

## Appendix 3:

# Censorship in Germany? Never! Unless...

ANTON MÄGERLE

## Prologue

In German history, censorship unfortunately has been more of a rule than an exception. It was introduced by the Catholic Church in the form of the Inquisition. However, it was left to the well-known Austrian statesman Metternich to perfect the system of suppressing freedom of speech by means of a comprehensive spy and surveillance apparatus. Neither the German Empire nor the Weimar Republic were particularly soft in their dealings with unwelcome literature,<sup>1</sup> but the worst reputation was doubtless acquired by the Third Reich, which managed, within the twelve years of its existence, to black-list some 10,000 books. While these books were not burned, they did disappear from the shelves of bookstores, to be banished to library archives.<sup>2</sup>

But what is not nearly as well known is the fact that it was the Allied ‘liberators’ of Germany who staged the greatest campaign of book destruction that mankind had ever seen. Among the victims of Allied displeasure were 34,645 titles as well as, comprehensively, all school textbooks published between 1933 and 1945; not only were these no longer permitted to be printed and sold after the war – they also had to vanish from the archives of many libraries.<sup>3</sup> In the years from 1946 to 1952, the Soviet Occupation Power published four such lists (“*Liste der auszusondernden Literatur*”, or list of proscribed literature) of titles earmarked for destruction. In accordance with the instructions in the censors’ introduction to the second and third volumes, the first three of these lists also went into force in the western Occupation Zones.

## The German Constitution

In its Article 5, Section 1, Clause 3, the current German Constitution (Grundgesetz, or GG) prohibits censorship. Section 2 of that same Article, however, limits this freedom from censorship as per the regulations imposed by “*general laws*”, among other things. A fundamental human right can

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<sup>1</sup> For more see Claus Nordbruch, *Sind Gedanken noch frei? Zensur in Deutschland*, Universitas, Munich 1998.

<sup>2</sup> The opinions about this differ slightly: acc. to Dietrich Strothmann, *Nationalsozialistische Literaturpolitik*, 3rd ed., Bouvier, Bonn 1985, some 12,500 books, acc. to Dietrich Aigner, *Die Indizierung “schädlichen und unerwünschten Schrifttums” im Dritten Reich*, vol. XI of the *Archiv für Geschichte des Buchwesens*, Buchhändlervereinigung, Frankfurt/Main 1971, the number was less than 10,000.

<sup>3</sup> For some more details see, e.g., Martin Lüders, *Nation und Europa*, vol. 47(9) (1997), pp. 7-11. The list of all books banned by the Allies (*Liste der auszusondernden Literatur*) was recently reprinted by Uwe Berg-Verlag, Toppenstedt (Germany) 1983/84 (Deutschen Verwaltung für Volksbildung in der sowjetischen Besatzungszone/Ministerium für Volksbildung der Deutschen Demokratischen Republik (ed.) *Liste der auszusondernden Literatur. Index der in der sowjetischen Besatzungszone verbotenen Bücher nach dem Stand vom 1. April 1946; Erster Nachtrag zum Index der in der sowjetischen Besatzungszone verbotenen Bücher nach dem Stand vom 1. Januar 1947; Zweiter Nachtrag zum “Index” der in der sowjetischen Besatzungszone verbotenen Bücher nach dem Stand vom 1. September 1948; Dritter und letzter Nachtrag zum “Index” der in der sowjetischen Besatzungszone verbotenen Bücher nach dem Stand vom 1. April 1952*, 4 vols., Zentralverlag, Berlin (East) 1946-1948, 1953). It can be found completely at [who.org/censor/tA.html](http://who.org/censor/tA.html).

thus be suspended, at least theoretically, by everyday laws such as those of criminal law.<sup>4</sup> In this respect, the German Federal Constitutional Court (Bundesverfassungsgericht) has determined that “general laws” are such that do not prohibit a specific opinion, or freedom of speech per se. Furthermore, general laws may impose limits on a fundamental right only if doing so serves to safeguard another fundamental right. In accordance with the principle of proportionality, the benefits of both conflicting fundamental rights must be weighed against each other.<sup>5</sup>

Further restrictions imposed on freedom of speech by Article 5 Section 2 GG serve the protection of young people and of personal honor. According to rulings of the German Federal Constitutional Court, the core significance of the human right to freedom of speech is that censorship of publications is permitted only if these publications are at least a constant or typical source of endangerment to the young people who might read, hear or watch them.

Regarding injury to honor, the Federal Constitutional Court has ruled that such injury generally has not occurred if no insulting expressions have been used.

## Criminal Law

The German Criminal Code (Strafgesetzbuch, StGB) has at its disposal tools facilitating censorship, particularly in §§ 185, 189 and 130f. While §§ 185 and 189 (slander, disparagement of the memory of persons deceased) may be subsumed under the category of “injuries to honor”, §§ 130f. (incitement of the people, incitement to hatred) are a mixed grouping of injuries to honor, injury to human dignity (Article 1 GG), and endangerment of the public peace, a conceptual chimera which we shall not investigate in greater detail here.

The autumn 1994 revision of § 130 StGB (the so-called *Lex Deckert*) decreed, among other things, that it is a criminal offense

*“publicly or in an assembly, and in a manner likely to lead to a breach of the peace, [to] endorse, deny or trivialize any act committed under National Socialist rule [which was] of the type specified in § 220a Section 1 [i.e., genocide, A.M...]”*

This is precisely the scenario which the Federal Constitutional Court has actually ruled out: this law criminalizes a specific opinion about one detail of the history of only one single, past regime. From this perspective alone, this “*hastily passed and unthought-out*”<sup>6</sup> “*special law against freedom of speech*”<sup>7</sup> would seem to be unconstitutional, and it has been criticized commensurately in German legal subject literature, where it is described as being, in effect, “*an attack on the intellectual freedom of dissidents*”<sup>8</sup> and “*virtually the classic example of a norm [...] directed against a specific opinion.*”<sup>7</sup>

*“The legitimacy of this regulation is dubious at the very least. One can already question whether a lie is a criminal wrong at all; one must question whether the mere denial of a historical fact, in the absence*

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<sup>4</sup> Two recent studies of censorship in Germany, highly to be recommended: Jürgen Schwab, *Die Meinungsdictatur. Wie “demokratische” Zensoren die Freiheit beschneiden*, Coburg: Nation Europa Verlag, 1997, 338 pp.; Claus Nordbruch, *op. cit.* (note 1).

<sup>5</sup> The Federal Constitutional Court’s decisions were quoted from: Karl-Heinz Seifert, Dieter Hömig (eds.), *Grundgesetz für die Bundesrepublik Deutschland*, 2nd ed., Nomos Verlagsgesellschaft, Baden Baden 1985.

<sup>6</sup> Eduard Dreher, Herbert Tröndle (eds.), *Strafgesetzbuch*, 47<sup>th</sup> ed., Beck, Munich 1995, *Strafgesetzbuch*, 47<sup>th</sup> ed., MN 18 regarding §130.

<sup>7</sup> Stefan Huster, “*Das Verbot der ‘Auschwitz-Lüge’, die Meinungsfreiheit und das Bundesverfassungsgericht*”, *Neue Juristische Wochenschrift*, 1995, pp. 487ff., here p. 489.

<sup>8</sup> Daniel Beisel, “*Die Strafbarkeit der Auschwitz-Lüge*”, *Neue Juristische Wochenschrift*, 1995, pp. 997-1000, here p. 1000.

*of any characteristics of agitation, may be described and dealt with as incitement of the people, of all things.*"<sup>9</sup>

The concept of "denying" something which the state deems true is a new element in German criminal law and poses problems which it seems quite impossible for criminal procedure to solve. In order for denial to objectively constitute a criminal offense, it must be done deliberately; that is, the denier must *know* that he is not telling the truth and the judge must prove this knowledge, which in and of itself is already virtually impossible. But in order to be able to also punish (especially) the so-called 'criminals of conviction' who are convinced that they are telling the truth, the German judiciary has concocted an entirely new definition of intent:

*"In this case, intent can only be the knowledge that one's conviction puts one into conflict with that which 'general opinion' indisputably regards as a historical fact. Admittedly, in a state under the rule of law this places a system of criminal law based on guilt squarely at the crossroads [to criminal law based on arbitrariness]. Just as Auschwitz will ever remain a nightmare for the Germans, the 'Auschwitz Lie' will clearly remain the same for German criminal law."*<sup>10</sup>

However, the revised § 130 StGB includes regulations which even go considerably further. It criminalizes not only dissident views of certain aspects of National Socialist persecution of minorities, but in a sense anything and everything which could be considered incitement to hatred against population subgroups of potentially any definition. In this regard the foremost German criminal law commentary observes that this amendment means that practically any kind of criticism of population subgroups – however they are defined – can become a criminal offense, since the legal right that is supposed to be protected (the anti-discrimination rule) is rendered too general and vague in this Section.<sup>11</sup>

Furthermore, it also permits precautionary censorship, as it were, by providing for the confiscation of publications or other data carriers which are allegedly intended for distribution. The judiciary holds that the intent to distribute prohibited publications exists if a person has in his or her possession, more than one single copy of a data carrier.

That this new German law is difficult to reconcile with international human rights standards is a fact openly acknowledged by Germany's leading politicians, but it is excused by virtue of the country's particular history.<sup>12</sup>

## Indexing

The first step in the process of German censorship is the black-listing or "indexing" of, for example, a book or pamphlet. This indexing is done by the Federal Review Office for Youth-Endangering Media (*Bundesprüfstelle für jugendgefährdende Medien*, BPjM).<sup>13</sup> Until 2002, this authority could only become active after a complaint by, e.g., a public youth welfare department. However, a more restrictive law introduced in 2002 now allows this authority to index media without the need of a complaint. This indexing means that the black-listed work may no longer be advertised and that it may not be sold or otherwise made available to persons under 18 years of age. In

<sup>9</sup> Karl Lackner, *Strafgesetzbuch*, 21st ed., Munich, 1995, MN 8a regarding §130; the criticisms of this article are legion; cf. Hans A. Stöcker, *Neue Zeitschrift für Strafrecht*, 1995, pp. 237-240; Manfred Brunner, *Frankfurter Allgemeine Zeitung*, Aug. 17, 1994; Ernst Nolte, *ibid.*, Sept. 8, 1994; Ronald Dworkin, *Tageszeitung*, May 17, 1995; Horst Meier, *Die Zeit*, Sept. 15, 1995; Horst Meier, *Merkur* 12/1996: 1128-1131.

<sup>10</sup> Theodor Leckner, in Adolf Schönke, Horst Schröder (eds.), *Strafgesetzbuch*, 25th ed., Beck, Munich 1997, p. 1111.

<sup>11</sup> *Ibid.*, p. 1103.

<sup>12</sup> Federal Minister of Justice Edzard Schmidt-Jorzig, Ruge, *NeunzehnZehn*: "Ehrenschutz für Soldaten – Gesetz gegen die Meinungsfreiheit?", *3-SAT*, March 10, 1996, 19:10; same, *Mut*, no. 351, 11/1996: 32-35; Wolfgang Schäuble, *Frankfurter Allgemeine Zeitung*, April 24, 1996, p. 41.

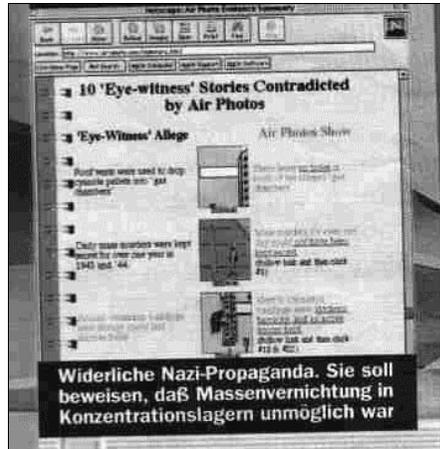
<sup>13</sup> Until 2002, this authority carried the name Bundesprüfstelle für jugendgefährdende Schriften, BPjS.

practical terms this means that the work ceases to exist for the public, as one can then legally learn of its existence only by private means – or, alternately, via the list of indexed works, which the BPjM regularly publishes in its *Report*. By now this list includes thousands of printed, audio and audio-visual works.<sup>14</sup> Once readily accessible by everybody, this *Report* is now sold only to libraries, wholesalers, and retailers, and even libraries have stopped giving free access to it, which renders the censorship activities of this authority more and more obscure. This tendency to hide its censorship activities was even more enhanced in 2002, when the law was changed so that media, which are regarded to be an especially severe threat to the mental development of young people, are now listed in secret lists. The victims of this secret censorship are media whose content violates German criminal law (libel, denigration of the dead, incitement to hatred, stirring up the people), which includes basically all revisionist literature.<sup>15</sup>

While the BPjM was initially created primarily to protect German youth from pornography and the glorification of violence, it has increasingly also engaged in the battle against politically or historically unpopular literature. As early as 1990 Eckhard Jesse, who is today a Professor of Sociology in Chemnitz, criticized that the BPjM had “in many ways turned out to be a gateway for one-sided anti-Fascism”<sup>16</sup> and that its measures are “difficult to reconcile with the principles of a liberal society [...], because, on principle, in an open society the printed and spoken word may not be stifled.”<sup>17</sup>

To date, this astonishing admission of the violation of human rights through censorship under the auspices of the Federal Constitutional Protection Office, which edited the contribution of Jesse, has received little attention.

The decision of German courts in the case of the book *Wahrheit für Deutschland* (Truth for Germany) has taken on a central significance where the BPjM’s practice of censorship is concerned. This book dealt in an allegedly unacademic manner with the question of who bears the blame for World War Two.<sup>18</sup> The BPjM black-listed it in the late 1970s. In 1994 the Federal Constitutional Court declared this black-listing decision unlawful,<sup>19</sup> but the BPjM promptly re-indexed the book



**Disgusting Hypocrisy:** The German soft porn magazine *Neue Revue* complains about pornography on the Internet and defames John Ball's strictly scholarly web site about interpretation of air photos from locations of the World War II as "disgusting Nazi-Propaganda" ([www.air-photo.com](http://www.air-photo.com)).

<sup>14</sup> The latest "comprehensive listing", *Gesamtverzeichnis indizierter Bücher, Taschenbücher, Broschüren und Comics, Stand 30.4.1993*, includes about 2,500 titles. Some 120 more have since joined the ranks. The list of indexed video tapes is about the same length. Added to this are several hundred electronic sound and data carriers. The current indexing lists are published in the periodical of the Federal Review Office for Youth-Endangering Publications, *BPjS aktuell*. To order: Bundesprüfstelle, Postfach 26 01 21, D-53153 Bonn, Germany.

<sup>15</sup> See the German government website [www.bmfsfj.de](http://www.bmfsfj.de) for more information.

<sup>16</sup> Eckhard Jesse, "Streitbare Demokratie und 'Vergangenheitsbewältigung'", in Bundesamt für Verfassungsschutz (ed.), *Verfassungsschutz in der Demokratie*, Carl Heymanns Verlag, Cologne 1990, p. 304, cf. p. 289.

<sup>17</sup> *Ibid.*, p. 287; cf. also p. 303: "Liberal society may not stifle or suppress the free exchange of ideas and points of view."

<sup>18</sup> Udo Walendy, *Wahrheit für Deutschland*, 3rd ed., Verlag für Volkstum und Zeitgeschichtsforschung, Vlotho 1976. Ref. 1 BvR 434/87.

on slightly reworded grounds.<sup>20</sup> The author's appeal against this, as well as his complaint to the Administrative Court of Cologne, were successful. According to the verdict the BPjM had failed to prove that the book posed a danger to the young people who might read it:

*"The BPjM fails to realize that it is precisely the possibility for open debate among different views which furthers the critical abilities of young people, and this demands free and unfettered discussion. Besides instruction in historical events, this requires particularly the critical examination of divergent views. In its considerations the BPjM has completely disregarded that this [...] can (perhaps) protect young people much more effectively from susceptibility to distorting portrayals of history than indexing can, which latter may even endow such opinions with a justified attraction."*<sup>21</sup>

However, this verdict, as well as the Federal Constitutional Court's previous verdict, also indicate that these principles do not apply if it is, for example, the historiography about the fate of the Jews in the Third Reich that is questioned. Such questioning, the argument goes, not only represents a scientifically blatantly incorrect opinion, it also glorifies National Socialism and disparages the Jews as a group. This does not by any means require that the publication in question verbally attacks the Jews or identifies itself with National Socialist ideology. Not even an open declaration of sympathy with the Jews and a condemnation of National Socialist transgressions in other respects will serve in the publication's favor if the factual nature of the Holocaust is questioned at even one single point in the work. German courts consider even one such occurrence to be adequate proof of a glorification of the National Socialist system and of an intention to slander the Jews.

To date, appeals against the black-listing of "Holocaust-denying" books have been uniformly unsuccessful, since German courts refuse all motions to bring evidence in such trials.<sup>22</sup> Documentation, however, is very fragmentary in this context. Older books which dispute the factuality of the Holocaust – such as *Geschichte der Verfemung Deutschlands* (History of the Defamation of Germany),<sup>23</sup> *Hexeneinmaleins einer Lüge* (Magic Square of a Lie),<sup>24</sup> *Feuerzeichen* (Fire signal)<sup>25</sup> or *Die 2. babylonische Gefangenschaft* (The 2nd Babylonian Captivity)<sup>26</sup> – are not to be found on the Index of the BPjM. On the other hand, one of the first books of this genre – a book that, regarding its style, must certainly be accorded scientific and academic credit, namely, *Der Jahrhundertbetrug*<sup>27</sup> (The Hoax of the Century) – was black-listed as early as spring 1979.<sup>28</sup>

A work issued by the publisher *Kritik-Verlag*, lately of Denmark, has achieved fame at least indirectly. In the early 1970s this publisher issued a brochure titled *Die Auschwitz-Lüge* (The Auschwitz Lie), in which a former German soldier described his experiences in Auschwitz, which are diametrically opposed to those recounted in the well-known eyewitness testimony.<sup>29</sup> At least in Germany

<sup>20</sup> *JMS-Report*, February 1/1995, pp. 52-54.

<sup>21</sup> Ref. 17 K 9534/94.

<sup>22</sup> In article 244 the German Code of Criminal Procedure provides for the option to refuse evidence if the point at issue is self-evident, which is a fundamental premise on the part of the courts, where the Holocaust is concerned ("judicial notice").

<sup>23</sup> Franz J. Scheidl, self-pub., 6 vols., Vienna 1967. Most of the books mentioned here can be found on the web site who.org, some of them even in an English translation (at least linked to).

<sup>24</sup> Emil Aretz, Verlag Hohe Warte, Pähl 1973.

<sup>25</sup> Ingrid Weckert, Grabert, Tübingen 1981; ordered seized and destroyed in 1995; in English: *Flashpoint: Kristallnacht 1938*, Institute for Historical Review, Newport Beach (CA) 1991.

<sup>26</sup> Steffen Werner, 2nd ed., Grabert, Tübingen 1991; ordered seized and destroyed in 1995.

<sup>27</sup> Arthur R. Butz; in German: Verlag für Volkstum und Zeitgeschichtsforschung; in English: *The Hoax of the Twentieth Century*, Institute for Historical Review, Newport Beach (CA) 1976, 1992.

<sup>28</sup> *Gesamtverzeichnis indizierter Bücher, Taschenbücher, Broschüren und Comics, Stand 30.4.1993*, p. 8: Index No. E 2765, *Bundesanzeiger* no. 95 of May 22, 1979.

<sup>29</sup> Thies Christophersen, "Die Auschwitz-Lüge", *Kritik* issue no. 23, Mohrkirch: Kritik Verlag, 1973, available today from Vrij Historisch Onderzoek, Berchem Belgium.

the title of this publication became the embodiment of what is otherwise known less polemically as Holocaust revisionism, *i.e.*, the thesis that there was no Third Reich policy of extermination of the Jews. A portrait of Thies Christophersen, the brochure's author, who was prosecuted in Germany and had fled abroad, was used in 1995 by Amnesty International as advertisement for free speech because even the most controversial of all opinions, namely the one that disputes the Holocaust, ought to be protected by the human right to freedom of speech.<sup>30</sup> The publication was not indexed until 1993, fully 20 years after its first publication.<sup>31</sup>

Since the 1994 tightening of criminal law no change has become apparent in the BPjM's decision-making process, and neither is any change necessarily to be expected, since the BPjM proceeds in accordance with the Law for Youth Protection (Gesetz zum Schutz der Jugend, or GjS), not with criminal law.

## Confiscations to 1994

The second stage of German censorship is the so-called confiscation (or seize-and-destroy) stage. This stage hardly registers with the public at all, and even Professor E. Jesse, whom we quoted earlier, seems either not to be aware of it or to ignore it. The confiscation of a publication takes place on the order of a court. What happens to the confiscated copies of such a publication is not quite clear, but it probably varies with the police station in charge. One publisher who is quite frequently the target of such book confiscations reported that he had been told that the books are burned under police supervision.<sup>32</sup> In one case the press reported that confiscated literature is being burnt in waste incinerators.<sup>33</sup>

According to information from the German Federal Government, and unlike for indexed works, there is no office or authority which publishes an even remotely complete list of confiscated books; similarly, the confiscation orders issued by the courts are not published anywhere.<sup>34</sup> Certainly every court that orders or revokes the confiscation of a publication is required to communicate its decision to the Federal Criminal Investigation Office (Bundeskriminalamt), which therefore ought to have a complete and current list, particularly as it serves the courts as information central regarding confiscation orders already issued.<sup>35</sup> However, these confiscation orders are published only every now and then in the *Bundeskriminalblatt*, a publication not readily accessible to the public. What goes for the public's review of black-listing does not go for the actual confiscation of the works in question. In this respect the public is left completely in the dark.

Although pornographic or pro-violent publications are also affected by confiscations, these are not discussed here, since the destruction of political or historical publications is a much more explosive issue from a human-rights point of view.

<sup>30</sup> The leftist *Tageszeitung* (Berlin) reported on this in a surprisingly fair manner, Dec. 12, 1995.

<sup>31</sup> *Bundesanzeiger* of Sept. 30, 1994.

<sup>32</sup> Wigbert Grabert, of Grabert Verlag in Tübingen, to the author.

<sup>33</sup> *Abendzeitung* (Munich), March 7/8., 1998: "The remaining copies are occasionally being burnt in a wast incinerator.", regarding R. J. Eibicht, *Hellmut Dirwald*; cf. *Zur Zeit* (Vienna), no. 9/1998 (Febr. 27): "65 years ago this happened publicly, today this is being achieved on the quiet in waste incinerators."

<sup>34</sup> Admission of the Federal Government, *Bundestagsdrucksache* 13/4222, March 26, 1996, p. 6. Gernar Rudolf tries to compile a list of books confiscated in Germany, see [who.org/censor/Censor.html](http://who.org/censor/Censor.html). Due to lack of official information, this list is necessarily incomplete. Links to confiscated books that are available online can be found there, so no further URLs are given for them in this article's footnotes.

<sup>35</sup> *Richtlinien für das Strafverfahren und das Bußgeldverfahren* (Guidelines for penal procedure and fining procedure), No. 208, II + IV; according to Gerd Pfeiffer (ed.), *Karlsruher Kommentar zur Strafprozeßordnung*, 3rd ed., Beck, Munich 1993, p. 2174.

Up to 1994 it was still possible to keep track of all the confiscated publications with political or historical content. The most spectacular case was no doubt the confiscation of the revisionist book *Der Auschwitz-Mythos* (The Auschwitz Myth). Due to the book's 'Holocaust-denying' theses, the author, a former judge, was stripped of his doctorate, and his pension was reduced.<sup>36</sup>

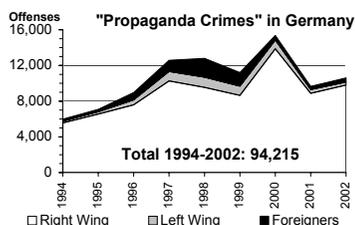
Another interesting case are the confiscations of the books published by the revisionist Jew Joseph Ginsburg, under the pseudonym J. G. Burg. His Holocaust-denying books also fell victim to German book burning, even though – being a Jew, and in light of the contents of his writings – he could hardly be accused of anti-Semitism.

Up to the winter of 1996, and where political and historical publications are concerned, the BPjM itself had listed the confiscation of only a few issues of the Swiss-based revisionist periodical *Der Eidgenoss*. The various issues of the revisionist periodical *Historische Tatsachen* (Historical Facts), on the other hand – which have long been subject to confiscation, and which are published by the same publisher whose book *Wahrheit für Deutschland* the BPjM has now been trying for over 20 years to ban – are not mentioned.<sup>38</sup> It was not until the spring of 1997 that the BPjM updated its list, particularly with four books by the Swiss revisionist author Jürgen Graf. With one exception, however, these books had all been confiscated before late 1994, and one had already been de-indexed again in 1995.<sup>39</sup> The BPjM itself is thus even less clear on the state of confiscations than is the author of the present article.

### Germany today: 94,215 Criminal Prosecutions Because of "Thought Crimes" During the Last Nine Years:

Year	Right	Left	Foreign	Sum
1994	5,562	185	235	<b>5,982</b>
1995	6,555	256	276	<b>7,087</b>
1996	7,585	557	818	<b>8,960</b>
1997	10,257	1,063	1,029	<b>12,349</b>
1998	9,549	1,141	1,832	<b>12,522</b>
1999	8,698	1,025	1,525	<b>11,248</b>
2000	13,863	979	525	<b>15,367</b>
2001	8,874	429	353	<b>9,656</b>
2002	9,807	331	467	<b>10,605</b>

- **Right:** "Offenses with right wing extremist background", that is: "Propaganda Offenses" and "Stirring up the People"
- **Left:** "Offenses with left wing extremist background", generally referred to as "other offenses"
- **Foreign:** offenses committed by foreign extremists, mainly against the German law of organizations ("Vereinsgesetz") by Kurds in the prohibited Kurdistan Liberation Army PKK<sup>37</sup>



*Especially right-wingers are  
persecuted in Germany.*

<sup>36</sup> Cf. Wigbert Grabert (ed.), *Geschichtsbetrachtung als Wagnis*, Grabert, Tübingen 1984; see also DGG, "Bundesverwaltungsgericht im Dienste der Umerzieher. Erstmals Doktorgrad aus politischen Gründen aberkannt", in *Deutschland Geschichte und Gegenwart* 36(3) (1988), p. 18 (online: [vho.org/D/DGG/DGG36\\_3\\_2.html](http://vho.org/D/DGG/DGG36_3_2.html)); DGG, "Unglaubliches Urteil im Fall Dr. Stiglich", *ibid.*, 36(1) (1988), p. 7 (online: [.../DGG36\\_1\\_1.html](http://.../DGG36_1_1.html)); DGG, "Verurteilt wird Unsinn ... Späte Rache für den 'Auschwitz-Mythos'", *ibid.*, 31(1) (1983), pp. 19f. (online: [.../DGG31\\_1.html](http://.../DGG31_1.html)); DGG, "Ende der Wissenschaftsfreiheit?", *ibid.*, 29(3) (1981), p. 38 (online: [.../DGG29\\_3\\_1.html](http://.../DGG29_3_1.html)).

<sup>37</sup> Bundesministerium des Inneren (ed.), *Bundesverfassungsschutzbericht* (Report of the German Office for the Protection of the Constitution), Bundesdruckerei, Bonn 1995-2002, quoting data as provided by the German Federal Bureau of Investigation (Bundeskriminalamt). Since the German government keeps changing the online addresses of their publications, only the addresses of the two latest reports are given here: 2001: [www.bmi.bund.de/Annex/de\\_20737/Verfassungsschutzbericht\\_2001\\_Pressefassung.pdf](http://www.bmi.bund.de/Annex/de_20737/Verfassungsschutzbericht_2001_Pressefassung.pdf); 2002: [www.bmi.bund.de/Annex/de\\_24336/Verfassungsschutzbericht\\_2002.pdf](http://www.bmi.bund.de/Annex/de_24336/Verfassungsschutzbericht_2002.pdf).

<sup>38</sup> However, the black-listing of two of these issues is mentioned: *Historische Tatsachen* no. 23 ("Zigeuner bewältigen eine 1/2 Million"), Decision No. 4208, *Bundesanzeiger* 204 of Oct. 31, 1991, and *Historische Tatsachen* no. 36 ("Ein Prozeß, der Geschichte macht"), Decision No. 4029, *Bundesanzeiger* 64 of March 31, 1990.

<sup>39</sup> Jürgen Graf, *Auschwitz. Tätergeständnisse und Augenzeugen des Holocaust*, Neue Visionen, Würenlos 1994; confiscated by the Mannheim County Court, 41 Gs 2626/94, released by the Mannheim District Court, 5 KLS 7/95.

## Confiscations after 1994

This ‘moderate’ confiscation policy changed radically after the revised § 130 StGB took effect on December 1, 1994. Even though the time from December 1, 1994 (the date the new § 130 StGB came into force), and mid-1997 (the authorship date of this article) is only two and a half years, the list of books ordered seized and destroyed during this period is about as long as that of the books which to our knowledge were confiscated in the previous 45 years of the Federal Republic of Germany’s existence.

It is important to note that in most instances the court case reference numbers given refer not only to the confiscation proceedings directed at the books themselves, but refer also to concomitant criminal trials of authors, editors, publishers, booksellers, sometimes even against the printers and multiple-copy purchasers of the publications in question. Criminal prosecution of the purchasers of prohibited publications is initiated even if the books were bought at a time when they were not yet prohibited. In actual fact almost all such trials are of this retroactive nature, *i.e.*, they deal with cases where books were bought before they were confiscated, since as a rule it is no longer possible to obtain the books at all after they have been violently withdrawn from the market.

In reply to an inquiry the Ministry of Justice of the Federal Land of Baden-Württemberg has stated that in the time between the end of 1994 and mid-1996, in Baden-Württemberg alone, there were 32 cases of preliminary proceedings being instituted against private individuals for their multiple purchases of such books.<sup>40</sup> Projected to cover all of Germany, this figure indicates some 250 to 300 such criminal cases.

Revisionist books which, to our knowledge, have not even been black-listed yet – such as *Feuerzeichen* or *Die 2. babylonische Gefangenschaft* – were not the only victims of this new wave of censorship. Books with strictly political content, such as *In Sachen Deutschland* (In the Matter of Germany) or *Wolfs-gesellschaft* (society of wolves), were also destroyed. Both these books deal in an unpolemic but rejective manner with the problems of multiculturalism and the supposed incompetence of German politicians. However, since this openly negative attitude allegedly represents incitement against the foreigners in Germany and against the establishment political parties and their representatives, in other words since the books endangered the internal peace of the Federal Republic, they were confiscated.

It is impossible to discuss every prohibited book adequately within the scope of this article. We shall therefore focus on only one case, namely the first seize-and-destroy order that was issued after the legal revision of December 1, 1994. This order was carried out in late March 1995 against the scientific handbook *Grundlagen zur Zeitgeschichte* (Foundations of Contemporary History, German original of this work), which deals very critically with the Holocaust. Since then, 1,000 persons, primarily from the ranks of academia, have spoken out publicly in support of de-indexing this book,<sup>41</sup> and two distinguished historians have even testified in court that the book is scientific and academic in nature and thus ought to be protected under Article 5 Section 3 of the Constitution, where freedom of research is guaranteed without limitations.<sup>42</sup>

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<sup>40</sup> Landtag (state parliament) of Baden-Württemberg, 12th session, Paper 12/334, Parliamentary question by Rep. Michael Herbricht REP, “*Appell der 500*” Stuttgart, Aug. 27, 1996. Position of the Baden-Württemberg Ministry of Justice, Stuttgart, Sept. 23, 1996, Ref. 4104 - III/185, Dr. Ulrich Goll.

<sup>41</sup> “*Appell der 100 · Die Meinungsfreiheit ist in Gefahr!*”, *Frankfurter Allgemeine Zeitung*, May 17, 1996; in the *Stuttgarter Nachrichten* and the *Stuttgarter Zeitung* on July 19, 1996, with 500 signatures; in the *Westfalen-Blatt* on Sept. 13 and 18, 1996, with 1,000 signatures each.

<sup>42</sup> Expert reports by Prof. Dr. Ernst Nolte and Dr. Joachim Hoffmann, Tübingen County Court, Ref. 4 Gs 173/95; the latter was published in *Vierteljahreshefte für freie Geschichtsforschung*, 1(3) (1997), pp. 205ff., see Appendix 2.

Meanwhile, the Ministry of Justice of Baden-Württemberg has announced that this constitutional provision is not sacrosanct. The Ministry has ruled that destruction of a scientific work is permissible if said work unduly restricts the fundamental rights of a third party.<sup>43</sup> This interpretation is not new, as the German Constitutional High Court decided already in 1985 in the matter of Wilhelm Stäglich/*Der Auschwitz-Mythos*, that the freedom of science is no longer granted when its results allegedly attacks the human dignity of Jews.<sup>44</sup> The implications of this are that scientists may not postulate certain theses and may not question or seek to refute certain establishment theses when this perhaps runs counter to Jewish interests. This ruling of the German Constitutional High Court is quite obviously a violation of human rights, for this interpretation strikes at the heart of the fundamental right to freedom of research, *i.e.*, the right to freedom of choice in the selection of one's theses and the right to openness of research findings (cf. Karl R. Popper<sup>45</sup>). Publications of subject specialists have confirmed that this approach is clearly unconstitutional.<sup>46</sup>

The trial concerning the book *Grundlagen zur Zeitgeschichte* – that is, concerning the freedom of its authors, editor, publisher, printer, sellers and buyers – will likely drag on for several more years and is indeed a crucial case which will contribute significantly to shaping the future course of human rights in Germany.

## Personal Fates

Naturally, every trial for printing, publishing or disseminating a prohibited work also involves at least one personal fate. Exactly how many persons have been punished in recent years for their will to disseminate publications which were outlawed afterwards is not known; the aforementioned figure of several hundred preliminary proceedings, however, would indicate that the number is substantial. In the following we shall touch on only four of the most prominent examples from recent years. (The corresponding court case reference numbers may be found with the entries for the books in question, in the appended list of confiscated books.)

First and foremost, we would mention the case of Günter Deckert, the former Federal Chairman of the German right-wing Nationaldemokratische Partei (National Democratic Party). This case even attracted international attention. As early as 1994 Deckert was sentenced to two years' imprisonment for having interpreted, in an assenting manner, an American speaker's English-language presentation which disputed the mass extermination of the Jews in Auschwitz.<sup>47</sup> This case has been partially recounted in the book *Der Fall Günter Deckert* (The Case of G.D.), co-edited by Deckert himself.<sup>48</sup> This book, in which Deckert supported his revisionist views with new arguments, as well as the sale of 50 copies of the revisionist anthology *Grundlagen zur Zeitgeschichte*, resulted in renewed proceedings against him, the bottom line of which was that he was sentenced to another 20 months' imprisonment in spring 1997. He is supposed to be released from jail in August 2000 – after almost 5 years.

<sup>43</sup> As a reaction to the appeal referred to in note 41 during the parliamentary session referred to in note 40, see IDN, “*Appell der 500' vor Landtag*”, DGG 44(4) (1996), S. 9f. (online: vho.org/D/DGG/IDN44\_4.html); VHO, “*Zur Wissenschaftsfreiheit in Deutschland. Justizminister Württemberg: Wissenschaftsfreiheit ist nicht existent*”, *Vierteljahresshefte für freie Geschichtsforschung* 1(1) (1997), pp. 34-37 (online: vho.org/VffG/1997/1/VHOWiss1.html)

<sup>44</sup> Federal Constitutional Court, ref. 1 BvR 408f./83, reprinted in W. Grabert, *op. cit.* (note 36), pp. 287ff.

<sup>45</sup> Karl Raimund Popper, *Objektive Erkenntnis*, 2nd. ed., Hoffmann & Campe, Hamburg 1984.

<sup>46</sup> Cf. also Daniel Beisel, *op. cit.* (note 8).

<sup>47</sup> Incidentally, this American citizen, Frederick A. Leuchter, was arrested in Germany shortly before he was to appear on a major German television show. He fled to the United States when he was released from pre-trial detention, to await his trial in freedom.

<sup>48</sup> G. Anntohn, H. Roques, DAGD/Germania Verlag, Weinheim 1995

The second-worst fate struck a long-time publisher from Vlotho, the academically accredited political scientist Udo Walendy. In December 1996 he was sentenced, in his last possible appeal, to 15 months' imprisonment for four issues (nos. 1 (2<sup>nd</sup> ed.), 59, 60 and 64) of his revisionist series *Historische Tatsachen*, a series which includes 77 issues to date. In May 1997 the County Court of Herford struck a supplemental blow, as it were, by sentencing Walendy to yet another 14 months' imprisonment for his issues 66 and 68. Subsequently, Walendy's license as a publisher was withdrawn in September 1999, so it is no longer permitted to Herrn Walendy to publish or distribute any media.<sup>49</sup> This case shows especially clearly how German censorship has escalated since the introduction of the relevant legal revisions in late 1994: while none of Walendy's issues had had any criminal consequences for the author prior to the revision, fully six of the twelve issues that appeared afterwards resulted in trials and convictions, even though neither the style nor the content of the periodical had changed in any way.<sup>50</sup>

Our third example is the fate of academically accredited chemist Gernar Rudolf, who also publishes under the pseudonym Ernst Gauss. For drawing up and disseminating a chemical and technical expert report known as *Das Rudolf-Gutachten* (The Rudolf Report), which claims to disprove the mass gassings in Auschwitz, he was sentenced in June 1995 to 14 months' imprisonment and has since been prosecuted and persecuted for authoring or editing various revisionist books and brochures (for example, *Grundlagen zur Zeitgeschichte, Prof. Dr. Ernst Nolte: Auch Holocaust-Lügen haben kurze Beine, Auschwitz: Nackte Fakten, Kardinalfragen zur Zeitgeschichte*, various issues of the Journal *Vierteljahreshefte für freie Geschichtsforschung*). He avoided his first prison sentence as well as the trial for editing the book *Grundlagen zur Zeitgeschichte* by fleeing into exile.<sup>51</sup> Wigbert Grabert, the publisher of the book *Grundlagen zur Zeitgeschichte*, was unable to avoid his punishment, and was fined DM 30,000.00.

And last but not least, we would mention the case of Hans Schmidt, an American citizen born in Germany. He is the head of a US-based right-wing organization that claims to represent the interests of the German-Americans in the United States. In this capacity he has for many years annoyed numerous prominent persons in Germany with Open Letters. When Schmidt visited Germany in the summer of 1995, he was held in custody, awaiting trial, for more than five months, since one of these Open Letters, in which he had described the German elites as "infested by Jews and Freemasons", allegedly constituted incitement of the people. Schmidt avoided prosecution by fleeing to Florida.<sup>52</sup>

The fact that there is no publicly accessible list of confiscated books makes it difficult in some cases to determine whether or not a confiscation order exists. Sometimes one only learns of confiscations by the various public prosecutors' offices in the course of full-blown criminal investigations. If proceedings are then stopped or abandoned for reasons other than supposed innocence (for example, a legally valid conclusion to the proceedings, lapse, or a consolidation with other proceed-

<sup>49</sup> Oberkreisdirektor Herford, ref. 32/33.31.10.

<sup>50</sup> U. Walendy has published a separate issue on his own case: *Historische Tatsachen* no. 69: "Ausgehebelte Grundrechte", and no. 77 "'Vv'-Strafhäftling Walendy", Verlag für Volkstum und Zeitgeschichtsforschung, Vlotho/Weser 1996/1999. Of course it is necessary, when reading this work, to distinguish carefully between facts and the author's opinions, which are perforce subjective.

<sup>51</sup> About Gernar Rudolf see Wilhelm Schlesiger, *Der Fall Rudolf*, Cromwell Press, London 1994; Herbert Verbeke (ed.), *Kardinalfragen zur Zeitgeschichte*, Vrij Historisch Onderzoek, Berchem 1996. Naturally, the need to distinguish carefully between facts and the subjective opinion of the author(s) applies in this case as well.

<sup>52</sup> Hans Schmidt has also reported on this: *Jailed in "Democratic" Germany. The Ordeal of an American Writer*, Milton/FL: Guderian Books, 1997, 490p. Again, it is necessary to distinguish carefully between facts and the author's subjective opinion. The Australian citizen Dr. Fredrick Toben shared Schmidt's fate in spring 1999 when he traveled to Germany in order to challenge the censorship of the German authorities. He was subsequently arrested and sentenced; see his website at [www.adelaideinstitute.org](http://www.adelaideinstitute.org).

ings, frequently accompanied by the withholding of evidence such as the confiscated books), the legal state of the confiscation proceedings – *i.e.*, with respect to the ‘weapon’, the book – often remains unclear. And quite a few of the censored publishers and authors are not very co-operative, as they do not want to see their case dragged into the public. They fear damage to their reputation, so they stay silent, too. Obviously, the general confusion regarding the law in matters of German book confiscations is a constant uncertainty factor for every publisher, bookseller and book buyer. For this reason a trend towards preventive self-censorship is becoming increasingly manifest in Germany: to avoid the incalculable risk of criminal prosecution, one is less and less inclined to pick up politically or historically hot potatoes which a judiciary might choose to single out as being right-of-center. This silent, hidden censorship is admittedly the most effective and thus the most dangerous one that can be. That in the long term this must bring catastrophic effects on social and political life in Germany seems not to interest anyone.

Now it does not really matter what one thinks of the theses advocated by this group of persons. The fact is that the human right to freedom of speech must be indivisible, as Professor R. Dworkin already put it in *Index on Censorship*.<sup>53</sup> And since none of the cases described here involved any calls to violence, instructions for violent acts, or trivializations of violence – at most, violence is disputed for certain historical events, or portrayed as less than generally usual in other accounts – the harshness with which the German judiciary proceeds against these dissidents is incomprehensible and unjustified.

If the cases described herein affected any other persons or groups, then there would be a worldwide outcry in the press, denouncing such human rights violations. But since the victims are after all only the *right* ones, the matter is ignored and hushed up. But from an objective perspective there is no difference between, for example, Communists and Jehovah’s Witnesses being imprisoned in the Third Reich for their beliefs, and right-wingers and Revisionists being thrown behind bars in the Federal Republic of Germany today for the sake of their publications. Human rights remain human rights. They go for leftist radicals just as for right-wingers.

Considering the results of a more comprehensive, highly recommended study about the deterioration of civil rights in Germany in general,<sup>54</sup> one must conclude that Germany’s tradition of free speech is rather underdeveloped. The general German attitude behind this – ‘tough measures are justified to prevent the repetition of this dark (Third Reich) chapter of our history’ – is understandable, but it is wrong, too, since it leads to the paradox and perverse situation where, in order to prevent the persecution of minorities and the burning of books, minorities are persecuted and books are burned. This is exactly the situation we are facing in Germany today. In light of her history, the only correct position for Germany to take would doubtless be the strict and impartial granting of human rights for everyone – and that is not to suggest that this time they ought to be denied the other side for a change, either. Obviously, where human rights are concerned, Germany is caught in a historical vicious circle, or, to use a different metaphor: the pendulum is swinging wildly from one extreme to the other. It is high time that it came to rest in the middle.

<sup>53</sup> R. Dworkin, “A new map of censorship”, in *Index on Censorship*, 1/2 (1994), pp. 9-15; cf. R. Dworkin, “Forked tongues, faked doctrines”, *ibid.*, no. 3 (1997), pp. 148-151.

<sup>54</sup> G. Rudolf, “Discovering Absurdistan”, *The Revisionist* 1(1) (2003), pp. 203-219 (online: [vho.org/tr/2003/2/Rudolf203-219.html](http://vho.org/tr/2003/2/Rudolf203-219.html)).