

# ANTIGYPSYISM IN PUBLIC DISCOURSES AND ELECTION CAMPAIGNS

Central Council of German Sinti and Roma  
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**CENTRAL** [of German  
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## **INSTRUMENTS FOR THE PREVENTION OF RACIST ELECTION PROPAGANDA**

The 2013 election campaign of the NPD (National Democratic Party of Germany) was characterised by racist election posters which were particularly targeted against Sinti and Roma. The efforts of civic organisations, activists and local politicians to curb the racist election campaign by political and legal means largely failed. As an increasing number of right-wing extremist and right-wing populist players are using racist statements to promote their inhuman politics, the question must be raised of the extent to which politicians and the judiciary have confronted the issues and taken appropriate steps on the basis of past experience. In particular, serious thought must be given to whether and to what extent it is at all possible to prevent a potentially racist election campaign. This article will start by showing the political developments since 2013 and then give a brief outlook.

### **SYMPOSIUM “BOUNDARIES IN THE POLITICAL DEBATE”**

The public relations work of the Central Council and the numerous discussions which were held during the election campaign by representatives of the Central Council on all political levels with regard to the prevention of racist electioneering sparked a wide-ranging debate amongst politicians and the general public. On 16th December 2014, there was a symposium with the title “Boundaries in the Political Debate”, which was hosted by the Federal Ministries of the Interior and of Justice and Consumer Protection, as well as the Federal Agency for Civic Education (BpB). As well as the federal ministers Heiko Maas and Dr Thomas de Maizière, the President of the BpB Thomas Krüger and the former judge of the German Constitutional Court Prof. Udo Di Fabio took part.

### **FEDERAL MINISTRY OF JUSTICE AND CONSUMER PROTECTION AND CONFERENCE OF THE STATE JUSTICE MINISTERS**

At the 86th Conference of the State Justice Ministers, there was a discussion of how to deal with a racist and discriminatory election campaign in item II.18 of the agenda. In a resolution, the justice ministers condemned the fact that resentment against minorities is repeatedly stirred up in a cynical and irresponsible manner and exploited for a party’s own election campaign purposes. In view of this, the Federal Ministry of Justice commissioned a report which examined the question of the extent to which the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) of the United Nations can be used for proceeding against racist election advertising. The report was prepared by Prof. Stefanie Schmahl, Chair for German and Foreign Public Law, Public International Law and European Law at the Julius-Maximilians-Universität Würzburg and put online on the website of the Federal Ministry of Justice. The academic report obtained was discussed in the agenda item at the 87th Conference of the State Justice

Ministers. The justice ministers noted that the report lists arguments for being able to use the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) of the United Nations, which applies in Germany with the status of a federal law, in order to take action against racist election campaigns.

## LEGAL REPORT ON DEALING WITH THE RACIST ELECTION CAMPAIGN POSTERS OF THE NPD –

### A SUMMARY

*The legal report<sup>1</sup> can be retrieved on the website of the Ministry of Justice and Consumer Protection. The following description only aims to act as a simplified summary and, therefore, does not meet the criteria of an academic paper. For a well-founded scientific discussion, you are recommended to read the original report.*

**The posters were taken down in local communities on the basis of the blanket clause in police law. This allows emergency measures to be adopted when there is a concrete risk to public order and security (for example an infringement of legislation). Local politicians who had issued a decree to have the posters taken down, on the basis of the blanket clause in police law, were forced by the court to hang them up again. The administrative courts justified their decision in particular with the argument that the offence of incitement to hatred (Section 130 German Criminal Code (StGB)) had not been committed. Regulations from conventions on human rights which have been ratified by Germany were not taken into account in connection with this.**

## APPLICABILITY OF INTERNATIONAL REGULATIONS FOR GERMAN LEGAL DISPUTES?

Human rights treaties which Germany has signed are part of the German legal system due to the provisions of the Basic Law. The constitutional law conveys the provisions of international law into the domestic legal system via the “bridge” of Art. 59 (2) Sentence 1 Basic Law (GG). Many provisions of the treaties are formulated sufficiently precisely and definitely to be directly legally applicable. Even with regard to the interpretation and application of police law, international commitments which Germany has entered into must be taken into consideration as part of the legal system.

## PROHIBITION OF RACIST PROPAGANDA IN THE INTERNATIONAL PROTECTION OF HUMAN RIGHTS

The prohibition of racial discrimination is a core element of the international protection of human rights. The international human rights treaties consider even damage to the general feeling of peace and security of the injured group of persons to be so significant that it has to be countered with prohibitions. The International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), the International Covenant on Civil and Political Rights (ICCPR) and the European Convention on Human Rights (ECHR) are particularly important.

<sup>1</sup> Prof. Stefanie Schmahl: Rechtsgutachten über den Umgang mit rassistischen Wahlkampfplakaten der NPD erstattet am 24. Oktober 2015 im Auftrag des Bundesministeriums der Justiz und für Verbraucherschutz, online

available: [http://www.bmjv.de/DE/Themen/Menschenrechte/GutachtenWahlwerbung/GutachtenWahlwerbung\\_node.html](http://www.bmjv.de/DE/Themen/Menschenrechte/GutachtenWahlwerbung/GutachtenWahlwerbung_node.html)

### ICERD and ICCPR

Racist propaganda is a specific variation of the forms of racial discrimination prohibited in accordance with the treaties on human rights. The forms of action prohibited by the ICERD include spreading ideas which are based on the superiority of one race or on racial hatred (Art.4 lit. a ICERD), as well as organised or other propaganda activities which promote or incite racial discrimination (Art. 4 lit. b ICERD). The prohibitions laid down in Art. 4 ICERD are addressed to the signatories of the Convention. Art. 20 (2) ICCPR expressly obliges the signatories to prohibit by law any propagation of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence.

The prohibitions laid down in Art. 20 (2) ICCPR and in Art. 4 in conjunction with Art. 2 (1) lit. b and lit. d ICERD unequivocally call on the signatories to not only refrain from spreading a racist ideology themselves, but also to ensure an end to attacks by private individuals who degrade, stigmatise or ostracise other people because of their ethnic origins. Racist remarks by private individuals trigger an obligation to act on the part of the state, which must aim at eradicating any incitement to discrimination through the dissemination of racist ideas.

### ECHR AND EUROPEAN CASE LAW

Neither the primary law of the EU nor the text of the ECHR contain explicit prohibitions of racist propaganda. In accordance with the guidelines laid down by the European Court of Justice in the “Feryn” judgement (judgement of 10th July 2008, Rs. C-54/07), however, the EU member states are obliged to make provision for effective and dissuasive sanctions even for racist remarks which do not relate to a specifically identifiable person. The European Court of Human Rights also regularly applies the abuse clause of Art. 17 ECHR to the freedom of expression of Art. 10 ECHR in cases of xenophobic hate speech and generally gives this a broad interpretation. Accordingly, the Convention does not protect any act “aimed at the destruction of the rights and

freedoms set forth in the Convention or at their limitation to a greater extent than is provided for in the Convention”. Therefore, no one who is calling for the fundamental and human rights of certain groups of people to be curtailed can invoke the freedom of expression.

### PROTECTION AGAINST DISCRIMINATION VS. FREEDOM OF EXPRESSION AND POLITICAL PARTIES

The German Constitutional Court assumes that the freedom of expression and the resulting contention between opinions is “an essential part” of a free democratic order. In democratic states, speech that shocks should, in principle, be answered by contradiction or other intellectual means and not by state regulation. The power of free public discussion is the foundation of a democratic society which relies upon the citizens forming and strengthening their critical faculties by engaging with different opinions. In this respect, controversial and objectionable minority views, in particular, which the majority finds unacceptable, even outrageous, must be subject to the protection of the freedom of expression.

However, not all barriers can be dropped. The expression of an opinion which aims at diminishing a person or a group of people because of their ethnic origins or other unchangeable characteristics and to deny them the basic right to human rights is not acceptable. Racial agitation negates the civility of people’s dealings with one another and counteracts the entitlements to equal treatment and equal participation which are guaranteed by human rights. The public expression of this kind of degrading and defamatory slogan is likely to reinforce prejudices and intolerance; it prepares the ground for exclusion of the victims of the attacks from communicative interaction and social integration. There are forms of hate speech which cannot be countered effectively enough with arguments and verbal retaliations. Racial agitation often triggers identity crises and serious mental consequences, such as anxiety, fear, dejection, social insecurity and depression, in its

victims. The painful and intimidating impact of racist statements also grows as they are repeated and systematically spread. Therefore, the prohibition of hate speech aims at effectively countering the so-called “silencing effect”, whereby ethnic minorities are “muzzled” by verbal intimidations and denied the fundamental right to equal freedom and participation in the purpose and functions of society. Understood in this way, a mutual respect for human dignity and the prohibition of racist propaganda are also constitutive elements of a stable liberal democracy.

If hate speech and xenophobic propaganda were permitted without limitation, there would be the risk that democracy and peaceful life would be poisoned from the roots. This is particularly the case because the globalisation and digitalisation of the living environment brings a high risk of racist remarks quickly spreading over state borders (so-called “spill-over effect”) and turning into real agitation. The most important reason for meeting public manifestations of racist discrimination with the coercive powers of the law is based on the relationship between such remarks and the use of physical violence. It is not uncommon for isolated racially discriminating statements to be the first step in a general pattern of behaviour of the incitement to racial hatred against a minority. Every individual incident of “hate speech” contains the inherent risk of growing into racist “mainstream talk” through indoctrination over time.

When racist ideas are spread methodically, this is not merely a matter of the symbolic presentation of convictions and opinions which remain in the intellectual sphere and can be combatted with intellectual means, but of current threats to specific groups of people and to peaceful co-existence. Anyone who systematically uses racist hate slogans in the public sphere is generally not interested in democratic discourse; they do not want any “contradiction”, but are instead aiming to exclude the victims of the verbal attacks from any discourse through intimidation.

Art. 21 (1) GG guarantees the political parties a special status under the constitution, and the Basic Law highlights the importance of the freedom of communication of political parties for the maintenance of the free democratic basic order. However, the parties are not excused from compliance with the applicable law. Instead, they are – like everyone – subject to the objective legal system, which includes the international treaties ratified by Germany which demand effective measures for the prevention of racist propaganda from their signatories.

The NPD will not be barred from election campaigning, as this would mean that a political party would be unlawfully disabled, which would not be compatible with the rules on the banning of parties in Art. 21 (2). It is only racist election propaganda which is carried out extensively and systematically in the public sphere which will be prohibited. The freedom of expression and political self-representation of the NPD remains unaffected in its essence.

## CONCLUSION

For the application of the blanket clause in police law, it is irrelevant that the election campaign posters do not commit the offence referred to in Section 130 StGB in the view of the administrative courts. Election campaign posters with the slogan “*Geld für Oma statt für Sinti und Roma*” (“Money for Granny instead of Sinti and Roma”) infringe prohibitions standardised under international law which are part of the German legal system. The systematic, intensive election poster campaign also denies Sinti and Roma participation as citizens with equal rights, and members of the minority group are disparaged. The result is a climate of opinion which is destructive to social cohesion and has a detrimental effect not only on the attacked minority groups, but also on the majority society. This is not compatible with the prevailing ethical and social views as indispensable conditions for an ordered co-existence. Thus, hanging up such posters poses a risk to public safety and order.

*“Historical experience teaches us that in every case of serious violations of human rights, the use of violence is preceded by a racist climate of opinion as a conditio sine qua non. It is true that forms of racist attitude cannot be eliminated by a prohibition of hate speech; it is not possible to force moral outlooks and ideas by means of law. The law can and must, however, control external behaviour, i.e. the expression of an attitude, if the dignity or personal rights of the victims and the ethical minimum requirements of a democratic community are at risk. Prohibitions of racist propaganda act, so to speak, as early warning systems for imminent danger situations.”*

**Quote from Prof. Schmahl’s report**

## **OUTLOOK: POSSIBILITIES FOR ACTION FOR A RACISM-FREE SOCIETY**

The findings of Prof. Schmahl’s report provide an important basis for argumentation for action against right-wing extremism. However, the Central Council has discovered time and time again, in political discussions with high-ranking politicians and in committee meetings with other civic organisations which are active in this area that the report is largely unknown. It is important that the judiciary, politicians and the administration are informed about and made aware of the legal possibilities which are available to them, so that there are no more errors of judgement and miscarriages of justice in favour of the right-wing extremists. Even when imposing sanctions under criminal law appears difficult under the present circumstances, decisive counteraction in the form of appropriate measures under police law is imperative, as protection from racial discrimination is a human right.

So that the negative experiences are not repeated, a provisional plan of action for the maximum realisation of protection against discrimination may look as follows:

1. The results of the legal report from Prof. Schmahl should be made better known.
2. Citizens should report election posters with racist content to the police authorities, in conjunction with the request to have them taken down.
3. (Local) politicians should initiate measures to end the racist propaganda after they become aware of it.
4. The awareness of the judges in administrative courts should be raised during further training events focussing on “the international protection of human rights”.
5. Both at university and in their practical training, lawyers should be trained in the area of the international protection of human rights.