

ARTICLE19



Germany: Responding to 'hate speech'

2018

Country Report

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Executive summary

This report examines legislation, policies, and practices related to ‘hate speech’ in Germany, with a particular focus on the media. It examines compliance with international freedom of expression standards and offers recommendations for improvement. It also describes recent changes to legislation related to ‘hate speech’, in particular in regard to social media networks.

During the last few years there has been surge of ‘hate speech’ and intolerance in Germany, particularly against refugees, migrants, and asylum seekers. This has been accompanied by a great deal of uncertainty regarding how to respond to the issue of intolerance, resulting in hasty and sometimes contradictory reactions by law enforcement agencies, legislators, policy-makers, and civil society.

Equally, State authorities seem indecisive regarding the interpretation of international freedom of expression standards, privacy, and equality rights in the context of social media and the online environment in relation to ‘hate speech,’ often to the detriment of the right to freedom of expression.

Despite the fairly robust protection afforded to both the right to freedom of expression and equality by German law, the existing legal framework on ‘hate speech’ does not fully comply with international human rights standards. Criminal law does not offer guidance or a threshold test to assist in the assessment of ‘hate speech’ cases. In their jurisprudence, Germany’s highest courts have repeatedly demonstrated that – in an attempt to protect the public debate – they tend to apply the requirement of ‘pursuit of truth’, rather than harm, in ‘hate speech’ cases, in particular those concerning Holocaust denial. Furthermore, higher courts have often issued contradicting decisions in comparable ‘hate speech’ cases, creating legal uncertainty about how relevant provisions should be interpreted by the lower courts. Additionally, the Criminal Code contains a number of provisions on, for example, insult, defamation, defamation of religion, and insult of state symbols, which are contrary to international human rights standards.

Civil law remedies are insufficient to provide redress to victims of ‘hate speech.’ The General Act on Equal Treatment (AGG), which also applies to discrimination in civil law matters, has been criticised for providing a very short period (two months) within which victims can initiate damage claims and injunctions for ‘hate speech.’ The AGG also fails to establish a right of class action for non-governmental organisations (NGOs) working in the field of discrimination.

In the field of administrative law, the 2017 Network Enforcement Law (NetzDG) is particularly problematic. It was introduced to speed up the process of removing online ‘hate speech’ and to reduce ‘hate speech’ on social networks. However,

its provisions are vague and overbroad, it lacks clear definitions, and decisions on ‘hate speech’ cases have been placed with private actors under the penalty of hefty fines; all of this led to pre-emptive censoring of content by social media companies even prior to the adoption of the Law. Since NetzDG entered into force, it has led to over-blocking and the censoring of legitimate speech, including satire and political speech, without any remedy.

In the media law framework, there are a number of positive provisions. All laws on public service broadcasting have provisions related to hatred and discrimination in the media, as well as provisions on pluralism and diversity. Many public broadcasters offer programmes for minorities and immigrant communities in different languages.

Unfortunately, despite a number of initiatives countering ‘hate speech’ and intolerance in the media, the German government has yet to adopt a comprehensive policy on the media and ‘hate speech.’ Additionally, media regulators lack specific guidelines or codes on ‘hate speech,’ and have been criticised for being overly passive and disengaged in this area; they rarely issue reprimands on any grounds. ‘Hate speech’ cases are instead being referred to criminal prosecution.

While Germany has several agencies tasked with promoting anti-discrimination policies and equal opportunities for all groups in society, the Federal Anti-Discrimination Agency has a fairly limited role in addressing ‘hate speech.’ Unlike equality bodies in several European Union countries, it is not mandated to provide legal aid to victims. The Agency cannot act on its own initiative regarding any cases, and does not have a mandate to identify and eliminate structural discrimination in the private or public sector.

Summary of recommendations:

- All relevant legislation – in particular criminal law provisions – should be revised into compliance with the international human rights standards applicable to ‘hate speech.’
- The Criminal Code should undergo comprehensive review: all offences that are not compatible with international freedom of expression standards should be abolished, in particular blanket provisions on Holocaust denial, criminal defamation, and insult, as well as defamation of religion and defamation of state symbols.
- The advocacy of discriminatory hatred which constitutes incitement to hostility, discrimination, or violence should be prohibited in line with Articles 19(3) and 20(2) of the International Covenant on Civil and Political Rights, establishing a high threshold for limitations on free expression (as set out in the Rabat Plan of Action).

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- The Network Enforcement Act (NetzDG) should be repealed, with consideration given to provisions on reporting requirements in alternative legislation to increase transparency around online content moderation by private actors.
 - The Youth Protection Act should be amended: in particular, it should ensure due process procedures for blocking of online content.
 - Germany's anti-discrimination/equality legislation should be amended. Equality institutions should be granted real political and governmental independence, and should be equipped with a more robust mandate to address the problem of discrimination and intolerance. They should be able to provide legal aid to victims, the right to act on their own initiative, and the right to work towards tackling structural discrimination.
 - The Government should develop a comprehensive policy on the media and 'hate speech' in cooperation with public broadcasters and media regulators.
 - The Press Council should increase its internal diversity, and in particular ensure that it includes members from minorities and other groups subject to discrimination. They should also develop further guidelines on reporting on groups subject to discrimination, and streamline the complaint process to prevent individuals being discouraged from bringing claims. Effective measures should be taken to address violation of ethical codes of conduct. The Press Council should also organise regular training courses and updates for professional and trainee journalists on human rights standards on 'hate speech' and freedom of expression, and on the relevant ethical codes of conduct.
 - Public officials, including politicians, should acknowledge that they must play a leading role in recognising and promptly speaking out against intolerance and discrimination, including instances of 'hate speech.' This requires recognising and rejecting the conduct itself, as well as the prejudices of which it is symptomatic; expressing sympathy and support to the targeted individuals or groups; and framing such incidents as harmful to the whole of society. These interventions are particularly important when intercommunal tensions are high, or are susceptible to being escalated, and when political stakes are also high, such as in the run-up to elections.
 - Media organisations and media outlets should also recognise that they play an important role in combatting 'hate speech,' intolerance, and prejudice in the public discourse. They should intensify their efforts to provide adequate responses. They should ensure that they fully respect

relevant ethical codes, as well as ensuring that ethical codes of conduct on 'hate speech' are effectively implemented, and that effective measures are undertaken to address any violations. The ethical codes should be internalised by journalists and media outlets in order to ensure full compliance. Media outlets should also increase ethnic, religious, and gender plurality amongst journalists, editors, media workers, and other employees of public service broadcasters.

Introduction

‘Hate speech’ regulation in Germany stems primarily from experience under Nazi rule and extremist politics. However, the issue of ‘hate speech’ regulation in the country became more prominent recently, in 2015, when the European Union (EU) experienced an increased number of asylum seekers and migrants – the highest number since World War II.

It is estimated that in 2015, 60% (over 700,000) of asylum applications in the EU were filed in Germany.¹ The German public’s initial welcoming attitude towards refugees and asylum seekers in the summer of 2015 was short-lived. It was replaced with irrational fear in the population, populist rhetoric, and even instances of hatred and physical violence against asylum seekers and refugees. In 2017, this led to the Alternative for Germany (AfD), a far-right political party, gaining strength and seats in most regional parliaments.²

Fear of their party losing seats in the elections and to appease growing anti-migrant attitudes, mainstream party politicians changed their approach to migrants in public debates.³ The populist nature of the political debate spilled over into media’s reporting, setting the public discourse tone surrounding what was subsequently dubbed ‘the migrant crisis.’

The nature of political debates fuelled further negative attitudes in the population, not just towards asylum seekers but also other minorities, those with migrant family backgrounds, and even people simply perceived to be too liberal and tolerant.⁴

Media reporting on the ‘migrant crisis’ became increasingly emotional, leaving little space for considered political debate, privileging quick solutions over careful analysis and prejudices over facts. As a result, the discourse, especially on social media, spiralled out of control, forcing traditional media to moderate or even suspend their online comment functions in some cases.⁵

Germany’s legislation, and the jurisprudence of its higher courts, provide a number of legal tools to respond to various forms of ‘hate speech.’ However, the government felt that the best way to deal with the deteriorating discourse in society was to change the regulation of ‘hate speech’ on social media, and to impose a de facto censorship role on social media companies. In 2017, the Federal Parliament passed the ‘Network Enforcement Law’⁶ (commonly known as NetzDG) which establishes an intermediary liability regime for major social media

companies and, through severe administrative penalties, incentivises the removal and blocking of certain content over a 24-hour period. This content includes various forms of ‘hate speech.’

Legislation which was, theoretically, targeted at improving public discourse online has already led to the blocking and withholding of legal (though sometimes tasteless) statements. In the first week of January 2018, Twitter not only deleted a racist tweet by an AfD politician but also censored the satirical reaction to it (and also to Twitter’s subsequent deletion) by satire magazine Titanic, by blocking Titanic’s Twitter account.⁷

The German government and mainstream parties regularly proclaim that it is necessary to listen to minority groups in the population as well as to take into account the concerns and fears regarding immigration and multi-culturalism in the population. However, aside from passing legislation to control public debate, little to nothing seems to have been done by public officials to address those concerns, or meaningfully engage in the public discourse. This lack of comprehensive engagement contributes to the wider failure to address the root causes of hatred, and plays into the hands of radical parties and groups.

In contrast to the state, there are various private initiatives, sometimes using bold tactics. In 2016, Ali Can, a young German resident of Turkish origin, organised various activities to engage in interethnic dialogue to dispel fears of immigration and tackle negative stereotypes of immigrants. During that year, he attended the right-wing demonstrations spreading across Germany. He wore a shirt with the slogan ‘migrant of your trust’, and spoke with several demonstrators. As a result, he founded an intercultural association,⁸ and launched a hotline which people could call to simply express their concerns and ask questions pertaining to immigration and migrants. He also used the hotline to speak about his own personal experience as a young migrant in Germany. Since then, the hotline has been featured in most of the German media, and Ali Can is frequently invited to give talks on interethnic dialogue.⁹

ARTICLE 19 believes that in order to respond to growing concerns about ‘hate speech’ in Germany, it is important that legislation, policies, and practices fully comply with international human rights standards, in particular the right to freedom of expression.

This report examines these areas,¹⁰ in regard to ‘hate speech’ in Germany, with a particular focus on the media. It examines the compliance of relevant legislation with international freedom of expression standards, and offers recommendations for its improvement.

The report is a part of a broader project by ARTICLE 19, carried out in six EU countries (Austria, Germany, Hungary, Italy, Poland, and the United Kingdom) to identify commonalities and differences in national approaches to ‘hate speech,’ specifically in the media, recommend good practices for replication, and identify concerns which should be addressed.

International human rights standards

This review of the German framework on ‘hate speech’ is informed by international human rights law and standards, in particular regarding the mutually interdependent and reinforcing rights to freedom of expression and equality.

The right to freedom of expression

The right to freedom of expression is protected by Article 19 of the Universal Declaration of Human Rights (UDHR)¹¹ and given legal force through Article 19 of the International Covenant on Civil and Political Rights (ICCPR).¹²

The scope of the right to freedom of expression is broad. It requires States to guarantee to all people the freedom to seek, receive, or impart information or ideas of any kind, regardless of frontiers, through any media of a person’s choice. The United Nations (UN) Human Rights Committee (HR Committee), the treaty body of independent experts monitoring States’ compliance with the ICCPR, has affirmed the scope extends to the expression of opinions and ideas that others may find deeply offensive,¹³ and this may encompass discriminatory expression.

While the right to freedom of expression is fundamental, it is not absolute. A State may, exceptionally, limit the right under Article 19(3) of the ICCPR, provided that the limitation is:

- **Provided for by law**, so any law or regulation must be formulated with sufficient precision to enable individuals to regulate their conduct accordingly;
- **In pursuit of a legitimate aim**, listed exhaustively as: respect of the rights or reputations of others; or the protection of national security or of public order (*ordre public*), or of public health or morals; or
- **Necessary in a democratic society**, requiring the State to demonstrate in a specific and individualised fashion the precise nature of the threat, and the necessity and proportionality of the specific action taken, in particular by establishing a direct and immediate connection between the expression and the threat.¹⁴

Thus, any limitation imposed by the State on the right to freedom of expression, including limiting ‘hate speech’, must conform to the strict requirements of this three-part test. Further, Article 20(2) of the ICCPR provides that any advocacy of national, racial, or religious hatred that constitutes incitement to discrimination, hostility, or violence must be prohibited by law (see below).

At the European level, Article 10 of the European Convention on Human Rights (European Convention)¹⁵ protects the right to freedom of expression in similar terms to Article 19 of the ICCPR, with permissible limitations set out in Article 10(2).¹⁶ Within the EU, the right to freedom of expression and information is guaranteed in Article 11 of the Charter of Fundamental Rights of the European Union.

The right to equality

The right to equality and non-discrimination is provided in Articles 1, 2, and 7 of the UDHR.¹⁷ These guarantees are given legal force in Articles 2(1) and 26 of the ICCPR, obliging States to guarantee equality in the enjoyment of human rights, including the right to freedom of expression and equal protection of the law.

At the European level, the European Convention prohibits discrimination in Article 14 and, more broadly, in Protocol No. 12.

Limitations on ‘hate speech’

While ‘hate speech’ has no definition under international human rights law, the expression of hatred towards an individual or group on the basis of a protected characteristic can be divided into three categories, distinguished by the response international human rights law requires from States:¹⁸

- Severe forms of ‘hate speech’ that international law *requires* States to prohibit, including through criminal, civil, and administrative measures, under both international criminal law and Article 20(2) of the ICCPR;
- Other forms of ‘hate speech’ that States *may* prohibit to protect the rights of others under Article 19(3) of the ICCPR, such as discriminatory or bias-motivated threats or harassment; or
- ‘Hate speech’ that is lawful and should therefore be protected from restriction under Article 19(3) of the ICCPR, but which nevertheless raises concerns in terms of intolerance and discrimination, meriting a critical response by the State.

Obligation to prohibit

Article 20(2) of the ICCPR obliges States to prohibit by law “any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence”. In General Comment No. 34, the HR Committee stressed that while States are *required* to prohibit such expression, these limitations must nevertheless meet the strict conditions set out in Article 19(3).¹⁹

The Rabat Plan of Action,²⁰ adopted by experts following a series of consultations convened by the UN Office of the High Commissioner for Human Rights (OHCHR), advances authoritative conclusions and recommendations for the implementation of Article 20(2) of the ICCPR.²¹

- **Incitement.** Prohibitions should only focus on the advocacy of discriminatory hatred that constitutes incitement to hostility, discrimination, or violence, rather than the advocacy of hatred without regard to its tendency to incite action by the audience against a protected group.
- **Six-part threshold test.** To assist in judicial assessments of whether a speaker intends and is capable of having the effect of inciting their audience to violent or discriminatory action through the advocacy of discriminatory hatred, six factors should be considered:
 - **Context:** the expression should be considered within the political, economic, and social context prevalent at the time it was communicated, for example the existence or history of conflict, existence or history of institutionalised discrimination, the legal framework, and the media landscape;
 - **Identity of the speaker:** the position of the speaker as it relates to their authority or influence over their audience, in particular if they are a politician, public official, religious or community leader;
 - **Intent** of the speaker to engage in advocacy to hatred; intent to target a protected group on the basis of a protected characteristic, and knowledge that their conduct will likely incite the audience to discrimination, hostility, or violence;
 - **Content of the expression:** what was said, including the form and the style of the expression, and what the audience understood by this;
 - **Extent and magnitude of the expression:** the public nature of the expression, the means of the expression, and the intensity or magnitude of the expression in terms of its frequency or volume; and
 - **Likelihood of harm occurring, including its imminence:** there must be a reasonable probability of discrimination, hostility, or violence occurring as a direct consequence of the incitement.
- **Protected characteristics.** States' obligations to protect the right to equality more broadly, with an open-ended list of protected characteristics, supports an expansive interpretation of the limited protected characteristics in Article 20(2) of the ICCPR to provide equal protection to other individuals and groups who may similarly be targeted

for discrimination or violence on the basis of other recognised protected characteristics.

- **Proportionate sanctions.** The term “prohibit by law” does not mean criminalisation; the HR Committee has said it only requires States to “provide appropriate sanctions” in cases of incitement.²² Civil and administrative penalties will in many cases be most appropriate, with criminal sanctions an extreme measure of last resort.

The Committee on the Elimination of all forms of Racial Discrimination (the CERD Committee) has also based their guidance for respecting the obligation to prohibit certain forms of expression under Article 4 of the International Convention on the Elimination of all forms of Racial Discrimination (ICERD) on this test.²³

At the European level, the European Convention does not contain any obligation on States to prohibit any form of expression, as under Article 20(2) of the ICCPR. However, the European Court of Human Rights (European Court) has recognised that certain forms of harmful expression must necessarily be restricted to uphold the objectives of the European Convention as a whole.²⁴ The European Court has also exercised particularly strict supervision in cases where criminal sanctions have been imposed by the State, and in many instances it has found that the imposition of a criminal conviction violated the proportionality principle.²⁵ Recourse to criminal law should therefore not be seen as the default response to instances of harmful expression if less severe sanctions would achieve the same effect.

At the EU level, the Council’s framework decision “on combating certain forms and expressions of racism and xenophobia by means of criminal law”²⁶ requires States to sanction racism and xenophobia through “effective, proportionate and dissuasive criminal penalties”. It establishes four categories of incitement to violence or hatred offences that States are required to criminalise with penalties of up to three years. States are afforded the discretion of choosing to punish only conduct which is carried out in “a manner likely to disturb public order” or “which is threatening, abusive, or insulting”, implying that limitations on expression not likely to have these negative impacts can legitimately be restricted. These obligations are broader and more severe in the penalties prescribed than the prohibitions in Article 20(2) of the ICCPR, and do not comply with the requirements of Article 19(3) of the ICCPR.²⁷

Permissible limitations

There are forms of ‘hate speech’ that target an identifiable individual, but that do not necessarily advocate hatred to a broader audience with the purpose of inciting discrimination, hostility, or violence. This includes discriminatory threats

of unlawful conduct, discriminatory harassment, and discriminatory assault. These limitations must still be justified under Article 19(3) of the ICCPR.

Lawful expression

Expression may be inflammatory or offensive, but not meet any of the thresholds described above. This expression may be characterised by prejudice and raise concerns over intolerance, but does not meet the threshold of severity at which restrictions on expression are justified. This also includes expression related to the denial of historical events, insult of State symbols or institutions, and other forms of expression that some individuals and groups might find offensive.

This does not preclude States from taking legal and policy measures to tackle the underlying prejudices of which this category of ‘hate speech’ is symptomatic, or from maximising opportunities for all people, including public officials and institutions, to engage in counter-speech.

Freedom of expression online

International law

At the international level, the UN Human Rights Council (HRC) recognised in 2012 that the “same rights that people have offline must also be protected online.”²⁸ The HR Committee has also made clear that limitations on electronic forms of communication or expression disseminated over the Internet must be justified according to the same criteria as non-electronic or ‘offline’ communications, as set out above.²⁹

While international human rights law places obligations on States to protect, promote, and respect human rights, it is widely recognised that business enterprises also have a responsibility to respect human rights.³⁰ Importantly, the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression (Special Rapporteur on FOE) has long held that censorship measures should never be delegated to private entities.³¹ In his June 2016 report to the HRC,³² the Special Rapporteur on FOE enjoined States not to require or otherwise pressure the private sector to take steps that unnecessarily or disproportionately interfere with freedom of expression, whether through laws, policies, or extra-legal means. He further recognised that “private intermediaries are typically ill-equipped to make determinations of content illegality,”³³ and reiterated criticism of notice and take-down frameworks for “incentivising questionable claims and for failing to provide adequate protection for the intermediaries that seek to apply fair and human rights-sensitive standards to content regulation,” i.e. the danger of “self- or over-removal.”³⁴

The Special Rapporteur on FOE recommended that demands, requests, and other measures to take down digital content must be based on validly-enacted law, subject to external and independent oversight, and must demonstrate a necessary and proportionate means of achieving one or more aims under Article 19(3) of the ICCPR.³⁵

In their 2017 Joint Declaration on “freedom of expression, ‘fake news’, disinformation and propaganda”, the four international mandates on freedom of expression expressed concern at “attempts by some governments to suppress dissent and to control public communications through [...] efforts to ‘privatise’ control measures by pressuring intermediaries to take action to restrict content.”³⁶ The Joint Declaration emphasises that intermediaries should never be liable for any third party content relating to those services unless they specifically intervene in that content or refuse to obey an order adopted in accordance with due process guarantees by an independent, impartial, authoritative oversight body (such as a court) to remove it, and they have the technical capacity to do so. They also outlined the responsibilities of intermediaries regarding the transparency of and need for due process in their content-removal processes.

European law

At the EU level, the E-Commerce Directive requires that Member States shield intermediaries from liability for illegal third party content where the intermediary does not have actual knowledge of illegal activity or information and, upon obtaining that knowledge, acts expeditiously to remove or disable access to the content at issue.³⁷ The E-Commerce Directive prohibits Member States from imposing general obligations on intermediaries to monitor activity on their services.³⁸ The regulatory scheme under the E-Commerce Directive has given rise to so-called ‘notice-and-takedown’ procedures, which have been sharply criticised by the special mandates on freedom of expression for their lack of clear legal basis and basic procedural fairness.

The limited shield from liability for intermediaries provided by the E-Commerce Directive has been further undermined by the approach of the European Court. In *Delfi AS v. Estonia*, the Grand Chamber of the European Court found no violation of Article 10 of the European Convention where a national court imposed civil liability on an online news portal for failure to remove “clearly unlawful” comments posted to the website by an anonymous third party, even without notice being provided.³⁹ A joint dissenting opinion highlighted that this “constructive notice” standard contradicts the requirement of actual notice in Article 14 para 1 of the E-Commerce Directive, necessitating intermediaries to actively monitor all content to avoid liability in relation to specific forms of content, thus additionally contradicting Article 5 of the E-Commerce Directive.⁴⁰

Decisions subsequent to *Delfi AS* appear to confine the reasoning to cases concerning ‘hate speech’.⁴¹ More recently, the European Court rejected as inadmissible a complaint that the domestic courts had failed to protect the applicant’s right to privacy by refusing to hold a non-profit association liable for defamatory comments posted to their website by a third party. The Court noted that the comments were not ‘hate speech’ or direct threats and were removed upon notice (though a formal notice-and-takedown procedure was not in place).⁴² The position and resources of the intermediary were also relevant factors.⁴³

Lastly, the 2016 European Commission’s Code of Conduct on Countering Illegal Hate Speech,⁴⁴ developed in collaboration with some of the major information technology companies, constitutes a (non-legally binding) commitment to remove “illegal hate speech,” defined on the basis of the Framework Decision on Combatting Certain Forms and Expressions of Racism and Xenophobia by Means of Criminal Law,⁴⁵ within 24 hours. While the Code of Conduct is ostensibly voluntary, it is part of a concerning trend whereby States (including through intergovernmental organisations) are increasing pressure on private actors to engage in censorship of content without any independent adjudication on the legality of the content at issue.⁴⁶

In short, the law on intermediary liability remains legally uncertain in Europe, with tensions between the European Court’s jurisprudence and the protections of the E-Commerce Directive, as well as the guidance of the international freedom of expression mandates.

Basic legal guarantees

An enabling environment for freedom of expression and the right to equality

Legal protection of the right to freedom of expression

The German Constitution⁴⁷ – the Basic Law of the Federal Republic of Germany (the Basic Law) – guarantees protection of the right to freedom of expression in Article 5.⁴⁸ The right to freedom of information – although not explicitly provided for in the Basic Law – is recognised in the federal legislation⁴⁹ and in the legislation of most German federal states.

The Basic Law allows the limitation of the right to freedom of expression:

- “In the provisions of general laws, in provisions for the protection of young persons, and in the right to personal honour;”⁵⁰
- In “specific circumstances” (for instance for those serving in the military and alternative forces);⁵¹
- Under Article 18 of the Basic Law,⁵² whoever “abuses the freedom of expression, in particular the freedom of the press” can forfeit the right. The forfeiture of this right is subject to the decision of the Federal Constitutional Court (the Constitutional Court), under the procedure and criteria outlined in the Law on the Federal Constitutional Court.⁵³ According to these criteria, when making the decision, the Constitutional Court may limit the forfeiture to a specific period of time,⁵⁴ while the Court is bound to the principles of necessity and proportionality.⁵⁵ This measure is, however, a last resort: the case must reach the high threshold of constituting a threat to the “free democratic basic order;” a mere disrespect or rejection of the fundamental democratic principles is not sufficient.⁵⁶ So far, Article 18 has been invoked only four times since being in force; all cases concerned German defendants with right-wing affiliations who disseminated racist, anti-Semitic, and/or nationalistic content. All cases have been dismissed by the Constitutional Court as insufficiently substantiated;⁵⁷ and
- Article 19 of the Basic Law states that any limitation of fundamental rights must be based on a *lex generalis* (that is, a law that applies generally, and not merely to a single case), and in no case may the essence of a basic right be affected.⁵⁸

Guarantees to the protection of the right to freedom of expression are also provided in the press and media laws of 16 German federal states. Each state has adopted its own press/media law, as legislative competences in the field of press law lie with the states.⁵⁹ All these laws explicitly state that the freedom of the press may only be limited pursuant to provisions stipulated in the Basic Law, and they guarantee that any journalistic and publishing activities by the press shall be free of any licensing.

Further, the federal state laws oblige public institutions to grant access to information to members of the media, and also regulate the right to reply. Some of the federal state laws regulate the confiscation (and the limitations thereof) of published works.

Legislative initiatives on the right to equality

The Basic Law guarantees protection of the right to equality in Articles 2 and 3.⁶⁰ The main anti-discrimination legislation is the 2006 General Act on Equal Treatment (AGG)⁶¹ through which Germany transposed four EU anti-discrimination directives.⁶² The AGG established the Federal Anti-Discrimination Agency within the Federal Ministry for Family Affairs, Senior Citizens, Women and Youth, which carries out a number of tasks related to discrimination.

Additional protection against gender discrimination is provided in the 2015 Federal Act on Gender Equality⁶³ which deals with various measures to achieve gender equality and eliminate gender discrimination, in particular discrimination against women, including in labour relations. It obliges every federal agency, court, and enterprise with more than 100 employees (as well as the highest authorities with fewer staff) to appoint a female equal opportunity officer to promote and monitor the enforcement of the Act by the respective agency.⁶⁴

In 2015, the German Parliament also adopted the Act on Equality between Women and Men in Executive Positions in Private Sector and Public Service.⁶⁵ It requires around 100 German companies to ensure no gender forms less than a 30% minority in executive bodies, leading to a *de facto* quota for women in these companies. In listed companies in which the state has shares, the quota is set to rise to 50% as of 2018. So far, given their structure and size, media organisations are not included among these companies, as they are too small or not state-owned.

This federal legislation is supplemented by the respective gender equality legislation of the 16 federal states; that is, by regional and communal public administration, courts, and publically owned enterprises.⁶⁶

Protection against discrimination on the basis of disability is provided in Book IX of the Social Security Code,⁶⁷ and in the Act on Equal Opportunities of Disabled People.⁶⁸ Similar to other areas of discrimination, 16 federal states have adopted their own legislation on equal opportunities for people with disabilities employed in federal state administration. These laws provide for the same rights at regional and communal level and establish commissioners for matters relating to equal employment opportunities for people with disabilities.⁶⁹

Criminal law restrictions on ‘hate speech’

Criminal provisions directly restricting ‘hate speech’

The primary piece of criminal legislation prohibiting ‘hate speech’ in Germany is the Criminal Code,⁷⁰ which contains a number of relevant provisions against the most serious types of ‘hate speech’ and hate crimes. Hate crimes are categorised as ‘bias-motivated’ crimes (*Vorurteilsdelikte*) and ‘symbolic’ crimes (*Botschaftsverbrechen*).

Regarding bias-motivated crimes, Section 46 para 2 of the Criminal Code stipulates that racist, xenophobic, and other inhumane or contemptuous motives are an aggravating circumstance to be taken into account when establishing the grounds for sentencing for any crime under the Criminal Code. These provisions were introduced into criminal law following a series of murders and bombings by the National Socialist Underground (NSU) – a far-right German terrorist group which was uncovered in 2011.

Racially or ethnically motivated crimes are considered ‘politically motivated crimes’ that target “the political attitude, nationality, ethnicity, race, colour, religion, worldview, origin, sexual orientation, disability, external appearance or social status”⁷¹ of the victim. Bias-motivated crimes, in order to be defined as such, have to be carried out as ‘message crimes.’

Symbolic crimes include:

- Incitement to hatred: Section 130 of the Criminal Code prohibits incitement to hatred, incitement to violence, and incitement to arbitrary measures “against a national, racial, religious group or a group defined by their ethnic origins;”⁷²
- Attempting to cause the commission of offences by means of publication, which is prohibited in Section 130a;⁷³
- Dissemination of propaganda material of unconstitutional organisations, as prohibited in Section 86;⁷⁴ and
- Using symbols of unconstitutional organisations, as prohibited in Section 86a of the Criminal Code.⁷⁵

When assessing these provisions on incitement offences in the light of international freedom of expression standards, the following key features should be mentioned:

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- **Key terms:** Terms such as ‘hatred’ or ‘propaganda’ are not well-defined in the Criminal Code. Only a definition of prohibited ‘symbols’ of unconstitutional organisations is provided;⁷⁶
 - **Intent:** The provisions do not require specific intent to commit these crimes. However, according to the Criminal Code, the courts should consider various factors when imposing sentences, including “the motives and aims of the offender” or “the attitude reflected in the offence;”⁷⁷
 - **Protected grounds:** Protected characteristics cover incitement against “a national, racial, religious group or a group defined by their ethnic origins, against the segments of the population or individuals because of their belonging to one of the aforementioned groups or to segments of the population.” The wording “a segment of the population” is considered broad and, in practice, covers grounds that are not explicitly mentioned, such as disability or gender and sexual orientation. The wording “national, racial, religious group or a group defined by their ethnic origins” was added by the March 2011 Amendment to the Criminal Code. It was introduced to implement the EU Framework decision on racism⁷⁸ and the Additional Protocol to the Cybercrime Convention of the Council of Europe;
 - **Prohibited conduct** in the provisions of the Criminal Code goes beyond the provisions of Article 20 para 2 of the ICCPR. A broad range of conduct is prohibited:
 - “Incitement to hatred” of protected groups;
 - “Calls for violent or arbitrary measures” against protected groups, “assaulting human dignity of others by insulting, maliciously maligning” protected groups;
 - “Defaming” them, disseminating written materials, publicly displaying, posting, presenting or make accessible otherwise written materials that incite hatred or violent or arbitrary measures;
 - Offering, supplying, stocking, importing or exporting, or making accessible publications and written materials to the public or to persons under 18 years of age, including via broadcast media or telecommunication services. “Material” includes sound, image, and data storage media;⁷⁹
 - Disseminating publications “capable of serving as an instruction for an unlawful act,” or encouraging others to commit such an act, as defined by Section 126; these acts include, *inter alia*, breach of ‘public peace,’ genocide, crimes against humanity, and war crimes. Such materials, if intentionally disseminated or intended for such dissemination, can be confiscated and destroyed, alongside the equipment for the production of such material;⁸⁰

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- Disseminating, producing, stocking, importing, exporting, or making publicly accessible through data storage media for dissemination within Germany or abroad the propaganda of certain unconstitutional organisations, “the content of which is directed against the free, democratic constitutional order or the idea of the comity of nations.”⁸¹ Exceptions are made if the act is “meant to serve civil education, to avert unconstitutional movements, to promote art or science, research or teaching, the reporting about current or historical events, or similar purpose;”
 - Domestically distributing or publicly using (in a meeting or through written materials) symbols of one of certain unconstitutional organisations; or producing, stocking, importing, or exporting objects which depict or contain such symbols for distribution or use in Germany or abroad.⁸²
 - Importantly, prohibited conduct extends to denial of the Holocaust and other crimes committed under Nazi rule: Section 130 paras 3 and 4 prohibit, *inter alia*, “approving of, denying, or downplaying” an act committed under the rule of National Socialism, either “publicly or in a meeting” and “approving of, glorifying, or justifying National Socialist rule of arbitrary force.” The ‘Holocaust denial’ provisions of Article 130 para 3 were introduced to the Criminal Code in November 1994, following the decision of the Constitutional Court;
 - Furthermore, Section 130 para 4 prohibits “approving of, glorifying, or justifying National Socialist rule of arbitrary force.” It was introduced in 2005 as a response to the steady increase of right-wing extremist demonstrations, reminiscent of the style of historical marches of the Nazi regime; these demonstrations were taking place shortly before the 60th anniversary of the end of World War II. The amended wording aimed to prohibit these assemblies, particularly if held in places symbolic to the victims of organised, inhumane treatment under the Nazi regime. However, the wording ‘glorifying’ is vague and overbroad, and the provision has been criticised for preventing the distinction “between permissible expression and illegal speech;”⁸³
 - It should be noted that since 1994, Constitutional Court jurisprudence distinguishes between “simple” and “qualified” Holocaust denial,⁸⁴ both punishable under the criminal law.⁸⁵
 - “Simple” Holocaust denial consists either of a blanket denial of the fact that genocide took place, or the denial of one or more so-called ‘essential’ characteristics of the Holocaust.⁸⁶ These include expressions that the magnitude of the genocide is grossly exaggerated, for example, statements such as “the Holocaust never happened,” or “the number of Jews killed is inflated;”⁸⁷ and

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- A “simple” denial of the Holocaust becomes “qualified” Holocaust denial when accompanied by additional normative conclusions or calls to action.⁸⁸ This includes the denigration of the Jewish people and the identification with Nazi ideology, for example the sentence “something should be done about the use of extortion as a political tool against Germany by Jews spreading lies about.”⁸⁹
 - The Criminal Code does not outline a specific test for assessing incitement cases. However, Section 46 of the Criminal Code⁹⁰ lists a number of criteria which the courts should consider when deciding on sentencing. These include, *inter alia*, “the motives and aims of the offender,” attitude, harm caused, the degree of violation, the modus operandi, and the prior history of the offender. The 2015 amendment of the Criminal Code expanded these provisions to include “racist, xenophobic and other inhumane or contemptuous motives as an aggravated circumstance.”⁹¹

Importantly, there is no need to assess the immediacy of danger of expression (e.g. immediacy of violence or discrimination). The incitement offences are considered “abstract endangerment offence” (*abstraktes Gefährdungsdelikt*), which means that courts can pronounce a sentence even if there is no actual or imminent danger or disruption to the public peace.⁹²

Interpretation of criminal provisions directly restricting ‘hate speech’

German courts do not follow any specifically enumerated test for assessment of the cases under these provisions, such as the test outlined in the Rabat Plan of Action. However, the scope and several aspects of the above provisions of the Criminal Code have been clarified in the jurisprudence of high courts. The following issues are of particular relevance:

- **Intent:** In their jurisprudence, higher courts have not provided any guidance on the intention required to reach the threshold of the crime. The courts only consider the intent of the actual conduct, for example intent to disseminate the publication, rather than the intent to cause harm;⁹³
- Criterion of **pursuit of truth, rather than harm:** In the 1994 Irving Case,⁹⁴ the Constitutional Court interpreted the provisions on denial of Holocaust (as provided by law at the time): the Court did not assess whether the expression caused certain harm, but examined whether it was true. The case did not concern a criminal conviction, but arose out of an administrative proceeding. It concerned the Munich/Upper-Bavarian branch of the National Democratic Party (NPD), who invited the historian David Irving (widely seen as a revisionist of the extreme right wing) to

a lecture and an assembly. The municipal authorities of Munich, when notified of the planned assembly by the NPD, issued an order prohibiting Irving, other speakers, and the participants of the assembly from denying the persecution of Jews during the Third Reich, on the grounds that denials would constitute criminal acts under, *inter alia*, Article 130 of the Criminal Code.

In its decision, the Constitutional Court acknowledged the difference between statements of fact and opinions (that “cannot be proved true or untrue,” and are thus fully protected).⁹⁵ However, the Constitutional Court argued that statements of fact were “in the strict sense not statements of opinion. In contrast to such statements, the objective relationship between the statement and the reality predominates,” and that it was possible to establish the truthfulness of such statements.

Consequently, the Court found that the protection of statements of fact “ends at the point where they cease to contribute anything to the formation of [public] opinion that is presupposed in constitutional law.” It concluded that “incorrect information” and “assertion of facts known or proved to be untrue” are not constitutionally protected under the right to freedom of expression and that the State’s interest in promoting the truth “is not furthered by permitting the spread of clearly false statements.”⁹⁶

This is in contrast with the test laid out by international standards, which does not examine the value of the expression, but rather judges whether the restriction pursues a legitimate aim and whether it is necessary and proportionate to that aim.

Defining truth is not a legitimate objective under the provisions of the ICCPR (in contrast to the protection of the rights of others). Having said this, the Constitutional Court did recognise that the clear distinction of statements of facts from opinions might prove difficult, as both are often interconnected. It concluded that, if no distinction was possible, the statement shall be regarded as an expression of opinion and should enjoy full constitutional protection;

- **Manner of distribution and the size of the audience:** In subsequent cases, the Constitutional Court narrowed the scope of Holocaust denial provisions in favour of freedom of expression under certain circumstances. For example, in a November 2011 ruling,⁹⁷ it specified that the constitutional protection of “untrue” statements of facts would depend on the form of their distribution and the size of the audience. The applicant, an advocate of National Socialist ideology, publicly criticised a TV documentary on World War II in a pub. Two days after the broadcast, he gave written materials disputing certain facts about the Holocaust to the pub owner,⁹⁸ allegedly to educate him about purportedly factual historical events. The

materials asserted that it was scientifically proven that there had not been any gas chambers for people, and that the Holocaust committed on the Jews was a “convenient lie” making it possible to attribute guilt for World War II to Germany. No third parties had been present during the act. The applicant was convicted for incitement to hatred.⁹⁹

In its decision, the Constitutional Court found that the nature of the opinion itself was not a reason to ban the content. Instead, it stated that “only the manner of communication, which already tangibly gives rise to overstepping the line to violating legal interests, and crosses the threshold to an immanent violation of legal interests.” The Court stressed that, while information in the material was proven to be an “untrue statement of fact” and as such was not protected, not all such types of expression were punishable under the respective provisions of the Criminal Law. Punishment can be imposed on the person responsible only for “dissemination which takes place if written material is made available to a larger group of individuals which can no longer be controlled;”¹⁰⁰

- **Definition of “dissemination”:** In the same 2011 case, the Constitutional Court defined the scope of “dissemination” as making the material available “to a group of individuals whose size becomes uncontrollable.”¹⁰¹ It found that a mere passing on of written material would not constitute an offence of dissemination “if it is not ascertained that the third party for his/her part will pass on the written materials to further individuals.”¹⁰² Hence, the mere act of passing the material to one specific individual in itself would not constitute the offence of dissemination, unless they also further distribute the material;
- **The meaning of the expression:** Further criteria for assessing the incitement cases were outlined by the Constitutional Court decision in March 2017.¹⁰³ It concerned an applicant who published on his website an article entitled “Conspiracy,” which, *inter alia*, included the sentence “Strange as it may seem, but since 1944 not a single Jew was deported to Auschwitz.” He was convicted for aiding and abetting the incitement to hatred against segments of the population.¹⁰⁴

The Constitutional Court stipulated that, in order to determine whether a statement was protected under freedom of expression, the law requires that “the specific meaning of the statement in question has been accurately established.” In case of ambiguous statements, “compelling reasons” must be provided as to “why other possible interpretations were disregarded” in order to justify the conviction. In this particular case, the Constitutional Court found that the word “since” in the publication did not refer to a point in time, but rather describes a period. The judgment criticised lower courts for only focusing on the introductory part of the sentence (“strange as it may seem”) and interpreting the statement as referring to the entire year of 1944, without considering other “equally

plausible interpretation” and “context and other relevant circumstances of the matter.” The Constitutional Court concluded that the words “strange as it may seem” alone did “not constitute a viable basis for attributing to the applicant’s statement the [ascribed] meaning;”

- **Jurisdiction:** The 2000 Töben Case was important for establishing jurisdiction in cases when the defendant only acted abroad but “the success of the offense” occurred in Germany.¹⁰⁵ The applicant, a German-born Australian citizen, in his capacity as director of the Australian Adelaide Institute, published English-language newsletters and articles promoting revisionist ideas. The materials were uploaded onto the Institute’s website, hosted by a server in Australia. In one incident, the applicant sent an open letter (in English) to a German judge for sentencing a person for insulting a Jewish survivor and uploaded the letter online. In two other cases, he posted on the site two articles denying the genocide against the Jewish people, under the pretext of scientific research. Although the District Court could not establish whether or how many persons in Germany (apart from the investigating police officer) had downloaded the online articles of the latter two cases, it established that the offence falls within the scope of Section 130 para 1 and 3 of the Criminal Code on incitement to hatred; and therefore he was found guilty of the offence. However, since the defendant was an Australian citizen living outside of Germany, the Criminal Code would not cover a sentencing pursuant to Section 130.

The Federal High Court overturned this decision, focusing on the fact that the impact of the offence occurred in Germany, regardless of the place where the offence was committed.¹⁰⁶ It concluded that the case fell under Section 130 paras 1 and 3 as the acts were committed “in a manner capable of disturbing the public peace” within Germany – regardless of the language used. The High Court found, *inter alia*, whether the public peace has actually been disturbed or whether the danger caused was imminent or likely to occur was not a necessary component of the crime; and

- **Matters of public concern:** In incitement cases, high courts tend to protect “public opinion” about the group targeted by the expression. An example of this approach is The Fraudulent Asylum Seeker Poem Case of 1994, in which the writer of the poem made exaggerated allegations about the abuse of the right to asylum by asylum seekers, and Germany’s toleration of that abuse. Although writing and publishing poems is generally protected under the Basic Law,¹⁰⁷ the courts interpreted this poem as incitement to hatred under Section 130 of the Criminal Code.

The Court concluded that the expression attacked the human dignity of all asylum seekers: “because the people concerned are generally and

therefore without justification accused of spreading AIDS; of seducing children into taking drugs; of being particularly despicable, ungrateful parasites; and of, morally speaking, not even reaching the lowest level of human existence.”¹⁰⁸ The Frankfurt Higher Regional Court overturned the decision, stating that “the unspecified legal term ‘attack on human dignity’ covers only actions by which people’s identity and integrity are so deeply affected that they are denied their right to life within the community. This is not the case with the abusive poem.”¹⁰⁹

The courts came to the same conclusions in subsequent cases regarding materials by the right-wing NPD, which accused foreigners and asylum seekers of being responsible for high-levels of crime and being the primary suppliers of illegal drugs in Germany.¹¹⁰

Criminal provisions indirectly restricting ‘hate speech’

Although the Criminal Code does not explicitly state this, the provisions of the Criminal Code on insult¹¹¹ (Section 185) and several criminal defamation provisions (under Sections 186–189)¹¹² are applicable to ‘hate speech’ cases. Both deal with disparaging statements made in the presence of third parties, but set different qualifiers.

These provisions are applicable in cases when an individual or a group (defined by protected characteristics) is targeted by these offences. A bias motivation (as per Section 46 para 2 of the Criminal Code) is an aggravating circumstance in insult and defamation offences in sentencing.

In particular, the jurisprudence distinguishes between two types of group defamation:

- **Collective defamation** (*Kollektivbeleidigung*) means targeting certain organisations performing “recognized social tasks that are capable of forming a common will on account of their organisational structure and existing independently of any change in membership,” such as the Central Council of Jews in Germany;¹¹³ and
- **Defamation against members of the group** (*Sammelbeleidigung* or *Beleidigung von Einzelpersonen unter einer Kollektivbezeichnung*) means targeting members of the group identified by protected characteristics, for example, “Jews use the Holocaust to extort money from Germany.”

Higher courts’ jurisprudence provides further guidance on the application of these provisions that can be applied in ‘hate speech’ cases.¹¹⁴ In particular:

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- A small, rather than a large, group is attacked;
 - The group is clearly distinguishable by external signs from the general public;
 - Statements target all members of the group rather than single or typical members; and
 - Statements are based on unalterable criteria or on criteria that are attributed to the group by the larger society around them instead of by the group itself.¹¹⁵

The German courts are likely to apply these provisions when a group is targeted based on “ethnic, racial, physical or mental characteristics from which the inferiority of a whole group of persons and therefore simultaneously each individual member is deduced.”¹¹⁶

For example:

- In the 1952 Hedler Case, the Federal High Court of Justice (BGH) found that the term ‘traitors to the nation’ (*Vaterlandsverräter*), used to describe members of the resistance, amounted to insult of a group pursuant to Section 185 of the Criminal Code.¹¹⁷ This view was upheld in a further decision by the BGH in May 1958;¹¹⁸ and
- In a 1958 case, the BGH held that Jewish people that were persecuted under the Nazi-regime had been insulted as a group by the sentence: “A Jew is like a louse, crawling into fur and remaining there,” written on a postcard.¹¹⁹ The Court reiterated that an expression can offend or disparage members of a group if this group is clearly defined. In this case not as Jews but Jewish people persecuted under the Nazi regime.

Additionally, German criminal law contains a number of provisions affecting ‘hate speech’ which are problematic from a freedom of expression perspective. These include defamation of religions and religious and ideological associations in a manner that is capable of disturbing the public peace (Section 166 of the Criminal Code).¹²⁰ Although these provisions have not been applied in ‘hate speech’ cases, they are linked to ‘hate speech’ through NetzDG, in which they are referenced as a category of “unlawful content” that social networks must remove from their platforms within 48 hours of receipt.

These provisions require the offence to be committed with wilful intent, including a regard to the public nature of the act. However, no actual or imminent danger to the public peace is required; legitimate reasons to fear for the disturbance of public peace are sufficient grounds for sentencing. Furthermore, it is sufficient for the insulting statements to be received by the addressees, and it is not required that statements are made directly to them.¹²¹ In this regard, even the distribution

of single piece of writing or the publishing of a magazine aimed at ‘enlightened readers’ fulfil the definition of the offence, regardless of whether the defamed group is aware of the defamatory statement.¹²²

However, as invoking Section 166 requires the offence to be committed with wilful intent, emotionally loaded spontaneous utterances against only one member of a religious community fall outside its scope.¹²³

These provisions have not yet been applied in cases where disparaging statements were made against religious believers or in cases where religious affiliation or belief is a protected characteristic. However, their existence in the criminal legislation, and inclusion in legislation targeting ‘hate speech’ on social media is extremely problematic.

Efforts to amend existing criminal legislation on ‘hate speech’

There are currently no legislative initiatives underway to amend the existing provisions related to ‘hate speech’ under the Criminal Code.

Measures against ‘hate speech’ in administrative law

Administrative provisions directly restricting ‘hate speech’

There are several administrative laws directly applicable to ‘hate speech’ at present.

- The first is the Public Meetings Law,¹²⁴ which stipulates that those who participate in assemblies that promote the objectives of a party whose adherents seek to undermine or abolish a free democratic order or endanger the existence of the Federal Republic of Germany or a party which was declared as unconstitutional or substitute organisation of such party,¹²⁵ forfeit their right to freedom of expression and assembly.¹²⁶ However, the use of ‘hate speech’ is not sufficient to declare parties unconstitutional.

So far, the Constitutional Court has only on two occasions since the 1950s declared parties to be unconstitutional: a successor party to the NSDAP (the National Socialist German Workers’ Party, the Nazi Party) and the Communist Party of Germany (KPD). In the KPD case, the Court ruled that it is not sufficient that a party endangers the free democratic order; its actions must be characterised by unconstitutional behaviour and active, aggressive, and fierce actions against the public order.

All attempts to have the far-right NPD declared unconstitutional have failed. In the first case (2003) this was because the government used undercover agents and the Court ruled that declaring a party to be unconstitutional requires the adherence to rule of law principles, which had been violated by the use of espionage. In 2017, the Constitutional Court again ruled against declaring the party as unconstitutional, as it could not establish that the party could successfully pursue its “constitution-hostile” goals, due to its insignificance and small size; the Court did however declare that the party was hostile to the constitution. As a result, the Basic Law was amended to provide for the exclusion of “constitution-hostile” parties from public party financing,¹²⁷ without having to have them declared illegal.

- The Law on Associations¹²⁸ stipulates that an association can be dissolved by the state “if it violates penal law, exceeds its statutory scope, or is no longer in line with the terms of its legal status,” which might include the above-listed provisions of the Criminal Code. These provisions have been

applied to far-right associations which style themselves as ‘successors’ to institutions of the Nazi regime, like the *Hitlerjugend* (Hitler Youth). Since World War II, there have been 17 associations banned at federal level, and approximately 75 at state level.

- NetzDG¹²⁹ was adopted in June 2018, and aims to reduce ‘hate speech’ on social media by obliging intermediaries to delete or block such content upon notification within 48 hours. The key elements of NetzDG are as follows:

- NetzDG applies to “social networks” – defined as “telemedia service providers which, for profit-making purposes, operate Internet platforms which are designed to enable users to share any content with other users or to make such content available to the public.”¹³⁰ Platforms “offering journalistic or editorial content, the responsibility for which lies with the service provider itself,” are excluded from the definition.¹³¹

Certain parts of the Law only apply to social networks with more than two million users in the Federal Republic of Germany.¹³² The explanatory memorandum to the Law speaks of “three social network companies” which fall under the remit of the law, with a “further seven being potentially covered;”¹³³

- NetzDG outlines “unlawful content” that social networks have to block or remove, which includes a number of ‘hate speech’ offences, including incitement, insult, and defamation;¹³⁴
- It requires social networks to adopt a particular approach to the removal and blocking of ‘unlawful content’ in response to user-generated complaints or complaints sent by other bodies. It requires social networks to block or delete “content that is manifestly unlawful” within 24 hours of receipt (or a longer term, to be determined between a social network and relevant law enforcement authority), and “unlawful content” within seven days of receipt (describing this, somewhat incongruously, as “immediate” in the English-language version).¹³⁵

It establishes an administrative offence for a social network to fail to “provide, to provide correctly or to provide completely” a procedure in conformity with the requirements of the Law,¹³⁶ and establishes administrative penalties of up to 5 million Euros for such violations. However, the potential application of the Act on Regulatory Offences enables the fine to be multiplied ten-fold, to 50 million Euros. The Act on Regulatory Offences also establishes a process for imposing liability for failures to remove or block content.¹³⁷ The explanatory memorandum clarifies that single misdemeanours would not lead to an administrative offence and fines: for those to be established a reoccurring and

systematic breach of rules would be required. The Law does, however, foresee that an administrative offence may be sanctioned even if committed outside of German jurisdiction;

- NetzDG provides that an applicable procedure by a social network may be subject to monitoring by an agency tasked to do so by the Federal Office for Justice. It also provides for the appointment of a person authorised to receive service in relation to procedures under the Law or in judicial proceedings, and this person is obliged to respond to requests from law enforcement within 48 hours of receipt.¹³⁸ This is an equivalent to an editor's responsibility, according to German press law.

NetzDG has been broadly criticised for its vague and overbroad provisions, for its lack of clear definitions, and for privatising censorship. There are also challenges to its constitutionality in relation to federal states.¹³⁹ Although it does not create new 'hate speech' prohibitions, it compels content removal on the basis of a number of provisions in the Criminal Code. As noted above, many of these provisions raise serious freedom of expression concerns. Deputising private companies to engage in censorship on the basis of these provisions is deeply troubling.

Moreover, the obligation to remove or block content applies without any prior determination of the legality of the content in issue by a court, and gives no guidance to social networks on respecting the right to freedom of expression in 'hate speech' determinations. Private enterprises are not competent to make these complex factual and legal determinations, and NetzDG provides no recourse to users whose content is blocked or deleted unfairly. There have also been concerns raised about the capacity of social media companies to equip their staff with the knowledge and expertise to carry such assessment.¹⁴⁰ Though NetzDG creates a system for recognising "self-regulation institutions" as secondary review bodies for "unlawful content," this recognition is conditional and held by the Federal Office of Justice (*Bundesamt für Justiz*), an administrative body not insulated from political influence. The Federal Office of Justice is the central service authority of the Federal German judiciary.¹⁴¹

There have been concerns that social networks will be over-zealous in deleting or blocking content under the law. Some providers, such as Twitter, started to remove content even before NetzDG was adopted. Between April and May 2017, 251 Twitter accounts were temporarily suspended, 10 were blocked, and 11 deleted.¹⁴² Most of the affected tweets and accounts concerned right-wing or extremist content, but many contained protected speech – such as simply bad taste jokes or factually incorrect statements. Twitter also blocked, but later unblocked, the account of comedian Jan Böhmermann who (under alias 'Adolf Twitler' at @therealfuehrer) mocks Donald Trump, Nazi behaviour, and German politics.¹⁴³ Another blocked account belonged to the Liberal Democratic Party

politician who, in a June tweet, pointed out the low participation in an anti-terrorism demonstration by Muslims in Cologne compared to that of an anti-Israel demonstration in Berlin. The tweet was withheld based on “possible violations of guidelines pertaining to hate speech.”¹⁴⁴

Concerns about the problematic nature of NetzDG further materialised when it entered into force in October 2017. In the first week of January 2018, Twitter not only deleted a racist tweet by an AfD politician but also censored the satirical reaction to it (and the reaction to Twitter’s deletion) by the satire magazine *Titanic* by blocking *Titanic*’s Twitter account.¹⁴⁵ Furthermore, ironic tweets by journalists and posts and tweets by AfD politicians have been deleted or their accounts blocked.¹⁴⁶ Since both sides of the debate are being censored under the law, NetzDG appears to be stifling public debate already.

Administrative provisions indirectly restricting ‘hate speech’

Administrative law contains further provisions which can be applied to ‘hate speech’ cases indirectly. These include Section 15 of the Youth Protection Act, which stipulates that written material capable of morally endangering children and young people must be placed on a ‘restricted list.’ This includes writings that are immoral, brutal, glorify war, or incite others to violent acts, crimes, or hatred.¹⁴⁷ The provisions of this Act allow for executive measures by law enforcement agencies, including the blocking of Internet pages without any court proceedings, and are below the threshold of illegality of the content.¹⁴⁸

The District Council of Düsseldorf used the provisions of the Youth Protection Act to put pressure on 56 access providers by threatening them with administrative fines of up to one million German Marks, pressuring them to block a number of websites containing Nazi propaganda and content depicting and glorifying brutal violence without a prior court decision. In subsequent court proceedings, the blocking of the Nazi websites was upheld by the Higher Administrative Court.¹⁴⁹

Civil actions against ‘hate speech’

Civil causes of action against ‘hate speech’

Under the German Civil Code,¹⁵⁰ victims of ‘hate speech’ have several options to pursue civil claims for ‘hate speech’:

- They can pursue civil remedies for moral and pecuniary damages caused by the commission of the crime – this is in particular for the crimes of incitement to hatred, insult, and defamation;¹⁵¹
- They can pursue tort claims under provisions on so-called “protection of personality rights” (allgemeines Persönlichkeitsrecht);¹⁵² or
- They can seek damages for “immoral intentional damage.”¹⁵³

Remedies in these cases include compensation for material damages, retraction of false assertions of facts, and, in some cases, compensation for pain and suffering.¹⁵⁴ Victims can also seek injunctions against false statements.¹⁵⁵ However, this does not apply in cases “where a person disseminates harmful value judgements, because the categories of true and false cannot be readily applied to opinions.”¹⁵⁶

Protection under the Law on Equal Treatment

Victims can pursue claims under the anti-discrimination provisions of the 2006 General Act on Equal Treatment (AGG).¹⁵⁷ As already noted, the AGG covers discrimination in employment and civil law matters, in particular in contracts and civil law obligations. It prohibits direct and indirect discrimination, harassment, and sexual harassment on specifically enumerated grounds: “race or ethnic origin, gender, religion or belief, disability, age or sexual orientation.”

Harassment can thus be a form of discrimination, defined as “an unwanted conduct” on the basis of protected grounds that “takes place with the purpose or effect of violating the dignity of the person concerned and of creating an intimidating, hostile, degrading, humiliating or offensive environment.” Some instances of ‘hate speech’ can fall under the scope of this definition.

Under the AGG, the person who has been discriminated against may demand that the discriminatory conduct be stopped, and in cases “where other discrimination is to be feared, he or she may sue for an injunction.”¹⁵⁸ Additionally, the person

who committed the discrimination “shall be obliged to compensate for any damage arising therefrom:” compensation in the event of non-recruitment following from discrimination (or a discriminatory process) can be up to three month’s salary, although further compensation for economic loss arising from the discrimination is excluded.¹⁵⁹

The AGG stipulates a two-month period within which any claim and petition for a restraining order concerning any discrimination covered by the AGG must be filed.¹⁶⁰ This time period has been criticised as being too short: under the civil law, the statute of limitation for violation of personal rights (privacy, reputation, etc.) is three years.¹⁶¹ The Federal Anti-Discrimination Agency has repeatedly called for a longer statute of limitation for the action under the Act, particularly since some forms of discrimination (such as sexual harassment) might leave victims too traumatised to seek legal support or demand the protection of their rights in such short period.¹⁶²

Additionally, the Federal Anti-Discrimination Agency has been advocating for non-governmental organisations (NGOs) working in the field of discrimination to be given the right of action, thus increasing the prospect of success for victims. Currently, NGOs and associations can only provide legal aid, including legal advice in court hearings. However, to offer this service they are required to be of a certain size, consisting of either 75 natural members or seven member-organisations, and they have to represent the special interests of disadvantaged groups on a non-for-profit and non-temporary basis (that is, if representation of disadvantaged groups is a part of their central mandate or demonstrable long-term policy plans).

Remedial action in cases of ‘hate speech’ against people with disabilities is possible under the 2002 Act on Equal Opportunities of Disabled People.¹⁶³ Contrary to the AGG, NGOs recognised by the Federal Ministry for Labour and Social Affairs are entitled to file a class action or a representative action lawsuit to sue for discrimination and enforce accessibility for people with disabilities. A class action lawsuit can be filed even if no identifiable person is affected.¹⁶⁴

However, there is no jurisprudence available in which the victims of ‘hate speech’ rely on these provisions of the civil law to seek remedies in ‘hate speech’ cases.

Role of equality institutions in relation to public discourse and ‘hate speech’

The national equality institution in Germany is the Federal Anti-Discrimination Agency, which sits within the Federal Ministry for Family Affairs, Senior Citizens, Women and Youth.¹⁶⁵ The Agency can carry out a number of tasks related to addressing discrimination, and thus theoretically could have a preventative role in relation to ‘hate speech.’

The Agency’s tasks include:

- Providing independent assistance to persons believed to have been discriminated against in enjoyment of their rights, including providing information as to applicable legal provisions and judicial proceedings and arranging for further guidance and advice by other authorities;
- Seeking to mediate between the involved parties or reaching out-of-court settlements;
- Engaging in advocacy and public relations concerning its work and the topic of discrimination and equal treatment;
- Taking measures to prevent discrimination;
- Conducting research and academic studies in the relevant area; and
- Reporting together with the respective parliamentary and governmental commissioners every four years to Parliament on the state of discrimination in Germany and providing recommendations as to its elimination and prevention.¹⁶⁶

Unfortunately, the role of the Federal Anti-Discrimination Agency in addressing ‘hate speech’ is limited. Its tasks are somewhat vaguely formulated in the AGG, and unlike equality bodies in a number of EU states, it does not provide direct legal aid to victims. It may only direct victims of discrimination and other affected persons to organisations: merely a directory role. Also, it cannot act of its own initiative, it may only “request that the involved parties make submissions, insofar as the person who has turned to the Agency” consented making the submission.¹⁶⁷ Further, the Agency is not tasked with working towards identifying and eliminating structural discrimination in the public and private sectors, which would deal with underlying social causes of ‘hate speech’ and intolerance.

Moreover, the Agency is not an independent authority, as mandated by the Paris Principles.¹⁶⁸ The Minister for Family Affairs appoints the head of the Agency, who is then supposed to be independent in the execution of her/his duties and only subject to law. However, the mandate of the office-holder is tied to the legislative period of the parliament, and is thus dependent on political conditions, making the head of the Agency effectively a political appointee.

Additionally, there are other institutions which deal with issues of discrimination, most importantly the Federal Government Commissioner for Migration, Refugees and Integration,¹⁶⁹ and bodies with mandates in the area of equal opportunities for people with disabilities.¹⁷⁰

Several federal states and some major towns have established their own institutions dealing with anti-discrimination. The states of Thüringen and Mecklenburg-Vorpommern, for example, both appointed a Commissioner for Integration and Refugees; the states of Bavaria, Baden-Württemberg, Brandenburg, Bremen, Saarland, Schleswig-Holstein, and Hamburg all have a government commissioner for people with disabilities; the states of Schleswig-Holstein, Hessen, Rheinland-Pfalz, Brandenburg, and Thüringen have established anti-discrimination institutions.¹⁷¹

All these institutions are primarily tasked with developing and providing measures to prevent discrimination, such as organising public events and campaigns against discrimination. None of these entities is provided with the resources to actively monitor 'hate speech' or to design specific responses. However, they are tasked with arbitrating between institutions and complainants, and issue regular reports on their work.

Media regulation and ‘hate speech’

Government frameworks on media policy

The foundations of the current media landscape in Germany were laid after World War II by the Allied Western Forces. The new public service broadcasting system was modelled on the BBC’s structure, and new newspapers and magazines were licensed.

External and internal pluralism in the German broadcasting system is the result of 14 landmark decisions by the Federal Constitutional Court, many of them dealing with the independence of supervisory boards of media regulators with a view to ensuring internal and programmatic pluralism.¹⁷² The decisions have also established “the dual broadcasting system”¹⁷³ which requires the state to guarantee media pluralism and pluralism of opinion by ensuring that the overall broadcasting structure provides for internal¹⁷⁴ and external pluralism.¹⁷⁵

Pursuant to the Basic Law, media legislation and regulation fall under the competence of the federal states.¹⁷⁶

There is a complex system of media regulation in Germany, consisting of:

- The Interstate Broadcasting Treaty (IBT):¹⁷⁷ An umbrella law setting the normative framework for public and private broadcasting in all 16 federal states. As such, its provisions are part of the regional broadcasting laws and media laws;
- The Interstate Treaty on the Protection of Human Dignity and the Protection of Minors in Broadcasting and Telemedia (JMStV):¹⁷⁸ An umbrella electronic information and communication media law on protection of children and adolescents. It aims to set rules on protection from content which “impairs or harms their development or education” and “which violates human dignity or other legal goods protected under the German Criminal Code;”
- Interstate broadcasting treaties on public service broadcasters which broadcast in more than one federal state;¹⁷⁹
- The Telemedia Law;¹⁸⁰
- The Anti-Trust Law, which guarantees external pluralism of the media;¹⁸¹
- The nine state broadcasting laws, regulating nine state public service broadcasters;¹⁸²

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- The 14 state media laws, which regulate private broadcasting (two of the laws are applicable in more than one federal state);¹⁸³
 - The 16 state press laws;¹⁸⁴ and
 - The Interstate Treaty on the Protection of Human Dignity and the Protection of Minors in Broadcasting and Telemedia.¹⁸⁵

The IBT contains a number of provisions addressing ‘hate speech’ or creating positive obligations to prevent it. In particular:

- The IBT obliges all 11 (national and regional) public service broadcasters and all private broadcasters with a nationwide footprint “to respect and protect in its programming the human dignity and the moral and religious beliefs of the population. The offered content shall strive to strengthen the respect for life, for freedom and physical integrity, for the beliefs and opinions of others;”¹⁸⁶
- It refers to the Criminal Code and explicitly states that broadcasts should be prohibited if they, *inter alia*, “arouse hatred against segments of the population or national, racial, religious or ethnic groups, encourage violent or arbitrary action against them or attack the human dignity of others by insulting segments of the population or any of the aforementioned groups or by maliciously degrading or defaming them;”¹⁸⁷
- It stipulates that advertisements and telesales should not violate human dignity, or include or promote discrimination based on gender, race, ethnicity, nationality, religion or belief, disability, age, or sexual orientation;¹⁸⁸
- It obligates broadcast media to follow recognised ethical journalistic standards and apply due diligence in their reporting; and
- It compels private broadcasters to ensure essential pluralism of views in their content: the main political, ideological, and social forces and groups must be adequately represented and opinions of minorities are to be taken into consideration.¹⁸⁹ Furthermore, private broadcasting programs must “respect human dignity and the moral, religious and ideological beliefs of others.”¹⁹⁰

Similarly, the Interstate Treaty on the Protection of Human Dignity and the Protection of Minors in Broadcasting and in Telemedia (JMStV) refers to provisions on incitement in the Criminal Code (Section 130) and stipulates that the content is illegal if, *inter alia*, it:

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- Represents propaganda instruments (as per Article 86 of the Criminal Code), the content of which is directed against the free and democratic order or the spirit of understanding among nations;
 - Incites hatred against parts of the population or against a national, racial, religious, or ethnic group, encourages violent or arbitrary action against such a group, or violates the human dignity of a person or group by insulting, maliciously degrading, or defaming parts of the population or any of the aforementioned groups; or
 - Denies or downplays acts committed under the National Socialist regime (as per Article 6(1) of the International Criminal Code) in a manner capable of disturbing the public peace, or disturbs the public peace in a manner violating the dignity of the victims by endorsing, glorifying, or justifying the National Socialist regime of arbitrary terror.

The German Federal Government does not have a comprehensive policy on the media and ‘hate speech.’ Prior to the adoption of NetzDG, the Ministry of Justice established a taskforce¹⁹¹ on online hate. Aside from participants agreeing to develop policies on how to fight online hate through deletion and blocking, the taskforce did not result in any further projects or initiatives. The aims of the taskforce were eventually implemented through NetzDG.

Specific initiatives have, however, been developed in the area of online ‘hate speech.’ For example:

- The national public broadcasters ARD¹⁹² and ZDF¹⁹³, in co-operation with the Ministry for Family, developed the initiative, ‘Look! At what your child is doing with media’ (Schau hin. Was Dein Kind mit Medien macht).¹⁹⁴ The project aims to support parents with media education and provides recommendations and advice on topics such as how to deal with online hate, cyber mobbing, fake news, data protection, and how to strengthen tolerance online;
- Tagesschau, the ARD’s main news programme, set up the online portal ‘Fact Finder,’ which compares false online reports (often related to migrants, Islam, and refugees) with its own journalistic research;¹⁹⁵ and
- In collaboration with the Federal Agency for Civic Education, YouTube launched the ‘#NichtEgal’ campaign in response to hate speech. #NichtEgal campaigns for less discrimination and more respectful exchange of views in social networks and everyday life.¹⁹⁶

Broadcast media

As mentioned above, standards on pluralism, diversity, and respect for equality in broadcasting are laid out in the IBT, federal state broadcasting laws, and the 14 federal state media laws.

The IBT requires that broadcast programmes are governed by the constitutional order, and that they shall respect human dignity as well as the moral, religious, and ideological convictions of others.¹⁹⁷ Programmes should promote togetherness in a unified Germany as well as international understanding and work towards non-discriminatory coexistence.¹⁹⁸ Programmes are required to adhere with legal provisions for the protection of the personal reputation.¹⁹⁹ The IBT further prohibits advertising and telesales that violate human dignity, include or promote discrimination based on sex, race or ethnic origin, nationality, religion or belief, disability, age, or sexual orientation.²⁰⁰

Federal broadcasting and media laws contain provisions similar to the IBT for public service and for private broadcasters with regional and local coverage respectively. In some instances, particularly where the broadcasters cover minority areas in Germany, they extend the scope of the IBT provisions. For example:

- Bavarian media law requires all Bavarian broadcasters to ensure that all programmes not only respect human dignity, and the moral, religious and ideological beliefs of others, but also marriage and family;²⁰¹
- The media law of North-Rhine Westphalia requires private broadcasters “to promote with their programs effective gender equality between women and men, as well as the equal participation of people with disabilities; to exhort to uphold peace and social justice; to defend democratic freedoms and to obligate oneself to the truth; and to take account of the integration of people with diverse cultural backgrounds;”²⁰²
- The Interstate Treaty on the MDR (the Central German Broadcaster) requires the broadcaster to ensure that its programmes take into account the interests and needs of all segments of the population including minorities.²⁰³ The MDR broadcasts some of its programmes in the Sorbian language (the language of a West Slavic ethnic group predominantly inhabiting their homeland in Lusatia, a region divided between Germany and Poland);
- Similarly, the Broadcasting Law for Mecklenburg-Vorpommern requires, in Article 23 para 1, that programmes “respect the dignity of man as well as the moral, religious and ideological convictions of others. They should promote togetherness in a unified Germany, as well as international understanding and work towards non-discriminatory coexistence, taking

into account the interests of disabled people. The Low-German language (a West Germanic language spoken mainly in northern Germany and the eastern part of the Netherlands) should be taken into account to a reasonable extent;”²⁰⁴

- The Media Law for Saarland includes similar provisions related to the French language and minority,²⁰⁵ and the Broadcasting Law for the WDR (the West German Broadcaster) stipulates in its public service remit that the programmes shall foster the peaceful and equal coexistence of people of different cultures and languages and reflect this diversity in a constructive way.²⁰⁶ Its programme should take into account the regional structure, the cultural diversity of the coverage area, the process of European integration, and the needs of the population, including those with a migrant background;²⁰⁷
- The WDR regularly broadcasts radio programmes in nine foreign languages (also available as podcasts).²⁰⁸ The Funkhaus Europa (WDR in cooperation with Radio Berlin-Brandenburg and Radio Bremen) runs a daily ‘refugee radio’ – news and information for refugees in English and Arabic.²⁰⁹ The SWR (South-West Broadcaster), on its website, offers practical advice on life in Germany, and news and information for asylum seekers in four languages;²¹⁰
- The nationwide, independent association ‘New Media Workers’ (*Neue Medienmacher*), composed of journalists and media workers of different ethnic and cultural backgrounds, offers training for journalists who are or whose family were immigrants, produced a glossary for minority reporting, and established a database on experts with a migration background;²¹¹ and
- In December 2016, the ‘Mediendienst-Integration,’²¹² an information platform for media workers supported by the Federal Government Commissioner on Migration, Refugees and Integration, published a journalist handbook offering facts and statistics on Islam and Muslims in Germany, thus hoping to counteract fake news and stereotypical reporting.²¹³

Fourteen media regulatory authorities (media regulators) are responsible for licensing, regulating, and monitoring private broadcasters based on federal state media legislation.²¹⁴ These media regulators are further mandated to ensure the protection of minors on the Internet.

Media regulators have adopted ‘Common Guidelines of the State Media Authorities for Advertising, Product Placement, Sponsorship and Teleshopping on TV.’²¹⁵ In cases of online ‘hate speech,’ the media regulator either refers the case to criminal prosecution or to the Commission on the Protection of Minors. Media

regulators do not publish a list of ‘hate speech’ cases handled by them, or an overview of enforced sanctions against media outlets. The typical reaction to violations of broadcasting provisions consists of (only rarely issued) reprimands, and sanctions are imposed even more rarely; this has led to media regulators being called “useless paper tigers.”²¹⁶

Print media

Print media regulation in Germany falls under the jurisdiction of federal states. They have either adopted dedicated press laws or included press regulation in their media laws (therefore having the same regulation for print and broadcast media).²¹⁷

All of Germany’s state press laws are very similar in nature and scope: they all emphasise the role of the press in maintaining and fostering democracy, and guarantee the press the right to information, the right to criticise, and the right to obtain and report on news and information in an unhindered way.

They do not include specific provisions on ‘hate speech’ or discrimination, but require the press and journalists to aim at “truthful reporting;” and also set a number of requirements for the press,²¹⁸ including an obligation to name an “editor responsible according to German press law” (*verantwortlicher Redakteur im Sinne des Presserechts OR V.i.S.d.P.*).

The press laws also provide for the right of reply (in addition to the provisions of the Civil Code): an obligation to publish “an opposing point of view by the person or organisation affected by any factual statements in the article.”²¹⁹

The press self-regulatory body in Germany, the Press Council (*Presserat*),²²⁰ was created in 1956 to prevent the then-planned Federal Press Law. It includes two journalist unions, the association of newspaper publishers, and the association of magazine publishers.²²¹ Members of the Press Council are those who are carrying out “the journalistic profession in the public interest.”²²²

The Press Code²²³ does not contain any explicit provisions on ‘hate speech,’ but contains several provisions related to equality and non-discrimination.

The Press Code:

- Requires members to respect the truth, preserve the respect for human dignity, and aim for truthful reporting;²²⁴
- States that “violating people’s dignity with inappropriate representations in text and image contradicts journalistic ethics;”²²⁵

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- Mandates members to “refrain from invective reporting on religious, philosophical or moral convictions;”²²⁶
 - Prohibits “any discrimination based on sex, impediment, or belonging to an ethnic, religious, social or national group;”²²⁷ and
 - Specifies that, when reporting crimes, the press must not “refer to the suspect’s religious, ethnic or other minority membership unless this information can be justified as being relevant to the readers’ understanding of the incident” as “such references could stir up prejudices against minorities.”²²⁸ These provisions were added in March 2017, following the increase in reporting on crimes allegedly committed by asylum seekers, in particular the events of New Year’s Eve 2015/2016 in Cologne. During the celebrations, many women reported sexual harassment by (allegedly) foreigners; and this led to criticism of the police and some media for being overly cautious in revealing the origins of the alleged perpetrators.

In cases of violations of the Press Code, the only sanction the Press Council can issue is “public reprimand” which must also be published by the concerned outlet (i.e. newspaper or magazine).²²⁹

The Press Council does not publish disaggregated data on the nature of the complaints it receives, so it is not possible to determine what percentage concerns ‘hate speech’ in the media. It is also difficult to ascertain the specific test that the Press Council would apply in assessing the compliance with the relevant provisions.

For instance:

- In its 2016 annual report, the Press Council mentions that the reporting on conflicts, terror attacks, the war in Syria, and the type of assessment of the parties involved in these conflicts, were the focus of complaints during the year;²³⁰
- In a high profile ‘hate speech’ case, the Press Council adjudicated concerns about a commentary by Nicolaus Fest, then-deputy editor-in-chief of the tabloid weekly Bild am Sonntag. The Press Council issued a reprimand for violation of several provisions of the Press Code.²³¹

The case concerned statements in which Fest said that he was bothered by “the far over-proportional crime of young people with a Muslim background” and was “disturbed by the homicidal contempt of Islam for women and homosexuals” He said he questioned whether the religion was sometimes “an obstacle to integration.”²³²

The Complaints Commission found that the commentary contained sweeping statements about the behaviour of Muslims in general, thus having a discriminatory effect on members of the Islamic faith. It found that the comment not only violated Section 12, but was also incompatible with the reputation of the press under Section 1 of the Press Code. In addition, it found that the commentary denounced Islam as a religious belief in its ability to integrate itself and thus violates Section 10 of the Code. The decision stressed that “comments may be pointed, contain strong criticisms – even of religions – and sometimes even push boundaries. Here, however, the limits of freedom of expression have clearly been overstepped by placing all Muslims under a general suspicion;²³³ and

- In September 2017, the Press Council issued a decision in the case of FAZ, a nationwide daily newspaper, for violation of Section 12 of the Code. FAZ had published (online and in its print edition) a commentary entitled ‘We reveal everything about us,’ about the legalisation of same-sex marriage and the relevant changes in adoption legislation. In the commentary, an anonymous author raised a rhetorical question as to whether adopted children are more likely to be at risk of sexual abuse due to a lapse of “incest inhibition.” The Council found that these claims amount to a discrimination against homosexuals and constitute a serious violation of the prohibition of discrimination pursuant to Section 12 of the Press Code.²³⁴

Approaches to media convergence

As for media convergence, the 2007 Telemedia Law – which consolidated legislation on teleservices²³⁵ – applies to almost all online services and content, including search engines, podcasts, chatrooms, web-portals, private sites, information websites, and blogs. It includes provisions on legal information to be displayed on websites, on liability for illegal online content, on data protection, and the handing over of personal information to law enforcement agencies and courts. It also applies to online services and content provided by a service provider outside of Germany in cases where it is warranted to “maintain public safety and order, to prevent, investigate, and prosecute crimes and administrative offences, including pertaining to the protection of minors and the combatting of incitement to hatred based on race, gender, religion or nationality, to prevent the violation of the dignity of man, or to protect national security interest.”²³⁶

Germany's many regulators, including self-regulatory bodies, have acknowledged the dynamics of media convergence and have started to extend their remit over online content. Most press laws have extended their scope to the online content which traditional press outlets now offer.²³⁷

Advertising self-regulation

In addition to regulation of advertising in legislation, the German Advertising Council is an institution for the 44 organisations of advertisers, the media, advertising agencies, advertising professionals, and research establishments represented by the German Advertising Federation.

The Council adopted its Code of Conduct²³⁸ which applies to all sectors of the industry and to the media. The Code contains specific sets of rules for a number of areas. These include:

- A prohibition on stimulating or tolerating any kind of discrimination based on race, origin, religion, gender, age, disability or sexual orientation, and discrimination aimed at reducing people to a sexual object,²³⁹ and
- A prohibition on causing fear, harm, or suffering.²⁴⁰

The Advertising Council has adopted specific guidelines against humiliation and discrimination.²⁴¹ The guidelines establish that no advertisements or depictions are permitted that, *inter alia*:

- Discriminate against persons based on their gender, ancestry, race, language, origin, religion, political view, age, disability, or belonging to a particular occupational group;
- Degrade people for not meeting general norms related to their looks, behaviour, sexual orientation, characteristics, or way of life;
- Are suggestive of equating persons with objects or that they are available for purchase;
- Reduce persons to their sexuality, to sexual objects, or to imply their sexual availability; or
- Degrade a particular gender by exaggerated nakedness.

When deciding the outcome of complaints against advertisers, the ten-member panel of the Advertising Council must take into consideration: the type of advertised product and the type of advertisement itself, the situation in which the consumer is confronted with the advertisement, the nature of the media carrying the advertisement, aspects related to the protection of youth, and generally accepted moral and ethical norms.²⁴²

Advertisements found in breach of the Code of Conduct and the guidelines are either to be removed from the public space or amended. Companies that do not follow the instruction are publicly reprimanded, with copies of the reprimand being sent to mass media.²⁴³ This threat of negative publicity seems sufficient: over 90% of the Council's decisions are respected and followed.²⁴⁴

According to available information, the majority of complaints under discrimination provisions concern complaints on the basis of gender.²⁴⁵ There is no record of such decisions against 'hate speech' on other protected grounds, such as race or ethnicity.

Conclusions and recommendations

Germany has a robust legislative framework which protects the right to freedom of expression and the right to equality. The right to free speech is also upheld and ensured by the Federal Constitutional Court, which sets many of the legal standards and is the driving force behind, and guarantor of, the pluralistic media system in Germany.

Due to Germany's history, governments and the judiciary attempt to control public debate to safeguard a certain level of public discourse, in an effort to ensure that the rhetoric of Nazi Germany is not repeated. However, a number of provisions of criminal law do not fully comply with international freedom of expression standards in this area. In particular, provisions on prison sentences for Holocaust denial, insult, and defamation.

The interpretation of these provisions by higher courts is often contradictory, and leads to legal uncertainty. Instead of applying international standards, such as those outlined in the Rabat Plan of Action, the Constitutional Courts seem to assess these provisions based on the value of the speech for 'truthful' public debate.

Moreover, under the threat of the severe administrative sanctions outlined in NetzDG, social media platforms have adopted a restrictive approach to compliance with the legislation, and have been over-zealous in removing content. NetzDG is likely to have a further chilling effect on free speech in the online environment.

As such, a more concerted effort is needed at government level – in law, policy, and practice – to ensure that adopted measures are effective and in line with international obligations, striking a balance between the protection of freedom of expression and the prohibition of incitement to discrimination, hostility, and violence.

ARTICLE 19 proposes that, at a minimum, Germany should take the following measures to improve the current situation:

- All relevant legislation – in particular criminal law provisions – should be revised into compliance with the international human rights standards applicable to 'hate speech;'
- The Criminal Code should undergo comprehensive review: all offences that are not compatible with international freedom of expression standards should be abolished, in particular blanket provisions on Holocaust denial, criminal defamation, and insult, as well as defamation of religion and defamation of state symbols;

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- The advocacy of discriminatory hatred which constitutes incitement to hostility, discrimination, or violence should be prohibited in line with Articles 19(3) and 20(2) of the ICCPR, establishing a high threshold for limitations on free expression (as set out in the Rabat Plan of Action);
 - NetzDG should be repealed, with consideration given to provisions on reporting requirements in alternative legislation to increase transparency around online content moderation by private actors;
 - The Youth Protection Act should be amended: in particular, it should ensure due process procedures for blocking online content;
 - Germany's anti-discrimination/equality legislation should be amended. Equality institutions should be granted real political and governmental independence, and should be equipped with a more robust mandate to address the problems of discrimination and intolerance. They should be able to provide legal aid to victims, the right to act on their own initiative, and the right to work towards tackling structural discrimination;
 - The Government should develop a comprehensive policy on the media and 'hate speech' in cooperation with public broadcasters and media regulators;
 - The Press Council should increase its internal diversity, and in particular ensure that it includes members from minorities and other groups subject to discrimination. They should also develop further guidelines on reporting on groups subject to discrimination, and streamline the complaint process to prevent individuals being discouraged from bringing claims. Effective measures should be taken to address violations of ethical codes of conduct. The Press Council should also organise regular training courses and updates for professional and trainee journalists on human rights standards on 'hate speech' and freedom of expression, and on the relevant ethical codes of conduct;
 - Public officials, including politicians, should acknowledge that they must play a leading role in recognising and promptly speaking out against intolerance and discrimination, including instances of 'hate speech.' This requires recognising and rejecting the conduct itself, as well as the prejudices of which it is symptomatic; expressing sympathy and support to the targeted individuals or groups; and framing such incidents as harmful to the whole of society. These interventions are particularly important when intercommunal tensions are high, or are susceptible to being escalated, and when political stakes are also high, such as in the run-up to elections; and
 - Media organisations and media outlets should also recognise that they play an important role in combatting 'hate speech,' intolerance, and

prejudice in the public discourse. They should intensify their efforts to provide adequate responses. They should ensure that they fully respect relevant ethical codes, as well as ensuring that ethical codes of conduct on 'hate speech' are effectively implemented, and that effective measures are undertaken to address any violations. The ethical codes should be internalised by journalists and media outlets in order to ensure full compliance. Media outlets should also increase ethnic, religious, and gender plurality amongst journalists, editors, media workers, and other employees of public service broadcasters.

Endnotes

¹ Eurostat, Statistics Explained, available from <https://bit.ly/1xHP3Yh>. According to these statistics, 35% of the EU-wide first-time asylum applications were submitted in Germany in 2015.

² See e.g. Bundestag Election 2017: Result, distribution of seats, coalitions, costs, available from <https://bit.ly/2wLssPv>.

³ See e.g. SWPde Why we urgently need to talk about our culture of debate, 5 July 2016, available from <https://bit.ly/2J7UtqD>.

⁴ *Ibid.*

⁵ See e.g. *RP Online*, There is a rift through society, 11 January 2016, available from <https://bit.ly/2LiREQ3>.

⁶ NetzDG, 30 June 2017, in force from 1 October 2017 (Federal Law Gazette 2017 I, Nr. 61, p. 3352); available from <https://bit.ly/2yyg99P>. For an unofficial English translation, see <http://bit.ly/2GjOMQI>.

⁷ See e.g. *Zeit*, What you need to know about the NetzDG4, January 2018, available from <https://bit.ly/2LkandV>; or *Zeit*, Twitter locks “Titanic” account for satire tweets, 3 January 2018, available from <https://bit.ly/2xDjLrb>.

⁸ For more information, see <http://interkulturell-leben.de>.

⁹ For more information, see e.g. *Der Spiegel*, 9 September 2016, available from <https://bit.ly/2HDcitN>; or *FAZ*, Why a Kurd is friends with an AfD politician, 8 September 2017, available from <https://bit.ly/2EP4diu>.

¹⁰ The report is based on a review of existing legislation and its application by relevant authorities, analysis of information provided by public bodies at the author’s request, and interviews with key stakeholders (in particular, human rights activists and experts). All the analysis in the report is made on basis of the German version of the respective laws; all translations of respective laws in this report

are unofficial translations. ARTICLE 19 takes no responsibility for the accuracy of the translation or for comments made on the basis of any inaccuracies in the translation.

¹¹ Through its adoption in a resolution of the UN General Assembly, the UDHR is not strictly binding on states. However, many of its provisions are regarded as having acquired legal force as customary international law since its adoption in 1948; see *Filartiga v. Pena-Irala*, 630 F. 2d 876 (1980) (US Circuit Court of Appeals, 2nd circuit).

¹² The ICCPR has 167 States parties, including Germany.

¹³ See HR Committee, General Comment No. 34 on Article 19: Freedoms of opinion and expression, CCPR/C/GC/34, 12 September 2011, para 11.

¹⁴ See, e.g. European Court, *The Sunday Times v. UK*, App. No. 6538/7426 (1979), para. 49.

¹⁵ Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4 September 1950 (European Convention).

¹⁶ Article 10(1) of the European Convention on Human Rights reads: “Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises; Article 10(2): “The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information

received in confidence, or for maintaining the authority and impartiality of the judiciary.”

¹⁷ Article 1 of the UDHR states: “All human beings are born free and equal in dignity and rights”; Article 2 provides for the equal enjoyment of the rights and freedoms contained in the declaration “without distinction of any kind;” and Article 7 requires protection from discrimination.

¹⁸ For a full explanation of ARTICLE 19’s policy on ‘hate speech,’ see Hate Speech Explained: A Toolkit; available from <http://bit.ly/1UvUQ9t>.

¹⁹ General Comment 34, *op.cit.*, para 52.

²⁰ The Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence, A/HRC/22/17/Add.4, Appendix, adopted 5 October 2012; available from <http://bit.ly/2fTNMG6>.

²¹ The Rabat Plan of Action has been endorsed by a wide range of special procedures of the UN Human Rights Council; see, for example, the Report of the Special Rapporteur on FOE on hate speech and incitement to hatred, A/67/357, 7 September 2012; Report of the Special Rapporteur on freedom of religion or belief on the need to tackle manifestations of collective religious hatred, A/HRC/25/58, 26 December 2013; Report of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance on manifestations of racism, racial discrimination, xenophobia and related intolerance on manifestations of racism on the Internet and social media, A/HRC/26/49, 6 May 2014; and the contribution of the UN Special Advisor on the Prevention of Genocide to the expert seminar on ways to curb incitement to violence on ethnic, religious, or racial grounds in situations with imminent risk of atrocity crimes, Geneva, 22 February 2013.

²² HR Committee, General Comment 11: prohibition of propaganda for war and inciting national, racial or religious hatred (Art. 20), 29 July 1983, para 2.

²³ UN Committee on the Elimination of Racial Discrimination, General Recommendation No. 35: Combating racist hate speech, 26 September 2013, paras 15 - 16. The CERD Committee specifies that five contextual factors should be taken into account: the content and form of speech; the economic, social and political climate; the position or status of the speaker; the reach of the speech; and the objectives of the speech. The CERD Committee also specifies that States must also consider the intent of the speaker and the imminence and likelihood of harm.

²⁴ European Court, *Erbakan v. Turkey*, App. No. 59405/00 (2006), para 56; or *Gündüz v. Turkey*, App.No. 35071/97 (2004), para 22.

²⁵ European Court, *Jersild v. Denmark*, App. No 15890/89 (1992), para 35.

²⁶ Council Framework Decision [2008/913/JHA](http://bit.ly/2nTmRAi) of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law; available from <http://bit.ly/2nTmRAi>.

²⁷ For a full analysis, see ARTICLE 19, Submission to the Consultations on the EU Justice Policy, December 2013; available from <http://bit.ly/2APKRZ9>.

²⁸ HRC Resolution 20/8 on the Internet and Human Rights, A/HRC/RES/20/8, June 2012.

²⁹ General Comment No. 34, *op cit.*, para 43.

³⁰ Guiding Principles on Business and Human Rights: Implementing the UN “Protect, Respect and Remedy” Framework (The Ruggie Principles), A/HRC/17/31, 21 March 2011, Annex. The HRC endorsed the guiding principles in HRC resolution 17/4, A/HRC/RES/17/14, 16 June 2011.

³¹ Report of the Special Rapporteur on FOE, 16 May 2011, A/HRC/17/27, paras 75-76.

³² Report of the Special Rapporteur on FOE, 11 May 2016, A/HRC/32/38; para 40 – 44.

³³ *Ibid.*

³⁴ *Ibid.*, para 43.

³⁵ *Ibid.*

³⁶ Joint Declaration on Freedom of Expression and “Fake News,” Disinformation and Propaganda, adopted by the UN Special Rapporteur on FOE, the Organization for Security and Co-operation in Europe (OSCE) Representative on Freedom of the Media, the Organization of American States (OAS) Special Rapporteur on Freedom of Expression and the African Commission on Human and Peoples’ Rights (ACHPR) Special Rapporteur on Freedom of Expression and Access to Information, 3 March 2017; available from <http://bit.ly/2meFQ6g>.

³⁷ Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market, Article 14(1).

³⁸ *Ibid.*, Article 5.

³⁹ Grand Chamber of the European Court, *Delfi AS v. Estonia*, App. No. 64569/09 (2015) .

⁴⁰ *Ibid.*, Judges Sajó and Tsotsoria’s Joint Dissenting Opinion. See also ARTICLE 19, *Delfi AS v Estonia Case Comment: Strasbourg Undermines Freedom of Expression*, 1 October 2015; available from <http://bit.ly/2zQTEur>.

⁴¹ For example, in *Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v. Hungary*, No. 22947/13 (2016), the European Court found a violation of Article 10 of the European Convention where a self-regulatory body of Internet content providers and an owner of an online news portal were held liable for defamatory comments posted by a third party, which the parties removed on receipt of notice.

⁴² European Court, *Pihl v. Sweden*, App. No. 74742/13 (2017).

⁴³ For further analysis, see Dirk Voorhoof, *Pihl v. Sweden*: non-profit blog operator is not liable for defamatory users’ comments in case of prompt removal upon notice, Strasbourg Observers, 20 March 2017; available from <http://bit.ly/2zMUQB8>.

⁴⁴ European Commission, Code of Conduct

on Countering Illegal Hate Speech, signed on 31 May 2016; available from <http://bit.ly/1XLcJVo>.

⁴⁵ Council Framework Decision, *op.cit.*

⁴⁶ For the criticism of the Code of Conduct, see ARTICLE 19, EU Commission Code of Conduct for Countering Illegal Hate Speech Online and the Framework Decision, June 2016, available from <http://bit.ly/29BVUJh>.

⁴⁷ Basic Law of the Federal Republic of Germany (Grundgesetz für die Bundesrepublik Deutschland), adopted on 8 May 1949, in force as of 23 May 1949, last amended 23 December 2014, available (in German) from <http://www.bundestag.de/gg>. The Basic Law is the *de facto* Constitution of Germany, although the term ‘Constitution’ (*Verfassung*) as a title was avoided given the provisional and divided state structures of the country after World War II. It was expected that a ‘Constitution’ would be adopted by a reunified Germany: Article 146 of the Basic Law stipulates that the Basic Law “shall cease to apply on the day on which a constitution freely adopted by the German people takes effect.” However, after reunification, the Basic Law (as amended in 1990) was not subject to a referendum. Nevertheless, its text refers to itself both as Basic Law (*Grundgesetz*) as well as to Constitution (*Verfassung*).

⁴⁸ Article 5 of the Basic Law guarantees the right to freedom of expression in the following terms: “(1) Every person shall have the right freely to express and disseminate his opinions in speech, writing and pictures, and to inform himself without hindrance from generally accessible sources. Freedom of the press and freedom of reporting by means of broadcasts and films shall be guaranteed. There shall be no censorship. (2) These rights shall find their limits in the provisions of general laws, in provisions for the protection of young persons, and in the right to personal honour. (3) Arts and sciences, research and teaching shall be free. The freedom of teaching shall not release any person from allegiance to the constitution.”

⁴⁹ Federal Act Governing Access to Information held by the Federal Government (*Informationsfreiheitsgesetz*), adopted

by the Federal Government in June 2005, coming into force on 1 January 2006. Article 5 para 1 of the Basic Law provides only for the right to information found in “generally accessible sources;” the phrase excludes state documents.

⁵⁰ *Ibid.*, Article 5 para 2.

⁵¹ Article 17a of the Basic Law.

⁵² Under the provisions of Article 18 of the Basic Law, other rights subject to possible forfeiture include the freedom of teaching (Article 5 para 3), the freedom of assembly (Article 8), the freedom of association (Article 9), the privacy of correspondence, posts and telecommunications (Article 10), the rights of property (Article 14), or the right of asylum (Article 16a).

⁵³ The Law on the Federal Constitutional Court, Articles 36–41 lay out the procedure and the criteria for the forfeiture of the above-mentioned fundamental rights. In particular, the decision on forfeiture of fundamental rights requires a two-third majority of eight judges (hence at least 6 judges, leading to a de-facto three-quarter majority needed). A motion to forfeit one or more of the mentioned fundamental rights has to be filed by the federal parliament, a state parliament, or the federal government.

⁵⁴ *Ibid.*, Article 39–41.

⁵⁵ See the Constitutional Court decisions of 25 July 1960 (2 BvA 1/56) and of 2 July 1974 (2 BvA 1/69).

⁵⁶ See e.g. the Constitutional Court decision of 2 July 1974 (2 BvA 1/69); summary available from <https://bit.ly/2LjpwMK>.

⁵⁷ In these cases, the Court could either not establish a threat or the threat had ceased to exist, mainly due to time passed since the offence was committed. This was also due to the time it took for one of the relevant bodies to file a motion to forfeit the rights and the length of judicial proceedings before the Court. Moreover, other sanctions have been imposed on the offenders in the meantime.

⁵⁸ Basic Law, Article 19 (1).

⁵⁹ For the list of state press laws, see <http://bit.ly/2EezNKV>.

⁶⁰ Article 2 para 1 of the Basic Law states that every person has “the right to free development of his personality insofar as he does not violate the rights of others or offend against the constitutional order or the moral law.” Article 3 of the Basic Law provides guarantees of equal treatment: “(1) All persons shall be equal before the law. (2) Men and women shall have equal rights. The state shall promote the actual implementation of equal rights for women and men and take steps to eliminate disadvantages that now exist. (3) No person shall be favoured or disadvantaged because of sex, parentage, race, language, homeland and origin, faith, or religious or political opinions. No person shall be disadvantaged because of disability.” The provisions of Article 3 para 2 on actual implementation of equal rights of men and women and guarantees of equal treatment on the basis of disability were introduced by the amendment to the Basic Law from 27 October 1994.

⁶¹ Act Implementing European Directives Putting into Effect the Principle of Equal Treatment (General Act on Equal Treatment), adopted 14 August 2006, in force from 18 August 2006, Federal Law Gazette 2006 I, p. 1897, available from <http://bit.ly/2EVxYQm>.

⁶² Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin; Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation; Directive 2002/73/EC of 23 September 2000 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions; and Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services.

⁶³ Federal Act on Gender Equality, amending Federal Act on Equality between Women and Men in the Federal Public Administration and in Federal Enterprises and Courts, adopted

on 24 April 2015, in force from 1 May 2015, Federal Law Gazette 2015 I, p. 642, available from <http://bit.ly/2G1Ug23>. It should be noted that the Act was met with criticism by the Federation of German Trade Unions and the Union of Employees of the highest federal authorities, as it contained several steps backwards compared to its original 2011. For example, the final version weakened the position of equal opportunity officers by stipulating a 10-day deadline for filing objections.

⁶⁴ *Ibid.*, Section 34 of the Federal Act on Gender Equality. Equal opportunity officers shall be involved in recruitment procedures, decisions on transfers, training and professional advancement, decisions on dismissals and termination agreements, and in preparation of an equality plan for that particular agency. They also have the right of objection *vis-à-vis* the head of the agency when it comes to infringements of the Act. In a case where the agency has “infringed the rights of the equal opportunity officer or prepared an equality plan which does not comply with the requirements” of the Act, the equal opportunities officer may bring the matter, after repeated failures to reach an agreement extra judicially, before the administrative court.

⁶⁵ Law for Equal Participation of Women and Men in Executive Positions in the Private Sector and Public Service (*FührposGleichberG*), adopted on 24 April 2015, in force from 1 May 2015, Federal Law Gazette 2015 I, p. 642, available from <http://bit.ly/2EfBK5U>.

⁶⁶ For the list and references of all federal state laws on gender equality in public administration on federal state level, see <http://bit.ly/2EUzaDo>.

⁶⁷ Book IX of the Social Security Code, adopted 19 June 2001, in force from 1 July 2001, Federal Law Gazette 2001 I, p. 1046–1047; available from <https://bit.ly/2kl4MTs>. Book IX of the Social Security Code regulates the rehabilitation and participation of people with disabilities and, *inter alia*, provides for (financial) benefits they are entitled to as well as protection against unfair dismissal. It allowed the transition from merely providing

relief and care to persons with disabilities, to recognising and promoting their right to self-determination and enhancing their participation in society by providing targeted assistance and ‘help to self-help.’ The Law also provides for the right to class action by relevant NGOs and associations in Article 63.

⁶⁸ Act on Equal Opportunities of Disabled People (BGG), adopted 27 April 2002, in force from 1 May 2002, Federal Law Gazette 2002 I, p. 1467-1468, available from <http://bit.ly/2r04B7A>. The Act was amended in 2016 to provide for the implementation of the UN Convention on the Rights of Persons with Disabilities (CRPD) through national legislation in several areas. These included the improvement of accessibility for people with disabilities employed in the Federal Administration and the increase of the use of sign language and ‘Simple Language’ (“*Leichte Sprache*” which encompasses ‘simple language,’ ‘easy to understand/read language,’ or ‘plain language’). The 2016 Amendment has been widely criticised for failing to apply to the private sector, in particular public accommodations, in contravention of the CRPD.

⁶⁹ Overview of all state-level laws on Equal Opportunities of Disabled People, available from <https://bit.ly/2srE3yP>.

⁷⁰ German Criminal Code, in its version of 13 November 1998 (promulgated), Federal Law Gazette 1998 I p. 3322, last amended by Article 1 of the Law of 11 June 2017, Federal Law Gazette 2017 I, p. 1612; German official version available from <http://bit.ly/2G315R6>. For the English translation, see <https://bit.ly/2JmNg5d>.

⁷¹ See answer by the Federal Government of 14 May 2009 to a minor interpellation by parliamentarians of the party Die Linke regarding riots of xenophobic and extremist nature in Germany in March 2009, Bundestag printed paper (*Bundestagsdrucksache*) Nr. 16/13035, p. 1, available from <http://bit.ly/2nWUkZJ>.

⁷² Section 130 of the Criminal Code reads: (1) Whosoever, in a manner capable of disturbing the public peace:

1. incites hatred against a national, racial, religious group or a group defined by their ethnic origins, against segments of the population or individuals because of their belonging to one of the aforementioned groups or segments of the population or calls for violent or arbitrary measures against them; or
2. assaults the human dignity of others by insulting, maliciously maligning an aforementioned group, segments of the population or individuals because of their belonging to one of the aforementioned groups or segments of the population, or defaming segments of the population, shall be liable to imprisonment from three months to five years.

(2) Whosoever:

1. With respect to written materials (section 11(3)) which incite hatred against an aforementioned group, segments of the population or individuals because of their belonging to one of the aforementioned groups or segments of the population which call for violent or arbitrary measures against them, or which assault their human dignity by insulting, maliciously maligning or defaming them,
 - (a) disseminates such written materials;
 - (b) publicly displays, posts, presents, or otherwise makes them accessible;
 - (c) offers, supplies or makes them accessible to a person under eighteen years; or
 - (d) produces, obtains, supplies, stocks, offers, announces, commends, undertakes to import or export them, in order to use them or copies obtained from them within the meaning of Nos (a) to (c) or facilitate such use by another; or
2. disseminates a presentation of the content indicated in No 1 above by radio, media services, or telecommunication services shall be liable to imprisonment not exceeding three years or a fine.

(3) Whosoever publicly or in a meeting approves of, denies or downplays an act committed under the rule of National Socialism of the kind indicated in section 6 (1) of the Code of International Criminal Law, in a manner capable of disturbing the public peace shall be liable to imprisonment not exceeding five years or a fine.

(4) Whosoever publicly or in a meeting disturbs the public peace in a manner that violates the dignity of the victims by approving of, glorifying, or justifying National Socialist rule of arbitrary force shall be liable to imprisonment not exceeding three years or a fine.

(5) Subsection (2) above shall also apply to written materials (section 11(3)) of a content such as is indicated in subsections (3) and (4) above.

(6) In cases under subsection (2) above, also in conjunction with subsection (5) above, and in cases of subsections (3) and (4) above, section 86(3) shall apply *mutatis mutandis*.”

⁷³ Section 130a prohibits the dissemination of publications “capable of serving as an instruction for an unlawful act,” or encouraging others to commit such an act, as defined by Article 126, this includes breach of the public peace, genocide, crimes against humanity and war crimes.

⁷⁴ Section 86 (Dissemination of propaganda material of unconstitutional organisations) reads:

“(1) Whosoever within Germany disseminates or produces, stocks, imports or exports or makes publicly accessible through data storage media for dissemination within Germany or abroad, propaganda material

1. of a political party which has been declared unconstitutional by the Federal Constitutional Court or a political party or organisation which has been held by final decision to be a surrogate organisation of such a party;
2. of an organisation which has been banned by final decision because it is directed against the constitutional order or against the idea of the comity of nations or which has been held by final decision to be a surrogate organisation of such a banned organisation;
3. of a government, organisation or institution outside the Federal Republic of Germany active in pursuing the objectives of one of the parties or organisations indicated in Nos 1 and 2 above; or
4. propaganda materials the contents of which are intended to further the aims of a former National Socialist organisation,

shall be liable to imprisonment not exceeding three years or a fine.

(2) Propaganda materials within the meaning of subsection (1) above shall only be written materials (section 11(3)) the content of which is directed against the free, democratic constitutional order or the idea of the comity of nations.

(3) Subsection (1) above shall not apply if the propaganda materials or the act is meant to serve civil education, to avert unconstitutional movements, to promote art or science, research or teaching, the reporting about current or historical events or similar purposes.

(4) If the guilt is of a minor nature, the court may order a discharge under this provision.”

⁷⁵ Section 86a (Using symbols of unconstitutional organisations) reads:

“(1) Whosoever

1. domestically distributes or publicly uses, in a meeting or in written materials (section 11(3)) disseminated by him, symbols of one of the parties or organisations indicated in section 86(1) Nos 1, 2 and 4; or
2. produces, stocks, imports or exports objects which depict or contain such symbols for distribution or use in Germany or abroad in a manner indicated in No 1, shall be liable to imprisonment not exceeding three years or a fine.

(2) Symbols within the meaning of subsection (1) above shall be in particular flags, insignia, uniforms and their parts, slogans and forms of greeting. Symbols which are so similar as to be mistaken for those named in the 1st sentence shall be equivalent to them.

(3) Section 86(3) and (4) shall apply mutatis mutandis.”

⁷⁶ See Section 86a para 2 of the Criminal Code; “symbols” are defined as “in particular flags, insignia, uniforms and their parts, slogans and forms of greeting” as well as “symbols” which are so similar as to be mistaken for them.”

⁷⁷ See Section 46 para 2 of the Criminal Code.

⁷⁸ European Council Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law.

⁷⁹ Section 11 para 3 of the Criminal Code.

⁸⁰ *C.f.* Section 74d of the Criminal Code.

⁸¹ See Section 86 of the Criminal Code.

⁸² See Section 86a of the Criminal Code.

⁸³ See e.g. Sabine Leutheusser-Schnarrenberger (former Minister of Justice), NGO: The Internet Zeitung, Leutheusser-Schnarrenberger sees the foundations of democracy threatened, available from <http://bit.ly/2BPhZ7L>.

⁸⁴ See decision of the Federal High Court of Justice of 16 November 1993, BGH 1 StR 193/93.

⁸⁵ “Simple denial” constitutes an offence pursuant to Sections 185 and 189; qualified denial is an offence under Sections 130, 185 and 189 of the Criminal Code.

⁸⁶ Jurisprudence of the Federal Constitutional Court and the Federal Court of Justice has defined the essential characteristics of the Holocaust as: a) the existence of a master plan, b) the use of gas chambers, c) the number of victims, and d) the singularity of the Holocaust. See e.g. J. Neander, With criminal law against the “Auschwitz lie”. Half a century § 130 Criminal Code “sedition” in *Teologie.geschichte*, Volume 1, 2006, Saarland University, available from <https://bit.ly/2sAgK5p>.

⁸⁷ *Ibid.*

⁸⁸ See e.g. W. Brugger, The Treatment of Hate Speech in German Constitutional Law (Part I), in *German Law Journal*, Volume 4, No. 1 (2003), available from <http://bit.ly/2nZyG6X>.

⁸⁹ *Ibid.*

⁹⁰ Section 19(2) states: “When sentencing, the court shall weigh the circumstances in favour of and

against the offender. Consideration shall in particular be given to the motives and aims of the offender; the attitude reflected in the offence and the degree of force of will involve in its commission; the degree of the violation of the offender's duties; the modus operandi and the consequences caused by the offence to the extent that the offender is to blame for them; the offender's prior history, his personal and financial circumstances; his conduct after the offence, particularly his efforts to make restitution for the harm caused as well as the offender's efforts at reconciliation with the victim."

⁹¹ German Criminal Code, amendment of 12 June 2015, in force as of 1 August 2015, *Federal Law Gazette* 2015 I, p. 925, available from <http://bit.ly/2EBZEFg>. The amendment was adopted following a recommendation by the parliamentary commission of enquiry on the NSU.

⁹² *C.f.* Federal Court of Justice, Decision of 12 December 2000, *New Legal Weekly*, 2001, p. 624.

⁹³ *Ibid.* "Töben" case.

⁹⁴ The Constitutional Court, Decision of 13 April 1994, 1 BvR 23/94, available from <http://bit.ly/2EinPzX>.

⁹⁵ *Ibid.* The Constitutional Court stated that "a statement of opinion does not lose the basic right protection by being formulated sharply or hurtfully [references omitted]. In this respect the question can only be whether and to what extent limits to the freedom of opinion arise according to the standard of Article 5 para 2 of the Basic Law."

⁹⁶ *Ibid.*

⁹⁷ See Federal Constitutional Court ruling of 9 November 2011, 1 BvR 461/08; for English translation, see <https://bit.ly/2JbOfDD>.

⁹⁸ The materials asserted that it was scientifically proven that there had not been any gas chambers for people, and that the Holocaust committed on the Jews was a "convenient lie" making it possible to attribute guilt for the World War II to Germany.

⁹⁹ The conviction was issued under Section 130, paras 2, 3, and 5 of the Criminal Court.

¹⁰⁰ Federal Constitutional Court ruling of 9 November 2011, 1 BvR 461/08.

¹⁰¹ *Ibid.*

¹⁰² *Ibid.*

¹⁰³ The Constitutional Court, Decision of 28 March 2017, 1 BvR 1384/16, available from <http://bit.ly/2nSDxI7>.

¹⁰⁴ The conviction was issued under Section 130 para 3 of the Criminal Code.

¹⁰⁵ The Federal High Court of Justice, Decision of 12 December 2000, 1 StR 184/00, available from <http://bit.ly/2snhwFM>.

¹⁰⁶ *Ibid.*, The High Court concluded that, in reference to Article 9 para 1 of the Criminal Code, an offence is committed "in every place where the offender acted or [...] in which the result of the offence occurs or should have occurred according to the intention of the offender."

¹⁰⁷ *C.f.* Article 5 para 3 of the Basic Law, *op.cit.*

¹⁰⁸ Bavarian Supreme State Court, Decision of 31 January 1994, *New Legal Weekly*, 1994, pp. 952, 953.

¹⁰⁹ See the Decision of the Higher Regional Court (OLG Frankfurt) 2 Ss 413/93, 11 May 1994. However, in a separate case the Bavarian OLG did establish in 1995 that the "poem" amounted to an attack on human dignity; so did the OLG Karlsruhe in its decision of March 1995.

¹¹⁰ Administrative tribunal Frankfurt, Decision of 22 February 1993, *New Legal Weekly*, 1993, p. 2067.

¹¹¹ Under Article 185 of the Criminal Code, insult constitutes "an illegal attack on the honour of another person by intentionally showing disrespect or no respect at all." It can be "punished with imprisonment not exceeding one year or a fine and, if the insult is committed by means of an assault, with imprisonment not exceeding two years or a fine."

These include:

- Defamation – Section 186 of the Criminal Code reads: "Whosoever intentionally and knowingly asserts or disseminates an untrue fact related to another person, which may defame him or negatively affect public opinion about him or endanger his creditworthiness shall be liable to imprisonment not exceeding two years or a fine, and, if the act was committed publicly, in a meeting

or through dissemination of written materials (section 11(3)) to imprisonment not exceeding five years or a fine;” and

- Intentional defamation – Section 187 reads: “(1) If an offence of defamation (section 186) is committed publicly, in a meeting or through dissemination of written materials (section 11(3)) against a person involved in the popular political life based on the position of that person in public life, and if the offence may make his public activities substantially more difficult the penalty shall be imprisonment from three months to five years. (2) An intentional defamation (section 187) under the same conditions shall entail imprisonment from six months to five years.”

The Criminal Code also prohibits the defamation of a deceased person (Article 189) and defamation for persons in political arena (Article 188). Defamation of bodies and representatives of the foreign states (former Article 103 of the Criminal Code) was decriminalised in 2017, following the Böhmermann Case, concerning the comedian Böhmermann and his broadcast of a poem about President Recep Tayyip Erdoğan of Turkey (for case summary, see ‘The Case of Satirist Jan Böhmermann’, Columbia Global Freedom of Expression, 17 May 2016, available from <https://bit.ly/2HvIkYv>).

The Criminal Code includes some minor safeguards for defamation cases, such as limited defence of truth (Article 192 of the Criminal Code), public interest and fair comment defences (Article 193), and prosecution upon request (Article 194).

¹¹³ See T. Wandres, The criminal liability of Auschwitz denial 2000, p. 201; or M. Zuleeg, ‘Group Defamation in West Germany’, 13 *Cleveland-Marshall Law Review* 52 (1964), p. 55.

¹¹⁴ See e.g. the Constitutional Court, Decisions 1 BvR 1476/91, 1 BvR 1980/91, 1 BvR 102/92 and 1 BvR 221/92, decision of 10 October 1995, Decisions of the Constitutional Court (BVerfGE), vol. 93, pp. 266 et seq., 299-303).

¹¹⁵ The Constitutional Court, BVerfGE 93, 266, 300, Decision of 10 October 1995, Decisions 659, at 68. Cited in W. Brugger, The Treatment of Hate Speech

in German Constitutional Law, *op.cit.*

¹¹⁶ *Ibid.*

¹¹⁷ See decision of the Federal High Court of Justice of 8 May 1952, BGH 2 StR 182/52.

¹¹⁸ See decision of the Federal High Court of Justice of 6 May 1958, BGH 5 StR 14/58.

¹¹⁹ See decision of the Federal High Court of Justice of 28 February 1958, BGH 1 StR 387/57.

¹²⁰ Section 166(1) of the Criminal Code stipulates that “[w]hosoever publicly or through dissemination of written materials defames the religion or ideology of others in a manner that is capable of disturbing the public peace, shall be liable to imprisonment not exceeding three years or a fine.” Article 166 para 2 extends liability to “[w]hosoever publicly or through dissemination of written materials defames a church or other religious or ideological association within Germany, or their institutions or customs in a manner that is capable of disturbing the public peace, shall incur the same penalty.”

¹²¹ Lenckner/Bosch in Schönke/Schröder, Criminal Code (Strafgesetzbuch) Commentary, 28th edition 2010, §166, Rn. 1-24.

¹²² See decision by Higher Regional Court Cologne (OLG Köln) of 11.11.1981, 3 Ss704/81; and decision by Higher Regional Court Karlsruhe of 17.10.1985, 2 Ss 58/85.

¹²³ S. Stübinger in Kindhäuser, Neumann & Paeffgen, Commentary to the Criminal Code, the Fifth Edition, 2017, Rn. 17.

¹²⁴ The Public Meeting Law, Assembly Act, adopted on 24 April 1953, as amended on 15 November 1978 (Federal Law Gazette I p. 1789), last amended by Article 2 of the Law of 8 December 2008 (BGBl. I p. 2366).

¹²⁵ *C.f.* Article 21 of the Basic Law.

¹²⁶ The right to assemble is protected in Article 8 of the Basic Law.

¹²⁷ Public party financing is a direct monetary support by public authorities for the activities of political parties together with the support paid out to parties to finance their activities in the public sector.

¹²⁸ The Law on Associations (*Vereinsgesetz*), adopted on 5 August 1964 (BGBl. I p. 593), as subsequently amended, last amended by Article 1 of the Act of 10 March 2017 (BGBl. I p. 419).

¹²⁹ *Op.cit.*

¹³⁰ NetzDG, *op.cit.*, Section 1(1).

¹³¹ *Ibid.*

¹³² *Ibid.*, Section 3.

¹³³ Explanatory memorandum, p.3, available from <https://bit.ly/2HjDjEB/>.

¹³⁴ *Ibid.*, Section 1(3) refers to the following provisions of the Criminal Code, *op.cit.*: Section 86 “dissemination of propaganda material of unconstitutional organisations,” Section 86a “using symbols of unconstitutional organisations,” Section 89a “preparation of a serious violence offence endangering the state,” Section 91 “encouraging the commission of a serious violence offence endangering the state,” Section 100(a) “treasonous forgery,” Section 111 “public incitement to crime,” Section 126 “breach of the public peace by threatening to commit offences,” Section 129 “forming criminal organisations,” Section 129a “forming terrorist organisations,” Section 129b “criminal and terrorist organisations abroad,” Section 130 “incitement to hatred,” Section 131 “dissemination of depictions of violence,” Section 140 “rewarding and approving of offences,” Section 166 “defamation of religions, religious and ideological associations,” Section 184b “distribution, acquisition and possession of child pornography” in conjunction with Section 184(d) “distribution of pornographic performances by broadcasting, media services or telecommunications services,” Section 185 “insult,” Section 186 “defamation,” Section 187 “intentional defamation,” Section 201(a) “violation of intimate privacy by taking photographs,” Section 241 “threatening the commission of a felony,” and Section 269 “forgery of data intended to provide proof.”

¹³⁵ *Ibid.* Section 3(2)(2) and Section 3(2)(3).

¹³⁶ *Ibid.*, Sections 4(1)(2) and 4(1)(3)

¹³⁷ *Ibid.*, Section 4(5).

¹³⁸ *Ibid.*, Section 5.

¹³⁹ Pursuant to the Basic Law, media content is regulated at state – not federal – level. However, under NetzDG, all responsibility lies with the Federal Office for Justice, under the auspices of the Ministry of Justice, from overseeing the implementation of the law to setting the regulatory fines. This raises the questions of its constitutionality and compliance with the Basic Law.

¹⁴⁰ For example, Facebook (through the service provider Arvato) currently runs two offices in Germany and employs 1,200 people to handle ‘unlawful’ content on Facebook. According to daily newspaper *FAZ*, new staff members receive one week of ‘orientation’ training followed by in-depth training and shadowing of colleagues for several weeks. There is a concern over whether this is sufficient to make robust decisions on the lawfulness of contentious content, particularly given the fact that employees seem not to be required to have any legal background. See e.g. *FAZ*, Everyday in the Facebook deletion team: “After the first decapitation I cried,” 11 July 2017, available from [http://bit.ly/2sLBcPo](http://bit.ly/2sLBcPo;); or *FAZ*, Second German Delicacy Center: Facebook fights cruelty on the net in future from Essen, 9 August 2017, available from <http://bit.ly/2EXCb65>.

¹⁴¹ **Federal Office of Justice** is also part of call for international legal transactions and performs other functions.

¹⁴² See *Spiegel Online*, Evaluation of thousands of tweets, Freedom of speech? What Twitter blocked everything, 27 June 2017, available from <http://bit.ly/2rWCOpm>.

¹⁴³ *Ibid.*

¹⁴⁴ *Ibid.*

¹⁴⁵ See e.g., *Zeit*, What you need to know about the NetzDG 4 January 2018, available from <https://bit.ly/2LkandV>; or *Zeit*, Twitter locks “Titanic” account for satire tweets, 3 January 2018, available from <https://bit.ly/2xDjLrb>.

¹⁴⁶ See e.g., Dlf24, Against hatred or freedom of

expression?, 4 March 2018, available from <https://bit.ly/2Hbg8ZE>.

¹⁴⁷ Protection of Young Persons Act, (*Jugendschutzgesetz*), adopted 23 July 2002 (Federal Law Gazette I p. 2730), last amended by Article 11 of the Law of 10 March 2017 (Federal Law Gazette I p. 420), available at <https://dejure.org/gesetze/JuSchG>. Material appearing on the list may only be made available to adults and must be kept only in commercial spaces off-limits to children and young people. In addition, Section 15(4) and (5) of the Act impose a ban on advertising the list for commercial purposes.

¹⁴⁸ Pursuant to Section 15(2), subject to the restrictions set out in para 1, are contents meeting the elements of criminal offence set out in Article 130 of the Criminal Code without having to be publicly listed. This allows for executive measures by law enforcement agencies, particularly for the blocking of Internet pages without any court proceedings and below the threshold of culpability.

¹⁴⁹ See minor interpellation at the Landtag of Northrhine-Westphalia of 3 February 2017, Landtag printed paper 16/14142, available from <http://bit.ly/2G9FE07>.

¹⁵⁰ The Civil Code (*Bürgerliches Gesetzbuch-BGB*) (Civil Code), in the version promulgated on 2 January 2002 (Federal Law Gazette 2002 I, Nr. 53, p. 2909; 2003 I, p. 738), last amended by Article 1 of the Act of 20 July 2017 (Federal Law Gazette 2017 I, p. 2787). English version available from <https://bit.ly/2GWvFkj>.

¹⁵¹ This is possible under Section 823(2) of the Civil Code in combination with Section 185 ff. of the Criminal Code, *op.cit.*

¹⁵² The Civil Code, *op.cit.*, Section 823(1).

¹⁵³ *Ibid.*, Section 826, which stipulates that “anyone who deliberately causes harm to another in a manner contrary to common decency commits the other person to compensation for the damage.”

¹⁵⁴ See the Civil Code, Section 847.

¹⁵⁵ *Ibid.*, Section 1004.

¹⁵⁶ *C.f.* BVerfGE 90, 241, 247, *op.cit.*, cited in W. Brugger, *The Treatment of Hate Speech in German Constitutional Law*, *op.cit.*

¹⁵⁷ *Op.cit.*

¹⁵⁸ General Act on Equal Treatment, *op.cit.*, Section 15 (1) and 21 (1).

¹⁵⁹ *Ibid.*, Section 21 (2) and Section 15 (2).

¹⁶⁰ General Act on Equal Treatment, *op.cit.*, Section 15 (4).

¹⁶¹ Civil Code, *op. cit.*, Section 195.

¹⁶² See the Agency’s own evaluation of the General Act on Equal Treatment, available from <http://bit.ly/2H20KPM>.

¹⁶³ Act on Equal Opportunities of Disabled People (BGG), *op.cit.*

¹⁶⁴ *Ibid.*, Section 15.

¹⁶⁵ The Anti-discrimination Agency is established under AGG, *op.cit.*, Section 25(1).

¹⁶⁶ General Act on Equal Treatment, *op.cit.*, Section 27.

¹⁶⁷ General Act on Equal Treatment, *op.cit.*, Section 27 (2).

¹⁶⁸ Principles relating to the Status of National Institutions (The Paris Principles), adopted by UN General Assembly resolution 48/134 of 20 December 1993, available from <https://bit.ly/1SGrPXt>.

¹⁶⁹ The Federal Government: Immigration and Integration, for more information, see <https://bit.ly/2GWQHep>.

¹⁷⁰ These are in particular, the Federal Agency for Accessibility for People with Disabilities and Federal Government Commissioner for Matters relating to Persons with Disabilities; both were established under the Act on Equal Opportunities of Disabled People, *op.cit.*

¹⁷¹ For an overview of all state and non-state anti-discrimination institutions, see <https://bit.ly/2JcWCxg>.

¹⁷² See e.g. Federal Constitutional Court ruling of 28 February 1961, 2 BvG 1/60, 2/60, available from

<https://bit.ly/2IWMZSz>; or Federal Constitutional Court ruling 25 March 2014, 1 BvF 1/11 - Rn. (1-135), available from <https://bit.ly/1MCzMxM>.

¹⁷³ See Federal Constitutional Court ruling of 16 June 1981; 1 BvL 89/78; available from <https://bit.ly/2JKYsWT>. The Court stated that it was “the responsibility of the legislator to ensure a programmatic offer that represents a diversity of opinion which is constitutive for the freedom of democracy. The risk that on hand certain views are excluded from formation of public opinion, and, on the other hand, opinion-makers who are in possession of broadcasting frequencies and financial resources have a major influence, is to be avoided. It will not be possible to eliminate this risk with ultimate certainty. At the very least, however, there must be a sufficient probability that equally weighted pluralism will be legally established by the broadcasting system.”

¹⁷⁴ *Ibid.*, this is to be done through the composition of the public service broadcasting councils.

¹⁷⁵ *Ibid.*, this is to be done through the introduction of private broadcasting.

¹⁷⁶ Basic Law, *op.cit.*, Section 70–75.

¹⁷⁷ The IBT (*Rundfunkstaatsvertrag*), dated 31 August 1991 (incorporating the third amendment adopted between 26 August and 11 September 1996), available from <https://bit.ly/2JLMdZW>.

¹⁷⁸ JMStV, dating from 10–27 September 2002, last amended 3-7 December 2015, entry into force 1 October 2016; English version available at <https://bit.ly/2I5Hrvt>.

¹⁷⁹ These are the Interstate Treaty on SWR, adopted 3 July 2013, entry into force 1 January 2014, last amended 30 June 2015; The Interstate Treaty on a public service broadcaster for the states of Berlin and Brandenburg, adopted 25 June 2002, last amended 11 September 2013; the Interstate Treaty on MDR, adopted 30 May 1991. Additionally there are three Interstate Treaties on public broadcasters broadcasting in all the territory of Germany: the ARD-Staatsvertrag (Interstate Treaty on ARD), adopted 31 August 1991, entry into force 1 January 1992, last amended 1 June 2009; the ZDF-Staatsvertrag (Interstate Treaty on ZDF), adopted 31 August 1991, entry into force 1 January 1992, last amended 7 December 2015; and the Deutschlandradio-Staatsvertrag (Interstate Treaty on Deutschlandradio), adopted 17 June 1993, last

amended 31 July–10 October 2006.

¹⁸⁰ Telemedia Law (Telemediengesetz – TMG), promulgated 26 February 2007, Federal Law Gazette I, p. 179, last amended 31 May 2010, available from <https://bit.ly/2GXWPHw>.

¹⁸¹ Law Against Restraints on Competition, (Gesetz gegen Wettbewerbsbeschränkungen-GWB), adopted 26 August 1998, Federal Gazette I, p. 1750, 3245, last amended 1 June 2017, available from <https://bit.ly/2HkOPS5>. Article 35 and 36 of the Law Against Restraints on Competition allows courts to stop mergers under certain conditions, for example if the outlets in question operate in the same market and if they have an annual turnover above a certain threshold, this being considerably less than with non-media companies, thus attaching particular value to the importance of the press in a pluralistic democracy. Further, Article 30 stipulates exemptions to the prohibition of price fixing for the press and its products.

¹⁸² These are: Bayrisches Rundfunkgesetz, MDR-Staatsvertrag, Rundfunkgesetz Mecklenburg-Vorpommern, Medienstaatsvertrag Berlin-Brandenburg, SWR-Staatsvertrag, Radio Bremen Gesetz, WDR Gesetz, Gesetz über den Hessischen Rundfunk, and the Saarländisches Mediengesetz. The latter also regulates private media in the state of Saarland.

¹⁸³ For an overview of the state media laws, see: <https://bit.ly/2kL46gn>.

¹⁸⁴ For an overview of the 16 press laws, see: <https://bit.ly/2J9YSW4>. The press in the states of Rheinland-Pfalz and Saarland is regulated by the respective state media laws in those states.

¹⁸⁵ Staatsvertrag über den Schutz der Menschenwürde und den Jugendschutz in Rundfunk und Telemedien (JMStV), adopted 10 September 2002, entry into force 1 April 2003, last amended 1 October 2016, available from <https://bit.ly/2J7WDGR>.

¹⁸⁶ The IBT, *op.cit.*, Article 3.

¹⁸⁷ *Ibid.*, Article 3.

¹⁸⁸ *Ibid.*, Article 7.

¹⁸⁹ *Ibid.*, Article 25.

¹⁹⁰ *Ibid.*, Article 41.

¹⁹¹ For information about the meetings of the taskforce, see <https://bit.ly/2LVKbaY>. The taskforce is comprised of: the Ministry for Family, the Elderly, Women and Youth, Facebook, YouTube, Twitter, the Amadeu-Antonio-Foundation (web against Nazis), eco - the association of the Internet industry, jugendschutz.net, the German Association for Voluntary Self-Regulation of Digital Media service providers (FSM e.V.), and the association Showing Face.

¹⁹² ARD stands for Consortium of public broadcasters in Germany ('Arbeitsgemeinschaft der öffentlich-rechtlichen Rundfunkanstalten der Bundesrepublik Deutschland').

¹⁹³ ZDF is a German public-service television broadcaster based in Mainz, Rhineland-Palatinatein ('Zweites Deutsches Fernsehen').

¹⁹⁴ See 'Hate on the Net: How do I protect my child?' available from <https://bit.ly/2fflRoS>.

¹⁹⁵ See Tagesschau.de at <https://bit.ly/2nw9WRx>.

¹⁹⁶ For information on the campaign, see <https://bit.ly/2fgFKGp>.

¹⁹⁷ The IBT, *op.cit*, Article 41 (1).

¹⁹⁸ *Ibid.*

¹⁹⁹ *Ibid.*

²⁰⁰ *Ibid.*, Article 7(1), 7(2)

²⁰¹ Law on the Development, Promotion and Organization of Private Broadcasting Services and Other Telemedia in Bavaria (Bayerisches Mediengesetz – BayMG), promulgated 22 October 2003, last amended 20 December 2016, available from <https://bit.ly/2qzZpZk>.

²⁰² State Media Law North Rhine-Westphalia (LMG NRW), adopted 2 July 2002, last amended 2 February 2016, Article 31, available from <https://bit.ly/29FDLdl>.

²⁰³ State Treaty on Central German Broadcasting (MDR), Article 6(3), adopted 30 May 1991, available from <https://bit.ly/2xHfJ1a>.

²⁰⁴ Broadcasting Act for the state of Mecklenburg-Vorpommern, adopted 20 November 2003, last amended 20 April 2015, available from <https://>

bit.ly/2HdLTRn.

²⁰⁵ Saarland Media Law, adopted 27 February 2002, last amended 10 December 2015, Article 23 (2), available from <https://bit.ly/2LkIWSn>.

²⁰⁶ Law on West German Radio (*Gesetz über den Westdeutschen Rundfunk, WDR Gesetz*), version of 6 December 2016, Article 4(2), available from <https://bit.ly/2kJkZb7>.

²⁰⁷ *Ibid.*, Article 4(3).

²⁰⁸ Information available from <https://bit.ly/2DxJaoP>.

²⁰⁹ Information available from <https://bit.ly/2LUc4jm>.

²¹⁰ Information available from <https://bit.ly/2JmgOeq>.

²¹¹ Information available from www.neuemedienmacher.de.

²¹² Information available from <https://mediendienst-integration.de/>

²¹³ Journalist Handbook on Islam, available from <https://bit.ly/2eQbNjB>.

²¹⁴ The legal basis for media regulators' oversight function are the IBT, JMStV, the respective state media laws and the Law on Telemedia.

²¹⁵ Common guidelines of the state media authorities for advertising, product placement, sponsorship and Teleshopping on TV, adopted on 18 September 2012, available from <https://bit.ly/2Liw11f>.

²¹⁶ See TAZ, We did not write off the internet, available from <https://bit.ly/2HfDihb>; and Spiegel, Take off the state media authorities, 20 March 2005, available from <https://bit.ly/2JsGFGv>.

²¹⁷ Telemedia Law (Telemediengesetz – TMG), promulgated 26 February 2007, Federal Law Gazette I, p. 179, last amended 31 May 2010, available from <https://bit.ly/2GXWPHw>.

²¹⁸ For example, all newspapers must have a 'responsible editor' for each editorial section who by definition is legally liable for editorial

content. The press laws spell out the criteria a ‘responsible editor’ needs to meet to be appointed. Not eligible for appointment are persons who a) do not have their permanent residence in Germany; b) due to judgement cannot assume public offices; c) are below 21 years old; d) do not have full legal capacity; and e) cannot be fully prosecuted. Non-adherence to the appointment criteria amounts in six of federal states (most of them being Eastern German federal states) to administrative offenses; while in the remaining ten states, it constitutes a criminal offense, punishable with six to twelve months of imprisonment. See, for example, Article 8 and 9 of the Landespressegesetz Baden-Württemberg, adopted 14 January 1964, last amended 4 February 2003; or Article 5 of the Bayerisches Pressegesetz, adopted 3 October 1949, last amended 10 April 2007.

Press laws further require outlets to clearly indicate, on the published work, the name of the author, and the name and address of the publisher and printing house. Exemptions apply to material such as instruction manuals, tickets, official forms, price lists, election ballots, etc. Magazines and newspapers further have to indicate the name of the ‘responsible editor(s),’ as well as regularly make information public about the ownership structure and any changes thereof, and clearly distinguish editorial content from paid advertisement. See, for example, Article 5 of the Landespressegesetz Nordrhein-Westfalen, adopted 24 May 1966, last amended 3 December 2013.

²¹⁹ See e.g. the Berlin Press Law, available from <https://bit.ly/2HmVA42>.

²²⁰ For more information, see <http://www.presserat.de/>.

²²¹ These are the German Journalists Association (DJV), German Journalists Union (DJU), the Federal Association of German Newspaper Publishers (BDZV) and the Association of German Magazine Publishers (VDZ).

²²² The main criterion is that the journalistic activity has to be in the public interest, excluding, for instance, authors of the advertising sector and potentially making it difficult for bloggers to be included – they would have to argue for the

‘public interest nature’ of their blog. Full-time and for profit employment is a prerequisite of obtaining a press card. See the Guidelines of the German Journalist Union, available from <https://bit.ly/2vhm7Lh>. An example is BildBlog,⁸⁶ which began as a ‘watchblog’ following, criticising, and challenging the German tabloid *Bild*. Since 2009, it has widened its scope to include the wider German media. The Press Council has accepted a series of complaints from BildBlog about *Bild*, but following counter-complaints from *Bild*’s publisher Axel Springer, clarified that it will not take on ‘cases of misuse’, explaining: “an abuse may occur when complaints are brought through organised campaigns against individual media.”

²²³ The German Press Code, available from <https://bit.ly/1FgsgW8>.

²²⁴ *Ibid.*, Section 1.

²²⁵ *Ibid.*, Section 9.

²²⁶ *Ibid.*, Section 10.

²²⁷ *Ibid.*, Section 12.

²²⁸ *Ibid.*, Section 12.1.

²²⁹ *Ibid.*, Section 16.

²³⁰ German Press Council, Annual Report 2016, available at <https://bit.ly/2JsGPxB>.

²³¹ These were Sections 1 (respect for human dignity), Section 10 (prohibition of vilification of one’s convictions), and Section 12 (prohibition of discrimination) of the Press Code.

²³² See Press Council Decision of 9 September 2014, No. 0597/14/2; see also Press Release of 9 September 2014, available from <https://bit.ly/2Joyb3k>.

²³³ *Ibid.*

²³⁴ See Press Council decision of 12-14 September 2017, No. 0596/17/1.

²³⁵ Telemedia Law (Telemediengesetz – TMG), promulgated 26 February 2007, Federal Law Gazette I, p. 179, last amended 31 May 2010, available from <https://bit.ly/2GXWPHw>.

²³⁶ *Ibid.*, Telemedia Law, Article 3 (5).

²³⁷ For the list of the federal state press laws, see <https://bit.ly/299UTsY>.

²³⁸ The Basic Rules of the German Advertising Council, available from <http://www.werberat.de/grundregeln>.

²³⁹ *Ibid.*

²⁴⁰ *Ibid.*

²⁴¹ German Advertising Council, 2014 Guidelines against Denigration and Discrimination of Persons.

²⁴² The Basic Rules of the German Advertising Council.

²⁴³ The German Advertising Council, Complaint Procedure, available from <https://bit.ly/2sC8jX7>.

²⁴⁴ *Ibid.*

²⁴⁵ *Ibid.*, Breakdown of complaints, available from <https://werberat.de/bilanz-2017>.



