SEMINAR
PROF. JACK GREENBERG
SPRING 1989

CONSTITUTIONAL ISSUES IN POST-APARTHEID SOUTH AFRICA:

OUTLAWING RACIST IDEOLOGY

ALFRED KUENSCHNER

KRONENSTRASSE 18
D - 7800 FREIBURG
TEL. 49-761-77621

112 HAVEN AV., # 56
NEW YORK, N.Y. 10032
TEL. 212-795-7263

A. PRELIMINARY REMARKS: ANTI-RACISM AND THE FUNCTION OF THE CONSTITUTION

The constitution of post-apartheid South Africa will grow out of the present system of an oppressive state based on racial discrimination known as apartheid. It hardly can be an only non-racist constitution. It must be a distinctively anti-racist constitution[1]. Otherwise it will lack an essential character of constitutions: of being linked to the historical and political conditions of its origin. A constitution being discussed "in exile" and necessarily often far away from the domestic political struggle is even more prone to such failures[2]. It eventually would fail its potentially benign function of shaping the political and social life of a free and democratic post-apartheid South Africa.

Not only historical and political necessities but concern for the fundamental human rights of the opressed majority press for the inclusion of provisions which facilitate and serve as a catalysor in the process of transition from the racist society today to the non-racist society tomorrow. The non-racist society will not be created by simple declaration on the day a democratic constitution comes into effect. The best example for the long and painful process of getting from the starting point of the declaration of equal rights to the final goal of elimination of all racial discrimination is the experience of the United States in its effort to overcome the remnants of slavery and less obvious forms of racial discrimination. The long way from implicit recognition of slavery in Art. I Sect. 9 Subsection 1 of the Constitution of 1789 to the Civil War, the Restoration Amendments of 1865 to 1870 (XIII - XV Amendment), the segregation cases and finally to the Civil Rights Acts of the late 50's and 60's is not yet at its end. The situation in South Africa is fundamentally different: there it is the majority of the population which is denied its rights. But this does not necessarily make the process of transition easier[3].

If a constitution has the function to integrate the whole population in the process of shaping and securing a democratic and free South Africa, then there is an additional need to include anti-racist provisions. This need is based in the function of the constitution itself. Anti-racist provisions will serve as a dynamic tool of the majority to overcome the

---

[1] SACHS, Albie: A Bill of Rights for South Africa, Lusaka 1988, p. 23.

[2] See the critical remarks of SACHS, FN. 1, p. 14 and SEIDMANN, Robert B.: Perspectives on Constitution-Making: Independent Constitutions for Namibia and South Africa, Unpublished Draft, p. 75 in multilith, on the drafting of the constitution in well financed foreign "think-tanks". SACHS even reports that an "anti-Bill of Rights committee" has been constituted.

[3] The redistribution of wealth as a basic precondition for equality of opportunity poses problems of a much larger scale in South Africa as it does in the United States, only to mention one example.

racist society of today; in the same time it can serve as a necessary protection for the white minority from excessive intrusion of its fundamental rights[4]. All anti-racist and non-racist legislation will be difficult to implement as long as racist ideology is an essential feature of more than marginal parts of the South African population. The struggle against racism has to be fought in the minds of the people. Has the force of law any useful and legitimate role in this struggle?

B. CONFLICTING INTERESTS: OUTLAWING RACIST IDEOLOGY AND PROTECTION OF FREE SPEECH

The final task of a constitution for post-apartheid South Africa is not only to overcome racism. It should be as much the building of a democratic society with respect for the fundamental rights of its citizens. The more tansitory goal of overcoming apartheid must be reconciled with the more lasting goal of building and protecting a democratic and free society. Freedom of opinion, of speech, of assembly, of association etc. are at the core of such a society. Outlawing racist ideology means to impose restrictions on such freedoms. Can both interests be reconciled, to what extent and what are the (acceptable) means to overcome racist ideology?

These are the questions to be adressed by this paper. I will not limit the scope of the paper to the specific legal problems arising in the context of suits for "group defamation" as known in american tort law. To leave the struggle against racist ideology to tort law alone means to privatize it and to leave it to individual initiative. This has apparent advantages insofar as it gives society the responsibility of defending itself instead of conferring (delegating) this responsibility to the state[5] (and it explains to a certain extent the reluctance of the United States to adopt a broader approach in the suppression of racist speech[6]). But my preliminary remarks suggest that the combat against racism and racist ideology has to be considered as essential for the identity for the post-

---

[4] Which indeed is the cause of concern of those who suspect a Bill of Rights of serving only to secure the privileges of the whites, see footnote 2.

[5] This weighs even stronger when the majority can be expected to fight actively against racist speech because the majority itself has been exposed to the evils of racism like it is the case in South Africa. But even for the South African situation this argument is too simplistic: in post-apartheid South Africa it is not only and maybe not even primarily the black majority which has to defend itself against racist speech. It is a multi-racial country with all the potential for racial conflicts and the protection of the black majority will be only one aspect of a much broader task of fighting racism.

[6] But there surely are much more reasons I cannot deal with here.

apartheid South African state[7]. Therefore I rather look at ex officio enforceable provisions of statutory and constitutional law which restrict racist speech and related activities (assemblies, political parties, associations etc.). The analysis draws heavily on material from the American and West-German experiences. The consideration of American constitutional law is indicated for its widely recognized liberal tradition in free speech issues; the country's own history of racism might give additional insights in possible solutions for the conflict. The choice of the Federal Republic of Germany provides the approach of a country with a less liberal tradition and a recent historical experience of a racist regime using defamation as a major weapon in its rise to power[8].

I. Constitutional and International Formulas of Anti-Racism

Existing proposals for a post-apartheid constitution for South Africa include provisions calling for the outlawing of racist ideology. The "Constitutional Guidelines" of the African National Congress (ANC) read as follows[9]:

> "The advocacy of racism, fascism, nacism or incitement of ethnic or religious exclusiveness or hatred shall be outlawed."

Various international conventions and institutions dealt with the issue[10] Art. 20 of the International Covenant on Civil and Political Rights (1966)[11] states that

> "1. ...
> 2. Any advocacy of national, racial, or religious hatred that constitutes incitement to discrimination, hostility, or violence shall be prohibited by law."

---

[7] See also the text accompanying footnotes 9 and 10.

[8] For a contemporary account of the the use of nazi-propaganda see David RIESMAN: Democracy and Defamation: Control of Group Libel, 42 Columbia Law Review 727 f. (1942), p. 728 f.

[9] Guidelines . The "Constitutional Proposals" of 28 November 1986 of the INDABA, which represent the position of Buthelezi's INKATHA-movement, include a similar but somewhat narrower provision in its Bill of Rights section, no. 11(2): "Any advocacy of national, racial or religious hatred or agression between groups that constitutes incitement to discrimination, hostility, violence or political animosity is prohibited."

[10] See generally Natan LERNER: International Definitions of Incitement to Racial Hatred, 14 New York Law Forum 49 (1968).

[11] Citation of the international covenants according to Ian BROWNLIE: Basic Documents on Human Rights, Clarendon Press Oxford 1981.

Art. 4 of the International Convention on the Elimination of All Forms of Racial Discrimination (1966) states:

> "States Parties condemn all propaganda and all organizations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form, and undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination and, to this end, with due regard to the principles embodied in the Universal Declaration of Human Rights and the rights expressly set forth in Article 5 of this Convention, inter alia:
> a) Shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as acts of violence or incitement to such acts...and also the provision of any assistance to racist activities, including the financing thereof;
> b) Shall declare illegal and prohibit organizations, and also organized and all other propaganda activities, which promote and incite racial discrimination, and shall recognize participation in such organizations or activities as an offence punishable by law;
> c) Shall not permit public authorities or public institutions, national or local, to promote or incite racial discrimination."

The European Commission of Human rights decided in 1979 that the dissemination of ideas encouraging racial discrimination in violation of the rights and freedoms of others is not protected by the right to freedom of expression (Art. 10 of the European Convention on Human Rights[12]

II. Anti-nacism in the law of the Federal Republic of Germany

National socialism constitutes an ideology not confined to, but essentially characterized by racism. The building of the West-German state after World War II thus can be expected to be marked by some sort of anti-racist legislation.

1. The Constitutional Framework

The West-German constitution was drafted in a very short time in 1948/49 and went into effect May 23, 1949. Art. 5 Grundgesetz (GG)[13] guaranteeing

---

[12] GLIMMERVEEN and HAGENBECK v. the NETHERLANDS 18 Eur. Comm. H.R. 87, 196 (1979).

[13] The constitution is called "Grundgesetz" (meaning "Basic Law") in order to mark its transitory character in a divided Germany which according to the preambule shall be reunited one day.

the freedom of opinion, freedom of speech and information etc. reads as follows[14]:

> (1) "Everyone shall have the right freely to wxpress and disseminate his opinion by speech, writing and pictures and freely to inform himself from generally accessible sources. Freedom of the press and freedom of reporting by means of broadcasts and films are guaranteed. There shall be no censorhip.
> (2) These rights re limited by the provisions of the general laws, the provisions of law for the protection of youth, and by the right to inviolability of personal honour.
> (3) Art and Science, research and teaching are free. Freedom of teaching shall not absolve from loyalty to the constitution."

The constitution of the new West-German state, despite of the racist terror committed in the name of its formal predecessor, contains no provision that expressly outlaws nacism or racism. A reference to "race" is to be found only in the equal protection clause of Art. 3 Section III GG[15]. There are however some provisions which are intended to protect the newly designed free and democratic society as a whole (Art. 9 II, 18, 21 II, 20 IV, 79 GG). They later served as the basis for the doctrinal development of the concept of the "militant democracy" (wehrhafte Demokratie)[16]. This provisions read as follows:

---

[14] Translations of provisions of the West German constitution according to "The Basic Law of the Federal Republic of Germany", fotocopies on file in the Law Library for Prof. Henkin's Fall '88 seminar. Art. 139 taken out of the translation by FLANZ in: Albert P. BLAUSTEIN/ Gisbert H. FLANZ (Eds.): Constitutions of the countries of the world, Oceana Publications Dobbs Ferry NY, 1985. An overview of the jurisdiction of the Federal Constitutional Court (Bundesverfassungsgericht) and its theoretical and doctrinal basis is given by SCHMITT-GLAESER, Walter: Die Meinungsfreiheit in der Rechtsprechung des Bundesverfassungsgerichts, in: Archiv des Oeffentlichen Rechts 97 (1972), p. 60 f., 276 f. and 113 (1988), p. 52 f. and SCHOLLER, Heinrich: Freedom of opinion and information in the Federal Republic of Germany, in: de MESTRAL/BIRKS/BOTHE/COTLER/KLINCK/MOREL (eds.), The Limitation of Human Rights in Comparative Constitutional Law, Cowansville/Can. 1986, p. 417 f.

[15] Here it is not even clear which role the immediate nazi-past played in the formulation of the article; there is only a general reference to the experiences of the past in the materials, see AE-STEIN # 10.

[16] Translation according to Eric STEIN: History against free speech: The new German law against the "Ausschwitz" - and other - "lies", 85 Michigan Law Review 277 (1986) ; for a comprehensive and critical discussion of this concept see AE-RIDDER, Tome II, p. 1408 f.

Art. 9 (Freedom of association)
(1) ...
(2) Associations, the purposes of activities of which conflict with criminal laws or which are directed against the constitutional order or the concept of international understanding, are prohibited.
(3) ...

Art. 18 (Forfeiture of basic rights)
Whoever abuses freedom of expression of opinion, in particular freedom of the press ... of teaching ... of assembly ... of association ..., privacy of posts and telecommunications ... property ... or the right of asylum ... in order to combat the free democratic basic order, shall forfeit these basic rights. Suc8h forfeiture and the extent thereof shall be pronounced by the Federal Constitutional Court.

Art. 21 (Political parties)
(1) ...
(2) Parties which, by reason of their aims or the behaviour of their adherents, seek to impair or abolish the free democratic basic order or to endanger the existence of the Federal Republic of Germany, shall be unconstitutional. The Federal Constitutional Court shall decide on the question of unconstitutionality.
(3) Details shall be regulated by federal laws.

And there is Art. 139 GG which has a very limited meaning and for reasons dealt with at a later stage of this paper does not constitute a general anti-nacist provision:

> "The legislation enacted for the 'Liberation of the German People from National Socialism and Militarism' shall not be affected by the provisions of this Basic Law."[17]

Even though no clear constitutional argument can be made from the face of the constitution, the German society basically wanted to overcome the remnants of nazi ideology and build a stable democratic state with respect for the fundamental rights of its citizens. Its approach resulted to be more anti-totalitarian than anti-nazi. This is the conclusion to be drawn from the constitutional as well as from the statutory provisions and the experience of their implementation during the 40 years of the existence of the Federal Republic of Germany.

2. Prohibition of Speech per se

a) Provisions specifically directed against racist speech

Legal activity to outlaw nazi speech started very soon after the defeat and liberation of Germany. The first statutes were enacted by the states

---

[17] The quotation marks do not appear in the translation given by FLANZ, but in the original German text.

("Laender")[18]. Several similar bills were introduced in the Federal Parliament ("Bundestag") after the Federal Republic had been created in 1949[19] but did not come far in the legislative process. The legislature was already too busy with other problems in the reconstruction of the country[20]. Only in 1960, after various incidents of anti-semitism in Hamburg, one of the major cities, and a very lenient handling of these events by the judiciary[21] was the criminal code amended. Section 130 Strafgesetzbuch (StGB) was introduced[22]:

> Inciting to hatred. Whoever, in a manner apt to breach the public peace [public order] attacks the human dignity of others by
> 1. inciting to hatred against parts of the population,
> 2. provoking to violent or arbitrary acts against them,
> 3. insulting, maliciously making them contemptible, or defaming them,
>
> shall be punished by a term of imprisonment of 3 months to 5 years.

The provision did not choose the way of enumerating the protected groups. Instead it contains a general prohibition of incitement to racial hatred[23]. It was supplemented in 1973 by Section 131 StGB:

> Representation of violence. Instigating racial hatred.
> (1) Whoever
> 1. disseminates,
> 2. publicly exhibits, posts, presents or otherwise makes accessible,
> 3. ...makes accesible to a person below the age of 18, or
> 4. produces, subscribes to, supplies, stocks, offers ... writings ... that incite to race hatred or describe cruel or otherwise inhuman acts of violence against humans in a manner which glorifies or minimize such acts of violence ... shall be punished by a term of imprisonment of up to one year or by a fine.
> (2) ...
> (3) Paragraphs 1 and 2 are not applicable when the act is in the

---

[18] See Art. I of the Bavarian Act Condemning Racial Agitation and Hatred of Foreign Nations of 13.3.1946, GVBl. 1946, p. 134; for the German text see STEIN footnote 27.

[19] See the draft of the Social Democratic Party in Bundestags-Druchsache 1/563 of 15.2.1950.

[20] COBLER p. 161 footnote 6.

[21] See STEIN p. 282 f. for a report of these events.

[22] Translation by STEIN p. 284, 322; another but to my opinion less precise translation is to be found in DARBY: The West German Criminal Code

[23] For examples for the general and enumerating approach see TARDU p. 74 footnote 28 and 29.

service of reporting on current events or history.
(4) ...

b) Provisions protecting individual honor and dignity

Some protection was already existent before this post-war legislation. Through Section 185 StGB insult was a punishable offence; a private petition to prosecute by the insulted person is generally necessary. These laws did not prevent the resurgence of nazi propaganda in the last years. Especially the lower courts had considerable difficulties in dealing with one of the most often employed nazi propaganda themes in post-war West-Germany, the so-called "Ausschwitz-lie"[24]. Its proponents claim that the mass-extermination of Jews in the concentration camps never took place and perceive it as a faked propaganda lie of international Jewry. It lead to recent legislation that made the denial of historical truth an offence which must be prosecuted ex officio[25]. It must now be prosecuted as a criminal offence like any other insult defaming the Jews according to Section 185 StGB. There is well established jurisdiction that the Jews constitute a sharply characterized group and that a single person can be insulted by reference to the group in general despite of a general reluctance to accept mere group defamation as a criminal insult. This has been accepted for no other group except for the Jews. The reason given for this 'preferential' treatment is their persecution in the Third Reich[26].

c) Provisions protecting the free and democratic order as such

Advocacy of racism and nacism might be prohibited by provisions of Section One Title III of the West-German Criminal Code as a crime "Endangering the Democratic Rule of Law". The provision mostly relevant in our context is Sections 86[27]:

---

[24] For a comprehensive and excellent study of this special problem see STEIN p. 291 f. 299, FN 16.

[25] Before it could be dealt with as criminal insult already, Section 185 StGB, but it could be prosecuted only upon private petition. This led to "bizarre" problems of "benign" application of the nazi Nuremberg racial laws, because the petitioner had to proof that he personally was insulted as a Jew, see STEIN p. 304, FN 16.

[26] Such a historical approach would obviously exclusively protect non-white races and groups in South Africa which would be hardly acceptable. If we grant all groups and races protection we eventually will have to face an enormous amount of litigation. It should be considered then if ex officio prosecution of all offenses is feasible or if it should better be limited to epecially grave cases of group defamation.

[27] Translation according to DARBY p. 111.

"(1) Whoever,..., distributes, produces for distribution..., keeps in supply or imports...,propaganda:
1. of a political party which has been held unconstitutional by the Federal Constitutional Court,...
4. the contents of which is designed to further the aspirations of a former National Socialist organization
shall be punished by up to three years' imprisonment or by fine."
(2) Propaganda in the meaning of subparagraph (1) shall be deemed only such writings...whose content is directed against the free, democratic system of government...

It is supplemented by Section 86a StGB which punishes the use of the symbols of unconstitutional organizations[28]. Section 86 was interpreted narrowly by the Federal Supreme Court in a decision which held that Hitler's "Mein Kampf" does not qualify as propaganda in the meaning of Section 86 (2)[29]. It held that the principles stated in Section 92 StGB are essential to the "free, democratic system of government" referred to in Section 86 StGB. Section 92 (2) reads:

"Within the meaning of this Code, "constitutional principles" shall include:
1. the right of the people to exercise the power of the State in elections and plebiscites and through special legislative, executive and judicial bodies and to elect parliament through general, direct, free, equal and secret elections;
2. the subjection of legislation to the constitutional order and of the executive and judicial power to the law;
3. the right to form and exercise a parliamentary opposition;
4. the replacability of the government and its responsibility to parliament;
5. the independence of the judiciary, and
6. the exclusion of all forms of rule by violence and arbitrary action."

---

[28] Problems of interpretation arose when those symbols were used in leaflets which intended to underscore the nazi affiliation of certain politicians. Although the publisher of the leaflet expressly warned against the dangers of nazism, it was seriously debated if he had to be prosecuted for the sole use of the symbol. See GREISER: Verbreitung verfassungsfeindlicher Propaganda, in: Neue Juristische Wochenschrift (NJW) 1972, 1556 and NOELDECKE: NS-Symbole im politischen Tageskampf, NJW 1972, 2119. The dispute has later been solved by amending Subsection 86 (3).

[29] It argued that the book could not be directed against the free, democratic order which was created only after the book had been written, Entscheidungen des Bundesgerichtshofes in Strafsachen 29, p. 73. See for the opposite position Dreher-Troendle, Strafgesetzbuch, 42. ed. 1988, Section 86 # 5. The publication can nevertheless be prosecuted under Section 131 StGB, see Schoenke-schroeder-Lenckner, Strafgesetzbuch, 22. ed. 1988, Section 131 # 5.

This corresponds to the jurisdiction of the Federal Constitutional Court which decided that the principles of the rule of law, self determination of the people, majority-vote, freedom and equality and exclusion of dictatorship characterize the free, democratic system of government[30].

d) Criticism

The legal critique concentrates on the vagueness of the provisions and the obstacles they pose to a free and open political debate of radical opinions (the constitutional questions of free speech will be dealt with separately at a later stage). Lack of statutory precision led to hairsplitting distinctions. The slogan "Juden raus!" (a nazi slogan widely used in the Third Reich roughly meaning "Jews go home") was held not to trigger criminal liability when used alone; it was decided the other way round when it was used in connection with the swastika[31]. On the other side it led to some hundred criminal prosecutions of students, professors and other professionals who did no more than to reprint an article in which an anonymous writer expressed his "clandestine sympathy" with the killers of the then Chief Prosecutor of the Federal Republic[32]. This happened in a time of public hysteria about so-called terrorist activities. The provisions intended to protect the free, democratic system of government turned into tools for punishing morally shabby behaviour, politically undesired analysis and even documentaries which criticized the original article.

The need for punishment of all this forms of speech is often not clearly established[33]. If punishment serves more the purpose of corresponding to a feeling of national guilt for the terrors of the past than a purpose of protecting the current system, then the formulations of many of the provisions are clearly to broad. But the legislature had to turn to such broad conceptions because individual punishment for collective guilt of the past would have been hardly acceptable on constitutional grounds. Today the above cited international conventions give an additional justification for the suppression of racist and nazi speech, but they do not require the broad formulations employed in some of the provisions dealt with above.

---

[30] Entscheidungen des Bundesverfassungsgerichts (BVerfGE) 2, 12.

[31] BGHSt 32, 310.

[32] See for a report of the events and the following prosecutions Juergen AHRENS/ Ulrich MUECKENBERGER: Dokumentation zu den Prozessen wegen des "Buback-Nachrufs", in: Kritische Justiz (KJ) 1978, 280 f., 432 f., also covering other provisions of the Criminal Code applied in this context: Section 90a, 140, 185, 189.

[33] COBLER p. 161. FN 20.

Legal protection of the incitement to racial hatred may lead to a politically misguided reliance on state intervention in the struggle against nazi and racist ideology. "Authoritatetively mandated political morality" will ultimately fail to provide the kind of morality the political process itself must provide[34].

Criminal prosecution and process gives racists and nazis an additional public forum to promote their ideas. This has the positive effect of keeping the knowledge of history and the existence of the threat of these ideologies alive[35]. It has the negative effect of involuntarily giving a forum to such ideas; it is understood that defendants in such cases in no way can be denied the procedural guarantees of the defendant. This led to the situation that the courts sometimes had to hear "experts" who tried to give the racist and nazi ideologies of defendants the character of historical or social truth[36]. It cannot be excluded that racists might in a similar way try to justify their ideology by so called 'scientific' proof in the course of the trial. This might create painful situations especially in a situation where the judiciary itself cannot be expected to be totally free from racist ideology. There are uncontestable procedural ways out of such situations but the judiciary must be well prepared and free from racist tendencies for it.

e) Constitutionality of the statutory limitations on speech

The Federal Constitutional Court did not have much difficulties in dealing with convictions on the basis of the statutory provisions named above. In most of the cases it held that they are general laws in the meaning of Art. 5 III GG and thus do not violate the right to free speech[37]. Legal controversies therefore concentrated more on problems of statutory interpretation and appropriateness of limitations on speech than on issues of constitutional law. In a case concerning Art. 130, 131 StGB the Federal Constitutional Court held that the interpretation and application of the statute did not raise questions of possible violation of fundamental

---

[34] See COBLER p. 161, FN 20.

[35] An effect which e.g. is also given considerable weight by the prosecutors of the Argentinian military after the restoration of the democratic rule.

[36] Especially in the context of the so called "Ausschwitz-lie" when 'historians' tried to prove that the mass-extermination of Jews did not take place or to a lesser extent, see COBLER p. 161, 168 and STEIN p. 290, FN 16. FN 20

[37] See von MUENCH Art. 5 # 50 "Strafgesetze", concerning Sections 88a, 89, 90a, 93 I No. 1 StGB. Commentators often don't even mention Sections 86, 130, 131 as posing problems of free speech and it must be assumed thereby that they consider them as posing problems of free speech, see e.g. MAUNZ/DUERIG/HERZOG, Kommentar zum Grundgesetz, Beck Muenchen, Art. 5 # 276.

rights; it did not even give the case a full hearing[38]. In a case involving criminal insult based on a leaflet calling the holocaust a "Zionist swindle" the Federal Supreme Court decided that no one denying the fact of the holocaust can invoke the guarantees of Art. 5 I GG for that[39].

The Federal Constitutional Court did not have to decide yet about the constitutionality of Sections 86, 86a StGB[40]. But as the Court is itself involved in the procedure of declaring political parties unconstitutional it probably will not have much difficulties in dealing with the corresponding provisions of the Criminal Code which partially depend on this declaration. This procedure and its constitutional implications will be dealt with now.

3. Outlawing political parties

According to Art. 21 II GG and Sections 43 Bundesverfassungsgerichtsgesetz (BVerfGG), 33 II Parteiengesetz (PartG) the Federal Constitutional Court has the power to outlaw political parties. In the 40 years of the existence of the Federal Republic the article has been applied only twice in the early 1950's. First against a nazi-party[41] and shortly after against the Communist Party[42]. Meanwhile political parties have been formed on the left and on the right which replace to a certain extent the political parties prohibited in the early 50's. There has been no serious debate around prohibition of political parties in recent times. Procedural safeguards are intended to prevent the provision from becoming a tool in everyday politics. Only the Federal Constitutional Court has the power to outlaw the political party and only the parliament (Bundestag), its second chamber (Bundesrat) and the government may file the suit starting the procedure.

Given the historical development the procedure may eventually be looked at as a measure to ease transition to democracy and respect of fundamental rights. But it is still in the Basic Law and there are no serious proposals to take it out. The democratic self-confidence of West Germany seems by far not strong enough to allow such thoughts on the abolition of Art. 21 Sect. II GG; but it is strong enough not to use the procedure as a means of political struggle and to rely on the force of the free political

---

[38] BVerfGE NJW 1982, 1803; see STEIN p. 287, FN 16

[39] BGHSt 75, 160, 161; lower courts left no doubts that the freedom of science, Art. 5 III GG, cannot be invoked to justify the "Auschwitz-lie", see citations in STEIN p. 288 footnote 50.

[40] But see for Section 90a BVerfG NJW 1985,263 "Hessenloewe".

[41] BVerfGE 2, 1.

[42] BVerfGE 5, 85 f.

process as the most effective weapon against racist, fascist and other totalitarian political parties.

4. The doctrine of the "militant democracy"

The reluctance of the Court to engage in a more precise analysis of the above mentioned criminal statutes has much to do with the development of the doctrine of the "militant democracy" (streitbare Demokratie)[43]. The outlawing of the nazi and communist party in the early 1950's constitutes its starting point. Especially Art. 9 II, 18 and 21 II GG are perceived as exceptions from the protection provided by the Bill of Rights in cases where its freedoms are misused for the purpose of overthrowing the free and democratic state itself. Totalitarian political parties which advocate the forced elimination of divergent opinions and political parties cannot be the beneficiaries of all the freedoms guaranteed by the constitution; there is "no unlimited freedom for the enemies of freedom"[44] in the constitution of the Federal Republic as the Federal Constitutional Court put it in the judgment that outlawed the Communist Party.

It is doubtful if the whole doctrine of the "militant democracy" can be justified by reading together the single provisions of the Basic Law and thus forming a whole new concept which has effects beyond the specific situations adressed in these provisions. It clearly were methodologically more appropriate to concentrate on the single provisions of the constitution which constitute the elements of some militancy. A too broad concept of militancy threatens to generate legal and jurisdicitonal dynamics of its own and might turn into a universal goal for the suppression of unwanted ideas. The jurisdiction denying active members of radical, but legal political parties access to civil service position of all kinds is but one example for the ways this principle found into broadly formulated legal concepts of other fields of law.

5. Purging the apparatus: Denazification

Anti-racism in post-war Germany could not be restricted to the task of providing tools to prevent the future upcoming of racist ideology. Few Germans wanted to be nazis after the war, but the majority was before. The "object lesson"[45] taught by history with the devastating results of 13 years of Nazi rule was enough to to convince most of them (at least superficially) that Nazism was the wrong way. But of course this could not be taken for granted at immediately after the War. The purge of all

---

[43] For an early and - for its far reaching proposals made in a time of fachist surge all over Europe - chilling elaboration of the concept see Karl LOEWENSTEIN: Militant Democracy and Fundamental Rights, 31 American Political Science Review 417-432, 638-658 (1937).

[44] BVerfGE 5, 85, 138.

[45] I take this concept from Prof. Blasi of Columbia Law School; it describes well what happened to most Germans after the Second World War.

organizations, administration, judiciary and public life in general from adherents of nazi ideology was considered by the Allies an essential part in the process of the building of a free and democratic Germany. The process of denazification lay exclusively in their hands first[46]. There was only agreement on the basic principles according to the results of the Jalta and Potsdam Conferences. In Jalta the Allies agreed on February 11, 1945 to "destroy German militarism and Nazism", to "wipe out the Nazi Party, Nazi laws, organizations and institutions" and to "remove all Nazi and militarist influences from public office and from the cultural and economic life of the German people"[47]. It was a program designed at the complete destruction of Nazi ideology and affecting every sector of public life, from the destruction of Nazi monuments to the restructuring of the media[48]. I will concentrate on the individual denazification procedures.

Each of the occupying forces had its own procedure and regulations[49]. Millions of cases were investigated in a very short time[50]. The procedures were largely summary and there was a presumption of guilt out of membership in nazi organizations. The idea of collective instead of individual responsibility and the involvement of so many Germans in the process created an attitude of rejection and mutual non-incrimination. The whole campaign is largely considered as not very sucessful and sometimes even counterproductive[51]. This did not change when the Germans later took over the procedures themselves. The need to rebuild the country, the Cold

---

[46] See Control Council Directives no. 24 of 12 January 1946 and no. 38 of 12 October 1946. There is not even a genuine German term for it, the German word "Entnazifizierung" is just a translation from English, see Volker DOTTERWEICH in: Staatslexikon, 7. ed., Herder Freiburg, Basel, Wien 1985, key word "Entnazifizierung".

[47] Cited after PLISCHKE, footnote 48, at p. 808.

[48] Denazification thus did not only affect the administrative and political structure of post-war Germany, but as well the cultural and other sectors of society. Writers, musicians and artists were as well subject to denazification procedures as politicians and former civil service officers with affiliation to the Nazi Party, see e.g. New York Times 25 April 1989 p. C13/20 "Karajan leaves Berlin Philharmonic" at the end.

[49] See for the US-zone J.F. TENT: Mission on the Rhine. Reeducation and Denazification in American-Occupied Germany, Chicago 1982; PLISCHKE, Denazification Law and Procedure, 41 Am.J.Int.L. 807 (1947); Tom BOWER: Blind eye to murder. Britain, America and the Pruging of Nazi Germany. A Pledge Betrayed, London 1981; generally N. PRONAY/K.WILSON: Political Reeducation of Germany and her Allies after World War II, London 1985.

[50] PLISCKE FN 49 gives the number of 3.3 million as of 1947, at p. 826; DOTTERWEIN gives 3.7 million as the number for the West zones alone. FN 46

[51] DOTTERWEIN cifra. FN 46

War[52] and the integration of the country in the western alliance did not leave much room to for continued ideological struggle with the past. With the exception of nazis having geen sentenced for criminal acts virtually all others who went through the denazification procedures returned to their prior functions[53].

The convincing force of the "object lesson" taught by history can explain to a certain extent that despite a more than lenient purge of the apparatus and the existence of statutory provisions with a high anti-democratic potential there was not more state intrusion in the political process[54].

6. Summary

Denazification and anti-nazism was not a prime concern for the drafters of the constitution. The were more concerned with the rebuilding of the country than with the past. The generally accepted need to fight the communist threat did not allow for a purely anti-nazi orientation of the provision of the constitution dealing with the protection of the free and democratic state. It called instead for the politically more neutral approach which later generated the concept of the "militant democracy". Thereby the exclusion of the far left from the political process was as well feasible as the exclusion of the far right. The threat was considered to be totalitarianism, not only in its unique historical form of nazism. Due to the devastating impact of the historical "object-lesson", the post-war historical developments and internal socio-economical factors the threat of nazism and the legal battle against it very soon ceased to be a matter of prime political and legal importance.

In the constitution only Art. 139 GG deals directly with nazism. But it is no anti-nazi or anti-fascist provision. Its purpose was to exempt the denazification laws of the states ("Laender") from the guarantees of the fundamental rights of the Constitution. The former members of the National Socialist Party should not enjoy the protection namely of the equal protection clause when the denazification laws limited their right to vote and their privileges as public service officers as a form of punishment. Some authors see Art. 139 GG as an expression of the anti-fascist

---

[52] Which only recently has been definitely declared to be over, see editorial of the New York Times 4/2/1988: "The Cold War is over".

[53] DOTTERWEIN cifra. FN 46

[54] The situation in South Africa appears to be different in this respect. Racial segregation, economic wellbeing for the white supremacists, pressure on the media and all the other dictatorial measures employed by the current South African police state effectively seem to prevent South Africans from being confronted with any kind of "object-lesson".

character of the Basic Law[55]. Others see it as a mere confirmation of the rejection of nazism and a basically anti-democratic provision in a otherwise democratic constitution[56]. They deny that it is a "special provision against the right"[57]. A look at the context of the provision affirms the latter position. It corresponds to the claim to keep discrimination for political reasons as strictly limited as possible[58].

III. Anti-racism in the law of the United States

The United States have a long and painful history of racism. It also has a strong liberal tradition of free speech. It is for the latter that it has signed, but not ratified yet the International Convention on the Elimination of all Forms of Racial Discrimination and the International Covenant on Civil and Political Rights. The former Deputy Secretary of State contended that the above mentioned articles of this conventions are in conflict with the american constitutional law of free speech[59].

1. Free Speech in General

The jurisdiction of the Supreme Court in the area of free speech is often considered as a model for a tolerant, liberal approach. It held in the case of SCHENCK[60] that a "clear and present danger" is required as a justification to suppress subversive speech, a test still applied today[61] as a basis of the distinction between mere advocacy of abstract doctrine and advocacy directed at promoting unlawful action[62]. In the WHITNEY

---

[55] ABENDROTH/BEHNISCH/DUEX/ROEMER: Der antifaschistische Auftrag des Grundgesezes, 1974 p. 18, see also p. 53 and 63 footnote 4.

[56] Von MUENCH-HECKER Art. 139 # 12.

[57] MAUNZ/DUERIG/HERZOG-DUERIG aRT. 139 # 4.

[58] AE-LADEUR Art. 139 # 3. In this context see the dissent of Justice SIMON in BVerfG DVBl. 1983, 697, 703; he contends that the practice to deny active members of radical political parties which are not declared unconstitutional access to civil service positions contradicts the idea behind Art. 139 GG.

[59] See ROHRER p. 35 f., 36.
59 a At that time still in a dissent.

[60] SCHENCK v. US 249 U.S. 47, 63, 39 S.Ct. 247, 63 Led. 470 (1919).

[61] See the reference to SCHENCK in Justice BLACKMUN's dissent in one of the SKOKIE-decisions, SMITH v. COLLIN 439 U.S. 916.

[62] See ROHRER p. 26 for more discussion of this distinction, FN 59

case[63] Justice BRANDEIS formulated his famous opinion saying that the remedy to dangerous and subversive speech is more speech and not enforced silence[64]. And in the SKOKIE litigation[65] the Court confirmed the right of the American National Socialist Party to have a rally in a predominantly jewish suburb of Chicago. The nazis were represented in the courts by jewish lawyers from the American Civil Liberties Union[66].

2. Protection against racist speech

There is however protection against libelous racist speech in tort law and in criminal group libel laws on the state and local level[67]. I will concentrate on the latter for reasons given above[68]. In its only decision dealing with this specific issue the Supreme Court upheld an Illinois criminal group libel law[69] by a 5 to 4 vote in 1952. BEAUHARNAIS was convicted for distrbuting a leaflet urging the "..one million self respecting white people in Chicago to unite" against the "aggressions...

---

[63] WHITNEY v. CALIFORNIA 274 U.S. 357, 47 S.Ct. 641, 71 L.Ed. 1095 (1927).

[64] Similar to that the reasoning of the Colombian representative for his rejection of Art. 4 of the convention on the elimination of Racial Discrimination, see LERNER p. 54: "Ideas should be fought with ideas", FN 10.

[65] SMITH v. COLLIN 436 U.S. 953 and 439 U.S. 916 (1977) and NATIONAL SOCIALIST PARTY v. SKOKIE 578 F.2d 1197, 1206 (7th Cir.), cert. denied. For a summary of the events and litigation around the Skokie controversy see Donald A. DOWNS: Skokie Revisited: Hate Group Speech and the First Amendment, 60 Notre Dame Law Review 629 (1985); also ROHRER p. 158 f.,181.

[66] The Executive Director of the ACLU, Ira Glasser, recently affirmed the uncompromising stand of her organization towards free speech in connection with a debate revolving around proposed bans on "harassment by vilification" on the campuses of Stanford, Michigan and Atlanta (Emory), see New York Times April 25, 1989 at p. A 1/20: "Campus Debate Pits Freedom of Speech Against Ugly Words".

[67] See Note: A communitarian defense of group libel laws, 101 Harvard Law Review 682 (1988), p. 682 f. For protection through tort law see Richard D. BERNSTEIN: First Amendment Limits on Tort Liability for Words intended to inflict Severe Emotional Distress, 85 Columbia Law Review 1749 (1985).

[68] See text accompanying footnotes 6 f.

[69] BEAUHARNAIS v. ILLINOIS 343 U.S. 250 (1952); the statute prohibited the public display or dissemination of materials intended to "expose the citizens of any race, color, creed or religion to contempt, derision or oblequy or which is productive of breach of the peace or riots".

rapes, robberies, knives, guns and marijuana of the negro"[70]. The Court held that the defendant's libelous speech was not protected by the first amendment and thus the conviction had to pass only the fourteenth amendment (due process) "rational basis" test. The decision was never openly overturned but later jurisdiciton is casting doubt on its authority[71]. Indeed, NEW YORK TIMES v. SULLIVAN[72] restored first amendment protection for libelous speech - but the case concerned defamation of public officials and public figures. And COHEN v. CALIFORNIA[73] ruled that the sensibilities of onlookers to the defendants jacket bearing the words "Fuck the Draft" was not enough to show that there was a "imminent" danger of provoking violence - but here the target of the speech was not a clearly defined individual or group. Thus the position of American constitutional law on criminal group defamation statutes seems to be much less clear than many statements seem to suggest[74]. There seems to be some room for such statutes under tthe perspective of constitutional law. It is also not yet decided if the holding of BRANDENBURG v. OHIO[75] must extend to group defamation cases. There the Court held that the punishment of mere advocacy of force or lawless action cannot be criminalized[76]. The statute in question there incriminated much more than racist speech. Ovrbroad formulations of statutes restricting speech must be considered as a prime obstacle to the introduction of statutes punishing racist speech. The widespread conviction that statutes against racist speech are not in conformity with the First Amendment seems to have a lot to do with the overbroad formulations of statutes and regulations. When the victims of racist speech demand protection, the victims of sexist of anti-homosexual defamation come close behind with their demands[77].

---

[70] See the reprint of the leaflet in Justice's Blacks dissent at 276.

[71] See Note p. 685 f., 694 f. for a discussion of subsequent critical decisions and BERNSTEIN p. 1775: "BEAUHARNAIS no longer provides the answer."

[72] 376 U.S. 254 (1964).

[73] 403 U.S. 15 (1971).

[74] See for example the statement of the US-government concerning ratification of the above mentioned international conventions.

[75] 395 U.S. 444, 89 S.Ct. 1827, 23 L.Ed. 430 (1969).

[76] The case concerned the conviction of a Ku Klux Klan leader for speech derogatory to Jews and Blacks and announcing "revenge" for the suppression of the white, caucasian race.

[77] See e.g. the current debate on restrictions on free speech on several university campuses, footnote 66, which perfectly illustrates this point.

As a result the lack of criminal group libel statutes in the United States seems to have its cause at least as much in political resistance and in a lack of narrowly defined provisions against racist speech as in constitutional constraints.

3. Protection against subversive speech

There are however some statutes which outlaw certain forms of speech considered dangerous to the internal security of the United States. The Smith Act of 1940[78] adopted out of fear over fascism[79] states that whoever "... advocates, abets, advices, teaches, prints, publishes, edits, issues, circulates, sells, distributes or publicly displays any communication with the intent to cause the overthrow or destruction of the United States government ... by force or violence ... shall be fined no more than $ 20.000 or imprisoned not more than 20 years...". The Internal Security Act (or McCarran Act) of 1950[80] focuses on the fear of (communist) conspiracy to establish a totalitarian dictatorship. The Communist Control Act of 1954[81] belongs to the same line of "thought-control" statutes[82]. While the provisions restricting speech per se in this statutes currently do not seem to be enforced the mere existence seems to be enough cause for concern over the right to free speech[83]. All statutes have been held to be in conformity with the Constitution.

These cases show that what constitutes a "clear and present danger" is subject to highly subjective (mis-) perceptions about the weight of the threat inherent in totalitarian ideologies. It does not matter here if mistaken judgements about the inherent danger are made collectively or individually, the result (suppression of minority opinion and speech) remains the same. The anti-communist decisions of the 20's[84] and of the

---

[78] 18 U.S.C. $ 753, 64 Stat. 987.

[79] ROHRER p. 55.

[80] 50 U.S.C. $ 783, 64 Stat. 987.

[81] 50 U.S.C. $ 841, 68 Stat. 775.

[82] It is important to note that the focus of these statutes shifted from the quite simple and crude means of simply outlawing subversive speech to the more indirect and subtle means of restricting access to public service etc.

[83] See ROHRER p. 33: the greatest assurance against their abuse would be to repeal them.

[84] See e.g. GITLOW v. NEW YORK 268 U.S. 652, 45 S.Ct. 625 (1925) - conviction for printing and circulating writings advocating a communist revolt; WHITNEY v. CALIFORNIA, cited above - conviction for active membership in a communist party.

50's[85] should make sufficiently clear that labeling something a "clear and present danger" is necessarily often more a product of public consensus than of real threat. And it seems interesting to note here that while it is debatable to what extent a real threat of a communist revolt ever existed in the United States the threat of racism was a very real one for many Americans. The suppression of racist speech nevertheless did not attract as much the attention of the legislature. One possible explanation could be that racism was not considered as serious a threat to the fabric of the free and democratic society (state) as communism.

As a result the lack of legislation against racist speech in the United States cannot be explained simply by refering to the guaranteés provided by the First Amendment of the constitution. It is possibly more a result of political and historical constellations than of respect to the free speech guarantees of the constitution.

IV. Perspectives for post-apartheid South Africa

Neither the United States nor the Federal Republic of Germany is South Africa. These are three different continents, three different social and historical backgrounds, three different cultures. It is difficult enough to understand each other, it is even more difficult to compare or even to give advice. I confine myself here to giving a structure of some of the choices post-apartheid South Africa has in the legal combat against racist speech and related activities.

1. The fundamental question: free speech or less?

This question is easy to answer: there is no such thing as an absolute right to free speech. Incitement to commit felony is legitimately forbidden speech and even liberal[86] countries such as the United States accept certain restrictions of less imminently dangerous speech. If the evil of certain speech is clearly identified and grave enough some kind of restriction seems to be appropriate and legitimate.

Advocacy of racism is internationally recognized as speech not protected by the right to free speech; some acts of racism are even declared international crimes. There should be no doubt about the legitimacy of a constitutional provision demanding to outlaw advocacy of racism. But this is only where the problems begin.

2. The rationale behind restrictions on free speech

The rationale behind legal measures to outlaw advocacy of racism should be clear. Outlawing racism can be targeted mainly at three goals:
1. Protection of (individual or collective) dignity,

---

[85] See e.g. DENNIS v. UNITED STATES 341 U.S. 494, 71 S.Ct. 857 (1951) - conviction for violation of the Smith Act by

[86] In the classical meaning of freedom from state interference.

2. Public order and security and
3. Protection of the free and democratic order as a whole.

All three rationales are interrelated; they nevertheless urge for different means for their implementation. If we want to protect human dignity alone we can leave it to society to enforce their right by civil law suits and criminal prosecution upon private petition. The government will interfere only when a imminent threat, a clear and present danger of violence is posed.

3. Safeguards against overbroad limitations on free speech on the level of the constitution

Racism is inherently anti-democratic and opposed to fundamental human rights. The same is true for nazism and fascism. Hence it seems appealing to integrate the legal struggle against this ideologies into the broader concept of the legal protection of the democratic state against subversion. This in fact is the approach of West-Germany[87]. The broad wording of many of the provisions cited above and the dynamics of the concept of the "militant democracy" should be reason for caution. As nazism as well as fascism is a very complex phenomen this might have been an appropriate solution for West-Germany. But it must not be a good approach for South Africa. It might even be an unnecessary one, for the concept of racism is much more focussed and well defined than the concept of fascism and nacism. The anti-democratic potential of broad provisions protecting state and government as such is high; therefore they should be formulated as narrowly as possible. The combination of anti-racism with anti-fascism and anti-nacism in the "Constitutional Guidelines" of the ANC therefore seems to be a problematic approach[88].

3. The means to reach the end: the statutory level

The wide range of means to reach the goals named above is illustrated by the post-war development in West-Germany. The anti-democratic potential inherent in much of the legislation did not realize itself on a large scale; many reasons could be given for that. The experience of the devastating results of a totalitarian regime, the supervision of the Allies, the involvement of Germans in the reconstruction of the country and last but surely not least the quick economic success and the following social stability.

---

[87] The reasons for it are much more complex: the influence of the Cold War which shifted attention to the communist threat, integration of West-Germany into the Western Alliance etc.

[88] In addition to that we should consider that nacism in the form it occured in Germany probably has the characteristics of a single and unique historical event and it is not all too clear why South Africa should have a reference to that in its constitution, even when there are active nazi groups present.

We do not know yet if South Africa will have the chance to restructure its society in an equally stable environment. There are reasons for serious concern in this respect: economic uncertainty of the effects of a change of government, political power struggles, tribal conflicts etc. Safeguards against the anti-democratic potential inherent in all kinds of "thought control" legislation are indispensable. These are mainly: careful (narrow) formulation of the substance of the laws, procedural checks and balances against abuse and a reliable administration to enforce the laws.

a) Careful formulation means that we should concentrate on prohibitions of racist speech and should not embrace, e.g., the anti-totalitarian approach of the West German legislature or the "harassment by vilification" approach of the recent U.S.-campus debate[89]. These approaches are based on a different rationale than the protection against advocacy of racism and do not share the special justification of free speech limitations derived from South African history and the function of its post-apartheid constitution. It is doubtful therefore if the potential for inter-tribal conflicts in post-apartheid South Africa can and should be dealt with through provisions against racist ideology.

b) As important as careful formulation of laws putting restrictions on free speech seem to be procedural safeguards, 'checks and balances', which can assure that the often unavoidable breadth of constitutional and statutory provisions do not allow to suppress political opposition and violate fundamental human rights and that the necessary exception from free speech does not become the rule. E.g., it seems to be positive to concentrate jurisdiction for these cases on the higher courts in order to prevent regional contradictory decisions and to have more control on the courts making these difficult decisions. This becomes especially important when measures such as the prohibition of a (racist) political party is in question. That this would be a legitimate measure seems to be without doubt; the problem is the appropriateness and implementation of the measure: do we prohibit parties, which have a racist program, which deny membership on a race-based criterion, which by matter of fact have only members of specific races in their ranks, or which have a racial bias in their higher ranks? All these special problems cannot be analyzed within the scope of this paper.

c) Perhaps most important is the existence of an administration and a judiciary that is able to deal with the anti-democratic potential of "thought control"-legislation in a responsible manner. This requires (criminal) prosecution of individuals which have participated in (racially motivated and other) crimes committed under the current government; it will also require deplacement of civil service officers and other personnel involved in non-criminal racist activities[90]. In the latter

---

[89] See footnote 66.

[90] The enforcement problems of some South American countries, e.g. Argentina, concerning the prosecution of crimes committed under military rule, seem to be fairly different in some respect and cannot be dealt with

cases a more careful approach might be necessary in order not to create a strong potential of permanent opposition to the new order. As the future structure of the public service is concerned, a strictly enforced disciplinary law for the public service against racist outbursts of employees seems to be appropriate; it could prevent not only openly racist acts, but already seemingly racist acts and speech. On the other side the personal protection of members of the public service against racist attacks should not only be dealt with as an individual matter of the employee, but as an attack against the anti-racist character of the post-apartheid South African state.

C. FINAL REMARKS

Racist and nazi ideology will not disappear by force of law. People will have to combat it and a succesful struggle aganist it will largely depend on them and how they work inside and outside the institutions. A narrowly defined and cautiously enforced legislation against racist ideology must not interfere with the ideal of a democratic state with respect for the freedom of opinion and freedom of speech. Well focused legislation and strict enforcement of such legislation can help to create identification with the new political order which will eventually need such identification as a source of stability in the process of transition.

---

here.

APPENDIX

A formulation for a constitutional provision against advocacy of racism could be

"THE ADVOCACY OF RACISM

AND

ANY ADVOCACY OF NATIONAL, RACIAL, OR RELIGIOUS HATRED THAT CONSTITUTES INCITEMENT TO DISCRIMINATION, HOSTILITY, OR VIOLENCE

SHALL BE OUTLAWED.

ORGANIZATIONS AND POLITICAL PARTIES,

WHICH PROMOTE AND INCITE RACIAL DISCRIMINATION,

SHALL BE UNCONSTITUTIONAL.

THE [SUPREME COURT] SHALL DECIDE ON THE QUESTION OF UNCONSTITUTIONALITY

DETAILS SHALL BE REGULATED BY THE LAWS."

The formulations are chosen in regard of the international covenants mentioned on p. 4 f. Note the distinction between mere advocacy and incitement in the first phrase. The second part seems more a question of political and constitutional soundness to me; instead of directly outlawing these organizations a procedure is chosen which allows for more flexibility according to the political necessities of the situation. The precise consequences of unconstitutionality when declared by the [Supreme Court] can be regulated in a statute. It should be taken care that only organizations for which racism is an essential part of their political agenda can be outlawed.

Anti-racist provisions dealing with the media and the public authorities (civil service etc.) should be designed only in regard to the whole context and structure of the constitution, which is not available yet. Provisions protecting the free and democratic structure of the society as a whole should also not be designed isolated from the whole context. Therefore I do not deal with them here.

Other