Eberhard-Schultz-Stiftung
für soziale Menschenrechte und Partizipation

Fight everyday and institutionalised racism!

Parallel report to the UN-Committee for the Elimination of Racial Discrimination as part of the 23rd – 26th Report of the Federal Republic of Germany according to Article 9 of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)

von der Eberhard-Schultz-Stiftung für soziale Menschenrechte und Partizipation und die folgenden unterstützenden NGOs:

advd Antidiskriminierungsverband Deutschland
cusbu
Internationale Liga für Menschenrechte Im Geiste Carl von Ossietzkys
Humanistische Union Menschenwürde achten, Bürgerrechte durchsetzen, Demokratie stärken.
NATIONALE STELLE ZUR VERHÜTUNG VON FOLTER
KOP Kampagne für Opfer rassistischer Polizeigewalt
Lesbenberatung
LesMigraS
PSZ PSYCHOSOZIALES ZENTRUM FÜR GEFLÜCHTETE IM LAND BRANDENBURG
Integrationszentrum Harmonie e.V.
KORIENTATION
AmF Aktionsbündnis Muslimischer Frauen
KommMit für Migranten und Flüchtlinge e.V.
EACH ONE TEACH ONE e.V.
BBZ Beratungs- und Betreuungszentrum für junge Geflüchtete und Migrant*innen
ROMA TRIAL
Reach Out
XENION Psychosoziale Hilfen für politisch Verfolgte e.V.
ippnw Internationale Ärzt*innen für die Verhütung des Atomkrieges – Ärzt*innen in sozialer Verantwortung e.V.
mr MIGRATIONSRAT

- Antidiskriminierungsverband Deutschland (advd),
- AmF-Aktionsbündnis muslimischer Frauen in Deutschland e.V.,
- CommUnities Suport for BIPoC Refugees from Ukraine (CUSBU),
- Each One Teach One (EOTO) e.V.,
- Harmonie e.V.,
- Humanistische Union Berlin e.V., Landesverband Berlin,
- Internationale Liga für Menschenrechte,
- IPPNW-Deutschland,
- KommMit-für Migranten und Flüchtlinge e.V. mit den Standorten Beratungs- und Betreuungszentrum für junge Geflüchtet und Migrant*innen *(*BBZ*)* und PSZ (Psychosoziales Zentrum Brandenburg),
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- Migrationsrat Berlin e.V.,
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Publisher and Reference address
Eberhard-Schultz-Stiftung für Soziale Menschenrechte und Partizipation
Greifwalderstr. 4, 10405 Berlin
Tel.: 0049 30 24533798, Mail: info@sozialemenschenrechtsstiftung.org

Scientific Director
Cengiz Barskanmaz

Editorial Group
Biplab Basu
Lisa M. Hagen
Klaus Kohlmeyer
Selma Oker
Eberhard Schultz
Josephine Ziehrer-Lättner

Translation
Julius De Michelis

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Berlin, October 2023

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List of abbreviations

advd	*Antidiskriminierungsverband* | German Anti-Discrimination Association
AfD	*Alternative für Deutschland*
AGG	*Allgemeines Gleichbehandlungsgesetz* | General Equal Treatment Act
ARI	*Antirassistische Initiative Berlin*
Art.	Article
AsylG	*Asylgesetz* | Asylum Act
AsylbLG	*Asylbewerberleistungsgesetz* | Asylum Seekers' Benefits Act
AufenthG	*Aufenthaltgesetz* | Residence Act
BAföG	*Bundesausbildungsförderungsgesetz* | Federal Training Assistance Act
BAG	*Bundesarbeitsgericht* | Federal Labour Court
BDS	Boycott, Divestment and Sanctions Movement
BGH	*Bundesgerichtshof* | Federal Court of Germany
BKA	*Bundeskriminalamt* | Federal Criminal Police Office
BMAS	*Bundesministerium für Arbeit und Soziales* | Federal Ministry of Labour and Social Affairs
BMI and	*Bundesministerium des Innern und Heimat* | Federal Ministry of the Interior Community
BMJ	*Bundesministerium der Justiz* | Federal Ministry of Justice
BMSFSJ	*Bundesministerium für Familie, Senioren*, *Frauen und Jugend* | Federal Ministry for Family, the Elderly, Women and Youth
BPolG	*Bundespolizeigesetzes* | Federal Police Act
BT	*Bundestag* | German Federal Parliament
BVerfG	*Bundesverfassungsgericht* | Federal Constitutional Court
BVerfGE	*Entscheidungen des Bundesverfassungsgerichts* | Rulings of the Federal Constitutional Court
BvL	*Bundesvereinigung Logistik* | Federal Logistics Association
BW	Baden-Württemberg
CDU	*Christlich-Demokratische Union Deutschlands* | Christian Democratic Union of Germany
CEDAW	Convention on the Elimination of all Forms of Discrimination Against Women
CERD	Committee on the Elimination of Racial Discrimination
CESR	Committee on Economic, Social and Cultural Rights
CFR	Council on Foreign Relations
CRC	Convention on the Rights of the Child
CRPD	Committee on the Rights of Persons with Disabilities
CSU	*Christlich-Soziale Union in Bayern* | Christian-Social Union in Bavaria
DGB	*Deutscher Gewerkschaftsbund* | German Trade Union Confederation
Dir.	Directive
DS	*Drucksachen* | Printed Documents
EC	European Commission
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
ECJ	European Court of Justice
ECRI	European Commission against Racism and Intolerance
EEC	European Economic Community
EGMR	*Europäischer Gerichtshof für Menschenrechte* | European Court of Human Rights

EU	European Union
FDP	*Freie Demokratische Partei* | Free Democratic Party
ff.	and following
GDPR	General Data Protection Regulation
GG	Grundgesetz | Constitution of the Federal Republic of Germany
GKV	*Gesetzliche Krankenversicherung* | Statutory Health Insurance
GewO	*Gewerbeordnung* | Trade, Commerce and Industry Regulation Act
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
IHRA	International Holocaust Remembrance Alliance
IPPNW	International Physicians for the Prevention of Nuclear War
JS	*Jüdische Stimme für gerechten Frieden in Nahost e.V.* | Jewish Voice for Just Peace in the Middle East
KOP	*Kampagne für Opfer rassistischer Polizeigewalt* | Campaign for Victims of Racist Police Violence
LAG	*Landesarbeitsgericht* | Regional Labour Court
lit.	Littera (Letter)
LG	*Landgericht* | Regional Court
LGBTI	Lesbian, Gay, Bisexual, Transexual and Intersexual
LKA	Landeskriminalamt | State Criminal Police Office
MAD	*Militärischen Abschirmdienst* | Military Counter-Intelligence Service
NPD	*Nationaldemokratische Partei Deutschland* | National Democratic Party of Germany
NSU	*Nationalsozialistischer Untergrund* | National Socialist Underground
OLG	*Oberlandesgericht* | Higher Regional Court
para.	Paragraph
PC	Personal Computer
PartIntG	*Partizipations- Integrationsgesetz* | Participation and Integration Act
PartMigG	*Partizipations- und Migrationsgesetz* | Participation and Migration Act
PKS	*Polizeiliche Kriminalstatistik* | Police Crime Statistics
PTSD	Post-Traumatic Stress Disorder
SEK	*Spezialeinsatzkommando* | Special Task Force
SGB	*Sozialgesetzbuch* | German Social Code
SPD	*Sozialdemokratische Partei Deutschlands* | Social Democratic Party of Germany
StGB	*Strafgesetzbuch* | German Criminal Code
StPO	*Strafprozessordnung* | German Code of Criminal Procedure
TBB	*Türkischer Bund Berlin-Brandenburg* | Turkish Federation in Berlin-Brandenburg
TinG NRW	*Nordrheinwestfälische Teilhabe- und Integrationsgesetz* | North Rhine-Westphalian Participation and Integration Act
TJ	Tablighi Jamaat
UDHR	Universal Declaration of Human Rights
UN	United Nations
VG	*Verwaltungsgericht* | Administrative Court
WHO	World Health Organisation

About this report

This parallel report to the State Report of the Government of the Federal Republic of Germany (hereinafter, the Federal Government) to the UN Committee, initiated by the Eberhard-Schultz-Stiftung,[1] is the result of a cooperation of various civil society organisations, actors, and experts on racism, with the aim of drawing attention to persistent and structural forms of racism. These are not nearly taken into account enough in the present 23rd – 26th State Report of the Federal Republic of Germany[2] in line with a consistent elimination of all forms of racist discrimination. For us, the inclusion of the voices of groups worthy of protection according to the International Convention on the Elimination of All Forms of Racial Discrimination (hereinafter ICERD), is of central importance.

This parallel report takes a look at Convention-relevant areas where the risk of discrimination is high or where the Federal Republic of Germany fails to provide adequate protection against structural forms of discrimination. These are exclusions, stigmatisation, disproportionate use of force and hate speech, which are illustrated in this report using cases that have received little publicity and further empirical data. The areas of application of Art. 2, 4 and 5 ICERD are particularly affected: justice and police, education, health, housing and social media (hate speech). In these areas, an increasing number of cases of racial discrimination against refugees in the field of asylum law have been registered in recent years, in addition to the already existing forms of discrimination.

The report begins in **Section I** with a summary of the UN Committee's criticism of previous state reports by the Federal Government. Among other things, the lack of reliable demographic statistics relevant to racism and the unsuitability of the term "people with a migration background" to identify people who may be at risk of discrimination were mentioned here. There are still gaps in the German legal system regarding adequate protection from discrimination, which can be clearly demonstrated by the lack of implementation of the ICERD requirements. For example, the General Equal Treatment Act (*Allgemeines Gleichbehandlungsgesetz*, hereinafter AGG) by no means offers all-embracing protection in areas relevant to the Convention according to Art. 2, 3, and 4 ICERD. Especially in the area pertaining to the police, there is a lack of effective regulations, such as independent complaints bodies against racial profiling or unlawful police violence.

Section II shows how an understanding of racism that is narrowed to direct and intentional discrimination and does not conform to human rights leads to a lack of practical handling of racism by investigating authorities and judges. A reorganisation of the financial support for civil society engagement against racism, anti-Semitism and right-wing extremism is also called for, which should give the initiatives planning security. Furthermore, it is important to promote a diversity-oriented opening of the public service. Last but not least, the need for a Democracy Promotion Act is addressed, which clearly regulates the legal requirements for funding – all the more urgent in view of the increasing right-wing extremist attacks and crimes.

[1] The Eberhard-Schultz-Stiftung has made it its mission to help social human rights achieve universal validity and become the basis for a just and peaceful world. In 2020, a parallel report on the enforcement of the social human right to housing was thus completed for the UN review process together with 20 NGOs. An important result was the UN Social Committee's request to the Federal Government to implement important demands, especially for the human right to housing, within 24 months. For the report, see https://sozialemenschenrechtsstiftung.org/parallelberichte.

[2] BMJ: 23rd – 26th Report of the Federal Republic of Germany under Article 9 of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), dated 28.02.2020.

Section III gives examples of the discrimination realities of different groups affected by racism. In each case, the groups include the following populations: Asians, Jews, "migrants" and people wrongly stigmatised as "migrants" of any national origin, people of Sinti or Romani origin, Muslims and Blacks. Nevertheless, caution is required. As this report shows, the groups cannot be essentialised as homogeneous groups without internal differentiation and further intersections.

To describe **racism against Black people** in Germany, we draw on the Afro Census, which, based on a study, criticises several deficits in the fight against anti-Black racism and also contains numerous recommendations, which are outlined. **Anti-Muslim racism** is presented in different facets by Christine Buchholz from DIE LINKE party, with a focus on anti-fascism and anti-racism: this concerns violence against Muslims, right-wing terror and the various forms of institutional racism associated with it. It also concerns discrimination in everyday life and the position of Muslim religious communities. Another group-related form of racism is **anti-Semitism**, which is within the scope of the Convention despite the absence of the characteristic "religion". Udi Raz describes current manifestations of anti-Semitism and outlines the discourse on "Jewish Life in Germany". The founder of *Roma Trial e.V.*, Hamze Bytyci, describes **racism against people of Sinti and Romani origin**, a problem which has grown historically and is structurally deeply rooted in Germany. He looks in detail at current studies and demonstrates various forms of discrimination in the areas of education, asylum policy and the authorities. Racism against **people who are considered Asian** is manifested in Germany, among other things, through stereotypes with which they are seen as "different", "exotic" and "dangerous" as well as a homogeneous mass. Again and again, these have become the target of right-wing extremist attacks in Germany in recent decades. Finally, Parto Tavangar and To Doan, staff members of *ReachOut*, justify how racism is always **intersectional** and thus any analyses and reports without an intersectional understanding truncate racism and thus make racist crimes invisible and ultimately legitimise them.

Section IV (no segregation and apartheid) deals with two segregated living environments that are a reality for the people concerned: the housing market, where the division is exacerbated due to the lack of legal protection, and the accommodation of asylum seekers or persons obliged to leave the country. Marie Frank from the National Agency for the Prevention of Torture reported on the disproportionality in the detention conditions of refugees and on the lack of child-friendly support for minors in reception centres, where child protection is mostly absent.

Section V critically assesses the state's handling of the fight against racist propaganda and organisations (Art. 4 ICERD). With regard to criminal law regulations and their effectiveness, doubts are raised that Germany is sufficiently fulfilling its obligation. The increasing number of racist murders and Germany's structural failure to investigate them are worrying. Germany does *not* address the death of Oury Jalloh in his prison cell in its state report, although evidence points to outside influence.

In his contribution, lawyer Ahmed Abed focuses on the stigmatisation of "clan crime" as a concept of racial profiling, according to which persons of the Muslim and South-Eastern European immigrant groups are disproportionately checked on the basis of their names and whereabouts. The *Campaign for Victims of Racist Police Violence*, (*Kampagne für Opfer rassistischer Polizeigewalt*, hereinafter KOP) advocates against racist police violence and racial profiling. In the documented examples from practice, the systematic media concealment

of racist police violence and the racist coordinated system between the police and the judiciary as well as the resulting powerlessness of those affected are made visible based on the perspective of those affected. Biplab Basu, founder of KOP, refers to the German Institute for Human Rights' classification of the Federal Police Act as being contrary to human rights and claims the need for action in view of the lack of action – despite the rising trend of right-wing extremism.

Section VI looks at racism and human rights protection in selected areas of society, ranging from the safety of refugees, participation in political life, access to nightclubs, to discrimination and segregation in the education system, labour market, churches and health care. In his expert contribution, vocational training expert Klaus Kohlmeyer describes mechanisms of racist discrimination in the German school system and its “tripartism". Pupils are divided into the three types of school after primary school between the ages of 10 and 12, which lead to different vocational perspectives. In the case of young people from racialised families, this is exacerbated by the fact that their disadvantaged situation is also the result of structural discrimination and their own or transmitted and "inherited" experiences of discrimination. Discrimination in the health sector is also dealt with in detail. In 2020, a civil human rights tribunal concluded that the Federal Republic of Germany massively violates the right to life and physical integrity in regards to health.

Against the background of the realities of life of those affected, the declaration of the Federal Government that German law in its current form offers sufficient protection against racial discrimination is strongly contradicted. The intention of the present parallel report is to supplement the State Report with the missing experience reports and perspectives of groups worthy of protection. We hope that this will contribute to a better fight against racism at all levels of society. In this sense, the report concludes in **Section VII** with recommendations of measures that need to be implemented, improved, further developed and, in particular, continuously better adjusted with regard to their concrete application.

With the support of more NGOs, this report can become an effective tool for identifying and targeting racism, if not eliminating it completely, in its main manifestations.

Foreword

With this NGO parallel report we want to critically examine the 23rd – 26th report of the Federal Republic of Germany according to Article 9 of the ICERD. We want to use the possibility of an institutionalised debate at the international and national level to make the experiences of NGOs and those affected visible, in addition to the position of the Federal Government. We, i.e. experts under the supervision of Prof. Dr. Cengiz Barskanmaz, have taken up individual aspects of the State Report in order to evaluate them in the light of the provisions of the ICERD and the previous case law of the UN Committee.

In our opinion, the present State Report of the Federal Government regrettably fails to list central aspects of everyday and institutional racism that have been discussed in public and academia at least since the National Socialist Underground (hereinafter NSU) case. The aim of this parallel report is to document everyday and institutional forms of racism in the Federal Republic of Germany and to illustrate them with cases that have not yet been discussed in public or have been underrepresented. It is essential that those affected themselves have their say, for example by describing their own experiences. In this sense, this evidence-based report is to be understood as an impetus for a long overdue debate on the future of a discrimination-free society.

In order to ensure the realisation of this vision, it is necessary that the Federal Republic of Germany promptly and comprehensively implements the requirements of the ICERD, giving due consideration above all to the criticism made in the last State Report. It is crucial that all public institutions and authorities in Germany make the ICERD the basis of their sovereign actions in order to guarantee the inviolability of human dignity as guaranteed in Article 1 (1) of the German Constitution (*Grundgesetz* hereinafter GG), with regard to the prohibition of discrimination on the basis of race as guaranteed in Article 3 (3) GG, which is to be interpreted in the light of Article 1 (1) ICERD.

This NGO parallel report, as well as the associated State Report, will be the subject of public debate at a meeting of the UN Committee in Geneva. It should be noted, however, that due to the Covid 19 pandemic, the national report and the parallel report have a striking temporal difference. The reporting period of the State Report stretches from December 2012 to June 2018 and the Parallel Report also explicitly tries to argue within this period. Nevertheless, it should be noted that, due to the repeated cancellation or postponement of UN Committee meetings during the pandemic, current developments and measures are also included in the parallel report in order to make it clear once again whether and to what extent the measures announced by the German government were actually implemented – or not.

Racism and discrimination in Germany are topics that have been increasingly discussed publicly in recent years, so the experts responsible for this parallel report do not want to completely disregard the most recent findings. Above all, to show that there is still a big difference between the Federal Government's intended strategies and the actual lifeworld of racialised people in Germany, and that the discourse was only increasingly brought into the public eye after 2018. The reception of the tragic murder of George Floyd (2020) and the effectiveness of the Black Lives Matter movement in Germany contributed to this development. Recently, however, the German public has been shaken in particular by the explosive revelations related to racist attacks such as those in Halle or on politicians in Berlin Neukölln,

among others, as well as by revealed neo-Nazi groups in the Bundeswehr and in various security forces such as the police.

The rapid increase in racist hate speech as well as activities of right-wing extremist parties and organisations in social media and at the political level are also alarming and a serious sign of racist ideals and racist structures in state institutions. Nevertheless, criticism of these incidents in the public discourse, especially on the part of the state, is usually reduced to the fact that "unfortunately" there are still individual cases, for example in the police and the Bundeswehr, which must be fought resolutely. To this day, one encounters resistance when these numerous incidents are named as a manifestation of institutional and structural racism. After all, different federal ministries such as the Federal Ministry for Family, the Elderly, Women and Youth (*Bundesministerium für Familie, Senioren, Frauen und Jugend*, hereinafter BMSFSJ) and the the Federal Ministry of the Interior and Community (*Bundesministerium des Innern und Heimat*, hereinafter BMI) have in the meantime launched several funding programmes for research and civil society action against racism. The afterword will also deal with the Federal Government's catalogue of measures to combat right-wing extremism and racism, which was adopted in November 2020, as well as the situation report on racism in Germany[3] by the Federal Government's Commissioner for Anti-Racism, which was published at the beginning of 2023.

I. Introduction

1. Summary of the UN Committee's criticism of previous State Reports by the Federal Government

In its most recent Concluding Observations on the 2015 report of the Federal Republic of Germany, the UN Committee pointed out clear criticism as well as positive points. While noting Germany's reluctance to collect racial/ethnic statistics due to its specific past, the Committee reiterated the concerns expressed in its previous Concluding Observations that the production of reliable demographic statistics relevant to racism, as well as sound empirical knowledge on the reality of racism, remain necessary to realise the objectives of ICERD. The inappropriateness of the term "persons with a migration background" to identify people who may be at risk of discrimination was also pointed out.[4]

Furthermore, the Committee had expressed concern about the lack of a legal definition of racial discrimination in line with Article 1 of the Convention in domestic legislation. This appeared to lead to a reluctance on the part of the judiciary to refer to ICERD or to apply the definition of racial discrimination under Art. 1 ICERD when considering statutory characteristics. While recognising the importance of addressing right-wing extremism and neo-Nazism, the Committee was also concerned about the continued use of these terms because it implicitly reduced racism to a problem of these two ideological sentiments. The Committee called for ensuring that a legal definition of racial discrimination is included in legislation that fully

3 https://www.integrationsbeauftragte.de/resource/blob/1864320/2157012/77c8d1dddeea760bc13dbd87ee9a415f/lagebericht-rassismus-komplett-data.pdf.

4 This designation is contained in Section 6 (1) no. 4 of the Microcensus Act; it includes all persons who are not Germans within the meaning of Art. 116 (1) GG or persons born outside the present territory of the Federal Republic of Germany and who have migrated to Germany since 1950 (in Baden-Württemberg after 1955) or persons where at least one parent fulfils this birth criterion as per Section 2 of the Berlin Participation and Integration Act (*Partizipations- und Integrationsgesetz*, hereinafter PartIntG), Section 4 (1) of the North Rhine-Westphalian Participation and Integration Act (*Nordrheinwestfälische Teilhabe- und Integrationsgesetz*, hereinafter TIntG NRW), Section 4 (1) PartIntG BW (Baden-Württemberg).

complies with Art. 1 (1), and that clearly identifies racial discrimination so as to ensure full protection of all groups and individuals within the meaning of the Convention. There is still no such legal definition of racial discrimination as called for by the Committee, although the prohibition of discrimination on the basis of race is an integral part of the national legal system.

The Committee also pointed to existing gaps in the domestic legal system that would leave room for discrimination. The fight against racism would be hindered by high costs of legal prosecution and more difficult class actions. In addition, the Administrative Courts (*Verwaltungsgericht*, hereinafter VG) rarely refer to the GG in practice in cases of racial discrimination.

Another point of criticism raised by the Committee was the concern about the spread of racist ideals by certain political parties and movements, and the lack of effective measures to strictly sanction and deter such public discourse and behaviour. In the Committee's view, it is precisely the lack of effective remedies against racism that encourages the further occurrence of racist acts, including violence against certain groups. As measures to combat dangerous racist ideas, racist statements by political leaders, sovereigns and public figures should be strongly condemned. According to the case law of the European Court of Human Rights (hereinafter ECtHR), political representatives also have a special responsibility to stand up for a defensible democracy and to refrain as far as possible from making statements that endanger democracy and are intolerant. According to the ECtHR, such prejudiced and hateful political statements can endanger social peace and the political stability of democratic states.[5]

In addition, the UN Committee said, "a comprehensive strategy should be developed, including mandatory training, to achieve a better understanding among police officers, prosecutors and judges of the phenomenon of racial discrimination and how to combat it, and to ensure that all acts that may be racially motivated are effectively investigated and, where appropriate, charged and punished.[6]" Racist hatred and discrimination on the internet could be reduced by blocking inflammatory websites and increasing controls on internet sites. It would therefore be desirable to include statistical information on trends in racist hate speech and violence, including Islamophobic tendencies, in the State Report procedure.

The Committee had also requested that specific investigations into the racially motivated NSU murders be pursued in such a way that the extent and connections of the movement are fully clarified.[7] Furthermore, the Committee asked for the enforcement of all necessary measures against the law enforcement officials responsible for discrimination within the NSU investigations.

These have not only not been carried out by the end of the new State Report, but regrettably have not yet been conclusively dealt with at the beginning of 2023. With regard to these points of criticism, the German Anti-Discrimination Association (*Antidiskriminierungsverband*, hereinafter advd) also stated in its statement of 8 December 2020 that "no clear improvements can be observed at the legal level.[8]" Progress can at best be found in the simple legal regulation for protection against racial discrimination, the AGG of 18 August 2006. The Federal Government writes: "Thus, the legal instruments are available in Germany to pursue a broad

[5] ECtHR, ruling dated 16.07.2009, no. 1516/07 – Féret/Belgium, para. 73 ff.
[6] ibid.
[7] for further details: Pichl 2022.
[8] advd 2020, p. 1.

approach in combating racial discrimination in all its forms", however, the AGG by no means contains an all-encompassing protection, which lies in Convention-relevant areas according to Art. 2, 3, 4, and 5 ICERD. Especially in the area of the police, there is a lack of effective regulations, such as independent complaints bodies against racial profiling or unlawful police violence, as criticised in the Basu ruling[9] of the ECtHR. The new draft bill of the Federal Government on the amendment of the Federal Police Act (*Bundespolizeigesetzes*, hereinafter BPolG) does not address the complaints body either; more than that, according to the current version, racial profiling is even standardised as justifiable in a constitutionally questionable way if there is an objective reason that justifies the purpose of the measure (see Section 23 (2) sentence 2 BPolG).

2. CERD's condemnation of the Federal Republic of Germany and case studies in German jurisprudence

Expert Contribution

Eberhard Schultz, human rights lawyer, author and founder of the Foundation for Social Human Rights and Participation dealt in his 2018 book *Feindbild Islam und institutioneller Rassismus. Menschenrechtsarbeiten in Zeiten von Migration und Anti-Terrorismus*, using case studies, with the problem of institutional racism in Germany, including from the perspective of legal practice.

a) Germany's condemnation in the Sarrazin case

In its Sarrazin ruling (2013), the CERD criticises the lack of a clear criminal provision against racist hate speech as well as the lack of effective legal protection under Art. 6 ICERD. While recognising the importance of freedom of expression, the Committee ruled that Mr Sarrazin's remarks constituted a dissemination of views based on a sense of racial superiority or hatred and contained elements of incitement to racial discrimination, in accordance with Article 4 lit. (a) ICERD. The ECtHR argued similarly in a ruling condemning a Belgian politician for his racially discriminatory statements.[10] Even though even the German Social Democratic Party (*Sozialdemokratische Partei Deutschlands*, hereinafter SPD) only managed to expel Sarrazin from its ranks after years of disputes and controversial debates, this is not exactly a glorious achievement but underlines the urgency of change. The inadequate handling of racist cases will be illustrated by further case studies from Eberhard Schultz's work as a lawyer.

b) Berlin SEK-operation before the UN Committee on the Elimination of Racial Discrimination (CERD)

The following case, which illustrates the racist discrimination and arbitrariness of German authorities, is currently before the UN Committee against Racial Discrimination (CERD), which accepted the complaint of Mohamad S. and his wife Fatima against the Federal Republic of Germany and sent it to the Federal Government for comment.

The facts of the case: the plaintiffs are victims of a police operation by the Berlin Special Task Force (*Spezialeinsatzkommando*, hereinafter SEK), which resulted in bodily harm with serious physical and psychological injuries and was apparently based on mistaken identity. SEK

[9] ECtHR, ruling dated 18.10.2022 – 215/19, Basu v. Germany = NJW 2023, p. 138 w. notes by Barskanmaz, NVwZ 2022, p. 1887.
[10] See Schultz 2018, p. 84 ff.

officers had stormed the plaintiff's flat, brought the plaintiff to the ground and handcuffed him. They were not told the reason for storming their flat. The wife - a devout Muslim - was denied the request to put on a headscarf and to translate for her husband, who does not speak German, which was only allowed after 15 minutes. Even when it was clear that this was not the person they were looking for, the complainants were neither released from the frightening situation nor allowed to contact a lawyer.

The confusion had occurred because of the "partially identical name" of the complainant with the actual person sought. Such a result can therefore only be assumed with Arabic names by those who – following racist prejudices – consider people with darker skin colour to look the same or to have the same (unpronounceable) name, because they do not take the trouble to perceive and treat them as individuals with different first and last names, or at least use an interpreter.

The proceedings against the police officers for bodily harm while in office, deprivation of liberty, damage to property, trespassing and insult were discontinued; the complaint filed against this and the proceedings to compel action were unsuccessful, as were the appeal against the hearing and the constitutional complaint. In contrast to the so far unsuccessful criminal proceedings, against which the complaint to the CERD is directed, the civil law proceedings against the state of Berlin for damages and compensation for pain and suffering due to tortious acts have in the meantime produced at least a first partial success: in a ruling, the Berlin Regional Court (*Landgericht*, hereinafter LG) has ordered the state of Berlin, represented by the Senator of the Interior, to pay a (far insufficient) compensation for pain and suffering, the amount of which is still being disputed. The complaint to the UN Committee was about the violation of Art. 1 ICERD.

c) The case of German-Moroccan Mohamed Hajib: handed over to torture in Morocco by German security authorities in 2010

This is the case of German-Moroccan Mohamed Hajib,[11] in which the Federal Government is not – at least not demonstrably – directly involved as far as torture is concerned, yet various state agencies are, in particular the State Protection Police of Hesse and North Rhine-Westphalia and the Federal Office of Administration, which is subordinate to the Federal Government. Above all, however, this case is an indictment of the federal government on suspicion of complicity and inaction based on racist prejudice.

These are the facts of this complex case, which has meanwhile occupied several German courts including the Berlin Constitutional Court.
The German government has confirmed that the Moroccan authorities were informed by the Federal Criminal Police Office (*Bundeskriminalamt*, hereinafter BKA) on 17.02.2010 that the German-Moroccan citizen had travelled on to Morocco "within the framework of the reciprocal police exchange of information", although he had not committed any criminal offence under "German law and he was not an accused in criminal proceedings in Germany". He had been coerced by a large contingent of officers from the State Criminal Police Offices (*Landeskriminalamt*, hereinafter LKA) of Hesse, North Rhine-Westphalia and the BKA to fly on to Morocco, contrary to his intention at the time. A so-called dangerous person approach took place as a possible supporter of Tablighi Jamaat (hereinafter TJ) Islamist terrorists. He was

[11] See ibid., p. 111 ff.

accompanied by LKA officers all the way onto the plane and the BKA communicated his imminent landing in Casablanca to the Moroccan secret service.

After his arrest in Morocco, the federal authorities tried to revoke his German citizenship – which could only be prevented with the help of lawyers – although this would at least have provided some protection. As in the case of Murat Kurnaz from Bremen, who was severely tortured for years as a Guantanamo prisoner, he had been accused of supporting the alleged terrorist organisation TJ.

Since 2010, the case had led to criticism and protest not only in the Bundestag, but also from renowned international human rights organisations and finally the UN human rights commissioners. Finally, even the UN General Assembly initiated a resolution demanding his immediate release to the Kingdom of Morocco. Only after the presentation of an expert report obtained by the US military court, according to which the TJ is by no means a terrorist organisation, did the competent authority agree to refrain from the expatriation. Even after his release from prison and return to Duisburg in 2017, the German authorities did not hesitate to continue treating the severely traumatised and forever scarred client as a so-called dangerous person and to subject him to hours of interrogation every time he crossed the border to visit his family, who had moved to Ireland, and even to issue a ban order against him before the planned Tour de France in Düsseldorf in 2017, because he was planning a terrorist attack there.

The German-Moroccan's application for legal aid for his lawsuit against the Federal Republic of Germany for millions in damages for pain and suffering due to its co-responsibility for severe torture and many years of solitary confinement was initially rejected. However, according to the decision of the Berlin Constitutional Court, his lawsuit may not be rejected for lack of prospects of success. With it, the Constitutional Court overturns the decision of the *Kammergericht*. The Berlin Court of Appeal must now decide anew because it violated the plaintiff's fundamental rights by refusing legal aid by way of an inadmissible anticipatory assessment of evidence.

After the Court of Appeal's attempt to clarify the client's damage claims through extensive mediation proceedings failed due to the federal authorities' refusal to pay even a cent in compensation for pain and suffering, the Berlin LG will now have to clarify the claims in a potentially lengthy and difficult hearing of evidence.

Against this context, it is necessary to examine whether there has been a possible violation of Article 1(1) in conjunction with Article 1(3) ICERD, since in the present case the German security authorities have used the Moroccan origin of the German national concerned as a basis for acts contrary to human rights.

d) The first known case of a murder with racist motives

Instead of a summary, I would like to conclude with a case that illustrates the entanglement of authorities and the judiciary in institutional racism very clearly: the case of the Egyptian Marwa El-Sherbini, murdered on 1 July 2010, which was designated "Anti-Muslim Racism Day" by the Central Council of Muslims in Germany in the last decade.

This is an excerpt from my contribution at the official commemoration ceremony in front of the Dresden LG at the invitation of the Saxon Ministry of Justice on 01 July 2022, because I have represented the family as a lawyer since the murder:

The family from Egypt is unfortunately unable to attend here, but has asked me to reiterate what they have stated in previous years, particularly before the UN Committee on the Elimination of Racial Discrimination. I quote: "We refuse to be satisfied with punishment for the act of murder, while others who share responsibility for the tragedy remain untouched. We were deeply hurt. We do not want this to happen again to any Muslim woman in Europe. We want to protect our dignity as we would never wish for anyone to suffer so much."

From the perspective of the family and those affected, what are the most important features beyond the gruesome details that are known, such as the literal slaughter of the pregnant Marwa, the life-threatening injury of the husband and the witnessing of it all by their then three-year-old child in court?

1. This already starts with the justification of the ruling, according to which the convicted man did not act "out of diffuse racism" but "out of sheer hatred" – an abstruse differentiation. As I could gather from the files, the perpetrator was treated by the investigating authorities as a confused lone perpetrator, racist backgrounds were hardly checked and connections to organised neo-Nazis were completely faded out, although he had explicitly called for voting for the NPD.

2. The behaviour of the responsible judges of the Dresden LG also raises more than questions: although they had already received a letter from the racist months before the main hearing, according to which the "Islamist" had, and I quote verbatim, "no right to live" with us, they failed to order a search of this racist before entering the court or the courtroom, during which the kitchen knife with the 18 cm long blade would certainly have been found. They did not even call a judicial guard to the hearing, who could have prevented the worst. Nor did they come to the aid of Marwa El-Sherbini's husband in his attempt to protect his wife, but confined themselves to pressing the alarm button after a long period of observation.

Then the next regrettable mistake: The BKA officer who happened to be present in the court and was alerted by the alarm rushed into the courtroom and first tried (which is correct and his task) to end the physical confrontation between two men covered in blood and beating each other up with a warning shot. When this did not help, he fired a well-aimed shot at one of the two, but at whom? Not at the blond racist, but at Marwa's black-haired husband, of all people, who was critically injured and fell into a coma.

It took an hour for the ambulance to arrive. The judges failed to locate and inform relatives and friends of the family, the pharmacist's employers, and the Max Planck Institute, where her husband was doing a doctoral thesis, which would have been easily possible on the basis of the file. Not even the Egyptian consulate was notified. So it was only by chance that the family later became aware of this terrible act of murder. So, from the family's point of view, it is by no means only the convicted racist who is responsible for this "multidimensional tragedy", as they have called it, and as they also put it before the UN Committee on the Elimination of Racial Discrimination (CERD), which I called upon, because of the inadequate treatment of this act of murder in Germany.

3. Those who perhaps think that these criminal mistakes are due to special (then) conditions in Dresden are mistaken. As is well known, the horrific act of murder did not attract any particular media attention at the time. On a political level, the Federal Government only became active weeks later, when massive protests and demonstrations from Egypt, which caused an international sensation, also became known in our country.

We must not forget that either: Marwa's great courage. If now, after more than ten years, at least the park opposite the LG is named after Marwa El-Sherbini, this could be a first step towards reparation.

II. The prohibition of discrimination on the basis of race (on Article 1 ICERD)

1. In General

As mentioned above, German law does not provide a comprehensive definition of racial discrimination in the sense of Art. 1 (1) ICERD. According to Art. 3 (3) sentence 1 of the GG stipulates: ("No one may be ... because of his or her "race" ... be disadvantaged or favoured."). Although the definition of Art. 1 (1) ICERD is also applicable law in Germany, the human rights-based definition of racial discrimination is not applied or is applied incorrectly, even though the legal definition of Art. 1 (1) ICERD is used by the Federal Government as a basis for interpreting Art. 3 (3) sentence 1 of the GG, and it actively advocates its application in judicial and official practice.[12] In combination with an understanding of racism that is narrowed to direct and intentional discrimination and does not conform to human rights, this leads to a lack of practical handling of racism by investigating authorities and judges.[13] The current State Report also shows a truncated understanding of racism by systematically using the term "people with a migration background" as a synonym for people affected by racism.[14]

2. The controversies surrounding the concept of race in the GG

Rather, it is a symbolic political demand that lists a removal or replacement of the term race as an editorial improvement of the GG. Simply to label the concept of race as poisoned and antiquated and to reject it because it could have biologistic connotations, but at the same time not to address the principle of ethnic descent in Article 116 (1) of the GG, is in any case not rigorous.[15] Furthermore, it is overlooked that a biologistic understanding of race is also indirectly inherent in criminal procedure law. Section 81e (2), sentence 2 of the Code of Criminal Procedure (*Strafprozessordnung*, hereinafter StPO) stipulates that under certain conditions, trace material may be examined for the "colour of eyes, hair and skin". It is also questionable whether this provision does not introduce an implicit biological concept of race.[16]

The demand for the removal of race is an expression of a German state of mind that threatens to abandon the important achievements in the human rights discourse based on the ICERD. In doing so, a category-based prohibition of discrimination (gender, religion, disability, etc.) is riddled with holes without good reason. Replacing "race" with "racist" is not convincing either. Racism is structural and a phenomenon of society as a whole, which – even in adjectivised form – would overload an action-oriented and person-based anti-discrimination law.[17] The formula "racial discrimination" also wrongly suggests that there is clarity and agreement on the concept of "racism", but without even beginning to define racism itself.[18] A factual discussion on race would therefore have to take into account other grounds of discrimination in order to think of race together with other categories relevant to racism, such as ethnicity, religion, skin colour, or descent.

[12] BMJ, para. 9, and see also Federal Government of Germany, Nationalen Aktionsplan gegen Rassismus.
[13] See also Diakonie Deutschland 2015, p. 8.
[14] BMJ, para. 80.
[15] Also BVerfG, ruling dated 17.01.2017, 2 BvB 1/13 – NPD, BVerfGE 144, 20, para. 690 ff.
[16] See Payandeh 2020, p. 15 and Barskanmaz 2019, p. 259 ff., for further references.
[17] Nor is the inclusion of sexism and classism in Article 3 (3) of the GG advocated.
[18] e.g. Ludyga 2021.

The regularly recurring demand for a GG without the concept of race endangers the human rights protection status, while the prohibition of discrimination on the basis of race is even attributed the character of *ius cogens* (mandatory international law).[19] Beyond the human rights concerns, it is not justifiable according to current constitutional dogma anyway.[20]

The question arises as to whether the term race in Art. 3 (3) of the GG should be retained against this background in order to meet the requirement of Art. 1 ICERD. Although some organisations and political parties have spoken out in favour of replacing the term in the past, there has recently been an increase in the number of voices arguing in favour of retaining the concept of race. For the first time, the Central Council of Jews in Germany[21] has explicitly spoken out in favour of retaining the concept of race. It is also noticeable that the Federal Anti-Discrimination Agency is still in favour of replacing the concept of race; "on racial grounds" should be replaced by "on the basis of racist attributions.[22]"

3. Incentive measures within the scope of Art. 1 (4) ICERD and Art. 2 (2) ICERD

As early as 2013, the NSU investigative committee had emphatically demanded a reorganisation of the financial support for civil society engagement against racism, anti-Semitism and right-wing extremism, which should give the initiatives planning security. At the time, various initiatives commissioned a legal expert opinion that established the constitutionality of permanent funding, for example through the establishment of a foundation at the federal level.[23] In the National Action Plan against Racism of 2017, the Federal Government also affirmed its intention to strengthen the promotion of democracy in a long-term and sustainable manner.[24]

Beyond concrete promotion measures relevant to equality law, the federal promotion programmes should be addressed. In its State Report, Germany refers to funding measures[25] that have been taken, in particular to the funding of federal funding programmes, but at the structural level, despite political discussions, there is still little movement. This is illustrated, for example, by the Democracy Promotion Act called for by the NSU Investigation Committee[26] as early as 2013. At the end of the present reporting period, no sufficiently necessary steps have been taken in this regard to fulfil the claim of democracy promotion that were not only on paper.

a) Intercultural and diversity-oriented opening of the public service

[19] ILC, Chapter 5: Peremptory Norms in General International Law, p. 146 ff., at: https://legal.un.org/ilc/reports/2019/english/chp5.pdf.
[20] See Hong 2020.
[21] https://www.faz.net/aktuell/politik/inland/rasse-im-grundgesetz-verfassung-muss-klar-und-schnoerkellos-sein-18728133.html; https://www.juedische-allgemeine.de/politik/zentralrat-rasse-nicht-aus-grundgesetz-streichen/.
[22] https://www.antidiskriminierungsstelle.de/SharedDocs/downloads/DE/Sonstiges/20230718_AGG_Reform.pdf?__blob=publicationFile&v=7; https://www.antidiskriminierungsstelle.de/SharedDocs/aktuelles/DE/2021/20210622_rassebegriff_gg.html.
[23] See Battis, Grigoleit and Drohsel 2013, clients included the Amadeu Antonio Foundation, the German Trade Union Confederation (*Deutscher Gewerkschaftsbund*, hereinafter DGB), the Central Council of Jews in Germany, the Central Council of Muslims in Germany and the Central Council of Sinti and Romani people in Germany.
[24] Federal Government of Germany 2017, p. 43.
[25] BMJ, para. 31 ff.
[26] BT DS 17/14600, p. 866 ff.

The Federal Government's catalogue of measures to combat right-wing extremism and racism, which was announced in 2017 but not presented until November 2020, provides in no. 7 for an intercultural and diversity-oriented opening of the civil service. Conceivable measures include reviewing selection procedures for the civil service, targeted campaigns to recruit more "people with a migration background" for the civil service and a regular survey on diversity in the civil service. Three state integration laws also explicitly mention increasing the proportion of employees "with a migration background" as a goal. The TIntG NRW, for example, calls for corresponding measures in rather general terms (Section 6 (1) no. 1 TIntG NRW). The participation and integration laws of the states of Baden-Württemberg and Berlin, on the other hand, specifically state that the aim is to increase the proportion of employees "with a migration background" in accordance with their share of the population (Section 4 (4) PartIntG Berlin, Section 6 (1) no. 2 PartIntG BW). However, an initial evaluation of Berlin's former PartIntG showed that there was still a lack of diversity, which is why the Integration Senator wanted to introduce a "migrant quota" of 35% corresponding to the proportion of people with a "migration background" in Berlin. However, this proposal was controversially discussed in the Berlin coalition and eventually dropped. The debate was conducted mainly with constitutional arguments, but in a rather restrictive manner. The newly named Berlin Participation and Migration Act (*Partizipations- und Migrationsgesetz*, hereinafter PartMigG) now provides for the following requirement for recruitment in its Section 11 (1):

"Persons with a migration background who have qualifications (aptitude, ability and professional performance) equivalent to those required to fill the post or function are to be recruited in a targeted manner and given special consideration in recruitment, taking into account the primacy of the principles laid down in Article 33 (2) of the GG as well as the existing provisions of simple law in this regard and ensuring fairness in individual cases, in order to reflect the proportion of persons with a migration background in each career, occupational specialisation, superior or management level and functional post of the respective public body in accordance with Section 4 (1) at least in proportion to their share of the population of Berlin. The requirements of Section 8 of the Land Equal Opportunities Act and Sections 154 to 158, 205 of the Ninth Book of the German Social Code (*Sozialgesetzbuch*, hereinafter SGB) shall remain unaffected."

Although the aim of this provision can only be agreed with, it is more likely to cause confusion than clarity in conjunction with Section 3 PartMigG Berlin. It reads:

"(1) Persons with a migration history are persons with a migration background, persons who are racially discriminated against and persons to whom a migration background is generally attributed. This attribution can be linked in particular to phenotypical characteristics, language, name, origin, nationality and religion.

(2) A person has a migration background if he or she, or at least one parent, does not have German nationality by birth."

It follows from the definition that the preferential treatment, which is tied to strict preconditions, only applies to persons with a migration background in the case of equal qualifications, but not to persons who are racially discriminated against (without being migrants) or persons to whom a migration background is generally attributed, where the attribution is linked in particular to phenotypical characteristics, language, name, origin, nationality and religion. This exemplary provision, however, shows that it fails to meet the objectives of the ICERD because it only applies a very limited promotion of persons affected by racial discrimination who are worthy of

protection under the ICERD. Furthermore, this provision illustrates once again the terminological inconsistencies that can be caused by terms such as "persons with a migration history" or "persons with a migration background".

The term "persons with a migration background" is not useful for two reasons. Firstly, it does not cover all persons affected by racism, such as black people who do not have a migration biography. Secondly, the term is redundant because it can cover people who do not necessarily need support even according to the broad Convention definition of racial discrimination.[27] It would have been more appropriate to "link support measures to categories that are standardised in Art. 3 (3) sentence 1 of the GG and relevant legal foundations under international and European law.[28]" With regard to the prohibition of discrimination on grounds of race contained in Art. 3 (3), sentence 1 of the GG, it should also be noted that, if interpreted in accordance with Art. 1 (4) ICERD, affirmative action measures are in principle permissible and unequal treatment of qualified members of groups deserving protection does not constitute discrimination against groups not deserving protection within the meaning of the Convention. Furthermore, it follows from Art. 2 (2) ICERD that Art. 3 (3) sentence 1 of the GG can be interpreted to the effect that this norm also contains a promotion requirement.[29] With this interpretation, the limit of an interpretation of the GG that is friendly to international law, as indicated by the BVerfG, is not exceeded.[30]

b) The Democracy Promotion Act

The Democracy Promotion Act has also been put on the political agenda time and time again. Most recently, a draft was passed in the federal cabinet in December 2022, but the law has not yet been passed by Parliament.[31] As early as November 2020, after the Cabinet Committee on Combating Right-Wing Extremism and Racism was set up in March 2020 in response to the terrorist attack in Hanau,[32] Measure 52 announced that the BMI and the BMFSFJ would "promptly develop key points for a law to promote a defensible democracy", the so-called Democracy Promotion Act, which is intended to create a legal basis for the permanent promotion of projects and initiatives. The law was to be passed in the Bundestag in June 2021, but the CDU/CSU parliamentary group has blocked the project, which means that initiatives at the federal level will only be funded for a limited period of time. This model funding, for example through the programmes "Live Democracy!" by the BMFSFJ and "Cohesion through Participation" by the BMI, is awarded on the basis of guidelines. So far, there is no legal basis in federal law.[33] The new Federal Government has now announced its intention to launch a Democracy Promotion Act as soon as possible, with a participation process launched in

[27] See Kanalan 2021; see also Groß 2021, p. 880.

[28] ibid.

[29] ibid.

[30] See BVerfG, ruling dated 06.11.2019.

[31] BMFSFJ: Infopaper on the Democracy Promotion Act, dated 14.03.2023, at: https://www.bmfsfj.de/resource/blob/222650/220c57c149caa95ca417a09f9f84a509/infopapier-demokratiefoerdergesetz-data.pdf.

[32] Catalogue of measures of the Cabinet Committee to combat right-wing extremism and racism, dated 25.11.2020, at: https://www.bundesregierung.de/resource/blob/997532/1819984/4f1f9683cf3faddf90e27f09c692abed/2020-11-25-massnahmen-rechtsextremi-data.pdf?download=1.

[33] BT DS 19/20166, p. 7 ff.

February 2022.[34] The Federal Minister of the Interior also announced that she would present an action plan against right-wing extremism.[35]

The demand for a legal basis for permanent funding is therefore not a new concept. This is justified with the following arguments, among others, which illustrate the problems of model funding: model funding is mostly limited in time, which means that structures, even if they have proven themselves, are not necessarily further funded. The funding period is mostly between one and five years. In addition, some of the funding can only be awarded once. Furthermore, federally funded projects must be co-financed by funds from the states, municipalities or other sources. This is particularly overwhelming for smaller associations and also makes funding dependent on the respective local political majorities at the municipal level.[36] Thus, it becomes clear that the project funding practice is a matter of structural deficits that cannot be countered by increasing funding alone (an increase to 200 million euros has been announced until 2023).[37] A Democracy Promotion Act, which clearly regulates the legal requirements for funding, is therefore still urgently needed, also in view of the increasing right-wing extremist attacks and crimes.[38]

III. Discrimination against individual population groups (on Art. 2 (2) ICERD)

In the 23rd – 26th State Report, Germany addresses the discrimination realities of various groups affected by racism. This is logical with regard to the obligations under the Convention.[39] However, the presentation is incomplete, especially with regard to the failure to recognise the structural discrimination structures, which are explained below on the basis of individual points of criticism. It remains problematic that Germany repeatedly refuses to collect comprehensive data on groups deserving protection under the ICERD, even on a voluntary basis, in its 23rd – 26th State Report. This justification is questionable, especially because Germany does use "skin colour" as a criterion in other contexts (see Section 81e (2), sentence 2 of the StPO).

1. Racism against Black people in Germany

In order to make the specific experience of discrimination of Black people in Germany visible, the independent analysis of measures is important.

In its State Report, the Federal Republic of Germany acknowledges that Black people are "particularly at risk of being exposed to racism,[40]" but then only lists initiatives, associations, etc. that are supported by state funding programmes. It does not go into the exact effects of, for example, institutional racism on this group. Black people are particularly affected by police violence and racial profiling. On 8 August 2022, for example, Mouhamed Dramé, a 16-year-

[34] Announcement dated 25.02.2022 on the website: BMFSFJ – Participation process for planned Democracy Promotion Act launched.
[35] Announcement by the BMI dated 15.03.2022, at: https://www.bmi.bund.de/SharedDocs/downloads/DE/veroeffentlichungen/2022/aktionsplan-rechtsextremismus.pdf?__blob=publicationFile&v=1.
[36] BT DS 19/20166, p. 4, 8.
[37] ibid., p. 7.
[38] See also with a detailed justification, the statement of the Amadeu-Antonio-Stiftung, dated 23.11.2020, before the 3rd meeting of the Cabinet Committee on Combating Right-Wing Extremism and Racism, at: https://www.amadeu-antonio-stiftung.de/stellungnahme-zum-vorhaben-eines-demokratiefoerdergesetzes-63699/.
[39] BMJ, para. 48 ff.
[40] ibid., para. 69.

old Black man, was shot dead by police. The youth was attacked first with pepper spray and then with firearms within 20 seconds, although according to current knowledge there was no danger to the police officers on the scene.[41]

In 2020/2021, the comprehensive Afro Census[42] was published, which, based on a study, criticised several deficits in the fight against anti-Black racism and also contained numerous recommendations. For example, the Black communities in Germany demand the recognition of the genocide against the Herero and Nama peoples, the return of colonial looted art and the recognition of Black victims of National Socialism. They also demand the expansion of counselling centres on anti-Black racism as well as action plans to combat anti-Black racism and to promote the Black and Afro-diasporic communities at federal and state level. The communities also demand that the Federal Government implement the resolution of the European Parliament on fundamental rights of people of African descent in Europe.

The Afrocensus also contains the following recommendations for action for politics and administration:

1. *The establishment of a parliamentary commission on anti-Black racism* in order to develop, among other things, a definition of anti-Black racism, which is to find its way into administrative action in implementing regulations and federal programmes, among other things.
2. *Action plans on anti-black racism. These could be modelled on the second edition of the National Action Plan on the UN Disability Rights Convention by the Federal Ministry of Labour and Social Affairs (Bundesministerium für Arbeit und Soziales, hereinafter BMAS) in 2016.*
3. *Counselling centres on anti-Black racism. Those affected by anti-Black racism must be established nationwide and supplemented by a Germany-wide monitoring of anti-Black racism, which must be implemented under the conceptual direction and expert supervision of self-organisations.*
4. *Anti-Black racism in German remembrance policy. The centuries-long formative power of anti-Black racism in German history must be recognised and become part of public remembrance. This includes appropriate restitution and reparations, which must be made directly with the representatives of the societies of origin and descendants of the communities affected by German genocide and colonial violence. This includes the recognition and compensation of black victims of Nazism.*
5. *Raising awareness of anti-Black racism. In all social and political projects, the different effects on the living situations and interests of Black, African, and Afro-diasporic people must be fundamentally and systematically considered and mainstreamed.*
6. *Promotion of empowerment initiatives. Funding instruments such as the May-Ayim Fund, which are explicitly aimed at Black people, must be expanded. Funding logics must ensure that Black people do not primarily react to racism, but can shape framework conditions in which they empower themselves and choose the priorities and content of their work themselves.*
7. *Institutionalisation of empowerment structures. Community empowerment of Black, African, and Afro-diasporic people needs to be institutionalised in different ways. An empowerment infrastructure is needed, including in the form of community centres.*

[41] Tödliche Schüsse auf Mouhamed Drame: Anklage gegen fünf Polizeikräfte, WDR dated 16.02.2023, at: https://www1.wdr.de/nachrichten/ruhrgebiet/anklagen-fall-mouhamed-100.html.
[42] Afrozensus 2020.

8. *Professionalisation. All public institutions have a responsibility to engage in the process of professionalisation critical of racism. This includes, but is not limited to, training for current staff.*
9. *Police. Legislators at federal and state level must remove without replacement legal provisions that contain corresponding or similar authorisations according to which the police can carry out checks on persons without concrete cause in "crime-ridden" or "dangerous" areas. In addition, independent police officers must be appointed at federal and state level.*

2. Racism against Muslims in Germany

Expert Contribution

Christine Buchholz, until 2021 spokesperson on religious policy for the Die Linke Party parliamentary group in the Bundestag, since 2022 party executive of Die Linke with a focus on anti-fascism and anti-racism.

Anti-Muslim racism is not given enough space in political debates. This applies to violence against Muslims, right-wing terror and the various forms of institutional racism tied to it. It also concerns discrimination in everyday life and the position of Muslim religious communities.

Together with coalition partners, Die Linke made an inquiry to the Federal Government in 2019, to which it received a detailed answer from the Federal Government in February 2020. Three topics in particular were focused on within the framework of the Grand Inquiry.

a. Everyday discrimination of Muslims

Everyday discrimination exists in all areas of life (see below), including access to education, the labour market, the housing market and health care. Muslim women who visibly wear the headscarf are particularly affected.

In response to the Federal Government's answer, Die Linke and other coalition partners drafted a resolution[43] analysing the situation and the problem area and proposing concrete measures against anti-Muslim racism. There needs to be a clear outlawing of anti-Muslim racism by the parliaments. Unlike other forms of racism, there is no clear resolution against anti-Muslim racism by the democratic parties in the Bundestag. Achieving this is an important goal. It would be a political signal to society and an important indication to those affected, but of course also an expression of solidarity against all forms of racism.

b) General suspicion of the security authorities

People seen as Muslims are confronted with general suspicion on the part of the security authorities. The general suspicion works on the one hand through terminology. Especially fuzzy terms such as so-called Islam (political Islam, legalistic Islam) are to be understood in this light. With these terms, security authorities place groups and institutions, as well as persons associated with them, under suspicion. In addition, pointless mass raids are carried out, and so are regular queries by the Office for the Protection of the Constitution and the LKA when residence permits are renewed. In the answer to the above-mentioned question of Die

[43] German Bundestag, motion for a resolution, at: https://dserver.bundestag.de/btd/19/257/1925778.pdf.

Linke, it also emerges that the Federal Government is sticking to racial profiling. There are mosques and associations that have taken legal action against general suspicion, some of them successfully.[44] Nevertheless, general suspicion fuels prejudice against whole groups of Muslims, and Islam as a whole.

c) Islamophobia as a common denominator of the far right

The fact that the measures announced by the Federal Government in its report are not sufficient to actively and preventively work against racism against Muslims in Germany is made more than evident by the developments of the last two years. In 2020, at least 184 attacks on mosques, cemeteries, meeting places, cultural associations or other religious sites were registered, in other words: every second day an Islamic site was attacked.[45] It is true that the Federal Government is aware in its answers that anti-Muslim racism is a constant field of action of the right-wing scene, that it binds together the different currents and factions of the extreme right, and that it represents a bridge to the so-called centre of society. However, effective mechanisms to combat racism against Muslims are still lacking. Anti-Muslim racism also has the highest prevalence of racist stereotypes and resentment in the centre of society.

Only the State of Berlin established an expert commission against anti-Muslim racism at the beginning of 2021 on the occasion of the right-wing extremist and racist murder attack on 9 people in Hanau on 19 February 2020. With the establishment of the commission, the State of Berlin is pursuing the goal of creating a science-based foundation for prevention and participation structures. The aim is to generate concrete and tangible recommendations for the administration and civil society. However, it is questionable and worthy of criticism that the assassination in Hanau was primarily acknowledged as anti-Muslim racism by the decision-makers in Berlin. Only some of the victims were of Muslim faith and the pamphlet "Message to the entire German people" distributed by the perpetrator on the internet made it clear that the perpetrator was a right-wing extremist with a pronounced biologistic and culturally arguing racist world view.[46] It would therefore have been consistent not to limit the field of activity of the expert commission to anti-Muslim racism, but to include all forms of racism.

d) The so-called Berlin Neutrality Act

(See also detailed additions by the AmF-Aktionsbündnis muslimischer Frauen in Deutschland e.V. at the end of the report).

It is also worrying that the Federal Government is meanwhile making further changes for the worse. For example, in a little-publicised law on the appearance of civil servants – which was initially about banning Nazi tattoos and unconstitutional symbols – the Federal Government introduced a headscarf ban through the back door. This passed through the Bundestag on 22 April 2021 with the votes of the Christian Democratic Union/Christian Social Union in Bavaria alliance (hereinafter CDU/CSU) and SPD without debate. The Alternative für Deutschland (hereinafter AfD) voted in favour of the law, the Greens and the Free Democratic Party

[44] See Tagesspiegel: Moscheen in Deutschland: Der fatale Generalverdacht.

[45] https://www.tagesspiegel.de/berlin/reaktion-auf-anschlag-in-hanau-berlin-gruendet-expertenkommission-gegen-antimuslimischen-rassismus/26930256.html.

[46] https://www.spiegel.de/panorama/justiz/hanau-taeter-veroeffentlichte-ausfuehrliches-bekennerschreiben-a-a026da8c-86b9-4de6-894d-7a6598edecdc.

(hereinafter FDP) abstained, and Die Linke voted against it. On 7 May, the law passed through the *Bundesrat*.

In its working paper, which was handed over to the Berlin Senate in September 2022, the expert commission against anti-Muslim racism convened by the State of Berlin emphasises the "systematic and institutionalised discrimination against women with headscarves" [47] through the Neutrality Law and calls for its abolition.

In the meantime, the BVerfG, in its "Headscarf III" decision, has upheld a ban on female legal trainees wearing headscarves during their legal traineeship, or more precisely, during courtroom hearings.[48] In its decision, the BVerfG concedes the decision-making prerogative of the State legislature (in this case, the State of Hesse), which is thereby able to guarantee the neutrality of the judiciary. As a result, female legal trainees wearing headscarves cannot sit on the bench during courtroom hearings, but can only sit in the audience. They are also not allowed to preside over hearings or take evidence, are not allowed to represent the public prosecutor's office at hearings, and are not allowed to chair a hearing committee meeting during the administrative station. However, the standard performance not rendered due to the prohibition must not have any influence on the evaluation.

3. Anti-Semitism (Anti-Jewish Racism)

Another group-related form of racism is anti-Semitism, which is within the scope of the Convention despite the absence of the characteristic "religion".[49] With regard to Jews, the Federal Government points to the financial support provided to the Jewish religious community, associations, etc.[50] Religious communities are also protected by Art. 4 of the GG as public corporations. This gives them certain privileges, e.g. exemption from certain taxes and duties. In 2015, the independent expert group on anti-Semitism was also established.[51] In the State Report, Germany also recognises the worrying rise in anti-Semitic crimes (para. 55) and addresses the anti-Semitic and generally racist attack on a synagogue in Halle on 9 October 2019. This is to be welcomed, but the investigations were also marked by institutional racism.

Expert Contribution

Udi Raz on current manifestations of anti-Semitism and on the discourse on "Jewish Life in Germany".

In recent years, manifestations of anti-Semitism have become increasingly broadly defined in Germany. This is reflected in the introduction of the International Holocaust Remembrance Alliance (hereinafter IHRA) working definition of anti-Semitism by the Federal Government in

[47] https://islamische-zeitung.de/berlin-expertenkommission-gegen-antimuslimischen-rassismus-fordert-abschaffung-des-neutralitaetsgesetzes/.
[48] BVerfG, ruling dated 14.01.2020.
[49] Lerner 2014; see also Barskanmaz 2019, p. 98 ff., who argues that anti-Jewish racism works in the same ways as other forms of group-base racialisation and hierarchisation.
[50] BMJ, para. 53.
[51] https://bmi.bund.de/DE/themen/heimat-integration/gesellschaftlicher-zusammenhalt/expertenkreis-antisemitismus/expertenkreis-antisemitismus-artikel.html.

2017 and the Bundestag in 2018. This working definition is strongly influenced by the international interests of Israeli governments.[5253]

In the political discourse, the rash accusation of anti-Semitism silences any debate, especially on the occupation of the Palestinian territories – and increasingly narrows the corridor of freedom of expression, art and science, to the point of chilling effects and self-censorship. For example, the initiative GG 5.3 *Weltoffenheit* ("5.3" refers to Art. 5 (3) GG) argued that misuse of the accusation of anti-Semitism pushes aside important voices from art and science and distorts critical positions. In this context, the anti-BDS (Boycott, Divestment and Sanctions movement), resolution[54] of the Bundestag (dated 17.05.2019, BT DS 19/10191) represents a caesura that reinforces and solidifies this effect. In the meantime, the definition of the IHRA is used by all anti-Semitism officers at the federal and state level as a basis for combating anti-Semitism (on this critically below). One of its authors, Kenneth Stern, distanced himself from the definition early on because it had a far-reaching inadmissible intrusive character and could all too easily be misused.[55] For example, the postcolonial theorist Achille Mbembe was finally disinvited to give the opening speech at the Ruhrtriennale in 2020 under pressure from the newly appointed anti-Semitism commissioner Felix Klein (critical of the function of the anti-Semitism commissioner: Gärditz 2020.[56])

The IHRA definition[57] (adopted by cabinet decision on 20.09.2017) and the counter draft by the Jerusalem Declaration on Antisemitism (25.03.2021) continue to be the subject of disputes. Disputes on the occasion of Dirk Moses' contribution to the so-called Catechism[58] of the Germans as well as the translation of Michael Rothberg's book "Multidirectional Memory" were carried out in the newspapers for weeks. There was also controversy on the occasion of the very extensive report[59] by Amnesty International on "Israel's Apartheid against Palestinians", which was published in 2022 and accused of anti-Semitism, also by the federal-state working group of the Conference of Interior Ministers.[60]

In the meantime, the Federal Government has established a Commissioner for Combating Anti-Semitism, and Jewish Life. In addition, there are commissioners for combating racism in every federal state. This development is generally to be welcomed, but since the introduction of the IHRA definition and the establishment of anti-Semitism commissioners, the assumption has become established in public discourse that criticism of the state of Israel and anti-Zionism is essentially a manifestation of anti-Semitism.[61] Thus, Palestinians in particular are declared a national problem, as they are mostly directly and indirectly affected by the form of Zionism implemented by Israel, and are accordingly active against it. For example, there were several

[52] See Stern-Weiner 2021.

[53] See Deckers and Coulter 2022.

[54] https://verfassungsblog.de/aufforderung-zum-rechtsbruch/.

[55] Stern K (2019): I drafted the definition of antisemitism. Rightwing Jews are weaponising it. In: The Guardian dated 13.12.2019, at: I drafted the definition of antisemitism. Rightwing Jews are weaponising it | Kenneth Stern | The Guardian

[56] See Gärditz 2020.

[57] Accusation of defectiveness by Peter Ulich, Bian Klug and Amos Goldberg: “Expert submission in the context of a public consultation launched by the European Commission of its upcoming ‘Strategy on combating antisemitism and fostering Jewish life in the EU’; also critical is Joseph Croitoru, Was ist Antisemitismus? In: *Suddeutsche Zeitung*.

[58] https://geschichtedergegenwart.ch/der-katechismus-der-deutschen/.

[59] https://www.amnesty.org/en/documents/mde15/5141/2022/en/.

[60] https://www.innenministerkonferenz.de/IMK/DE/termine/to-beschluesse/2022-12-02/anlage-zu-top-41.pdf?__blob=publicationFile&v=2.

[61] See Moses 2021.

bans on the Palestinian gathering on the Naqba anniversary, some of which were not challenged[62] by the Berlin VG.[63]

In recent years, accusations of anti-Semitism have been and continue to be used as a means of silencing political opponents. This has led to legally untenable dismissals, bans on meetings and exclusion from discussion spaces. The majority of those affected are people of non-German origin, often racialised persons and even an increasing number of Jews. In view of the freedom of assembly and expression, which is the very essence of democracy (BVerfG, 69, 315), this represents a considerable problem for democracy and leads to the paralysis of the exercise of fundamental rights. This is all the more true in view of the recent policies in Israel that are unworthy of the rule of law and have met with great criticism worldwide.

Constitutionally reassuring is at least the recent case law of the VGs on BDS , which puts a stop to the constitutionally questionable tendencies of narrowing free spaces of discourse. Although the Berlin VG [64] ruled that the anti-BDS resolution of the Bundestag was constitutional, all decisions of municipal authorities that refused public spaces to people with "BDS affiliation" on the basis of the anti-BDS resolution have been declared unlawful.[65] In the meantime, there is also case law from the highest courts. For example, the Federal Administrative Court decided that the denial of access to public communal spaces was an unjustified indirect interference in freedom of expression because it "links an adverse legal consequence to the expected manifestation of opinions on the BDS campaign or on its contents, goals or topics and thus hinders an opinion-forming debate on this issue." (para. 19). The ECtHR (5th Section, ruling dated 11.09.2020, no. 15271/16) has also already ruled that criminal convictions for calling for boycotts of Israeli products constitute an unjustified interference with freedom of expression (see Ambos 2020 for more details).

However, this problematisation also affects any individuals and organisations that do not recognise the Israeli-Zionist worldview or the associated historical narrative as neutrally given. The *Jewish Voice for Just Peace in the Middle East* (*Jüdische Stimme für gerechten Frieden in Nahost e.V.*, hereinafter JS) is an example of such an organisation, which is strongly affected by the increasingly established equation of anti-Zionism and anti-Semitism in German public discourse. The following is an example of the problems inherent in the logic of this equation and its dangerous and long-term impact on Jewish life in Germany.

In 2016, the B*ank für Sozialwirtschaft* (BfS) terminated the JS account without warning. The reason given was that the JS denied Israel's right to exist. Eventually, after an exchange with the JS, the BfS revised this assessment and withdrew the termination in 2017.

In 2019, the BfS cancelled the JS account again. The reason was the JS's public solidarity with the BDS campaign. BDS is a civil society movement whose aim is to put Israeli governments

[62] Critical of this is Michaels, at: https://verfassungsblog.de/versammlungsfreiheit-gilt-auch-fur-palastinenser/.

[63] VG Berlin (ruling dated 13.05.2022 – 1 L 180/22).

[64] VG Berlin, ruling dated 07.10.2021 - 2 K 79.20, found that the anti-BDS resolution was a statement of the position of the German Bundestag in a controversial debate and that the resolution did not infringe on the plaintiffs' general right of personality, as it did not make any personal statements, but only factual ones. Nor does the resolution make any statement to the effect that all supporters of the BDS movement are anti-Semites, nor does it encroach on the plaintiffs' freedom of opinion, freedom of assembly and freedom of association; after all, the requirements of the principle of objectivity are also met.

[65] VG Oldenburg, ruling. dated 27.09.2018 – 3 a 2012/16; OVG Lüneburg, ruling dated 27.03.2019 – 10 EME 48/19; VGH Hessen, dated 04.12.2020 - 8 B 3012/20; VGH München (4th Senate), ruling dated 17.11.2020 – 4 B 19.1358; VG München, ruling dated 19.07.2021 – M 7 E 21.3679; VG Köln, ruling dated 12.09.2019 – 14 L 1765/19.

under international pressure to bring about an end to the occupation policy. The BfS commissioned German historian Dr Juliane Wetzel to investigate whether the JS was anti-Semitic. Dr. Wetzel, who helped introduce the IHRA definition, was also to determine, through interviews with individual members of the association, what their affection or hatred towards Israel was according to the said definition. In response, a number of Jewish intellectuals, including Judith Butler, Noam Chomsky, Eva Illouz, and Moshe Zimmermann, sharply criticised this decision. According to these critics, such an action is alarming because "representatives of the German state, financial sector and academia are coming together here to make a joint judgement on whether a group of Jews and Israelis, including many descendants of Holocaust survivors, are anti-Semitic." Accordingly, the critics noted that "for good reason, members of JS [refuse] to participate in such a ridiculous and shameless endeavour.[66]" This is only one example in a series of phenomena of arbitrary institutional violence against Jews, which are classified from the outside as anti-Zionist, and accordingly defamed as anti-Semitic. On the JS website one can read about numerous other examples. It is worth mentioning that the JS is only one organisation affected by this dangerous logic of equating anti-Zionism and anti-Semitism. Other Jewish individuals and organisations are also affected.[67] First and foremost, however, persons and organisations are attacked and slandered because their Arab and Muslim attribution (origin) repeatedly leads to the general suspicion of anti-Semitism.[68]

One consequence of this is that in the contemporary struggle against anti-Semitism, Jewish plurality is increasingly restricted and threatened. Regrettably, this phenomenon is taking place in today's Germany, of all places, where the diversity of Jewish life realities is reminiscent of the pre-war period. This effort on the political level of Germany to “brush up”[69] the Jewish population in recent years and decades and to reduce it to a monoculture that corresponds to the desired image is gradually emerging as a new manifestation of anti-Semitism.

4. Racism against people of Sinti or Romani origin in Germany

Expert Contribution

RomaTrial e.V. is a transcultural Romani self-organisation and interactive platform with the aim of making the complex problems of antiziganism visible through educational work and cultural projects.

The State Report, on behalf of its founder **Hamze Bytyci**, is also strongly criticised by the insufficiency of the steps taken so far: "In order to eliminate disadvantage in a sustainable way, the measures taken so far and described in the State Report are by no means sufficient.”

Racism against people of Sinti or Romani origin is a historically grown, structurally deep-rooted problem in Germany, which is not sufficiently reflected and combated in any social and/or political sphere. Because the Romani and Sinti, like other minorities, have always been a kind of litmus test for society: how we are treated is a measure of the rule of law and democracy. Certainly, there were worse times. In the Holy Roman Empire, Romani and Sinti were "outlawed"; men, women and children were "hunted down", beaten to death and robbed during so-called heathen hunts. In the principalities of Wallachia and Moldavia – in present-day

[66] https://www.juedische-stimme.de/2019/01/18/offener-brief-der-einsatz-fuer-menschenrechte-ist-nicht-antisemitisch/.
[67] e.g. Schools for Unlearning Zionism.
[68] e.g. DW journalists, Nemi Nemi El-Hassan, Palästina Spricht.
[69] See Tzuberi 2020.

Romania – the Romani were enslaved until the middle of the 19th century and could be beaten, raped or sold. The now somewhat better known tragic climax of the history of this persecution is the Nazi genocide: up to 500,000 people fell victim to it throughout Europe.

Unfortunately however, studies clearly show that the situation is not exactly pleasant even today. To this day, many Romani in southern and eastern Europe live in abject poverty as a result of antiziganism. They are denied education, the chance to work and to participate in society. They experience hostility and violent hatred, even murder. In Germany, too, the Sinti who have lived here for many generations and the Romani who have immigrated in recent decades and are currently seeking asylum are exposed to antiziganism in all walks of life. According to the latest mid-study by Leipzig University in 2016, almost 60% of the German population do not want people of Sinti or Romani origin as neighbours; almost half are of the opinion that the Romani and Sinti are criminals.[70] The racists in Germany continue to blame those affected for their racism. We are still stigmatised in the media, in police reports and children's films as the strangers, the savages, the ones who don't belong. The life-threatening poverty into which many Romani are forced throughout Europe by social exclusion is interpreted as the result of a lack of integration or even as part of our “culture".

In the words of the Holocaust survivor from the Dutch Sinti family Zoni Weisz about the genocide: "Nothing or almost nothing has society learned from it, otherwise it would deal with us more responsibly today." In today's Germany, the talk may be of the "monument of shame". This "Never again!" Lastly became obsolete when the AfD entered the Bundestag.

The fact that projects that are explicitly directed against antiziganism or specifically help the Romani and Sinti people are supported both privately and by the state makes sense and is to be welcomed. But the German state is acting contradictorily: because at the same time, conditions are being created for the deportation of thousands of Romani – many of whom, mind you, grew up or were even born in Germany and who may also have participated in similar projects financed from public funds.

The chances of being granted protection in the case of the Romani, who suffer racist persecution in the Balkan countries, also drop to zero. Thus, an endless spiral of deportations, renewed attempts to enter the country and repeated deportations is operated.

The Free State of Bavaria goes one step further. Bavaria wants to take the lead in opening central facilities for refugees. This involves denying asylum applications to people from so-called safe countries of origin. They will be housed in quasi-extraterritorial camps, comparable to airports, where fundamental rights are suspended. This is a continuity worthy of criticism, since it was the Munich Police Headquarters that founded the first "Gypsy Centre" in 1899, after which other police "Gypsy Centres" were soon set up both nationally and internationally. What is equally little known is that as early as May 1946, the "News centre on Gypsies" was renewed in the *Landeserkennungsamt*, an authority of the Bavarian LKA, since 1947 called the "News collection and information centre on Gypsies". The headquarters was again the Munich Police Headquarters, and the activities of the *Landfahrerzentrale* (Travellers’ Centre) were not officially discontinued until the 1970s.

In September 2015, the "reception and repatriation centres" were already opened in Manching and Bamberg to provide concentrated accommodation in Bavaria for the supposedly large

[70] See Universität Leipizig 2016.

number of asylum seekers from "safe countries of origin" in the Western Balkans and, after a short-term examination, to immediately deport them again or encourage them to leave voluntarily. A pilot study examined the conditions in these two centres. The results are shocking: the organisation in Bamberg is completely geared towards a stay that can be ended as quickly as possible. No attention is paid to the priority of the best interests of the child as enshrined in the United Nations Convention on the Rights of the Child (Art. 3). For budgetary reasons and in order not to hinder the morning deportations, room and flat doors cannot be locked, which stirs up fears among the children and increases the risk of theft and assaults against women and children (Art. 16). Health care only prevents life-threatening illnesses and repeatedly transfers diagnostic tasks to guard staff who are not qualified to do so (Art. 24). The children are not integrated into regular classes, as is customary in Bavaria, but are taught separately in a single room in learning groups of three to four grades each with (theoretically) up to 60 pupils and only twelve lessons per week. In practice, the majority of the children avoid school without consequences. This violates the children's right to equal education (Art. 28).[71]

Reception and return centres, exclusion and deportations are cumulative forms of discrimination that threaten the existence of Romani people.[72]

a) Current studies on racism against people of Sinti and Romani people in Germany

In its 2021 report, the Independent Commission on Antiziganism, which was convened in 2019 on behalf of the Federal Government and the Bundestag, identified a considerable need to "put combating and overcoming antiziganism on the political agenda in a targeted, direct manner and without levelling down the specificity of antiziganism.[73]" The Commission's report clearly demonstrates that antiziganism must be combated not only among the population, but above all in state structures. The measures for the protection of the Sinti and Romani described in the Federal Government's State Report, such as model projects, state democracy centres and conferences, as well as the promotion of the Documentation and Cultural Centre of German Sinti and Roma e.V. and framework agreements with state associations,[74] are by no means sufficient to achieve this. Among the particularly worrying parts of the report of the Independent Commission on Antiziganism are the results of the comprehensive study on experiences of racism that Sinti and Romani have in Germany – which focus on the areas of education, everyday life and the authorities.[75]

b) Education

According to the RomnoKher study of 2021, in which over 600 Sinti and Romani were interviewed, 60% reported discrimination at school (see "Unequal Participation", p. 84).[76] Only 4.8% of the respondents said that they experienced teachers as helping them to learn at school (see "Unequal Participation", p. 86). A "self-reflection of the education system with regard to the institutional racism anchored in it" towards Sinti and Romani, "remains absent.[77]" Contrary to the claim of the State Report,[78] antiziganism is not explicitly named as a teaching topic in

[71] See Hildegard-Lagrenne-Stiftung: Pilot study.
[72] See Bytyci 2017.
[73] BT DS 19/30310 (2021), p. 13.
[74] See BMJ, p. 12–13.
[75] BT DS 19/30310 (2021), p. 146 ff.
[76] RomnoKher, Study 2021.
[77] BT DS 19/30310 (2021), p. 211.
[78] BMJ, para. 193.

any of the 197 curricula from 16 federal states examined by the Georg Eckert Institute for International Textbook Research (see "Textbooks and Antiziganism", p. 15),[79] despite the measures described in the State Report to avoid stereotypes in textbooks,[80] dozens of textbooks contain the antiziganistic foreign designation of Sinti and Romani, often even without inverted commas or commentary.[81]

c) Authorities

In the area of public authorities, the Independent Commission on Antiziganism states that discrimination against Sinti and Romani by municipal administrations "cannot be reduced to the misconduct of individual administrative employees", but that it is "rather a matter of an institutional failure to protect the rights, dignity and life chances of people of Sinti and Romani origin", "which fulfils the facts of institutional racism.[82]" Examples of numerous open letters and statements by Sinti and Romani organisations in cases of particularly conspicuous violations of the principle of non-discrimination support this conclusion: in Berlin alone, self-organisations have reacted in recent months, for example, to the threat of homelessness of about 350 Romani people in Berlin-Friedrichhain[83], because of years of unobserved racist data collection of Sinti and Romani at the Berlin Emergency Service for Child Protection in cases of child and youth protection[84] (see Rainer Rutz, *neues deutschland* dated 07.09.2021), or because of racist statements against asylum seekers from Moldova by the Berlin State Office for Refugee Affairs (see Frank Bachner, *Tagesspiegel* dated 06.08.2021). The Independent Commission on Antiziganism recommends a comprehensive catalogue of measures to overcome institutional racism against people of Sinti and Romani origin among German authorities, such as education and awareness-raising work against racism, consideration of institutional discrimination in the AGG, or racism-critical monitoring of official practices.[85] The intercultural opening of the public service described in the State Report is not enough.[86]

d) Asylum policy / legislation

On the legislative level, the decades-long insecure residence status of Romani people who fled the Yugoslav wars as well as the classification of Serbia, Northern Macedonia, Bosnia-Herzegovina, Albania, Montenegro and Kosovo as "safe countries of origin" are to be criticised as anti-Romani, as this ignores the discrimination of people of Romani origin in these countries.[87] Furthermore, the current legislation does not do justice to Germany's historical responsibility (both because of the Nazi genocide and its co-responsibility in the Yugoslav wars). But the asylum policy goes even further: the State Report also reveals even worse conditions for people from so-called "safe countries of origin" with regard to the obligation to live in a reception centre for longer than the usually permitted six months. This is justified by the fact that the "termination of residence" should not be made more difficult by a legally

[79] Georg Eckert Institute: The Representation of Roma in European Curricula and Textbooks. Analytical Report, at: https://repository.gei.de/bitstream/handle/11428/306/COE%20-%20The%20Representation%20of%20Roma%20-%20web%20version.pdf?sequence=10&isAllowed=y.
[80] BMJ, para. 196 ff.
[81] BT DS 19/30310 (2021), p. 207.
[82] ibid., p. 225.
[83] See Potter 2021.
[84] See Rutz 2021.
[85] BT DS 19/30310 (2021), p. 226.
[86] See BMJ, para. 136–138.
[87] BT DS 19/30310 (2021), p. 263.

required change of residence.[88] This can only be understood as a cynical regulation, which can only be explained on the basis of an unreflected adoption of stereotypical argumentation structures from public discourse.[89]

e) Conclusion

Numerous recently published reports and studies, especially the report of the Independent Commission on Antiziganism appointed by the German Bundestag, have established massive discrimination against people of Sinti and Romani origin in Germany. The most serious problems include institutional racism against the Sinti and Romani, among others in the field of education, in the way they are viewed by the authorities and in asylum policy. The measures taken so far and described in the State Report are by no means sufficient to eliminate discrimination in the long term. In particular, reflection and the dismantling of stereotypical structures of thought and action within the state systems are a basic prerequisite for ending the multi-layered discrimination against Sinti and Romani in Germany. In this sense, the appointment of the Commissioner for Combating Antiziganism in 2022 is to be welcomed.

5. Anti-Asian racism

In its State Report, Germany does not address racism faced by people seen as Asians under the bullet point "Protection of individual population groups.[90]" Germany hereby fails to recognise the reality of discrimination faced by these people and does not make a single mention of them in the entire report. In Germany, people who are seen as Asian are confronted, among other things, with stereotypes in which they are seen as "different", "exotic" and "dangerous" as well as being seen a homogeneous mass.[91] Again and again, they have become the target of right-wing extremist attacks in Germany in recent decades.[92]

Although it was not yet possible to address the consequences of a global pandemic during the reference period of the State Report, it is important to emphasise once again at this point the increasing racist stigmatisation and the rising attacks on people seen as Asian associated with the Covid 19 pandemic.[93] In the wake of this, anti-Asian racism is also increasingly being talked about in Germany at the moment.[94] The fact that racialised attributions continue, as with other group-related racisms, can be attributed, among other things, to a lack of diversity in state institutions, the media, in academia and in educational institutions, as well as the aforementioned insufficient confrontation with unintentional racism. In the catalogue of measures of the cabinet committee against right-wing extremism and racism, the truncated understanding of racism and its social mechanisms of action is also made clear by formulations

[88] See BMJ, para. 88–89.
[89] BT DS 19/30310 (2021), p. 262.
[90] BMJ, para. 48 ff.
[91] See Suda, Mayer and Nguyen 2020, p. 39–44.
[92] Pogroms in Hoyerswerde 1991 and Rostock-Lichtenhagen 1992. Racially motivated murder of Nguyen Ngoc Chau and Do Anh Lan on 20 August 1980 during a far-right terrorist attack in Hamburg.
[93] See for example the press release of the Korientation association: “Made in Media” – Diskriminierende Berichterstattung zum Coronavirus, dated 05.02.2020, at: https://www.korientation.de/pm-rassismus-coronavirus/.
[94] Since August 2020, the collaborative project "Social Cohesion in Times of Crisis. The Corona Pandemic and Anti-Asian Racism in Germany" has been collecting data on social perceptions before and during the Covid 19 Pandemic of people seen as Asian.

such as "anti-Asian racism and any other form of group-related hostility towards people are unacceptable to the federal government and have no place in Germany.[95]"

6. Intersectional discrimination using the example of racism against lesbian, gay, bisexual, transgender and intersex people belonging to a vulnerable group according to the ICERD

Expert Contribution:

Parto Tavangar and **To Doan** are employees of the following.

ReachOut is a counselling centre for victims of right-wing, racist and anti-Semitic violence and threats in Berlin. *ReachOut* counsels victims of racial profiling and racist police violence and also supports and counsels relatives, friends of the victims and witnesses of an attack. The situation and perspective of victims of racist, right-wing and anti-Semitic violence are at the centre of their work. *ReachOut* offers anti-racist, intersectional educational programmes. They also research right-wing extremist, racist and anti-Semitic attacks in Berlin and regularly publish a chronicle.

Racial discrimination is often intertwined with other categories of discrimination such as gender, religion or class.[96] The bans on Black men entering discos should also be seen in this context (see below). The fact that Germany includes intersectional experiences of discrimination as a separate category of protected groups in the State Report is welcome. But here, too, the necessary sensitisation of state authorities and decision-makers is lacking.

The federal government lacks a holistic intersectional understanding of discrimination. As a result, racism reporting makes groups of people, aspects of discrimination and state-institutional racist measures invisible and/or does not take them into account.

In the counselling work, it becomes clear time and again that BiPoC who show strong psychological stress symptoms due to racist violence and permanent structural discrimination experiences hardly receive any connection to counselling centres and thus they cannot be cared for. They often already go through several (inpatient) hospital stays, which, however, usually do not work multidimensionally and intersectionally, so that these people repeatedly break out of these structures because they do not feel heard and seen. Their racist experiences are often denied in the clinics and *white-majority* counselling centres, thus retraumatising the people.

Even in *white-majority* counselling centres that specialise in specific discrimination such as queerness, queer BiPoC repeatedly experience racism because the focus is on the needs of *white* queer people. Unfortunately, this circumstance is not addressed enough.

Intersectionality can also be shown very well in the example of racial profiling: as a rule, young BiPoC men, to whom the Islamic religion is often attributed, are controlled, pursued, attacked and murdered by the police seemingly “on suspicion” and “without cause.” Through the

[95] Catalogue of Measures of the Cabinet Committee to Combat Right-Wing Extremism and Racism, dated 25.11.2020, p.3.

[96] Crenshaw 1989; see also General Recommendation no. 25 on gender-related dimensions of racial discrimination (2000), in which the Commission declares that “[t]here are circumstances in which racial discrimination only or primarily affects women, or affects women in a different way, or to a different degree than men.” In its General Recommendation no. 32 (2009), the Committee explicitly uses the term intersectionality.

construction and interaction of various attributions such as age, gender, sexual orientation, nationality and religion, BiPoC men are criminalised and presented as a “security” risk from which the *white-German* majority society must be protected.[97] The construct of the sexist heterosexual man or orientalist “other” is reproduced and at the same time staged as a danger for Europe, which imagines itself as *white*. Muslim people are ascribed queerphobia in *white* discourse, whereas the *white* queer scene constructs itself as “progressive” and queer-friendly. This perpetuates *white* supremacy narratives and anti-Muslim racism and affirms nationalism.[98]
Structurally and in everyday life, racism must always be considered intersectional, as racism can never be analysed in isolation from other axes of power (classism, heterocissexism, rejectionism, etc.) and does not work alone. Due to the continuation of colonial and imperial structures, which are reflected in global and local relations of exploitation, BiPoC permanently experience declassification,[99] which leads to precarious working (low-wage sector) and housing conditions.

In summary, racism is always intersectional and thus any analyses and reports without an intersectional understanding truncate racism and thus make racist crimes invisible and ultimately legitimise them.[100]

IV. No segregation and Apartheid (on Article 3 ICERD)

In its State Report, Germany (para. 80 ff.) refers to possible segregation as well as to the "accommodation of asylum seekers and persons who are obliged to leave the country.”

1. Housing market

The AGG makes it possible to sue for discrimination in the field of tenancy agreements "because of race" or "because of ethnic origin" (Section 1 AGG).[101] However, there is largely a lack of case law in this area, which is by no means due to the fact that there is no discrimination in the housing market as empirical studies prove.[102] One reason for the lack of case law is, among others, Section 19 (5) AGG, which restricts the scope of application of the prohibition of discrimination under civil law from Section 19 AGG, and with Section 19 (3) AGG creates a ground for justification in the case of unequal treatment with regard to the renting of housing.[103]

The Tempelhof-Kreuzberg District Court awarded two plaintiffs compensation in the amount of 15,000 euros pursuant to Section 21 (2) sentence 3, and 19 (2) AGG for violation of the prohibition of discrimination on grounds of ethnic origin.[104] In the underlying case, a landlord

[97] Çetin 2021, p. 141–152.
[98] Çetin 2015. p. 35–46.
[99] Hooks 2020.
[100] Balibar and Wallerstein 1990.
[101] Discrimination when concluding, executing or terminating the tenancy agreement can lead to a claim under the AGG, see. Schmidt-Futterer and Eisenschmid (2019), Section 535 BGB (14th ed.), para. 108.
[102] See for example the expert contribution „Diskriminierung auf dem Wohnungsmarkt. Strategien zum Nachweis rassistischer Benachteiligungen.” by the Federal Anti-Discrimination Agency of Germany, esp. p. 27 ff.
[103] For this reason, Gregor Thüsing and Sabine Vianden propose a new version of Section 19 (3) and (5), sentences 1 and 2 AGG in their expert opinion: see Thüsing and Vianden (2019).
[104] AG Berlin-Tempelhof dated 19.12.2014 - 25 C 357/14, BeckRS 2015, 2609. Previously, there was also a first judgement in the housing market discrimination case in 2010. A Black couple was turned away at a viewing appointment of a rented flat with clearly racist remarks by the caretaker. After the Aachen LG had dismissed the

had increased the rent of his non-white tenants ("of Turkish origin") from 7.04 €/m² to 9.52 €/m², whereas other tenants did not receive a rent increase. The court classified the Turkish origin as ethnic origin in the sense of Section 1 AGG and therefore affirmed a direct discrimination in the sense of Section 3 (1) AGG.[105]

The Mönchengladbach LG[106] ruled that direct discrimination before the conclusion of the tenancy agreement can also give rise to a claim for compensation under the AGG. In the underlying case, the potential landlord had stated in a telephone conversation that his wife did not want the house to be rented to persons of "Turkish or Arab origin.[107]" The distribution of the burden of proof is also important in this ruling: The person concerned only has to prove circumstantial evidence suggesting a disadvantage. The burden of proof is then on the opposing party to prove that he did not discriminate against the tenant.[108]

The Hamburg-Barmbek Local Court also ruled an unsuccessful application for a viewing appointment as direct discrimination on grounds of ethnic origin prior to the conclusion of the tenancy agreement.[109] In the aforementioned case, the plaintiff had received a rejection of her request for a viewing appointment. On the same day, she sent further expressions of interest via e-mail, each with invented German and Turkish-sounding names, but otherwise identical information. All Turkish-sounding names received a rejection, while all German-sounding names received an invitation to view the flat. In addition, the court clarified, as it had already done in rulings from other areas, that the claim for damages under Section 21 (2) AGG arises regardless of fault, i.e. it is irrelevant whether the discrimination was intentional or unintentional.

Despite these decisions, it is necessary to strengthen sanctions against discrimination in housing in the sense of Art. 15 of the EU Racial Equality Directive (Dir. 2000/43/EC) in order to deter landlords. In its last report, the EU Commission[110] expressed concern that in some Member States the courts do not provide effective sanctions against discrimination. Following the case law of the ECJ, the EU Commission emphasises that sanctions must be effective,

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case on the grounds that it was not the caretaker but the flat owners who were liable for compensation, the Cologne OLG, the court of next instance, ordered the caretaker to pay €5,000 in damages for pain and suffering due to violation of general personal rights. The AGG was only mentioned in passing in the ruling. The basis for the claim was Section 823 (1), 831 (1) sentence 1 BGB, OLG Köln, ruling dated 19.01.2010 - 24 U 51/09, NJW 2010, 1676.

[105] "The defendant has given the plaintiffs to understand by their behaviour that they do not fit into the rental and housing concept pursued by the defendant because of their origin and the related cultural background, without the plaintiffs having given any reason for this. The impression is created that the defendant fears a devaluation of the housing estate by tenants of Turkish-Oriental origin or Arab origin, which is not to be feared by tenants of European origin. The blatant devaluation, exclusion and massive injustice thus conveyed encroaches on the core area of the plaintiffs' personal rights as a significant violation. This not only violates German constitutional law, which the courts have to take into account in their assessment, but also fundamental European legal principles." AG Berlin-Tempelhof dated 19.12.2014 - 25 C 357/14, BeckRS 2015, 2609, para. 13 ff.

[106] LG Mönchengladbach, ruling dated 27.05.2016 – 11 O 99/15.

[107] LG Mönchengladbach, ruling dated 27.05.2016 – 11 O 99/15, para. 18.

[108] This decision is based on a similar argumentation pattern as in the labour law case "Feryn" (ECJ). In the present case, the ECJ had already assessed the public statement of an employer that he would not hire "Moroccan" workers in consideration of his clientele as direct racial or ethnic discrimination, as such statements may seriously discourage certain applicants from applying and thus have a restricted access to the labour market; ECJ, ruling dated 10.07.2008, C-54/07 - Feryn, [2008] ECR I-5187.

[109] AG Hamburg-Barmbek, ruling dated 03.02.2017 – 811b C 273/15, BeckRS 2017, 118019.

[110] Report dated 19.03.2021 from the Commission to the European Parliament and the Council on the application of Council Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin ("the Racial Equality Directive") and of Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation ("the Employment Equality Directive"), at: https://ec.europa.eu/info/sites/default/files/report_on_the_application_of_the_racial_equality_directive_and_the_employment_equality_directive_en.pdf.

proportionate and dissuasive, and that a purely symbolic sanction is therefore out of the question.[111] Sanctions that are too low could discourage potential plaintiffs from taking legal action against discrimination, according to the EU Commission.

On the situation of the housing market

Despite the emphasis on the AGG and the associated enforceability, the legal situation for people affected by racism has not changed much in recent years. Due to the housing shortage, especially in urban areas, it can even be assumed that the situation on the housing market has only worsened due to the lack of legal protection.

One of the most recent rulings came from the Berlin-Charlottenburg Local Court.[112] This case also involved a prospective tenant with a Turkish surname who was directly discriminated against in the application procedure for rental flats due to his ethnic origin and who was awarded a claim for damages by the court according to Section 21 (2) sentence 3 AGG. The ruling clarifies that the "testing" procedure[113] carried out by the plaintiff in the area of residential rent is expressly permissible in order to be able to establish a disadvantage, which is particularly important for the presentation of evidence in court.[114] The defendant was a legal entity that owns approximately 110,000 flats in Berlin, which is why the court found "particularly serious" discrimination, "as the plaintiff is thereby cut off from access to a significant share of the rental housing market in Berlin.[115]"

2. Accommodation of asylum seekers and persons obliged to leave the country

Expert Contribution

Marie Frank from the National Agency for the Prevention of Torture.

The National Agency for the Prevention of Torture is an independent national institution for the prevention of torture and ill-treatment in Germany. The National Agency unites the Federal Agency and the Commission of the States under its umbrella. Its establishment is based on the Additional Protocol to the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. The National Agency for the Prevention of Torture has the task of regularly visiting places of deprivation of liberty, drawing attention to abuses and making suggestions for improvement. It reports on this annually to the Federal Government, the State governments, the German Bundestag and the State parliaments.

During an unannounced visit to the deportation detention centre, a delegation of the National Agency for the Prevention of Torture witnessed numerous offences in Büren's deportation

[111] ibid., p. 10.

[112] AG Berlin-Charlottenburg, dated 14.01.2020 - 203 C 31/19.

[113] On testing studies in the housing market, see the expert contribution "Diskriminierung auf dem Wohnungsmarkt. Strategien zum Nachweis rassistischer Benachteiligungen." by the Federal Anti-Discrimination Agency of Germany (2015), p. 30–43.

[114] In response to his request for a viewing appointment via an online form containing his name and contact details, the plaintiff received an email with a rejection referring to the numerous requests. The plaintiff then wrote to the landlady using a fictitious German name and received a reply one day later that he could pick up the keys for the viewing at the service point. The plaintiff then went to the service point in person to inquire about the incident. He was told that the flat was already taken. An hour later, a colleague of the plaintiff asked for informations about the flat and was told that he could view the flat.

[115] AG Berlin-Charlottenburg, dated 14.01.2020 - 203 C 31/19, para. 37.

detention centre. Although the legal basis stipulates that solitary confinement should be imposed as briefly and infrequently as possible on persons obliged to leave the country, some of them were placed permanently in solitary confinement. There are also violations and disproportionality in solitary confinement, in which prisoners are monitored and filmed even during their toilet visits, regardless of their gender. Prisoners are locked in their premises not only at night but also during the day. There are also disproportionate restraints, which have no legal basis. Psychological care is also not guaranteed despite the psychologically stressful situation, resulting in an increased risk of suicide attempts and self-harm.

The inspection of the pubic area was also conspicuous for its serious interference with the right of personality. The inspection, during which even female staff asked male prisoners to undress, lacked any proportionality.

There are eleven detention centres for deportees in Germany, of which Büren is only one. Around 50% are unjustly imprisoned there.[116]

The special situation of the accommodation of underage refugees

Refugees, especially minors, are hardly provided with child-friendly support, as there is hardly any person responsible for child protection in the reception centres. Experience also shows that the age of children is not correctly assessed. In most cases, attempts are made to determine the age by means of medical procedures such as X-rays or genital examinations, which, however, do not allow for reliable age determination. These procedures are therefore not justifiable from a health and ethical point of view.[117] Caregivers and the families of underage refugees are important for their development and for safeguarding the best interests of the child. In most cases, it is not possible for unaccompanied underage refugee to quickly join their families, as the applications for family reunification are lengthy and a positive decision is not guaranteed.

The accommodation of underage refugees and refugee children is important for their development. Collective accommodation is a negative factor due to its cramped living conditions, lack of privacy and opportunities for retreat, poor hygiene and the often poor psychological condition of the parents. In order to create the best possible environment for these children and adolescents to grow up in, it is therefore essential not to place them in collective accommodation, but to place them in a foster family or youth facility as soon as possible.

Regardless of the accommodation of the refugee children and adolescents, it is important to deal with the reasons for flight that affect children in particular, such as forced marriage, the circumcision of girls or recruitment as child soldiers. This discussion and consideration is also regulated in the UNHCR guidelines, according to which the flight experience is taken into account in the asylum procedure according to the age and maturity of the children, as these experiences have a more psychologically stressful and threatening effect on children compared to adults.

There are also special problems for refugee children and young people when it comes to integration in the education system. Schools should be accessible to refugees from their

[116] Frank 2018.

[117] Terre des hommes: Flüchtlingskinder, at: https://www.tdh.de/was-wir-tun/arbeitsfelder/fluechtlingskinder/

accommodation, but they are often not. There are no nationwide regulations on compulsory schooling, which makes it difficult for refugees to get an overview and severely restricts their schooling options. This structural obstacle is compounded by the fact that regular school attendance can only begin after assignment to a municipality, which can take time, as a result of which the children and young people are not directly reintegrated into a structured everyday life. Not every refugee minor is given the opportunity to complete school, as compulsory schooling ends at the age of 16.

However, the obstacles do not end with the school system – the requirements for obtaining a training place are also more complex than for their peers of the same age who have no history of flight. For example, asylum-seeking and tolerated young people can only start their training once they have been in Germany for three months. Their access to vocational training measures and vocational training assistance according to the Federal Training Assistance Act (*Bundesausbildungsförderungsgesetz*, hereinafter BAföG) is also severely restricted.

The same three-month time limit applies to taking up a job. Here, too, refugees must stay in Germany for at least three months before they are allowed to legally work.

V. Tasks of the state to combat racist propaganda and organisations (on Article 4 ICERD)

Germany is obliged under Art. 4 of the ICERD to establish a criminal law framework to combat racist discriminatory statements and actions.[118] This includes the incrimination of the dissemination of racist ideas and the incitement or support of racial discrimination, the legal prohibition of racist organisations or other propaganda activities as well as the prevention of the promotion of discrimination by state authorities or public institutions.

1. Criminal law provisions and their effectiveness (on Article 4 (a) ICERD)

a) Legal bases and legal reality, application of the rules in preliminary proceedings

Art. 4 ICERD is also insufficiently implemented by Germany. The State Report deals with individual, especially criminal, regulations to combat racism (Sections 86, 86a, 130, 46 of the German Criminal Code, or *Strafgesetzbuch*, hereinafter StGB).[119]

Section 130 StGB – hate speech

It remains questionable whether Section 130 of the StGB[120] mentioned by Germany in the State Report fully complies with the obligation under Art. 4 ICERD, especially since the offence of disturbing the public peace in Section 130 of the StGB is an additional requirement.[121]

[118] Payandh, in Angst and Lantscher's ICERD-commentary, 2020, Art. 4 para. 5.

[119] BMJ, para. 91 ff.

[120] ibid., para. 92.

[121] See CERD, General recommendation no. 35 dated 26.09.2013; CERD, Notice dated 26.02.2013, no. 48/2010 – TBB e.V./Deutschland ; Section 130 (1) StGB reads: Whoever, in a manner likely to disturb the public peace, 1. incites hatred against a national, racial, religious or ethnically determined group, against parts of the population or against an individual because of his or her membership of an aforementioned group or of a part of the population, or incites violence or arbitrary measures or 2. attacks the human dignity of others by insulting, maliciously

According to the reading of the BVerfG Section 130 of the StGB does not criminalise certain forms of right-wing extremist and racist agitation if the hate speech merely leads to subjective disturbance or poisoning of the mental climate, but does not cause a disturbance of the public peace.[122] The requirements of the ECHR and ICERD, on the other hand, are less strict. Even the impairment of the general feeling of security and peace of the affected groups is sufficient to push back freedom of expression.[123]

Finally, an interpretation in conformity with the Framework Decision can also be considered for the interpretation of Section 130 of the StGB, because this Section partly contains the implementation of the EU Hate Crime Decision[124] with the Amending Act[125]. The aim of the Framework Decision is to combat racism and xenophobia more effectively and to introduce a minimum standard of protection against racist criminal acts throughout Europe (Recital No. 13). Art. 1 obliges Member States to ensure that racist acts are punishable and that necessary measures are taken to this end. The Framework Decision limits the criminal offences to intentional acts (Art. 1 (1), sentence 1). Among other things, public incitement to violence or hatred against a group of persons defined according to the criteria of race, colour, religion, descent or national or ethnic origin, or against a member of such a group, is punishable (Art. 1 (1) lit. a).

Section 81e (2) StPO

Section 81e (2) of the StPO, which was introduced in 2019, states that under certain conditions, trace material may be examined for the "colour of eyes, hair and skin". It is questionable to what extent such a biological concept can be useful in criminal procedure law and whether it does not encourage already existing prejudices.

With regard to this provision, the Federal Government is of the opinion in the draft law on the modernisation of criminal proceedings [126] that the examination of the trace material to determine the probable eye colour, hair colour, skin colour as well as age does not encroach on the absolutely protected core area of personality.[127] According to the Federal Government, the determination of the explicitly recognisable characteristics of eyes, hair and skin colour as well as the approximate age represents a significantly lesser intrusion than the determination of characteristics which the external appearance does not reveal. This justification is questionable because the Federal Government assumes a conception that classifies people according to skin colour. However, it is precisely this notion of skin colour that has shaped biological race theories over the past centuries. In the end, such an approach can only encourage racist stereotypes.

Conversely, the long tradition of racial discrimination based on skin colour has led to the formation of identity based on skin colour, whereby Black people, for example, define

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disparaging or defaming a pre-designated group, parts of the population or an individual because of his or her membership of a pre-designated group or part of the population, shall be punished by imprisonment for a term of three months to five years.

[122] BVerfGE 124, 300 (334 ff.).

[123] See CERD, General recommendation no. 35 dated 26.09.2013, para. 16; Human Rights Committee, General comment no. 34, para. 35.

[124] Act Amending Section 130 StGB dated 22.03.2011, Federal Law Gazette 2011 I, 418.

[125] Council Framework Decision 2008/913/JHA dated 28.11.2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law, OJ L 328/55.

[126] BT DS 19/14747.

[127] ibid., p. 28.

themselves by skin colour. In this sense, skin colour is definitely part of the absolutely protected core area of personality, which is flanked by the inviolability of human dignity according to Article 1 (1) GG. Against this background, Section 81e (2) of the StPO is generally incompatible with the spirit of the Convention and in particular with Articles 2 and 4 of the ICERD.

b) Racist murders (e.g. NSU and Oury Jalloh) and the role of the state

The increase in racist murders in Germany is worrying. Particularly through the NSU group and the work of the family members and initiatives, the state's involvement and its structural failure in relation to the investigation of racist murders has also come to light. Nevertheless, many questions remain unanswered, as will be shown with the example of the NSU group, the death of Oury Jalloh in a detention cell and the racist attack in Hanau.

Oury Jalloh

In its state report, Germany does not address the death of Oury Jalloh in a detention cell in Dessau-Roßlau, although there is strong evidence that Oury Jalloh's death was caused by outside interference.

Oury Jalloh was found dead in a detention cell in January 2005 after a fire. According to the police account, Oury Jalloh had set himself on fire. Several points speak against this account, some of which have since been proven by independent investigative bodies: firstly, the lighter with which Oury Jalloh is said to have set himself on fire only turned up three days after his death in the laboratory of the LKA (it was not found during the search of the cell). Furthermore, Oury Jalloh was chained by both his hands and feet and was lying on a fire mattress. It also came out years after the death that Oury Jalloh already had a broken nose, a fractured skull and broken ribs before his death.

It is not only shocking that a Black person dies in a custody cell over which white police officers have control, but also that the legal processing of the case, which satisfactorily answers all open questions, has still not been done.[128] The *Initiative Gedenken an Oury Jalloh* has been fighting for a comprehensive legal investigation of the death since 2005 and has repeatedly encountered obstacles.

In a first trial, the two accused police officers were acquitted.[129] The verdict was overturned by the Federal Supreme Court in 2010,[130] whereupon Andreas S. was sentenced to a fine of €10,800 for involuntary manslaughter by the Magdeburg LG in 2012.[131] However, the cause of the fire and the cause of death are not clarified in this judgement. In 2013, the senior public prosecutor Preissner opened a murder investigation against unknown persons, but the public prosecutor's office in Dessau did not question possible suspects. As a result, the Initiative Gedenken an Oury Jalloh filed written charges of murder in 2013 with the Attorney General Harald Range, who declined jurisdiction. In 2017, Senior Public Prosecutor Folker Bittmann abandons the hypothesis of spontaneous combustion and for the first time concretely suspects two police officers. He asks the Attorney General Peter Frank to take over the murder investigation. This is refused. The Attorney General then withdraws the investigation from the

[128] Initiative Gedenken an Oury Jalloh: Chronology of the Oury Jalloh case 07.01.2005 until 2020.
[129] LG Dessau-Roßlau, ruling dated 08.12.2008 – 6 Ks 4/05.
[130] BGH, ruling dated 07.01.2010 – 4 StR 413/09, in: NStZ 2010, 407.
[131] LG Magedburg, ruling dated 13.12.2012 – 21 Ks 141 Js 13260/10 (8/10).

jurisdiction of the Dessau Public Prosecutor's Office, where Folker Bittmann worked. The public prosecutor in Halle, who was then responsible for the case, sees no evidence for the involvement of third parties. He rejects sufficient suspicion, so that - despite new indications through the preparation of fire reports (2013 by expert Maksim Smirnou[132] and 2015,[133]) which were commissioned by the Initiative Gedenken an Oury Jalloh – no investigation is carried out. Several fire reports by independent experts had shown that the fire in the cell could only have been caused by the addition of a strong accelerant such as petrol, and that Oury Jalloh could not have started the fire himself because he was tied up. Lawyers for Oury Jalloh's family are appealing against the prosecutor's decision.[134]

Development in the Oury Jalloh case after 2018

In 2019, the subsequent complaint enforcement proceedings at the Naumburg OLG were rejected due to sufficient suspicion of murder against two police officers from the precinct in question.[135] As a result, the family of Oury Jalloh filed a constitutional complaint with the BVerfG in 2019.[136] In particular, the violation of Article 19 (4) GG (right to effective criminal prosecution) as well as the violation of the right to be heard under Article 103 (1) GG come into consideration here.[137]

During the course of the trials, two further unexplained deaths became known in the context of detentions by the police in Dessau-Roßlau, both of which took place under the head of the department Andreas S.: Hans-Jürgen Rose (1997)[138] and Mario Bichtemann (2002).[139]
Due to the ongoing impunity despite the existence of several expert reports questioning the statements of the police, the International Independent Commission to Uncover the Truth about the Death of Oury Jalloh was founded in 2018.[140] The members of the commission observe with concern the increasing attacks and murders of racialised persons by members of the security authorities.

Jalloh's brother's constitutional complaint was unsuccessful; the court decided not decide on the complaint.[141] With the constitutional complaint, the brother claimed that his right to effective criminal prosecution, effective legal protection, arbitrariness-free decision-making and a fair hearing had been violated. In the opinion of the BVerfG, the Naumburg OLG had not overstretched the requirements for the existence of a sufficient suspicion of an offence and had explained that – even if there was still much to be said for spontaneous combustion –

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[132] Initiative Gedenken an Oury Jalloh: Fire Investigation Report by expert Maksim Smirnou.

[133] The latest report is from 2021. https://www.tagesschau.de/inland/tod-jalloh-gutachten-101.html.

[134] Halle Public Prosecutor's Office: Press release dated 11.10.2017. Investigations in the Oury Jalloh case discontinued, at:
https://sta-hal.sachsen-anhalt.de/fileadmin/tsa_rssinclude/staatsanwaltschaft-halle_11_10_2017_pressemitteilung_ermittlungen-im-fall-oury-jalloh-eingestellt.pdf.

[135] OLG Naumburg, ruling dated 22.10.2019, Case 1 Ws (gE) (1/19).

[136] Initiative Gedenken an Oury Jalloh: Press release. Family of Oury Jalloh files an appeal with the BVerfG, dated 26.11.2019, at: https://initiativeouryjalloh.wordpress.com/2019/11/26/familie-von-oury-jalloh-legt-beschwerde-beim-bundesverfassungsgericht-ein/ . The constitutional complaint is directed against the decision of the Halle Public Prosecutor's Office of 12.10.2017 and against the review note of the Naumburg Public Prosecutor's Office of 29.11.2018 to discontinue the investigations and against the current decision of the Naumburg OLG not to order a public prosecution of suspects in the case of Oury Jalloh.

[137] If the BVerfG rejects this, the Initiative intends to go to the ECtHR.

[138] Review note by the Naumburg Attorney General's Office on the investigations into the death of Ouri Jallow [sic!], 2017, p. 68 ff.

[139] ibid., p. 83 ff.

[140] https://www.ouryjallohcommission.com/willkommen.

[141] BVerfG, ruling dated 21.12.2022, case 2 BvR 378/20.

there was in any case a lack of sufficient suspicion of an offence against a specific accused for setting the fire by another party. Furthermore, the Naumburg OLG had not misjudged the importance of the fundamental right to life and the constitutional requirements for the effective investigation of deaths. Last but not least, the court had correctly pointed out in its decision that the brother's statements lacked a description of "which police officers are supposed to have set the fire and on the basis of which evidence it is supposed to be possible to prove this". Finally, the Naumburg OLG had not violated the right to be heard under Article 103 (1) GG. After the case was closed in 2018, two special investigators had re-investigated the case on behalf of the State Parliament. In their investigation report, the special investigators found numerous mistakes by the police and other authorities. However, they also did not see any approaches for new investigations.

In the meantime, the brother has filed a complaint with the ECtHR. Accordingly, the plaintiff invokes, among other things, the right to life from Article 2 ECHR, the prohibition of torture from Article 3 ECHR (especially in its procedural aspect) and the prohibition of discrimination from Article 14 ECHR (case 26578/23).

NSU Group

In contrast, Germany refers in its State Report[142] to the NSU group and emphasises the verdict of the Munich OLG and in particular the life sentence for Beate Zschäpe.[143] However, the criticism of the predominantly short prison sentences of other defendants such as Andre Eminger and Ralf Wohlleben is downplayed.[144] Another problematic aspect of the verdict is that it upholds the "trio thesis", according to which the NSU's crimes can only be attributed to three perpetrators with little or no support from right-wing groups. This theory was repeatedly reiterated by the Federal Prosecutor's Office during the trial and in the closing argument, which misjudged the dimension of the NSU terrorist network. The involvement of the state, in particular the Office for the Protection of the Constitution, was repeatedly pointed out during the trial by the joint prosecution. Certain circumstances have still not been clarified, for example why the confidential informant Andreas Temme did not notice the murder of Halit Yozgat in an internet café in Kassel despite his presence according to his own statement and contrary evidence by Forensic Architecture.[145]

The ruling also reproduces stereotypes and makes it clear that the judges do not base their legal assessment on the definition of Art. 1 ICERD. For example, Seda Başay-Yıldız, a lawyer for the incidental claim, criticised the court for portraying the victims as "stereotypical extras". In part, the court adopts the racist description of the crimes from the perpetrator's perspective. For example, the term "southern",[146] which is strongly stigmatised and pejorative in Germany, is used 66 times in the ruling alone.

[142] BMJ, para. 114 ff.

[143] OLG München, ruling dated 11.07.2018, case 6 St 3/12. Currently, an appeal by the Office of the Attorney General against the verdict is open with regard to the accused André Eminger.

[144] For example, the press release by the representatives of the incidental claim on the end of the NSU trial dated 11.07.2018, at: https://www.nsu-nebenklage.de/blog/2018/07/11/11-07-2018-presseerklaerung-von-nebenklagevertreterinnen-zum-ende-des-nsu-verfahrens/.

[145] The Murder of Halit Yozgat, Forensic Architecture, at: https://forensic-architecture.org/investigation/the-murder-of-halit-yozgat.

[146] On this, see Everdosa 2022.

The large number of committees of enquiry that existed at both federal[147] and state level (Baden-Württemberg, Brandenburg, Hesse, North Rhine-Westphalia, Bavaria, Mecklenburg-Western Pomerania, Saxony and Thuringia) is to be welcomed. The existence of these investigative committees all over Germany makes it clear that the NSU was active and murdered all over Germany and was able to draw on right-wing extremist networks.

However, the work of the committees of enquiry can also be criticised.[148] In particular, the committee of enquiry in Hesse, for which there is not even a final document,[149] continues to reveal structural problems. Here, the above-mentioned presence of the undercover agent Andreas Temme at the murder of Halit Yozgat was discussed, who continued to state that he had not seen the murdered man when he left the internet café. The fact that this statement is untruthful has already been proven by Forensic Architecture, which, however, did not mean any consequences for Temme.[150]

c) Findings on right-wing extremist and racially motivated murders as a consequence of insufficient preventive measures by the state

Despite the legal process, initiatives such as NSU Watch and the multitude of investigative committees, local, right-wing extremist support networks remain largely unknown. The fact that the measures taken by the Federal Government and the analyses presented in the State Report are inadequate is shown in retrospect by the development of the past years. The fact that this poses a great danger is also made clear by the right-wing extremist murder of Walter Lübcke in June 2019, who had been on an enemy list of the NSU, as well as the attempted murder of Ahmed I. in Kassel by the same perpetrator, who maintained contacts in the environment of the NSU network. Many questions about the involvement of the Office for the Protection of the Constitution were not clarified, among other things because it shredded files.

Racist attack of Hanau on 19.02.2020

The events surrounding the attack in Hanau also show the complete inadequacy of the measures taken so far, which are reviewed in the State Report. On 19 February 2020, Ferhat Unvar, Hamza Kurtović, Said Nesar Hashemi, Vili Viorel Păun, Mercedes Kierpacz, Kaloyan Velkov, Fatih Saraçoğlu, Sedat Gürbüz and Gökhan Gültekin were shot dead by a white, right-wing extremist perpetrator in an attack. Other people were injured during the attack at three different locations (a shisha bar, another bar and a newsstand). The crime was classified by the BKA as right-wing extremist and racially motivated. However, even with this racist act, questions remain open, especially in relation to state authorities.

Thanks to the *Initiative 19. Februar Hanau*, the failure and indications of failure of the state authorities can be shown.[151] On the one hand, the perpetrator received weapons permits and

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[147] BT DS 17/14600 (2013), https://dserver.bundestag.de/btd/17/146/1714600.pdf.

[148] Essentially Pichl 2022.

[149] Press release on the publication of the final report of the NSU investigation committee in Hesse by NSU Watch Hesse, dated 23.08.2018, https://hessen.nsu-watch.info/2018/08/23/pressemitteilungzur-veroeffentlichung-des-abschlussberichts-des-hessischen-nsu-untersuchungsausschusses/; There was no joint final report of the NSU investigation committee in Hesse. In addition, the NSU files have been classified as secret and are therefore not accessible to the public for thirty years.

[150] See Forensic Architecture: The Murder of Halit Yozgat, at: https://forensic-architecture.og/investigation/the-murder-of-halit-yozgat.

[151] We accuse! One year after the racist terrorist attack, dated 14.02.2021, Initiative 19. Februar Hanau, at: https://19feb-hanau.org/wp-content/uploads/2021/02/Kette-des-Versagens-17-02-2021.pdf.

thus committed the crime with legally acquired weapons, although he had been undergoing psychiatric treatment since 2002 and various investigations and criminal proceedings were ongoing against him. Furthermore, the emergency exit at the last crime scene, the shisha bar, had been locked. It cannot be ruled out that some people could still have escaped to safety by leaving through the emergency exit. According to witnesses, the emergency exit of the arena bar had been closed by agreement between the owner and the police, so that the latter would have an easier time during raids.

In addition, the Hanau emergency numbers were not available on the night of the attack. The treatment of the families and friends of those murdered is also marked by racist discrimination. For example, Piter Minnemann, a survivor of the attack, was ordered by a police officer to walk to a police station 3 km away when they arrived at the crime scene, at a time when the perpetrator had not yet been caught. The parents of the murdered Vili Viorel Păun were not informed of his murder, although he had his identity papers in his pocket. Only when his parents reported to the police station did they learn of their son's death.

It was only in December 2020 that survivors and family members learned about the role of the perpetrator's father through a publication in the media. He had filed numerous racist charges in the preceding months, such as inciting hatred by building memorials commemorating the victims. This dynamic shows that the investigation of racist acts is shifted to the responsibility of the survivors and family members, although this is the task of the state. It is a good thing that a committee of enquiry has been set up in Hesse.[152] However, it is still necessary to fight for every explanation of the crime.

Conclusion and recommendations for action

These cases show that the resolution of racist acts remains dependent on survivors, lawyers, family members and civil society initiatives, although state authorities should investigate and the public prosecutor's office or the federal prosecutor's office should ensure the resolution of the acts in the proceedings. There is also a recognisable tendency to criminalise such initiatives, for example in the case of the *Initiative Gedenken an Oury Jalloh*. The targets of attacks must also be seen in connection with the criminalisation of certain places, especially shisha bars (see section on clan crime below).

Thus, the Federal Republic of Germany is not fulfilling its obligations under Art. 2 (1) ICERD even several years after the State Report was written. The role of state authorities must be consistently prosecuted and legally punished. Further investigations are needed in connection with the above-mentioned racist acts. These are not isolated cases, which is why institutional racism in security agencies such as the police, the Office for the Protection of the Constitution and the Military Counter-Intelligence Service (*Militärischen Abschirmdienst*, hereinafter MAD) must be urgently recognised and fought.

2. Measures against organisations with racist objectives (on Article 4 (b) ICERD)

The State Report speaks here of banning associations: associations can be banned under Article 9 (2) GG if their purpose or activities contravene criminal law or are directed against the

[152] Hessian State Parliament: Committee of Inquiry, at: https://hessischer-landtag.de/content/untersuchungsausschuss-una-202.

constitutional order or the idea of international understanding. With regard to right-wing extremism, some associations have been banned at federal and state level. This concerns "Altermedia Deutschland" (charged with forming a criminal organisation), "Weiße Wölfe Terrorcrew", "Nordadler" and "Combat 18 Deutschland", as well as at the state level the "Widerstandsbewegung Südbrandenburg", "Freies Netz Süd", "Nationale Sozialisten Döbeln", "Nationale Sozialisten Chemnitz", "Autonome Nationalisten Göppingen" and "Sturm 18 e.V.". It is noticeable that some right-wing extremist associations such as "Geeinte deutsche Völker und Stämme" (United German Peoples and Tribes), a Reich citizens' association, are listed on the BMI page under the ban category "Other associations" and not under "Right-wing extremism".

The AfD is not mentioned in the 23rd – 26th State Report, although it is now observed in parts by the Office for the Protection of the Constitution. The AfD is classified in parts as right-wing extremist, racist and anti-Semitic.

3. Racism among public authorities (on Article 4 (c) ICERD)

Expert Contribution

Ahmed Abed is an expert in social and labour law and works in this field as a lawyer in Berlin. His goal is to fight against rampant racism and for a peaceful world. His focus is on supporting refugees who have fled from new and old wars.

a) Racism in the police and in the judiciary using the example of so-called clan crime

The police concept of "clan crime" applied in various German federal states provides for disproportionate checks on persons of the Muslim and South-Eastern European immigrant groups on the basis of their names and whereabouts.

Stigmatisation of "clan crime" as a concept of racial profiling

Even before the attack in a shisha bar in Hanau, among other places, police statistics were inflated and kept on the basis of ethnicising criteria that violate the ban on discrimination according to Article 3 (3) GG. People seen as of Arabic, Turkish and South-Eastern European origin are collectively described as foreign and crime-prone, contrary to their complexity and individuality.[153] The very idea that they would live in "ethnically segregated subcultures" or "parallel societies" is highly problematic in view of the UN Committee's decision-making practice to date.[154] In Lower Saxony and North Rhine-Westphalia, even the carrying of a certain family name leads to the smallest administrative offences being included in the statistics on "clan crime". Lower Saxony and North Rhine-Westphalia each use their own definitions of "clan crime", while the state of Berlin still adopts the definition of the BKA in 2019, which uses the suspicion of organised crime as a basis. According to the definitions of the other federal states, the basic requirement is that a person is accused of offences from the field of organised crime. If the suspects also belong to "ethnically segregated subcultures" or "parallel societies", they are classified as "clan criminals". The latter alone, however, is sufficient for inclusion in the police file for "clan crime" of Lower Saxony. There, the term "incidents" is used to refer to all incidents that are supposed to have something to do with "clans", without them necessarily having any relevance under law and order or criminal law. What is meant by "subcultures" or

[153] See Schultz 2018.

[154] See only CERD, Notice dated 26.02.2013, no. 48/2010 – TBB e.V./ Deutschland = EuGRZ 2013.

"parallel societies" remains just as unclear as the question as to what size a family should be to qualify as a "clan" or what degree of kinship counts.

Stigmatisation of affected persons

In public, the raids are presented in connection with the search for serious criminals or terrorists, even though the majority of the raids are unprovoked checks at police predefined "dangerous places" and are mostly joint operations under commercial law. This means that the *Ordnungsamt* (Public Order Office) and the *Finanzamt* (Tax Office) check businesses for their regularity and are supported by the police through administrative assistance if they cannot carry out the checks themselves without disturbances. According to Section 29 of the Trade, Commerce and Industry Regulation Act (*Gewerbeordnung*, hereinafter GewO), such business inspections are possible, but they must be proportionate: business operations must not be restricted without reason and controls must not stigmatise. Police presence that leaves a negative impression on neighbours and other members of the public is only justified if dangers are to be expected.

The processing of personal data solely on the basis of the surname, as is practised in Lower Saxony and North Rhine-Westphalia, violates the prohibition of discrimination on grounds of descent under Article 3(3) GG. Contradictory statements on the purpose of establishing identity can be found in Berlin. In response to a parliamentary question, the Berlin Senate (DS 18/23809) claimed that the guests were recorded during the raids as witnesses to the offences or as persons affected. However, the Berlin public prosecutor's office openly stated to the media that all people in the bars were checked in order to find out where "serious criminals" were staying.

Being able to be checked simply for being in a certain place is highly problematic from a constitutional point of view and contributes to racial profiling, which is prohibited under constitutional and human rights law. With the help of the vague accusation that "clan members" could be in a place, further warrantless checks are now being extended to places where certain "ethnic" groups are present. Increased checks, however, almost automatically result in more offences being detected, thus confirming the assumption of "dangerous places" by itself.

Conclusion and outlook on dealing with so-called "clan crime”

The police operations against so-called clans reinforce the racist images that are circulating anyway, which has a negative effect on finding work and housing, for example. Thus, it is questionable to what extent the authorities are violating the prohibition of discrimination on the grounds of descent, race and origin according to Article 3 (3) GG, the protection of the family according to Article 6 (1) GG, the right to informational self-determination and privacy according to Article 2 (1) in conjunction with Article 1 (1) GG, the right to free exercise of one's profession under Article 12 (1) GG and the presumption of innocence under Article 20 (3) GG.

The figures of the last few years also show that this practice has not changed since the last State Report and requires a critical reappraisal of discrimination in the police and judiciary.

In Berlin's "Annual Balance 2019 for Combating Clan Crime" and the "Annual Balance 2020 for Combating Clan Crime", there are thousands of entries that are far from meeting the "clan crime" definition. For example, thousands of traffic controls that take place during shisha bar raids are recorded. As in North Rhine-Westphalia, hygiene violations, bicycle thefts,

undeclared shisha tobacco or drug possession by guests are also included in the statistics. In 2019, over 46,000 police deployment hours were accumulated in 397 raids in Berlin. In North Rhine-Westphalia, 83,000 hours were counted in the control of 1,900 objects and 23,255 identity determinations. In Lower Saxony, on the other hand, 2,630 "events" were counted and 1,695 cases were investigated.[155]

On 27 March 2019, fully hooded police units with machine guns at the ready stood outside three Arab shisha bars in the Neukölln district of Berlin.[156] Dozens of guests were searched, their personal details taken and checked to see what their residence status was and whether they were under investigation. 357 police officers are deployed that evening, while a section of the street is cordoned off for two hours for hundreds of traffic checks. Similar scenarios played out many times in North Rhine-Westphalia and in Berlin in 2019 and 2020. TV and front pages reported sensationally on these and similar raids - with pictures of the shop owners, the guests and the shops.

b) Racial profiling

Expert Contribution

KOP Berlin, the campaign for victims of racist police violence, opposes institutional racism on different levels in order to break through the racist normal state. Above all, they strengthen the positions of those affected and victims, accompany them and refer them to counselling centres. In addition, they sensitise the public, expose the systematic approach of the police and the judiciary and above all try to confront the police with their responsibility for society and put them under pressure. The activist and founder of *KOP*, *ReachOut* and *Death in Custody* **Biplab Basu** works against and educates about strategies and demands against racist police violence and racial profiling.

Racial profiling describes the racist control of police, security, immigration and customs personnel. The officers check and search Black people, BIPoC, Romani and Sinti people and those who are identified as Muslims without any concrete indication or suspicion. In addition, non-white sex workers and trans women are increasingly controlled and criminalised.[157]

The migration law basis for racial profiling can be found in Art. 22 (1) lit. a BPolG. This provision makes it possible to carry out suspicion-independent checks to prevent the unauthorised crossing of national borders and unauthorised residence. As early as 2013, the German Institute for Human Rights published a study in which the BPolG was classified as violating human rights and an urgent need for action was identified.[158] (See Cremer 2013). Consequently, racial profiling takes place on a daily basis in public spaces, in parks, train stations, red light districts, on the street, etc. These supposedly "crime-ridden places" are predominantly places where people worthy of protection according to the convention live and stay. Thus, the controls are not carried out without reason, but serve to criminalise racialised people. They are presented as a threat from outside, which is why increased controls are necessary to ensure the safety and protection of the "general" white population. Thus, two tasks of racial profiling become clear: in the first step it is about migration control and in the second step about the general criminalisation of racialised people.

[155] LKA Lowe Saxony: Clan crimes in Lower Saxony.
[156] Tagesspiegel: Razzia im Berliner Clan-Milieu: Mehrere Lokale und Fahrzeuge in Neukölln durchsucht.
[157] See Dankwa, Amman, and dos Santos Pintos 2019.
[158] Cremer 2013; see also Burkhardt and Barskanmaz 2019 concerning Section 21 ASOG (Berlin).

The following case shows the strategic criminalisation of racial profiling.[159] A black man is with friends in Görlitzer Park in Berlin. Suddenly he is stopped and searched by police officers. Although nothing is found and all his papers are in order, he is asked to come to the police so that he can be identified. After he asks why he is to be identified, the police officers explain that a plainclothes policeman had seen him selling drugs three days beforehand. Although the man explains that he had not been in the park three days before and did not sell drugs, he is taken away and charged with drug trafficking and resisting law enforcement officers. The police regularly use counter charges strategically to legitimise the violence as a "lawful official act" and to criminalise the person involved. The chances of convicting the police officer remain slim, even if the evidence is conclusive and some charges – such as "resistance to law enforcement officers", "insult", "injury of the honour" etc. – turn out to be unfounded and illegitimate.

Under the guise of supposedly necessary measures to maintain public safety and order, racialised victims are thus staged as a danger. KOP documents incidents of racist police violence in Berlin with the aim of informing the public about this organised violence and state crimes that are systematically in the service of a racist policy of deterrence, to strengthen the position of those affected and to make the police accountable. Above all, the chronicle is to make visible the systematic media concealment of racist police violence and the racist coordinated system between the police and the judiciary as well as the resulting powerlessness of those affected, using the perspective of those affected as an example.

Racial profiling in the wake of the Covid 19 pandemic

Racial profiling was also very evident during the restrictions due to the Covid 19 Pandemic: more negatively racialised people were checked and criminalised. In 2020, the Federal Anti-Discrimination Agency also notes that counselling requests almost doubled and that people identified as Asian in particular experienced racist attacks at the beginning of the pandemic. It was reported that Romani, Sinti and Asian-identified people were increasingly controlled by public order offices and police, and access to medical services and jobs was massively restricted.[160]

It is increasingly noticeable that after the death of George Floyd, there is a great public interest in filming racist police stops. The police systematically prohibit filming and threaten violence and charges under the so-called "wiretapping paragraph" Section 201 StGB (violation of the confidentiality of the word). This states that anyone who unauthorisedly "records the non-public spoken word of another on a sound recording medium" commits a criminal offence. But it also states that "it (...) is not unlawful (if) the public communication is made for the purpose of safeguarding overriding public interests." Unfortunately, documentations of massive police violence and reports based on filming, which acts as a method of deterrence, are becoming more frequent. Here, too, it becomes clear that police violence against racialised persons is to be concealed and made invisible.

KOP Berlin appreciates that all police actions are clearly public actions in the line of duty, which is why Section 201 StGB must not be strategically interpreted, used and instrumentalised in the one-sided interest of the police in order to misappropriate evidence and criminalise those

[159] KOP Berlin: Chronik rassistisch motivierter Polizeivorfälle für Berlin von 2000 bis 2021.
[160] See Federal Anti-Discrimination Agency of Germany: Annual report 2020.

affected. Therefore, it is necessary that video recordings of racist police violence be admitted as evidence. A solidarity-based counter-resistance and strategy can only be guaranteed if video recordings of racist incidents are recognised as evidence. For this reason, KOP Berlin launched the campaign "GoFilmthePolice" on 11 November 2021 by asking people to film specifically problematic police stops and thus to make possible racist police stops visible without violence and to admit them as evidence.

Meanwhile, in its Basu ruling, the ECtHR reprimanded Germany for failing to effectively investigate a circumstantial incident of racial profiling and for lacking an appropriate independent investigative body for police misconduct in this case. The ECtHR assumed a violation of Art. 14 in conjunction with Art. 8 ECHR in its procedural sense.

c) Dealing with racism within the security authorities

Within the German police as well as in specialised literature, police officers with a migration background are referred to as "MH officers." This includes both police officers without German citizenship and naturalised officers.[161] The European Commission against Racism and Intolerance (hereinafter ECRI) periodically evaluates measures taken by individual European countries to combat intolerance and racism and makes recommendations. Within this framework, it calls on all the states examined to commit to a multicultural police force and to take measures to diversify the police. The government programme 2009–2013 contains the sentence: "We want to specifically attract even more people with a migration background to the police profession and the judiciary. They are important 'bridge builders'." Thus, the German government is committed to more police officers with a migration background. Individual politicians have been doing this for years, such as Günther Beckstein (Bavarian Minister of the Interior) in a press release in 2005.[162] The police, too, have repeatedly stated that they want to increase the number of officers with a migration background.[163] The Federal Police employs about 41,000 people, including more than 30,000 trained police officers. In 2009, the proportion of officers with a migration background in the federal police forces was less than 1.5%.[164] To reflect the composition of the German population, a percentage of 19.6% would be required.

The percentage of persons with a migration background is very difficult to determine for Germany in precise figures, since in most of the federal states, with reference to the principle of equality, no differentiation criteria related to origin are collected apart from formal citizenship. The figures given here come from a research project on the topic.[165] A reflection of society has not yet been achieved at the state level either. Berlin is the front-runner with 1.94%, Thuringia brings up the rear with 0%.[166] The Hamburg police, for example, which has taken numerous measures, currently employs 9,851 people, of whom, those with foreign citizenship amount to 30 law enforcement officers, 11 police officers and 23 employees of the general administration – this corresponds to 0.65%.[167]

d) Lack of action despite rising trend of right-wing extremism

[161] See Behr 2006.
[162] See Beckstein 2005.
[163] See Behr 2006, p. 124.
[164] See Ahmari 2009, p. 30.
[165] See Hunold et al 2010, p. 137 ff.
[166] ibid., p. 138.
[167] See Polizei Hamburg, Polizeibericht 2010, p.94.

Another worrying trend has emerged in recent years with regard to right-wing networks within security agencies. Again and again, right-wing extremist police chat groups are discovered, threatening letters with the sender "NSU 2.0" are sent to private non-public addresses of activists. In North Rhine-Westphalia alone, 200 people from the ranks of the security authorities are under investigation.[168]

The Federal Office for the Protection of the Constitution has compiled a situation report on suspected cases of right-wing extremism. According to this, 53 such cases had been reported from Berlin by the end of March. According to police data, 17 disciplinary proceedings have already been conducted in 2019 on suspicion of right-wing extremism.[169] In October 2020, the federal government decides to commission a study on everyday racism. There is also to be a study of everyday police life. But not a study on racism. According to Seehofer's reasoning: "They're sticking their necks out for us, and that's why there's no study directed against the police with insinuations or accusations.[170]"

In some cases, a breach of duty in the police force may result in disciplinary proceedings. Different codes are used to differentiate between offences committed while on duty. While there are eight codes for alcohol offences, there is no single code for racist behaviour. As a result, almost one third of the on-duty offences fall into the category "Other". No further classification is made here, so that even minor offences are equated with a racist offence. 105 breaches of official duty fell into this category without any further differentiation as to which offence is more precisely concealed behind it. It should also be emphasised that only 18 of these cases resulted in subsequent measures.[171]

Furthermore, in another 18% of the discontinued proceedings (56 cases), the authorities discontinued the proceedings even though a breach of duty had been proven, but a disciplinary measure did not appear appropriate (section 32 (1), no. 2 BDG). The employer can refrain from taking a measure for reasons of expediency. A variety of reasons may be relevant, for example, the transfer of the civil servant to another office, to another place of employment, a change in family circumstances or the social background may be decisive for the decision. This makes it possible to weigh up a minor misconduct against the otherwise impeccable behaviour of the civil servant in the individual case.

[168] Schmidt and Erb 2021, p. 43.
[169] Rbb24: Fast 50 Disziplinarverfahren bei Berliner Polizei.
[170] Tagesschau: Wer schaut auf Rassismus bei der Polizei?
[171] BMI: Disciplinary statistics for the year 2019.

VI. Racism and human rights protection in selected areas of society (on Article 5 ICERD)

1. Safety of refugees

The 23rd – 26th State Report also addresses the safety of people with a history of flight with regard to the increase in violence and threats against them, as well as activists. In order to make this visible, the category "Crimes against asylum seekers / refugees" was introduced in the Police Crime Statistics (*Polizeilichen Kriminalstatistik*, hereinafter PKS), which is welcome.[172] Here too, however, the problem of recording these offences within the authorities arises, since on the one hand there is no sufficient internal sensitisation to this phenomenon, and on the other hand the police authorities are suspected of institutional racism on the occasion of uncovering several right-wing extremist structures. With regard to the situation of refugees in Germany, after several tightening of asylum law in recent years, the situation has rather deteriorated in comparison to the previous State Report. Within the Asylum Package I (2015) and Asylum Package II (2016), the following tightening measures, for example, were passed with the pretended justification of the high asylum application numbers of 2015 and 2016: strong expansion of the housing obligation in initial reception facilities, increase in the requirements for certificates for deportation bans, restriction of family reunification for persons entitled to subsidiary protection as well as the *Duldung Light* (automatically leads to a work ban and thus prevents any chance of the right to stay).[173]

Despite the measures announced in the State Report, however, no improvement in the situation of refugees could be observed beyond the reporting period. Rather, the adoption of the migration package in 2019 resulted in further tightening. In addition, the deportation ban for Syria was not extended beyond 2020 at the conference of interior ministers in June 2020, meaning that Syria will henceforth be classified as a “safe country of origin” in the asylum procedure, despite the fact that, according to reports by UN institutions, a dignified life is still not possible in Syria.[174]

As before, the residence obligation and housing obligation contained in Sections 47 ff. of the Asylum Act (*Asylgesetz*, hereinafter AsylG) also constitute an inadmissible imposition on refugees, which was particularly noticeable due to the ongoing pandemic. The Pandemic also resulted in inadequate health care (see below for more details) for refugees. It is also incomprehensible that people who are obliged to leave the country are excluded from the right to freedom of movement. Due to the residence obligation and housing obligation, access to the general housing market is denied, which makes it more difficult for them to be accepted into society. Furthermore, civil society organisations continuously claim that collective accommodation cannot guarantee the basic needs for a dignified existence, which is why it should be abolished.[175] Finally, asylum seekers are detained in the context of so-called deportation detention, even though they have not committed any crime.[176]

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[172] BMJ, para. 151 ff.

[173] PRO ASYL: Menschenrechte zählen!, p. 15.

[174] See e.g. UNHCR: Global Focus. Syria Situation 2021, at: https://reporting.unhcr.org/operational/situations/syria-situation.

[175] PRO ASYL: <<Bedeutet Unser Leben nichts?>>.

[176] PRO ASYL: Flüchtlingspolitische Anliegen zur Tagung de Innenministerkonferenz vom 16. Bis 18. Juni 2021.

2. Participation and sharing

a) Political life

Germany acknowledges the discrepancy between the entitlement to political participation of people living in Germany and the real possibility of political participation in its beginnings in the State Report and refers in its comments to the circumstances under which a person can acquire German citizenship.[177] However, this does not solve the problem of many people, as the laws on acquiring citizenship are very strict. Germany should, on the one hand, relax the laws on acquiring citizenship as well as establish a right to vote for people who do not have German citizenship but have lived in Germany for a certain period of time.[178] This would be a necessary step for racialised persons to fight for their demands at the political level and to influence political decisions.

Thus the question must be submitted to the UN Committee as to what extent such a democratic deficit can still be justified with regard to Art. 1 (2) and (3) ICERD.

With regard to the political life of racialised people, in the context of the 2021 Bundestag elections, initiatives drew attention to the fact that approximately 14% of people living in Germany will be without the right to vote in the 2021 Bundestag elections.

b) Social life, using the example of access to nightclubs

With regard to access to nightclubs, it was judicially determined by the Stuttgart OLG[179] that a prohibited discrimination based on race and gender, i.e. intersectional discrimination in the sense of Section 19 AGG, exists if a Black man is refused access to a nightclub on the basis of the aforementioned discrimination characteristics, and this gives rise to a claim for damages according to Sections 15, 21 AGG. The reversal of the burden of proof under Section 22 AGG is relevant here, according to which it is sufficient if there are circumstances that lead to the assumption that the persons concerned were refused because of their race. Circumstantial evidence can be individual testimonies as well as the "testing" procedure, in which the treatment of comparison groups is used. It is noteworthy that in determining the amount of damages, a district court took into account, to the detriment of the person concerned, that he or she had provoked the discrimination, and thus made a differentiation between an expected and unexpected disadvantage.[180] This differentiation is not convincing, particularly with regard to the severity of the violation of the right of personality, as this is no less important regardless of whether the disadvantage is surprising or not.[181] On the one hand, this decision does not comply with the requirements of the EU Racial Equality Directive (effective sanctions) and, on the other hand, with the obligations of Art. 5 ICERD.

c) Discrimination and segregation in the education system (teaching, curricula, textbooks and education)

[177] BMJ, para. 157.

[178]

[179] OLG Stuttgart, ruling dated 12.12.2011 – 10 U 106/11, BeckRS 2011, 28749, w. Notes by Liebscher in: *NJW* 2012, 1085.

[180] AG Oldenburg, ruling dated 23.07.2008 – 2 C 2126/07.

[181] For detailed reasons, see Franke, Das zivilrechtliche Benachteiligungsverbot des Allgemeinen Gleichbehandlungsgesetzes (AGG), in *Neue Justiz* 2010, p. 233, 235.

Expert Contribution

Klaus Kohlmeyer, vocational training expert, author and policy advisor on reducing discrimination and exclusion in access to the labour market, advocates for equal opportunities in Berlin's increasingly heterogeneous urban society, was project director of *Berlin braucht dich!*[182] and managing director of BQN Berlin until 2021, serves on the board of the Foundation for Social Human Rights and is co-author of the book "Soziale Spaltungen in Berlin" (2016) and co-editor of the book “Der institutionelle Rassismus ist das Problem" (2023).[183]

Education

In addition to CERD, Article 13 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), Article 1 of the UNESCO Convention against Discrimination in Education and Articles 2, 3 and 29 of the Convention on the Rights of the Child (hereinafter CRC) also contain a prohibition of discrimination on the basis of race. In addition, the important and differentiated case law of the ECtHR since D.H. v. Czech Republic[184] should be noted. In particular, the strict grounds of justification for direct and indirect unequal treatment required by the ECtHR must be taken into account here.

Racial discrimination in education is an ongoing issue in Germany, although it is not uncommon for the view to be expressed that social origin rather than race or national or ethnic origin plays a role in the German education system. The fact that social origin plays an important role in education is by no means disputed here; on the contrary, the point is to make the interaction with other categories of inequality visible. Unfortunately, the authorities – as also in the last 23rd – 26th State Report – use the inadequate concept of migration background or partly non-German language of origin to combat racial discrimination in education.[185]

What is special about the German school system is its tripartite nature. After primary school, at the age of 10 to 12, pupils are divided into different types of school, which lead to different career perspectives between exclusion, skilled worker training or academic training. The early selection process and the permanent pressure to be evaluated and graded humiliate children and young people instead of strengthening them, it dampens their curiosity instead of making them inquisitive, open to discussion and critically questioning people. In the case of young people from racialised families, this is exacerbated by the fact that their disadvantaged situation is also the result of structural discrimination and their own or transmitted and "inherited" experiences of discrimination.

The so-called "educational failures" who leave school every year without a diploma (about 15%), most of whom come from poverty, are released into a labour market that offers them, if at all, only the lowest positions in the unskilled and semi-skilled sectors, often precarious, poorly paid, physically or psychologically stressful, lacking personal and professional development prospects. A large proportion of each cohort remains without training. Racialised young people are disproportionately affected. At the same time, training places cannot be filled. On the one hand, failure in this phase leads young people into a high-risk social situation. On

[182] Using the example of *Berlin brauch dich!*, Andreas Germershausen and Wilfried Kruse trace more than a decade of Berlin participation policy and show what intercultural opening and diversity orientation in vocational education and training means in concrete terms (Germershausen and Kruse 2018).
[183] Basu et al (eds) 2023.
[184] ECtHR, D.H. and others v. the Czech Republic.
[185] BMJ, para. 164 ff.

the other hand, the growing shortage of skilled workers endangers economic development (calls for the recruitment of foreign skilled workers are becoming louder). This contradiction requires a political solution and close cooperation between important relevant departments such as education and labour.

Social division among children and young people

What happens to these young people before they face the step "out of school" carries considerable weight. For years, child poverty has been a scandalised problem in Germany. This is associated with considerable consequences for children's growing up, well-being, education and future opportunities.[186] The myth of equal opportunities through achievement in the school system contributes to the exacerbation of educational injustice and structurally disadvantages racialised people. As a result, schools are freed from the responsibility to provide effective compensatory contributions to the social situation.

This is the context in which the problem of transition must be placed. Throughout childhood and early adolescence, differences are built up and disadvantages reinforced. There are no legally enforceable claims to the social human right to education, training and work. Instead, educational and professional opportunities are distributed in the free play of forces in a social reality characterised by social disadvantage and dichotomous images of "us" and the "others". The image of the "others" in the German "educational dispositive" is composed of attributions such as "educationally distant", "less achievement-oriented" and "less active". The social background of educational differences is lost from view and is culturalised and individualised. Conversely, the successes of racialised people are celebrated as the "exception".

The interplay of "school – training – work" must be rethought. The biographical stages of life must be linked more strongly, offers must build on each other. Preparation for vocational training must be part of the school curriculum: no qualification should be left without a connection. Equal rights for unequal conditions are not equal rights. A curriculum in lockstep for all, the same limited time per child, no matter where they come from, what they bring with them, the same yardstick for school achievements that have come about under very different conditions – not only children and young people, but also teachers are in danger of breaking down from this contradictory social task and institutionalised injustice of a supposed equality of opportunity.

Recommendations

All children and adolescents should be supported in the best possible way, i.e. in a targeted and systematic way, taking into account the findings of school and teaching research. The extent to which racialisation negatively influences educational opportunities must always be taken into account. Schools must be freed from the function of selecting and assigning young people to different career development paths and positions.

The division into well-secured, high-income living situations on the one hand and insecure, poverty-stricken living situations on the other hand has a negative effect on the social cohesion

[186] Even before the outbreak of the Covid 19 crisis, poverty was part of everyday life for more than one fifth of all children in Germany. Now its consequences are being added. For more information, see: https://www.bertelsmann-stiftung.de/fileadmin/files/BSt/Publikationen/GrauePublikationen/291_2020_BST_Facsheet_Kinderarmut_SGB-II_Daten__ID967.pdf.

of society and especially on children and young people who are worthy of protection according to the Convention.

Education as a human right accessible to all means understanding the recognition and consideration of different educational prerequisites as the core of the professional task of teachers. If teachers are to approach children and young people, as they come into schools from very different backgrounds, in a respectful, discrimination-sensitive and adequate manner, then they need sufficient time and sufficient scope in terms of content and methods in order to be able to successfully stimulate and accompany learning processes.

For this purpose, it is necessary to take into account the findings of educational research, which in turn requires an adequate categorisation beyond the terms "migration background" and/or "non-German language of origin". In addition, it is important to design university teacher training in such a way that future teachers can recognise and counteract stigmatisation processes and racial discrimination at an early stage.

d) Discrimination in professional and economic life

Labour market

In Germany, there is a gross disparity between different groups in the population and their representation and participation in the labour market, in offices and in politics. The higher up in the hierarchy, the more glaring the difference. People have disadvantages, are treated worse and excluded because they are constructed as different.

Around 21.2 million people with a migration history live in the Federal Republic of Germany, many of them with experiences of racism, a large number of them for several decades already. They make up almost a third of the population, in Berlin it is over 35% and in many large cities like Stuttgart the relationship between majority and minority is reversing, a trend that is becoming generally apparent and can be seen in the growing proportion of children and young people with an immigration history in this country. Their share is not only vanishingly small in many sectors of the labour market, but in almost all areas of society such as culture and politics. Despite a growing share in the population, they are far from being reflected in social life. Nor do they have equal opportunities to participate. The public service in particular is still dominantly made up of white German employees.[187] Other groups that are underrepresented are East Germans and people with disabilities. Discrimination and increasing social inequality in the population is a fact that is well documented and often deplored, but effective counter-strategies have not yet been implemented.

In its State Report, Germany addresses protection against discrimination in the labour market through the AGG and in particular Sections 2 and 12 AGG, which Germany had to transpose into national law due to the EU Racial Equality Directive 2000/43/EC. The Act, as described in the State Report, in conjunction with State and Federal Anti-Discrimination Bodies, protects against racial discrimination against private individuals by private individuals.[188] The AGG thus helps to ensure that action can also be taken against discrimination within private law relationships. Discrimination can occur not only in relation to access to employment, but also during or upon termination of an employment relationship.

[187] The proportion of non-German migrants in 2020 is 2.2%, the proportion of migrants overall is estimated at 12%, and the proportion of people with a migration history is growing only slowly.
[188] BMJ, para. 169 ff.

Lawsuits by associations

Materially, there is a right to compensation for damages, for example. However, a lawsuit is associated with considerable financial and emotional resources for those affected. A right of action by associations – as is already common in other countries – should also be introduced in Germany to remedy this problem. Such lawsuits could, for example, be accompanied by anti-discrimination bodies.

Section 9 AGG and the churches' right to self-determination

Another problem with the legal formulation of the AGG is Section 9 AGG, which Germany also addresses in its State Report.[189] This provides for an exception to the prohibition of discrimination, which in practice can regularly lead to discrimination against non-Christians. This is important, among other things, because church employers play a major role in the social and educational sector. This means that there are opportunities to exclude people from employment in this area because of their religious convictions. This can affect Muslims and Jews in particular.[190] The exception in Section 9 AGG is justified by the churches' constitutional right to self-determination (Article 140 GG in conjunction with Article 137 (3) of the Weimar Constitution). According to this, unequal treatment is permissible if the "communal cultivation of a religion or belief" is stipulated as a prerequisite for employment, provided that this "(...) constitutes a justified occupational requirement with regard to their right of self-determination or according to the nature of the activity" (see Section 9 (1) AGG).[191]

In the "Egenberger" case,[192] the ECJ ruled that the rejection of a non-denominational applicant on the grounds of religion discriminated against the applicant because of religion and that this was not justified by Section 9 AGG. The case concerned a job advertisement of the deaconry, which required membership of a Protestant church. The *Evangelisches Werk für Diakonie und Entwicklung e.V.* filed a constitutional complaint against the Federal Labour Court's (*Bundesarbeitsgericht*, hereinafter BAG) decision. The BVerfG has yet to rule on this.[193]

Thus, the question to be submitted to the UN Committee is whether the right of self-determination of the churches, concretised in Section 9 AGG, contradicts the spirit of the ICERD in that it can promote discrimination against Muslims and Jews.

[189] BMJ, para. 174 ff.

[190] Schulte 2013, who concludes in his contribution that the right of self-determination of the churches continues to be weighted more heavily by the courts than the human right to freedom from discrimination and religion.

[191] The ECJ also takes a thoroughly critical view of this, see ECJ, ruling. dated 11.09.2018. C-68/17 IR/JQ, (Chefarzt); ECJ, ruling dated 17.04.2018, C-414/16 (Egenberger) and BAG, ruling dated 25.10.2018 - 8 AZR 501/14.

[192] ECJ, ruling dated 17.04.2018, C-414/16 (Egenberger) and BAG, ruling dated 25.10.2018 – 8 AZR 501/14.

[193] Di Fabio (2020).

Application by courts

Overall, there are few court cases in which discrimination "on the grounds of racial or ethnic origin," or "religion" was examined.[194] Some judgements also show the need for training for judges in the field of racism.

Again, the measures announced in the State Report seem to have only a limited impact on institutional racism in Germany. In 2019, for example, the Hamm Regional Labour Court (*Landesarbeitsgericht*, hereinafter LAG) dealt with the question of whether a black probationary administrative employee at the central foreigners authority of the city of Bielefeld had been dismissed because of ethnic origin or race.[195] The court came to the conclusion that with "overwhelming probability in the sense of contributory causation"[196] a causality between the dismissal and the legal characteristics of race and ethnic origin could not be assumed. The plaintiff, on the other hand, felt he had been discriminated against because the city had limited his scope of work to simple tasks and his supervisor replied to his question about helping with a fax dispatch that she did not do "N-word work". This statement was justified by the white superior by pointing out that the statement referred to the cumbersome technical procedure. The decision appears particularly worrying in view of the clearly racist and insulting remarks made by the supervisor and, more generally, the apparently racist working environment, and highlights the problem of the burden of proof in the context of anti-discrimination law.[197]

Conclusion and recommendations for action

The AGG is now showing its effect, even if decisions such as that of the Hamm LAG illustrate that in certain cases there is a lack of heightened sensitivity to experiences of discrimination. For the purpose of better enforcement of the objectives of the AGG, the introduction of a right of action by associations, such as in the Berlin State Anti-Discrimination Act, is necessary. This would enable fundamental decisions to be reached and those affected would no longer have to take action against discrimination exclusively on an individual basis and under the burden of court proceedings.

However, the small number of court decisions in the area of application of the AGG also shows that only a few affected persons take legal action against discrimination. Several factors may play a role here, e.g. lack of knowledge of legal remedies among those affected or little trust in the judiciary, which is already read as white.[198] If access to justice remains limited, the introduction of out-of-court dispute resolution is conceivable, for example in the form of mediation or arbitration. This would lower the threshold for asserting one's own claims. In addition, the introduction of a right of action by associations could at least partially remedy this problem.
Therefore, the position paper (see above) of the anti-discrimination commissioner of the Federal Government is very welcome. This is linked to the hope that the government will adopt effective regulations to combat discrimination on these important points.

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[194] e.g. BAG, ruling dated 22.06.2011 – 8 AZR 48/10, and BAG, ruling dated 28.01.2010 – 1 AZR 764/08.

[195] LAG Hamm, ruling dated 10.01.2019-11 Sa 505/18; as this is an employment relationship instead of a civil servant relationship, the AGG is relevant.

[196] LAG Hamm, ruling dated 10.01.2019-11 Sa 505/18, para. 45.

[197] See also Landesverfassungsgericht Mecklenburg-Vorpommern, ruling dated 19.12.2019, in which the court did not object to the multiple use of the N-word in a parliamentary session; on this, Mangold and Buszewski: Worüber man nichts sagen kann, darüber soll man schweigen, *Verfassungsblog*, dated 2019/12/23, at: https://verfassungsblog.de/worueber-man-nichts-sagen-kann-darueber-soll-man-schweigen/.

[198] In-depth, see Baer 2021.

3. Structural discrimination in the health sector

Expert Contribution

Fatim Selina Diaby and the **working group Refugees & Asylum of the IPPNW** - ***Physicians in Social Responsibility e.V.*** (hereinafter IPPNW) campaign for the human right to health of migrants and refugees. As an international medical peace organization, IPPNW works across borders in more than 50 countries of the world for peace, disarmament and a world free of nuclear threats, as well as for medicine in social responsibility.

In October 2020, as part of an alliance of activist, human rights, health and migrant organisations, IPPNW organised a civil human rights tribunal on this issue, which highlighted the systematic violation of the right to health and physical and mental integrity of migrants and refugees within the European border regime, and highlighted racism as a pathogenic determinant of health.

In accordance with Article 2 ICERD, States Parties are called upon to ensure "(a) the right to security and state protection" and "the right to public health, medical care, social security and social services without racial discrimination". Art. 5 ICERD already reveals an understanding of health that cannot be found in the 23rd – 26th State Report of the Federal Government. The Report focuses increasingly on the important issues of restrictions on rights based on racial discrimination, state protection against racial discrimination and the need for legal protection, compliance and guarantee.[199] However, the impact of racial discrimination on health and health care is neglected. It reveals a lack of reflection on the discrepancy between the legal framework and its practical interpretation and application, which is mostly to the detriment of the health and healthcare of migrants and refugees. Health is not understood holistically, as a right for all or intersectionally. This is particularly surprising in light of the fact that the State Report focuses on protection seekers or "refugees" in the chapters that include or touch on health aspects.[200]

This circumstance can be understood, among other things, as an imbalance between the state's understanding of the reality of the lives of refugees and migrants and the neglect, health risks and racist discrimination in the interplay with German migration and asylum policies. These policies, as well as the behaviour of the police and security authorities, must be included in the understanding of racist discrimination and health and systematically changed in a non-symptomatic way. To this symptom-like "treatment" the measures described in the report can be understood in the context of "racial profiling".[201] There is a lack of discussion of human rights violations and violations of the ICERD in dealing with refugees and migrants, their right to health and physical and mental integrity within the German national borders and the European border regime, which the German government supports politically and financially.

Health care using the example of asylum seekers

Limited or non-existent access to health care poses a threat to the health of migrants and refugees. For many groups, such as migrants and refugees, asylum seekers, illegalised persons and workers from EU and non-EU countries, access to healthcare is affected by

[199] BMJ, para. 178 ff.
[200] For example, LGBTI refugees are addressed, who are defined as a particularly vulnerable group, ibid. para. 154.
[201] BMJ, para. 141 ff.

discrimination. Apart from discrimination by health professionals and language barriers, there are also legal regulations that hinder this access and endanger health. People who are in the asylum process or living in Germany with a Duldung also do not receive social assistance and medical care under the general social security system and Statutory Health Insurance (*Gesetzliche Krankenversicherung*, hereinafter GKV). The legal entitlement to health care in the Asylum Seekers' Benefits Act (*Asylbewerberleistungsgesetz*, hereinafter AsylbLG) is significantly lower than the level of GKV, so that those affected do not receive any medically necessary benefits. Germany takes up this circumstance in the State Report, but without reflecting on the associated problems and violations of rights.[202]

According to Sections 4, 6 AsylbLG, protection seekers are only entitled to limited medical benefits in the case of acute or painful illnesses, pregnancy and childbirth. Often, the need for medical treatment is decided by non-specialist staff and missing required language mediation in the context of already approved applications for psychological treatment fail to be implemented. Furthermore, the AsylbLG sanctions alleged violations of the duration of stay with benefit restrictions that can also affect health care. Refugees who have already been granted protection status in another EU country are even completely excluded from medical care; only in exceptional cases do they receive access to medical care.

The provisions of the AsylbLG, however, are likely to violate the fundamental right to health and to the dignified minimum subsistence level enshrined in Article 2 (1), Article 1 (1) and Article 20 (1) GG. The minimum subsistence level for vital health services is defined by the scope of the GKV and is accordingly guaranteed by the basic income support for persons not subject to the AsylbLG.[203] In the case of a reduction, the legislator must provide a justification in a comprehensible and factually differentiated manner. Politically justified reductions in benefits, for example to deter those seeking protection, are not permissible and contradict the Convention objectives of combating all forms of discrimination. The different treatment via the GKV and the AsylbLG also violates the principle of equality of Article 3 (1) GG. The denial of health care to those in need constitutes a violation of the right to the enjoyment of the highest attainable standard of physical and mental health and the right to non-discriminatory access to health care services, as set out in Article 25 of the 1946 WHO Constitution, Art. 12 ICESCR and Art. 2 and 5e (4) ICERD.[204]

In addition, Art. 11 and 13 ESC, Art. 4 of the Istanbul Convention and Art. 2 and 8 ECHR may be violated. Exclusion from access to health care and medical treatment under the conditions of the general social security system and GKV also violates Art. 35 CFR in connection with the provisions on health care laid down in the EU Reception Directive, in particular the guarantee of subsistence and physical and mental health. When vulnerable persons, such as pregnant women and children, seek medical assistance, the provisions and guidelines may violate Art. 25 (2) UDHR, Art. 12 (2) no. 1 ICESCR, Art. 11 (2) CEDAW, Art. 25, 26 CRPD and Art. 24 CRC. Measures that intentionally deprive someone of the means to live may further violate Art. 9 ICESCR (right to social security) and Art. 11 ICESCR (right to an adequate standard of living) and constitute inhuman and degrading treatment in violation of Article 5 UDHR, Article 3 ECHR and Article 4 CFR.

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[202] BMJ, para. 178–181.

[203] See Section 5 (1) no. 2a SGB V, Section 264 SGB V, Section 48 SGB XII, BVerfG, 13.02.2008 – 2 BvL 1/06, BVerfGE 120, 125.

[204] The CESCR came to the same conclusion when expressing concern about the limited and unequal health care provision for asylum seekers in Germany. See CESCR: Concluding observations on the sixth periodic report of Germany, 27.11.2018, U. N. Doc. E/C.12/DEU/CO/6, para. 58.

For people without regular residence status, Sections 4, 6 AsylbLG ensure a legal entitlement to limited benefits. In practice, however, they have no access to medical care. According to Section 87 (2) of the Residence Act (*Aufenthaltgesetz*, hereinafter AufenthG), all authorities, including social welfare offices, are obliged to report every person without a residence title to the foreigners authority. This threatens deportation.[205]

Section 87 (2) AufenthG is a provision that restricts access to health care and social security in a discriminatory manner. The CESCR notes that Section 87 (2) AufenthG may prevent illegalised migrant workers from accessing services, such as health care, that are essential for the enjoyment of their rights, as well as from reporting crimes, including domestic violence and sexual and gender-based violence, and may thus negatively affect the exercise of the rights set out in Art. 2 (2) ICESCR and Art. 12 ICESCR. This constitutes a violation of Art. 2 (1), Art. 3 (1), Art. 1 (1) and Art. 20 (1) GG, Art. 22 (Social Security), Art. 25 (1) of the UDHR, the 1946 WHO Constitution, Art. 2 (2), Art. 9, 11 and 12 ICESCR, Art. 2 and 5e (4) ICERD, Art. 11, 13 ESC and Art. 4 and 35 CFR in relation to the provisions on health care contained in the EU Return Directive.

When pregnant persons, children, or persons with disabilities seek medical assistance, the provision may violate Art. 25 (2) UDHR, Art. 12 (2) no. 1 ICESCR, Art. 11 (2) CEDAW, Art. 24 CRC and Art. 25, 26 CRPD. Measures leading to the production of data obtained in the exercise of social rights also disproportionately interfere with the right to privacy as enshrined in Art. 12 UDHR, Art. 16 CRC, Art. 22 CRPD and Art. 8 ECHR, as well as with the right to the protection of personal data as enshrined in Art. 8 CFR. As data protection legislation has been fully harmonised by the General Data Protection Regulation (hereinafter GDPR), Article 8 and Article 35 CFR are applicable.

Non-employed migrants from EU member states who have been registered in Germany for less than five years are no longer entitled to health benefits under the SGB XII since the so-called Exclusion of Benefits Act of late 2016. Instead, they can receive so-called bridging benefits once within two years for a maximum of one month. These include limited health benefits for acute illnesses and pain. After the end of the month, there is no longer any entitlement – even in emergencies – to reimbursement of costs for visits to the doctor, hospital stays or medication. These restrictions on inactive migrants from EU member states violate the human right to health and physical subsistence, the right to the enjoyment of the highest attainable standard of physical and mental health and the right to non-discriminatory access to health services, as well as the right to social security and the right to an adequate standard of living and, as described in the previous sections, may constitute inhuman and degrading treatment contrary to Art. 5 UDHR, Art. 3 ECHR and Art. 4 CFR.

Another structural discriminatory factor in access to health care is the lack of qualified language mediation, which is not specified as a benefit in SGB V. Many people are unable to present their health complaints in a qualified manner, which leads to misdiagnoses and incorrect interventions to a greater extent and damages health.

[205] Only in cases of emergency care, where an application to the social welfare office could not be made in time, the patient is not reported because of medical confidentiality. Therefore, many people do not seek medical help until the disease is already far advanced and has become an emergency. The obligation to report also applies to pregnant women, who thus de facto have no access to prenatal care. As emergency care, only delivery can be carried out in hospital.

An example of a refused adequate treatment of a chronic disease in the initial reception camp Nosdorf-Horst near Boizenlager is the case of Ms. A.
Ms. A. has had diabetes mellitus for 20 years, which is difficult to adjust and tends to have strongly fluctuating blood sugar levels. She has been staying at the Horst initial reception centre for more than 6 months with her underage son. As she had entered Germany via Spain, she is in a Dublin procedure. In a medical consultation that had to be held outside the initial reception centre in Horst (doctors are not allowed to enter), it quickly became apparent that the medical treatment of this diabetic woman was completely inadequate and not up to standard for this serious illness. An adequate individually adapted diet cannot be followed because she is not allowed to prepare her own meals, but is only provided with food three times a day in the canteen for refugees. The blood sugar is measured once a week, she has never been introduced to her own blood sugar measurement with subsequent insulin adjustment. There is a lack of suitable language mediators. There are no examinations for secondary diseases, as they are normally carried out every three months, for example changes in the background of the eyes, kidney restrictions or neuropathies. She has complained about her vision recently. Several times there were acute derailments with short hospital stays, without any consequences being drawn from this. A detailed letter to the medical service stressed the need for adequate treatment according to medical standards. This was not heeded. In a second letter, the precarious health care was pointed out. Also without success. She did not receive adequate diabetes treatment at a centre specialising in this until she was taken into a church asylum. In addition to the refusal of medical treatment when her blood sugar was not adjusted, external conditions such as living in collective accommodation, which often produced stress-related fluctuations, also played a role.

Living conditions in mass accommodation have negative effects on the mental and physical health of asylum seekers. Asylum seekers are generally obliged to live in a reception centre until a decision is made on their asylum application and, in the case of rejection, until they leave the country or until deportation is carried out (Section 47 (1) AsylG). However, this obligation is limited in time. The maximum period of stay that asylum seekers can be obliged to stay is usually up to 18 months. However, the federal states have the option of extending the housing obligation to up to 24 months by means of a state-specific regulation (Section 47 (1) lit. b AsylG). For families, i.e. children and their parents as well as adult unmarried siblings, a maximum residence period of up to six months applies.[206]

Formally, refugees must be reallocated to shared or decentralised accommodation at the latest after the aforementioned periods have expired. However, practical experience has shown that some facilities merely redesignate individual sections of the accommodation as shared accommodation for this purpose. In these cases, refugees are not distributed to the municipalities but, for example, merely transferred from one section of the building that formally belongs to the anchor centre to another wing that is formally considered to be shared accommodation. De facto, they merely change their room, without anything changing in their living conditions or their care situation.

Furthermore, the benefits to secure the minimum subsistence level for persons subject to the AsylbLG are reduced even further for persons living in collective or shared accommodation.

[206] With the entry into force of the "Orderly Return Act" in August 2019, the possible periods of stay in reception facilities were tripled. At the same time, it was stipulated that persons who are accused of violating certain obligations to cooperate are subject to the obligation to stay in the camps for an indefinite period of time. The same has already applied since October 2015 to persons from so-called safe countries of origin such as Afghanistan (as of 16 July 2021).

The legislator falsely claims that these persons have lower needs because they can share their benefits with other residents such as "married couples". Such living conditions are extremely stressful due to social isolation, lack of privacy, structural deficiencies and lack of protection against violence and (sexual) assault, among other things, and have a negative effect on the physical and mental health of the residents, especially in connection with the long duration of the stay. Women, children and persons with disabilities are particularly affected. Recently, the BVerfG[207] ruled that Section 2 (1) sentence 4 no. 1 of the AsylbLG is incompatible with the fundamental right to be guaranteed a minimum subsistence level in human dignity under Article 1 (1) in conjunction with Article 20 (1) GG. The decision concerns single adults who live in so-called collective accommodation and have been legally residing in the Federal Republic of Germany for at least 18 months. As of 1 September 2019, the legislator had attributed to them a 10% lower need for subsistence benefits by no longer basing it on standard needs level 1, but on the newly created "special needs level" of standard needs level 2 in Section 2 (1) sentence 4 no. 1 AsylbLG. According to the BVerfG, this is incompatible with the basic right to a minimum subsistence level in human dignity.

Failure to protect persons living in inhumane collective accommodation from physical or mental harm inflicted by the government or third parties and/or disease may violate the right to physical and mental integrity as set out in, inter alia, Art. 2 (2) GG, Art. 3 and 5 UDHR, Art. 5 (b) ICERD, Art. 19 CRC, Art. 3 ECHR and Art. 3 CFR. Failure to provide adequate housing may violate the right to an adequate standard of living, which is enshrined, inter alia, in Art. 25 ECHR and Art. 11 ICESCR, further reinforced by General Comment no. 4 on adequate housing by the CESCR (1991), Art. 27 CRC, – as well as in Art. 2, 5 (e i) ICERD. Furthermore, the obligation to stay in a camp or collective accommodation may affect the right to freedom of movement as recognised in, inter alia, Art. 11 GG, Art. 13 UDHR, Art. 11 ICCPR, Art. 2 and 5 (d i) CERD. Because of the lack of privacy, there are further encroachments on the rights enshrined in Art. 12 UDHR, Art. 2 and 5 (d i) CERD, Art. 17 ICCPR, Art. 16 CRC, Art. 22 CRPD and Art. 8 ECHR.

Health consequences of deportations

The representative study published in 2018 by the Scientific Institute of the AOK, in which 2021 refugees from Syria, Afghanistan and Iraq were interviewed nationwide about the trauma they had experienced and their health situation, shows that around three-quarters of the respondents had experienced single or multiple traumas, such as war experiences, attacks by gunmen or the abduction, injury or killing of relatives.[208]

Compared to refugees who have not experienced trauma, the respondents who have been exposed to traumatic experiences are more than twice as likely to report psychological and physical complaints, according to the AOK study. More than 40% of this group show signs of a depressive disorder in addition to other psychological and physical complaints, as do more than 40% symptoms of nervousness and restlessness. Various studies on the mental situation of refugees have already confirmed similar prevalences.

The extent to which traumatic experiences can be processed and whether post-traumatic disorders (such as PTSD, but also other mental illnesses such as depression, somatoform disorders or addictions) manifest themselves depends strongly on the framework conditions in

[207] BVerfG, ruling dated 19.10.2022, 1 BvL 3/21.
[208] AOK Study: Gesundheit von Geflüchteten in Deutschland.

the migration context. Among other things, living with an insecure residence status and the associated threat of deportation to the country of origin, where life-threatening, traumatising experiences were made, leads to a strong increase in vulnerability for the manifestation and further chronification of mental illnesses and trauma consequences. It has also been proven that the high stress levels of asylum seekers lead to a significantly higher risk of miscarriages and stillbirths as well as postnatal complications in pregnant women. Furthermore, the physical and mental development of the children is often impaired as a result.

However, experienced trauma and the extent of psychological stress are not recorded in a standardised way in Germany. This is in contrast to the guarantees laid down in the EU Directive to create necessary conditions in the asylum procedure, such as granting sufficient time, to be able to produce the necessary information to substantiate an application. As a result, health reasons that stand in the way of deportation cannot be identified and asserted in time.

Furthermore, the night-time invasion of flats and shelters, and even hospitals, in order to carry out deportations is often a (re)traumatising factor, which is accompanied by considerable damage to the health and dignity of those affected by deportation. Particularly due to the legislative changes in 2016 and 2019 (Asylum Package II, Ordered Return Act), the conditions for obtaining a destination-based ban on deportation for health reasons have become significantly more difficult for refugees. As a result, people with serious illnesses such as PTSD, whose adequate care cannot be guaranteed in their country of origin, are often unable to protect themselves from deportation, with sometimes serious consequences such as acute suicidal tendencies or an increased risk of dying from a chronic illness that could be treated in Germany.

In its State Report, Germany points out that only little representative information is available on the medical care of protection seekers and refers to studies financed or commissioned in this context in order to improve the data situation and the health care of refugees.[209]

However, the study *Repräsentative Untersuchung von geflüchteten Frauen in unterschiedlichen Bundesländern in Deutschland – Study on Female Refugees* (Representative Study of Women Refugees in Different Federal States in Germany) from 2017, which is mentioned in the report, points out the pronounced problem of insufficient identification of special protection needs, insufficient access to medical and psychotherapeutic care as well as cultural and language mediation. Apart from the fact that the high prevalence of mental stress and illnesses as well as the almost non-existent access to adequate care and language mediation have been known for many years, the State Report does not identify any solutions to this glaring problem, which often leads to people not receiving the protection they are legally entitled to.

Further representative studies since the reporting period

Since the completion of the State Report, there have been further representative studies dealing with the health effects of an unresolved residence title.

According to the *Antirassistische Initiative Berlin* (ARI), an average of two to three refugees died by suicide every month in 2016 up to and including 2020. That is 159 people in total; 2466

[209] BMJ, para. 179.

people attempted suicide or self-harmed. That is an annual average of 493 and at least 40 per month. A very high number of unreported cases can be assumed.

In October 2020, IPPNW, as part of an alliance of activist, human rights, health and migrant organisations, organised a civil human rights tribunal to examine the right to health of migrants and refugees in Germany and within the European border regime. With reports from 39 organisations and numerous testimonies, it became clear in eight hearings that migrants and refugees are treated inhumanely and their right to health is violated[210].

Furthermore, reference is made to the study on the experiences and perspectives of deported Afghans published in June 2021, which shows that the majority of those deported to Afghanistan have already experienced violence after their re-arrival (90.5%), less than 1% can earn a living on their own, and state and often family support is lacking. This is also a massive violation of the right to life and physical integrity/health by the Federal Republic of Germany.

Therefore, the Federal Government should be called upon to give due consideration in the State Report to the particular vulnerability of the group of refugees, which is expressed especially in the health sector. An in-depth examination of all individual aspects is necessary here.

VII. Summary and demands/measures needed (Article 6 ICERD, Article 7 ICERD)

1. The need for a coherent overall concept of proactive and reactive approaches

For an effective and sustainable anti-racism policy, which also focuses in particular on institutional racism, a well-coordinated interplay of pro-active civil society measures and the use of effective reactive instruments and legal channels is essential. At the proactive level, the main aim is to promote and raise awareness of racism in society as a whole. As a reactive measure, the multi-layered anti-discrimination law serves to sanction discrimination and racism, on the other hand, also as a means of deterrence (proactive). In both the proactive and reactive areas, it is important to improve and further develop the secured stock of measures and legal provisions and to adjust and optimise them with regard to their concrete application by courts.

2. Reliable state support structures

The existence of state funding programmes is only logical with regard to Germany's obligations under international law. What is needed are funding programmes that are able to combat racism in the long term and structurally and to strengthen existing structures at the federal, state and local levels. In addition, it must be possible to measure successes in order to increase effectiveness. Therefore, a reorganisation of the financial support for civil society engagement against racism, anti-Semitism and right-wing extremism is demanded, which should give the initiatives planning security.

[210] https://permanentpeoplestribunal.org/the-ppt-judgment-on-the-human-right-to-health-of-migrant-and-refugee-peoples-berlin-23-25-october-2020/?lang=en.

3. A differentiated picture of the realities of discrimination

For anti-racist strategies to be effective, it is necessary to have a differentiated picture of the specific realities of discrimination in the respective areas. Furthermore, an appropriate pluralisation of the groups affected must be carried out in order to do justice to the experienced reality of discriminated groups. In all social and political projects, their different effects on the life situations and interests of those affected must be fundamentally and systematically considered and mainstreamed.

4. Counselling centres for those affected

In order to register and support people affected by discrimination and racism, it is necessary to establish independent counselling centres nationwide and to supplement them with a Germany-wide monitoring system that is implemented under the conceptual management and professional supervision of self-organisations. (See also detailed additions by advd at the end of this report).

5. Education, work, housing and health: social human rights accessible to all

Despite their binding nature under international law, there is a wide gap between the claim and social reality of social human rights in Germany. Particularly in education, on the labour market, on the housing market and in healthcare, the opportunities of racially discriminated population groups are impaired, in some cases considerably. The Federal Government has committed itself to do everything in its power to realise social human rights for all residents of this country to the same extent and to comply with them in a legally binding manner.

In education, this means, for example, that

- all children, adolescents and young adults (including homeless people and refugees) are supported in the best possible way, i.e. in a targeted and systematic way, taking into account the findings of school and classroom research.
- the recognition and consideration of different educational prerequisites are to be understood as the core of the professional task of teachers.
- schools must be freed from the function of selecting and assigning young people to different professional development paths and positions.

The task of realising the human right to work also includes the diversity-oriented opening of the public service at the federal, state and municipal levels, which is difficult to access for people with experiences of racism. As an employer, the civil service must be available to all population groups. The composition of the workforce must be oriented towards the composition of the population.

6. Professionalisation

All public institutions have a responsibility to engage in the process of a professionalisation critical of racism. This includes, but is not limited to, training for current staff. In addition, it is important to design university teacher training in such a way that future teachers can recognise stigmatisation processes and racial discrimination at an early stage and counteract them.

7. Combating racial profiling

Combating racial profiling requires concrete measures such as the following, which the Committee could consider for its concluding observations:

- A first step to further effectively combat racial profiling should be the creation of a federal legal basis that sanctions suspicion-independent unlawful police stops with deterrent claims for damages.
- In addition, the introduction of a right of action by associations could relieve those affected in view of the considerable financial and emotional resources involved.
- For the purpose of facilitating enforcement, the introduction of a right of action by associations as well as the extension of the time limits for bringing an action (currently 2 months) are necessary. Finally, because access to justice is more difficult, it is conceivable to introduce the possibility of out-of-court dispute resolution, for example in the form of mediation or arbitration.

- Nevertheless, the expansion of police powers through legislative amendments to the state police laws in many federal states, which broaden the preconditions for police intervention, remains a cause for concern. Therefore, independent police and ombudsmen must be established as independent complaints bodies at the federal and state level, which will then also help to ensure that the courts actually perform their constitutional task as the third power.
- Legislators at federal and state level must delete without replacement legal provisions that contain corresponding or similar authorisations according to which the police can carry out checks on persons without concrete cause in "crime-ridden" or "dangerous" places.

8. Amendment of the General Equal Treatment Act (AGG)

In a basic paper on the AGG reform,[211] the Federal Anti-Discrimination Commissioner criticises that Germany has one of the weakest anti-discrimination laws in Europe. Against this background, it is necessary to amend the AGG in several points:

- The scope of application of the AGG should be expanded to include federal authority action.
- Algorithmic discrimination is also to be focused on in the fight against discrimination.
- Protection against discrimination in the housing market should be strengthened.[212]
- The time limit for asserting claims should be extended to 12 months, currently it is 2 months.
- The easing of the burden of proof should be further optimised and reduced to credibility liability, so that overwhelming probability should suffice.
- A right to information against the discriminating party should be created.
- Section 22 AGG should stipulate as standard examples that, for example, the statements of the persons affected, testing or even the failure of an employer to set up a complaints body can constitute sufficient circumstantial evidence.

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211 https://www.antidiskriminierungsstelle.de/SharedDocs/downloads/DE/Sonstiges/20230718_AGG_Reform.html?nn=305458.

212 A legal ban on discriminatory housing advertisements should be introduced, for example in Section 19 AGG. The exceptions in Section 19 (3) AGG (creation and maintenance of socially stable resident structures) and Section 19 (5) sentence 1 AGG (special relationship of proximity or trust) should be deleted.

- Last but not least, compensation should be effective and dissuasive and the right of associations to sue and an altruistic right of action should be introduced.[213]

(See also detailed additions by advd at the end of this report).

9. Responsibility of the Federal Government in relation to the states

In order to introduce measures that fall within the competence of the states (e.g. in education, health, police and justice), the Federal Government must lobby the states to introduce the necessary measures.

End of the part voted with the supporting NGOs.

[213] https://www.integrationsbeauftragte.de/ib-de/staatsministerin/expert-innenrat-2194024.

The following contribution could not be noted in time by the supporting NGOs and is therefore listed after the voted part.

Additions to the ICERD-Parallel Report, Chapter VII: Demands of the advd

Expert Contribution

Jennifer Petzen, Antonia Bottel and Nadiye Ünsal from the Antidiskriminierungsverband Deutschland (advd), the German Anti-Discrimination Association, on the demand for anti-discrimination counseling centers and the amendment of the General Equal Treatment Act (AGG).

1. Counselling centres for the victims of the racist discrimination (demand 4)

In addition to the fact that the General Equal Treatment (Allgemeines Gleichhandlungs Gesetz, or AGG in German) act must be urgently reformed in order to close the many loopholes and to make possible the enforcement of rights through the collective right to action (see Number 8 below), it is crucial that victims of racist and other forms of discrimination are able to access professional, partisan counselling that is free of charge. For many years this work has been done by a handful of anti-discrimination counselling centres (ADCC) in Germany. Anti-discrimination counselling (ADC) supports people as they deal with the experiences of discrimination the concrete situation, informs the client about possible legal courses of action, accompanies them in legal processes and assists in communicating with the discriminating party. In addition, the ADCC are an essential part of the monitoring process.

Beyond the supporting individuals with their cases, ADC works towards structural change. ADC is a necessary component of a proactive anti-discrimination and anti-racism policy, which is essential to ensure social cohesion and broad-based participation of all segments of society. As part of the reform process of the General Equal Treatment act, independent ADCCs are calling for the access to anti-discrimination counselling to be enshrined in law. Currently, only a few federal states have sufficient ADCCs. A recent study by the Federal Anti-Discrimination Agency "Well counselled! On the way to nationwide anti-discrimination counselling in Germany. Current Status and Conceptual Cornerstones" shows that the amount of counselling offered nationwide is very thinly and unevenly spread. Currently, there is only one full-time anti-discrimination counsellor for every one million residents in Germany.[214]

The lack of anti-discrimination counselling centers represents serious gaps in protection, and hurdles in legal enforcement mean that victims of racism often remain alone with what they have experienced. It must be ensured that all victims of racist and other discrimination have access to counselling close to their place of residence. Legally anchored, sustainable support must be anchored in the General Equal Treatment Act. As part of this law's amendment

[214] Bartel, Daniel/Kalpaka, Annita: Berlin 2020. The study is the first comprehensive inventory and description of current anti-discrimination (counselling) structures in Germany. A key finding is that the amount of counselling nationwide is very low. https://www.antidiskriminierungsstelle.de/SharedDocs/downloads/DE/publikationen/Expertisen/gut_beraten_flaechendeckende_antidiskrimberatung.pdf?__blob=publicationFile&v=9.

process, Germany must legislate the expansion of sustainable counselling structures throughout its territory and secure them financially in the long term.

2. Amending the General Equal Treatment Act (Demand 8)

To ensure the right to equal treatment and protection against racist and other discrimination, a variety of measures are needed. Central to this is a legal framework that defines discrimination, specifies rights and obligations, and determines how these can be enforced. With the introduction of the General Equal Treatment Act in 2006, such a framework was introduced for the private sector, which identifies six categories of discrimination. Beyond that, many other anti-discrimination regulations exist in various laws and address different groups subject to discrimination. For racial discrimination, the GETA is particularly relevant due to the lack of other specific laws in this area. But who uses these rights? Who can enforce their claims? The practice of ADCC makes it clear that accessing their rights is extremely difficult for many people who experience discrimination. In particular, it is clear from the low number of legal complaints regarding racial discrimination that legal mobilization and enforcement de facto hardly occur.
In a significant paper on the GETA reform[215], the Federal Anti-Discrimination Commissioner criticizes that the fact that Germany lags behind the European legal standard in many points of the GETA and calls for a reform of the law. Likewise, the Anti-Discrimination Federation of Germany (advd) demands as an umbrella organization of the independent anti-discrimination counselling centres and part of the alliance "AGG reform - now!" - an alliance of 120 NGOs from the field of anti-discrimination and community work - a comprehensive amendment of the law.[216] Both the evaluation of the GETA and the counselling practice have long shown the deficiencies of the law regarding the scope of protection as well as legal mobilization and enforcement.

3. Protection gaps in the scope of application of the General Equal Treatment Act (AGG)

I. Extension of the scope of application to public bodies

The GETA is strictly limited to the areas of employment and goods and services. The GETA's protection against discrimination does not apply to the state sector. The GETA thus falls short of the requirements of the European anti-discrimination directives. However, this area is no less relevant to discrimination, as has already been shown by way of example in relation to racial profiling, security authorities and in the area of education.

The constitutional requirement of equal treatment and the corresponding regulations in the state constitutions and the Social Code are not sufficient in practice. The laws do not cover all categories of discrimination and provide for different legal consequences. Moreover, contrary to the requirements of the European directives, they do not contain any provisions on the participation of associations in legal protection, on the burden of proof, on protection against victimization and on the establishment of deterrent sanctions. There is a need for simple legal regulations that enable those affected to access their rights when discrimination is attributable to state action. Therefore, the scope of application of Section 2 of the GETA urgently needs to be extended to include the actions of public bodies in the areas of federal legislative

215 https://www.antidiskriminierungsstelle.de/SharedDocs/downloads/DE/Sonstiges/20230718_AGG_Reform.html?nn=305458 und https://agg-reform.jetzt/wp-content/uploads/2023/09/2023-08-10_advd_Ergaenzungsliste.pdf.
216 https://agg-reform.jetzt/

competence. Other European countries, such as France, Sweden, the Netherlands, Hungary, Latvia, Finland and Cyprus, have also implemented the protection against discrimination in the public sector required by European law.

In addition, all federal states should enact state anti-discrimination laws to ensure comprehensive protection against discrimination at the state level.

II. Expanding the categories of discrimination

The GETA covers six categories of discrimination, which the corresponding EU directives explicitly stipulate. Existing gaps in protection must be closed by the inclusion of further discrimination categories in the GETA or by making existing ones more specific. At the same time, additional categories such as social status, language, nationality, chronic illness, body weight, and family responsibility for caretaking should be included in the catalogue. In addition, the catalogue of discrimination categories should not be designed to be exhaustive in order to remain applicable to current social developments. The lived reality of many people shows that experiences of discrimination do not only refer to one category; rather they are experienced intersectionally and are the effects of the discrimination and/or violence are often heightened (see footnote 96.) An amendment to the GETA must take this into account and offer equal protection to all groups of people affected by discrimination. This is relevant for those affected by racism and for the fight against racist discrimination, since it is often only in the interaction of different dimensions of discrimination that unequal treatment becomes visible.

III. Expanding Forms of Discrimination

The five forms of discrimination listed in Section 3 of the GETA are not sufficient in practice to cover all forms of discrimination and must therefore be expanded. Here, for example, the denials of "reasonable accommodation" and "accessibility" should be defined as forms of discrimination. In addition, protection against sexual harassment in civil law should be ensured. The concept of discrimination used as a basis in the GETA must be adapted to the case law of the ECJ and expanded to include associated discrimination so that cases of third-party discrimination are also covered by the GETA.

IV. Standardization of protection against discrimination for all categories of discrimination without weakening protection against racial discrimination.

In principle, all groups experiencing discrimination should be granted equal protection in the GETA and a horizontal approach should be implemented consistently. However, the GETA does not do justice to this approach in civil law, insofar as the prohibition of discrimination only applies comprehensively to racial discrimination and is limited to mass transactions with regard to other categories. The hierarchization of the grounds for discrimination must be abolished, so that all discrimination categories of the (in the future extended) § 1 enjoy equal protection against discrimination. Here, it is explicitly pointed out that the level of protection for all categories is to be raised without weakening the protection against racial discrimination.

V. Making compensation deterrent

The European anti-discrimination directives require that sanctions for discrimination be effective, proportionate and to have a deterrent effect. However, the reality of the court cases shows that the sums of compensation called for in practice are neither effective nor proportionate, nor do they have a deterrent effect. Moreover, there is a need for compulsory

contracting as a legal consequence in cases where effective protection means access to the contractual service itself.

VI. Problems of legal mobilization and enforcement

For successful legal mobilization, legal rights must be accessible and thereby realized by those affected by discrimination. To ensure this access, however, a state of legal certainty must be established for all parties involved. When looking at judgments of German courts, it is clear that they hardly deal with racism as a subject and as a result anti-discrimination law cannot be mobilized. Clear regulations for discrimination, sanctions and instruments for the prevention of discrimination are needed, which will be presented in the following. But procedural law is also important for enforcing the law.

VII. Raising the time limit for asserting claims

The very short enforcement period of two months in GETA Section 21, Paragraph 5 has contributed significantly in the past to hindering or making it impossible to enforce the law. The previous federal government had already decided in the last legislature to extend the GETA deadline from two months to six months. Nonetheless, the time limit for asserting claims should be increased to at least 12 months.

VIII. Burden of Proof

The proof of conclusive circumstantial evidence represents a central problem in the judicial enforcement of anti-discrimination law, since discrimination is rarely documented or observed by third parties. The easing of the burden of proof under Section 22 of the GETA should therefore be extended. In this respect, it must be clarified that the burden of proof relief does not only refer to the causality between a discrimination and a reason named in Section 1 of the GETA, but also includes the presentation of the disadvantage itself. In addition, the requirements to be placed on circumstantial evidence need to be made more concrete. For example, the hearing of parties, the non-establishment of an internal complaints body, the results of testing procedures and statistics should be admissible and sufficient to be accepted as evidence in individual cases. Finally, the burden of proof in employment law should be supplemented by a right to legal information in order to help rejected applicants with the requirements of the burden of proof.

IX. Rights of participation in court and appeal proceedings: Right of associations to sue, to act as legal standing and to provide assistance

The practice of the anti-discrimination counselling centres shows that only very few victims of racism file a complaint. Although they want to see change and assert their rights, many victims cannot and do not want to bear the time, emotional and financial burdens associated with lengthy legal proceedings. But a lack of knowledge of legal remedies among those affected or little trust in the judiciary, whose employees are largely perceived as white and German, can also be a factor in deciding against a lawsuit[217]. Discrimination is therefore not sanctioned in most cases. Unlike in many EU member states, there is also no possibility to take legal action against cases of structural discrimination without being individually affected.

[217] In-depth, see Baer 2020.

In view of the specific weakness of anti-discrimination law regarding its enforcement, the principle of individual legal protection should be abandoned and collective legal protection established, as in other areas of law. To ensure effective enforcement of the prohibition of discrimination, procedural autonomy should therefore be introduced into the GETA, allowing anti-discrimination associations to assert the rights of a discriminated person in their own name. In addition, the right to assert claims for associations should be anchored in the GETA, so that anti-discrimination associations can bring claims that will force courts to rule on violations of the prohibition of discrimination, regardless of whether individuals are affected.

(Association) lawsuits require enormous professional and financial resources. As already outlined in No. 4, anti-discrimination counselling and its funding must have a legal basis (see No. 4 above). A solution to the issue of funding for lawsuits and legal costs is crucial if the right to assert claims is to be made accessible. Sufficient funds must be available to recognized anti-discrimination associations for collective actions so that they may make use of their new opportunities to bring legal complaints regarding discrimination. To this end, a legal aid fund should be set up at the Federal Anti-Discrimination Agency to provide access to a fund for associations that do not have the necessary financial resources but have the expertise to bring a lawsuit.

A right to legal information should be enshrined in the law for anti-discrimination associations in order to strengthen the rights of those affected, e.g. in cases of algorithm-based discrimination, which are even more difficult to prove than analogue discrimination incidents.

X. Make employers more accountable

Protection against racism in the workplace must be improved. Sections 11, 12 and 13 of the GETA are fundamental cornerstones of the obligations for employers to protect against discrimination. On the one hand, the field of employment is susceptible to discrimination and, on the other hand, discrimination can be dealt with at a low level within companies and institutions. All employees who are affected by discrimination must be given low-threshold access to and competent support through an in-house complaint procedure. In order to achieve this, the development of a concrete complaint procedure or a complaint procedure regulation should be required by the legislator as a minimum standard for in-house complaint bodies and anchored in the GETA. The GETA should be based on the fact that internal bodies, such as the workers' council or staff council (*Betriebsrat* or *Personalrat*), must be actively involved in setting up the internal complaints body in accordance with Section 13 of the GETA. To date, there are no control mechanisms in place to verify establishment of a complaints body. It should be possible to check and sanction the non-establishment of an effective internal complaints body in order to encourage employers to take action.

XI. Adapt church privilege to European requirements

Section 9 of the GETA grants denominational employers' extensive autonomy in the context of labour law. The requirements of Directive 2000/78/EC for religious employers must be taken into account in the GETA. According to the European Court of Justice (ECJ, judgment of 17.04.2018, Case C-414/16), membership of a religious community must constitute "an essential, legitimate and justified occupational requirement" for the performance of the job. Since this already follows from Section 8 of the GETA, Section 9 should be deleted.

Additions by the AmF to the ICERD-Parallel Report, Chapter III: Section 2: Racism against Muslims in Germany

Expert Contribution

Gabriele Boos Niazy from the AmF-Aktionsbündnis muslimischer Frauen in Deutschland e.V. on structural discrimination and the Berlin Neutrality Act.

Structural discrimination

In 2023 - nine years after the decision of the Federal Constitutional Court, which also applied to Berlin - the state of Berlin abandoned its opposition to the constitutional interpretation of its neutrality law with regard to the wearing of a headscarf for female teachers. It remains to be seen to what extent this will actually put an end to the discriminatory recruitment policy.

From a legal perspective, blanket bans on headscarves in schools (in place since 2015) and nurseries (since 2016) are no longer permitted due to their unconstitutionality, but advice centers still report isolated violations of the law.

In 2004 and 2005, legal bans were introduced in two federal states, and since 2017 in six others, which prohibit the wearing of clothing with religious connotations within the entire judicial system (Baden-Württemberg 2017, Bavaria 2019, Lower Saxony 2020, North Rhine-Westphalia 2021, Schleswig-Holstein 2022, in Hesse 2004 and Berlin 2005 they also apply to the entire civil service).

In 2020, the Federal Constitutional Court (Kopftuch III)[218] ruled that a headscarf ban may be permissible in the case of a legal clerkship because the period affected by the ban is very short, the training stages concerned are not compulsory and failure to complete them has no influence on the grade. Accordingly, according to the BVerfG, the fundamental rights of those affected and the state legislature's desire to ban the headscarf weigh equally. The latter had the decision-making prerogative and could therefore impose a ban. This is not mandatory, as the approval of the headscarf does not impair state neutrality. All laws passed by the federal states affect all judicial employees, not just trainee lawyers.

In 2021, the Act on the Regulation of the Appearance of Civil Servants came into force, which contains a regulation according to which items of clothing and jewelry with religious connotations can be banned under certain conditions. This law gives state legislators or individual employers the opportunity to issue such a ban without a legal basis of their own, so the hurdle is low. Even if the wording gives the impression of neutrality, bans only affect people who belong to a religion that has clothing regulations: Jews, Muslims and Sikhs. In practice, this means that Muslim women in particular are denied access to large parts of the civil service. Among other things, this constitutes a violation of Article 33 (2) of the Basic Law (guarantee of access to public office on the basis of suitability, ability and professional performance).

The necessity of the bans is consistently argued on the basis of an "objective recipient horizon", i.e. a fictitious person who could lose confidence in the neutral conduct of their office at the sight of an office holder with religiously connotated clothing; this could lead to the loss

[218] BVerfG 2020

of the ability of the entire judiciary to function. With this line of argument, the state uses prejudicial stereotypes of third parties as a basis for deciding whether to interfere with someone's fundamental rights. In doing so, the state is not fulfilling its task of countering and eliminating prejudice and is disturbing social peace.

The UN Committee monitoring compliance with the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW Convention) found in its 2023 status report for Germany[219] that the law regulating the appearance of civil servants and the assertion contained therein impairs the employment prospects of Muslim women wearing headscarves. (Own translation, para. 43a) The Committee has asked Germany to report within two years on what steps have been taken to ensure "that Muslim women in the public sector, including the judiciary, are not penalized for wearing headscarves, including by further amending the Federal Civil Service Act and by raising public awareness so that it is not seen as a breach of trust if a female civil servant wears a headscarf in the public service: (Own translation, para. 44a; 61.)

Overall, it can be observed that the constitutional requirements regarding the state's obligation of neutrality (equal treatment of all religions and world views, no interpretation of their content, supportive state attitude) are increasingly being politically undermined and narrowed down to a secular understanding of the state, which contradicts our constitution.

[219] CEDAW 2023, at: https://www.bmfsfj.de/resource/blob/231272/d54046e4274175c24a1e3947e15378d0/eng-neunter-staatenbericht-cedaw-concluding-observations-data.pdf

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