

CONSTITUTIONAL ISSUES IN POST-APARTHEID SOUTH AFRICA:

OUTLAWING RACIST IDEOLOGY

A. Anti-Racism and the Function of the Constitution

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C. Final Remarks

 Criminal Code:

§ 86 "(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...

§ 92 II: "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."

EXCERPTS FROM THE WEST GERMAN CRIMINAL CODE

Article 130

BASIC LAW (1949) :

Article 1 (Protection of human dignity)

(1) The dignity of man shall be inviolable. To respect and protect it shall be the duty of all state authority.

Article 5 (Freedom of expression)

(1) Everyone shall have the right freely to express 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 censorship.

(2) These rights are 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, shall be free. Freedom of teaching shall not absolve from loyalty to the constitution.

Article 9 (Freedom of association)

(1) All Germans shall have the right to form associations and societies.

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

Article 18 (Forfeiture of basic rights)

Whoever abuses freedom of expression of opinion, in particular freedom of the press (paragraph (1) of Article 5), freedom of teaching (paragraph (3) of Article 5), freedom of assembly (Article 8), freedom of association (Article 9), privacy of posts and telecommunications (Article 10), property (Article 14), or the right of asylum (paragraph (2) of Article 16) in order to combat the free democratic basic order, shall forfeit these basic rights. Such forfeiture and the extent thereof shall be pronounced by the Federal Constitutional Court.

Article 139 (Liberation Law)

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.

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 three months to five years.

Article 131

Representation of violence. Instigating race hatred.

(1) Whoever

1. disseminates,
2. publicly exhibits, posts, presents, or otherwise makes accessible,
3. offers to, leaves with, or makes accessible to a person below the age of eighteen, or
4. produces, subscribes to, supplies, stocks, offers, announces, recommends, undertakes to import into, or export out of, the territory in which this law applies, in order to use them, or pieces derived from them, in the manner indicated in 1 to 3 above, or to enable others to do so.

writings (art. 11, para. 3) that incite to race hatred or describe cruel or otherwise inhuman acts of violence against humans in a manner which glorifies or minimizes such acts of violence or represents the cruel or inhuman aspects of the occurrence in a manner offending human dignity, shall be punished by a term of imprisonment of up to one year or by a fine.

(2) The same punishment shall apply to any person who disseminates a presentation with the contents indicated in paragraph 1 by means of broadcasting.

(3) Paragraphs 1 and 2 are not applicable when the act is in the service of reporting on current events or history.

(4)

Article 185

Insult. Insult shall be punished by imprisonment for a term of up to one year or by a fine, and, if the insult is committed by a physical act, by a term of imprisonment of up to two years or by a fine.

Article 21 (Political parties)

(1) The political parties shall participate in the forming of the political will of the people. They may be freely established. Their internal organization must conform to democratic principles. They must publicly account for the sources of their funds.

(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.