DEVELOPMENTS

The Ban of Right-Wing Extremist Symbols According to Section 86a of the German Criminal Code

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A. Introduction

The rise of right-wing extremism in Germany since the beginning of the 1990s corresponds with an increasing number of propaganda offences, escalating from 8337 reported cases in 2004 up to 10881 in 2005.[1] Also, the provision against the use of symbols of unconstitutional organizations, Section 86a *Strafgesetzbuch* (Criminal Code [StGB]), became increasingly important. The following essay will explain the aims and structure, the constitutional background and the main practical problems of applying this prescription.

B. Wording of Law

The wording of Section 86a StGB is:
"(1) Whoever:
1. domestically distributes or publicly uses, in a meeting or in writings (Section 11 (3)) disseminated by him, symbols of one of the parties or organizations indicated in Section 86 (1), nos. 1, 2 and 4; or
2. produces, stocks, imports or exports objects which depict or contain such symbols for distribution or use domestically or abroad, in the manner indicated in number 1,
shall be punished with imprisonment for not more than three years or a fine.
(2) Symbols, within the meaning of subsection (1), shall be, in particular, flags, insignia, uniforms, slogans and forms of greeting. Symbols which are so similar as to be mistaken for those named in sentence 1 shall be deemed to be equivalent thereto.
(3) Section 86 subsections (3) and (4), shall apply accordingly."

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[1] *Bundesministerium des Innern*, VERFASSUNGSSCHUTZBERICHT 2005 (Berlin 2006), 34.

The wording of referred Section 86 StGB is:
"(1) Whoever domestically disseminates or produces, stocks, imports or exports or makes publicly accessible through data storage media for dissemination domestically or abroad, means of propaganda:
1. of a party which has been declared to be unconstitutional by the Federal Constitutional Court or a party or organization, as to which it has been determined, no longer subject to appeal, that it is a substitute organization of such a party;
2. of an organization, which has been banned, no longer subject to appeal, because it is directed against the constitutional order or against the idea of international understanding, or as to which it has been determined, no longer subject to appeal, that it is a substitute organization of such a banned organization;
3. of a government, organization or institution outside of the territorial area of application of this law which is active in pursuing the objectives of one of the parties or organizations indicated in numbers 1 and 2; or
4. means of propaganda, the contents of which are intended to further the aims of a former National Socialist organization,
shall be punished with imprisonment for not more than three years or a fine.
(2) Means of propaganda within the meaning of subsection (1) shall only be those writings (Section 11 (3)) the content of which is directed against the free, democratic constitutional order or the idea of international understanding.
(3) Subsection (1) shall not be applicable if the means of propaganda or the act serves to further civil enlightenment, to avert unconstitutional aims, to promote art or science, research or teaching, reporting about current historical events or similar purposes.
(4) If guilt is slight, the court may refrain from imposition of punishment pursuant to this provision."

C. Aims and Structure of the Law

Section 86a StGB, by reference to Section 86 (1), nos. 1, 2 and 4 StGB ties into the ban of unconstitutional parties and other organizations in order to protect the democratic rule of law by preventing the revival of those associations and their aims. For that purpose, in accordance with the jurisdiction of the *Bundesgerichtshof* (Federal Court of Justice [BGH]) Section 86a StGB prohibits the use of their symbols not only in a political but also in a general sense in order to avert social habituation to them. Additionally, it purports to safeguard political peace.[2] However, the

[2] 25 *BGH* ENTSCHEIDUNGEN DES *BUNDESGERICHTSHOFS* IN STRAFSACHEN (*BGH*St) 30, 33; 28 *BGH*St 394, 397; 47 *BGH*St 354, 359.

content of this latter term is not quite clear. The *BGH* constantly defines "political peace" as the reputation of the German state. Thus, both at home and abroad, even the impression of tolerance for extremist activities is to be avoided. Moreover the *Landgericht* (Regional Court [LG]) *Frankfurt am Main* considered political peace already to be disturbed by stultification and belittlement of National Socialism, which merely created annoyance[3]. In effect the *LG's* opinion defines political peace as a state of tranquillity founded on the fiction of common social consensus. But in a pluralistic society, there is no legitimate interest in such a state as an end in itself. Therefore, the *LG's* interpretation goes beyond the meaning of the wording of the provision.

Exceptions for certain kinds of tolerable use are provided in Section 86a (3) StGB in connection with Section 86 (3) StGB. With regard to the latter, Section 86a StGB may be called an organization-related provision[4]. Furthermore Section 86a, according to its wording, is a potentially endangering offence[5]. This is defined as conduct typically capable of bringing a dangerous situation into existence, even if in any given case the subject of protection is not actually exposed to the danger concerned.[6]

D. Constitutional Background

As decided by the *Bundesverwaltungsgericht* (Federal Administrative Court [BVerwG]), the licence to show one's opinion by using a certain symbol is protected by the freedom of expression according to Article 5 (1) sentence 1 *Grundgesetz* (Basic Law, the German Constitution [GG]).[7] The extent of protection includes even

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[3] *Landgericht* (Regional Court) *Frankfurt am Main,* NEUE ZEITSCHRIFT FUER STRAFRECHT (NStZ) 187, 188 (1986).

[4] Troendle and Fischer, § 86a in: STRAFGESETZBUCH (53rd ed., 2006), margin number 2.

[5] 23 *BGH*St 267, 270; 25 *BGH*St 30, 32; 47 *BGH*St 354, 359.

[6] Troendle and Fischer, *supra* note 4, § 13 margin number 9.

[7] 72 *BVerwG* ENTSCHEIDUNGEN DES *BUNDESVERWALTUNGSGERICHTS* (*BVerwGE*) 183, 185.

Article 5 GG reads:

"(1) Every person shall have the right freely to express and disseminate his opinions in speech, writing, and pictures and to inform himself without hindrance from generally accessible sources. Freedom of the press and freedom of reporting by means of broadcasts and films shall be guaranteed. There shall be no censorship.

polemic and abhorrent opinions, according to the *Bundesverfassungsgericht* (Federal Constitutional Court [BVerfG]).[8] Thus, there is little doubt that Section 86a (1) StGB interferes with this freedom, giving rise to the question of constitutional justification.

The German constitution does not exclude offhand right-wing extremists from reference to Article 5 (1) sentence 1 GG.[9] Rather, according to Article 5 (2) GG, freedom of expression is limited by the provisions of general laws, by the provisions for the protection of young persons and by the right to personal honour. Here only the "general laws" come into consideration. However the meaning of this term is controversial. The *BVerfG* interprets it as provisions which aim not at freedom of expression but safeguard subjects which must obviously be protected; it asserts that Section 86a StGB does not provide a detailed explanation of such a general law.[10] Several *Oberlandesgerichte* (Higher Regional Courts [OLGs]) share this opinion.[11] On that view, the provision complies with Article 5 (1) sentence 1 GG because it protects the democratic rule of law and political peace as pointed out above.

However, with regard to the equally constructed Section 86 StGB, the *BGH* was sceptical of such a submission.[12] As a matter of fact, the history of the origin and the wording of Article 5 (2) GG show that the actual meaning of the term "general laws" is that, apart from the provisions for the protection of young persons and the right to personal honour, an opinion must not be inhibited because of its content.[13] Yet, according to its wording, Section 86a (1) StGB definitely refers to attitudes with a certain content. Pursuant to that narrower view, Section 86a StGB complies with Article 5 (1) sentence 1 GG. By reference to Section 86 (1), nos. 1 and 2 StGB, it connects to the ban of unconstitutional parties and other organizations, as mentioned before. This ban is based on Article 21 (2) resp. Article 9 (2) GG, which

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(2) These rights shall find their limits in the provisions of general laws, in provisions for the protection of young persons, and in the right to personal honour.

(3) (…)"

[8] 61 *BVerfG* ENTSCHEIDUNGEN DES *BUNDESVERFASSUNGSGERICHTS* (*BVerfGE*) 1, 8; 65 *BVerfGE* 1, 41.

[9] *BVerfG*, NEUE JURISTISCHE WOCHENSCHRIFT (NJW) 3050, 3051 (2006).

[10] *BVerfG*, NJW 2814, 2815 (2004); NJW 3050, 3051 (2006).

[11] *Oberlandesgericht* (Higher Regional Court) *Hamburg*, JURISTISCHE RUNDSCHAU (JR) 76, 77 (1982); *OLG Hamm*, NEUE ZEITSCHRIFT FUER STRAFRECHT RECHTSPRECHUNGSREPORT (NStZ-RR) 231 (2002).

[12] 23 *BGHSt* 64, 70.

[13] Bettermann, *Die allgemeinen Gesetze als Schranken der Pressefreiheit*, JURISTENZEITUNG (JZ) 601, 603 (1964).

provide for a certain proceeding by the *BVerfG* resp. the responsible authorities.[14] However, the ban would be ineffective if it could not be safeguarded by additional provisions designed to inhibit the continuation and promotion of the organization concerned. Thus, according to the *BGH,* Article 21 (2) and Article 9 (2) GG, in that special respect, in effect allow for restrictions of freedom of expression beyond Article 5 (2) GG.[15] Therefore, criminal rules that safeguard those bans by prohibiting propaganda or symbols of illegal organizations like Section 86a StGB do not infringe Article 5 (1) sentence 1 GG because the restrictions are also based on constitution itself.

In effect, this is also valid for the proscription of propaganda and symbols of former National Socialist organizations in terms of Section 86 (1) no. 4 StGB, although they were never subjected to bans by the *BVerfG* or the German authorities according to Article 21 (2) resp. Article 9 (2) GG. The historic National Socialist organizations had already been dissolved after the Second World War, *inter alia*, by Allied Control Council Laws nos. 2 and 16. Even when occupation law was abolished, the dissolution of those organizations was meant to persist, thus providing a premise for the German Basic Law of 1949.[16] So, propaganda and symbols which are related to historic National Socialist organizations can be restricted regardless of Basic Law limitations. Yet, it should be emphasized that the fight against modern right-wing

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[14] Article 21 GG reads:

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

(2) Parties that, by reason of their aims or the behaviour of their adherents, seek to undermine or abolish the free democratic basic order or to endanger the existence of the Federal Republic of Germany shall be unconstitutional. The Federal Constitutional Court shall rule on the question of unconstitutionality.

(3) (…)"

Article 9 GG reads:

"(1) All Germans shall have the right to form corporations and other associations.

(2) Associations whose aims or activities contravene the criminal laws, or that are directed against the constitutional order or the concept of international understanding, shall be prohibited.

(3) (…)"

[15] 23 *BGH*St 64, 71.

[16] Luebbe-Wolff, *Zur Bedeutung des Art. 139 GG fuer die Auseinandersetzung mit neonazistischen Gruppen*, NJW 1289, 1294 (1988).

extremist organizations must be based on the restrictions provided by Article 21 (2) and Article 9 (2) GG.

E. Practical Application

I. Unconstitutional Organizations

The only right-wing extremist party that has been banned yet by the *BVerfG* according to Article 21 (2) GG is the *Sozialistische Reichspartei* (Socialist Reich Party [SRP]) in 1952.[17] The trial against the *Nationaldemokratische Partei Deutschlands* (National Democratic Party of Germany [NPD]) had to be dismissed in 2003[18]. Listing all the right-wing extremist organizations banned by the authorities according to Article 9 (2) GG is not possible because of their huge number; they will be mentioned where required. The most important former National Socialist organization is the *Nationalsozialistische Deutsche Arbeiterpartei* (National Socialist German Workers' Party [NSDAP]). Also included are its subsections and affiliated syndicates.[19] However, the late German army, the *Reichswehr*, does not fall in that category.[20]

II. Organization-Related Symbols

One of the most important problems of the practical application of Section 86a StGB is the question of what turns a sign into the symbol of an unconstitutional organization. As mentioned before, the purpose of Section 86a StGB is to prevent the revival of banned organizations and to safeguard political peace. As decided by the *Bayerisches Oberstes Landesgericht* (Highest Regional Court of Bavaria [BayObLG]), the use of a sign crosses this threshold if an impartial observer associates the symbol with a certain organization.[21] However, as the use of symbols of unconstitutional organizations is a potentially endangering offence, that impartial observer is a virtual construct.

Starting from this, there is no doubt that an impartial observer would recognize a sign as the symbol of a certain organization if it was formally created for that purpose. But most right-wing extremist symbols already existed in various contexts and were only adopted later. For example, the swastika of the NSDAP is an ancient

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[17] 2 *BVerfG*E 1.

[18] 107 *BVerfG*E 339.

[19] Troendle and Fischer, *supra* note 4, § 86 margin number 9.

[20] 23 *BGH*St, 64, 65.

[21] *BayObLG* decision 5 StRR 87/98 – 30 July 1998 (unreleased).

sun sign; the double Sig rune of the *Schutzstaffel* (Protective Squadron [SS]) consists of Nordic characters. The association of signs with these banned organizations derives from their broad and permanent use in that special context which, in the public consciousness, definitely turns them into the symbols of the NSDAP[22] resp. the SS,[23] regardless of the context. The former meaning is totally lost. Contrary to this, the so-called "life rune," which consists of an upward line expanding into three branches, was indeed used by various National Socialist organizations, including, *inter alia*, the medic section of the *Sturmabteilung* (Storm Division [SA]) and the *Deutsches Frauenwerk* (German Women's Works [DFW]), but it was and is broadly used in other contexts, for example, on tombstones. Thus, it never attained any definite political meaning. Without an especially National Socialist association, an impartial observer would not consider the life rune as its symbol[24]. For the same reason, the Celtic cross, which was used until 1982 by a meaningless right-wing extremist organization called *Volkssozialistische Bewegung Deutschlands/ Partei der Arbeit* (People's Socialist Movement of Germany/ Party of Work [VSBD/PdA]) but has never been commonly known in that relation, was not offhand seen as the sign of that banned group.[25]

III. Alterations of Symbols

With regard to the aims of Section 86a StGB, there were never objections to subsuming even slightly shifted signs under this prescription as long as they resemble the original ones. For example, a swastika with shortened cross beams is still a symbol of the NSDAP.[26] This jurisdiction remains within the limits of allowed interpretation and does not interfere with the prohibition of penal analogy to the disadvantage of the delinquent according to Article 103 (2) GG.[27] In 1994, the principle of similarity was put into written law by inserting Section 86a (2) sentence

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[22] *OLG Hamburg*, JR 76, 77 (1982).

[23] *OLG Frankfurt am Main*, NStZ 333 (1982).

[24] *BayObLG* ENTSCHEIDUNGEN DES *BAYERISCHEN OBERSTEN LANDESGERICHTS* IN STRAFSACHEN (*BayObLG*St) 1998, 181.

[25] *BGH*, NStZ 81 (1996).

[26] *OLG Koeln*, NStZ 508 (1984).

[27] Article 103 (2) GG reads:

"An act may be punished only if it was defined by a law as a criminal offence before the act was committed."

2 StGB, also in order to close a number of gaps.[28] But in subsequent years several courts misunderstood this clause and dismissed suits on the basis of the use of alterations of the then specially designed emblem of the National Socialist *Bund Deutscher Maedel* (Union of German Girls [BDM]). On this view, no one could mistake something with a symbol he does not know at all.[29] In 2002, the *BGH* finally overruled these decisions and confirmed that similarity only refers to extrinsic characteristics and does not require any special historic knowledge by the observer. A lack of publicity of an altered symbol is irrelevant, just as it does not matter in relation to the original symbol. The former jurisprudence, according to which a sign had to be commonly known precisely as the symbol of an organization, was not upheld.[30] Here the *BGH* is correct on broad scale, but seems to have overlooked that there was no need to give up its previous jurisdiction. The decisive question in those cases was, as seen above, whether a sign which is known in various contexts gets a certain meaning by being occupied by an unconstitutional organization and thus becomes its symbol according to Section 86a (1) StGB. For this, historic knowledge in public consciousness is crucial. In the 2002 case, the relation of the symbol to the BDM was clear - it had been specially designed for that organization and therefore had never been used in a neutral sense. The decisive point is the similarity of such an unambiguously relatable emblem with its variation. For that, in effect only extrinsic characteristics matter. Nevertheless, based on the *BGH* decision, right-wing extremists now are being prosecuted for showing any symbol once used by a banned organization. For example, the above mentioned life rune on a T-shirt is considered as a symbol of the SA and the DFW if it is worn by a skinhead, even when there is no further relation to any banned organization[31]. This result seems rather dubious because in effect punishability then depends on an attitude, while Section 86a (1) StGB, in order to avoid any interference with freedom of expression, does not relate to a belief but to the ban of an unconstitutional organization.

This strict prosecution makes it harder for right-wing extremists to switch to alternative symbols. Nevertheless some emblems definitely cannot be subsumed under Section 86a (1) StGB without infringing the prohibition of analogy according to Article 103 (2) GG. In this context, the Reich War Flag must be specially mentioned. This flag was used during the Second Empire from 1871 to 1918 and re-

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[28] Koenig and Seitz, *Die straf- und strafverfahrensrechtlichen Regelungen des Verbrechensbekaempfungsgesetzes*, NStZ 1, 3 (1995).

[29] *BayObLG*, NStZ 190 (1999); *OLG Dresden*, NStZ-RR 42 (2001).

[30] 47 *BGH*St 354.

[31] *LG Landshut* decision 4 Qs 326/05 – 20 Dec 2005 (unreleased).

used during the first years of the National Socialist reign from 1933 to 1935. Indeed, in modern right-wing extremism, it is a symbol for the opposition of democracy. But historically, it had always been a sign of the German state, not of an organization banned later.[32] Similarly, the slogan "*Ruhm und Ehre der Waffen-SS*" ("Glory and Honour to the Armed SS") cannot be subsumed under Section 86a (1) StGB; indeed it sounds like a slogan of a former National Socialist organization but in effect it is a mere fantasy sign.[33] Another example of this problem is the logo of the trademark "LONSDALE". Clothing with that logo is very popular among German right-wing extremists because of the included letter combination "NSDA". This is reminiscent of "NSDAP," but is not an actual symbol of that organization. According to the *OLG Hamm*, not even the logo of the trade mark "CONSDAPLE" falls under Section 86a StGB because, absent special accentuation, an impartial observer would not perceive the combination "NSDAP" in that word.[34] However, with regard to the obvious and purposeful alteration of the word "constable" which attracts attention to the centre part, this decision seems dubious.

IV. Actions in General

Section 86a (1) StGB includes many diverse actions. Here, especially with regard to modern means of communication, problems arise. An important question is when the use of banned symbols in a computer network is committed "publicly" according to Section 86a (1), no. 1 StGB. Publicity means perceptibility for a major number of people who are not linked with each other by personal relations[35]. Thus, the *OLG Frankfurt am Main* ruled that showing a swastika in a computer mailbox which could be accessed by anyone with its number has to be subsumed under the term "publicly," regardless of the number initially being restricted to a small circle.[36]

Additional problems with regard to the term "domestically" according to Section 86a (1), no. 1 StGB emerge when the offenders act abroad. German spectators of a football match in Poland being broadcasted on television in Germany were punished for showing the Hitler greeting in the stadium because, by transmission,

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[32] *Verwaltungsgerichtshof* (Higher Administrative Court [VGH]*) Mannheim*, NEUE ZEITSCHRIFT FUER VERWALTUNGSRECHT (NVwZ) 935 (2006).

[33] *BVerfG*, NJW 3050 (2006); *BGH*, NJW 3223 (2005).

[34] *OLG Hamm*, NStZ-RR 12 (2004).

[35] 10 *BGH*St 194, 196.

[36] *OLG Frankfurt am Main*, NStZ 356 (1999).

the symbol was perceived here. In a sense, part of the action took place in Germany; therefore the offence was committed "domestically" according to the provision about the place of the act, Section 9 (1) StGB.[37]

For the same reason, it may be expected that the use of the symbol of a banned organization on a web site of a foreign internet server would be prosecuted if the web site was retrieved in Germany. However, this would interfere with the jurisdiction of other countries, which may be likewise unlimited. Moreover, providers would be overwhelmed by attending to every national legal system. Especially in countries like the USA, the UK and Australia, the restrictions of free speech in Germany often cause surprise.[38] Thus, German law should only be applied if the web site connects to domestic matters, especially if it is written in German or otherwise obviously aimed to Germany.[39] This topic is controversial because there is no jurisdiction to discuss that question in the context of Section 86a StGB.

V. Negatory and Neutral Actions

Another current problem is whether the use of a symbol in a strictly negatory denotation can be subsumed under Section 86a (1) StGB. The *BGH* had already concurrently denied this question in several cases during the 1970s because the particular kind of use was not capable of infringing the aims of that provision.[40] Recently the *OLG Stuttgart*[41] and following its decision the *LG Stuttgart*[42] ruled that with regard to the danger of habituation, selling buttons with a crossed-out swastika is indictable and is not privileged by Section 86a (3) in connection with Section 86 (3) StGB either. A new decision by the *BGH* on these dubious opinions is due but has not been enacted yet.

Neither is the jurisdiction concerning the use of symbols of banned organizations in a neutral sense always clear. Also, with regard to the danger of habituation and disturbance of political peace, the use of Hitler's picture on a postcard was

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[37] *Kammergericht* (Chamber Court [KG]) *Berlin*, NJW 3500 (1999).

[38] Hoernle, *Case Commentary*, NStZ 309 (2001).

[39] Collardin, *Straftaten im Internet*, COMPUTER UND RECHT (CR) 618, 621 (1995).

[40] 23 *BGH*St 267; 25 *BGH*St 30; 28 *BGH*St 394.

[41] *OLG Stuttgart* decision 1 Ws 120/06 – 18 May 2006 (unreleased).

[42] *LG Stuttgart* decision 18 KLs 4 Js 63331/05 – 29 Sept 2006 (unreleased).

categorised as prohibited according to Section 86a (1) StGB.[43] as was a swastika on a model aircraft[44]. In contrast, the antiquarian sale of a single exemplar of Hitler's book "Mein Kampf" with an imprinted swastika was seen as a "similar purpose" pursuant to Section 86a (3) in connection with Section 86 (3) StGB and therefore allowed.[45]

F. Conclusion and Prospects

The main problems of the practical application of Section 86a StGB are the reference of a symbol to a banned organization and the similarity of an altered sign to the original. Furthermore, right-wing extremism is often not bound to solid organization structures, thus making it even harder to ascertain the reference required. Although jurisdiction has managed to handle these problems to a great extent, the subtle distinctions still make it hard to outline general principles which are valid for most constellations. The result is uncertainty in difficult cases, which often results in acquittal or in dismissal according to Section 86a (3) in connection with Section 86 (4) StGB.

Whether these standards can be improved is questionable, because legislation and jurisdiction are limited by Article 5 (1) sentence 1 GG. Even if the term "general laws" in Article 5 (2) GG is understood in a wide sense according to the *BVerfG*, it will be hardly possible to create a provision which is compliant with Basic Law demands because the *BVerfG* emphasizes the outstanding importance of freedom of expression also in cases concerning right-wing extremism.[46] Indeed, in 2005 the legislature tried to reduce the gap by introducing a new non-organization-related prescription, Section 130 (4) StGB. This provision punishes public glorification of the National Socialist rule by force and decree if the offence violates the dignity of the victims. In the above mentioned "*Ruhm und Ehre der Waffen-SS*" case, this clause might have been applicable according to the *BGH*[47]. But the *BVerfG* seems to be sceptical of the constitutionality of this provision[48]. Therefore, prosecution of right-wing extremist propaganda may not be implemented beyond the existing

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[43] *OLG Muenchen* decision 4 StRR 142/06 – 7 Aug 2006 (unreleased).

[44] *OLG Muenchen*, NStZ-RR 371 (2005).

[45] 29 *BGH*St 73, 84.

[46] *BVerfG*, NJW 2814, 2815 (2004).

[47] *BGH*, NJW 3223, 3225 (2005).

[48] *BVerfG*, NJW 3204 (2005).

regulations against endangering the democratic rule of law, agitation of the people, insult, defamation and endangering of young persons.

Regardless of all these problems, facing the enduring rise of right-wing extremism in Germany and the facilities of some individuals and organizations adherent to such ideas, Section 86a StGB is an indispensable instrument for the fight against inhuman and subversive activities. Anyhow they can be embanked considerably. However, the limited range of that provision emphasizes the fact that a political and social problem cannot be solved only by means of criminal law.