



Deutsches Institut
für Menschenrechte

German Institute for Human Rights

Parallel Report

to the 111th session of the Committee on the Elimination of Racial Discrimination (CERD) in the context of the examination of the 23th - 26th State Report of Germany

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1 Preliminary observations

The German Institute for Human Rights (*Deutsches Institut für Menschenrechte*) (the Institute) is the independent human rights institution in Germany. The Institute is accredited according to the Paris Principles of the United Nations (A-status). The Institute's tasks include public policy research, education, information and documentation on human rights, application-oriented research on issues related to human rights and cooperation with international organisations. It also monitors the application of the UN Convention on the Rights of Persons with Disabilities and the UN Convention on the Rights of the Child and has established monitoring mechanisms for these purposes. The Institute is also mandated as National Rapporteur Mechanism under the Council of Europe Conventions on Violence against Women and Domestic Violence (Istanbul Convention) and on Trafficking in Human Beings. The Institute is also Germany's focal point in reporting within the research network FRANET of the European Union Agency for Fundamental Rights (FRA).

With this submission the German Institute for Human Rights wishes to highlight selected issues of relevance to the implementation of the International Convention on the Elimination of All Forms of Racial Discrimination by Germany. The selection of issues was strongly influenced by the main areas of the Institute's work, as it is in those areas that the Institute has built up expertise in recent years.

By way of introduction, however, the Institute would like to point out that several previous concluding observations of the UN Committee on the Elimination of Racial Discrimination (the Committee) have not yet been fully implemented by Germany. That includes e.g. the continued reference to the term "migration background" in legislation, policy and statistics, which is unsuitable to address or describe racism and is a deviation from established international scientific vocabulary. That also includes the aim to reduce the high number of residents of shared refugee accommodation (this number has in fact sharply risen since). The Institute therefore recommends that the Committee advocates an evaluation mechanism that would require Germany to track the implementation of the Committee's recommendations.

2 Reform of the General Act on Equal Treatment (art. 2 para. 1)

cf. State Report, paras. 169 – 177

Background

In 2015, the Committee on the Elimination of Racial Discrimination (CERD) called on Germany to conduct an evaluation of the General Equal Treatment Act and other anti-discrimination legislation in order to identify gaps regarding full and effective protection against, and effective remedies for, racial discrimination, in line with the Convention (concluding observation 8a). Other international committees made recommendations regarding the General Equal Treatment Act as well. Reiterating its recommendation from 2017 the Committee on the Elimination of Discrimination against Women (CEDAW) asked Germany in May 2023 again to amend the Act.¹ In October 2023, the Committee on the Rights of Persons with Disabilities (CRPD) issued its concluding

¹ <https://digitallibrary.un.org/record/4013941>

observations, within it also proposed to Germany to amend the General Equal Treatment Act. In observation No. 12 the CRPD recommended to state parties to extend the legal protection against discrimination and of the specific rights under the Convention to all private entities that provide goods and services to the public, and establish effective remedies to enforce the respective obligations. CRPD also asked to adopt legal and other measures necessary to provide for explicit protection from multiple and intersectional forms of discrimination, including discrimination based on the intersection between disability and other status, such as age, sex, gender, indigeneity, lesbian, gay, bisexual, transgender and intersex status, ethnicity, migration status, national origin and racial discrimination. The Committee also suggested to amend the laws on the relief of burden of proof, in particular section 22 of the General Act on Equal Treatment, to explicitly include the parties' obligations to prove the existence of a disadvantage as a part of that relief.² An evaluation was conducted on behalf of the ADS by an independent panel in 2016 and the results were published in October 2016.³ However, respective recommendation by UN Committees and demands by civil society organisations were not taken up by the government. In its coalition agreement in December 2021, the then new government agreed upon the plan to evaluate the General Equal Treatment Act (AGG) once more, to close protection gaps, to improve legal protection and to expand the scope of the Act's application.⁴

In January 2023, the alliance "*AGG Reform jetzt!*" was formed, consisting of over 100 civil society organisations. It took stock of 16 years of practical experience and highlighted the weaknesses of the AGG: From the organisations' point of view, the law does not protect all those affected by discrimination, it is not applicable to all areas of life and in many cases law-enforcement does not work.⁵ At its constitutive meeting in March 2023, the advisory board of the Federal Anti-Discrimination Agency appealed to the Federal Ministry of Justice to come up with a draft for a modern reform of the General Equal Treatment Act as soon as possible and to ensure good participation in the legislative process.⁶ The Federal Ministry of Justice replied on 25 July 2023, pointing out that the ministry was already working intensively on the formulation of the main features of a reform for improved protection against discrimination. Accordingly, it is planned to introduce the conceptual ideas of the Federal Ministry of Justice for a reform of the AGG in the course of the year 2023. In July 2023, the Federal Anti-Discrimination Agency issued a position paper presenting the necessary changes to the law.⁷ Up until now the reform has not been presented by the Federal Ministry of Justice.

CERD also asked for support for the establishment of accessible non-governmental anti-discrimination advice centres throughout the country and to support the creation of public anti-discrimination agencies in all Länder (concluding observations 8c). In 2023 the Federal Anti-Discrimination Agency launched a funding programme for non-

² https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolNo=CRPD%2FC%2FDEU%2FCO%2F2-3&Lang=en, p. 4.

³ https://www.antidiskriminierungsstelle.de/SharedDocs/downloads/DE/publikationen/AGG/agg_evaluation.pdf?__blob=publicationFile&v=12 (only in German).

⁴ Coalition agreement "Dare to make more progress. Alliance for Freedom, Justice and Sustainability", p. 96. (only in German).

⁵ <https://agg-reform.jetzt/> (only in German).

⁶ https://www.antidiskriminierungsstelle.de/DE/ueber-uns/beirat/beschluesse_des_beirats/beschluesse_des_beirats_node.html (only in German)

⁷ https://www.antidiskriminierungsstelle.de/SharedDocs/downloads/DE/Sonstiges/20230718_AGG_Reform.html (only in German)

governmental anti-discrimination bodies throughout Germany (*respect* land*). In consultation with the federal states, it selected 35 funding projects from 103 applications, nine of which have a nationwide impact. Almost all of the federal states are represented. The nationwide expansion of anti-discrimination counselling is intended to create a nationwide service, that covers counselling for all groups of characteristics according to the AGG, i.e. for age, disability, gender, racism and anti-Semitism, religion/belief and sexual identity.

In all *Länder* but Mecklenburg-Western Pomerania public anti-discrimination agencies have been established.⁸

Assessment by the German Institute for Human Rights

In the Institute's view, the General Equal Treatment Act should be revised after it has been in force for 17 years. The recommendations of the international Committees should be taken into account as well as the reports of the anti-discrimination bodies and counselling centres, which provide valuable insights into practical problems in the application of the law.

Despite the recognisable efforts of the Federal Anti-Discrimination Agency, the *Länder* as well as other state and non-state bodies, a Germany-wide accessible infrastructure of anti-discrimination advice centres has yet to be established.

Proposed recommendations

- Present a reform of the AGG that meets the human rights requirements for Germany, taking into account the advice of the international committees and solving the legal and practical problems in the current application of the Act.
- Continue to expand the counselling structure throughout Germany and ensure that sufficient financial resources for this task are included in the budget so that the structures are sustainably available to those affected by discrimination.

3 Prevention of racial discrimination in international supply-chain management (art. 2 para. 1 lit. d)

not mentioned in the state report

Background

Due to the German dependency on international supply chains, German companies have a risk to cause, contribute or be linked to adverse human rights impacts outside German territory. The value chains of German companies affect racialized communities in the Global South, since most of the populations of countries, which supply cheap labour and natural resources to German corporate actors are not white. Additionally, marginalized groups are more vulnerable to adverse human rights effects than non-marginalized groups. This became most obvious during the COVID 19

⁸ <https://www.svz.de/deutschland-welt/mecklenburg-vorpommern/artikel/mv-ist-das-einzige-bundesland-ohne-antidiskriminierungsstelle-45554579> (only in German).

pandemic, when migrant workers were among those most affected, as a result of inadequate and crowded living conditions, harsh containment measures and racial discrimination.⁹ In Germany, as elsewhere, women migrant workers – the most important part of the workforce in the care sector – were particularly affected. Racial discrimination also affects other social rights: For example, Afro-communities in the supply chain of the German energy sector in Colombia report a lack of access to healthcare and medical support due to discrimination. Consequently, the emission of coal particles into the air has a stronger impact on the right to health of afro-communities.¹⁰

To address human rights impacts in the supply chain, the Act on Corporate Due Diligence Obligations for the Prevention of Human Rights Violations in Supply Chains (Hereinafter the “Supply Chain Act”)¹¹ has come into effect in January 2023. It obliges German companies with at least 3,000 employees to carry out human rights and environmental human rights due diligence with due regard.¹²

In addition to several important ILO labour rights and a small number of environmental law conventions, the Annex of the legislation refers to the International Covenant on Civil and Political Rights (ICCPR) and International Covenant on Economic, Social and Cultural Rights (ICESCR) as human rights instruments from which protected legal positions within the meaning of the Act arise. The prohibition of racial discrimination is thus a protected legal position under the Act.

Under the Act, companies are required to “establish an appropriate and effective risk management system”.¹³ The effectiveness of measures that should be adopted to prevent and mitigate human rights harm in their supply chains is contingent on a company’s cause and contribution to risks and violations.¹⁴ Companies must “conduct an appropriate risk analysis”.¹⁵ According to the government’s explanatory memorandum “appropriate” means that companies can exercise discretion and leeway to discern which measures they deem suitable to comply with the Supply Chain Act.¹⁶ The Act establishes as supervising authority the Federal Office for Economic Affairs and Export Control (BAFA), with far ranging competencies to control compliance with the Act.

Assessment by the German Institute for Human Rights

The adoption of the Supply Chain Act demonstrates Germany’s commitment towards ensuring that corporate action or inaction will not negatively affect human rights of rights-holders regardless of their place of residence. It is a commendable first step

⁹ See: *Süddeutsche Zeitung* (29.04.2020) “Nearly 300 workers at a meat plant become infected” (in German), <https://www.sueddeutsche.de/wirtschaft/birkenfeld-coronavirus-fleischbetrieb-1.4892485> (last accessed 14.10.2023); see also: Fasani, F., Mazza, J. (2020): A Vulnerable Workforce: Migrant Workers in the COVID-19 Pandemic, Luxembourg, doi:10.2760/316665.

¹⁰ Niebank, Jan-Christian, Utlu, Deniz (2017): Closing Gaps in Protection Transnational cooperation on human rights: The case of the extractive sector in Colombia, Berlin, German Institute for Human Rights. <https://nbn-resolving.org/urn:nbn:de:0168-ssoar-55631-2>

¹¹ German Parliament (16.07.2021) Act on Corporate Due Diligence Obligations for the Prevention of Human Rights Violations in Supply Chains. https://www.csr-in-deutschland.de/SharedDocs/Downloads/EN/act-corporate-due-diligence-obligations-supply-chains.pdf?__blob=publicationFile

¹² *Ibid.*, Sec. 3 para 1.

¹³ *Ibid.*, Sec. 4 para 1.

¹⁴ *Ibid.*, Sec. 4 para 2.

¹⁵ *Ibid.*, Sec. 5 para 1.

¹⁶ Explanatory Memorandum, BT-Drs. 19/28649, p. 42 (in German only).

towards improving business practices worldwide by setting much-needed binding standards towards respecting human rights in the supply chains.

Since the Act lacks a clear obligation to consult rights-holders in a substantive manner, companies may be tempted to conduct their risk analysis as a tick-the-box exercise and develop measures based on a one-size-fits-all-approach. This is certainly at odds with the desired qualitative benefit of the Act to strengthen the rights of the people affected by corporate activities in supply chains.¹⁷

Germany will be required to transpose the forthcoming EU-directive on corporate sustainability human rights due diligence (CSDDD). Therefore, an evaluation of the Supply Chain Act is scheduled for 2026. Subject to the final text of the CSDDD this could be an opportunity to account for the Acts' contribution to preventing discrimination and racism and recommendations on how to strengthen this contribution. Moreover, as negotiations on the CSDDD are ongoing, Germany should ensure that CSDDD will provide for a stand-alone provision on stakeholder engagement including rights-holders consultations. Notably, only a small minority of stakeholders in the Global South, including rights-holders, participated in the official public consultation to inform the legislative process of the EU-directive.

Proposed recommendations

- Centre the upcoming evaluation of the Supply Chain Act on its impacts on rights-holders; depending on results of the evaluation: improve guidance to companies for meaningful consultations with rights-holders.
- Take budgetary and policy measures to increase the capacity of rights-holders and their legitimate representatives in the Global South, especially those who are particularly vulnerable to structural racism and discrimination, to engage with governmental and corporate actors in a meaningful manner, including but not limited to, in multi stakeholder initiatives.
- Ensure that the final text of the forthcoming EU directive on corporate sustainability (CSDDD) will provide for a rights-holder centric approach and a stand-alone provision on stakeholder engagement, especially regarding the prevention of racial discrimination of particularly vulnerable and marginalized groups and potential adverse effects.
- Include a business and human rights perspective and respective measures in the National Action Plan on Racism and include an anti-racism perspective and respective measures in the upcoming National Action Plan on Business and Human Rights.

¹⁷ Explanatory Memorandum, BT-Drs. 19/28649, p. 79 (in German only).

4 The rise of the right-wing extremist AfD as a threat to Germany's liberal-democratic system (art. 4)

cf. State Report, pp. 127-131, AfD is not mentioned

Background

Germany witnessed the rise of the Alternative for Germany party (AfD), which poses a significant threat to the country's liberal-democratic order.

The AfD is represented in the Bundestag, as well as in all state parliaments except for two (Schleswig Holstein and Bremen, where the party was excluded from the election for formal-legal reasons).

In the 2023 state elections, the AfD secured at least 14.6 percent of the vote (ranked 3rd) in Bavaria, 18.4 percent (ranked 2nd) in Hesse. Apart from the high number of seats in parliaments, the danger posed by the AfD to the liberal democratic order is also evident in its significant role in the competition for top municipal positions in some regions. In June 2023, the AfD has won a district council election for the first time in Sonneberg, located in Thuringia.¹⁸ In early July 2023, for the first time the AfD won the election for a full-time mayor in Raguhn-Jeßnitz, a town in Saxony-Anhalt.¹⁹ The party currently stands at between 19 and 23 percent in federal level election polls (known as the *Deutschlandtrend*).²⁰ In the states of Brandenburg, Thuringia, and Saxony, where new regional parliaments will be elected in autumn 2024, the party is currently leading in opinion polls with scores of 32 percent^{21,22} and 33 percent.²³

Assessment by the German Institute for Human Rights

The party's programme is based on a national-ethnic concept of "the people", which differentiates between people according to racist categories. It therefore deviates from the concept of the people in the Basic Law (*Grundgesetz*), the German Constitution, and is not compatible with Article 1 (1) of the Basic Law. Above all, the programme leads to a denial of elementary legal equality. It does not accept the dignity of the human being in the sense of Article 1 (1) of the Basic Law but professes the primacy of a national-ethnically defined people. It undermines the inherent dignity of every person and seeks to create a legally marginalized status for individuals who are not part of the national-ethnic defined "people".

German history has demonstrated that the democratic order of a state can be destroyed when inhumane positions are not met with vigorous opposition, and thus spread and prevail. As a last resort Article 21 of the Basic Law therefore provides the possibility to ban a party that seeks to abolish the guarantee of Article 1, Paragraph 1 of the Basic Law, which protects the liberal democratic order. An analysis conducted

¹⁸ Deutsche Welle (06.25.2023): Germany: Far-right AfD wins first governing post. <https://www.dw.com/en/germany-far-right-afd-wins-first-governing-post/a-66024256>.

¹⁹ t-online (12.10.2023): Vor Wahl viel versprochen. AfD-Bürgermeister kann Zusagen nicht einhalten, https://www.t-online.de/nachrichten/deutschland/innenpolitik/id_100258740/hannes-loth-erster-afd-buergermeister-bricht-versprechen.html.

²⁰ <https://www.wahlrecht.de/umfragen/> status: 13.10.2023

²¹ <https://dawum.de/Thueringen/> status: 13.10.23

²² <https://dawum.de/Brandenburg/> status: 17.10.23

²³ <https://dawum.de/Sachsen/> status: 13.10.23

by the German Institute for Human Rights in June 2023 indicates that the legal prerequisites for a ban under Article 21 of the Basic Law are met.²⁴

The analysis of the German Institute for Human Rights also shows that the AfD party is increasingly adopting the policy advocated by Björn Höcke, the AfD's state and parliamentary leader in Thuringia. Höcke, who openly aims for a rule inspired by National Socialism, has come to significantly influence the orientation of the AfD as a whole. He does not have to hold a position at federal level, as he is already a leading voice in the party with many supporters nationwide.²⁵ Moreover, the Institute's analysis explains that there are concrete indications that make it at least possible that the actions of AfD can be "successful". The AfD takes an active and systematic approach to realising its anti-constitutional intentions. This includes, for example, cooperating with other right-wing extremist actors in Germany who support the party in achieving its anti-constitutional goals.

By obtaining numerous mandates in parliaments, the AfD has gained significant opportunities to influence society. Given its substantial presence in some German federal states and regions, it seems plausible that the party may expand its successes. The growing number of seats held by the AfD in several federal states and regions represents a significant threat to the liberal democratic foundation of the country.

In the public discourse, the advanced process of AfD's radicalisation is not sufficiently reflected. The party is regularly played down by being described as right-wing populist or as right-wing extremist only "in parts". Yet it has long since developed into a national-ethnic and thus extreme right-wing party. At the same time, the AfD achieves high approval ratings, and representatives of democratic parties do not sufficiently distance themselves from the AfD, especially at the municipal level.

One of the reasons why the AfD is regularly played down in public discourse is that the Federal Office for the Protection of the Constitution (*Bundesamt für Verfassungsschutz, BfV*) has so far only classified the AfD as a suspected case of extremist activity, not as a "proven right-wing extremist activity", which goes beyond the classification as a suspected case. On 15 January 2019, the Federal Office for the Protection of the Constitution initially classified the AfD as a so-called test case. The test case is the preliminary stage to the suspicious case. The AfD was classified as a suspected case by the Federal Office for the Protection of the Constitution in March 2021, which was confirmed by the Cologne Administrative Court in a ruling in March 2022. However, the AfD has appealed against the ruling of the Administrative Court of Cologne to the Higher Administrative Court of the State of North Rhine-Westphalia. The court has not yet ruled on the appeal. Since its classification as a suspicious case in 2021, the AfD has clearly become more radical.

The fact that the AfD has not already been classified as a "proven right-wing extremist endeavour" can also be attributed to the fact that the Federal Office for the Protection

²⁴ Cremer Hendrik (2023): Warum die AfD verboten werden könnte. Empfehlungen an Staat und Politik. Deutsches Institut für Menschenrechte. <https://www.institut-fuer-menschenrechte.de/publikationen/detail/warum-die-afd-verboten-werden-koennte>

²⁵ Cremer Hendrik (2023): Warum die AfD verboten werden könnte. Empfehlungen an Staat und Politik. Deutsches Institut für Menschenrechte. <https://www.institut-fuer-menschenrechte.de/publikationen/detail/warum-die-afd-verboten-werden-koennte>, S. 40-48.

of the Constitution only started examining the AfD after the change at the top of the agency in November 2018.

Proposed recommendation

- Prepare intensively and continuously material for an application in front of the Federal Constitutional Court in order to be able to act at any time. Entitled to file an application for review proceedings before the Federal Constitutional Court are the Federal Government, the Bundestag and the Bundesrat. It is important to bear in mind, that the preparation of a corresponding application takes considerable time. Also the proceedings before the Federal Constitutional Court would require further time until a decision is reached by the Federal Constitutional Court.

5 Preventing racial discrimination by law enforcement agencies (art. 5)

cf. State Report, paras. 142-150 and Annex 10

Background

Legislation: In 2015, the Committee on the Elimination of Racial Discrimination (CERD) criticized the 'extremely broad scope' of section 22 (1a) of the Federal Police Act (*Bundespolizeigesetz*). The Committee was concerned that the provision leads *de facto* to racial discrimination, especially as the German delegation had explained that the criteria used by the police when applying the provision "involves notions such as a 'feel for a certain situation' or 'the person's external appearance'".²⁶ On occasion of its 6th visit to Germany in 2019, the European Commission against Racism and Intolerance (ECRI) renewed its concern about the broad powers of the Federal Police to stop people without any suspicion and recommended that the police authorities of the Federation and the *Länder* commission and participate in a study on racial profiling with the aim of developing and implementing measures that eliminate existing and prevent future racial profiling. Moreover, ECRI recalled that in recent years also the Council of Europe's Commissioner for Human Rights and the UN Expert Group on People of African Descent had voiced concerns about the numerous reports of racial profiling by the German police.²⁷

Section 22 (1a) of the Federal Police Act allows the Federal Police to stop and question, demand to see the identity papers of, and visually inspect any items carried by any person at an airport, or on a train or within the territory of a railway station, provided that knowledge of the situation or border police experience afford grounds for the assumption that the respective facility is used for unauthorized entry into the federal territory. The purpose of the provision is to "prevent or stop unauthorized entry into the territory of the Federal Republic of Germany". In practice, checks are carried out at all stations, even if they are not located near the border. They also take place

²⁶ Committee on the Elimination of Racial Discrimination (2015): Concluding observations on the combined nineteenth to twenty-second periodic reports of German, no. 11, online: <http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2fPPRiCAqhKb7yhsv4qujPA8qSE3O3exJU3P3wgtKMsq%2b7wnmDaL0QG%2bCrqz3WvutmtVfB6y0GzXGYzlb14Z8mkSN66F26sFOGGKy4FLsqRYqhqFFqEl2aUrdXdlmIBMqnWzLzyypNzGqRUw%3d%3d>

²⁷ European Commission against Racism and Intolerance (2020): ECRI Report on Germany, Sixth Monitoring Cycle, p. 33, online: <https://rm.coe.int/ecri-report-on-germany-sixth-monitoring-cycle/-/16809ce4be>

on trains that only travel within Germany. This provision already came under criticism while it was being enacted in 1998, at a public hearing at the Bundestag. Experts at the hearing argued that the provision creates an indefinite non-judiciable authorization that would allow police to carry out ‘selective’ checks on individuals based on external characteristics such as skin colour, particularly as the wording of the provision contained no restrictions in this regard.²⁸ The Federal Police Act also authorizes the federal police to check people “in the border area up to a depth of thirty kilometres for the purpose of preventing or stopping unauthorized entry into federal territory” without any reason (section 23 (1) Nr. 3). The state police laws also contain provisions allowing the state police to check people in certain areas without any reason for the purpose of migration control.

Education and training: Police education and training is decentralized and mainly the responsibility of the 16 German federal states (*Länder*). In general, police cadettes receive a B.A. degree after three years of studies at a university for applied science. Students preparing to join the federal police also attend a university of applied science. The German Institute for Human Rights analyzed the curricula of the police studies programs. The analysis reveals that only a few *Länder* mention racism explicitly. The curricula have been screened for their inclusion of education regarding racism specifically and human rights more generally. The police studies curriculum for North Rhine-Westphalia is the only one that has mainstreamed anti-racism and human rights education throughout the modules for constabulary and criminal investigators. Berlin explicitly sensitizes the issues of racial profiling. Hesse mentions racism only under the aspect of victimology (dealing with victims of racially motivated crime). Several *Länder* still focus on intercultural competences, an approach that has been criticized for its *othering* tendencies (Saxony: “culture specific knowledge about selected groups”; Saxony-Anhalt: “cultural particularities”, “dealing with members of other cultures”; Schleswig-Holstein: “appropriate self-assertion in cross-cultural situations”). The branding “intercultural” may or may not include an appropriate discussion of racism.

In some *Länder*, neither human rights nor racism are mentioned in the police studies curricula. However, this does not mean that racism is not addressed and problematized by lecturers. In addition, in some *Länder* in which the university for applied science does not mention racism or human rights in its module for police training, the *Länder* may focus on these topics in their programs for furthering education (*Fortbildung*).

Independent complaints mechanisms: In 2015, CERD recommended the establishment of independent complaints mechanisms at both federal and *Länder* level to investigate acts of racial discrimination committed by law enforcement officials.²⁹ In October 2022, the European Court for Human Rights held that internal investigations of a complaint alleging a racist identity check by officers of the Federal

²⁸ Hendrik Cremer (2013): Racial Profiling – Menschenrechtswidrige Personenkontrollen nach § 22 Abs. 1a BPolG, p. 17, online: https://www.institut-fuer-menschenrechte.de/fileadmin/user_upload/Publikationen/Studie/Racial_Profiling_Menschenrechtswidrige_Personenkontrollen_nach_Bundespolizeigesetz.pdf. (only in German)

²⁹ CERD (2015): Concluding observations on the combined nineteenth to twenty-second periodic reports of Germany. UN Document CERD/C/DEU/CO/19-22, para. 11a.

Police cannot be considered independent in view of the hierarchical and institutional connection between the investigating superior police authority and the officers.³⁰

Since 2014, police complaint mechanisms without hierarchical and institutional ties with the police or the supervising ministries of the interior have been established in six *Länder*, namely Rhineland-Palatinate (2014), Baden-Württemberg (2016), Schleswig-Holstein (2016), Bremen (2020), Berlin (2020) and Brandenburg (2022).³¹ The state of Hesse has also adopted a law to establish such an ombudsperson in 2020 but until now no ombudsperson has been elected.³² The ombudspersons are elected by majority vote of the *Länder* parliaments for office terms that range from five to eight years. Usually, they are called state police commissioners (*Beauftragte für die Landespolizei*).³³ They are tasked to handle complaints against alleged misbehaviour or illegal actions of police officers and to find a remedy. By this means they shall “support the dialogue of the population with the police” and “strengthen the partnership” of both parties.³⁴

The police commissioners are legally obliged to mediate conflicts and facilitate an amicable solution.³⁵ They have no sanctioning power. Thus, remedies they provide are usually counselling services or the facilitation of conversations between complainants and police officers or superiors. In more serious cases they shall inform the competent police authorities or the interior ministry and request their statement, and they can refer their findings to the public prosecutor on authorities or senior police ranks who may decide to initiate criminal or disciplinary proceedings.³⁶ All police commissioners must submit reports to the state parliaments on a regular basis. In addition, they inform the parliaments about significant incidents.³⁷

In four other federal states, i.e. Saxony-Anhalt (since 2009), Lower Saxony (2014), Saxony (2016) and Thuringia (2016), police complaints mechanisms were established

³⁰ European Court for Human Rights (2022): *Basu v. Germany*. Judgment. 18 October 2022, Application no. 215/19, para. 36.

³¹ Wissenschaftliche Dienste des Deutschen Bundestages (2022): *Unabhängige Polizeibeauftragte in den Ländern*. Berlin. <https://www.bundestag.de/resource/blob/899854/c703911ae8f6e04a16618f8a85727ad3/WD-3-057-22-pdf-data.pdf>; Piening, Marie-Theres / Kühne, Marius / Töpfer, Eric (2022): *Parlamentarische Polizeibeauftragte. Vermittlungs- statt Ermittlungsstellen*. In: *Bürgerrechte & Polizei/CILIP* (130), pp. 17–28; Botta, Jonas (2022): *Unabhängige Polizeibeauftragte. Einfachgesetzliche Grundlagen, verfassungsrechtliche Bewertung und rechtspolitische Empfehlungen*. In: *JuristenZeitung* 77 (13), pp. 664–672; Sammet, Emma (2023): *Polizeibeauftragte zwischen Anspruch und Realität. Die Institutionalisierung von Polizeibeauftragten als parlamentarische Hilfsorgane und Ombudsstellen vor dem Hintergrund menschenrechtlicher Erwartungen*. In: *Die Öffentliche Verwaltung* (13), pp. 534–544.

³² Voigts, Hanning (2023): *Hessen: Kein Polizeibeauftragter vor der Landtagswahl*, *Frankfurter Rundschau*, 31 May 2023, <https://www.fr.de/politik/landtagswahl-hessen-ere855992/hessen-kein-polizeibeauftragter-vor-der-landtagswahl-92313669.html>.

³³ In addition, parliamentary ombudspersons exist in Thuringia and Mecklenburg Western Pomerania. Any complaint against public administration of the states, including the state police, can be lodged with these ombudspersons but, unlike the above mentioned police commissioners, they do not have specific functions with regard to complaints against the state police. In 2021, an amendment of the ombudsperson act of Mecklenburg Western Pomerania made the office also a “state police commissioner” but this new function only covers the task to handle complaints lodged by state police officers.

³⁴ See, for example, § 16 (1) of the Ombudsman Act of the State of Rhineland Palatinate (*Landesgesetz über den Bürgerbeauftragten des Landes Rheinland-Pfalz und den Beauftragten für die Landespolizei*). <https://www.diebuergerebeauftragte.rlp.de/wp-content/uploads/2022/05/Landesgesetz-BB-neu.pdf>, § 1 of the Bremen Independent Police Commissioner Act (*Gesetz über eine unabhängige Polizeibeauftragte oder einen unabhängigen Polizeibeauftragten für die Freie Hansestadt Bremen*). https://www.transparenz.bremen.de/metainformationen/gesetz-ueber-eine-unabhaengige-polizeibeauftragte-oder-einen-unabhaengigen-polizeibeauftragten-fuer-die-freie-hansestadt-bremen-brempolbg-vom-24-november-2020-184269?asl=bremen203_tpgesetz.c.55340.de&template=20_gp_ifg_meta_detail_d

³⁵ See, for example, § 23 (1) of the Ombudsman Act of the State of Rhineland Palatinate; § 6 (5) of the Bremen Independent Police Commissioner Act.

³⁶ See, for example, § 23 (2) and (3) of the Ombudsman Act of the State of Rhineland Palatinate; § 7 (5) and § 10 (1) of the Bremen Independent Police Commissioner Act.

³⁷ See, for example, § 24 of the Ombudsman Act of the State of Rhineland Palatinate; § 13 of the Bremen Independent Police Commissioner Act.

as part of the executive branch of government.³⁸ Usually, these bodies are units of the state ministries of the interior established by executive decree which stipulates their operational independence. Only in Saxony the complaints mechanism is (meanwhile) located at the state chancellery (*Staatskanzlei*), i.e. the chief minister's office, and was established by law which warrants its independence.³⁹

In Berlin, a state antidiscrimination law (*Landesantidiskriminierungsgesetz*) was adopted in 2020 which, among others, established a state ombudsperson who handles complaints alleging discrimination by public authorities, including the Berlin state police. The office of the ombudsperson was established as an independent unit within the Senate Administration for Justice.⁴⁰

Assessment by the German Institute for Human Rights

Legislation: The protection afforded by the prohibition of discrimination under German constitutional law and international human rights law is not limited to protection against legal provisions which, by their very wording, implement unequal treatment. It also takes effect when legal provisions ultimately lead to discrimination. Under the case law of the Federal Constitutional Court⁴¹ and of the European Court of Human Rights⁴², the legislature has an obligation to protect against de-facto discrimination. ICERD, too, makes it clear that at issue is whether laws "have the effect of creating or perpetuating racial discrimination".⁴³ Analogously, checks carried out by police forces can violate German and human rights law even if those checks are not motivated by racist views.⁴⁴

The German government is of the opinion that in the case of random checks, racial profiling is only present if the police measure is based on physical characteristics such as skin color as the exclusive or predominant criteria.⁴⁵ On the other hand, the Higher Administrative Court of Rhineland-Palatinate, for example, based on the case law of the Federal Constitutional Court, has clarified: "A violation of the prohibition of discrimination under Article 3 (3) sentence 1 of the German Basic Law does not only exist if the unequal treatment is exclusively or decisively linked to one of the characteristics mentioned therein, but already if, in the case of a bundle of motives, one inadmissible differentiating characteristic has been a supporting criterion among several".⁴⁶ Corresponding clarifications can also be found in a ruling by the Higher

³⁸ Töpfer, Eric (2018): Unabhängige Polizeibeschwerdestellen. Zum Stand der Dinge. In: Bürgerrechte & Polizei/CILIP (116), pp. 72–81 (pp. 75 and following).

³⁹ § 98 of the Saxonian Police Act (*Sächsisches Polizeivollzugsgesetz*).

⁴⁰ § 14 of the Berlin State Anti-Discrimination Act (*Landesantidiskriminierungsgesetz Berlin*). The ombudsperson's website at: <https://www.berlin.de/sen/lads/recht/ladg/ombudsstelle/>

⁴¹ BVerfG (2008): Beschluss vom 18.06.2008, Az. 2 BvL 6/07, Rn. 48f.

⁴² EGMR, Große Kammer (2007): Urteil vom 13.11.2007, Antragsnummer 57325/00 (D.H. und andere gegen Tschechien), insbesondere Ziffer 175, 185, 193.

⁴³ Art. 2 Para 1 c) ICERD

⁴⁴ Deutsches Institut für Menschenrechte (2020): Racial Profiling: Bund und Länder müssen polizeiliche Praxis überprüfen. Zum Verbot rassistischer Diskriminierung. https://www.institut-fuer-menschenrechte.de/fileadmin/Redaktion/Publikationen/Stellungnahmen/Stellungnahme_Racial_Profiling_Bund_Laender_muessen_polizeil_Praxis_ueberpruefen.pdf.

⁴⁵ See State Report, p. 143: "Police measures based exclusively or overwhelmingly on outward appearance or ethnic origin (racial profiling under the definition applied by CERD and EU-FRA) do not feature among the methods used in police practice in Germany; see also: Deutscher Bundestag (10.05.2019):

Drucksache 19/10065, S. 5, unter Hinweis auf Deutscher Bundestag (22.02.2017): Drucksache 18/11302, S. 3.

⁴⁶ Oberverwaltungsgericht Rheinland-Pfalz (2016): Urteil vom 21.04.2016, Aktenzeichen 7 A 11108/14.OVG, Leitsatz 8, und Verweis (Rn. 106) auf Bundesverfassungsgericht, Beschluss vom 16.11.1993, Aktenzeichen 1 BvR 258/86, Rn. 49; ebenso Verwaltungsgericht Dresden (2017): Urteil vom 1.2.2017, Aktenzeichen 6 K 3364/14; siehe auch Europäischer Gerichtshof für Menschenrechte (2006): Beschluss vom 13.03.2006, Antragsnummer Nr. 55762/00 und 55974/00, Ziffer 55–59.

Administrative Court of North Rhine-Westphalia.⁴⁷ Accordingly, selective, unprovoked checks on persons, which - also in combination with other criteria - are linked to phenotypical characteristics such as skin color and/or the (alleged) origin of people, are fundamentally inadmissible. In this sense CERD's recently published General Recommendation No. 36 defines racial profiling as "the practice of law enforcement relying, to any degree" on such criterion.⁴⁸

The German provisions in question governs police checks conducted to prevent or stop the illegal entry of persons to the country. The law implies that a person's residence status can be determined on the basis of that person's phenotypic characteristics, even if this relies on a combination with other characteristics. Seen in this light, the provision itself is worded in a way that gives rise to discrimination. The message that it sends to the police runs counter to the prohibition of racial discrimination.

Education and training: The GIHR agrees with the statement made by the Federal Republic of Germany in paragraph 10 of the 23. – 26. German state report that the legal status of ICERD is not sufficiently known by administrations, courts, and police authorities to guide the actions of these authorities as an effective standard. The Institute evaluates this finding as a deficiency in the implementation of the obligations under ICERD, since state officials can only grant and protect rights that are known to them.

Unfortunately, the reference in paragraph 9 to the National Action Plan Against Racism (NAP), is not suitable for remedying this deficiency. The state government undertakes to provide information on ICERD in the NAP, but does not specify any measures or goals, nor does it specify any body responsible for implementation: „The ministries should refer to this information within the scope of their respective areas of responsibility in order to improve the practical implementation and consideration of the international legal requirements in the application of German law. This should be accompanied by suitable events and formats.“ (NAP, p. 41). In paragraph 11 of the state report, a brochure from the federal ministry of justice is cited as the only example of this approach.

The Institute notes that optional efforts („*Soll-Bestimmungen*“) are not a sufficient tool to reconcile the identified deficiencies. Obligation, time limit and impact control are missing, as is a responsible body.

The state report's reference to the NAP includes the topic of police training: „Within the scope of its responsibilities and possibilities, the Federal Government will continue to work to ensure that training and further education for all areas of administration, the judiciary and the police is improved, if necessary through exchange and cooperation with the federal states.“

Independent complaints mechanisms: The Institute welcomes the progress made by the establishment of independent police commissioners and the announcement of

⁴⁷ Oberverwaltungsgericht für das Land Nordrhein-Westfalen (2018): Urteil vom 07.08.2018, Aktenzeichen 5 A 294/16, Leitsatz 3 und Rn. 52-55.

⁴⁸ Committee on the Elimination of Racial Discrimination (2020): General recommendation No. 36: Preventing and combating racial profiling by law enforcement officials, CERD/C/GC/36, para. 18, online: https://tbinternet.ohchr.org/Treaties/CERD/Shared%20Documents/1_Global/CERD_C_GC_36_9291_E.pdf

similar initiatives at the federal level and the federal states of North Rhine Westphalia and Lower Saxony.

However, in terms of practical independence, i.e. the capacity to effectively investigate complaints without significant external support, the ombudspersons of Rhineland Palatinate, Baden-Württemberg and Hesse lack adequate legal powers: To investigate facts they must request all relevant information from the state ministry of the interior.⁴⁹ In contrast, the ombudspersons in Berlin, Bremen, Schleswig-Holstein and Brandenburg can directly approach the police, review files, inspect premises and interview witnesses and external experts.⁵⁰ The capacity of all ombudspersons to investigate complaints is limited when criminal proceedings are initiated against a police officer. These cases then fall into the remit of the public prosecution authorities and investigators of the police, which in most states means that the ombudspersons must pause their investigations or cannot access relevant files. The same applies to cases in which disciplinary proceedings were initiated against police officers. Though the law usually stipulates that the police commissioners are to be provided with adequate staff and resources, all of them are poorly staffed compared to police complaints mechanisms in other countries.⁵¹

Proposed recommendations

- Repeal section 22 (1a) and section 23 (1) Nr. 3 of the Federal Police Act and enact legislation banning racial profiling.
- Review similar legal provisions in the police acts of the *Länder* with respect to whether their application leads to racial profiling.
- As a general recommendation for the matter of human rights education, racism as a social fact should be firmly anchored in training and further education trainings. This anchor would allow to mainstream the topic of racism in police education and further trainings. Training on racism and anti-Semitism should become mandatory for all police studies curricula. Professional ethics, human rights and racism education should be mainstreamed in all modules for police training.
- Establish independent police commissioners also at the federal level and in all federal states, provide them with adequate powers and resources to effectively investigate complaints alleging racial discrimination and stipulate that they cooperate with civil society organisations.

⁴⁹ See, for example, § 22 (2) of the Ombudsman Act of the State of Rhineland Palatinate.

⁵⁰ See, for example, § 7 of the Bremen Independent Police Commissioner Act.

⁵¹ The police commissioner of Schleswig-Holstein is, for instance, only supported by a staff of three whereas the Danish Independent Police Complaints Authority has a staff of around 35. To compare: Schleswig-Holstein has around 2.9 million inhabitants and around 7,000 police officers; Denmark has 5.7 million inhabitants and around 11,000 police officers.

6 Access to justice in the case of human rights abuses by or involving German companies (art. 5, art. 6)

not mentioned in the state report

Background

The activities of corporate actors significantly and adversely impact the human rights of people that experience racism, i.e. indigenous peoples, afro-communities, immigrants and People of Color worldwide. Global value chains, as a result of a colonial past, are often structured by racialized power structures.⁵² Therefore, the absence of international standards on combatting, ending and eliminating discrimination and racism in the text of the UN Guiding Principles on Business and Human Rights (UNGPs) and in the German discussions concerning business and human rights so far, be it in academic debates or fora with practitioners, is striking. While the Supply Chain Act has a strong enforcement mechanism, the Act does not improve access to justice in the case of human rights abuses by or involving German companies abroad.

Assessment by the German Institute for Human Rights

The Supply Chain Act's key weakness relates to the third pillar of the UNGPs; the Institute stresses that access to remedy for corporate human rights abuses in the Global South needs to be improved. The main reason for this shortcoming is that the Act covers indirect suppliers only, if the company "has actual indications that suggest that a violation of a human rights-related or an environment-related obligation at indirect suppliers may be possible (substantiated knowledge)".⁵³ Moreover, the Act does not provide for civil liability.⁵⁴ Thus, the possibilities of those affected by human rights abuses to sue for damages have not been extended.

Overall, the legal situation for victims of corporate human rights abuse remains unchanged, making redress for those affected in transnational cases practically impossible.

Proposed recommendations

- Improve access to effective remedy for victims of human rights abuses caused or contributed or directly linked to by companies throughout their value and supply chain, inter alia by advocating for a strong EU regulation, ensuring that the regulation removes obstacles to access to justice in Germany and in EU member states, including civil liability of companies and redress for human rights abuses for those affected.

⁵² See for instance: Niebank, Jan-Christian, Utlu, Deniz (2017): Closing Gaps in Protection Transnational cooperation on human rights: The case of the extractive sector in Colombia, Berlin, German Institute for Human Rights, <https://nbn-resolving.org/urn:nbn:de:0168-ssoar-55631-2>. Affected communities of export relevant mining projects in Colombia are often indigenous people or Afro-communities.

⁵³ Ibid at 3, Sec. 9, para. 3.

⁵⁴ Ibid, Sec. 3, para. 3.

7 Migrant Workers in Germany (art. 5, 7)

not mentioned in the state report

Background

Racialized groups of migrant workers in Germany are particularly vulnerable to labor exploitation. An interplay of socioeconomic factors, structurally disadvantageous institutional architecture and direct or indirect racist discrimination results in migrant workers being particularly frequently and drastically affected by work-related human rights violations. Existing prohibitions of discrimination are not sufficient to protect these groups effectively. Rather, proactive measures must be taken to increase the level of protection, prevent discrimination and combat racism.

Germany has a comparatively low unemployment rate and a high average wage. At the same time, the German low-wage sector is one of the largest in the EU and Germany has seen a persistent rise in social inequality for decades. Though the introduction of a minimum wage in 2015 made a significant contribution to reducing the risk of poverty among working people. Nevertheless, the situation remains precarious, especially for so-called „unskilled“ workers.⁵⁵

Migrant workers are particularly affected by poor working conditions - as migrant workers often are in those occupations that are indispensable but socially devalued. In recent years, scandalous working conditions in several industries have become public: Employers profited from the precarious situation of migrant workers by not accounting for overtime, charging high sums for transport, work clothes or accommodation, or by employing dependent workers as independent subcontractors, or by not even pay workers at all. Abuses like this were documented in a wide range of industries, such as hospitality, food, cleaning, domestic care, logistics, transport and agriculture.⁵⁶ The German Institute for Human Rights published a study in 2021 analyzing the precarious working and living conditions of so-called live-in care workers, mostly women from Eastern Europe.⁵⁷

Most recently, truck drivers mainly from Uzbekistan and Georgia hired by Europe-based transport companies protested publicly about the non-payment of wages. As the protests went on, trade unions also flagged the poor hygienic conditions and in some cases dramatic health situation of the truck drivers.⁵⁸

⁵⁵ Waas, Bernd / Hiessl, Christina (no year): Working, yet Poor. National Report Executive Summary: Germany. https://workingyetpoor.eu/wp-content/uploads/2021/10/Executive_summary_national_report_Germany.pdf

⁵⁶ This is shown in particular by reports from the helpdesks and information centers run by trade unions: Friedrich-Ebert-Stiftung/ faire Mobilität / DGB: Gräfenhausen is no exceptional case! Towards fair cross-border work in Europe, Conference 12 Oct 2023, Berlin; Wahl, Michael / Weirich, Anna (April 2023): Lebens- und Arbeitsbedingungen der LkW-Fahrenden auf Parkplätzen in Deutschland. Erfahrungen aus der Beratungspraxis von Faire Mobilität, Berlin; Wahl, Michael / Weirich, Anna (July 2022): Informationen zur Branche „Internationaler Straßentransport“. Erfahrungen aus der Beratungspraxis Faire Mobilität, Berlin; Oblacewicz, Justyna / Pető, Bernadette (February 2022): Informationen zur Branche der „Häuslichen Betreuung“. Erfahrungen aus der Beratungspraxis von Faire Mobilität, Berlin; Morgenroth, Tina / Mazurek, Piotr (May 2022): Informationen zur Branche der „Kurier- und Paketdienste“. Erfahrungen aus der Beratungspraxis von Faire Mobilität, Berlin.

⁵⁷ Phan-Warnke, Lê / Freitag, Nora (2021): Ending Live-In Care Workers' Labour Exploitation in the European Union. Lessons from Germany. German Institute for Human Rights: https://www.institut-fuer-menschenrechte.de/fileadmin/Redaktion/Publikationen/Analyse_Studie/Analysis_Live_in_Labour_Exploitation.pdf

⁵⁸ Frankfurter Rundschau (19.08.2023): Streik in Gräfenhausen: Lkw-Fahrer fordern mehr als eine halbe Million Euro, <https://www.fr.de/rhein-main/atemala-lkw-streik-graefenhausen-fahrer-raststaette-spediteur-erpressung->

Another example can be found in the meat food industry.⁵⁹ As a reaction to mass infections during the Covid-19 pandemic among workers in the meat industry due to bad housing and working conditions, the German legislator adopted the Act to improve enforcement in occupational health and safety (*Arbeitsschutzkontrollgesetz*) in 2020.

Assessment by the German Institute for Human Rights

While the Act to improve enforcement in occupational health and safety is a welcome step, the changes are unlikely to be sufficient to improve working conditions for migrant workers and protect them from exploitation. Their vulnerability is also due to the precarious situation of residence and housing: The overall housing crisis in Germany makes it virtually impossible for migrant workers to find housing on the private market so they depend on employers offering and forces them to accept overpriced low standard collective accommodation.⁶⁰

Protection gaps also exist in the German social security and health insurance system. The informality of employment relationships can mean that social benefits to which migrant workers are theoretically entitled to cannot be applied for or the necessary documents cannot be provided. Bureaucratic and language barriers as well as mistrust by authorities due to suspected social fraud prevent many from claiming their social rights.⁶¹

Racist attributions and internalizations, sometimes combined with classist devaluation, can make it difficult for migrant workers to claim their rights.⁶² In many cases employers use racialized work organization patterns by assigning work to workers according to their national affiliations and related legal status, making it difficult for them to organize collectively. Trade unions report racist hostility on the Internet when they specifically campaign for migrant workers.⁶³

Proposed recommendations

- Improve the enforcement of existing labor and social rights for migrant workers. So far, the control authorities can control violations. However, this does not happen to a sufficient extent. In addition, the controls only aim at enforcing the employers' obligation to pay social security contributions. A labor inspection authority that acts more from a rights-holder perspective could improve the situation.
- Address housing, poor hygiene facilities and insufficient healthcare for migrant workers. Germany should consider de-linking residence and work

edwin-92462245.html; tagesschau (22.09.2023): Im Hungerstreik an der Autobahn, <https://www.tagesschau.de/wirtschaft/arbeitsmarkt/lkw-fahrer-hungerstreik-hessen-100.html>

⁵⁹ See above. footnote 56.

⁶⁰ Birke, Peter / Neuhauser, Johanna (2023): Migration und Prekarität in der Pandemie. Empirische Studien aus Deutschland und Österreich. In: ARBEIT 23(1), pp. 3–26, 18 ff.; Sperneac-Wolfer, Christian (2023): Die multiple Prekarität rumänischer Bauarbeiter in Deutschland, in: Sozial.Geschichte Online 34, pp. 189-217, <https://doi.org/10.17185/dupublico/77538>.

⁶¹ Sperneac-Wolfer (2023), *ibid*; Lakić, Aleksandra (23.01.2023): Die EU muss ihren Umgang mit Erwerbsmigration radikal ändern, FES-Themenportal, <https://www.fes.de/themenportal-flucht-migration-integration/artikelseite-flucht-migration-integration/die-eu-muss-ihren-umgang-mit-erwerbsmigration-radikal-aendern>.

⁶² Sperneac-Wolfer (2023), *ibid*.

⁶³ Friedrich-Ebert-Stiftung/ faire Mobilität / DGB: Gräfenhausen is no exceptional case! Towards fair cross-border work in Europe, Conference 12 Oct 2023, Berlin.

and take other measures to decrease incentives for migrants to accept severe conditions and for employers to take advantage of migrant workers.

- Enable migrant workers to return to their home countries between occupations without losing social rights.