018, p. 1185, para. 25, see also para. 21.

disciplinary offence,<sup>304</sup> today the jurisprudence differentiates between the position of the civil servant.<sup>305</sup> Likewise, such candidates tend not to be accepted for public service.<sup>306</sup> While “putting into action” must exceed the mere “having” a conviction, it does not require active promotion and can be seen, for example, in a tattoo containing anti-constitutional content, even on body areas covered by the uniform.<sup>307</sup> It is also not necessary that the content be subsumed under a criminal norm such as the prohibition of symbols of anti-constitutional organisations, it suffices that the motives have a “National Socialist meaning”.<sup>308</sup> In March 2022, as part of a ten point plan to combat right-wing extremism, the Federal Minister of the Interior announced the decision to lower the hurdles in the Federal Disciplinary Act to dismiss right-wing extremists in the civil service.<sup>309</sup>

### 2.3.1.3. Laws Protecting ‘Public Security and Order’

Other provisions sometimes mentioned in the wider context of militant democracy safeguard the free democratic order indirectly as they protect the ‘public security and order’ of which the former is a constituent.<sup>310</sup> However, as these laws do not specifically aim at protecting the free democratic order

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<sup>304</sup> See, for example, *ibid.*, paras. 19 ff.; to safeguard judicial independence, Article 97(2) of the Basic Law contains certain formal requirements for the removal of judges, see *Rock band*, p. 2568, para. 18, see above note 289; if the civil servant is retired, the state can withdraw the pension, see on a former teacher who publicly defended positions of the anti-constitutional ‘Reichsbürger’ movement, Higher Regional Court of Koblenz, Judgement, 11 March 2022, 3 A 10615/21.

<sup>305</sup> See Federal Administrative Court, Judgement, 19 January 1989, 7 C 89/87, in *Neue Juristische Wochenschrift*, 1989, p. 1374.

<sup>306</sup> See, for example, Administrative Court of Wiesbaden, Order, 23 July 2018, 3 L 5382/17.WI, in *BeckRS*, 2018, 17975.

<sup>307</sup> *Ibid.*, paras. 23–31.

<sup>308</sup> *Ibid.*, paras. 54 f., 58 f. (which was the case, *inter alia*, for runic characters); see for the removal of a lay judge who was member in an extreme right-wing rock band, *Rock band*, p. 2568, see above note 289.

<sup>309</sup> “Wir wollen rechtsextremistische Netzwerke zerschlagen”, in *Legal Tribune Online*, 15 March 2022.

<sup>310</sup> At the constitutional level, this is the case, for example, for Article 13(4), (7) of the Basic Law (possibility to employ technical means of surveillance of the home in case of (acute) danger) or Article 35(2) Sentence 1 of the Basic Law (possibility for the Länder to call upon the Federal Border Police to maintain or restore public security or order). Similarly, Article 61(1) of the Basic Law allows for the impeachment of the Federal President, *inter alia*, in case of wilful violation of the Basic Law; see on these examples Papier and Durner, 2003, p. 355, see above note 259; there are many examples in ordinary laws.

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or the constitutional order, it would stretch the term of quasi memory laws too far to also include them in this category as a matter of principle.

Still, in the context of assemblies, domestic courts have, to some extent, interpreted the protected interest of ‘public order’ so as to specifically restrict the glorification of the Nazi regime and its atrocities. This case law complements the aforementioned explicitly mnemonic § 15(2) of the Assembly Act which allows for the restriction or prohibition of assemblies at National Socialist victim memorial sites<sup>311</sup> and directly relates to prohibition or restriction of open air assemblies in case of acute threat to public security or public order under § 15(1) of the Assembly Act.<sup>312</sup> According to settled case law, the *content* of expected statements in assembly speeches may justify such restrictions, but only if the statement falls under a criminal provision (for example, §§ 86, 86a, 130 of the Criminal Code). Where statements fall under a criminal provision, they are then considered to be a threat to ‘public security’ as this term covers the respect of legal norms. It fits in this that § 5(1), No. 4 of the Assembly Act allows the prohibition of assemblies in closed rooms during which criminal statements are to be expected. This has been assumed, in particular, for statements that deny the persecution of Jews during the ‘Third Reich’.<sup>313</sup> However, as regards non-criminal forms of expressing National Socialist and antisemitic ideologies, the ‘public order’ in the sense of § 15(1) of the Assembly Act is not able to fill existing gaps.<sup>314</sup> The reason for this is the importance that the Federal Constitutional Court attaches to the freedom of expression for a democratic society. As this freedom protects minorities in particular,<sup>315</sup> it cannot be made subject to the

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<sup>311</sup> See above Section 2.2.

<sup>312</sup> See below on the Assembly Acts of the Länder.

<sup>313</sup> *Auschwitz lie*, see above note 50, arguing that this statement constituted the offence of insult (§ 185 of the Criminal Code) and leaving open whether it could also be subsumed under incitement to hatred (§ 130 of the Criminal Code) in its former version that did not yet explicitly contain the Holocaust denial, see for more details above Section 2.1.1.1.

<sup>314</sup> Federal Constitutional Court, Order, 23 June 2004, 1 BvQ 19/04, in *BVerfGE*, vol. 111, p. 155 (*Demonstration against synagogue*); Federal Constitutional Court, Order, 5 September 2003, 1 BvQ 32/03, in *Neue Zeitschrift für Verwaltungsrecht*, 2004, p. 91 (*Reichsparteitag*); *Protest march*, p. 2071, see above note 155; Federal Constitutional Court, Order, 19 December 2007, 1 BvR 2793/04, in *Neue Zeitschrift für Verwaltungsrecht*, 2008, p. 673 (*Hochsauerland*); besides, ambiguous statements must be reasonably interpreted, see Federal Constitutional Court, Order, 7 April 2001, 1 BvQ 17/01, in *Neue Juristische Wochenschrift*, 2001, p. 2074 (*Servants of the strangers*); on this jurisprudence see also above Section 2.2.

<sup>315</sup> See Masing, 2012, p. 586, see above note 112.

standard of the ‘public order’ that is under German law defined as the “prevailing moral views of the majority”.<sup>316</sup> In addition, the specific legal means that the Constitution contains to defend itself, that is, the safeguards of Article 9(2), 18 and 21(2) of the Basic Law, are considered to exclude an interpretation of the ‘public order’ as a general instrument to fight a National Socialist ideology.<sup>317</sup>

However, a threat to the public order – and hence a ground for restricting an assembly – can stem from the *manner* in which the assembly is held, namely, when aggressive and provocative behaviour creates a climate of violence.<sup>318</sup> This has been affirmed in two cases, the first relates to a procession which “by its overall character identifies itself with the rites and symbols of the Nazi tyranny and intimidates other citizens by wakening memories about the past totalitarian and inhuman regime”.<sup>319</sup> Courts have accepted this, for example, with respect to processions characterised by the use of black-white-red flags of the German Reich, drums, flares, and the singing of former SS songs.<sup>320</sup> It was different, however, for the mere use of the (not prohibited) black-white-red flag and the German Reich war flag<sup>321</sup> from 1935 in an assembly against a senatorial decree according to which the use of this flag constituted a regulatory offence.<sup>322</sup> An intimidating wakening of memories about the Nazi past was also rejected in other cases.<sup>323</sup> The second case

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<sup>316</sup> *Demonstration against synagogue*, pp. 155 f., see above note 314; *Hochsauerland*, p. 673, see above note 314; for the same reason, a danger for public security cannot be justified by an infringement of § 118(1) of the Act on Regulatory Offences (Ordnungswidrigkeitengesetz), 19 February 1987, as this provision precisely requires an impairment of the public order, *Reichskriegsflagge*, p. 245, see above note 173.

<sup>317</sup> *Demonstration against synagogue*, p. 158, see above note 314; *Reichsparteitag*, p. 91, see above note 314; *Hochsauerland*, p. 673, see above note 314.

<sup>318</sup> *Servants of the strangers*, p. 2074, see above note 314.

<sup>319</sup> *Demonstration against synagogue*, p. 157, see above note 314; *Reichsparteitag*, p. 91, see above note 314; see also *Protest march*, p. 2071, see above note 155, referring explicitly to the wakened memory about the German invasion in the Netherlands.

<sup>320</sup> Higher Administrative Court of Munich, Order, 14 November 2008, 10 CS 08.3016, in *BeckRS*, 2010, 53467, para. 10.

<sup>321</sup> See above note 173.

<sup>322</sup> *Reichskriegsflagge*, p. 246, see above note 173.

<sup>323</sup> For example, the intimidating effect may not already be deduced from the shouting of slogans, banners, or flyers as these are characteristics of any assembly, *Hochsauerland*, p. 674, see above note 314; similarly, an intimidating and violent appearance was rejected for an assembly with the slogan “Never, never, never again Israel” (“*Nie, nie, nie wieder Israel*”), Higher Administrative Court of Münster, Order, 21 October 2019, 15 B 1406/19, in *Neue Zeitschrift*

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relates to when the public order is endangered by processions which “are organised at a commemorative day specifically dedicated to the memory of the injustices of National Socialism and the Holocaust in a provocative manner that affects the moral feelings of citizens”.<sup>324</sup> This has been assumed for the Holocaust Memorial Day of 27 January: “By commemorating this day, responsibility is taken for the past and not only the victims are commemorated nationwide, but also the consequences of National Socialism are reminded in order to permanently prevent their repetition.” Thus, it was considered justified that the authorities had assumed the procession by the right-wing extremist ‘comradeship’ that day had a provocative effect.<sup>325</sup> Still, courts have specified later that it does not suffice that the assembly runs counter to the remembrance concerned, but rather, that the provocative effect and significant impairment of the moral feelings of citizens<sup>326</sup> requires “a clear thrust against the commemoration”.<sup>327</sup> This has been rejected, for example, for an assembly by the extreme right-wing NPD on Holocaust Memorial Day about the Euro crisis and the required return to the former German currency Deutsche Mark, as the competent court saw no indications that this topic was only used as a pretext for an assembly glorifying the Nazi regime.<sup>328</sup> The jurisprudence indicates that public authorities are generally more willing to restrict right-wing assemblies than what courts allow them to in view of the freedom of expression and assembly.

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<sup>324</sup> *für Verwaltungsrecht – Rechtsprechungsreport*, 2020, p. 204, para. 24; also, the close distance to an obelisk, a symbol for the liberation wars against Napoleon I, did not justify an intimidating effect of a stationary assembly for which the organiser had already accepted a prohibition of flares, drums and specific clothes, Higher Administrative Court of Lüneburg, Order, 13 November 2020, 11 ME 293/20, para. 21.

<sup>325</sup> *Demonstration against synagogue*, p. 157, see above note 314; *Holocaust memorial day*, p. 1410, see above 152.

<sup>326</sup> *Holocaust memorial day*, p. 1410, see above note 152.

<sup>327</sup> Federal Constitutional Court, Order, 27 January 2012, 1 BvQ 4/12, in *Neue Zeitschrift für Verwaltungsrecht*, 2012, p. 749 (“Back to D-Mark, Interim order”); Federal Administrative Court, Judgement, 26 February 2014, 6 C 1/13, in *Neue Zeitschrift für Verwaltungsrecht*, 2014, p. 883, para. 16 (“Back to D-Mark”).

<sup>328</sup> *Back to D-Mark*, p. 883, para. 17, see above note 326.

<sup>329</sup> *Ibid.*, paras. 18–22; similarly, *Back to D-Mark, Interim order*, p. 750, see above note 326, on interim measures against the postponing of the assembly by the authorities; the Court still rejected the interim measures in view of the negative consequences that a false decision would have caused.

These standards have, to some extent, had repercussions for other legal fields, namely, the very relevant question in practice of when the use of public premises may be denied to far-right political parties or other groups for their events. For political parties, including their non-local groups, the right to use city halls or other public premises generally follows from § 5(1), Sentence 1 of the Political Parties Act in conjunction with Article 3(1), 21(1) of the Basic Law;<sup>329</sup> for local associations and initiatives, it stems from a legal basis at the Land level.<sup>330</sup> In both cases, access may be denied, *inter alia*, in case of threats to public security or public order. However, public security is again only considered as threatened by the content of expected statements at the planned event if these can be qualified as criminal, and even then, this only allows for prohibition of the speech concerned, not for denial of access to the hall.<sup>331</sup> Similarly, public order again does not justify such denial on the grounds of an anti-constitutional ideology of the party. It is only when the political party has been formally declared unconstitutional<sup>332</sup> that the access can be denied. This is a consequence of the so-called ‘privilege of political parties’ under Article 21(2) of the Political Parties Act, according to which the political views defended may not entail negative consequences until the party has been declared unconstitutional.<sup>333</sup> Further, the question of whether the specific manner of the event threatens the public order is at this point irrelevant as this would (at most) allow for restrictions of the event, not the

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<sup>329</sup> This is the case as long as the city hall is generally made available to political parties as § 5(1) of the Political Parties Act, 24 July 1967 (<https://www.legal-tools.org/doc/simq94/>); Articles 3(1), 21(1) of the Basic Law only give rise to a right to non-discrimination.

<sup>330</sup> See, for example, § 8(2) of the City Act of North Rhine-Westphalia (Gemeindeordnung NRW) or Article 21(1), Sentence 1 of the City Act of Bavaria (Gemeindeordnung Bayern).

<sup>331</sup> Higher Administrative Court of Munich, Order, 21 February 2008, 4 ZB 07.3489, in *BeckRS*, 2008, 27582, para. 9 ('*City hall*').

<sup>332</sup> See above Section 2.3.1.2.1.

<sup>333</sup> Also, the mere recognition by the Federal Constitutional Court that a party pursues unconstitutional aims does not suffice to deny the access to the hall, Higher Administrative Court of Kassel, Order, 23 February 2018, 8 B 23/18, in *BeckRS*, 2018, 1847, para. 4 ('*Privilege of political parties*'); confirmed by Federal Constitutional Court, Order, 24 March 2018, 1 BvQ 18/18, in *BeckRS*, 2018, 3858 ('*Election campaign event*'); this is particularly relevant for the National Democratic Party of Germany that the Federal Constitutional Court has deemed to be pursuing anti-constitutional aims but not to be significant enough to be declared unconstitutional, see above note 250.

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denial of access.<sup>334</sup> Additionally, it is settled case law that, in principle, it is irrelevant whether the event provokes violent behaviour by third persons such as opposing demonstrators. Police measures must be addressed to third persons and not the political party or association itself, since the threat to public security cannot be attributed to the latter.<sup>335</sup> It is only in the exceptional case that public security and order cannot be upheld by all available means that access to the hall can be denied.<sup>336</sup>

While these principles are settled case law, they are not always respected by cities that sometimes prefer to be ordered by an overruling court decision to make their city hall available to a far right-wing party, in order to express a political point of view or to protect themselves against critics.<sup>337</sup> An extreme case in this regard is the case of the city of Wetzlar that went as far as not implementing orders by the administrative courts<sup>338</sup> and the Federal Constitutional Court,<sup>339</sup> which had obliged the city to admit the NPD to its hall.<sup>340</sup> This – to this extent unprecedented – case has been heavily criticised in legal literature<sup>341</sup> and the administrative court during its main proceedings once again condemned the illegal denial even though the date of the planned event had already passed.<sup>342</sup>

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<sup>334</sup> Besides, it is doubtful whether the narrow requirement of an intimidating effect of the assembly could ever be met in case of a city hall event as the relevant case law mainly relates to processions in public streets.

<sup>335</sup> See *City hall*, para. 8, see above note 331; Sascha Peters in Johannes Dietlein and Andreas Heusch (eds.), *Beck'scher Online-Kommentar Kommunalrecht Nordrhein-Westfalen*, 18th ed., C.H. Beck, Munich, 2021, § 8, para. 28.

<sup>336</sup> Higher Administrative Court of Münster, Order, 28 June 2018, 15 B 875/18, in *BeckRS*, 2018, 15395, para. 17; Peters, 2021, § 8, para. 28, see above note 335.

<sup>337</sup> Wolfgang Hecker, “Verweigerung der Stadthallen Nutzung gegenüber der NPD”, in *Neue Zeitschrift für Verwaltungsrecht*, 2018, p. 789; for a similar criticism see Wolfgang Hoffmann-Riem, “Demonstrationsfreiheit auch für Rechtsextremisten? Grundsatzüberlegungen zum Gebot rechtsstaatlicher Toleranz”, in *Neue Juristische Wochenschrift*, 2004, pp. 2779–2782.

<sup>338</sup> *Privilege of political parties*, see above note 333.

<sup>339</sup> *Election campaign event*, see above note 333.

<sup>340</sup> See the press release by the Federal Constitutional Court, No. 16/2018, 26 March 2018. The city did not change its view even after the administrative court had fixed a penalty payment; despite this, the supervisory authority concluded that the city had not intentionally ignored the order of the Federal Constitutional Court as it had been in a “dilemma”, Tanja Podolski, “Es war eben ein Dilemma”, in *Legal Tribune Online*, 13 April 2018.

<sup>341</sup> Hecker, 2018, p. 790, see above note 337.

<sup>342</sup> Administrative Court of Gießen, Judgement, 3 September 2019, 8 K 2064/18.GI.

A related debate that is relevant in the context of Holocaust commemoration concerns the use of city halls by groups related to the ‘boycott, divestment and sanctions’ movement (‘BDS’). After the BDS resolution of the German Bundestag of 5 May 2019, in which the Parliament decided to “resolutely oppose the BDS campaign”,<sup>343</sup> many Länder parliaments and city councils followed this example and decided that their public premises were not to be made available to groups supporting the BDS movement.<sup>344</sup> Most lower instances already censured this practice with varied reasoning for doing so: Some argued that while the clear rejection of antisemitism was a valid ground for restricting the use of public premises, the BDS campaign lacked a sufficiently homogeneous organisational structure in order to attribute to its supporters a necessarily antisemitic position.<sup>345</sup> Other courts held that an antisemitic ideology – although it infringed human dignity and the free democratic order – was generally unable to justify restrictions to the use of city halls as these aspects were only relevant for the prohibition of parties and associations. Beyond these prohibition procedures, the freedom of expression, in principle, also covered extremist, racist and antisemitic statements and only ended when the statements left the intellectual sphere and turned into apparent threats endangering the public peace.<sup>346</sup> The Federal Administrative Court joined the latter view: excluding events related to the BDS from the use of public premises violated the freedom of expression since such a resolution by a city council was neither neutral regarding the concerned opinions nor justified by a legal interest that was *per se* to be protected; the

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<sup>343</sup> See below Section 2.3.2.5. for more details on this resolution.

<sup>344</sup> See Uwe Schulz, “Die Anti-BDS-Beschlüsse im Lichte des kommunalrechtlichen Anspruchs auf Nutzung öffentlicher Einrichtungen der Gemeinde”, in *Kommunaljurist*, 2020, p. 245; Andreas Heusch, Franziska Dickten, “Neue Rechtsprechung zum Kommunalrecht”, in *Neue Zeitschrift für Verwaltungsrecht*, 2020, p. 363; resolutions were adopted, for example, by the parliaments of Berlin, Rhineland-Palatinate, Thuringia, Baden-Württemberg and North Rhine-Westphalia and the city councils of, for example, Frankfurt (Main), Munich, Berlin, Cologne, Mannheim, Dortmund, Oldenburg, Essen, Bochum, Bonn, Leipzig, Bielefeld, Neu-Ulm; see Dana Ionescu, “BDS-Bewegung/Antisemitische Boykottkampagnen gegen Israel”, Dossier prepared for the contact person for antisemitism of the Land Berlin, September 2020, p. 19.

<sup>345</sup> Administrative Court of Cologne, Order, 12 September 2019, 14 L 1765/19, in *BeckRS*, 2019, 22246, para. 15 (‘Culture festival’); similarly, Higher Administrative Court of Lüneburg, Order, 27 March 2019, 10 ME 48/19, in *BeckRS*, 2019, 4710, paras. 4, 8.

<sup>346</sup> Higher Administrative Court of Munich, Judgement, 17 November 2020, 4 B 19.1358, in *BeckRS*, 2020, 32734, paras. 56–58.

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latter was only the case when statements turned into apparent threats.<sup>347</sup> Besides, a mere city council resolution was no legal basis to interfere with the freedom of expression.<sup>348</sup>

The protection of public security – namely, respect for criminal provisions – also has effect on the relationship between private stakeholders. For instance, postal services are only obliged to provide their services “in respect of the law” (§ 3 of the Postal Services Regulation<sup>349</sup>). Accordingly, the administrative court in Frankfurt held that the postal service was prohibited from shipping printed materials belonging to the right-wing NPD as they constituted an incitement to hatred under § 130 of the Criminal Code.<sup>350</sup>

### 2.3.1.4. Police and Security Law and Public Commercial Law<sup>351</sup>

The most remote connection between the normative content of the law and its effect of outlawing the denial or approval of Nazi atrocities can be found within laws that, in their application, attach negative consequences to the adherence of Nazi ideology and glorification of this past, not to outlaw such mindsets but to prevent damage to other legal interests, such as security or financial interests. The mnemonic governance hence becomes more of an accidental reflex rather than a deliberate effect.

This is the case for the Weapons Act which presumes that former members of a prohibited association or a political party declared unconstitutional do not possess the necessary reliability for a licence to weapons for a ten-year period<sup>352</sup> (§ 5(2), No. 2 of the Weapons Act). The same applies, for a period of five years, *inter alia*, to persons who have supported activities directed against the Constitution or the idea of international understanding, in

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<sup>347</sup> Federal Administrative Court, Judgement, 20 January 2022, 8 C 35.20, *Gewerbearchiv*, 2022, p. 236, paras. 20 f.; these are the requirements that a law restricting the freedom of expression must meet in order to be considered a ‘general law’ and hence a valid limit under Article 5(2) of the Basic Law, see above note 106 and accompanying text.

<sup>348</sup> *Ibid.*; similarly, *Culture festival*, para. 17, see above note 345.

<sup>349</sup> ‘Postdienstleistungsverordnung’ (‘PDLV’).

<sup>350</sup> Administrative Court of Frankfurt (Main), in *Neue Juristische Wochenschrift*, 1993, p. 2067 on the former § 8(2) of the Postal Law, 22 December 1997, that provided a possibility to deny services where this was in the “public interest”; see critically Brugger 2019, p. 31, see above note 41.

<sup>351</sup> ‘Gewerberecht’. Weapons Act, 11 October 2002 (hereinafter often referred to as ‘Weapons Act’) (<https://www.legal-tools.org/doc/mv6vkf/>).

<sup>352</sup> From the date on which the membership ended.

particular the peaceful co-existence of peoples, or activities that endanger the foreign interests of Germany by using or preparing violence (§ 5(2), No. 3 a) of the Weapons Act) as well as to persons who were members or supporters of an association supporting such activities (§ 5(2), No. 3 b, c) of the Weapons Act). On this basis, functionaries of the right-wing extremist NPD have been presumed unreliable as this party shares many characteristics of National Socialism and aims to undermine the constitutional order.<sup>353</sup> After a legislative change, the same should apply today to any member of the NPD.<sup>354</sup> Persons belonging to the so-called ‘Reichsbürger’ movement are even irrefutably presumed unreliable as their ideology denies the existence and legitimacy of the Federal Republic and only recognises laws adopted until 8 May 1945, such a position indicates that they are likely to use weapons improperly (§ 5(1), No. 2 b) of the Weapons Act).<sup>355</sup> Lacking reliability under the Weapons Act also makes it impossible to possess a general licence for hunting (§ 17(1), Sentence 2 of the Hunt Act).<sup>356</sup>

Similar principles can be found in other legal areas, for example, in passport law. Courts have confirmed a passport restriction placed upon a

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<sup>353</sup> Federal Administrative Court, Judgement, 19 June 2019, 6 C 9.18, in *Landes- und Kommunalverwaltung*, 2019, p. 458 Headnote 2 (on the former version of § 5(2) No. 3 a) of the Weapons Act), rejecting the idea supported by some that a formal declaration by the Federal Constitutional Court on the unconstitutionality was needed, *ibid.*, p. 460.

<sup>354</sup> The former version of the law (see above note 353) still required that the person itself supported these activities “individually or as member of an association”; since 2020, the membership in an association supporting these activities is sufficient, § 5(2) No. 3 b) of the Weapons Act.

<sup>355</sup> Higher Administrative Court of Koblenz, Judgement, 23 October 2019, 7 A 10555/19, in *Neue Zeitschrift für Verwaltungsrecht – Rechtsprechungsreport*, 2020, p. 689, Headnote; Higher Administrative Court of Koblenz, Order, 3 December 2018, 7 B 11152/18.OVG, in *Neue Zeitschrift für Verwaltungsrecht – Rechtsprechungsreport*, 2019, p. 814, paras. 22 f.; Higher Administrative Court of Bautzen, Order, 3 December 2018, 3 B 379/18, in *Neue Zeitschrift für Verwaltungsrecht – Rechtsprechungsreport*, 2019, p. 415, para. 16; Higher Administrative Court of Munich, Order, 15 January 2018, 21 CS 17.1519, in *BeckRS*, 2018, 199, para. 14; Higher Administrative Court of Münster, Order, 15 September 2017, 20 B 339/17, in *BeckRS*, 2017, 139052; Administrative Court of Minden, Judgement, 29 November 2016, 8 K 1965/16, in *BeckRS*, 2016, 55361.

<sup>356</sup> ‘Bundesjagdgesetz’; reliability under the Hunt Act can also be rejected on other grounds, for example, courts disagree on whether a former position with the State Security Service of the GDR presumes unreliability, in favour: Higher Administrative Court of Greifswald, Judgement, 19 October 1994, 1 L 82/94, in *Landes- und Kommunalverwaltung*, 1995, p. 255, Headnote 2; Higher Administrative Court of Bautzen, Judgement, 25 November 1993, 1 S 615/92, in *Leitsatzkartei*, 1994, 330032; against: Higher Administrative Court of Munich, Order, 21 December 1995, 19 CE 95.3087, in *Landes- und Kommunalverwaltung*, 1997, pp. 69 f.

right-wing extremist representative of a prohibited neo-Nazi association in order to prevent him from traveling to Poland as his activities (he had sought to antagonise the German minority in Poland against the binding Polish-German border, which had strained the relations of both countries) threatened “other significant interests of the Federal Republic of Germany” in the sense of § 7(1) No. 1 Passport Act.<sup>357</sup> On the same grounds, the jurisprudence has accepted the prohibition on travel out of the country for a German right-wing rock band in order to prevent it from performing at a right-wing rock concert in Budapest on the ‘day of honour’ when right-extremists commemorate the Waffen-SS and its Hungarian allies.<sup>358</sup> Similarly, courts have rejected the ‘reliability’ necessary to run a business (§ 35(1), Sentence 1 of the Public Commercial Code)<sup>359</sup> of persons whose business trivialises or glorifies National Socialism and disseminates neo-Nazi ideas, even if their activities do not constitute an incitement to hatred.<sup>360</sup> Finally, courts have also accepted a revocation of the official title ‘retired notary’ on the basis of adherence to the ‘Reichsbürger’ movement, dismissing the claimants assertion of enduring Allied powers and the lack of German statehood as “plainly absurd”.<sup>361</sup>

### **2.3.2. Other Laws Aimed at Rooting Remembrance of the Totalitarian Past in Society**

Beyond the provisions and court decisions relating to the mindset or statements of individuals, there have been numerous attempts to root the remembrance of Germany’s totalitarian past, and the Shoah in particular, in society by legal means, although many of them came far too late or were given up too early. It would extend the scope of this report to present these means exhaustively, especially if the wide field of ‘reparation’ was also analysed as

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<sup>357</sup> Higher Administrative Court of Mannheim, Order, 18 May 1994, 1 S 667/94, in *Neue Zeitschrift für Verwaltungsrecht, Beilage*, 1994, p. 69.

<sup>358</sup> Administrative Court of Cologne, Order, 24 November 2020, 10 K 1309/20, in *BeckRS*, 2020, 39344.

<sup>359</sup> ‘Gewerbeordnung’.

<sup>360</sup> Higher Administrative Court of Munich, Order, 10 December 1993, 22 Cs 93.3158, in *Gewerbearchiv*, 1994, p. 239; Administrative Court of Arnsberg, Order, 23 December 1998, 1 L 2031/89, in *Neue Zeitschrift für Verwaltungsrecht – Rechtsprechungsreport*, 2000, p. 17; leaving this question open Higher Administrative Court of Magdeburg, Order, 13 September 2007, 1 M 78/07, juris, para. 8; the glorification of the Nazi regime can also be relevant, for example, for measures under the Youth Protection Act (*Jugendschutzgesetz*), 23 July 2002 (see § 10b(1)) or the Media State Treaty, 2020 (see § 51(1)).

<sup>361</sup> Federal Court of Justice, Order, 14 March 2022, NotZ(Brfg) 1/22, in *BeckRS*, 2022, 9580.

an expression of this aim. Thus, the following examples merely illustrate these efforts.

### 2.3.2.1. Days and Sites of Remembrance

In Germany, 27 January is a nation-wide memorial-day for victims of National Socialism. It was introduced at the initiative of the Chairman of the Central Council for Jews in Germany, Ignatz Bubis, by proclamation of the Federal President Roman Herzog on 3 January 1996. Herzog stated that “the memory must not end; it must also remind future generations to vigilance” and that it was therefore important “to now find a form of remembrance that will have an effect for the future”.<sup>362</sup> Despite increasing calls in that sense,<sup>363</sup> 8 May is neither a nation-wide official memorial-day nor a public holiday. In Berlin, there was a one-time public holiday in 2020 and there will be again in 2025.<sup>364</sup> However, it also is a public memorial-day in Brandenburg,<sup>365</sup> Mecklenburg-Vorpommern,<sup>366</sup> Schleswig-Holstein<sup>367</sup> and Thuringia.<sup>368</sup> Thuringia is the only Land to also have an official memorial-day for victims of the SED regime on 17 June,<sup>369</sup> the day of the violent repression of the uprising of the people in the GDR by the Soviet Union in 1953. The only parliamentarian that voted against the introduction of this SED-victims memorial-day in Thuringia justified her decision with the fact that this day was put in one line with the 8 May 1945: “This day is historically unique and it is illegitimate to put the liberation from Holocaust, the industrial mass-civilian extermination in one line with other historical events”.<sup>370</sup> In recent years, there have also been increasing calls to make the Jewish holiday Yom Kippur

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<sup>362</sup> Federal Bulletin (*BGBI.*), Part I, 1996, p. 17.

<sup>363</sup> See Martin Sabrow, “Der 8. Mai – ein deutscher Feiertag?”, in *Bundeszentrale für politische Bildung*, 8 May 2020.

<sup>364</sup> “Berlin bekommt wieder Extra-Feiertag”, in *Nordkurier*, 29 November 2021.

<sup>365</sup> § 2(2) No. 3 of the Holidays Act Brandenburg (Feiertagsgesetz Brandenburg), 21 March 1991.

<sup>366</sup> § 2(2) No. 3 of the Holidays Act Mecklenburg-Vorpommern (Feiertagsgesetz Mecklenburg-Vorpommern), 8 March 2002.

<sup>367</sup> Resolution of the Parliament of Schleswig-Holstein of 19 June 2020, Bundestag Doc. (BT-Drucks.) 19/2172 (neu), 16 May 2018; it also calls on the government to promote this memorial-day at federal level.

<sup>368</sup> § 2a(1) of the Holidays and Memorial-Days Act of Thuringia (Thüringer Feier- und Gedenktagsgesetz), 21 December 1994.

<sup>369</sup> *Ibid.*, § 2a(2).

<sup>370</sup> Johanna Scheringer-Wright, Plenary Protocol 6/46, 46th Meeting, 20 April 2016, p. 3867.

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a public holiday in Germany.<sup>371</sup> So far, these discussions have not led to legislative change.

Public memorial sites and monuments for victims of the Nazi regime of which there are a great number in Germany are most often constructed by foundations that are created by the federal state, the Land or the city, based on a law or statute that sets out the nature of the site, the persons honoured by it, its aims as well as the financial sources and structure of the foundation. The Law on the establishment of a “Foundation Memorial Site for the Murdered Jews in Europe” on the basis of which the Holocaust Memorial in Berlin was constructed is a prominent example.<sup>372</sup> In 2019, the Bundestag also adopted the legal basis for the construction of a central memorial site for victims of the communist regime in Germany.<sup>373</sup>

The general lines of memory culture at the federal level, both with regard to the Nazi and the SED regime, have been shaped by successive federal concepts decided on by the federal government and presented to the Bundestag. The first of these concepts was the ‘General concept on the participation of the federal state in memorial sites in Germany’ (‘Gesamtkonzeption zur Beteiligung des Bundes an Gedenkstätten in der Bundesrepublik Deutschland’) of 1993<sup>374</sup> by which the federal state, for the first time, took up the promotion of memorial sites at the federal level<sup>375</sup> with the decision to foster sites in Berlin and the new Länder.<sup>376</sup> Discussions regarding federal involvement in memorial sites had begun after the reunification, when memorial sites in the East needed to be reconstructed as the SED dictatorship had

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<sup>371</sup> See “Theologin schlägt Tausch von Pfingstmontag gegen Jom Kippur vor”, in *Zeit Online*, 30 May 2020; Grigori Lagodinsky, “Feiertage für alle”, in *Jüdische Allgemeine*, 21 March 2013.

<sup>372</sup> Federal Bulletin (*BGBI.*), Part I, 2017, p. 626; for an illustration of the preceding controversies about this monument see the debate in the Bundestag of 25 June 1999 at the end of which the decision for the draft of *Peter Eisenman* was adopted, Plenary Protocol 14/48, see above note 87.

<sup>373</sup> ‘Mahnmal für die Opfer der kommunistischen Gewaltherrschaft in Deutschland’, see, for example, Resolution 19/15778, 13 December 2019.

<sup>374</sup> Bundestag Doc. (BT-Drucks.) 13/8486, 9 May 1997, p. 3.

<sup>375</sup> With the exceptions of the memorial sites of the House of the Wannsee Conference and permanent expositions in Hadamar and Ladelund, see Detlef Garbe, “Die Gedenkstättenkonzeption des Bundes: Förderinstrument im geschichtspolitischen Spannungsfeld”, p. 4, 2016 (available on the Gedenkstättenforum’s web site).

<sup>376</sup> This included the sites in Buchenwald, Sachsenhausen, Ravensbrück, Torgau, Bautzen, Berlin-Hohenschönhausen, Mödlareuth and the House of the Wannsee Conference, see Bundestag Doc. (BT-Drucks.) 14/1569, 27 July 1999, p. 6.

turned them into ‘places with a double past’. The ‘Federal Concept of Memorial Sites’ (‘Gedenkstättenkonzeption des Bundes’) of 1999,<sup>377</sup> *inter alia*, expanded the promotion to sites in the Western Länder<sup>378</sup> while emphasising a decentralised memory culture.<sup>379</sup> The aim of increasing awareness regarding the SED dictatorship in Germany’s memory culture was one of the reasons for the ‘Continuation of the Federal Memorial Sites Conception’ (‘Fortschreibung der Gedenkstättenkonzeption des Bundes’) of 2008.<sup>380</sup> This conception, which is still applied today, underscores the differences between the Nazi and the SED regimes as well as the uniqueness of the Holocaust’s importance in the German, European and world-wide memory culture and the so-called ‘Faulenbach’ formula.<sup>381</sup> According to this formula, Nazi crimes should not be relativised nor should the injustice committed by the SED dictatorship be trivialised.<sup>382</sup> It also stated that crimes against Russians and Poles, the extermination of the Sinti and Roma, the murder of handicapped people, the persecution of homosexuals and resistance groups all belonged to, and were part of, the collective memory culture.<sup>383</sup> In order to intensify the fostering of sites remembering the SED-regime, but not at the expense of the victims of National Socialism, the total funding of memorial-sites was increased.<sup>384</sup>

### 2.3.2.2. School and University Education

A review of the German memory culture at a conference in 2015 organised by the Federal Government Commissioner for Culture and Media revealed a

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<sup>377</sup> *Ibid.*

<sup>378</sup> For example, sites in Bergen-Belsen, Dachau, Neuengamme, see *ibid.*, p. 4.

<sup>379</sup> See *ibid* 14/1569, p. 3; Garbe, 2016, p. 5, see above note 375.

<sup>380</sup> See Bundestag Doc. (BT-Drucks.) 16/9875, p. 2, see above note 380; another reason was the difference between the institutionally promoted sites in the Eastern Länder and the project-wise promoted sites in the Western Länder, Garbe, 2016, p. 6, see above note 375.

<sup>381</sup> In its complete length: “neither should Nazi crimes be relativised by the reference to post-war injustices, nor should the injustice committed by the SED dictatorship be trivialised in view of Nazi crimes”, see Bernd Faulenbach, “Written opinion on the hearing of the Bundestag Committee for culture and media”, 16 February 2005, Ausschussdrucks. 15(21)158, p. 8; on this formula, see also Assmann, 2020, pp. 113 f., see above note 7.

<sup>382</sup> Bundestag Doc. (BT-Drucks.) 16/9875, pp. 1 f., see above note 380; this formula was only taken up again after its omission had been criticised, see Garbe, 2016, p. 6, see above note 375.

<sup>383</sup> Bundestag Doc. (BT-Drucks.) 16/9875, p. 2, see above note 380.

<sup>384</sup> See Garbe, 2016, p. 6, see above note 375.

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consensus that the specific focus of further development should be on memorial education.<sup>385</sup>

In 2013, the conference of ministers of education of the Länder and representatives of the Holocaust memorial at Yad Vashem signed a joint declaration of intent to cooperate.<sup>386</sup> This soft law agreement provides, *inter alia*, for the encouragement of information sharing and exchanging of ideas, the promotion of professional development programming opportunities for German educators and the continued teaching of the Holocaust in the curriculum of all sixteen Länder.<sup>387</sup>

In fact, in all sixteen Länder, National Socialism is an obligatory topic in the curricula adopted and enforced by the ministries of education. These curricula define the more general framework within which every school specifies the finer details. Most history curricula for secondary schools (that is, ‘Gymnasium’, usually ranging from years five to 12 or 13) foresee that pupils are confronted twice with National Socialism in their history class: most often, for the first time in year nine or ten and again in year 11 or 12 as one of the main topics in the respective year.<sup>388</sup> As German curricula in the 2010s have generally replaced the listing of substantive aspects of necessary ‘knowledge’ with ‘competences’, the standards on the substantive aspects have become more flexible and thus, more difficult to assess.<sup>389</sup> Still, the curricula gives an indication regarding which angle and with which priorities the topic is taught. Many findings of an investigation conducted in 2014 by Andreas Geike<sup>390</sup> are still valid today: The aims of history lessons on National Socialism are in part phrased very generally.<sup>391</sup> Only some Länder

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<sup>385</sup> See “Weiterentwicklung der Gedenkstättenkonzeption”, last updated on 6 November 2018 (available on the Federal Government’s web site).

<sup>386</sup> Joint declaration of Intent of 23 October 2013, in the presence of the Minister of Education of the State of Israel.

<sup>387</sup> *Ibid.*

<sup>388</sup> The curricula are generally available on the web sites of the Länder ministries of education.

<sup>389</sup> Critically on this aspect see Andreas Geike, “Die Verankerung nationalsozialistischer Gewaltverbrechen im Unterricht”, in *Gedenkstättenrundbrief*, 2015, vol. 177, p. 26.

<sup>390</sup> *Ibid.*, pp. 26–33; for an earlier investigation that came to similar conclusions see Stefanie Rauch, “Die Verankerung von Gedenkstättenbesuchen im Unterricht”, in *Gedenkstättenrundbrief*, 2006, vol. 134, pp. 14–21 (Part 1) and 2007, vol. 135, pp. 9–16 (Part 2).

<sup>391</sup> Berlin and Brandenburg, Hessen, Lower Saxony, Mecklenburg-Vorpommern, North Rhine-Westphalia, Saarland, Saxony-Anhalt, Schleswig-Holstein.

anchor the topic more specifically in the context of preserving democracy<sup>392</sup> and human rights.<sup>393</sup> By this contextualisation, the Nazi dictatorship is sometimes put in one line with other dictatorships.<sup>394</sup> Relatively few Länder refer to the uniqueness of the Holocaust.<sup>395</sup> Most curricula refer explicitly to Jews as a victim group, relatively few also explicitly mention other victim groups.<sup>396</sup> Nazi organisations such as the SS, the SA, the Gestapo are rarely explicitly referred to,<sup>397</sup> some Länder place an emphasis on the passive role of society.<sup>398</sup> While resistance, including specific events, are mentioned in most curricula, Jewish resistance is not explicitly referred to. Memory and reckoning with the past are mentioned in most curricula though with reference to different aspects of it.<sup>399</sup> About half of the Länder explicitly include regional aspects of the topic<sup>400</sup> and recommend a visit to a memorial-site,<sup>401</sup> however, only in Bavaria is such a visit obligatory. Whether this should be the case in all Länder has repeatedly been a matter of debate.<sup>402</sup>

Likewise, a look at the legal university education reveals interesting findings. After a first attempt to make the reckoning with National Socialism

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<sup>392</sup> Baden-Württemberg, Bavaria, Rhineland-Palatinate, Saxony.

<sup>393</sup> Saarland.

<sup>394</sup> Hamburg, Saxony.

<sup>395</sup> Baden-Württemberg, Bremen, Rhineland-Palatinate, Thuringia.

<sup>396</sup> Sinti and Roma (Baden-Württemberg, Berlin and Brandenburg, Bremen, Hessen, North Rhine-Westfalia, Saarland), political dissenters (Berlin and Brandenburg, North Rhine-Westfalia), forced labourers (North Rhine-Westfalia), handicapped people (Berlin and Brandenburg, North Rhine-Westfalia, Saarland), homosexuals (Baden-Württemberg), war prisoners (Saxony), Jehovah's Witnesses (Saarland).

<sup>397</sup> Saxony.

<sup>398</sup> Lower Saxony, Saarland, Schleswig-Holstein; similarly, Baden-Württemberg.

<sup>399</sup> For example, juridical and political dealing with the past (North Rhine-Westphalia), attempts to justify (Saxony), possible ways of remembering the victims (Thuringia), memorial-sites and memorial speeches (Lower Saxony), debate on uniqueness (Baden-Württemberg).

<sup>400</sup> Bavaria, Berlin and Brandenburg, Hessen, Saarland, Saxony, Saxony-Anhalt; recommending the taking into account of regional aspects not specifically in the context of the Nazi regime: Baden-Württemberg, Hamburg, Mecklenburg-Vorpommern; Lower Saxony, Thuringia.

<sup>401</sup> Bavaria, Berlin and Brandenburg, Hessen, Saxony, Saxony-Anhalt; recommending external learning places: Saarland.

<sup>402</sup> See Paul Vorreiter, "Debatte um Pflichtbesuche in KZ-Gedenkstätten", in *Deutschlandfunk*, 10 January 2018.

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an obligatory part of the education of law students had failed in 2018,<sup>403</sup> the Bundestag complemented § 5a(2), Sentence 3 of the German Judiciary Act in 2021 by including a sentence noting that compulsory subjects during university education “are also taught in reckoning with National Socialist injustice and that of the SED dictatorship”.<sup>404</sup> The preparatory works demonstrate that ‘NS injustice’ was understood as including the ‘memory of and reckoning with’ these crimes.<sup>405</sup> North Rhine-Westphalia is the only Land so far to have included a slightly further-reaching reference to Nazi injustice in its Legal Education Law which specifies the state examination subjects in the respective Land. This stipulation which is based on a resolution by the German Law Faculties Association (Deutscher Juristen-Fakultätentag)<sup>406</sup> provides that “in the entire course of study, especially against the background of National Socialist injustice, the ability to critically reflect on the law, including its potential for abuse, must be promoted.”<sup>407</sup>

### 2.3.2.3. Renaming of Streets

After the Nazi and the SED regimes, numerous street names were changed<sup>408</sup> – a process that has still not been completed today. Current debates on this

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<sup>403</sup> See Denise Dahmen, “Juristenunrecht des Nationalsozialismus bald Pflichtstoff im Jurastudium”, in *Anwaltsblatt*, 16 June 2021.

<sup>404</sup> See on this legislative change Gerhard Werle and Moritz Vormbaum, “Nationalsozialistisches Unrecht, SED-Unrecht und juristische Ausbildung – Zur Reform von § 5a DRiG”, in *JuristenZeitung*, 2021, pp. 1163–1167; for a critical voice on the earlier reform attempt see Andreas Funke, “Haltung zeigen oder Haltung einnehmen? Justizunrecht des 20. Jahrhunderts in der Juristenausbildung”, in *Neue Juristische Wochenschrift*, 2018, pp. 1930–1933.

<sup>405</sup> Recommendation of the Legal Committee, Bundestag Doc. (BT-Drucks.) 19/30503, 9 June 2021, p. 21.

<sup>406</sup> Deutscher Juristen-Fakultätentag, “Resolution of 2018”, 2018, DJFT 2018/II, TOP 15c, para. 4.

<sup>407</sup> § 7(2), Sentence 2, of the Legal Education Law of North Rhine-Westphalia (Juristenausbildungsgesetz NRW), 11 March 2003; § 5(1) of the Legal Education Law of Rhineland-Palatinate (Landesgesetz über die juristische Ausbildung Rheinland-Pfalz), 23 June 2003 at least contains an – albeit not intended – reference to the new § 5a(1), Sentence 3 of the German Judiciary Act; for a critical account of how little attention is given to Germany’s past in the legal education, see Rupprecht Podszun, “Wertfreies Subsumieren in der Examensmühle”, in *Legal Tribune Online*, 26 May 2018.

<sup>408</sup> On the ‘revolution’ of street signs replacements after the SED regime, see Jörg Ennuschat, “Von Thälmann zu Adenauer – Schildersturm im Osten: Rechtliche Überlegungen zu der Welle von Straßennamenbenennungen in den neuen Bundesländern”, in *Landes und Kommunalverwaltung*, 1993, p. 43.

issue increasingly draw attention to names which are connected to Germany's colonial past.<sup>409</sup>

The legal bases for the naming and renaming of streets differ within the Länder.<sup>410</sup> Where an explicit legal basis is lacking, the possibility for change is deduced from the guarantee of municipal self-administration (Article 28 of the Basic Law).<sup>411</sup> Cities and municipalities have a large discretion as regards the naming and renaming of streets. While they must take into account legitimate interests of the residents and ensure that the naming or the renaming does not lead to "unreasonable, for example, arbitrary or unproportionate burdens",<sup>412</sup> there is no 'right to a specific street name'. A "nice", "fitting" or "traditional" street name is not considered to be a protected legal interest.<sup>413</sup> A specific name has only been considered as "offensive" and thus, as infringing on the personality right of the resident in exceptional cases.<sup>414</sup> This exception could become relevant, for example, if a municipality decided to

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<sup>409</sup> See, for example, Jule Bönkost, "Straßenumbenennung als weißer Stressfaktor und die Notwendigkeit über Rassismus zu lernen", in *Institut für diskriminierungsfreie Bildung*, June 2017, on the streets in Berlin's 'African quarter'; for detailed analyses of the legal questions resulting from the phenomenon, see Tristan Barczak, "Verwaltungsrechtliche und verwaltungshistorische Fragen der Umbenennung von Straßen und Entziehung von Ehrenbürgerschaften", in *Die Öffentliche Verwaltung*, 2014, p. 643; Jörn Ipsen, "Straßenumbenennung als kommunalpolitische und kommunalrechtliche Fragestellung", in *Niedersächsische Verwaltungsbücher*, 2016, p. 38.

<sup>410</sup> See, for example, § 4(2), Sentence 3 of the Streets Act North Rhine-Westphalia (Straßen- und Wegegesetz NR), 23 September 1995.

<sup>411</sup> For example, in Baden-Württemberg that has repeated this principle in § 5(4) of its Municipal Code (Gemeindeordnung), 24 July 2000, see, for example, Administrative Court of Freiburg, Judgement, 5 February 2020, 4 K 653/19, in *BeckRS*, 2020, 2481.

<sup>412</sup> Higher Admininstrative Court of Munich, 16 May 1995, 8 B 94/2062, in *Neue Zeitschrift für Verwaltungsrecht – Rechtsprechungsreport*, 1996, pp. 344 f. ('Treitschke street'); similarly Higher Administrative Court of Mannheim, Judgement, 22 July 1991, 1 S 1258/90, in *Neue Zeitschrift für Verwaltungsrecht*, 1992, p. 197; now also Higher Administrative Court of Münster, Order, 29 October 2007, 15 B 1517/07, in *Neue Zeitschrift für Verwaltungsrecht – Rechtsprechungsreport*, 2008, p. 488, that had formerly rejected such subjective right to a correct discretionary decision (echt auf ermessensfehlerfreie Entscheidung) in principle, Higher Administrative Court of Münster, Order, 15 January 1987, 15 A 563/84, in *Neue Juristische Wochenschrift*, 1987, p. 2695 ('Street renaming'); for a diverging view see also Higher Administrative Court of Berlin, Order, 1 February 1994, 1 S 118/93, in *Landes- und Kommunalverwaltung*, 1994, p. 298 ('Otto Grotewohl Street').

<sup>413</sup> *Treitschke street*, p. 345, see above note 412.

<sup>414</sup> *Street renaming*, p. 2696, see above note 412; similarly *Treitschke street*, p. 345, see above note 412.

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name a street after a Nazi representative, though to date, such a case has not yet occurred.<sup>415</sup> On the contrary, courts have mostly had to reject claims by residents against the renaming of a street in situations where the municipality wanted to replace the name of a person connected to historical crimes with another name. This has been the case for the name of persons involved in the National Socialist past,<sup>416</sup> Germany's colonial history<sup>417</sup> and its SED past.<sup>418</sup> Some courts have explicitly qualified such renaming as being a "reasonable ground" for the change,<sup>419</sup> although such a ground was not necessary. The alternative of adding an explanatory plaque to the street sign must only be taken into account as an option, it does not preclude the city council from adhering to its preference of renaming of the street.<sup>420</sup> The interests of the person after which the street was initially named do not need to be taken into account as, according to the Bavarian Constitutional Court, the person's personality rights are not affected by the renaming.<sup>421</sup>

In view of discussions about street names in recent years, in 2021, the German association of cities and towns (Deutscher Städetag') published guidance on the criteria of how to name and rename streets in order to help

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<sup>415</sup> However, the neo-Nazi Michael Kühnen, in 1988, publicly fantasised about the idea of requesting the renaming of the market place of Langen in Hessen to "Adolf-Hitler-Platz", see "In Adolf-Hitler-Platz umbenennen" Der Neonazi Michael Kühnen will die Stadt Langen 'ausländerfrei' machen", in *Der Spiegel*, 4 December 1988.

<sup>416</sup> See, for example, *Treitschke street*, p. 345, see above note 412; Higher Administrative Court of Munich, Judgement, 2 March 2010, 8 BV 08.3320; and Constitutional Court of Bavaria, Judgement, 25 September 2012, Vf.17-VI-11, in *Neue Zeitschrift für Verwaltungsrecht – Rechtsprechungsreport*, 2013, p. 1 ('Meiser Street'); Administrative Court of Arnsberg, Judgement, 6 July 2017, 7 K 2014/16, in *BeckRS*, 2017, 116646 ('Maria Kahle Street').

<sup>417</sup> See, for example, Higher Administrative Court of Lüneburg, Order, 13 January 2011, 10 LA 158/10, in *BeckRS*, 2011, 45929 ('Carl Peters Street'); Administrative Court of Hannover, Judgement, 3 March 2011, 10 A 6277/09, in *BeckRS*, 2011, 49703 ('Lettow Vorbeck avenue'); Administrative Court of München, Judgement, 11 December 2007, M 2 K 07.4074, in *BeckRS*, 2007, 37249 ('Lieutenant General').

<sup>418</sup> *Otto Grotewohl Street*, see above note 412.

<sup>419</sup> See, for example, *Lieutenant General*, see above note 417.

<sup>420</sup> *Carl Peters Street*, see above note 417.

<sup>421</sup> *Meiser Street*, p. 4, see above note 416, on the constitutional complaint by the grand-child of the Land bishop Hans Meiser, who was criticised for his position *vis à vis* the Nazi regime; see on this question Ipsen, 2016, pp. 38–41, see above note 409.

municipalities review their regulatory framework.<sup>422</sup> According to these recommendations, it is inadmissible, *inter alia*, to name streets after persons, organisations or institutions “that embody goals, actions or values which are contrary to the Basic Law or the Constitution of the Land or which harm the reputation of the city”, persons who “were involved in events that violated the Universal Declaration of Human Rights or who have actively contributed to other inhuman acts”, or after places or events that provide room for violations in the mentioned context.<sup>423</sup> Though renaming should be carried out on a limited basis, it can be deemed necessary “if there are new historical assessments that prohibit a naming according to the current standards”.<sup>424</sup>

#### **2.3.2.4. Lustration, Naturalisation, and Other Aspects of Transitional Justice**

While the term ‘quasi memory law’ would lose its contours if all elements of transitional justice such as lustration, criminal prosecution, reparation, restitution, and rehabilitation were included in this category, it cannot be denied that these instruments indirectly foster a truthful and socially rooted remembrance of the historical crimes and explicitly or implicitly acknowledge responsibility. *Vice versa*, the more hesitance that is exercised in the application of such instruments, the smaller the chances are that a truthful memory culture can develop. This indirect mnemonic effect is particularly visible with lustration and naturalisation laws as they influence the selection of persons in crucial positions and the composition of the population. With this in mind, their legal bases are hence briefly exposed here.<sup>425</sup>

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<sup>422</sup> Deutscher Städtetag, “Straßennamen im Fokus einer veränderten Wertediskussion, Handreichung zur Aufstellung eines Kriterienkatalogs zur Straßenbenennung”, March 2021, p. 4.

<sup>423</sup> *Ibid.*, Annex, 6.1, No. 3.7.

<sup>424</sup> *Ibid.*, Annex, 6.1, No. 4.

<sup>425</sup> For an overview on the other aspects of German transitional justice after the Nazi regime and the SED regime see Romeike, 2016, see above note 30; for a chronology of the legal and non-legal stipulations on reparation and restitution for Nazi injustices see Bundesministerium der Finanzen (ed.), *Kalendarium zur Wiedergutmachung von NS-Unrecht*, 2020; on the annulment of Nazi criminal judgements see Wolfgang Fikentscher, Rainer Koch, “Strafrechtliche Wiedergutmachung nationalsozialistischen Unrechts”, in *Neue Juristische Wochenschrift*, 1983, p. 12 and especially the Law on the repeal of Nazi injustice judgements in the administration of criminal justice, 25 August 1998, that repealed all decisions that were adopted after 30 January 1933 on political, military, racist, religious or ethical grounds to implement the Nazi injustice regime and violated elementary principles of justice (§ 1).

### 2.3.2.4.1. Reparations

The post-1945 politics of reparations for Nazi crimes are commonly referred to as ‘Wiedergutmachung’, meaning, literally, ‘making good again’. The term was originally seen as suitable for a country which was deemed not only morally liable but also financially indebted. However, given the extent of past horrors and atrocities, the connotation of ‘making up for Auschwitz’ has nowadays been criticised as inadequate.<sup>426</sup>

Reparations can be divided into reparation claims by victorious powers (Section 2.3.2.4.1.1.), restitution of property (Section 2.3.2.4.1.2.), compensation for loss of liberty, health and professional chances (Section 2.3.2.4.1.3.), and judicial rehabilitation (Section 2.3.2.4.1.4.).<sup>427</sup>

#### 2.3.2.4.1.1. Reparation Claims of Victorious Powers

According to the Potsdam Agreement of 1945, victorious powers were not to receive monetary payments, but their reparation claims were to be satisfied through the dismantling of German industry and infrastructure.<sup>428</sup> The Soviet Union received reparation from the Soviet zone, Poland being satisfied from the Soviet claims, whilst Western allies and all other States received reparation from the Western occupied zones. With the London agreement of 1953, all pending claims were deferred until a final peace treaty would be concluded. The Treaty on the Final Settlement with Respect to Germany, reuniting Germany in 1990, however, did not provide any regulation on reparations. The German government considers this Treaty to replace a peace agreement and rejects further reparation claims.<sup>429</sup> In recent years,

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<sup>426</sup> For an early approval of the term, see Hans Günter Hockerts, “Wiedergutmachung in Deutschland. Eine historische Bilanz 1945–2000”, in *Vierteljahrshefte für Zeitgeschichte*, vol. 49, 2001, pp. 167–214; for current critique, see Aleida Assmann, “Die Schlagwort der Debatte”, in Aleida Assmann and Ute Frevert, *Geschichtsvergessenheit, Geschichtsversessenheit. Vom Umgang mit deutschen Vergangenheiten nach 1945*, Deutsche Verlags-Anstalt, Stuttgart, 1999, pp. 57 f.

<sup>427</sup> See Hans Günter Hockerts, “Wiedergutmachung in Deutschland 1945–1990. Ein Überblick”, in Bundeszentrale für politische Bildung (ed.), *Aus Politik und Zeitgeschichte*, vol. 63, no. 25–26, 2013, p. 16.

<sup>428</sup> Romeike, 2016, see above note 30, p. 28.

<sup>429</sup> See on the whole Stefan Garsztecki, “Analyse: Deutsche Kriegsreparationen an Polen? Hintergründe und Einschätzungen eines nicht nur innerpolnischen Streites”, in *Bundeszentrale für politische Bildung*, 27 November 2018.

especially Poland has repeatedly invoked to still possess unsatisfied reparation claims.<sup>430</sup>

#### 2.3.2.4.1.2. Restitution of Property

The allies began to enforce restitution of property soon after World War II, returning stolen and withdrawn assets to their owners. Recipients of restitution were primarily Jewish victims and their dependents, and, where they had not survived and no heirs existed, Jewish successor organisations.<sup>431</sup> With the end of occupation, the provisions governing restitution within the Western sectors were incorporated into the law of the Federal Republic,<sup>432</sup> and, in 1957, expanded to also include property confiscated outside of the German Reich.<sup>433</sup> However, in the course of the Cold War, the application of this legal regime became significantly limited due to the requirement that the claimant had to reside within a territory which maintained diplomatic relations with the Federal Republic.<sup>434</sup> Since the GDR had rejected historic responsibility and compensation for Nazi crimes, the matter of restitution re-emerged with the reunification of Germany. Laws on these so-called ‘open property matters’, which also included expropriation based on discriminatory GDR laws, were enacted in 1990 and 1994.<sup>435</sup> Under these acts in particular, compensation for expropriation is excluded if the aggrieved party “considerably abetted” either the Nazi or Communist regime.<sup>436</sup>

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<sup>430</sup> *Ibid.*

<sup>431</sup> Romeike, 2016, see above note 30, p. 30.

<sup>432</sup> See Treaty for the settlement of issues arising from war and occupation (Vertrag zur Regelung aus Krieg und Besatzung entstandener Fragen, Überleitungsvertrag), in the version of the Protocol on the Termination of the Occupation Regime in the Federal Republic of Germany, signed in Paris on 23 October 1954, Federal Bulletin (*BGBL.*), Part II, 1955, p. 405.

<sup>433</sup> Federal Act for the Settlement of the Monetary Restitution Liabilities of the German Reich and Legal Entities of Equivalent Status (‘Federal Restitution Act’, ‘Bundesrückerstattungsgesetz’), 19 July 1957.

<sup>434</sup> *Ibid.*, § 45.

<sup>435</sup> Act on the Settlement of Open Property Matters (Vermögensgesetz), 23 September 1990; Compensation and Compensatory Payments Act (Entschädigungs- und Ausgleichsleistungsgesetz), 27 September 1994.

<sup>436</sup> See § 1 of the Compensation and Compensatory Payments Act, see above note 435.

### **2.3.2.4.1.3. Individual Claims for Compensation for Loss of Liberty, Health, and Professional Chances**

The first Compensation Law of the Federal Republic, providing for the compensation of Victims of National Socialist Persecution, was passed in 1953.<sup>437</sup> However, many Nazi victims living abroad remained excluded from compensation due to the ‘principle of territoriality’. According to this principle, individual compensation under the Compensation Act was essentially limited to victims who had resided in the Federal Republic on 1 January 1947, or who had been deported, expelled, had died or emigrated, but had had their last residence in the territory of West Germany, as well as victims who had lived within the 1937 borders of the German Reich at the time of their persecution and taken residence in West Germany,<sup>438</sup> though the principle was later relaxed.<sup>439</sup> The idea behind these limitations was that foreign victims were to be compensated through reparation paid to their state of origin. However, the deferral of remaining reparation claims in the London Agreement made that compensation of victims within Germany and those abroad drifted apart considerably.<sup>440</sup> Besides, compensation entitlement became again subject to the requirement that the victim lived in a state with which the Federal Republic entertained diplomatic relations.<sup>441</sup> Paid compensations were criticised for being too low, and for neglecting mental health issues,<sup>442</sup> while compensation paid for corporal and professional damages weight higher.<sup>443</sup> Furthermore, racist views within the administration and judiciary ultimately prevented the effective compensation in many cases. For example, in a 1956 ruling, the Federal Court of Justice refused to acknowledge that “measures taken by the National Socialist authorities against Gypsies during the period of persecution” were “measures taken on racial grounds” under the compensation law, and that only after March 1943,

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<sup>437</sup> Federal Law on Compensation for Victims of National Socialist Persecution (‘Compensation Law’, ‘Bundeschädigungsgesetz’), 18 September 1953 (hereinafter often referred to as ‘Compensation Law’) (<https://www.legal-tools.org/doc/mqeb7x/>).

<sup>438</sup> *Ibid.*, § 8(1).

<sup>439</sup> The law was amended by the Third Law on the Amendment of Federal Supplementary Act on Compensation for Victims of National Socialist Persecution, 29 June 1956; Second Law on the Amendment of the Federal Compensation Act, 14 September 1965.

<sup>440</sup> Hockerts, 2013, see above note 427.

<sup>441</sup> § 238a(1) of the Compensation Law, introduced in 1965, see above note 437.

<sup>442</sup> Iris Nustedt, “‘Eine lästige, verordnete Pflichtübung’”, in *Der Spiegel*, 9 October 1988.

<sup>443</sup> Hockerts, 2013, see above note 427.

this had been the case.<sup>444</sup> In 1963, the Court gave up this position, ruling that the persecution of Sinti and Roma, begun in 1938, was “also based on racial grounds”.<sup>445</sup>

With the insufficiency of the compensation law becoming apparent, Germany resorted to bilateral agreements, at first only with Western countries, later also with Poland and Yugoslavia, leaving decisions regarding the allocation of funds to the respective governments.<sup>446</sup> Today, as a result of these bilateral agreements, Germany dismisses individual compensation claims emanating from countries with whom a settlement has been reached. The jurisprudence of Italian courts challenging both this practice and a corresponding judgement of the International Court of Justice ('ICJ') of 2012, has led Germany to institute proceedings before the ICJ against Italy, for allegedly failing to respect its state immunity.<sup>447</sup> Following an Italian decree, setting up a Fund for the reparation of injuries suffered by victims, Germany withdrew its request for interim measures;<sup>448</sup> however, the main proceeding is still pending.

#### 2.3.2.4.1.4. Judicial Rehabilitation

In the immediate aftermath of the war, the Allied Control Council adopted 'Proclamation No. 3', ordering that "[s]entences on persons convicted under the Hitler Regime on political, racial, or religious ground must be

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<sup>444</sup> Federal Court of Justice, Judgement, 7 January 1956, IV ZR 273/55, in *BeckRS*, 2015, 19226.

<sup>445</sup> Federal Court of Justice, Judgement, 18 December 1963, IV ZR 108/63, in *BeckRS*, 2015, 20220 ("mitursächlich").

<sup>446</sup> Hockerts, 2013, see above note 427, pp. 20 f.; "Die Entschädigungszahlungen an jüdische Opfer des Nationalsozialismus", Research services of the Bundestag, WD 4 086/07, 2007.

<sup>447</sup> ICJ, *Questions of jurisdictional immunities of the State and measures of constraint against State-owned property (Germany v. Italy)*, "Germany institutes proceedings against Italy for allegedly failing to respect its jurisdictional immunity as a sovereign State", 29 April 2022, press release No. 2022/16; "Zwangsversteigerung deutscher Immobilien zugunsten von NS-Opfern?", in *Legal Tribune Online*, 2 May 2022.

<sup>448</sup> ICJ, *Questions of jurisdictional immunities of the State and measures of constraint against State-owned property (Germany v. Italy)*, "Germany withdraws its request for the indication of provisional measures: Cancellation of the hearings due to open on 9 May 2022", 6 May 2022, press release No. 2022/18; Lorenzo Gradoni, "Is the Dispute between Germany and Italy over State Immunities Coming to an End (Despite Being Back at the ICJ)?", in *EJIL: Talk*, 10 May 2022.

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quashed”.<sup>449</sup> As a consequence, laws were passed in the Länder which allowed for individual judgements to be rescinded upon request.<sup>450</sup> In 1950, the first draft of a federal law on the annulment of convictions failed, illustrating the hesitation on the part of several German politicians to rehabilitate, in particular, the allies of those who had attempted to assassinate Hitler on 20 July 1944.<sup>451</sup> Only in 1998 did parliamentarians revisit the earlier proposal and adopt a law that globally annulled the judgements of the ‘Volksgerichtshof’.<sup>452</sup> It was through an amendment in 2002, that a blanket rehabilitation was extended to convictions of homosexuals and deserters.<sup>453</sup>

### 2.3.2.4.2. Lustration

Lustration laws are primarily of historical importance as none of these laws are still in force today.<sup>454</sup> It was the Allies that initiated denazification after World War II, with the aim of sanctioning and removing supporters of National Socialism and its organisations from power positions, especially in the civil service. Thus, the initial legal bases for lustration did not stem from Germans but rather, from Allied authorities.<sup>455</sup> While the procedures and the rigour differed between the four zones of occupation,<sup>456</sup> denazification encountered difficulties in all of them, not least because of the high percentage

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<sup>449</sup> See Article 2(5) of the Proclamation No. 3 published in the Official Gazette of the Control Council for Germany, No. 1, 29 October 1945.

<sup>450</sup> Gerd Nettersheim, “Die Aufhebung von Unrechtsurteilen der Strafjustiz – Ein langes Kapitel der Vergangenheitsbewältigung”, in Ernst-Walter Hanack, Hans Hilger, Volkmar Mehle and Gunter Widmaier (eds.), *Festschrift für Peter Riess*, De Gruyter, Berlin, 2002, pp. 934 ff.; in certain cases, judgements were declared null and void by law without the need for request, see, for example, Article 9 of the Bavarian Law No. 21 on the Redress of National Socialist Wrongs Committed in the Administration of Criminal Justice, 28 May 1946.

<sup>451</sup> Norbert Frei, “Erinnerungskampf. Zur Legitimationsproblematik des 20. Juli 1944 im Nachkriegsdeutschland”, in Christian Jansen (ed.), *Von der Aufgabe der Freiheit*, De Gruyter, Berlin, 1995, pp. 670 f.

<sup>452</sup> § 2, No. 1 of the Law on the Annulment of National Socialist Unjust Verdicts in the Administration of Criminal Justice, 25 August 1998.

<sup>453</sup> Article 1 of the Law on Amendment of the Law on the Annulment of National Socialist Unjust Verdicts in the Administration of Criminal Justice, 23 July 2002.

<sup>454</sup> For a chronology of denazification in Germany, see Justus Fürstenau, *Entnazifizierung*, Luchterhand, Berlin, 1969.

<sup>455</sup> For the most important legal bases, see Klaus-Detlev Godau-Schüttke, “Von der Entnazifizierung zur Renazifizierung der Justiz in Westdeutschland”, in *Forum Historiae Iuris*, June 2001, paras. 5 ff.

<sup>456</sup> *Ibid.*, para. 19.

of the German population involved in Nazi organisations but also due to the opposition against this practice. In 1946, the Law for Liberation from National Socialism and Militarism by the Länderrat in the US zone entrusted German civilian tribunals ('Spruchkammern') with denazification.<sup>457</sup> Schleswig-Holstein adopted the 'Law on the continuation and termination of denazification'<sup>458</sup> which became the basis for subsequent denazification laws in Germany.<sup>459</sup>

In 1951, after Schleswig-Holstein adopted a law ending denazification,<sup>460</sup> the German Bundestag promulgated the 'Act to regulate the legal relationships of persons covered by Article 131 of the Basic Law'<sup>461</sup> which allowed former civil servants to return to the civil service. If this was not possible, the act entitled them to receive pensions.<sup>462</sup> This act implemented Article 131 of the Basic Law that had charged the legislator with finding a solution for civil servants who had lost their position with the end of the Nazi dictatorship without burdening negotiations regarding the Basic Law with this controversial question. The Federal Constitutional Court ruled in a controversial<sup>463</sup> decision that all public-law relationships with civil servants and contracts with public employees had ceased on 8 May 1945<sup>464</sup> which meant

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<sup>457</sup> See Fürstenau, 1969, pp. 52–69, see above note 454.

<sup>458</sup> Gesetz zur Fortführung und zum Abschluss der Entnazifizierung, 15 February 1948.

<sup>459</sup> Godau-Schüttke, June 2001, para. 25, see above note 455; in particular, it introduced the categorisation of "major offenders" ("Hauptschuldige"), "offenders" ("Schuldige"), "charged" ("Belastete"), "followers" ("Mitläufer") and "non-charged" ("Unbelastete"). However, as the law was applied, only very few persons examined were classified as "offenders", while most were qualified as "followers" or "non-charged", see Holger Otten, "Entnazifizierung und politische Säuberung in Kiel", in Arbeitskreis "Demokratische Geschichte" (ed.), *Wir sind das Bauvolk – Kiel 1945 bis 1950*, Neuer Malik-Verlag, Kiel, 1985, pp. 304 ff.

<sup>460</sup> Law on the termination of denazification (Gesetz zur Beendigung der Denazifizierung) of Schleswig-Holstein, 14 March 1951.

<sup>461</sup> Federal Bulletin (*BGBL.*), Part I, 1951, p. 307.

<sup>462</sup> *Ibid.*, §§ 1(1), 11 ff.

<sup>463</sup> Legal literature called the decision "sensational", Ernst Forsthoff, "Das Bundesverfassungsgericht und das Berufsbeamtentum", in *Deutsches Verwaltungsblatt*, 1954, p. 69; and "factually incorrect", Franz W. Jerusalem, "Das methodische Prinzip der 131-er Urteile des Bundesverfassungsgerichts", in *Neue Juristische Wochenschrift*, 1954, p. 983; for a critical view see Federal Court of Justice, Order, 20 May 1954, GSZ 6/53, in *Neue Juristische Wochenschrift*, 1954, pp. 1077 ff.

<sup>464</sup> Federal Constitutional Court, Judgement, 17 December 1953, 1 BvR 147/52, in *BVerfGE*, vol. 3, pp. 113 ff., in particular p. 115 ('Civil service'); Order, 19 February 1957, 1 BvR 357/52, in *BVerfGE*, vol. 6, p. 132 (Headnote 1) ('Gestapo members'); Order, 16 October

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that they had legally lost their positions and rights to pensions, although they often remained in place *de facto*.<sup>465</sup> This jurisprudence is today perceived as a radical break with the National Socialist state and its personnel.<sup>466</sup> The same Court considered the law implementing Article 131 of the Basic Law as fulfilling the State's duty of care *vis-à-vis* its officials,<sup>467</sup> however, the Court excluded persons whose actions had overall served to uphold the Nazi regime from the rights resulting from Article 131 of the Basic Law.<sup>468</sup> This concerned, in particular, members of the Gestapo.<sup>469</sup> Whilst some scholars today consider Article 131 of the Basic Law and its implementing law to have contributed to integration (as opposed to exclusion) and the stabilisation of the young state, albeit at the cost of compromising moral credibility,<sup>470</sup> their effect is assessed much more critically by others.<sup>471</sup> It is worth noting that after the end of the GDR, the Federal Constitutional Court ruled in the opposite way, stating that the public-law relationships with, and contracts of, GDR officials had not ceased, but rather transferred to the Federal Republic.<sup>472</sup>

As a result of the incomplete denazification, a great number of persons deeply entangled in the Nazi crimes were able to pursue their careers in Germany,<sup>473</sup> this was true in particular for the judiciary. Only a few individuals

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1957, 1 BvL 13/56, 46/56, in *BVerfGE*, vol. 7, p. 140; Order, 15 March 1961, 2 BvL 8/60, in *BVerfGE*, vol. 12, p. 273 ('Civil service pensions'); Order, 12 December 1967, 2 BvL 14/62, 3/64, 11/65, 15/66, 2 BvR 15/67, in *BVerfGE*, vol. 22, p. 408 ('Dependants').

<sup>465</sup> Ansgar Hense, in Volker Epping and Christian Hillgruber (eds.), *Beck'scher Online-Kommentar Grundgesetz*, 49th ed., C.H. Beck, Munich, November 2021, Article 131 paras. 4 f.

<sup>466</sup> Ulrich Battis, in Michael Sachs (ed.), *Grundgesetz*, 9th ed., C.H. Beck, Munich, 2021, Article 131, para. 27.

<sup>467</sup> *Civil Service*, p. 134, see above note 464.

<sup>468</sup> *Gestapo members*, pp. 217 ff., see above note 464; *Civil service pensions*, p. 271, see above note 464; *Dependants*, p. 409, see above note 464.

<sup>469</sup> *Gestapo members*, pp. 217 ff., see above note 464.

<sup>470</sup> Battis, 2021, Article 131, para. 6, see above note 466.

<sup>471</sup> Godau-Schüttke, June 2001, paras. 36–39, see above note 455, emphasising that the law opened the door for many former Nazi officials to high positions.

<sup>472</sup> Battis, 2021, Article 131, para. 6, see above note 466.

<sup>473</sup> After they remained neglected for decades, Nazi continuities in ministries, subordinate authorities and the judiciary have recently been dealt with increasingly (see Christian Mentel, Niels Weise, "Die NS-Vergangenheit deutscher Behörden", in *Aus Politik und Zeitgeschichte*, 31 March 2017); recent studies include, for example, "Die Akte Rosenberg – Das Bundesministerium der Justiz und die NS-Zeit", 2021 (on the Federal Ministry of Justice, available on its web site); "Hüter der Ordnung – Die Innenministerien in Bonn und Ost-Berlin nach dem Nationalsozialismus", 2018 (on the Ministries of Interior in Bonn and East Berlin),

who had been criminal judges or prosecutors between September 1939 and May 1945 made use of the possibility to retire under former § 116 of the German Judiciary Act.<sup>474</sup> None of the judges or prosecutors at the ‘Volksgerichtshof’, the special tribunals or war tribunals were ever convicted for the judicial perversion of justice (§ 339 of the Criminal Code) as the Federal Court of Justice rejected the subjective element in what became a heavily criticised interpretation.<sup>475</sup> It was not until the reckoning with the GDR, that judges of the Federal Court of Justice reversed this jurisprudence, stating, that the reckoning with the Nazi judiciary had “perverted the legal order in a way that could hardly be imagined worse” and failed altogether.<sup>476</sup> Lustration measures after the end of the SED regime are generally perceived to have been more successful.<sup>477</sup>

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publications of the independent historical commission on research of the history of the Foreign Intelligence Service ('BND'), vol. 1–1, 2016–2021; for an overview about the studies conducted until 2016 see Christian Mentel and Niels Weise, in Frank Bösch, Martin Sabrow and Andreas Wirsching (eds.), *Die zentralen deutschen Behörden und der Nationalsozialismus. Stand und Perspektive der Forschung*, Munich and Potsdam, 2016.

<sup>474</sup> The Federal Minister of Justice reported on 10 September 1962 (Bundestag Doc. (BT-Drucks.) IV/634) that 149 judges and prosecutors had retired or requested retirement so far; see also Hans Wrobel, *Verurteilt zur Demokratie. Justiz und Justizpolitik in Deutschland 1945–1949*, Decker & Müller, Heidelberg, 1989, p. 151.

<sup>475</sup> This is the critical finding of Federal Court of Justice, Judgement, 16 November 1995, 5 StR 747/94, in *Neue Juristische Wochenschrift*, 1996, p. 863 ('Perversion of justice'); for the criticised jurisprudence see Federal Court of Justice, Judgement, 7 December 1956, 1 StR 56/56, in *Neue Juristische Wochenschrift*, 1957, p. 1159; Federal Court of Justice, Judgement, 30 April 1968, 5 StR 670/67, in *Neue Juristische Wochenschrift*, 1968, p. 1340 (on Rehse, judge at the ‘Volksgerichtshof’).

<sup>476</sup> *Perversion of justice*, p. 863, see above note 475; strongly affirming this view Otto Gritschneider, “Rechtsbeugung. Die späte Beichte des Bundesgerichtshofs”, in *Neue Juristische Wochenschrift*, 1996, p. 1239; on the reckoning with the past by the judiciary in North Rhine-Westphalia see, for example, the study by Ministry of Justice of North Rhine-Westphalia (ed.), “Die nordrhein-westfälische Justiz und ihr Umgang mit der nationalsozialistischen Vergangenheit”, Final Report, 2001.

<sup>477</sup> The Treaty on the Final Settlement with Respect to Germany, 12 September 1990 (<https://www.legal-tools.org/doc/92mnqp/>) ('Unification Treaty') provided that civil servants and employees in the civil service should principally be incorporated in the civil service of the Federal Republic, but could be dismissed if they had violated principles of humanity or the rule of law or had worked for the Ministry of State Security and the continuation of the employment appeared untenable for this reason (see Article 13 and 20 § 1 of the Unification Treaty taken together with Article 1 §§ 1–3, 5 of Annex I, Chapter XIX, Subject A). Again, the actual practice varied greatly between the Länder. Many civil servants and employees also lost their position in the general decrease of state institutions of the former GDR. Former GDR

### 2.3.2.4.3. Naturalisation

Laws on the restoration of German citizenship are of relevance even today. Article 116(2), Sentence 1 of the Basic Law grants former German citizens who, between 1933 and 1945, were deprived of their citizenship on political, racial or religious grounds and their descendants the right to have their citizenship restored. For a long time, the Federal Administrative Court interpreted the term of ‘descendant’ restrictively, that is, by requiring proof that the person would have received German citizenship if his or her ancestor had not been expatriated.<sup>478</sup> As a result, many people were unable to benefit from Article 116(2), Sentence 1 of the Basic Law due to gender-specific inequalities in citizenship law that existed until the 1970s, for example, children of mothers who had lost their German citizenship by marrying a foreigner before the birth of the child. In 2020, in a landmark decision, the Federal Constitutional Court rejected the restrictive interpretation of Article 116(2) of the Basic Law and ruled that the normative decisions of the Basic Law, such as the principle of non-discrimination of women or non-marital children, were to be taken into account,<sup>479</sup> which in turn broadened the application Article 116(2) of the Basic Law considerably.<sup>480</sup> This court decision was one of the reasons underlying the introduction of the new § 15 of the Nationality Act<sup>481</sup> in 2021 that further expanded Article 116(2), Sentence 1 of the Basic Law to persons and their descendants who lost their citizenship on other grounds than withdrawal, for example, by giving it up after receiving a

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judges and prosecutors were individually screened whether their former decisions precluded their employment. Only slightly more than a third of them remained in their positions in reunified Germany. Lustration measures also met with greater acceptance in society than after 1945 and were favoured by the fact that there were enough persons available to replace those involved in the SED regime, see Romeike, 2016, pp. 49–53, see above note 30, with further references.

<sup>478</sup> Federal Administrative Court, Judgement, 11 January 1994, 1 C 35/93, in *Neue Juristische Wochenschrift*, 1994, p. 2165; Federal Administrative Court, Judgement, 27 March 1990, 1 C 5/87, in *Neue Juristische Wochenschrift*, 1990, pp. 2214 f.

<sup>479</sup> Federal Constitutional Court, Order, 20 May 2020, 2 BvR 2628/18, in *Neue Juristische Wochenschrift*, 2021, p. 223.

<sup>480</sup> For the exact consequences and laws in which the differences had rooted, see Horst Schneider in Andreas Decker, Johan Bader and Peter Kothe (eds.), *Beck'scher Online-Kommentar Migrations- und Integrationsrecht*, 10th ed., C.H. Beck, Munich, January 2022, § 15 StAG, paras. 15–15.3.

<sup>481</sup> Nationality Act (Staatsangehörigkeitsgesetz), 22 July 1913 (<https://www.legal-tools.org/doc/p7d5r0/>).

foreign citizenship or, for women, by marrying a foreigner.<sup>482</sup> The right to naturalisation under Article 116(2) of the Basic Law and § 15 of the Nationality Act is not subject to time limits as these provisions are exempt from the so-called ‘generation cut’ that principally excludes children of a German parent from acquiring the German citizenship if the parent was born abroad after 1999 and has his or her habitual residence abroad (§ 4(4), (5) of the Nationality Act).

A mnemonic dimension can also be identified in § 10(1), No. 7, (5) of the Nationality Act which provides that a foreigner, in order to be naturalised, must prove “knowledge of the legal system, society and living conditions” in Germany by taking a naturalisation test. The test, enshrined in an ordinance of the Federal Ministry of the Interior, includes questions about the time span of the National Socialists rule and World War II, the year that Hitler became *Reich Chancellor*, the constitutional character of the state under Hitler, the persecution of Jews, the November pogroms of 1938, the date of the Holocaust Memorial Day, the censorship, lack of free elections, prohibition of political parties, and politics of racism under Hitler as well as the assassination attempt by Stauffenberg.<sup>483</sup> Correspondingly, the curriculum of the (voluntary) preparatory course for the test covers the “period of National Socialism and its consequences”, albeit as one of six fields in the module “History and Responsibility”.<sup>484</sup>

### 2.3.2.5. Mnemonic Resolutions of the Bundestag

Whilst too late, the Bundestag has on many occasions formally distanced itself from Nazi crimes. Important resolutions include the resolution of 15 May 1997, in which the Bundestag declared for the first time that “the Second World War was a war of aggression and of extermination, a crime for which National Socialist Germany was responsible”;<sup>485</sup> the resolution of 25 June 1999, containing the decision to build the Holocaust memorial in Berlin honouring murdered victims in order to keep awake the memory of an

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<sup>482</sup> *Ibid.*, § 15(1) Nos. 1 and 2.

<sup>483</sup> See Naturalisation Test Regulation (Einbürgerungstestverordnung), 5 August 2008, Annex I, questions 152–164, 170, 220.

<sup>484</sup> See Naturalisation Test Regulation, Annex II, Module III, (b), foreseeing 13 teaching sessions for the whole module.

<sup>485</sup> “Der Zweite Weltkrieg war ein Angriff- und Vernichtungskrieg, ein vom nationalsozialistischen Deutschland verschuldetes Verbrechen”; for the debate, see Plenary Protocol 13/175.

## 2. German Memory Laws Related to the Nazi Regime

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“unbelievable event in the German history”;<sup>486</sup> the resolution of 11 December 2003, stating that the memory of the Holocaust was “part of our national identity”;<sup>487</sup> the resolution of 9 October 2020, on the construction of an education and memorial site on the history of World War II in Berlin, which called the Holocaust “the most terrible human rights crime of National Socialism” and an “organised systematic mass murder”, and emphasised the importance of also memorising other victims, namely the Sinti and Roma, homosexuals, victims of euthanasia, and neglected groups such as the populations of Poland and other Eastern European countries, the Soviet Union, Denmark, Norway, Luxembourg, Belgium, France, Greece, Serbia or Italy.<sup>488</sup> In its controversial ‘Armenian Resolution’ of 2016, where the Bundestag qualified the atrocities against Armenians as genocide, it also more generally recalled that “genocides have marked the 20th century”, at the same time “knowing about the singularity of the Holocaust”.<sup>489</sup>

In the more recent ‘BDS Resolution’ of 5 May 2019,<sup>490</sup> the Bundestag repeated its commitment to condemn and combat antisemitism, referring to the working definition of antisemitism adopted by the International Holocaust Remembrance Alliance. The resolution notes that “the state of Israel, understood as a Jewish collective, can also be the target of such attacks”.<sup>491</sup> In addition, it states that “the unreserved rejection of hatred against Jews, no matter their nationality, is part of Germany’s reason of state [‘Staatsräson’]” and that “antisemitism, in its murderous consequences, has proved to be the most devastating form of group-based misanthropy in the history of our country and in Europe and remains until today a threat both for people of

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<sup>486</sup> See above note 372.

<sup>487</sup> Bundestag Doc. (BT-Drucks.) 15/2164, Plenary Protocol of 11 December 2003, p. 7189.

<sup>488</sup> Bundestag Doc. (BT-Drucks.) 19/23136, 6 October 2020; by resolution of 13 February 2020, the Bundestag also recognised the so-called “asocials” and “professional criminals” as victims of National Socialism, Bundestag Doc. (BT-Drucks.) 19/14342, 22 December 2019.

<sup>489</sup> Resolution of 31 May 2016, Bundestag Doc. (BT-Drucks.) 18/8613; also, governmental representatives have done so on many occasions, see Research Services of the Bundestag, “Bezeichnet die Bundesregierung den Holocaust als Völkermord”, 2012, WD 1 – 3000/033/12, pp. 6 f.; besides, by resolution of 25 January 1985, the Bundestag qualified the ‘Volksgerichtshof’ an “instrument of terror” and declared all judgements void, see Plenary Protocol, 25 January 1985, 10/118, p. 8762.

<sup>490</sup> Resolution “To resist the BDS movement with a determination to fight antisemitism” (“BDS-Bewegung entschlossen entgegentreten – Antisemitismus bekämpfen”), Bundestag Doc. (BT-Drucks.) 19/10191, 5 May 2019.

<sup>491</sup> *Ibid.*, para. I.

Jewish faith and our free democratic basic order”.<sup>492</sup> In view of its special historical responsibility, Germany underlined its commitment to Israel’s security. The resolution then qualified the “patterns of argument and the methods” of the BDS movement as antisemitic: “The campaign’s calls for a boycott of Israeli artists and stickers on Israeli goods to discourage their purchase remind us of the most terrible period in German history. ‘Don’t Buy’ stickers of the BDS movement on Israeli products inevitably awaken associations to the Nazi slogan ‘Don’t buy from Jews’ and the graffiti on facades and shop windows.”<sup>493</sup> On this basis, the Parliament decided to oppose the BDS campaign and its call for a boycott of Israeli goods, business, scientists, artists and athletes.<sup>494</sup> Administrative claims against this resolution were rejected in the first instance.<sup>495</sup> Länder and city parliaments have adopted similar resolutions.<sup>496</sup>

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<sup>492</sup> *Ibid.*

<sup>493</sup> *Ibid.*, para. I.

<sup>494</sup> *Ibid.*, para. III.

<sup>495</sup> Administrative Court of Berlin, Judgement, 7 October 2021, VG 2 K 79/20, in *BeckRS*, 2021, 29696.

<sup>496</sup> See above note 344. The Constitutional Court of North Rhine-Westphalia rejected the constitutional complaint against the anti-BDS resolution of the Land Parliament as the legal remedies had not been exhausted, Order, 22 September 2020, VerfGH 49/19.VB-2, in *BeckRS*, 2020, 37662.

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## Compatibility with European Convention on Human Rights and European Union Law

The present section turns to the question of whether the identified memory laws are in line with the ECHR and EU law. This question primarily arises for those memory laws that interfere with a right or freedom under the ECHR or the EU Charter of Fundamental Rights ('CFR'). In view of the rich case law of the ECtHR, the focus lies on the ECHR. While these right-interfering memory laws are presented in the same order as before, their classification in different categories is omitted here for the sake of brevity.<sup>497</sup>

### **3.1. Holocaust Denial and Approval (§ 130(3), (4) of the Criminal Code)**

As the ECtHR has repeatedly held – especially in many German cases – convictions for Holocaust denial do not violate Article 10 of the ECHR (freedom of expression); applications are rejected as inadmissible. However, the reasoning of the European Commission of Human Rights ('ECommHR') and the ECtHR has evolved: first, the ECommHR applied Article 10 of the ECtHR without regard of Article 17 of the ECHR (prohibition of abuse of rights);<sup>498</sup> then, it interpreted Article 10 in light of Article 17 of the ECHR.<sup>499</sup> In 2003, the ECtHR began to categorically exclude denial of the Holocaust from the protection of Article 10 as part of the application of Article 17 of

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<sup>497</sup> § 140 of the Criminal Code is also omitted here as it is superseded by § 130(3) of the Criminal Code in case of the Holocaust denial, see above Section 2.3.1.1.5.

<sup>498</sup> ECommHR, *X. v. Germany*, Decision, 16 July 1982, Application No. 9235/81; *T. v. Belgium*, Decision, 14 July 1983, Application No. 9777/82; *Lowes v. United Kingdom*, Decision, 9 December 1988, Application No. 13214/87.

<sup>499</sup> ECommHR, *F. P. v. Germany*, Decision, 29 March 1993, Application No. 19459/92; *Walendy v. Germany*, Decision, 11 January 1995, Application No. 21128/92; *Remer v. Germany*, Decision, 6 September 1995, Application No. 25096/94; *Honsik v. Austria*, Decision, 18 October 1995, Application No. 25062/94; *Nationaldemokratische Partei Deutschlands v. Germany*, Decision, 29 November 1995, Application No. 25992/94; *Rebhandl v. Austria*, Decision, 16 January 1996, Application No. 24398/94; *D.I. v. Germany*, Decision, 26 June 1996, Application No. 26551/95; *Hennicke v. Germany*, Decision, 21 May 1997, Application No. 34889/97; *Nachtmann v. Austria*, Decision, 9 September 1998, Application No. 36773/97; ECtHR, *Witzsch v. Germany (No. 1)*, Decision, 20 April 1999, Application No. 41448/98 (<https://www.legal-tools.org/doc/wz4qgx/>).

the ECHR;<sup>500</sup> presently, the Court decides on a case-by-case basis whether Article 17 ECHR applies directly or indirectly.<sup>501</sup> It is not necessary to demonstrate that the denial incites violence against minorities, the inciting character against Jews is presumed as this denial invariably connotes an anti-democratic ideology and antisemitism.<sup>502</sup> While the Court, in *Perinçek v. Switzerland*, has shed some doubt on whether this presumption also applies in countries other than those which “have experienced the Nazi horrors and which may be regarded as having a special moral responsibility to distance themselves from the mass atrocities that they have perpetrated or abetted”,<sup>503</sup> this question is of no relevance here as Germany, the primarily responsible state, evidently possesses this connection. This principle applies not only to denial, but also to the trivialisation and approval of the Holocaust.<sup>504</sup> With its offence on Holocaust denial, the German legal order also aligns with the framework of the Council of Europe that calls on Member States to incriminate Holocaust denial, trivialisation, justification, or praise.<sup>505</sup>

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<sup>500</sup> ECtHR, *Garaudy v. France*, Decision, 24 June 2003, Application No. 65831/01 (<https://www.legal-tools.org/doc/x956kv/>); *M'Bala M'Bala v. France*, Decision, 20 October 2015, Application No. 25239/13 (<https://www.legal-tools.org/doc/8388fb/>); this shift had already been announced in ECtHR, *Lehideux and Isorni v. France*, Judgment, 23 September 1998, Application No. 24662/94, para. 47 (<https://www.legal-tools.org/doc/2fed5c/>); similarly, ECtHR, *Witzsch v. Germany (No. 2)*, Decision, 13 December 2005, Application No. 7485/03 (<https://www.legal-tools.org/doc/k0d3hw/>) (on the offence of disparaging the dignity of the deceased, see below Section 3.7.).

<sup>501</sup> See ECtHR, *Pastörs v. Germany*, Judgement, 3 October 2019, Application No. 55225/14, para. 37 (<https://www.legal-tools.org/doc/91fvm4/>), opting for the indirect application in view of the fact that the statements were made in a parliamentary debate; similarly, ECtHR, *Williamson v. Germany*, Decision, 8 January 2019, Application No. 64496/17, para. 20 (<https://www.legal-tools.org/doc/gkx8yc/>), also applying Article 17 indirectly.

<sup>502</sup> ECtHR, *Perinçek v. Switzerland*, Judgement, 15 October 2015, Application No. 27510/08, paras. 234, 243 (<https://www.legal-tools.org/doc/719085/>); similarly, *Garaudy v. France*, see above note 500; *Witzsch v. Germany (No. 2)*, see above note 500.

<sup>503</sup> *Perinçek v. Switzerland*, para. 243, see above note 502, specifying shortly before this passage that the cases examined thus far concerned “Austria, Belgium, Germany and France”; similarly, *Williamson v. Germany*, para. 27, see above note 501; on this aspect see Paolo Lobba, “Testing the ‘Uniqueness’: Denial of the Holocaust vs Denial of Other Crimes before the European Court of Human Rights”, in Uladzislau Belavusau and Aleksandra Gliszczyńska-Grabias (eds.), *Law and Memory*, Cambridge University Press, 2017, p. 127.

<sup>504</sup> *Williamson v. Germany*, para. 26 (on trivialisation), see above note 501.

<sup>505</sup> CoE, Parliamentary Assembly, Resolution No. 1563 on Combating Anti-Semitism in Europe, 27 June 2007, Article 12.3; other relevant legal texts in this context are, for example, CoE, Committee of Ministers, Recommendation No. R(97)20 on ‘Hate Speech’, 30 October 1997; CoE, European Commission against Racism and Intolerance, “General Policy

### 3. Compatibility with European Convention on Human Rights and European Union Law

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Not only is the incrimination of denial of the Holocaust (§ 130(3) of the Criminal Law) in line with ECHR, but also the criminalisation of the approval, glorification, and justification of the Nazi regime under § 130(4) of the Criminal Law. The ECtHR, in *Lehideux and Isorni v. France*, explicitly acknowledged that “there is no doubt that [...] the justification of a pro-Nazi policy could not be allowed to enjoy the protection afforded by Article 10”.<sup>506</sup> In that case, the Court only found a violation of Article 10 ECHR, as the applicants had been convicted not for approving Nazi atrocities but for the revision of history as they had presented the role of former Marshal and Nazi collaborator Philippe Pétain in a favourable light. Unlike the Holocaust, his Nazi supportive role did not belong to the clearly established historical facts.<sup>507</sup> Against this background, it seems that the ECtHR does not require the incrimination of denial of crimes other than the Holocaust, rather it appears that such an offence would, to the contrary, raise concerns.

Though there is alignment with ECHR law, current German legislation thus far seemed to fall short of EU law in two respects. First, the 2008 FD<sup>508</sup> obliges Member States to incriminate the public condoning, denying and gross trivialisation of crimes defined in Article 6 of the Charter of the International Military Tribunal (Article 1(1)(d) of the 2008 FD), that is, the crimes against peace, war crimes and crimes against humanity committed by major war criminals from European Axis countries.<sup>509</sup> § 130(3) and (4) of the Criminal Code, in their combination, incriminate the approval, denial and downplaying of the Holocaust and the genocide against the Sinti and Roma – including the individual actions – as well as the approval, glorification and justification of Nazi tyranny and arbitrary rule. Though this would suggest that the latter term includes German crimes against peace, war crimes and

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Recommendation No. 7 on national legislation to combat racism and racial discrimination”, 13 December 2002, CRI(2003)8; CoE, Additional Protocol to the Convention on Cybercrime, concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems, 28 January 2003; Declaration of the Stockholm International Forum on the Holocaust, 2000.

<sup>506</sup> *Lehideux and Isorni v. France*, para. 53, see above note 500.

<sup>507</sup> *Ibid.*, para. 47; confirmed by ECtHR, *Chauvy and Others v. France*, Judgement, 29 September 2009, Application No. 64915/01, para. 69 (<https://www.legal-tools.org/doc/984f32/>).

<sup>508</sup> Framework Decision on combating certain forms and expressions of racism and xenophobia by means of criminal law, see above note 128.

<sup>509</sup> See Report on the Implementation of Council Framework Decision 2008/913/JHA on combating certain forms and expressions of racism and xenophobia by means of criminal law, 2014, Doc. 52014DC0027, para. 3.1.4 (‘Implementation Report’).

crimes against humanity (since they can be seen as an expression of Nazi tyranny and arbitrary rule), § 130(4) of the Criminal Code does not incriminate the denial and trivialisation of these crimes as required by the 2008 FD. Second, as mentioned above,<sup>510</sup> Article 1(1)(c) of the 2008 FD requires the incrimination of publicly condoning, denying or gross trivialisation the crimes of genocide, crimes against humanity and war crimes under the ICC Statute. However, this has thus far not been reflected in §§ 130(3) and (4) of the Criminal Code since these provisions are limited to genocides committed under the Nazi regime. There are also doubts surrounding whether these two gaps can be filled by other existing provisions.<sup>511</sup> The incitement to hatred under § 130(1) of the Criminal Code requires actual incitement; its mere likelihood – which Articles 1(1)(c) and (d) of the 2008 FD lets suffice – is not covered.<sup>512</sup> The rewarding and approval of offences under § 140 in conjunction with § 126(1), No. 3 of the Criminal Code only covers rewarding and approval, not denial or trivialisation.<sup>513</sup> Also, it seems incompatible with the *effet utile* principle to consider these actions as being covered by the offences of insult and defamation. As these offences already existed in all EU Member States, the Framework Decision would have been superfluous.<sup>514</sup> It is hence not without reason that the European Commission has introduced an infringement proceeding against Germany for not fully transposing the binding 2008 FD.<sup>515</sup> The requirements of the 2018 European Parliament ('EP') Resolution on the rise of neo-fascist violence in Europe and of the

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<sup>510</sup> See above Section 2.1.2.

<sup>511</sup> This was the argument by the German government, Draft of 13 August 2010, Bundestag Doc. (BT-Drucks.) 495/10, p. 5.

<sup>512</sup> For more details on this argument see Stefanie Bock, "Die (unterlassene) Reform des Volksverhetzungstatbestands", in *Zeitschrift für Rechtspolitik*, 2011, p. 47.

<sup>513</sup> *Ibid.*, pp. 47 f.; another problem is that § 126 No. 3 of the Criminal Code refers to the crimes under the German Code of Crimes against International Law, which do not exactly mirror the ICC Statute, see for this requirement Implementation Report, para. 3.1.3, see above note 509.

<sup>514</sup> See Bock, 2011, p. 48, see above note 512; also the 2014 Implementation Report lists Germany among the countries that "have no criminal-law provisions governing" the public condoning, denial or gross trivialisation of genocide, crimes against humanity and war crimes under the ICC Statute; however, Paolo Lobba, in Paul Behrens, Olaf Jensen and Nicholas Terry (eds.), *Holocaust and Genocide Denial*, Routledge, New York, 2017, p. 194 considers it sufficient for Member States to implement the 2008 FD by the general provisions against hate speech.

<sup>515</sup> See European Commission, "December infringement package: key decisions", press release, 2 December 2021: "the German legal system fails to criminalise the public denial or gross trivialisation of these [international] crimes".

2019 EP Resolution on the importance of European remembrance for the future of Europe which call on Member States “to condemn and counteract all forms of Holocaust denial, including the trivialisation and minimisation of the crimes of the Nazi and their collaborators”,<sup>516</sup> however, are met by the Holocaust denial ban.<sup>517</sup>

### **3.2. Reform on Denial of Other Genocides, Crimes against Humanity and War Crimes**

The reform adopted by the German parliament which introduces a general ban on denial of genocide, crimes against humanity and war crimes where the statement is likely to incite to hatred or violence would align German denial bans with the 2008 FD. At the same time, it would considerably expand pre-existing denial bans, and even exceed the 2008 FD in that it does not require the historical crime to have been established by any international or national court.<sup>518</sup>

In order to conform to the ECtHR case law in *Perinçek v. Switzerland*, 2015, the new provision would also need to be restrictively applied. Though its wording suggests (congruent to what the 2008 FD stipulates) that the mere *likelihood* to incitement to hatred or violence suffices for the offence, the Grand Chamber can be understood to require, for a genocide denial ban to be conventional, that there either be a historical or geographical link between the legislating state and the historical event,<sup>519</sup> or that the genocide denial (actually) calls for violence or hatred.<sup>520</sup> The likelihood of incitement to hatred or violence under the new § 130(5) of the Criminal Code can hence not be interpreted as containing any more relaxed standard than the requirement of an (actual) incitement to hatred or violence, at least in cases without any historical or geographical link.

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<sup>516</sup> EP, Resolution of 25 October 2018 on the rise of neo-fascist violence in Europe, 25 October 2018, 2018/2869(RSP), para. 29; EP, Resolution of 19 September 2019 on the importance of European remembrance for the future of Europe, 19 September 2019, 2019/2819(RSP), para. 9.

<sup>517</sup> The importance of Holocaust denial bans is also emphasised in the European Union Strategy on Combating Antisemitism and Fostering Jewish Life (2021–2030), COM/2021/615, paras. 1.2, 3.3.

<sup>518</sup> See above 2.1.2.

<sup>519</sup> *Perinçek v. Switzerland*, paras. 242–248, see above note 502.

<sup>520</sup> *Ibid.*, paras. 230–240.

### **3.3. Dissemination of Propaganda Material and Symbols of Nazi Organisations (§§ 86(1), No. 4, 86a of the Criminal Code)**

In *Kühnen v. Germany*, the ECommHR accepted the German incrimination of the dissemination of propaganda material aiming at furthering activities of a former Nazi organisation, using Article 17 ECHR as an interpretative aid for the necessity test. It hence found that publications by the applicant aiming at reinstating the prohibited NSDAP, that the domestic courts had considered to revive antisemitic sentiments, clearly contained elements of racial and religious discrimination. The publications therefore ran counter to the basic values underlying the Convention and the application was rejected as inadmissible.<sup>521</sup>

In *Nix v. Germany*, the Court likewise accepted the German criminal prohibition of using Nazi symbols to maintain political peace and prevent the revival of Nazism, underlining again the historical role and experience of States “which have experienced the Nazi horrors” and thus, might be regarded as “having a special moral responsibility to distance themselves from the mass atrocities perpetrated by the Nazis”.<sup>522</sup> The applicant had been convicted for publishing a picture of Heinrich Himmler wearing a swastika armband. The latter was unambiguously a symbol for Nazi ideology which distinguished the present case from those related to the red star, the prohibition of which had violated Article 10 of the ECHR.<sup>523</sup>

These principles were subsequently confirmed in a number of other decisions, including in cases regarding the Austrian ‘prohibition of re-activism’ (‘Verbot der Wiederbetätigung’), codified in the law prohibiting the NSDAP and prohibiting activities that support National Socialist organisations or their aims.<sup>524</sup> They were also applied to the chanting of the traditional

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<sup>521</sup> ECommHR, *Kühnen v. Germany*, Decision, 12 May 1988, Application No. 12194/86.

<sup>522</sup> ECtHR, *Nix v. Germany*, Decision, 13 March 2018, Application No. 35285/16, para. 47 (<https://www.legal-tools.org/doc/jl7857/>).

<sup>523</sup> ECtHR, *Vajnai v. Hungary*, Judgement, 8 October 2008, Application No. 33629/06, paras. 52 ff. (<https://www.legal-tools.org/doc/92e39b/>); *Fratanoló v. Hungary*, Judgement, 3 November 2011, Application No. 29459/10, paras. 25–27 (<https://www.legal-tools.org/doc/514nto/>); similarly, ECtHR, *Fáber v. Hungary*, Judgement, 24 October 2012, Application No. 40721/08 for the Árpád-striped flag (<https://www.legal-tools.org/doc/3079f7/>).

<sup>524</sup> See ECommHR, *Ochsenberger v. Austria*, Decision, 2 September 1994, Application No. 21318/93; *B.H., M.W., H.P. and G.K. v. Austria*, Decision, 12 October 1989, Application No. 12774/87; ECtHR, *Schimanek v. Austria*, Decision, 1 February 2000, Application No. 32307/96 (<https://www.legal-tools.org/doc/grdpe8/>).

greeting of Croatian Fascist Ustashe movement.<sup>525</sup> The German prohibition of Nazi propaganda material and symbols is hence in line with the ECHR.

### **3.4. Restriction on Assemblies at Nazi Memorial Sites (§ 15(2) of the Assembly Act)**

According to the ECtHR, “where demonstrators do not engage in acts of violence, it is important for the public authorities to show a certain degree of tolerance towards peaceful gatherings if the freedom of assembly [...] is not to be deprived of all substance”.<sup>526</sup> In *Fáber v. Hungary*, the Court concluded that the prohibition on showing the Árpád-striped flag, a non-outlawed historical flag of Hungary with multiple meanings, by a person protesting against a demonstration against racism and intolerance at a memorial site for the extermination of Jews violated Article 10 read in the light of Article 11 of the ECHR (freedom of assembly).<sup>527</sup> Also, the Court reiterated that ill feelings or even outrage, in the absence of intimidation, could not represent a pressing social need to suppress the display of symbols or other forms of expression of views.<sup>528</sup> Still, the Court explicitly acknowledged that “in certain countries with a traumatic historical experience comparable to that of Hungary, a ban on demonstrations – to be held on a specific day of remembrance – which are offensive to the memory of the victims of totalitarianism who perished at a given site may be considered to represent a pressing social need”, and that the right to honour the murdered and the piety rights of their relatives may necessitate an interference when the particular place and time of the otherwise protected expression unequivocally changes the meaning of a certain display.<sup>529</sup> It is true that § 15(2) of the Assembly Act does not necessarily limit the possible ban or restrictions of assemblies at Nazi memorial sites *in time*, that is, to certain memorial days, while the Fáber exception

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<sup>525</sup> ECtHR, *Simunić v. Croatia*, Decision, 22 January 2019, Application No. 20373/17, para 45 (<https://www.legal-tools.org/doc/ecgnkw/>).

<sup>526</sup> ECtHR, *Oya Ataman v. Turkey*, Judgement, 5 December 2006, Application No. 74552/01, para. 42 (<https://www.legal-tools.org/doc/a2a7bf/>); *Fáber v. Hungary*, para. 47, see above note 523; see also ECtHR, *Öllinger v. Austria*, Judgement, 29 June 2006, Application No. 76900/01, paras. 47, 51 (<https://www.legal-tools.org/doc/624265/>) concluding on a violation for the prohibition of an envisaged peaceful and silent protest against a commemorative event of the Comradeship IV.

<sup>527</sup> *Fáber v. Hungary*, para. 47, see above note 523.

<sup>528</sup> *Ibid.*, para. 56.

<sup>529</sup> *Ibid.*, para. 58.

could be read as requiring possible restrictions to be limited in time *and* in place. At the same time, § 15(2), Sentence 1, No. 2 of the Assembly Act additionally requires that, in view of the specific circumstances, the dignity of the victim is harmed. Taken together with this requirement, § 15(2) of the Assembly Act appears to be sufficiently context-sensitive and to meet the Courts concern that freedom of expression and assembly should not be overly restricted even in countries with a traumatic historical experience.<sup>530</sup>

### **3.5. Incitement to Hatred (§§ 130(1) and (2) of the Criminal Code)**

§§ 130(1) and (2) of the Criminal Code are in line with the 2008 FD, particularly given that § 130(1) now protects not only the mentioned groups but also individuals belonging to them. The omission of the criteria of ‘skin colour’ and ‘descent’ mentioned in the 2008 FD does not raise concerns as these are covered by the criteria ‘defined by their ethnic origin’.<sup>531</sup> They also seem compatible with the ECHR since assessing whether statements call for violence or justify violence, hatred or intolerance is relevant for determining whether interference with the freedom of speech is necessary in a democratic society.<sup>532</sup> In this respect, the Court “has been particularly sensitive towards sweeping statements attacking or casting in a negative light entire ethnic, religious or other groups”.<sup>533</sup> In many of these cases, Article 17 (prohibition of abuse of rights) of the ECHR has been applied or used for the purposes of interpretation.<sup>534</sup>

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<sup>530</sup> See below Section 3.17. on restrictions resulting from the public order.

<sup>531</sup> See Draft of 13 August 2010, Bundestag Doc. (BT-Drucks.) 495/10, p. 11; Bock, 2011, p. 47, see above note 512.

<sup>532</sup> *Perinçek v. Switzerland*, para. 205, see above note 502.

<sup>533</sup> *Ibid.*, see ECtHR, *Seurot v. France*, Decision, 18 May 2004, Application No. 57383/00 (<https://www.legal-tools.org/doc/dtqzcv/>).

<sup>534</sup> See, for example, ECtHR, *Jersild v. Denmark*, Judgement, 23 September 1994, Application No. 15890/89 (<https://www.legal-tools.org/doc/fdf01c/>); *Atamanchuk v. Russia*, Judgement, 11 February 2020, Application No. 4493/11 (<https://www.legal-tools.org/doc/qn6tsb/>); *Molnar v. Romania*, Decision, 23 October 2012, Application No. 16637/06 (<https://www.legal-tools.org/doc/v2xwuf/>); *Budinova and Chaprazov v. Bulgaria*, Judgement, 4 March 2021, Application No. 12567/13 (<https://www.legal-tools.org/doc/akhqc6/>).

### **3.6. Insult, Malicious Gossip, Defamation and Disparaging the Dignity of the Deceased**

The ECtHR has consistently emphasised that Article 10 of the ECHR covers expressions that offend, shock, or disturb.<sup>535</sup> However, it has accepted that comparisons to Nazi crimes are capable of offending not only the person targeted by the comparison, but also victims of National Socialism generally. In *PETA v. Germany*, the Court confirmed the qualification of the animal protection campaign ‘The Holocaust is on your plate’ as an insult to Jews living in Germany today, although it should be noted that this case concerned an injunction claim.<sup>536</sup> Additionally, the ECtHR does not require strict standards with regards to the precision of the definition of the offence.<sup>537</sup> On this basis, the German jurisprudence that qualifies the denial, approval, or, depending on the circumstances, the relativisation of the Holocaust as insult of victims of the Nazi regime is in line with this case law. The same applies for convictions for disparaging the dignity of the deceased.<sup>538</sup>

Whether references to the past, such as the allegation of degrading facts about a person’s behaviour or his or her comparison to historical figures or atrocities, can also be qualified as insult or defamation against the person addressed, according to the ECtHR, depends on the individual circumstances. For example, the Court did not object to conviction for the statement

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<sup>535</sup> ECtHR, *Handyside v. United Kingdom*, Judgement, 7 December 1976, Application No. 5493/72, para. 49 (<https://www.legal-tools.org/doc/317fbb/>); for a recent decision see, for example, ECtHR, *Sinkova v. Ukraine*, Judgement, 27 February 2018, Application No. 39496/11, para. 104 (<https://www.legal-tools.org/doc/ivp5zz/>), although the Court overall seems to apply stricter limits to the freedom of speech than in prior decisions, for critical review Ronan Fathaigh, Dirk Voorhof, “Article 10 ECHR and Expressive Conduct”, in *Communication Law*, vol. 24, no. 2, 2019, pp. 62–73.

<sup>536</sup> *PETA Deutschland v. Germany*, see above note 193, while the case concerned an injunction claim, it incidentally affirmed the criminal offences under §§ 185 ff. of the Criminal Code.

<sup>537</sup> See, for example, *Perinçek v. Switzerland*, para. 133, see above note 502; *Sinkova v. Ukraine*, para. 101, see above note 535: “Even in cases in which the interference with the applicants’ right to freedom of expression had taken the form of a criminal ‘penalty’, the Court has recognised the impossibility of attaining absolute precision in the framing of laws, especially in fields in which the situation changes according to the prevailing views of society, and has accepted that the need to avoid rigidity and keep pace with changing circumstances means that many laws are couched in terms which are to some extent vague and whose interpretation and application are questions of practice”.

<sup>538</sup> *Witzsch v. Germany (No. 2)*, see above note 500 (denial of the fact that the mass killing of Jews had been planned and organised by Hitler and the NSDAP); *Witzsch v. Germany (No. 1)*, see above note 499.

that a member of the French resistance during World War II was a traitor responsible for the suffering and death of the resistance's leader<sup>539</sup> or for offensive comparisons of the Austrian Minister for Interior Affairs with Nazi criminals one day after her death.<sup>540</sup> However, the criminal conviction due to the designation of the Austrian right-wing politician Jörg Haider as "idiot instead of Nazi" violated Article 10 of the ECHR.<sup>541</sup> Similarly, the designation of a regional politician as "fascist" was covered by freedom of expression.<sup>542</sup> The same applied to denomination of a politician as "closet Nazi" when the context suggested that this designation contained the reproach to not dissociate herself from the extreme right.<sup>543</sup> Against this background, German jurisprudence that likewise applies a case-by-case assessment which has sometimes found the conviction for insult in accordance with the freedom of expression, sometimes in breach,<sup>544</sup> seems to generally meet ECHR requirements. The ECtHR in *Annen v. Germany* also mostly confirmed the German jurisprudence<sup>545</sup> according to which the applicant could be prohibited from comparing the abortion practice by physicians with the Holocaust – for example, by use of the term 'Babycaust': some of the underlying cases

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<sup>539</sup> *Chauvy and Others v. France*, see above note 507.

<sup>540</sup> ECtHR, *Genner v. Austria*, Judgement, 12 January 2016, Application No. 55495/08 (<https://www.legal-tools.org/doc/scaptj/>), the applicant had commented her death with the remark "The good news for the New Year: [...], Minister for torture and deportation is dead" and claimed she had been "a desk criminal just like many others there have been in the atrocious history of this country"; the Court also accepted the injunction prohibiting the comparison of a journalist's work to "Nazi journalism", ECtHR, *Wabl v. Austria*, Judgement of 21 March 2000, Application No. 24773/94 (<https://www.legal-tools.org/doc/oy1vff/>).

<sup>541</sup> ECtHR, *Oberschlick v. Austria*, Judgement, 1 July 1997, Application No. 20834/92 (<https://www.legal-tools.org/doc/8fwzev/>).

<sup>542</sup> ECtHR, *Gavrilovici v. Moldova*, Judgement, 15 December 2009, Application No. 25464/05 (<https://www.legal-tools.org/doc/hkac6g/>).

<sup>543</sup> ECtHR, *Scharsach and News Verlagsgesellschaft mbH v. Austria*, Judgement of 13 February 2004, Application No. 39394/98 (<https://www.legal-tools.org/doc/f5915c/>).

<sup>544</sup> See above Section 2.3.1.1.2.

<sup>545</sup> See above note 205.

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qualifying this explicitly as insult against the physician.<sup>546</sup> The ECtHR emphasised the “specific context of the German past” in this respect.<sup>547</sup>

It is doubtful that the 1971 decision of the Federal Constitutional Court prohibiting the publication of the novel ‘Mephisto’ would have been in line with the ECHR’s criteria for balancing competing rights<sup>548</sup> and the principle that historical figures involved in historical events of great importance affecting the destinies of multitudes of people should be open to public historical scrutiny and criticism.<sup>549</sup> However, today’s domestic jurisprudence has adopted a strict approach overall with regards to the prohibition of books inspired by historical figures so that today’s domestic standards do not raise serious concerns. The same applies to German court decisions according to which unproven factual assertions about a person’s relationship to the Nazi

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<sup>546</sup> See ECtHR, *Annen v. Germany*, Decision, 30 March 2010, Application Nos. 2373/07 and 2396/07 (<https://www.legal-tools.org/doc/sp5tww/>); *Annen v. Germany*, Decision, 12 February 2013, Application No. 55558/10 (<https://www.legal-tools.org/doc/8fki36/>) (both rejected as inadmissible); *Hoffer and Annen v. Germany*, Judgement, 13 January 2011, Application No. 397/07 and 2322/07 (<https://www.legal-tools.org/doc/h69tcv/>); *Annen v. Germany* No. 5, Judgement, 20 September 2018, Application No. 70693/11 (<https://www.legal-tools.org/doc/mbrsb4/>); only in *Annen v. Germany*, Judgement, 26 November 2015, Application No. 3690/10 (<https://www.legal-tools.org/doc/imhwc7/>), the Court found a violation with regard to the conviction for insult for the distribution in front of a medical centre of leaflets comparing the doctors employed with authors of Nazi atrocities; however, this judgement has been relativised by *Annen v. Germany* No. 5; see also *Annen v. Germany* No. 6, Judgement of 18 October 2018, Application No. 3779/11 (<https://www.legal-tools.org/doc/zoqeca/>) on a similar insult of a researcher on embryonal stem cells; see on this case law Philip Czech, “Vergleich von Abtreibungen mit dem Holocaust”, in *Newsletter Menschenrechte*, 2018, p. 455.

<sup>547</sup> See, for example, *Hoffer and Annen v. Germany*, 13 January 2011, para. 48, see above note 546; *Annen v. Germany* No. 5, para. 36, see above note 546.

<sup>548</sup> The criteria are: contribution to a debate of public interest, degree of notoriety of the person affected, subject of the news report, content, form and consequences of the publication, method of obtaining the information and its veracity, prior conduct of the person concerned, severity of the sanction imposed, ECtHR, *Petkevičiūtė v. Lithuania*, Judgement, 27 February 2018, Application No. 57676/11, para. 65 (<https://www.legal-tools.org/doc/ev4618/>); see also *Von Hannover v. Germany* No. 2, Judgement of 7 February 2012, Application Nos. 40660/08 and 60641/08, paras. 109–113 (<https://www.legal-tools.org/doc/ab2be3/>); *Axel Springer AG v. Germany*, Judgement, 7 February 2012, Application No. 39954/08, paras. 90–95 (<https://www.legal-tools.org/doc/cf1fbb/>).

<sup>549</sup> ECtHR, *Dzhugahvili v. Russia*, Decision, 9 December 2014, Application No. 41123/10, para. 32 (on Stalin) (<https://www.legal-tools.org/doc/3kgwhl/>); see also *Giniewski v. France*, Judgement, 31 January 2006, Application No. 64016/00 (<https://www.legal-tools.org/doc/0ceb16/>) censuring the conviction for a critical article about the relationship between the Catholic church doctrine and the Holocaust.

regime or its ideology may be qualified as malicious gossip or (if the facts are proven to be untrue) defamation. For if the ECtHR emphasises the importance of a free debate on matters of public interest and if the Court is restrictive with regard to attempts to silence historians, publishers and journalists,<sup>550</sup> it underscores that these groups must act in good faith in order to provide accurate and reliable information and in accordance with the ethics of their profession.<sup>551</sup>

### **3.7. Disturbance of Peace of the Deceased (§ 168 of the Criminal Code)**

In *Sinkova v. Ukraine*, the ECtHR accepted the conviction of a student for desecration of a tomb after having fried eggs over the Eternal Flame at the Tomb of the Unknown Soldier, a memorial to those who perished in World War II, in order to protest against wasteful use of natural gas by the state whilst turning a blind eye to poor living standards of veterans. It did not find a violation of Article 10 of the ECHR, emphasising that “there were many suitable opportunities [...] to express her views [...] without breaking the criminal law and without insulting the memory of soldiers who perished and the feelings of veterans”.<sup>552</sup> In this particular case, individual circumstances had also been taken into account as the student was handed a suspended sentence of which she did not serve any day.<sup>553</sup> On this basis, it can be assumed that the criminal offence of disturbance of peace of the deceased under § 168 of the Criminal Code, which prescribes a relatively mild sentence – imprisonment up to three years or a fine – is compatible with the freedom of expression.

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<sup>550</sup> See, for example, ECtHR, *Ungváry and Irodalom Kft. v. Hungary*, Judgement, 3 December 2013, Application No. 64520/10 (<https://www.legal-tools.org/doc/vfw27g/>) censuring the conviction of a historian and his publisher for alleging that a judge of the Constitutional Court had been an agent for the state security services under the Communist regime.

<sup>551</sup> ECtHR, *Radio France and Others v. France*, Judgement, 30 March 2004, Application No. 53984/00, para. 37 (on journalists) (<https://www.legal-tools.org/doc/ea66ee/>); see also *Verlagsgruppe Droemer Knaur GmbH & Co. KG v. Germany*, Judgement, 19 October 2017, Application 35030/13 (<https://www.legal-tools.org/doc/q50nsx/>) on the criteria building the standard for professional duties.

<sup>552</sup> *Sinkova v. Ukraine*, para. 110, see above note 535.

<sup>553</sup> *Ibid.*, paras. 109, 111.

### **3.8. Defamation of Religious Faiths (§ 166 of the Criminal Code)**

Since defamation of religious faiths by the assertion of facts does not cover proven true facts and, in exceptional cases, even exempts unproven facts, it is compatible with the jurisprudence of the ECtHR as the latter emphasises the need for room for public debate on historical events and has censured a conviction for defamation against the Catholic church due to the claim that there is a connection between its doctrines and the Holocaust.<sup>554</sup>

### **3.9. Racist and Antisemitic Motives as Aggravating Factors (§ 46(2) of the Criminal Code)**

In *Nachova v. Bulgaria*, the ECtHR emphasised that “the authorities’ duty to investigate the existence of a possible link between racist attitudes and an act of violence” was part of their procedural obligations arising under Article 2 of the ECHR (right to life) and implicit in their responsibilities under Article 14 of the ECHR (prohibition of discrimination) when read in conjunction with Article 2.<sup>555</sup> In the aforementioned case, the authorities had not investigated possible racist motives of military police who had killed two Roma men, despite existing evidence of such motives. While it would seem logical, it is not certain, however, whether from this duty to uncover any possible racist motives during the investigations there can also be deduced a duty to take these motives into account when sentencing.<sup>556</sup> If there is such a duty, § 46(2) of the Criminal Code which qualifies racist and antisemitic motives as aggravating factors complies with it. In any case, the ECHR does not preclude that these motives have the potential to increase the penalty. In making racist and antisemitic motives a relevant factor for sentencing, the

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<sup>554</sup> *Giniewski v. France*, see above note 549.

<sup>555</sup> ECtHR, *Nachova and Others v. Bulgaria*, Judgement, 6 July 2005, Application No. 43577/98, para. 161 (<https://www.legal-tools.org/doc/c583fc/>); similarly, *Šećić v. Croatia*, Judgement, 31 May 2007, Application No. 40116/02, para. 66 (<https://www.legal-tools.org/doc/908ae1/>).

<sup>556</sup> Against such a reading Oliver Harry Gerson, “Fauler (Wort-)Zauber im Strafzumessungsrecht”, in *Kriminalpolitische Zeitschrift*, 2020, p. 33; at least drawing on the ECHR case law to conclude on a need to introduce such a duty Klaus Stoltenberg, “Verpflichtung der Ermittlung und Berücksichtigung rassistischer Motive bei der Strafzumessung”, in *Zeitschrift für Rechtspolitik*, 2012, pp. 120, 122; Volker Beck and Christoph Tometten, “‘Glühende Antisemiten’ und ‘arabische Jugendliche’ – Zum unzureichenden Umgang des Rechts mit gruppenbezogener Menschenfeindlichkeit”, in *Zeitschrift für Rechtspolitik*, 2017, p. 244.

provision also obliges the authorities to investigate these motives<sup>557</sup> and hence to comply with the obligation arising from the ECHR in this respect.

### **3.10. Declaration of Unconstitutionality of Political Parties (Article 21(2) of the Basic Law)**

The ECommHR did not find a breach of Article 11 of the ECHR in relation to the possibility for the Federal Constitutional Court to declare political parties unconstitutional under Article 21(2) of the Basic Law in *Communist Party of Germany v. Germany*.<sup>558</sup> The Commission declared the application inadmissible by applying Article 17 of the ECHR which is “designed to safeguard the rights listed therein by protecting the free operation of democratic institutions”. It found that Article 21(2) of the Basic Law had been created with similar motives in mind and that the ultimate objectives of the German Communist Party implied a transition through the stages of dictatorship of the proletariat, which was incompatible with the Convention.<sup>559</sup> The Court has also accepted the pre-emptive application of a prohibition on parties.<sup>560</sup> However, the Court has rejected the prohibition of communist parties that do not call for the use of violence, an uprising or any other form of rejection of democratic principles,<sup>561</sup> even when taking into account the historical experience of totalitarian communism in the state concerned.<sup>562</sup> As the possibility to declare political parties unconstitutional is applied in an extremely restrictive manner by the Federal Constitutional Court, particularly since it requires the party to potentially be able to reach its goals, there seems to be no conflict

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<sup>557</sup> See § 160(3) of the Code of Criminal Procedure according to which the public prosecution office shall also investigate those circumstances relevant for the sentencing.

<sup>558</sup> ECommHR, *German Communist Party v. Germany*, Decision, 20 July 1957, Application No. 250/57.

<sup>559</sup> *Ibid.*

<sup>560</sup> ECtHR, *Refah Partisi and Others v. Turkey*, Judgement, 13 February 2003, Application No. 41340/98, 41342/98, 41343/98, 41344/98, paras. 102 f. (<https://www.legal-tools.org/doc/cd91e0/>).

<sup>561</sup> ECtHR, *Partidul Comunistilor (Nepeceristi) and Ungureanu v. Romania*, Judgement, 3 February 2015, Application No. 46626/99, para. 54 (<https://www.legal-tools.org/doc/b05a84/>); see also *United Communist Party of Turkey and Others v. Turkey*, Judgement, 30 January 1998, Application No. 19392/92, para. 56 (<https://www.legal-tools.org/doc/071ac9/>).

<sup>562</sup> *Partidul Comunistilor (Nepeceristi) and Ungureanu v. Romania*, para. 58, see above note 561.

with the necessity test required by the ECtHR, even if Article 21(2) does not formally depend on a proportionality requirement.<sup>563</sup>

### **3.11. Prohibition of Unconstitutional Associations (Article 9(2) of the Basic Law)**

Similarly, the ECtHR has permitted the prohibition or non-registration of associations by applying Article 17 of the ECHR, where the association seeks to employ Article 11 of the ECHR in order to engage in activities contrary to the text and spirit of the Convention and, where successful, would contribute to the destruction of the rights and freedoms set forth in the Convention. This was the case in *WP and Others v. Poland*, in which the ECtHR found that the ‘National and Patriotic Association of Polish Victims of Bolshevism and Zionism’ was reviving antisemitism as its statements alleged the persecution of Poles by the Jewish minority and the existence of inequality between them.<sup>564</sup> Likewise, Article 17 of the ECHR was applied in *Hizb Ut-Tharir v. Germany*, where the ECtHR found that the association not only denied the state of Israel’s right to exist, but also called for the violent destruction of this state including the banishment and killing of its inhabitants: here, the organisation attempted to employ Article 11 of the ECHR for ends clearly contrary to the values of the Convention.<sup>565</sup> On this basis, in another case, the Federal Administrative Court held that the prohibition of the right-wing extremist association ‘Hilfsorganisation für nationale politische Gefangene und deren Angehörige’ (‘HNG’) was in line with Article 11 of the ECHR.<sup>566</sup> However, beyond associations promoting totalitarian ideologies, the Court

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<sup>563</sup> In this sense Kaiser, 2020, pp. 290 f, see above note 260; for a detailed analysis of ECHR compatibility of its case law see also *Prohibition of the NPD*, paras. 607–626, see above note 234.

<sup>564</sup> ECtHR, *WP and Others v. Poland*, Decision, 2 September 2004, Application No. 42264/98 (<https://www.legal-tools.org/doc/c3pdqi/>).

<sup>565</sup> ECtHR, *Hizb Ut-Tharir v. Germany*, Decision of 12 June 2012, Application No. 31098/08, paras. 73 f. (<https://www.legal-tools.org/doc/d6y0k4/>); similarly, *Refah Partisi v. Turkey*, para. 98, see above note 560, emphasising that a political party whose leaders incite to violence or put forward a policy aimed at the destruction of democracy and the flouting of the rights recognised in a democracy cannot claim the Convention’s protection; the ECtHR however did not apply Article 17 in *Vona v. Hungary*, Judgement, 9 July 2013, Application No. 35943/10 (see paras. 36 f.) (<https://www.legal-tools.org/doc/82c78a/>), it still found that the dissolution of an openly anti-Roma association did not breach Article 11 of the ECHR.

<sup>566</sup> Federal Administrative Court, Judgement, 19 December 2012, p. 870, para. 65, see above note 257.

is stricter with regard to restrictions on the freedom of association on the grounds that the association challenges the official version of history.<sup>567</sup>

Against this background, the incrimination of the continuation of prohibited organisations under §§ 84, 85 of the Criminal Code also appears to be in line with ECtHR case law. With regard to organisations promoting National Socialist ideas, the ECtHR has explicitly accepted such criminal laws.<sup>568</sup>

### **3.12. Forfeiture of Rights (Article 18 of the Basic Law)**

The possibility of the forfeiture of rights under Article 18 of the Basic Law seemingly conforms with the abuse clauses contained in Article 17 of the ECHR and Article 54 of the CFR. It is true that Article 18 of the Basic Law is construed differently than the European abuse clauses: It does not prohibit the ability to *interpret* any right or freedom of the Basic Law in a way that would amount to its abuse, rather, it provides for a procedure by which, in case of abuse of certain rights, the Federal Constitutional Court can pronounce the forfeiture of these rights. In this respect, Article 18 of the Basic Law simultaneously exceeds and falls short of the European abuse provisions: it exceeds them in its legal consequence that the forfeiture is case-unspecific and a continuing measure,<sup>569</sup> but it falls short of them by requiring a constitutional court decision.<sup>570</sup> However, the ECommHR, in *Heinz Reisz v. Germany* (introduced by an applicant who complained about the length of proceedings before the Federal Constitutional Court), explicitly

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<sup>567</sup> See, for example, ECtHR, *Maison de la Civilisation Macédonienne et Autres contre Grèce*, Judgement, 9 July 2015, Application No. 1295/10 (<https://www.legal-tools.org/doc/fgo330/>), where it did not accept the rejection of registration of an association on the grounds that its name suggested the existence of a Macedonian civilisation and it could be used to promote the creation of a Macedonian nation that, according to the domestic courts, historically had never existed, as this did not pose a risk to the public order.

<sup>568</sup> *Schimanek v. Austria*, see above note 524.

<sup>569</sup> If the pronounced forfeiture under Article 18 of the Basic Law is not limited in time or longer than a year, the person concerned can request its revocation after two years, see § 40 of the Act on the Federal Constitutional Court.

<sup>570</sup> In contrast, no structural difference results from the fact that the wording of Article 17 of the ECHR, unlike Article 18 of the Basic Law, is general in its scope because the ECtHR clarified in *Lawless v. Ireland*, Judgement, 1 July 1961, Application No. 332/57, para. 7 of ‘the Law’ part (<https://www.legal-tools.org/doc/d803eb/>), and *Ould Dah v. France*, Decision, 17 March 2009, Application No. 13113/03 (<https://www.legal-tools.org/doc/6c588a/>) that Article 17 of the ECHR cannot either deprive a person from certain conventional rights, namely Articles 5, 6 and 7 of the ECHR.

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acknowledged that Article 18 of the Basic Law and Article 17 of the ECHR served similar purposes since the latter “refers to groups or to individuals, to prevent them from deriving from the Convention a right to engage in any activity or perform any act aimed at destroying any of the rights and freedoms set forth in the Convention”.<sup>571</sup> The ECtHR also more generally grants a certain margin of appreciation to Member States in the implementation of the militant democracy principle, although this margin is not unlimited.<sup>572</sup> Besides, Article 18 of the Basic Law merely provides for the forfeiture of rights under the Basic Law, not rights under the ECHR or CFR.<sup>573</sup> The ordinary laws implementing Article 18 of the Basic Law, which provide for the possibility to request the restoration of forfeited rights,<sup>574</sup> also respect the De Becker principle which states that Article 17 of the ECHR precludes a permanent deprivation of rights.<sup>575</sup> Similar principles apply to Article 54 of the CFR.<sup>576</sup>

#### **3.13. Dissemination of Propaganda Material and Symbols of Other Prohibited Organisations (§ 86(1) No. 1-3, 86a of the Criminal Code)**

Based on the principles that the ECtHR has applied to the offence of disseminating propaganda material and symbols of former Nazi organisations,<sup>577</sup> the corresponding offence for material and symbols of other political parties or associations prohibited for being directed against the free democratic order also appear to adhere with the ECHR.

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<sup>571</sup> ECommHR, *Heinz Reisz v. Germany*, Decision, 20 October 1997, Application No. 32013/96.

<sup>572</sup> See on the limits ECtHR, *Stankov and the United Macedonian Organisation Llinden v. Bulgaria*, Judgement, 2 October 2001, Application Nos. 29221/95 and 29225/95, para. 97 (<https://www.legal-tools.org/doc/043fea/>); ECommHR, *Glasenapp v. Germany*, Decision, 11 May 1984, Application No. 9228/80, para. 110; see on this argument also Walter Krebs and Markus Kotzur in Ingo von Münch and Philip Kunig (eds.), *Grundgesetz-Kommentar*, 7th ed., C.H. Beck, Munich, 2021, Article 18, para. 7; Günter Dürig and Hans Klein, in Theodor Maunz and Günter Dürig (eds.), *Grundgesetz-Kommentar*, 80th ed., C.H. Beck, Munich, June 2017, Article 18, para. 148.

<sup>573</sup> Krebs and Kotzur, 2021, Article 18, para. 7, see above note 572.

<sup>574</sup> See above note 569.

<sup>575</sup> ECommHR, *De Becker v. Belgium*, Report, 22 January 1960, Application No. 214/56, para. 279.

<sup>576</sup> See Krebs, Kotzur, 2021, Article 18, para. 7, see above note 572.

<sup>577</sup> See above Section 3.3.

### **3.14. Disparagement of the State and its Organs (§§ 90 ff. of the Criminal Code)**

In *Murat Vural v. Turkey*, the ECtHR concluded that a conviction on the basis of the Law on Offences against Atatürk for having poured paint on statutes of Atatürk in an effort to express criticism against the latter as well as the current government violated Article 10 of the ECHR. However, the Court also found that the provision pursued the legitimate aim of protecting the reputation or rights of others<sup>578</sup> and censured the conviction on the basis of the extreme severity of the penalty (that is, over thirteen years of imprisonment).<sup>579</sup> Hence it can be assumed that the ECtHR in principle accepts laws that incriminate the disparagement of state symbols or its organs as long as they are applied in a manner which respects the principle of necessity.<sup>580</sup> However, the Court also underscored that in principle, peaceful and non-violent forms of expression should not be made subject to the threat of a custodial sentence.<sup>581</sup> The Court nuanced this principle in *Sinkova v. Ukraine*, where it accepted a suspended custodial sentence for a student who put fried eggs over the tomb of the Unknown Soldier without using violence.<sup>582</sup> Still, concerns in this respect arise in relation to the penalties that German provisions foresee. While the disparagement of the state and its symbols (§ 90a) and of symbols of the EU (§ 90b) incur a penalty of up to three years imprisonment or a fine, the disparagement of the Federal President (§ 90) and of constitutional organs (§ 90b) does not provide for the possibility of a fine, only for imprisonment between three months and five years, although § 90(2) of the Criminal Code permits mitigation of the penalty wherever the disparagement is committed without an act of violence. However, it remains doubtful that the resulting sentence of imprisonment would be in line with the case law of the ECtHR, unless the sentence was suspended.

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<sup>578</sup> ECtHR, *Murat Vural v. Turkey*, Judgement, 21 October 2014, Application No. 9540/07, para. 60 (<https://www.legal-tools.org/doc/rkzr1i/>).

<sup>579</sup> *Ibid.*, para. 66.

<sup>580</sup> See also Hans-Ulrich Paeffgen in Urs Kindhäuser, Ulfried Neumann and Hans-Ulrich Paeffgen (eds.), *Strafgesetzbuch*, 5th ed., Nomos, Baden-Baden, 2017, § 90, para. 2 concluding that § 90 of the Criminal Code can “still be considered as compatible with a liberal criminal law based on the rule of law”.

<sup>581</sup> *Murat Vural v. Turkey*, para. 66, see above note 578.

<sup>582</sup> *Sinkova v. Ukraine*, para. 111, see above note 535.

### **3.15. Ban on Uniforms During Assemblies (§ 3 of the Assembly Act)**

As far as can be seen, the ECtHR has not yet had to rule on a ban on uniforms during assemblies or in public as provided for by § 3 of the Assembly Act. As this ban is today limited to uniforms which have the effect of an intimidating uniform militancy, and as the ECtHR has, as such, accepted the principle of militant democracy that lies at the core of this provision, it can be assumed that it is in line with the ECHR.<sup>583</sup>

### **3.16. Duty of Constitutional Loyalty of Civil Servants and Judges**

As the ECHR has been considered as not protecting the right of access to the civil service,<sup>584</sup> the non-employment of candidates for their non-adherence to the free democratic order does not raise particular concerns. As regards the possibility to dismiss civil servants for putting into action anti-constitutional attitudes, the ECtHR has accepted, *inter alia*, in *Vogt v. Germany*, the special duties of constitutional loyalty of civil servants in Germany,<sup>585</sup> taking into account the German experience under the Weimar Republic and the Nazi regime, as well as the idea that the new state should be a “democracy capable to defend itself”.<sup>586</sup> However, the Court found that the dismissal of a secondary school teacher on the grounds that she had been an active member of the German Communist Party violated Article 10 and 11 of the ECHR. The measure was held to be a very severe response to a low security risk given that the dismissal was based solely on her membership.<sup>587</sup> The Strasbourg judges, however, have admitted restrictions on political activities by civil servants in other cases.<sup>588</sup> The standards for dismissal are particularly high

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<sup>583</sup> Only with this narrow interpretation it has also been considered as constitutional, see *Uniform*, p. 1803, see above note 283.

<sup>584</sup> *Glasenapp v. Germany*, Application, para. 50, see above note 572; ECtHR, *Kosiek v. Germany*, Judgement, 28 August 1986, Application No. 9704/82, paras. 38 f. (<https://www.legal-tools.org/doc/a95e00/>); *Willi v. Liechtenstein*, Judgement, 28 October 1999, Application No. 28396/95, para. 43 (<https://www.legal-tools.org/doc/9e0fe1>).

<sup>585</sup> *Vogt v. Germany*, para. 59, see above note 302; similarly, ECtHR, *Volkmer v. Germany*, Decision, 22 November 2001, Application No. 39799/98 (<https://www.legal-tools.org/doc/811sek/>); *Lahr v. Germany*, Decision, 1 July 2008, Application No. 16912/05 (<https://www.legal-tools.org/doc/iz212c>) (on an NPD member in the compulsory military service).

<sup>586</sup> *Vogt v. Germany*, para. 59, see above note 302.

<sup>587</sup> *Ibid.*, para. 60.

<sup>588</sup> See ECtHR, *Ahmed and Others v. United Kingdom*, Judgement, 2 September 1998, Application No. 22954/93 (<https://www.legal-tools.org/doc/fe834c>) on restrictions on the right of

with regard to judges in view of the separation of powers and independence of the judiciary.<sup>589</sup> Against this background, the possibility to dismiss civil servants and judges is compatible with the ECHR as long as it is exercised within the constraints stemming from the necessity principle.

### 3.17. Restrictions on Assemblies Reminiscent of Nazi Injustices

The ECtHR's reasoning in *Fáber v. Hungary*, regarding the possibility to ban demonstrations on certain memorial sites and memorial days in countries with a traumatic historical experience has already been summarised above.<sup>590</sup> As long as this case law does not necessarily require that restrictions be limited both in time *and* in space,<sup>591</sup> the German jurisprudence permitting bans or restrictions on processions at commemorative days specifically dedicated to the memory of the injustices of National Socialism and the Shoah carried out in a provocative manner affecting the moral feelings of citizens appears to align with the EHCR. The same applies for the other domestic exception from the rule that public order cannot serve as possible grounds for restricting the freedom of assembly, namely for processions of an overall intimidating character awakening memories about the past totalitarian regime. For if the ECtHR has emphasised that ill feelings or outrage do not represent a pressing social need,<sup>592</sup> it has allowed restrictions where the relevant expressions were intimidating or capable of inciting violence by instilling a deep-seated and irrational hatred against identifiable persons.<sup>593</sup> The criterion of intimidation used by the Federal Constitutional Court has hence been accepted by the Court.

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certain civil servants to stand for elections or certain elected offices or to speak or write in public; see also *Rekvényi v. Hungarie*, Judgement, 20 May 1999, Application No. 25390/94 (<https://www.legal-tools.org/doc/867642/>) on the prohibition of membership in political parties in states with a specific historical experience.

<sup>589</sup> ECtHR, *Harabin v. Slovakia*, Judgement, 29 June 2004, Application No. 62584/00 (<https://www.legal-tools.org/doc/27zc48/>); *Willi v. Liechtenstein*, para. 64, see above note 584.

<sup>590</sup> See above Section 3.4.

<sup>591</sup> On this aspect, see above Section 3.4.

<sup>592</sup> *Fáber v. Hungary*, para. 56, see above note 523.

<sup>593</sup> ECtHR, *Sürek v. Turkey*, Judgement, 8 July 1999, Application No. 26682/95, para. 62 (<https://www.legal-tools.org/doc/a5d024/>); *Fáber v. Hungary*, para. 56, see above note 523.

### **3.18. Police and Security Law and Public Commercial Law**

It would appear that the ECtHR has not yet had to decide on cases where membership in a political party pursuing anti-constitutional aims entailed other negative consequences such as the withdrawal of a weapons licence in order to prevent dangers from other legal interests. The ECtHR jurisprudence on possible restrictions on civil servants taken together with the state duty to secure the right to life under Article 2 of the ECHR indicate, however, that corresponding domestic legal provisions are compatible with the freedom of association under Article 11 of the ECHR. It is unclear whether the same applies to travel restrictions based on “other significant interests of the Federal Republic of Germany” to prevent, for example, German citizens from performing at a right-wing rock concert or restrictions on businesses disseminating neo-Nazi ideas. However, the margin of appreciation that the Court accords to Member States for interferences based on their history,<sup>594</sup> taken together with its overall tolerance regarding restrictions of Nazi ideology, would suggest ECHR compatibility.

### **3.19. Lustration Laws**

In *Ādamsons v. Latvia*,<sup>595</sup> the ECtHR summarised the requirements that lustration laws must fulfil in order to be deemed compatible with the ECHR. In particular, they must meet the requirements of accessibility and foreseeability;<sup>596</sup> the procedure must not exclusively serve retribution or vengeance;<sup>597</sup> the law must be sufficiently specific to determine the individual responsibility of the persons concerned and contain procedural guarantees;<sup>598</sup> the authorities must take into account that the necessity of right restriction decreases over time.<sup>599</sup> It is doubtful that the lustration measures adopted after

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<sup>594</sup> See, for example, ECtHR, *Ždanoka v. Latvia*, Judgement, 16 March 2006, Application No. 58278/00, para. 96 (<https://www.legal-tools.org/doc/be92e0/>); *Vogt v. Germany*, para. 52, see above note 302.

<sup>595</sup> ECtHR, *Ādamsons v. Latvia*, Judgement, 24 June 2008, Application No. 3669/03, para. 116 (<https://www.legal-tools.org/doc/03e432/>).

<sup>596</sup> See also ECtHR, *Rotaru v. Romania*, Judgement, 4 May 2000, Application No. 28341/95, para. 52 (<https://www.legal-tools.org/doc/be522d/>).

<sup>597</sup> See also *Ždanoka v. Latvia*, para. 129, see above note 594.

<sup>598</sup> See also ECtHR, *Sõro v. Estonia*, Judgement, 3 September 2015, Application No. 22588/08, para. 60 (<https://www.legal-tools.org/doc/me6ii1/>); *Turek v. Slovakia*, Judgement, 14 February 2006, Application No. 57986/00, para. 115 (<https://www.legal-tools.org/doc/1cd0b7/>).

<sup>599</sup> *Ādamsons v. Latvia*, para. 116, see above note 595.

1945 would have met these requirements, especially as at the beginning they were based on a schematic review as opposed to individual review.<sup>600</sup> The lustration measures adopted after the SED regime, however, have been accepted by the ECtHR.<sup>601</sup>

### 3.20. Summary

Overall, most German measures of mnemonic governance seem to comply with European standards. Doubts essentially arise only with regards to two elements, the first being the implementation of the 2008 FD, which still appears deficient in some respects, the second being the possibility of custodial sentences for the disparagement of the state and its organs when unaccompanied by violence. As regards the dismissal of civil servants for breaches of their duty to constitutional loyalty, it should be reiterated that the relatively high standards for necessity under the ECtHR case law should be borne in mind by German authorities and courts.

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<sup>600</sup> See the criticism of Karl Loewenstein, *Political Power and the Governmental Process*, University of Chicago Press, 1957: “The categories established are formalistic; the practices are unfair and in conflict with the principles of justice and due process; they are reminiscent of the Gestapo, particularly in fact that the procedure, on the basis of the inadequate ‘Fragebogen’ is secret and that no hearing is permitted”.

<sup>601</sup> ECtHR, *Petersen v. Germany*, Decision, 22 November 2001, Application No. 39793/98 (<https://www.legal-tools.org/doc/0ud0a4/>) (on a former GDR history university scholar who was dismissed after his incorporation in the civil service of Berlin for lack of professional qualities); *Volkmer v. Germany*, see above note 585 (on a teacher who had served as honorary secretary of the SED at his school and in the executive committee of the district administration of the SED).

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## Particularities of German Memory Laws and Memory Culture

This last section briefly summarises the peculiarities that arise in a more general context in relation to the landscape of German memory laws when compared to other countries. Distinctive features concern, in particular, the strong emphasis on the concept of militant democracy, that marks the German legal order, including its memory laws (Section 4.1.); growing criticism of the existing memory culture and debates about a ‘new constitutional identity’ (Section 4.2.); the phenomenon of populism and the so-called ‘new right’ that has formed in recent years (Section 4.3.).

### 4.1. Concept of Militant Democracy

While there is no uniform definition, the concept of militant democracy is generally referred to as precluding those who abuse guaranteed rights in an attempt to abolish the liberal democratic character of the state from the benefit of these rights.<sup>602</sup> This idea is closely connected to the German constitutional order, which has been strongly shaped by this conception after the experience of the collapse of the Weimar Republic.<sup>603</sup>

Even if it is today recognised that the Weimar Republic, that is, the short democratic period from 1918 until Hitler’s appointment as Reich Chancellor in 1933, did not fail solely because of a lack of mechanisms protecting democracy but also for other reasons,<sup>604</sup> there is general agreement that this system, at a minimum, failed to effectively apply legal means to protect the liberal democratic order. While the question of how to defend democracy

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<sup>602</sup> There is abundant literature on this principle, see, for example, Anthoula Malkopoulou and Alexander Kirshner (eds.), *Militant Democracy and its Critics*, Edinburg University Press, 2019; Svetlana Tyulkina, *Militant Democracy*, Routledge, New York, 2015; Alexander Kirshner, *A Theory of Militant Democracy*, Yale University Press, New Haven, 2014; Eric Heinze, *Hate Speech and Democratic Citizenship*, Oxford University Press, 2016; Paulien de Morree, *Rights and Wrongs under the ECHR*, Intersentia, Cambridge, 2017; Viktor Volkmann, *Meinungsfreiheit für die Feinde der Freiheit?*, Duncker & Humblot, Berlin, 2019.

<sup>603</sup> See Tyulkina, 2015, p. 15, see above note 602, describing Germany as the “cradle” of militant democracy.

<sup>604</sup> On other factors, see, for example, Heinze, 2016, p. 132, see above note 602.

against its enemies is as old as democratic theory itself,<sup>605</sup> it was increasingly discussed from the 1930s among constitutional and philosophical thinkers such as Karl Loewenstein or Karl Popper. Loewenstein pleaded for an “authoritarian democracy” that had to find repressive answers against fascism.<sup>606</sup> In 1937, he coined the term ‘militant democracy’ and warned the Weimar Republic to capitulate before its enemies,<sup>607</sup> holding that democracy could only survive by suppressing its adversaries at home and abroad.<sup>608</sup> Interestingly, the possible defensive means he listed are reminiscent of many memory laws that can be found in the German legal order today. Namely, he referred to the consistent application of the general criminal law; the ban on subversive movements such as anti-constitutional parties or associations; legislation against the formation of private para-military armies of political parties, against the wearing of political uniforms, against the bearing of other unconstitutional symbols and against the illicit manufacture, wearing or possession of firearms; criminal provisions dealing with incitement to violence or hatred and other restrictions of the freedom of expression, association and assembly of anti-democratic movements; the offence of exalting political criminals; the protection of the police and the armed forces against infiltration by subversive propaganda and especially fascism; duties of loyalty of public officials to the state, a specially selected and trained political police for the discovery, repression and control of anti-constitutional activities; and protective measures against infiltration from foreign countries.<sup>609</sup> Popper, in a much-cited passage, also held that “unlimited tolerance must lead to the disappearance of tolerance” and that intolerant philosophies should be suppressed by force if they could not be kept in check by public opinion.<sup>610</sup> Even Carl Schmitt, himself a sharp critic of the Weimar Republic and later serving

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<sup>605</sup> Otto Pfersmann, “Shaping Militant Democracy”, in András Sajó (ed.), *Militant Democracy*, Eleven International Publishing, Utrecht, 2004, p. 47; Tyulkina, 2015, p. 14, see above note 602.

<sup>606</sup> Karl Loewenstein, “Militant Democracy and Fundamental Rights II”, in *American Political Science Review*, vol. 31, 1937, pp. 656 f.

<sup>607</sup> Karl Loewenstein, “Militant Democracy and Fundamental Rights I”, in *American Political Science Review*, vol. 31, 1937, pp. 426–428.

<sup>608</sup> *Ibid.*, pp. 430–432; see also Udi Greenberg, “Militant Democracy and Human Rights”, in *New German Critique*, vol. 42, 2015, p. 188.

<sup>609</sup> Loewenstein, 1937, pp. 644–656, see above note 606; see also Papier and Durner, 2003, p. 346, see above note 259.

<sup>610</sup> Karl Popper, *The Open Society and Its Enemies*, 1945, Princeton University Press, 2020, p. 581 (fn. 4 of Chapter 7).

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the National Socialists, argued in favour of a value-bound Constitution and held that there could be “no neutrality until suicide”.<sup>611</sup> He claimed that the substance of the Weimar Constitution could not be modified.<sup>612</sup> The view that the fall of Weimar amounted to a ‘suicide’ was also shared by the very enemies of democracy themselves, as is illustrated by the famous statement of Goebbels that “it will always remain one of the best jokes of democracy that it provided its mortal enemies itself with the means through which it was annihilated”.<sup>613</sup>

Loewenstein’s ideas were very influential on the drafting of the Basic Law that has codified several instruments to defend the free democratic order against its ‘enemies’. The core triad – the possibility to declare political parties unconstitutional, to prohibit unconstitutional associations and the forfeiture of rights – as well as the other provisions protecting the free democratic order have been set out above.<sup>614</sup> Even if only Article 18 of the Basic Law (forfeiture of rights) explicitly refers to the term “abuse” of the guaranteed rights, all core instruments of militant democracy mentioned involve the withdrawal of precisely those rights that are used to undermine the free democratic order. Further, they all imply an element of pre-emption.<sup>615</sup> If the legal consequences of these instruments are relatively clear, it is more difficult to assess in which cases they come into play. This difficulty arises in particular from the fact that the Basic Law does not specify which legal values are covered by the protected ‘free democratic basic order’. After this concept had increasingly been extended in earlier judgements,<sup>616</sup> the Federal

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<sup>611</sup> Carl Schmitt, *Legalität und Legitimität*, Duncker & Humblot, Munich, 1932, p. 50.

<sup>612</sup> Carl Schmitt, *Der Hüter der Verfassung*, Mohr, Tübingen, 1931, p. 113; Carl Schmitt, *Verfassungslehre*, Duncker & Humblot, Munich, 1928, p. 26; see on Schmitt’s position Jan-Werner Müller, “Militant Democracy”, in Michel Rosenfeld and András Sajó (eds.), *Oxford Handbook of Comparative Constitutional Law*, 2012, p. 1257; Papier, Durner, 2003, p. 346, see above note 259; Tyulkina, 2015, p. 17, see above note 602.

<sup>613</sup> Joseph Goebbels, “Die Dummheit der Demokratie in Goebbels”, in *Der Angriff, Aufsätze aus der Kampfzeit*, 7th ed., 1939, p. 61; see on this quote Müller, 2012, p. 1254, see above note 612.

<sup>614</sup> See above Section 2.3.1.2.1.

<sup>615</sup> Tyulkina, 2015, p. 14, see above note 602.

<sup>616</sup> See SRP, pp. 12 f., see above note 243, on eight elements including human rights, manifestations of the rule of law, party pluralism and equality of political parties; Federal Constitutional Court, Judgement, 17 August 1956, 1 BvB 2/51, in *BverfGE*, vol. 5, pp. 199 f. (‘KPD’), adding especially the freedom of association and necessity of free elections; Federal Constitutional Court, Order, 1 October 1987, 2 BvR 1434/86, in *BverfGE*, vol. 77, p. 74, adding the freedom

Constitutional Court, in 2017, emphasised that this term required concentration on a few central principles which are absolutely indispensable for the free constitutional state.<sup>617</sup> These are, *first*, human dignity, covering in particular the safeguarding of personal individuality, identity and integrity and elementary equality before the law including the prohibition of discrimination based on gender, descent, race, language, origin, faith, religious or political opinions or disabilities;<sup>618</sup> *second*, the principle of democracy, including the equal participation of all citizens in the forming of the political will, accountability to the people for the exercise of state authority, and a linkage of all acts of political power to the will of the people and the parliamentary system;<sup>619</sup> *third*, the principle of the rule of law, in particular, the principle that public authority is bound by law and overseen by independent courts, and the state monopoly on the use of force.<sup>620</sup> Naturally, opinions differ when it comes to determining whether a specific provision protects one of these values and can hence be justified by the militant democracy concept.<sup>621</sup>

However, significant voices have not ceased to warn that whilst the Basic Law is militant towards its ‘enemies’, it uses its own rules, not those of its enemies.<sup>622</sup> It is important to bear in mind that the Basic Law’s militant democracy does not provide any instrument to fight unconstitutional aims or ideologies *as such*, but only comes into play where individuals or organisations threaten specific legal values, for example, by adopting an “actively fighting and aggressive attitude”.<sup>623</sup> The strong connection that is widely seen between the Basic Law and the militant democracy concept hence must not obscure the fact that the Basic Law, in principle, is neutral *vis-à-vis* specific opinions and that right extremist ideologies are equally protected under the

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of the media, of expression and of information; Federal Constitutional Court, Order, 14 November 1969, 1 BvL 24/64, in *BverfGE*, vol. 27, p. 201, adding religious neutrality; on this evolution see *Prohibition of the NPD*, para. 533, see above note 234.

<sup>617</sup> *Prohibition of the NPD*, para. 535, see above note 234.

<sup>618</sup> *Ibid.*, paras. 538–541; the mentioned criteria are that of a prohibited discrimination under Article 3(3) of the Basic Law that the Court refers to in para. 541.

<sup>619</sup> *Ibid.*, paras. 542–546.

<sup>620</sup> *Ibid.*, para. 547.

<sup>621</sup> Compare, for example, the debate on whether Holocaust denial ban protects human dignity as intended by the legislator, see above note 98.

<sup>622</sup> Hoffmann-Riem, 2004, p. 2782, see above note 337.

<sup>623</sup> *KPD*, p. 141, see above note 616; further on this limitation, see Masing, 2012, p. 591, see above note 112.

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German conception of freedom of speech. The only recognised exception from the constitution's neutrality *vis-à-vis* specific opinions is the glorification of National Socialism.<sup>624</sup>

The concept of militant democracy has been met with various criticisms that ultimately relate to the ‘democratic dilemma’, that is, that a system claiming to uphold the values of democracy, human dignity, and equality risks to sacrifice these very ideas when it excludes inconvenient opponents from its protection. In that sense, it has been argued that instruments of militant democracy have the potential to be easily abused, that they are arbitrary as the content of the free democratic order is indeterminate and prone to ideology, that they cannot be put in line with the principle of societal consent and the right of each generation to replace a former constitution, or that a scheme distinguishing friends from enemies is ultimately as dangerous as the enemies itself.<sup>625</sup> Nevertheless, the Federal Constitutional Court has considered expressions of the militant democracy principle not to be inconsistent with the free democratic order. For they are not only to be understood, according to the Court, as external limits, but also as an “expression of a self-restraint inherent in the principle of democracy” by guaranteeing a lasting democracy.<sup>626</sup> As mentioned, the ECtHR has accepted the militant democracy principle and has considered it embedded in Article 17 of the ECHR. Likewise, it can be found in many other constitutional orders.<sup>627</sup>

#### 4.2. Growing Criticism of the Current Memory Culture and Discussions About a ‘New German Constitutional Identity’

During recent years, Germany’s former and current memory culture surrounding the Shoah and Nazism has been increasingly criticised. These critics stem from different parts of German society and partly from abroad. However, they do not express a homogeneous view, rather, they diverge significantly from each other.

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<sup>624</sup> See Masing, 2012, pp. 586–590, see above note 112.

<sup>625</sup> See on these lines of criticism Volkmann, 2019, pp. 162–175, see above note 602.

<sup>626</sup> *Prohibition of the NPD*, para. 517, see above note 234.

<sup>627</sup> For an overview of militant democracy provisions in the CEE region see András Sajó, “Militant Democracy and Transition Towards Democracy”, in András Sajó (ed.), *Militant Democracy*, 2004, pp. 218–220.

Taking up a claim brought forward by Y. Michal Bodemann in 1996,<sup>628</sup> parts of the population, especially young Jewish Germans, have voiced critique that the Holocaust commemoration has become a “memory theatre” that uses Jews to confirm Germany in its self-image of having become a peaceful country, hence supporting the descendants of perpetrators in the construction of their own identity.<sup>629</sup> These voices censure in particular that German memory culture identifies with the perspective of Jewish victims.<sup>630</sup> According to these critics, this practice draws attention from the German perpetrators and leads to the idealisation or complete ignorance of their ancestors’ crimes and behaviour.<sup>631</sup> Critics also deplore that fears of the populist AfD electorate are addressed respectfully while ethnic minorities are treated harshly and are subject to continuous new demands.<sup>632</sup>

These critics further underscore that the focus should shift from the Jewish victims of the first generation and their approaching disappearance to the living second and third generations, to which the traumata were passed on. Additionally, memory culture should move from the political stage to the core of society. Jewish life should be made more visible in Germany, non-Jewish Germans should learn more about Judaism and Jews should not be reduced to Holocaust victims but also connected to something positive.<sup>633</sup> Jewish authors should be read in school and school trips to Tel Aviv should be organised to show the complexity of the Middle East conflict.<sup>634</sup> Besides, memory culture should integrate Jews. Commemorations in particular

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<sup>628</sup> Y. Michal Bodemann, *Gedächtnistheater. Die jüdische Gemeinschaft und ihre deutsche Erfindung*, Rotbuch, Hamburg, 1996, pp. 82 ff.

<sup>629</sup> Max Czollek, *Des-integriert euch!*, Carl Hanser Verlag, Munich, 2018, pp. 9, 30; similarly, Mirna Funk, “Neuer Antisemitismus (3/6), Anders, als sie alle dachten”, in *Deutschlandfunk*, 30 June 2019; also criticising empty rituals Martin Sabrow, “Die Krise der Erinnerungskultur”, in *Merkur* 835, December 2018, pp. 96 f.; for other critical voices, although on different grounds, see, for example, Ulrike Jureit, Christian Schneider, *Gefühlte Opfer*, Klett-Cotta, Stuttgart, 2011; Dana Giesecke, Harald Welzer, *Das Menschenmögliche*, Edition Körper-Stiftung, Hamburg, 2012.

<sup>630</sup> See Jureit, Schneider, 2011, see above note 629, pp. 25, 33.

<sup>631</sup> Czollek, 2018, p. 23, see above note 629; Funk, 30 June 2019, see above note 629.

<sup>632</sup> Czollek, 2018, p. 111, see above note 629.

<sup>633</sup> Mirna Funk, “Über Erinnerung und was wir von der jüdischen Kultur lernen können”, Interview, 26 January 2022 (available on the Volkswagen’s web site).

<sup>634</sup> Funk, 30 June 2019, see above note 629.

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should be held together with the Jews, namely, a joined Jom HaShoa on the official Holocaust Memorial Day in Israel should be celebrated.<sup>635</sup>

A different criticism is formulated by those who have called German memory culture and in particular the claim of its singularity a ‘catechism’. This criticism claims that the ‘dogmas’ of this catechism – the tabooing of any comparison of the Holocaust to other atrocities, the mantras that the security of Israel is part of German state reason, and that antizionism equals antisemitism – have been internalised by millions of Germans like a religion, the respect of which ensures the only possible way to ‘salvation’. These voices deplore that the (most often non-Jewish) ‘high priests of the catechism’ attack especially Palestinians, antizionists, including US and Israeli Jews for their presumed ‘antisemitic’ position.<sup>636</sup> The critics hold that the unique focus on the Holocaust in Germany prevents the remembrance of other historical atrocities such as the Nakba<sup>637</sup> or the German colonial past. This is perceived as especially problematic in a society that is becoming more and more diverse and in which growing parts of the population have no biographic ties to the generation of German perpetrators, and, for biographic, culture or religious reasons, may identify more with Palestinians than with Israelis.<sup>638</sup> Some especially emphasise that the current German memory culture and the allegedly uncritical support of Israel collides with the claim for universalism that is contained in the memory culture.<sup>639</sup> Only if the current focus on the Holocaust were removed, would there be room for a truly universal memory culture and consequently a new German identity. The criticism hence also concerns the alignment of German politics with the

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<sup>635</sup> *Ibid.*; Funk, 26 January 2022, see above note 633.

<sup>636</sup> Dirk Moses, “Der Katechismus der Deutschen”, in *Geschichte der Gegenwart*, 23 May 2021; also critical with regards to the singularity claim, Sami Khatib, “Eine paradoxe Gleichung”, in *Der Freitag*, 22 February 2022.

<sup>637</sup> Khatib, 22 February 2022, see above note 636; emphasising anti-Arab racism, see also the commentary on the prohibition of pro-Palestinian demonstrations in Berlin in juxtaposition with the handling of right-wing demonstrations, Lea Fauth, “Falsches Demokratieverständnis”, in *Tageszeitung*, 16 May 2022; cautiously suggesting an anti-Muslim scepticism of the authorities, see Ralf Michaels, “Versammlungsfreiheit gilt auch für Palästinenser”, in *Verfassungsblog*, 14 May 2022.

<sup>638</sup> See Moses, 23 May 2021, see above note 636.

<sup>639</sup> Sami Khatib, in Jo Schück, “Kein Genozid wie jeder andere – wie wollen wir uns an den Holocaust erinnern?”, in *ZDF aspekte*, 28 January 2022.

definition of antisemitism established by the International Holocaust Remembrance Alliance and the rejection of the BDS.<sup>640</sup>

The latter criticism ties in with a debate that emerged in 2020 and 2021, which has become known as the ‘second historians’ dispute’ (‘zweiter Historikerstreit’). While the ‘first historians’ dispute’ of 1986–87 had focused on the singularity of the Holocaust and an asserted connection to crimes of the Bolsheviks,<sup>641</sup> the recent debate about a possible connection between the Holocaust and colonialism was provoked by criticism of the governmental antisemitism commissioner against the invitation of the post-colonialist historian Achille Mbembe to a publicly funded festival of arts. In the ensuing debate, the view held by some that essential aspects of the Nazi regime and the Holocaust could only be understood through their relationship to imperialistic colonialism<sup>642</sup> was challenged by others who deemed such a comparison to be antisemitic. The debate also intertwined with the discussion about Israel-related antisemitism.<sup>643</sup> Meanwhile, others have defended at least some aspects of the traditional memory culture with its focus on the Shoah, its rituals and memorial days.<sup>644</sup> Thus, Germany finds itself in the middle of a debate the outcome of which remains open.

#### **4.3. Memory Culture through the Prism of ‘New Right-Wing’ Populism**

The German memory culture with its emphasis on the singularity of the Holocaust and a special moral responsibility of commemorating its victims has been accompanied by constant backlash by the right-wing and some parts of the conservative spectrum. While parties of the extremist right were in decline during the period of economic growth in West Germany,<sup>645</sup> the silencing

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<sup>640</sup> Moses, 23 May 2021, see above note 636.

<sup>641</sup> For an overview on this dispute, see above note 67.

<sup>642</sup> Moses, 23 May 2021, see above note 636; in this sense also Michael Rothberg, *Multidirectional Memory*, Stanford University Press, 2009.

<sup>643</sup> For a chronology of events, see Thierry Chervel, “Historikerstreit 2.0 – eine Chronologie”, in *Perlentaucher*, 20 June 2021; for the first books on this debate, see Dan Diner, Norbert Frei, Saul Friedländer, Jürgen Habermas and Sybille Steinbacher (eds.), *Ein Verbrechen ohne Namen*, C.H. Beck, Munich, 2022; Susan Neiman and Michael Wildt (eds.), *Historiker Streiten – Gewalt und Holocaust – die Debatte*, Propyläen, Berlin (forthcoming).

<sup>644</sup> See, in particular, Assmann, 2020, see above note 7 (on the Jewish criticism, see pp. 204–216; on the criticism of Historians, see pp. 225–231).

<sup>645</sup> “Die NPD in den 1960ern – Geschichte und Ideologie”, in *Zukunft braucht Erinnerung*, 2006.

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of the previous broad support of the fascist regime in the early post-war society prepared a fertile ground for the ultra-right-wing NPD. In 1967, only three years after its foundation, the party was represented in seven of the eleven Western German Länder parliaments.<sup>646</sup> The party's manifesto defended the Holocaust, denied the existence of a systematic genocidal intent and relativised its scale by comparing it to the suffering of German war expellees.<sup>647</sup>

If the adoption of the crime of Holocaust denial and the decline of the NPD<sup>648</sup> reflected a broad consensus on the intolerability of these openly ahistorical and antisemitic statements, 77 years after the end of World War II, the so-called 'new right'<sup>649</sup> is on the rise again. The AfD, originally established as a Eurosceptic voice, has evolved into the main political force of right-wing populism in Germany. Aiming at a larger conservative electorate than the NPD, it has adopted a more restrained approach in its challenge of the dominant mnemonic perception. In its programme, the party calls for the break-up of the "current narrowing of the [...] memory culture to the National Socialist era [...] in favour of a broader view of history that also includes the positive, identity-forming aspects of German history."<sup>650</sup> The implementation of this position, however, proves to be more ambivalent and reflects the ongoing dispute between more moderate and more radicalised members.

The speaker of the parliamentary group of the AfD in the Land Parliament of Thuringia appealed for a complete reversal of memory politics. Alluding to the Memorial of the Murdered Jews of Europe, he lamented that the Germans were the only people "who has planted a monument of shame

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<sup>646</sup> *Ibid.*

<sup>647</sup> *Ibid.*; insistence on the recognition of German civilian victims was also voiced inside the governing Christian Democrats at the time; see above note 63 and accompanying text.

<sup>648</sup> This decline culminated in the Federal Constitutional Court's ruling in 2017 (*Prohibition of the NPD*, see above note 234) that confirmed that the party pursued anti-constitutional aims but lacked significance to be prohibited, see above Section 2.3.1.2.1.

<sup>649</sup> For a definition and critical analysis of the term, see Wolfgang Benz, *Alltagsrassismus, Feindschaft gegen "Fremde" und "Andere"*, 2nd ed., Wochenschau Verlag, Frankfurt (Main), 2021, pp. 194 ff.: "The term 'new right' is used to distinguish from old and neo-Nazis, but also from right-wing extremists who are ready to resort to violence. This is usually associated with claiming a higher intellectual level than that represented by the extremists marching in the streets and shouting slogans. The new right does not represent new content".

<sup>650</sup> Manifesto of the AfD, 2016, Article 7.

in the heart of their capital.”<sup>651</sup> Although this view was rejected by the party leadership,<sup>652</sup> it reflects a concerted project to expand the limits of the socially accepted political discourse.<sup>653</sup> Other statements indicate attempts to rehabilitate vocabulary that was used in Nazi propaganda.<sup>654</sup>

Unlike the NPD, the AfD, for the most part does not strive to vindicate or glorify the National Socialist rule but to diminish its contemporary significance.<sup>655</sup> For example, in 2018, former party and parliamentary group leader Alexander Gauland claimed that “Hitler and the Nazis are just bird shit in more than 1,000 years of successful German history.”<sup>656</sup> While AfD representatives acknowledge German war crimes<sup>657</sup> and the criminal character of the Nazi regime,<sup>658</sup> the insistence on remembrance is perceived as tearing open historic wounds and as attempting to subject the German people for generations to come to a fixated narrative of collective guilt.<sup>659</sup> This objection takes up the conception of a ‘cult of guilt’ (*Schuldkult*), a line of thought already put forward by conservative representants of the ‘Historikerstreit’.<sup>660</sup> The ‘cult’ imagery pinpoints memory culture to be at the origin of a

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<sup>651</sup> An excerpt of the speech can be found in *Zeit Online*, 18 January 2017.

<sup>652</sup> “Petry bezeichnet Höcke als Belastung für die AfD”, in *Zeit Online*, 18 January 2017.

<sup>653</sup> Philip Eppelsheim, “Wir versuchen, die Grenzen des Sagbaren auszuweiten – AfD-Chef Gauland im Interview”, in *FAZ.NET*, 7 June 2018.

<sup>654</sup> For party’s embrace of the term ‘community of the nation’ (*Volksgemeinschaft*), see Michael Wildt, *Volk, Volksgemeinschaft, AfD*, 2nd ed., Hamburger Edition, Hamburg, 2017, pp. 117 ff.

<sup>655</sup> Paradoxically, the rise of the AfD coincides with an increased curiosity of the young generation towards the subject of the Holocaust, see “Großes Interesse der Jugend an NS-Zeit”, in *Frankfurter Rundschau*, 25 January 2022.

<sup>656</sup> “Kritik an Gauland auch in der AfD”, in *Frankfurter Allgemeine Zeitung*, 4 June 2018 p. 4.

<sup>657</sup> Marc Jongen, Meeting of the Bundestag, 25 March 2021, Plenary Protocol 19/218, p. 27504: “There is complete agreement in this plenary hall that in the course of the so-called Balkan campaign of the German Wehrmacht and the SS in the spring of 1941 and the subsequent occupation of Greece terrible war crimes were committed [...]”.

<sup>658</sup> Marc Jongen, Meeting of the Bundestag, 14 May 2020, Plenary Protocol 19/160, p. 19943: “Of course, Germany and the world were liberated on 8 May 1945: from the criminal Nazi regime and from the state of emergency of extermination that it had unleashed in Europe”.

<sup>659</sup> Marc Jongen, Meeting of the Bundestag, 25 March 2021, Plenary Protocol 19/218, p. 27504: “You want to perpetuate the perpetrator-victim constellation to the next generation and beyond for all eternity. The Germans should always be the perpetrators and feel guilty, and the other nations [...] should feel like victims”.

<sup>660</sup> Wolfrum, 2002, p. 141, see above note 6.

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collective “identity disorder”.<sup>661</sup> According to this view, the purportedly resulting “schizophrenia” and “loss of sense of reality” provide tools for an elite to manipulate public opinion,<sup>662</sup> the ‘Schuldkult’ being a means of oppression to defend the power of the ‘established’ political parties and to delegitimise opponents.<sup>663</sup> This reflects a typical populist dichotomy of a corrupt ruling class oppressing the virtuous people.<sup>664</sup>

Similarly, the AfD criticises the commemoration of history as a means to prevent the re-emergence of memories of right-wing populism abuses for political aims.<sup>665</sup> AfD members portray themselves as victims of a “memory dictatorship”<sup>666</sup> and view social restraint in publicly discussing sensible topics as proof of a censoring mechanism that favours a leftist mainstream.<sup>667</sup>

Contradicting their own claim that “the cultivation of a complex of guilt renders the country indefensible against any insult, rape and overrun”,<sup>668</sup> AfD politicians call for the remembrance of negative aspects of German history when it fits their political worldview. Although antisemitism has been identified as an integral, albeit not evident part of the party’s programme,<sup>669</sup> the integration of refugees from predominantly Muslim countries with an

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<sup>661</sup> See Marc Jongen, Meeting of the Bundestag, 22 April 2021, Plenary Protocol 19/224, p. 28500.

<sup>662</sup> Götz Kubitschek, “Nachdenken über Auschwitz (öffentlicht?)”, in *Sezession*, 27 January 2020; the bimonthly publication *Sezession* and its web-blog are published by the so-called ‘Institute for State Policy’, a think tank which is classified by the federal domestic intelligence agency as a “suspected right-wing extremist case”, see *Zeit Online*, 23 April 2020.

<sup>663</sup> See Martin Erwin Renner, Meeting of the Bundestag, 23 February 2018, Plenary Protocol 19/15, p. 1301: “[The established parties] disgracefully instrumentalise this culture of remembrance through moralising in order to get rid of emerging social and political resistance”.

<sup>664</sup> Wildt, 2017, p. 98, see above note 654.

<sup>665</sup> Martin Sellner, “Postkoloniale Angriffe auf den “Auschwitz-Mythos”, in *Sezession*, 25 May 2021.

<sup>666</sup> Marc Röhlig, “‘Erinnerungs-Diktatur’: AfD-Politiker fordert Ende von Stolperstein-Aktion”, in *Spiegel Online*, 19 February 2018.

<sup>667</sup> Bernd Baumann, Meeting of the Bundestag, 22 April 2021, Plenary Protocol, 19/224, p. 28544: “Two thirds of all Germans are afraid to speak openly, especially when it comes to critical topics such as refugees, Islam or patriotism, or about the AfD. People know: you can say anything – but only once, and then your job is gone”.

<sup>668</sup> Marc Jongen, Meeting of the Bundestag, 23 February 2018, Plenary 19/15, p. 1295.

<sup>669</sup> Lars Rensmann, “Die Mobilisierung des Ressentiments. Zur Analyse des Antisemitismus in der AfD” in Ayline Heller, Oliver Decker and Elmar Brähler (eds.), *Prekärer Zusammenhalt. Die Bedrohung des demokratischen Miteinanders in Deutschland*, pp. 309 ff.

allegedly antisemitic mindset is pictured as incompatible with the historic responsibility towards the country's Jewish community.<sup>670</sup> The AfD drifts off even further from its call for establishing a positive identity when it highlights the injustices of the socialist regime in Eastern Germany. Remarkably, the party warns against 'drawing a line' ('Schlussstrich') under the process of coming to terms with communist crimes, thereby recurring to the identical metaphor, which has been used in the discourse about the dealing with the Nazi past decades ago.<sup>671</sup>

Growing populism is not the only worrying trend. German society has increasingly been the target of attacks by right-wing extremists, including a series of murders by the terrorist group National Socialist Underground<sup>672</sup> ('NSU'). These events include the killing of nine persons of migrant background based on racist motives,<sup>673</sup> numerous attacks on refugee accommodations,<sup>674</sup> the murder of the local politician Walter Lübcke who had advocated to welcome refugees,<sup>675</sup> the attack on the synagogue in Halle (Saale) on Yom Kippur in 2019,<sup>676</sup> the attack on ten persons on racist grounds in Hanau 2020,<sup>677</sup> threats against lawyers, parliamentarians, artists or journalists by the group NSU 2.0,<sup>678</sup> information gathered presumably by using data from police computers with several right-extremist chat groups consisting of police officers having been discovered.<sup>679</sup> The occurrence of antisemitic incidents

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<sup>670</sup> Jens Ahrends, State Parliament of Lower Saxony, 58th Plenary Meeting, 23 October 2019, pp. 5263 f.

<sup>671</sup> See legislative proposal by the AfD, Deutscher Bundestag, Drucksache 19/24420, 18 November 2020, p. 2.

<sup>672</sup> 'Nationalsozialistischer Untergrund'.

<sup>673</sup> See Federal Court of Justice, Order, 12 August 2021, 3 StR 441/20, in *Neue Zeitschrift für Strafrecht*, 2021, p. 663.

<sup>674</sup> See, for example, "Despite rise in attacks on asylum accommodations, still some good news", in *Deutsche Welle*, 5 November 2016.

<sup>675</sup> See Higher Regional Court of Frankfurt (Main), Judgement, 28 January 2022, 5-2 StE 1/20 and 5a -3/20.

<sup>676</sup> See Higher Regional Court of Naumburg, Judgement, 21 December 2020, 1 St 1/20.

<sup>677</sup> "Germany condemns extremism on Hanau attack anniversary", in *Deutsche Welle*, 19 February 2022.

<sup>678</sup> "Germany charges 'NSU 2.0' far-right threats suspect", in *Deutsche Welle*, 28 October 2021.

<sup>679</sup> See , for example, Katharina Iskandar, "Für die Polizei ist ein kritischer Moment erreicht", in *Frankfurter Allgemeine Zeitung*, 12 July 2021.

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remains at a high level.<sup>680</sup> They do not only stem from the right extremist spectrum but also from the left, Christian, Islamic, conspiracy ideologic, anti-Israeli spectrum or the political centre.<sup>681</sup>

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<sup>680</sup> See the annual report of Recherche- und Informationsstelle Antisemitismus (RIAS), *Antisemittische Vorfälle in Deutschland 2020*, Berlin, 2020, p. 16, concluding that there were less attacks and threats, but more cases of insulting behaviour.

<sup>681</sup> *Ibid.*, pp. 13 ff.



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Paula Rhein-Fischer and Simon Mensing

This case study focuses on German memory laws that allude to how the era of National Socialism is to be remembered in the present day. Germany adopted these memory laws in the course of its dealing with its Nazi legacy after decades of attempts to 'draw a line' under the past.

The study distinguishes three categories of memory laws. The first category refers to 'explicit punitive memory laws', which specifically relate to the Nazi past and provide for criminal sanctions. It includes, in particular, the offences of denial, approval and downplaying of the Holocaust and of glorification of the Nazi regime. Until the explicit Holocaust denial ban was introduced, Holocaust denial had been subsumed under incitement to hatred or the offence of insult. The legislator is currently about to introduce a more general ban on denial of genocide, crimes against humanity and war crimes where the statement is likely to incite hatred or violence. The second category of 'explicit non-punitive memory laws' includes only one statute, which allows for the restriction of assemblies at memorial sites. The third group, termed 'quasi-memory laws', gathers diverse provisions with a weaker mnemonic element. They again are divided into two sub-categories, the first being non-specifically history-related laws that turn mnemonic purely through their application. For example, they include the offence of incitement to hatred, insult, and the prohibition of unconstitutional political parties. The second sub-category refers to other laws that aim to root the remembrance of the totalitarian past in society such as the legal framework for memorial days and sites.

Though most of these memory laws appear to comply with European standards, doubts arise in relation to the implementation of the European Union Framework Decision on racism and xenophobia of 2008. The planned expansion of pre-existing denial bans, which has been adopted by the German Bundestag in October 2022 and will still be dealt with in the Bundesrat, would remedy this shortcoming.

Finally, three particularities arising in the specific context of German memory laws and politics are examined: the concept of militant democracy, the growing criticism of the current memory culture, and the 'new right-wing' populism.

ISBN: 978-82-8348-131-0.

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