*Translation by Lothar Letsche (berufsverbote.de) of the article by Klaus Dammann: Berufsverbote und Europäische Menschenrechtskonvention. Rechtliche und politische Konsequenzen. In: Ralf-M. Marquardt/ Peter Pulte (ed.): Mythos Soziale Marktwirtschaft. Arbeit, Soziales und Kapital [Festschrift für Heinz-J. Bontrup] Köln: PapyRossa **2019** (ISBN: 978-3-89438-692-4), pp. 107-122, - and (slightly shortened) in: Heinz-Jung Stiftung (ed.): Wer ist denn hier der Verfassungsfeind? Radikalenerlass, Berufsverbote und was von ihnen geblieben ist. Köln: PapyRossa **2019** (ISBN 978-3-89438-720-4) pp. 90-100.*

We mourn the death of the author, who passed away in January 2020. The following text is based on a translation made during the author's lifetime for intended publication in some English-language journal. Not all headlines and footnotes which were inserted in this translation appear in all German publications of this article.

"Berufsverbote" (Occupational bans in Germany) and the European Convention on Human Rights

Some legal and political implications

by Klaus Dammann

More than 45 years ago, a dark chapter of West German history started in the Free and Hanseatic City of Hamburg: occupational bans in the public services, referred to as "Berufsverbote" in German and also in other languages. In autumn 1971, the Senate of Hamburg, led by First Mayor Peter Schulz, first tried to impose such bans on two teachers: Heike Gohl and Ilse Jacob[*]. Peter Schulz, then the City's First Mayor and Senator of Justice – later known as the Hanseatic City's attorney during the trial – sneered at the two teachers as "fascists in red varnish". A storm of democratic protest was able to stop these first attempted persecutions on the grounds of political conviction – spontaneous protest triggered mainly by the fact that Ilse Jacob's father [Franz Jacob] was a Communist resistance fighter, a leading member of the "Saefkow-Jacob-Bästlein Organisation", murdered by the Hitler fascists.

1. The 1972 "Decree on Radicals" (or "extremists") and its administrative implementation

On 28 January 1972, [West] German Chancellor Willy Brandt and the Prime Ministers of the [then existing West] German states adopted the so-called "Decree on Radicals" *(Radikalenerlass)*. This decree made no change to existing constitutional law or legislation covering public servants of the Federal Republic or its states. But it did regulate procedures for handling applications for, or employment in, the public service of members of political parties or organisations which were deemed "hostile to the Constitution". The decree provided guidelines for the classification of parties or organisations as "hostile to the Constitution", and made clear that, as a standard procedure, all applications for the public service had to be

[*] *The name is misspelt in the German publications of the article.*

screened *("Regelanfrage")* by the domestic intelligence service, the so-called "Offices for the Protection of the Constitution" *("Verfassungsschutz").* Later, this screening procedure was extended to the private sector in areas considered "relevant to security". So this decree triggered a machinery of persecution by authorities of the state, and assigned a specific role to the intelligence service. Authorities that dealt with applications requested dossiers on applicants from the"Office for the Protection of the Constitution". If a dossier stated, for example, that the applicant was a member of the German Communist Party (DKP), had been nominated for that party in any election, or carried out any activities in this context, the applicant was summoned to a "hearing". In the early stage of introduction, the authorities even tried to exclude legal representatives of the applicants from such hearings, arguing, with some cynicicm, that these were talks of a very personal nature, like a medical examination, where no one would request the presence of legal counsel. It was only by injunctions or provisional orders of courts that applicants gained the right to be accompanied by a solicitor when they went to a hearing.

During such hearings, applicants were confronted with what the "Protection of the Constitution" dossiers contained – in many cases, this was false information. Applicants were questioned about their membership of political parties or organisations, nominations for elections, activities in and for political parties, participation in political events or demonstrations. Some such questions were indeed of a very personal nature like: "Are you married to a Communist", or: "Do you share an apartment with a Communist"? Non-appointment to the public service or even removal from the public service were the stereotype decisions that were taken if the respective person did not credibly and strongly distance himself/herself from the respective party, of if s/he even took the position that such questions about membership or activities for a legal political party were inadmissible under the privilege for political parties (Article 21, section 2) and the ban on discrimination (Article 3, section 3) in the Basic Law (Constitution) of the Federal Republic of Germany. *Simply* "distancing oneself" was rejected as insufficient, alleging that that person was "only paying lip service". All measures taken in the context of occupational bans were based on the stereotype allegation that the respective persons "lacked loyalty to the Constitution".

2. Different jurisdiction in the German states (Länder)

In a situation when the authorities - executive bodies - regularly turned down applications, or even fired public servants from their jobs, it was for the courts to decide what should be done. In the early years, we had some quite courageous decisions taken by some labour courts and administrative courts, even the Federal Disciplinary Court.[1] The State Labour Court of Bremen[2] ruled twice that the ban against the social education worker Horst Griese was unlawful - even after the Federal Labour Court *(Bundesarbeitsgericht)*[3] had rescinded the judgment of the local Labour Court and referred the case back to the State Labour Court.

The Labour Court of Oldenburg[4] reinstated a teacher to his job by referring to Convention No. 111 of the International Labour Organisation (ILO) concerning "Discrimination in Respect of Employment and Occupation." The Federal Disciplinary Court *(Bundesdisziplinargericht)*[5] had initially argued that a distinction had to be made between "constitutional" short-term objectives of the German Communist Party and the party's "unconstitutional" long-term objectives, and that members that insisted on its legality were "in error" if they focussed on the party's short-term objectives. But the Federal Administrative Court *(Bundesverwaltungsgericht)* based its judgment of 10 February 1975[6], which concerned the teacher Anne Lenhart and served as a guideline for other courts, on an extremely restrictive interpretation of the "loyalty to the Constitution" owed by civil servants. The Senate of the *Bundesverwaltungsgericht* used the phrase that a person's "inner confession" ("inneres Bekenntnis"), expressed by membership of a party and activities in the framework of that membership" were the yardstick for assuming that a civil servant lacked the loyalty owed by him or her.

A few months later on 22 May 1975, the ruling of the Federal Constitutional Court *(Bundesverfassungsgericht)*[7] on so-called "extremists" pointed out that, on the one hand,

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[1] More details on these first decisions of local and appeal courts, with references:: *Paech*, N. & *Kutscha*, M, Risse im Monolith – Zum aktuellen Stand der Berufsverbotsrechtsprechung, in: DuR, 1983, vol. 4, p. 420 ff.; *Brändle* , M., Wechselbad – Zur aktuellen Rechtsprechung in Berufsverbotesachen, in: DuR, 1987, vol. 4, p. 444 ff.; *Brändle*, M. & *Dammann*, K., Flickenteppich – Zur aktuellen Lage in Sachen Berufsverbote, in: DuR, 1989, vol. 1, p. 67 ff.

[2] LAG Bremen, DuR 1974, p. 217 f.; LAG Bremen, DuR 1978, p. 106 ff.

[3] BAGE 28 (1975), p. 62 ff.

[4] ArbG Oldenburg, DuR (1987: 452 ff.) The Presiding Judge of the Second Chamber of the Labour Court of Oldenburg, Ms Colneric, who was responsible for this judgment, was later (2000-2006) a Judge of the European Court of Justice at Luxembourg, and before that President of the State Labour Court of Schleswig-Holstein.

[5] BDiszG – III VL 26/80 – judgment of 11.11.1980; Paech and Kutscha (1983: FN 1, p. 421 f.).

[6] BVerwG, NJW 1975, p. 1143.

[7] BVerfGE 39 (1975), 334 ff.

"removal from service is only possible on the grounds of a concrete offence against the civil servant's duties," and that each case of an applicant had to be assessed individually. The existence of a political opinion would never be sufficient on its own, but membership of and activities for a party deemed anti-constitutional might justify "doubts" in that person's loyalty to the Constitution. The crucial point here, in terms of constitutional law, is the fact that the Federal Constitutional Court undermined the privilege for political parties enshrined in Article 21 section 2 of the German Basic Law. The Court legitimised the use of the term "inimical to the Constitution" (or "hostile to the constitution") - a phrase used in political debate -, whereas constitutional law only contains the notion of the "unconstitutional character" of a political party. A party can be declared "unconstitutional" by the Federal Constitutional Court. It is not this Court that will "deem" a party "inimical to the Constitution," but the Executive, the Federal Government - and such labels find expression in the annual reports of the "Offices for the Protection of the Constitution" *("Verfassungsschutz").*

On the basis of "individual assessments," as demanded by the Federal Constitutional Court, various German courts of different types dealt with a number of "disguised party ban" cases, saying that activity of a person in a party labelled as "inimical to the Constitution" gave sufficient grounds for the assumption that this person lacked the loyalty to the Constitution owed by civil servants. In contrast to the Federal Administrative Court *(Bundesverwaltungsgericht)*, the Federal Labour Court *(Bundesarbeitsgericht)* said that loyalty owed by an employee of the public service should refer to that person's function at work.[8] But in the case of teachers and social education workers, the stereotype allegation was that they would indoctrinate children, so in most cases, in practical terms, this court came to the same results as the Federal Administrative Court. Justice in the Federal Republic of Germany has failed miserably on this issue.

3. Berufsverbote in the context of international legal disputes

In 1991, a complaint concerning a violation of human rights by Berufsverbot was submitted for the first time to the European Commission of Human Rights in Strasbourg (the relevant body at that time) by the teacher Dorothea Vogt, who had been appointed as a life-tenured civil servant and removed from her post. Similar proceedings could have been initiated in

[8] BAG 36, 344; BAG – 7 AZR 296/84 – 7 AZR – 41/85 – 7 AZR – 141/85 – 7 AZR 383/85 – 7 AZR 613/85 – judgments of 01.10.1987.

earlier cases, but those Germans who had been previously been affected by judgments of the Federal Administrative or Federal Labour Court had chosen not to lodge appeals to the country's Federal Constitutional Court on the grounds of breach of the Constitution. Such a step would have been necessary [prior to taking further legal action], because complaints based on breach of the European Convention of Human Rights will only be admissible if recourse to the national courts has been exhausted, including an appeal to the Federal Constitutional Court. Those affected who were members of the German Communist Party followed a recommendation of their party. The DKP was afraid - not unwarranted - that Berufsverbot cases at this level might turn into some sort of party ban proceedings in disguise. Dorothea Vogt chose not to follow this recommendation. In her case, the Federal Constitutional Court denied on 7 August 1990, the admissibility of a constitutional complaint because it had insufficient prospects of success.[*] Finally, the Court stipulated: "The assessment [of the subordinate Courts] will allow the dismissal to appear as still justifiable in terms of constitutional law."[9] This is an indication that the Court never dealt with the implications of ILO Convention No. 111, nor of the European Convention of Human Rights, and of Articles 10 and 11 of that Convention in particular.

In its report of 30 November 1993,[10] the European Commission of Human Rights came to the conclusion that - contrary to what the German Federal Constitutional Court had said - a violation had occurred of the freedom of opinion guaranteed in Article 10 and of the freedom of association guaranteed in Article 11 of the European Convention of Human Rights of 4 November 1950. The Commission's decision was taken with 13:1 votes. The Council of Ministers of the Council of Europe and the German Federal Government lodged an appeal against this decision at the European Court of Human Rights (ECHR). The subsequent proceedings of this court are remarkable in that initially a Small Chamber of nine judges dealt with the case, consisting of the President, Vice-President and seven judges drawn by lot. In January 1995, however, jurisdiction in this case was relinquished to a Grand Chamber with

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[*] *Translator's note:* This perhaps unexpected decision of the Federal Constitutional Court – not to start some "party ban proceedings in disguise", as Klaus Dammann put it, against the German Communist Party, which was what that party and many of its members had always feared -, came in the middle of discussions on German "unification", which took place on 3 October 1990.

[9] BVerfG – 2 BvR 2034/89 – decision of 7 Aug 1990 taken by the judges *Klein, Grasshof, Kirchhof*. In these proceedings of the Federal Constitutional Court, Ms Vogt's legal counsel was Gerhard Schröder, who was a short time later elected as Prime Minister of Lower Saxony, and later as Chancellor of the Federal Republic of Germany.

[10] European Commission of Human Rights: Report adopted on 30 November 1993, Complaint No. 17851/91 (Vogt/Germany). The author of the present article was one of Ms. Vogt's three legal counsels, both in the European Commission of Human Rights and the European Court of Human Rights proceedings.

ten additional judges drawn by lot, on top of the nine judges who had already been appointed. Under the rules which were in force at that time, this was possible in legal cases of fundamental importance. The judgment was delivered on 26 September 1995.[11]

Initially, the ECHR held "by seventeen votes to two that Article 10 of the Convention is applicable in the present case," it further held "unanimously that Article 11 of the Convention is applicable in the present case." It also held "unanimously that it is not necessary to examine the case under Article 14 of the Convention" taken in conjunction with the above named articles. The Court held by ten votes to nine that there has been a violation of Article 10 and Article 11 of the Convention. The Court further held by seventeen votes to two that the question of awarding just compensation was not ready for decision at that time. The parties were asked to reach a settlement by mutual agreement, which was reached in the course of a hearing on 22 June 1996.

To reach this decision, it was important for the ECHR that the individual concerned had already been a life-tenured civil servant at the time when disciplinary proceedings were started and when the dismissal took place. In previous judgments, the ECHR had decided that appointment to the public service - in contrast to existing employment situations - is not covered by the European Convention of Human Rights.[12]

In the Dorothea Vogt case, the ECHR came to the conclusion that her dismissal as a result of disciplinary proceedings was, in principle, "prescribed by law," - a dismissal being, in principle, a "legitimate aim as defined in paragraph 2" of Article 10 of the Convention. But this particular dismissal was not justified because the measure was "not justified in a democratic society." A relevant consideration for the ECHR's decision was the fact that the applicant had never been blamed for any misconduct, neither in performing her official duties nor outside the service. Her political activities for the German Communist Party were absolutely legal, because this party had not been banned by the Federal Constitutional Court. The ECHR states that the absolute and unrestricted nature of the duty of political loyalty "as construed by the German courts is striking. It is owed equally by every civil servant, regardless of his or her function and rank." It seems that outside the Federal Republic of Germany, a similarly strict duty of loyalty has not been imposed in any other Western European country. Even if the state demands loyalty to fundamental constitutional principles

[11] ECHR Judgment of 26.9.1995, Complaint No. 7/1994/454/535 (Vogt/Germany).
[12] ECHR Judgment of 28.8.1986, Complaint No. 4/1984/76/120 (Glasenapp/Germany); ECHR Judgment of 28.8.1986, Complaint No. 5/1984/77/121 (Kosiek/Germany).

from its civil servants, this requirement will always need to be measured in terms of the concrete function of the person concerned, and the concrete requirements and conditions of the respective occupation.

The ECHR judgment refers explicitly to the inquiry proceedings of the International Labour Organisation concerning Berufsverbote-style practices in the Federal Republic of Germany. In view of the rigid character of these practices, both by the administration and jurisdiction, a strong solidarity movement had emerged at the time both at the national and international level. From 1976, the World Federation of Trade Unions had repeatedly lodged complaints at the ILO. The WFTU's renewed 1984 complaint led to an inquiry by an Expert Commission, which had been set up by the ILO separately. In its report issued in February 1985, this Commission unanimously came to the conclusion that political loyalty owed in the Federal Republic of Germany did not refer to any requirements of specific occupations, but applied to any civil servant, only as a result of his or her legal status, without differentiation on the basis of his or her function. Demanding a similar loyalty of people with employee status would go far beyond what is permissible under Convention No. 111.

At the request of the Federal Republic of Germany, the ILO bodies formed an independent Commission of Inquiry, which carried out an extensive review of Berufsverbote practices in the Federal Republic of Germany. In its report, which was presented on 20 February 1987,[13] the Commission of Enquiry condemned the Berufsverbote as a violation of Convention No. 111, an impermissible discrimination in employment and occupation. The German Federal Government was asked to end all ongoing Berufsverbote-style proceedings and grant rehabilitation to those involved. The German Federal Government strongly opposed this condemnation of their policy, but did not submit the case to the International Court of Justice at The Hague, a step that would have been possible or even imperative under the rules of procedure. Evidently, the government feared that the International Court of Justice would confirm the report of the Commission of Inquiry. In the following years, the ILO Committee of Experts on the Application of Conventions and Recommendations regularly reminded the German Federal Government to observe Convention No. 111 in its country, and called on the government to end Berufsverbote-style policies and rehabilitate the individuals concerned.

[13] Report of the Commission of Inquiry appointed under article 26 of the Constitution of the International Labour Organisation to examine the observance of the (Employment and Occupation) Convention, 1958 (No. 111), by the Federal Republic of Germany, 03 February 1987

4. Effects of the ECHR judgment on German jurisdiction

The ECHR judgment is of great importance beyond the individual case. This decision has strengthened protection of the freedom of opinion and association under Articles 10 and 11 of the Convention, as far as these are covered by the Convention. Regrettably, the ECHR had excluded applicants for the civil service, recall and probationary civil servants from the scope of persons covered by the Convention. Nevertheless the ECHR judgment has various legally binding domestic implications. In Article 46 of the Convention, the signatory states undertake to abide by a final judgment of the Court in all legal cases to which they are a party.

Some contributors of legal literature have expressed the opinion that the narrow majority in the Vogt case would not justify talking about established law practice, so deviating from this judgment in domestic law practice would in their view be justifiable.[14] A different view is taken by Jutta Limbach, former President of the Federal Constitutional Court. She wrote in *Neue Juristische Wochenschrift* (NJW):

> "What is also different between the two courts, is their power of imposing sanctions. ECHR judgments are not directly binding for German authorities and courts. The German Federal Constitutional Court can revoke measures taken by public authorities if they are incompatible with the Basic Law. This is something which the ECHR cannot do. It can state that a law, judgment or measure taken by an authority is incompatible with the Convention, but it cannot cancel any of them. This does not mean, however, that the ECHR could not, in a material sense, assume a function in terms of constitutional law. For, on the one hand, the power of direct interference is not a requirement for thinking of a system that checks norms via constitutional courts. On the other hand, decisions taken by the ECHR have multiple effects on German law, even though it does not have a direct power to cancel norms or measures taken. It should not be taken lightly that a member state can be sentenced by the ECHR under certain conditions to pay compensation to a complaining party. In addition, ECHR decisions have great authority in the sphere of German law."[15]

Someone who goes even further is Georg Ress, a former German judge of the ECHR. He is of the opinion that, on the one hand, the European Convention of Human Rights is a case in point of Article 24 of the German Basic Law, thus taking precedence over national law, and

[14] *Häde*, U. & *Jachmann*, M., Mitglieder extremistischer Parteien im Staatsdienst – Zum Urteil des Europäischen Gerichtshofs für Menschenrechte vom 26. September 1995 -, ZBR 1997, p. 8.
[15] *Limbach*, J, Das Bundesverfassungsgericht und der Grundrechtsschutz in Europa, in: NJW, 2001, p. 2915.

that, on the other hand, on the basis of ECHR judgments the respective cases need to be reopened at the national level.[16]

Beyond Dorothea Vogt's individual case there are, in my opinion, legal implications not only for cases which have not yet been closed with legal force, but also for disciplinary proceedings against life-tenured civil servants which have already been closed, and also for closed proceedings against applicants for the civil service. The rules for disciplinary proceedings, both at the federal and state ("Land") level, contain explicit provisions for a formal reopening of proceedings. Paragraph 8 section 2 of the Federal Disciplinary Rules says that reopening is admissible if "new facts" are presented. According to general opinion, a change of jurisdiction of the highest courts - also appeal courts - does not constitute a "new fact." But the jurisdiction of the Federal Constitutional Court says that a change of this court's own jurisdiction will indeed create "new facts" in the sense of paragraph 97 (section 2, first sentence) of the Federal Disciplinary Rules.[17] This is the consequence of the binding character of the Federal Constitutional Court's judgments for other courts. In our opinion, ECHR judgments have an equally binding character and, accordingly, have to be taken into account as "new facts." The truth is, however, that all applications for reopening old cases were turned down without exception by disciplinary and administrative courts in Germany, including the Federal Disciplinary Court. The Federal Disciplinary Court underlines in a decision taken on 4 June 1998, that the ECHR's Vogt judgment was no "new fact" in the sense of disciplinary rules, not leaving room for any reopening of cases. The court went even one step further by saying:

> "If - as under existing law and jurisdiction - reopening proceedings cannot even be considered for applicants who have won an ECHR judgment establishing violation of the Convention, this will to no smaller extent apply to those who only refer to the reasons of an ECHR judgment as a framework of their argument in a different case. Reopening of proceedings that would break through the legal force is not possible in such cases either."[18]

Against these judgments, constitutional complaints were lodged with the Federal Constitutional Court. Sitting as a panel of three judges, the Court decided not to entertain

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[16] *Ress*, G., Wirkung und Beachtung der Urteile und Entscheidungen der Straßburger Konventionsorgane, in: EuGRZ, 1996, p: 350 ff.
[17] BVerfG NJW 1961, p.. 1203*; Köhler*, H. und *Ratz*, G., Kommentar zur Bundesdisziplinarordnung, 3. Auflage (1974) Frankfurt am Main, Annotation. 5 for § 97.
[18] BVerwG NJW 1999, S. 1649; *Dammann*, K., Menschenrechtslektionen, in: Ossietzky, 1998, No. 11, p. 330 ff.

these complaints, without stating any reason. The Court`s President Jutta Limbach was involved in several of these decisions.[19]

Against this Federal Constitutional Court judgments, complaints were submitted to the ECHR, which decided, also as a panel of three judges, not to entertain the complaints, on the ground that they had insufficient prospects of success. The ECHR stated that the interpretation of procedural rules was exclusively the competence of national courts, and that the ECHR was not authorised by the Convention to provide such interpretations.[20]

In this context, attention should be paid to a decision taken by the Upper Administrative Court of Hamburg on 7 December, 2001,[21] in the case of the customs officer Uwe Scheer (now retired). Disciplinary proceedings had been taken against Scheer because of his membership of the German Communist Party and electoral nominations by that party. On 1 June 1985, he was suspended from his duties. Confronted with imminent dismissal by the Federal Disciplinary Court, Scheer agreed to give up his civil servant status while accepting, at the same time, an appointment with employee status by the Upper Fiscal Authority of Hamburg. He worked on the same job as before his suspension. After the ECHR (Vogt) judgment of 26 September 1995, Scheer applied for reinstatement as a civil servant, but this was turned down by his employer. The Administrative Court of Hamburg also rejected the application, but the Upper Administrative Court ruled in its appeal decision that the fiscal authority had to reconsider the application at due discretion, bearing in mind the ECHR judgment of 26 September 1995, and the fact that Scheer gave up his civil servant status in 1992 under pressure from a judgment of the Federal Disciplinary Court which legitimised such dismissals of civil servants. The parties then reached an agreement that Scheer will leave the fiscal service with the status of an employee but will, in the same logical split second, retire with the status of a civil servant, retaining all rights resulting from that status. This will considerably increase his pension as a retiree.

A variety of different cases, which were all closed with legal force, has demonstrated that at the administrative and judicial level only individual cases can be reopened, mainly with negative results. What is really needed is a general legal clarification of the injustice done by German authorities. We should note that some of those who were affected by a Berufsverbot were later appointed or reinstated, although a great deal still needs to be done here. But we

[19] *Dammann*, K., Taube stumme Verfassungrichter, in: Ossietzky1999, No.2, p.54f.
[20] *Dammann*, K., Kein Sieg der Menschenrechte, in: Ossietzky, 2004, No. 2, p. 48 ff.
[21] OVG Hamburg – 1BF 134/01 – Judgment of 07.12.2001

should also note that, so far, there has never been any compensation for the injustice they suffered for many years. Although the standard screening procedure by federal and state "Offices for the Protection of the Constitution" was abolished with the exception of the State of Bavaria, the 1972 "Decree on Radicals" has never formally been scrapped.

5. Parliamentary initiatives at the federal level and in the states of Germany[*]

In a parliamentary democracy, it is primarily the decision-makers' job in the executive and legislation to remedy wrongful legal acts by removing them through corrective decisions, and to prevent unlawful or even unconstitutional acts. Normally, it is the genuine task of justice, including constitutional jurisdiction, to guarantee the constitutional order by exercising judicial review. But the history of the Berufsverbote demonstrates that various types of German courts and the country's Federal Constitutional Court have failed miserably on this issue. In this context, the importance of such international institutions as the ILO and ECHR cannot be valued too highly. It is true that there were some domestic political statements by politicians who soon after initiating the Berufsverbote practices spoke of their greatest error (Willy Brandt, then Chancellor of the Federal Republic of Germany) or of having given a whole generation the feeling of insecurity, and the need to prevent such a development (Hans Ulrich Klose, at that time First Mayor of the city state of Hamburg). But parliamentary initiatives with the aim of removing the injustice and providing compensation for the damage done to those affected only came relatively late.

In 1996, the Green Party MPs in the state parliament ("Landtag") of Lower Saxony initiated legislation to rehabilitate persons affected by Berufsverbot, but at the time this failed due to resistance from Social-Democrats who were in the same government coalition.

The Landtag of Baden-Württemberg adopted the following resolution on 18 May 2000:

> "The State Government is requested to accept all those affected by the 'Decree on Radicals' into the state service after case-by-case review, provided that they submit individual applications. The case-by-case review will also include those criteria which were in force at the time of removal from the public service or non-appointment, in the framework of due legality."

[*] This chapter is not contained in the book „Wer ist denn hier der Verfassungsfeind".

But this resolution of the state parliament did not lead to any new administrative or legislative regulation, only to a review of some individual cases of whether appointment of that person in the public service was now possible. On the contrary, as late as 2006, the Administrative Court of Karlsruhe turned down, with a decision of 10 March, 2006, a complaint by the secondary middle school teacher Michael Csaszkóczy who had not been accepted for the school service of the State of Baden-Württemberg. (The state education minister at that time was Anette Schavan.[*]) Mr. Csaszkóczy's appeal was successful. The Mannheim Senate of the State Administrative Court *(Verwaltungsgerichtshof)* of Baden-Württemberg ruled on 14 May 2007 [22] that the Karlsruhe Administrative Court's judgment had to be altered, and the school authority was instructed to reconsider the application, taking into account the Senate's legal opinion. Mr Csaszkóczy was appointed as a teacher and later promoted to the status of a life-tenured civil servant.

The Bürgerschaft (legislative assembly) of the state of Bremen debated in 2011 for the first time a resolution calling for rehabilitation of citizens affected by Berufsverbot, as did the Landtag of Lower Saxony in 2012. However, in both cases without success.[23]

On 18 January, 2012, the parliamentary party "DIE LINKE" (The Left Party) tabled a motion in the Bundestag (Federal Parliament of Germany), calling on the federal government to rehabilitate people affected by the "Decree on Radicals."[24] It demanded from the federal government in cooperation with the German state (Länder) governments

- to take all necessary measures for the rehabilitation of the people concerned and
- take steps that dossiers based on the "Decree on Radicals" be removed from the "Offices for the Protection of the Constitution," transferred to and analysed by the Federal Archive and made available to the people concerned and to academic research, and
- that a legal framework be provided for material compensation.

The Bundestag turned down this motion in its session on 9 February, 2012.[25]

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[*] As Minister of Education in Baden-Württemberg (till 2005), she was finally responsible for the appointment of teachers in that state. In 2013, she had to resign as Federal Minister of Education and Research after her former university had revoked her doctoral degree because of 'systematic and premeditated deception' (plagiarism) in her doctoral thesis. In 2014, she was appointed as German Ambassador at the Holy See.

[22] VGH Baden-Württemberg (Senat Mannheim) – 4 S 1805/06 – Judgment of 14.03.2007.

[23] Antifa (magazine of VVN-BdA) Supplement May/June 2016, p.3.

[24] Deutscher Bundestag, 17th legislative period, document 17/8376, 18.01.2012.

[25] Deutscher Bundestag, Die Beschlüsse des Bundestages (Resolutions of the Bundestag) 9.2.2012.

The Landtag (state parliament) of Lower Saxony passed a resolution on 15 December, 2016, [26]saying

- that the so-called "Decree on Radicals" was lifted in Lower Saxony by a decision of the "Red-Green" state government taken 26 June 1990, [27] and is no longer in force,
- that politically motivated occupational bans, spying on people and suspicions should never again serve as instruments of a democratic state under the rule of law,
- that the implementation of the so-called "Decree on Radicals" was an inglorious chapter in the history of Lower Saxony, and that these events are explicitly regretted.
- that the people affected in Lower Saxony had to suffer harm in various ways caused by "hearings" on their personal opinions, by Berufsverbot, long-lasting court cases, discrimination and in some cases unemployment,
- that respect and recognition are expressed to the people who were affected, thanking those who worked with great dedication for democratic principles, for example, in initiatives against the "Decree on Radicals" and Berufsverbot.

The resolution further states that

> "the State Parliament requests the state government to appoint a mandated person for the purpose of reviewing the careers and destinies of people in Lower Saxony affected by Berufsverbote, and potential opportunities for their political and social rehabilitation. With the participation of the people concerned and representatives of trade unions and initiatives, the State Officer should research the histories of people affected by occupational bans. Academic research into these questions should also take place and be integrated into this work. The aim is a political and social reappraisal, public presentation of the results and further use of these results in the context of political education in Lower Saxony."[28]

Based on this resolution, on 31 January 2017 the state government appointed a State Officer (working without directives) "for reviewing the destinies of people affected in the context of the so-called Decree on Radicals in Lower Saxony", and potential opportunities for their

[26] Unterrichtung über die Entschließung des Niedersächsischen Landtages vom 15.12.2016, 17th legislative period, 118th session, in: *Rübke*,J.,(ed.), Berufsverbote in Niedersachsen 1972 – 1990, Hannover 2018: 209f.
[27] Beschluss des Landesministeriums über die politische Betätigung von Bewerbern für den öffentlichen Dienst und Angehörigen des öffentlichen Dienstes gegen die freiheitliche demokratische Grundordnung; Abschaffung der Regelanfrage und Aufhebung des Radikalenerlasses vom 26.06.1990, Nds. MBl. 27/1990: 923.
[28] Niedersächsischer Landtag – 17th legislative period, document 17/7131, motion amending documents 17/1491 and 17/7064

political and social rehabilitation.[29] This State Officer performed her duties in an honorary capacity.

This resolution by a state parliament is to be welcomed, but it makes no mention whatsoever of legal redemption including compensation for financial losses suffered by these individuals in their careers and pensions. In the meantime, the State Officer – whose appointment was only a temporary one, ending on 31 January 2018 – published a documentation on "Berufsverbote in Lower Saxony 1972-1990."[30] Recommendations for the state government have not yet been presented to the public, so we will need to wait which measures will be recommended and to what extent they will be implemented.

6. Redesigning federal and state legislation[*]

Apart from the German states in which occupational bans were imposed, it will be the German federal government's and parliament's job to do away with the injustice caused by the executive, legislation and jurisdiction, compensating for all the damage done to the people who were affected, as a form of remedial action. Action will need to be taken at the federal level to ensure some standardization, to guarantee that in some states the level of compensation will not be not lower than elsewhere. The Bundestag should pass a law to remedy violations of Articles 10 and 11 of the European Convention of Human Rights in the context of Berufsverbote practices in Germany. This law should stipulate

- that the decree of 28 January 1972, taken by the Chancellor of the Federal Republic and the Prime Ministers of the States, all subsequent implementation decrees and regulations be revoked;

- that all administrative acts taken on the basis of the Chancellor's and the Prime Ministers' decree of the States of 28 January 1972, to the detriment of those who were affected be revoked *ex officio* or by the courts on application by individuals;

- that a commission be set up with a mandated person in order to review the careers of those affected by Berufsverbot, with accompanying academic research and consultation of relevant dossiers, with the aim of political and social rehabilitation, including an apology to those who

[29] Nds. Mbl. P. 180 StK – 201-01447/01-01-VORIS-20100
[30] "Berufsverbote in Niedersachsen 1972–1990," cited in footnote 26 – also published online
[*] This chapter is not contained in the book „Wer ist denn hier der Verfassungsfeind"

were affected, and explicit clarification that the proceedings taken at the time were unlawful and unconstitutional;

- that all files of the federal and/or state ministries that were involved - including those of the "Offices for the Protection of the Constitution" and other security agencies including the political police departments - be disclosed and archived, with accompanying academic research and the opportunity for those involved to inspect these files without restriction;

- that those who were affected be awarded full compensation as a form of remedial action, including the damage affecting their careers and full compensation for possible cuts of their pensions and related losses.

It would be desirable to build and sustain rank and file pressure from those who were affected and their initiatives, making the political parties - especially the Left Party, the Green Party, Social-Democratic and Free Democratic Party - aware of their obligation to take up these claims and liabilities in parliamentary legislation, and initiate legal regulations accordingly.