

Study on legislation

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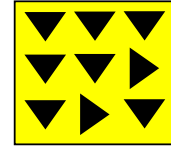
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GERMAN NATIONAL FOCAL POINT

RAXEN 3

STUDY

ON LEGISLATION

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Executive Summary

At the end of the year 2001, a total of approximately 7.3 million non-German residents lived in Germany, 55% of whom had been residents of Germany for more than ten years. According to the duration of their residence as well as other factors, these foreign residents are subject to **different residence status**. The question whether foreign nationals live in Germany as EU citizens, asylum seekers, contract workers or ethnic German immigrants (“*Aussiedler*”) has far-reaching consequences, both legally and in everyday life. Accordingly, **migration and residence legislation** has a considerable impact on the living situation of each migrant.

In spite of rising and diversifying migration inflows, it was not before 1998, when the new government coalition took office, that the traditional defensive self-definition according to which Germany was not a **country of immigration** was abandoned. The following years, in particular the years 2000 to 2002, saw numerous amendments and reforms in migration and foreign resident policy and legislation. This paradigmatic shift resulted, first of all, in the 1999 reform of German **nationality law**. Further steps were marked by the appointment of an Independent Commission on Migration in summer 2000, and the passing of the so-called **Green Card Regulations** in August 2002, which broadened the access of non-German specialists to the labour market in Germany.

In 2002, finally, German parliament passed the new **Migration Law**, which was to take effect as of 1st January 2003. However, as the law has been declared invalid for formal reasons by the Federal Constitutional Court on 18th December 2002, the government is now planning to re-introduce the bill into parliament in January 2003, without any amendment of the law itself. As the bill has to be passed by both houses of parliament, i.e. the *Bundestag* and the *Bundesrat*, it will probably be up to a conference committee of both houses to work out a compromise between the government and the opposition. The law aims at a comprehensive reform of foreign resident law. Contrary to the current Foreigners Law, the new law is to include regulations concerning the **gainful employment of non-German residents**, in order to simplify and structure the various legal residence and immigration titles. In addition, the legislation also aims at **fostering integration**. Under the new law, for example, new residents would generally be obliged to participate in integration courses.

On the whole, the passing of the Immigration Law has been **welcomed by a broad majority of organisations**, including trade unions, employers’ associations, churches and charitable organisations, even though some of planned regulations have met with **criticism**. Human rights and refugee organisations, for example, have welcomed the law’s extended protection for asylum seekers subject to non-governmental and gender-specific persecution, but also emphasised that some gaps would still remain in the protection of refugees.

Despite the fact that the goal of fostering integration has so far not been incorporated into law, local and state governments have already started to develop **new strategies in integration policy**. These efforts do not only aim at placing more emphasis on integration, but also at de-

fining it as an **inter-departmental task**, e.g. by setting up new cross-cutting administrative departments.

Similar to integration, the issue of **discrimination** has so far not been regulated by one comprehensive anti-discrimination bill. However, several laws contain specific **discrimination bans**.

In the **public sphere**, protection is provided, first and foremost, by Germany's constitution, which stipulates in Art.3 Par.3 **Basic Law** (*Grundgesetz*) that it is illegal to discriminate against anybody because of their sex, descent, race, language, origin, belief, or their religious and political views. In addition, handicapped persons are also protected against discrimination. This article of the constitution applies directly to all state authorities (e.g. public schools and housing authorities), and everybody who charges public officials with discrimination is entitled to take legal action. In addition, there are detailed anti-discrimination regulations for all civil servants. For example, §8 Par.1 **Federal Civil Service Law** (*Bundesbeamtengesetz*) bans all forms of discrimination based on sex, descent, race, religion and religious or political views. Similar directives are to be found in §7 of the **Civil Service Outline Legislation** (*Beamtenrechtsrahmengesetz*) and in §67 **Federal Staff Council Law** (*Bundespersonalvertretungsgesetz*). However, it is obligatory for civil servants to have **German citizenship**; exceptions to this rule are only admissible if there is an urgent public need to recruit non-German civil servants (e.g. for the police force).

The **private sector**, on the other hand, has no comprehensive legal protection against discrimination. In Civil law, in particular §611a *Bürgerliches Gesetzbuch* (*BGB*), there are regulations banning all forms of discrimination against employees because of their sex. However, the law comprises, up to now, no regulations against discrimination because of ethnicity. Detailed anti-discrimination regulations are only to be found in **subordinate laws**, for example in insurance supervision, public transport laws, telecommunication customer protection laws, or in the industrial relations law (including individual industrial relations agreements).

In February 2002, the Federal Ministry of Justice has presented a **bill for preventing discrimination in civil law** (Civil Law Anti-Discrimination Bill), in order to transfer, at least partly, two EU anti-discrimination directives into national law. The bill, however, only regulates contract law, whereas other areas, such as the membership and participation in trade unions and employers' associations, are to be regulated in a specific anti-discrimination labour law; respective bills have so far not been introduced into parliament. The amendments comprise, firstly, an explicit ban of discrimination based on "race", ethnicity, sex, religion and other beliefs, disability, age or sexual identity, and, secondly, a new **definition** for discrimination, which differentiates between discrimination and admissible forms of distinction, as well as a simplification concerning **burden of proof rules**.

In addition to national legislative projects, Germany has also signed respective **international agreements** and founded an **Institute for Human Rights**, thus underlining its determination to fight racism, xenophobia and discrimination.

Court cases on individual cases of discrimination constitute another important area. Up to now, there have been only few court actions dealing with cases of racial discrimination. Most of these cases concerned **labour law**, for the main reason that industrial relations laws and agreements provide a more extensive legal protection against discrimination than can be found in other areas. Public interest was greatest for cases, which dealt with the question of whether employees are entitled to **wear headscarves** at work.

Whereas more subtle forms of discrimination have up to now not been addressed by legal actions, there have been several court cases dealing with incidents of xenophobic or **racist incidents at the workplace** affecting non-German employees. German labour law entitles employers to dismiss staff that has committed xenophobic or racist infringements on the rights of non-German colleagues (e.g. insults or physical attacks).

Good-practice initiatives also play an important role in preventing and battling racial discrimination. These initiatives include special information campaigns for migrants, public relations work as well as **counselling and legal advice for victims of discrimination**. There are also several German lawyers who support victims of xenophobic violence by offering legal assistance in order to safe-guard victims' rights.

1. Introduction

The aim of this analytic study on “legislation” is, first and foremost, to outline **legal amendments** affecting migration, integration and anti-discrimination laws and analyse the consequences of these legal changes. In addition, we will also provide some **background information** on different groups of migrants. The main legislative projects in this respect are **migration law** and the draft for an **anti-discrimination bill**. In our analysis, we will also address the question whether legislative projects are characterised by anti-discriminatory aims and content. In addition to federal legislation, we will also take a closer look at state **directives and implementation orders**, as they, in practice, often have more far-reaching consequences than the underlying law itself.

In addition to laws, directives and implementation orders, we also aim at analysing the reality of **integration policy** in local administration, as integration is not only a federal matter, but also one that has to be implemented by local communities where migrants live. Whereas federal legislators have only recently begun to address certain aspects of integration, local authorities have been dealing with issues relating to migration and integration for a long time. In the process, local authorities have developed local integration strategies, and are thus in some cases one step ahead of federal legislation.

Furthermore, it is not sufficient to outline integration and anti-discrimination legislation, it is also essential to analyse how respective laws have been put into **practice**. To this end, our analysis has to include institutions that are responsible for **implementing the legislation** (e.g. the planned Federal Office for Migration and Refugees). Another important question concerns the conditions under which legal action can be taken in cases where rights have been violated, and if those affected by discrimination actually take legal steps. Up to now, it is not possible in Germany to take legal action in cases of discrimination, as the legislature has not yet passed the anti-discrimination bill and the constitutional court has rejected the migration law for formal reasons.

However, we can describe some court cases dealing with cases of discrimination on the basis of Civil Law (*BGB*). As far occurrences of discrimination are concerned, we can also use data that has been collected e.g. by **anti-discrimination bureaus**.

The first step in our research has been to study the Federal Law Gazette, the comprehensive collection of all legal changes at the federal level. In order to outline changes below the level of legislation, we have also researched websites, newspaper articles and legal journals. These publications have been useful in judging how legal amendments and their effects are evaluated by legal experts.

2. Background information on different groups of migrants

Despite continuously rising and increasingly diverse migration inflows, Germany refused, until the new government coalition took office in 1998, to give up its defensive self-definition of Germany not being a country of immigration. In the meantime, however, the new government coalition has faced the social reality of migration and embarked on a **new phase in migration policy**. Especially in the years 2000 to 2002, Germany has witnessed numerous amendments in its migration and foreign resident legislation and policy. One aspect contributing to this shift has been Germany's **demographic development** and its **shortage of specialist staff** in some parts of the economy.

The reform of nationality law in July 1999 marked the first result of this re-definition. Further steps were marked by setting up an Independent Migration Commission in summer 2000, in order to draw up practical solutions and recommendations for a new foreign-resident and migration policy, and the passing of the so-called Green Card regulations in August 2000, aimed at broadening the access of non-German specialists to the German labour market. In 2002, parliament passed a new migration law, which, however, was rejected for formal reasons by the Federal Constitutional Court in December 2002.

In the following, before outlining legal changes, we will provide some background information on the non-German resident population, migration flows and different groups of migrants in Germany.

Non-German resident population¹

At the end of the year 2001, Germany had a total of approximately **7.3 million** residents of non-German nationality, equalling a percentage of 8.9% of the entire population. About one fourth of foreign residents are descended from EU member states (a total of 1.873 persons, a third of whom are Italians). A further 27.4% are Turkish nationals, and another 15% nationals of one of the successor states of the former Yugoslavia. 55% of all non-German residents have been living in Germany for more **than 10 years**. As for foreign labour and their families from countries which had bi-lateral recruitment agreements with Germany, respective quotas are even higher: 67% of Turkish residents, 71.7% of Greek residents, 73.6% of Italian residents and 78.5% of Spanish residents have been living in Germany for more than 10 years.

Of the 7.3 million foreign residents, 1.614 million persons (about 22%) were **born in Germany**. Of foreign residents younger than 18 years, almost three fourths (72.9%) were born in Germany. The following table gives an outline of the **legal residence status²** of the non-German resident population.

¹Comprehensive "data and facts on non-German residents" can be found on the following website: www.integrationsbeauftragte.de/daten/index.stm.

² Foreign-resident law in Germany differentiates between the following residence titles:

A *Residence Entitlement (Aufenthaltsberechtigung)* can be granted on application to foreign residents who have been legal residents of Germany for eight years, provided that further requirements are met (e.g. that applicants are able to earn their own living without resorting to welfare payments). Residence entitlements are the most

Table 1: Residence status of non-German residents of selected nationalities (31st December 2000)

Nationality	Residence status							
	Total ³	Residence permit		Residence entitlement	Residence allowance	Residence authorisation	Leave of residence	Toleration certificate
		limited	unlimited					
Turkey	1,998,534	712,880	624,314	465,133	7,459	26,354	28,881	14,405
FR Yugoslavia ¹	662,495	114,781	160,927	98,697	3,706	24,439	56,239	120,381
Bosnia-Herzegovina	156,294	41,723	29,497	22,838	2,961	6,535	3,376	34,303
Poland	301,366	88,721	74,776	7,821	50,170	7,728	437	1,215
Croatia	216,827	44,218	81,584	69,125	8,404	986	269	2,452
Russian Federation	115,856	38,424	47,415	353	8,522	2,014	3,245	1,831
Iran	107,927	22,204	39,295	10,808	2,133	8,277	11,007	2,036
Romania	90,094	20,777	16,070	665	15,845	2,387	2,315	1,059
Ukraine	89,282	15,680	57,297	88	4,852	1,108	469	731
Vietnam	84,138	23,493	25,886	1,707	1,330	9,329	2,662	9,216
Morocco	80,266	31,412	23,656	9,400	5,779	242	327	384
Afghanistan	72,199	8,768	12,828	228	246	20,536	14,564	13,124
Iraq	60,913	3,393	10,872	87	126	25,558	12,380	2,397
Sri Lanka	50,579	15,121	10,536	2,987	288	5,744	4,694	2,994
Hungary	54,437	10,800	14,141	4,271	16,448	331	46	77
Lebanon	51,375	12,798	7,636	363	550	14,547	2,121	5,397
China	50,885	14,215	4,956	932	17,177	2,409	2,940	2,257
Tunisia	24,136	8,740	7,164	2,864	1,366	154	298	111
Total ²	7,296,817	1,727,381	2,037,428	809,883	262,711	199,233	199,831	261,506

Source: Federal Government Commissioner for Foreign Resident Affairs, Federal Administrative Office (Central Register for Foreigners)

1) Category includes all persons registered by the Central Register for Foreigners as Yugoslavian nationals (on a set date).

2) The difference between the sum of different residence titles and the category “total” is, at least partly, due to the fact that EU nationals are virtually exempt from residence regulations. About 409,319 EU nationals had a limited Residence Permit – EC, a further 416,349 persons an unlimited Residence Permit – EC.

3) If one sums up individual columns, it becomes obvious that these sums differ, in part considerably, from the total given for individual countries. E.g. there are no data on the residence status of almost 120,000 Turkish nationals or of 34% of Romanian nationals.

Migration flows³

Over the last ten years, migration flows to and from Germany have been influenced by several factors. One important factor was the **fall of the “iron curtain”**, which allowed migration outflows from the former Eastern-European bloc. As for Germany, it has led to an increase in

secure residence title since they are unlimited, i.e. there are no restrictions concerning the duration and place of residence.

A *Limited Residence Permit (befristete Aufenthaltserlaubnis)* forms the basis for a subsequent permanent residence status. In accordance with the duration of the residence, the residence status becomes legally more secure. Residence permits are granted unrelated to the purpose of residence in Germany.

An *Unlimited Residence Permit (unbefristete Aufenthaltserlaubnis)* constitutes the first step towards a permanent residence status. The main condition is that the applicants have been legal residents (with a limited residence permit) for at least five years. If further requirements are met, applicants are entitled to receive this residence status.

A *Residence Allowance (Aufenthaltsbewilligung)* allows residence for a clearly defined purpose; consequently, it limits the duration of residence (e.g. for university students, contract workers).

A *Residence Authorisation (Aufenthaltsbefugnis)* is granted because of international law, or for humanitarian or political reasons. It can only be extended if these humanitarian grounds continue to apply. This residence status is granted to, among others, quota and civil-war refugees.

Leaves of Residence (Aufenthalts-gestattung) and *Toleration Certificates (Duldung)* constitute two further legal titles which, however are not classified as residence titles. A leave of residence is granted to asylum seekers for the duration of asylum procedures, and limits their right to movement to the district they have been allocated to by the authorities. A toleration certificate provides temporary protection against deportation, without repealing the general obligation to leave the country.

migration inflows of ethnic German immigrants (“*Aussiedler*”) and asylum applicants from Eastern Europe. Secondly, the **civil wars** in former Yugoslavia resulted in considerable migration inflows of war and civil-war refugees, especially in the early 1990s. Thirdly, labour migration from neighbouring states, particularly Poland and the Czech Republic, has increased, too. As for migration flows to and from Poland, a distinct culture of “commuter migration” has developed, i.e. Polish nationals enter Germany for a limited period of time in order to seek temporary work. In view of the planned expansion of the European Union toward the east, Germany will be in the centre of future migration flows involving Eastern-European nationals.

Table 2: Migration in- and outflows across the borders of the Federal Republic of Germany (1992-2001)

Year	Inflows			Outflows			Net migration (inflows – outflows)	
	Total	of which: non-Germans	Percentage	Total	of which: non-Germans	Percentage	Total	of which: non-Germans
1992	1,502,198	1,211,348	80.6	720,127	614,956	85.4	+782,071	+596,392
1993	1,277,408	989,847	77.5	815,312	710,659	87.2	+462,096	+279,188
1994	1,082,553	777,516	71.8	767,555	629,275	82.0	+314,998	+148,241
1995	1,096,048	792,701	72.3	698,113	567,441	81.3	+397,935	+225,260
1996	959,691	707,954	73.8	677,494	559,064	82.5	+282,197	+148,890
1997	840,633	615,298	73.2	746,969	637,066	85.3	+93,664	-21,768
1998	802,456	605,500	75.5	755,358	638,955	84.6	+47,098	-33,455
1999	874,023	673,873	77.1	672,048	555,638	82.7	+201,975	+118,235
2000	840,771	648,846	77.2	673,340	562,380	83.5	+167,431	+86,466
2001	879,217	-	-	606,494	-	-	+272,723	-

Source: Federal Statistics Office

Groups of migrants

Groups of migrants can be differentiated, firstly, according to their legal status on entering Germany, and secondly, according to their residence title. These migration and residence regulations have a crucial impact on the living situation of migrants. For each migrant, it makes a huge difference whether he or she has entered Germany as an asylum seeker, contract worker or ethnic German immigrant (“*Aussiedler*”). In the following, we will outline the following **types of migration**:

- EU-internal migration
- labour migration
- asylum seekers and quota refugees
- ethnic German immigrant (“*Aussiedler*”).⁴

³ In Germany there are also some national minorities. For detailed information on these groups see Appendix II.

⁴ In addition to these types of migration, the following groups also have to be mentioned:

Family and spouse migration of third-country nationals, migration inflows of Jews from the territories of the former Soviet Union, war, civil-war and de-facto refugees, non-German university students.

*EU-internal migration*⁵

According to EU regulations (EEC Residence Regulations, as of 31st January 1980; EC Decree on Freedom of Movement, as of 17th July 1997) EU nationals enjoy freedom of movement within the European Union, provided certain requirements are given. First and foremost, gainfully employed persons (employees, self-employed persons and service providers) enjoy this privilege. In addition, spouses, direct descendants (children and grandchildren younger than 21 years) as well as parents and grandparents can accompany EU migrants, provided that the latter is able to provide for the maintenance of his or her family members. Europe's development from an economic community to a more deeply integrated European Union has given EU nationals and their family members the right to free movement within the EU, even if their migration to another EU-country is not economically motivated (EC Decree on Freedom of Movement, as of 17th July 1997).

Labour migration

On principle, nationals of non-EU member states or other states participating in the EEA (European Economic Area) are not entitled to enter Germany for the sake of taking up gainful employment. However, there are some exceptions, as outlined in the **Decree on Exceptions to the Ban on Allocating Foreign Labour** (*Anwerbestoppausnahmeverordnung - ASAV*⁶). It is the goal of this decree to provide a legal channel for migrants from Eastern Europe and thus prevent illegal immigration. In addition, the programme helps to compensate for the labour shortage in some sectors of the German economy.

Under these regulations, Eastern European labour, especially from Poland and the Czech Republic, has been given an opportunity to take up employment in Germany. The majority of these labour migrants works as seasonal or contract workers. In 2001, the number of allocations of non-German seasonal workers amounted to 254,000, the number of non-German contract workers to 47,000.

In addition, the passing of the so-called Green-Card regulations has opened up a new channel for migration inflows of **IT experts**. Under these rules, non-German information technology experts (who are not citizens of countries participating in the EEA) can be employed in Germany for a period of up to five years. Work permits can also be allocated to non-German graduates of German universities and colleges who take up employment after graduation. Until May 2002, a total of 11,984 Green Cards or work permits has been granted to non-German IT specialists.

Further details on migration flows can be found on the following website: www.integrationsbeauftragte.de/publikationen/migration2001.pdf.

⁵ For quantitative data see Appendix II, Table 3

⁶ According to §9, the following nationalities are exempted from the recruitment ban: nationals of EFTA states, the USA, Canada, Israel, Australia, New Zealand, Japan and small European states. According to §§2 to 5, the following professions are also exempted: contract workers, language teachers, specialist chefs, scientists, social workers and clergy for foreign nationals, nursing staff from Eastern European countries as well as artists and performers. Further exceptions exist for highly qualified specialists whose employment is in the national interest.

Foreign nationals that are residents of Germany and want to take up gainful employment have to apply for **work authorisation**, with the following groups being exempted from this obligation: EU nationals and citizens of EEA member states, persons holding a residence entitlement, and foreign nationals that were born in Germany and hold an unlimited residence permit. Work authorisation can be granted in two forms: firstly, in the form of a work permit in cases where job vacancies cannot be filled by German workers (or other European labour with a comparable legal status); secondly in the form of a work entitlement, which can be granted on condition that non-German residents have been legally employed in Germany for at least five years. Work permits can be temporary or limited to certain sectors of the economy. Work entitlements, on the other hand, are generally granted for an unlimited period of time.

Asylum seekers and refugees under the Geneva Convention

According to Art.16a Basic Law, non-Germans subject to political persecution have the constitutional right to asylum in Germany. Persons recognised as entitled to political asylum are granted an unlimited residence permit. In 2001, a total of 5,716 applicants were recognised as entitled to asylum (recognition rate: 5.3%).⁷

In addition to the right to political asylum according to Art. 16a Basic Law, there is also the possibility of granting what is commonly referred to as the "little asylum" ("kleines Asyl") according to §51 Par.1 Foreigners Act (*Ausländergesetz*), based on the Geneva Convention for Refugees (Art.33). Persons recognised as convention refugees are granted a residence authorisation which is limited to a period of two years. This period can be extended if the persecution risk persists. In 2001, a total of 17,003 persons were recognised as protected against deportation. This equals a quota of 15.9%, in relation to all decisions passed by the Federal Office for the Recognition of Foreign Refugees (*Bundesamt für die Anerkennung ausländischer Flüchtlinge*).

In addition, §53 Foreigners Act requires that persons are also **protected against deportation** if they are threatened by torture, capital punishment, inhuman punishment or other imminent dangers to life and limb or to their freedom. These foreign nationals can be granted a **limited toleration certificate**. Once this period of toleration expires, these persons are under a legal obligation to leave the country. If repatriation is not admissible, for the reasons stated above, toleration certificates can be extended. In 2001, 3,383 persons were recognised as protected against deportation according to §53 Foreigners Act (a quota of 3.2%).

These two groups are thus legally protected against deportation, but their **residence status is relatively insecure**. Furthermore, they face restrictions in labour market access (a one-year waiting period and a subordinate status in comparison to EEA nationals).

⁷ For more detailed data see Appendix II, Table 5 and 6

The number of asylum seekers reached its peak in 1992, with almost 440,000 asylum applications, and has continuously decreased ever since. In 2001, the total of applications amounted to 88,287.

Ethnic German immigrants (Aussiedler)

Under §4 Par.3 *BVFG* (Federal Law on Displaced Persons), *Aussiedler* are legally considered as **Germans** according to Art.116 Basic Law. The legal requirements are that they are German nationals or of German descent, living in one of the areas recognised in the *BFVG* as German settlement areas. Under the 1993 Law on Resolving Long-term Effects of World War II (*Kriegsfolgenbereinigungsgesetz*), most *Aussiedler* are former residents of territories within the former Soviet Union. In 1993, a **quota** was imposed on migration inflows of *Aussiedler* (following an amendment of the *BFVG* and a federal law on debt reduction, as of 22nd Dec. 1999). Since then, the Federal Administrative Office (*Bundesverwaltungsamt*) responsible for the admission of *Aussiedler* is not entitled to issue more entry permits than were granted in 1998 (i.e. a total of 103,080 persons, including applicants and other family members).

Due to the rising number **inter-ethnic marriages**, the ration between *Aussiedler* and their accompanying family members has been reversed: from slightly more than 77% in 1993, to about 22% in 2001. Consequently, the great majority of entries today are accompanying non-German family members. On arrival in Germany, they are also entitled to receive German citizenship⁸ and have the same legal entitlements as *Aussiedler* themselves. In 2001, approximately 98,000 persons entered Germany as *Aussiedler*. Since 1950, respective inflows of *Aussiedler* and accompanying family members have amounted to more than 4.2. million persons.⁹

3. Recent developments in integration legislation and policy

An analysis of integration policy and legislation has to take several levels into consideration: For one, federal laws and directives for implementing these laws nation-wide. For another, however, it is essential to include actual integration policy at the state and local level, too, as some of the state and local regulations aimed at fostering integration are more far-reaching than underlying federal legislation.

3.1 Laws and government directives

3.1.1 Citizenship and Nationality Act (*Staatsangehörigkeitsgesetz*)

In the following, we will provide an outline of new Citizenship and Nationality Act (15th July 1999), which took effect as of 1st January 2000:

⁸ On receiving their entry certificate, *Aussiedler* and accompanying family members (spouses and children) are automatically granted German citizenship. This amendment of nationality law (§7 *StAG*), which took effect as of 1st August 1999, has exempted this group from regular nationalisation procedures.

⁹ For more detailed data see Appendix II, Table 4

Acquisition of German citizenship by birth

As of 1st January 2002, children who are born in Germany to foreign nationals will receive German citizenship when one of the respective child's parents has resided lawfully in Germany for at least eight years and holds entitlement to residence or has had an unlimited residence permit for at least three years. This amendment substantially changes the traditional principle of descent (“*ius sanguinis*”) by introducing the principle of “*ius soli*” for the majority of children born to migrants in Germany.

In cases where children acquire dual nationality, i.e. German nationality and that of their parents, they will have to decide within five years of turning 18 - in other words, before their 23rd birthday - whether they want to retain their German citizenship or their other citizenship. They must opt for one of their two nationalities (which is why this is called the **requirement to opt**): In the event that they declare they want to retain their foreign citizenship, they lose their German citizenship. This is also the case when they do not make any statement to the authorities before their 23rd birthday. Should the respective individuals decide to keep their German citizenship, they have to provide proof before their 23rd birthday that they have renounced their other citizenship. **Exceptions** are possible, particularly when renouncement of the other citizenship is not possible or would be unreasonable.

Transitional provisions for children

In §40b of the new nationality act, a temporary entitlement to naturalisation (limited until 31st December 2000) has been created for children born to foreign residents before 1st January 2000, provided they fulfil the conditions under the principle of “*ius soli*” taking effect as of 1st January 2000. These cases are also governed by the requirement to opt when these children turn 18.

On 24th January 2001, the Federal Interior Ministry has introduced a bill into parliament to amend §40b of the nationality act. The aim of the legislation was to extend the transitional provisions outlined above for another twelve months, i.e. until 31st December 2002, and to lower the administrative fee charged by naturalisation authorities. However, the bill was rejected by the *Bundesrat*, the upper house of parliament, and could therefore not take effect.

Entitlement to naturalization under the Foreigners Act

Before the new legislation took effect, foreign nationals were granted entitlement to naturalization only after 15 years of residence in Germany. Now, a foreign national is entitled to naturalization after lawfully residing in Germany for eight years if he or she meets the following requirements: He is in possession of a residence permit or the right of unlimited residence, professes loyalty to the free democratic order laid down by Germany's constitution and has not been involved in any activities that are hostile to the constitution. In addition, applicants must not have a criminal record, have to be able to support himself and dependent family

members without the help of welfare benefits or unemployment assistance and, finally, have to have an adequate command of the German language.

3.1.2 Foreigners Act (*Ausländergesetz*)

As of 1st June 2000, amendments to Germany's Foreigners Act (§19 *AuslG*) have extended residence entitlements of non-German spouses:

According to the amendment, non-German spouses who separate from their husband or wife can be granted their **own residence title** after only 2 years, as compared to 4 years under previous rules (§19 Par.1 No.1 *AuslG*). In addition, **hardship regulations** have been expanded to the effect that separate residence titles can in some cases be granted even before the two-year waiting period has expired. Residence permits can thus also be granted in cases where spouses infringe on the rights of their partners (or children), and respective persons can therefore not be expected to continue living together with their spouse or parent. This amendment has also been incorporated into the new Migration Law (§31 Residence Law).

3.1.3 Work Permit Directive (*Arbeitsgenehmigungsverordnung*)

Regulations concerning labour market access for asylum seekers, civil-war refugees and foreign residents with a toleration certificate have been amended by the following two directives: First Directive Amending the Work Permit Directive (8th December 2000), and Second Directive Amending the Work Permit Directive (24th July 2001):

The first amendment repealed an earlier directive by the Federal Labour Ministry (the so-called “Clever-Directive” of May 1997), which had prevented the Federal Labour Office from granting work permits to asylum seekers, civil-war refugees and foreign residents with a toleration certificate if they had entered Germany after 15th May 1997. In future, respective persons can be granted a **work permit** after a one-year waiting period if there are no German or non-German (with a prior legal entitlement) applicants for a particular job vacancy. Similarly, a one-year waiting period has also been introduced for non-Germans who, as spouses or children of a foreign resident, have been granted a limited residence permit or allowance; under previous regulations, these residents could only be granted work permits after a four-year waiting period.

The second amendment has extended the rules for easier labour market access (as described above) to foreign residents’ **registered life partners**, provided they have been granted a limited residence permit or allowance. Foreign residents with a residence authorisation, e.g. war and civil-war refugees, will in future have immediate labour market access without any waiting period, but authorities still have to ensure that there are no other applicants with prior legal entitlement. In a further amendment concerning work permits for foreign residents, labour offices no longer have to carry out repeated **prior entitlement checks** for non-German labour who have been employed by the same company for at least one year and apply for an extension of their work permit.

3.1.4 Life Partnership Act (*Lebenspartnerschaftsgesetz*)

The new Life Partnership Act (*LPartG*) has been promulgated on 22nd February 2001, taking effect as of 1st August 2001. In addition to general regulations on same-sex partnerships, it also comprises amendments to Germany’s Foreigners Act (*AuslG*), granting equal rights to non-German partners who have their partnership officially registered. In future, **registered non-German partners** will be **equal** to non-German husbands or wives in terms of immigration and residence titles (insertion of new §§ 27a and 29 Par.4 into Foreigners Act).

3.1.5 Education Grant Act (*Erziehungsgeldgesetz*)

Under the 3rd amendment to the Federal Education Grant Act (§1 Par.6 Sent.2 No.2 and 3 *BerzGG*), dated 12th October 2000 and taking effect as of 1st January 2001, non-German parents will have improved access to education grants for their children. In future, entitlements will be extended to persons finally recognised as entitled to political asylum (according to Art.16a Basic Law) or as quota refugees (according to §51 Abs.1 *AuslG*).

3.1.6 Federal Education and Training Assistance Act (*Bundesausbildungsförderungsgesetz - BAföG*)

Under amendments taking effect on 1st April 2001, the Federal Education and Training Assistance Act (§8 Par.1 No.7 *BAföG*) now includes **extended entitlements** for education and training assistance. Non-German residents who are protected against deportation (according to §51 Par.1 *AuslG*) and non-German spouses (§8 Par.1 No.7 *BaföG*) are now also entitled to education and training assistance.

3.1.7 Migration Law (Law Controlling and Limiting Immigration, Regulating Residency and Integration of EU-Citizens and Third-Country Nationals)

3.1.7.1 Outline of legislation

In the following, we will provide an outline of the main points of the **new Migration Law** (*Zuwanderungsgesetz*), which was supposed to take effect on 1st January 2003. However, with the law having been rejected by the Federal Constitutional Court for formal reasons, the Federal Government is now planning to re-introduce the bill, unchanged, into parliament in January 2003.

Formally, the migration law is a so-called “article law”, i.e. it comprises numerous amendments to various existing laws such as the Asylum Procedure Act, the Asylum Seekers Benefits Act and the Citizenship and Nationality Act. The migration law comprises 15 articles, centred around Art.1, which contains new regulations on residence, gainful employment and integration of non-German residents (**Residence Act – *Aufenthaltsgesetz (AufenthG)***). The new migration law aims at a comprehensive reform of various laws relating to non-German residents, even though it adopts the majority of existing regulations. In contrast to earlier legislation, the migration law incorporates questions relating to the gainful employment of non-German residents into residence law, in order to create a complete and clear list of all legal residence and immigration titles. It also emphasises the goal of fostering integration.

§1 of the Residence Act (*AufenthG*) describes the goal of the legislation as follows: “This law aims at channelling and limiting inflows of non-German residents. It allows and regulates migration inflows on the basis of Germany’s integration capacity and its national interests concerning economic development and the labour market. Furthermore, the law fulfils Germany’s humanitarian obligations. It thus aims at regulating inflows, residency, gainful employment and integration of foreign residents.”

The new **residence law** is no longer based on residence titles, but on the motives underlying residence in Germany (education and training, gainful employment, family migration, humanitarian reasons). To this end, the law has reduced the number of residence titles to only two: a (temporary) residence permit (*Aufenthaltserlaubnis*) and a (permanent) settlement permit (*Niederlassungserlaubnis*). The law thus replaces the five residence titles currently in

effect.¹⁰ The new **residence permit** constitutes a limited residence title (§8 *AufenthG*), with the possibility of re-issuing it at a later stage with another legal title (it is therefore a so-called “first-step” title). The **settlement permit**, on the other hand, is permanent and does therefore include no restrictions or conditions (§9 *AufenthG*). It also entitles foreign residents to take up gainful employment.

The law comprises generous interim regulations for third-country nationals who are already residents of Germany. According to §99 Par.1 *AufenthG*, unlimited residence permits and entitlements that have been granted to these persons will remain in force. In effect, this regulation would “improve the legal status of about 2 million third-country nationals over night” (cf. Davy 2002, p.174; as to distribution of various residence titles, cf. Table 1).

Labour migration

In this area, the law sets out to replace current regulations, which are mainly to be found in the Decree on Exceptions to the Ban on Allocating Foreign Labour (*Anwerbestoppausnahmeverordnung*¹¹), with more flexible rules. According to §18 *AufenthG*, foreign nationals can be granted a residence permit in order to take up employment in Germany in cases of **labour market bottlenecks**. Conditions are that the Federal Labour Office has given its assent or that a federal decree has been passed which is based on a bi-lateral agreement with another country.

The law also simplifies so-called **prior entitlement checks**¹² which have to be carried out by labour offices, i.e. labour offices are not permitted to grant work permits to non-German residents for job vacancies if there are German applicants (or European nationals with a comparable legal status). In future, prior entitlement checks are to take regional factors into consideration. Moreover, work and residence permits are to be granted by means of one administrative act only, provided that the labour authorities have given their prior assent. These simplifications would save applicants a lot of time and effort as, under current law, they have to complete two separate administrative procedures, one for the residence and the other for the work permit.

¹⁰ They comprise the following five titles: residence entitlement, limited and unlimited residence permit, residence allowance and residence authorisation. In addition, so-called “toleration certificates” will also be abolished; legally, they do not constitute a residence title, but a suspension of somebody’s obligation to leave the country by means of deportation. The “leave of residence” (according to §55 Asylum Procedure Code), on the other hand, will be retained; legally, it also not considered to be a residence title. A leave of residence is granted to asylum seekers for the duration of asylum procedures. It is restricted to the administrative district of the regional authority asylum seekers have been allocated to.

¹¹ This decree lists exceptions to the general recruitment ban imposed in 1973. Under the decree, certain groups of foreign labour can, under some conditions, be granted a, in most cases, limited residence and work permit: e.g. contract and seasonal workers, and some professions such as artists or university teachers.

¹² Persons with prior entitlement include German citizens as well as nationals of EU member states, EEA member states or third-country nationals who are not subject to any legal employment restrictions. The latter group comprises, e.g., foreign residents who were born in Germany and have been granted an unlimited residence permit, or foreign nationals who have been granted a residence entitlement.

The law also allows **new forms of labour migration**. A small number of **highly qualified specialists** (e.g. IT experts, engineers, business executives and scientists) will be allowed to live and work in Germany. They may be granted a permanent residence permit immediately if they fulfil certain requirements (§19 *AufenthG*). These regulations will replace two earlier directives that were introduced in 2000; commonly referred to as “Green Card” regulations, they allow authorities to grant work and residence permits to IT specialists for a maximum period of five years.

In addition to highly qualified specialists, the new law also permits the introduction of an optional selection process for admitting labour migrants, which is based on a **points system** (§20 *AufenthG*).¹³ If such a selection process is to be initiated, the Federal Government has to pass a directive, with the approval of both houses of parliament, the *Bundestag* and the *Bundesrat*, defining the criteria according to which points can be allocated to applicants. However, several criteria that have always to be included in such a selection process have already been listed in the new migration law: they include good health and reputation, sufficient financial resources, age, academic and vocational qualifications, job experience, marital status, language skills, existing links to Germany and country of origin (§20 Par.3 *AufenthG*).

Foreign nationals who have successfully participated in this selection process will be granted a settlement permit, which allows them to take up gainful employment. However, recruitment procedures will only be carried out if a maximum quota for labour migrants under this system has been imposed by the Federal Office for Migration and Refugees and the Federal Labour Office, after consultation with the Migration Council. Depending on the situation on the German labour market, it is also possible to allow no labour migration at all. In a public statement, Federal Interior Minister Schily has declared that he expects no admissions under the points system for labour migrants before the year 2010.

Foreign graduates will be able to commence employment after obtaining approval from the authorities. They will also receive a one-year residence permit to enable them to seek work. This regulation aims at preventing them from moving to other industrialized countries. Until now foreign graduates have generally had to leave Germany after completing their studies.

According to §21 Par.1 *AufenthG*, foreign nationals who are **self-employed** can also be granted a residence permit, provided that this is expected to have a positive effect on economic growth and employment. Respective administrative decisions are to be based, above all, on the business plan and the entrepreneurial experience of the applicant, together with the amount of their planned capital investment and its expected effects on the labour market. In general, granting residence permits to self-employed businesspersons will be considered to be in the national interest if their investment amounts to at least €1 million or creates at least ten jobs.

¹³ The system gives preference to nationals of countries that have applied for EU membership and have already entered formal admission negotiations (§20 Par.2 *AufenthG*).

Family migration

Under the new law (§32 *AufenthG*), **children** of foreign nationals will be allowed to join their parents in Germany up to the age of 18 (as opposed to 16 years under current law). Conditions are that children migrate to Germany together with their parents, have sufficient German language skills, or that one parent has been recognised as a refugee, in accordance with the Geneva Convention, a highly qualified specialist or a labour migrant under the new points system. In all other cases, children are only allowed to join their non-German parents up to the age of 12, but authorities are entitled to grant special permits. For example, unmarried children who are minors can be granted a residence permit if this is in the “interest of the child” or the “family situation”.

Entitlements of **spouses or registered partners** to take residence in Germany depend on the residence title of the foreign national who already lives in Germany (§30 *AufenthG*). Spouses of a non-German resident will be granted a residence permit if their partner is in possession of a settlement permit, has been in possession of a residence permit for at least five years, or if they were already married at the time when the residence permit was granted. Family migration entitlements also exist for foreign nationals who have been recognised as entitled to political asylum or as refugees under the Geneva Convention. If such a marriage is divorced, foreign nationals (who have joined a resident of Germany) will be granted their **own residence permit** if they have lived together as a married couple in Germany for at least two years (§31 *AufenthG*). However, in “cases of hardship”, authorities can shorten the two-year waiting period.

Family members who are entitled to join their family in Germany enjoy the same labour market entitlements as the foreign resident that they are joining. Until now, a one-year waiting period applies in these cases.

On principle, a residence permit for the sake of family migration can be refused if the family member already living in Germany depends on welfare payments for this living (§27 Par.3 *AufenthG*).

Admission for humanitarian reasons

The new residence law sets out to create **only one residence title** for all types of humanitarian protection, which includes a (limited) residence permit. Other legal differences among groups of refugees protected for humanitarian reasons (recognised asylum seekers, refugees under the Geneva Convention, persons protected by law against deportation and persons who cannot be repatriated for other legal or factual reasons) will remain (§25 *AufenthG*).

The law aims at bringing in line the residence status granted to foreign nationals who are protected against deportation under the Geneva Convention, with that granted to recognised asylum seekers according to Art.16a Basic Law (§25 Par.1 and 2 *AufenthG*). In effect, this amendment would confer the same labour market entitlements on both refugees with a so-called “little asylum” status (“*kleines Asyl*”) and recognised asylum seekers.

Moreover, the same status is also to be transferred to refugees subject to **non-governmental and gender-specific persecution**, provided they fulfil the conditions outlined by the Geneva Convention (§60 Par.1 *AufenthG*). Under current law, these persons can only be granted the status of being protected against deportation (according to §53 *AuslG*) and a toleration certificate. In effect, the amendment would considerably improve the situation of **Geneva Convention refugees**¹⁴, and particularly of refugees subject to non-governmental and gender-specific persecution.

Nevertheless, another amendment will render the residence status of recognised asylum seekers **more insecure**. In future, recognised asylum seekers will not immediately be granted an unlimited residence permit, but one limited to three years (§26 *AufenthG*). After the three-year period, they are legally entitled to a permanent settlement permit, provided that the Federal Office for Migration and Refugees decides that there are no reasons for repealing or overturning the recognition.

Persons **protected against deportation** (under §53 *AuslG*) will in future be granted a residence permit (§25 Abs.3 *AufenthG*). Family migration can be allowed under international law or for humanitarian reasons, and labour market access will also be granted (prior entitlement checks notwithstanding). Furthermore, foreign residents who are legally obliged to leave the country can nevertheless be granted a residence permit if their repatriation is impossible for legal or factual reasons (§25 Abs.5 *AufenthG*).

However, the granting of residence permits has been ruled out for foreign residents who are **personally responsible** for obstacles to their repatriation, e.g. by submitting false personal data or by misleading authorities with regard to identity or nationality. These persons are to be excluded from family migration entitlements as well as child and education benefits. Moreover, they will only be granted welfare payments according to the Asylum Seekers Benefits Act, i.e. payments are reduced in comparison to other recipients. Finally, authorities will make increased efforts to repatriate persons who intentionally try to evade their obligation to leave the country. **Deferments of deportation** will continue to be certified, but without granting a toleration certificate.

Furthermore, the law also includes hardship regulations, according to which foreign residents can be granted a residence permit if a representative of a state government submits an application to local authorities in **cases of hardship** (§25 Par.4a *AufenthG*).

Integration

§43 Par.1 *AufenthG* states the goal of fostering the economic, cultural and social integration of legal and long-term foreign residents of Germany. This amendment will therefore, for the first time, incorporate the goal of integration into residence law. The law states that this

¹⁴ In 2001, a total of 5,716 applicants were recognised as asylum seekers (a recognition quota of 5.3%), but no less than 17,003 persons (a recognition quota of 15.9%) were recognised as protected against deportation under

change of policy is in response to the fact “that over the last decades a large number of foreign residents has settled down in Germany both legally and permanently. In future, too, qualified immigrants and their families will settle down in Germany for good, building a new life for themselves and their families” (Federal Government draft, p.185).

The section of the residence law dealing with “integration” is based on the principle of “**providing support and making demands (*Fordern und Fördern*)**”. §43 Par. 1 *AufenthG* explains: “Integration is based on the principle of mutuality and interchange between migrants and the receiving society. Migration inflows do not only make it necessary for migrants to adapt to a new life in unfamiliar surroundings, it also makes demands on society to provide support and orientation” (p.185)

The law creates both an entitlement to participate in integration courses (§44 Par.1 *AufenthG*) and an obligation to do so (§45 Par.1 *AufenthG*). All foreign residents who have been granted their first residence permit for reasons of employment, family migration or on humanitarian grounds are entitled to participate in such courses. Third-country nationals who have been granted a permanent settlement permit, on the other hand, are under no obligation to participate.

All entitled persons are under a legal obligation to participate if their German language skills are not sufficient for everyday oral communication. Integration courses comprise a German **language course** and a **social studies course** teaching the fundamentals of German law, culture and history (§43 Par.3 *AufenthG*). The courses include offers for child-care during lessons in order to ensure that all entitled persons are actually able to participate. Migrants who participate successfully in these courses can have their waiting periods for naturalisation shortened from eight to seven years. A refusal to participate, on the other hand, will have an impact on administrative decisions to extend residence permits (§8 Par.3 *AufenthG*).

Furthermore, the new migration law envisions a new **Federal Office for Migration and Refugees** (BAMF), which will succeed the Federal Office for the Recognition of Foreign Refugees (BAFL), and be responsible for several additional matters (www.bafl.de or www.bamf.de). According to §75 *AufenthG*, the new agency will have the following responsibilities:

- processing asylum applications
- allocating Jewish immigrants from the former Soviet Union to federal states
- co-ordinating the exchange of data on labour migrants between local authorities, labour offices and German embassies abroad
- processing applications for labour migration under the points system
- advising the Federal Government in integration programmes
- compiling information packages on integration projects for foreign residents and ethnic German immigrants (*Aussiedler*)

§51 Abs.1 *AuslG* (which is the equivalent of the Geneva Convention refugees status) (cf.

- conducting integration courses via private and public institutions
- updating the Central Register on Foreigners
- implementing programmes for the voluntary return of migrants.

Finally, the new migration law also calls for setting up a new independent **Expert Panel for Migration and Integration** (§76 *AufenthG*), which will publish an annual report on migration in- and outflows and the current capacity for inflows and integration (www.zuwanderungsrat.de). The expert panel, which is to comprise seven members, will also publish a regular report on whether it is advisable to allow inflows of labour migrants according to the points system, and recommend a maximum number of migrants.

3.1.7.2 Evaluation of new migration law

In the following, we will summarise the views various organisations have expressed regarding the new migration law (e.g. *Pro Asyl*, amnesty international, Berlin Refugees' Council, charitable organisations, Association of German Labour Unions (*DGB*), employers' associations, *CDU/CSU* (the main opposition parties), Church representatives and the Federal Government Commissioner for Foreign Resident Affairs).

Immigration for humanitarian reasons

Human rights and refugee organisations such as *Pro Asyl*, *amnesty international*, the *Berlin Refugees' Council* and several charitable organisations have welcomed the amendment recognising persons that have been subject to non-governmental and gender-specific persecution as entitled to political asylum. The organisations have emphasised that this broader interpretation of the Geneva Convention **closes a gap in the protection** of refugees, thus “bringing legislation in line with European standards” (*Berlin Refugees' Council* 2002, p.3) or “bringing German legislation in line with standards set by international law (*amnesty international* 2002, p.1).

However, the organisations also **criticise** that the law will lead to a deterioration of standards in some areas. For example, the legislation contains no clear definition for “refugee”. The UNHCR and amnesty international therefore demand that the definitions of Art. 1A-F of the Geneva Convention on Refugees be incorporated verbatim into German asylum procedure law.

Further criticism has been levelled at the fact that the new law does not change the practice of granting toleration certificates repeatedly, i.e. certifying ever new suspensions of deportation without any time limit. In practice, these “toleration chains” create an insecure status for refugees who can only be granted a series of short-term extensions of their toleration certificate.

In addition, organisations also criticise that so-called “ex-post asylum grounds”, i.e. justifications for asylum status that have been created by refugees themselves, e.g. through political activities in exile, will no longer be recognised in asylum procedure (*Pro Asyl* 2002, p. 10).

Furthermore, they disagree with the **obligation to re-assess** recognitions of quota refugees and asylum seekers after a maximum term of three years. In their view, this will create the impression with foreign nationals that their residency in Germany remains insecure: “They have to face another formal procedure potentially resulting in their removal from German territory” (*Pro Asyl* 2002, p.8).

But organisations have welcomed the fact that the law includes **hardship provisions**. An introduction of such regulations, which have been added by legislators shortly before the bill was passed by parliament, had been demanded by churches, charitable organisations and human rights groups for years.

In their assessment of the new migration law, human rights and refugee organisations have also criticised that the federal government has not used the opportunity to withdraw its **reservations against the UN Convention on Children’s Rights**, which the government expressed when it ratified the convention in 1992. The German government at that time had emphasised its intention to preserve “differences in its treatment of German and foreign nationals” („*die tageszeitung*“, 21st November 2002, as quoted by *Asyl-Info* 12/2002).

The organisations have drawn attention especially to the situation of refugees who enter Germany as **unaccompanied minors**. Under German asylum law, refugee children are treated as adults when they are sixteen years or older, and do only have limited access to education and medical treatment.¹⁵ *Pro Asyl* therefore draws the conclusion that the new migration law does not end “Germany’s treatment of under-age refugees and thus continues to violate international law (*Pro Asyl*, p.5).

Another point of criticism concerns the age up to which non-German children can join their parents in Germany, which has been lowered to twelve years by the new law. The Federal Government Commissioner for Foreign Resident Affairs has expressed the same view, expressing the view that migration flows of minors joining their parents in Germany will become fewer anyway. According to the commissioner, the **compromise** that legislators have reached regarding family migration - i.e. that the respective age limit for non-German children will rise to 18 years in some cases, but will generally be lowered to 12 years – is sufficient provided that authorities make adequate use of the discretion they have been granted “in accordance with constitutional and international law” (Federal Government Commissioner for Foreign Resident Affairs 2002, p.101).

Labour migration

The **Association of German Labour Unions (DGB)** has welcomed the passing of the new migration law, emphasising that it constitutes a rejection of the outdated belief of “Germany not being a country of immigration”. “Sustaining this belief has had a severely negative impact on the acceptance of immigration and integration among the general public” (*DGB*

¹⁵ The number of under-age refugees living in Germany without their parents has been estimated at up to 10,000.

2002a, p.2). However, the DGB has stated that the legislation falls short of a modern migration law.

On the positive side, the *DGB* welcomes the fact that the new residence law allows **permanent admissions** of labour migrants under the new points system. In its view, it is preferable to allow inflows of migrant labour who want to live and work in Germany permanently, as opposed to short-term labour migration. In the process, it is essential to ensure that migration inflows do not result in a **displacement** of resident workers (e.g. the long-term unemployed). Labour migration that compensates for temporary labour market shortages should therefore only be permitted under exceptional circumstances. In addition, the *DGB* objects to migration inflows of unskilled labour. The *DGB* has also criticised that the new migration law does not resolve the problem of residents without a legal residence status. It is of the opinion that problems of illegal employment and exploitation of migrants can only be tackled by allowing regular migration inflows (*DGB* 2002a, p.4).

In a similar vein, **employers associations** have also welcomed the new migration law, as it is “clearly oriented towards a more flexible migration policy which is responsive to labour market needs”. At the same time, employers have pointed out that there is still room for improvement, in particular that the law leaves vital questions unresolved, putting a wide range of questions at the **discretion** of state regulators and administrative bodies. In the view of employers, “this bears the risk that labour migration is dealt with too restrictively and bureaucratically and that administrative practices differ from state to state” (Federal Association of German Employers / German Industry and Trade Association 2002, p.3).

Integration

The fact that the new migration law addresses, for the first time, the issue of **integration**, for example by introducing entitlements to participate in integration courses, has met with widespread approval. But here, too, some aspects of the new law have been criticised. *Caritas*, for example, the largest Catholic charitable organisation, disapproves of the fact that the law reduces the issue of integration to language acquisition only, without proposing any other integration measures, e.g. advice centres that help migrants overcome social, cultural and administrative problems (*Caritas* 2002, p.2). Other organisations have criticised that migrants that have been granted a permanent settlement permit have been **excluded** from participating in integration courses (*DGB* 2002a, p.6).

CDU/CSU, the main **opposition parties**, object to regulations that introduce obligatory integration courses for new arrivals only, and thus exclude non-German residents that already live in Germany. Moreover, they call for effective sanctions against migrants who refuse to participate in such courses: “Integration efforts have to focus on foreign residents that already live in Germany, as there are some groups among them with a clear tendency towards forming parallel societies” (Beckstein 2002).

CDU/CSU have made it clear that they are opposed to most of the new regulations. In their view, the law will **increase migration inflows considerably**, despite its declared intention of channelling and limiting immigration. The parties anticipate increased inflows of refugees for humanitarian reasons, in particular because the law recognises non-governmental and gender-specific persecution and introduces far-reaching hardship provisions. In addition, they also expect inflows of labour migrants to rise due to the planned repeal of the general recruitment ban. In summary, the opposition parties fear that the law will erode Germany's identity and transform the country into a multicultural society (ibid.).

On 18th December 2002, the Federal Constitutional Court has declared the new migration law "invalid because it has not been passed in accordance with the German Constitution" (Federal Constitutional Court, 2 BvF 1/02). Consequently, the legislation cannot take effect as planned on 1st January 2003. In July, several states with a CDU/CSU-led government had lodged an appeal with the Federal Constitutional Court claiming that the law had not been passed by parliament in accordance with the constitution. Their appeal did not address the question whether the content of the law was constitutional, but it focused on the fact that when the law was passed by the *Bundesrat*, the upper house of parliament, the state of Brandenburg did not cast a uniform vote. If the President of the *Bundesrat* had refused to register the Brandenburg vote as a "yes" vote, the law would not have gained a majority. According to the Federal Constitutional Court, the President of the *Bundesrat* has violated Art.78 Basic Law, which stipulates that federal states have to cast a uniform vote in the *Bundesrat*.¹⁶

Federal Interior Minister Otto Schily has responded to the court's ruling by announcing that he will re-introduce the bill into parliament without making any changes. He has expressed the hope that it will be possible to reach a compromise with the opposition in the parliamentary conference committee after state elections in the states of Hesse and Lower Saxony, which are scheduled for 2nd February 2003. Mr. Schily has repeatedly emphasised that the **law has been welcomed** by all major social groups and organisations, and has warned against taking advantage of the migration issue in upcoming election campaigns in Hesse and Lower Saxony.

3.2. Local integration policy

Besides presenting existing or planned legislation in the area integration and anti-discrimination it is also the objective of this analytical study to describe the latest developments in integration policy.

In sum, the situation in Germany at the moment can be characterised with two developments:

1. As it becomes clear in the nation-wide discourse Germany has by now accepted to a great extent that it is a **country of immigration** and it acknowledges that, beside immi-

¹⁶ Mr. Wowereit, the mayor of Berlin, who presided at the *Bundesrat* session on 22nd March 2003, had decided that the state of Brandenburg had voted in favour of the bill, even though Mr. Stolpe, the prime minister of Brandenburg, and Mr. Schönbohm, the state's interior minister, had expressed conflicting views.

gration for humanitarian reasons, further controlled immigration is necessary. Migration and integration are still current topics in German politics and will probably continue to be. The relevance of the topic has also become clear by the fact that some effort has been made in trying to pass an immigration law.

2. At the same time it becomes more and more obvious that increased efforts are necessary to promote the **integration** of migrants already living in Germany (some of them as third generation). This aspect has also been taken into consideration in the planned immigration law by trying, for the first time, to create a legal basis for the integration of migrants living in Germany.

A nation-wide legal basis for the access to integration measures would be an important step in the promotion of integration. But also without such a national regulation practical integration work has to be carried out. And this integration work mainly takes place in **towns and districts**, where the migrants live. "The role of the local level [...] is enormous. They are the place where the actual social encounters take place. There, the co-existence can be experienced, in the town districts and council blocks, in the upmarket residential areas and the refurbished town houses, that's where life happens. It is on the local level where laws are implemented, which are planned and passed 'up there', but which are directly felt down here." [own translation] (Wolf-Almanasreh 1991; see also e.g. Rütten 2001, Beauftragte der Bundesregierung für Ausländerfragen 2000). Migration and integration policy is therefore not only relevant on the national level, but is of particular importance for the **local level**. At the moment concepts for implementing integration policies and integration work in local policies and the municipal administration are under discussion in many places. Providing assistance for migrants, such as support in the integration but also counselling in cases of discrimination will be taken into consideration by local policy makers to a much larger extent in future. Especially with regard to the discussion about the intercultural access to regular administrative bodies or considering the fact that migrants are not always treated without discrimination by the authorities, it is a very important step to shed more light on the interests and special needs of migrants within local policy development. Immigration and integration policy is increasingly regarded as a task with responsibilities across the authorities rather than an isolated policy area. In many cities structures and sometimes networks of institutions and organisations which focus on the task of assisting migrants have evolved during the years. Whereas integration has not been picked up as a relevant topic by policy makers at first, there is nevertheless a considerable number of institutions and organisations that started to work in that area at an early stage, particularly the leading charitable organisations.¹⁷ This already existing structure

¹⁷ Among the leading charitable organisations are Caritas, Diakonisches Werk (Diakonie), Arbeiterwohlfahrt (AWO), Deutscher Paritätischer Wohlfahrtsverband (DPWV), German Red Cross (DRK) and the Zentrale Wohlfahrtsstelle der Juden (ZWST). For further information on the integration work of the charitable organisations see Bosswick/Bronnenmeyer 2001.

as well as the experience gained over the years can be used and integrated in the development of a new integration policy for the local level.

In the meantime a number of cities try in various ways to integrate the topics integration and migration in municipal policy development **institutionally**. As an example the "Intercultural Office Darmstadt", the "Office for intercultural cooperation" in Munich, the "citizen and integration office" in Wiesbaden, the "Department for multicultural affairs" in Bonn and the "Office for multicultural affairs" in Frankfurt am Main [own translations] can be mentioned (for further details see Hessisches Sozialministerium).

Beside approaches to include integration in municipal and district policy making, one can also see first efforts by **the federal states** to develop overall concepts for the social integration and administrative networking, such as the integration concept of the state government of Schleswig-Holstein, "which, beside gaining an overview on already existing offers, outlines a working programme aiming at all migrant groups and trying to link already existing offers and funding institutions" [own translation] (Beauftragte der Bundesregierung für Ausländerfragen 2002, 39). In Bavaria, a working group with representatives of various ministries has been established, publishing a **Report on the Situation of Foreigners in Bavaria**. This report served as a basis for the development of a more efficient integration policy.

4 New anti-discrimination legislation

The prevention of discrimination has not been legally regulated in a comprehensive anti-discrimination bill yet.¹⁸ There are, however, **discrimination bans** in a number of individual laws. Looking at these individual laws one has to differentiate the public and the civic sector. Of special importance for the **public sector** is the **Basic Law** which determines in article 3 section 3 that nobody shall be discriminated or favoured because of sex, origin, race, language, country of origin and ethnicity, denomination, religious and political views. In addition, nobody must be discriminated because of handicaps. This article therefore decrees a discrimination ban in the relationship of state and citizen. This means that the Basic Law shall be directly applied to all administrative bodies (e.g. in the areas schooling, distribution of housing etc.) und the right to equal treatment can be individually obtained through legal action (judgements of courts in this context regarding discrimination based on, e.g. origin, however, do not exist yet.) A civil servant who violates these rights guaranteed by the constitution consequently also violates his duties according to his contract of employment and has to expect sanctions or, in serious cases, dismissal.

For employment in public service, too, explicit regulations with regard to discrimination exist. Unequal treatment on the basis of sex, descent, denomination, religious and political views,

¹⁸ German criminal law includes regulations, which allow the prosecution of offences and crimes such as intimidation, grievous bodily harm, arson and murder, which are not necessarily related to the culprit's political motivation on the one hand, and of so-called "communication or propaganda" offences on the other hand, but no prosecution of discrimination. For detailed information on the Penal code see Appendix II.

ethnic origin or forms of relationships are prohibited according to § 8 paragraph 1 of the Federal Civil Service Law (*Bundesbeamtengesetz*)¹⁹. Similar regulations can be found at §7 Civil Service Outline Legislation (*Beamtenrechtsrahmengesetz*) as well as in §67 Federal Staff Council Law (*Bundespersönalvertretungsgesetz*).²⁰

In the **private sector**, on the other hand, no extensive protection from discrimination exists. Gender-based discrimination by employers is indeed prohibited according to §611a Civil Code (*Bürgerlichen Gesetzbuch BGB*), discrimination on the basis of ethnic origin, however, has not been considered in this law yet. Explicit regulations with regard to discrimination only exist in some individual laws, for example in the Act on the Supervision of Insurance Matters (*Versicherungsaufsichtsgesetz*), the Act on the Transportation of Persons (*Personenbeförderungsgesetz*) or the Telecommunication Act for the Client Protection in Telecommunication (for further details see European Monitoring Centre on Racism and Xenophobia 2002, S. 21f.). There is one bill that has included an extensive discrimination ban during the reporting period of RAXEN3, and this is the Industrial Relations Act (*Betriebsverfassungsgesetz*). For that reason we will present the Industrial Relations Act as well as various Industrial Relations Agreements in the following, prior to introducing the latest draft of the Act for the Prevention of Discrimination in Civil Law as well as statements and reactions by various interest groups.

4.1 Laws and Regulations

Industrial Relations Act (*Betriebsverfassungsgesetz BetrVG*)

Whereas the changed laws in the area integration have a rather indirect impact on anti-discrimination by improving the conditions for foreign citizens living in Germany, the Act on the Reform of the Industrial Relations Act (in force since 28/07/2001) contains paragraphs which **actively oppose discrimination**. According to §75 BetrVG Section 1 employers and works committee have to take care of the fact that all persons working in a company are treated according to the principles of right and equitableness, particularly **preventing unequal treatment** of persons on the basis of their descent, religion, nationality, ethnic origin, activities in trade unions or political parties, their views or their sex or sexual identity. They have to make sure that employers are not discriminated on the basis of age. In addition, every employer has to report at least once a year on the **situation of the integration** of foreign employees working in the company in a meeting of the workforce, therefore has to account for their successful integration efforts ((§43 Section 2 Industrial Relations Act – BetrVG). The employer has the right to make a complaint to the company department in question, if he feels

¹⁹ However, according to § 7 Section 1 No. 1 Federal Act for Civil Servants only those persons can be employed as civil servants who have the citizenship of Germany according to article 116 Basic Law or of another member state of the European Union. Persons from EU member states are also excluded though, "if the tasks require it" [own translation] (§ 7 Section 2 Federal Act for Civil Servants). However, the Federal Interior Minister can, according to §7 section 3 Federal Act for Civil Servants, make exceptions of section 1 No. 1, if there is an urgent need for the employment of a civil servant, as it was the case for police officers.

²⁰ For further details see European Monitoring Centre on Racism and Xenophobia 2002

discriminated (§84 Section 1 BetrVG). If the employer considers the complaint to be well-founded, he is obliged to act immediately to improve matters (§84 Section 2 BetrVG). It is not stated in the Industrial relations Act, however, which sanctions might be imposed against the employer in cases he does not fulfil this duty. In addition, the members of the works committee will also be held responsible. Among others, they are responsible for the application of necessary measures for the fight of racism and xenophobia in the company (§80 Abs.1 Nr.7 BetrVG). On the other hand, the works committee has an important **monitoring function**. It can refuse the approval of the employment of an applicant, if it is concerned that the applicant might interfere with the company's working atmosphere by acting in a racist or xenophobic way (§99 Section 2 BetrVG).

4.2 Planned Laws

4.2.1 Draft of an Act for the Prevention of Discrimination in Civil Law (Anti-discrimination Bill)

With the signing of the Amsterdam Treaty in October 1997 the foundation for practical policies of equal treatment in the European Union has been provided. For the implementation of the conditions in the individual member states detailed guidelines are necessary which again have to be translated in national law. Up to now **two guidelines** have been prepared, one being the Guideline 2000/43 of the Council for Equal Treatment without Difference of Race and Ethnic Origin of June 29, 2000. In this guideline the features **race**²¹ and **ethnic origin** are taken up and a discrimination ban for all areas of life is established (**vertical approach**). The other guideline was enacted on November 27, 2000; it is guideline 2000/78 EG of the Council for the Determination of a General Frame for the Realisation of Equal Treatment in Employment and Occupation. In this regulation the discrimination features religion and belief²², handicap, age and sexual orientation are also considered beside race and ethnic origin, though also for the areas **employment and occupation (horizontal approach)**. The unequal treatment on the basis of citizenship has explicitly been excluded from the regulation of the guideline. However, the Federal Government has promised that while working on the antidiscrimination bill existing differing regulations for Germans and foreigners in individual laws and regulations will be reviewed and, if need be, abolished (see Deutscher Bundestag 1999).

In February 2002 the Federal Ministry of Justice presented the **Draft of an Act for the Prevention of Discrimination in Civil Law (Civil Law Antidiscrimination Bill)**. This slightly modified draft replaces the draft of a law presented in December 2001, which was supposed to be passed by the end of the last parliamentary term (until September 2002). Because of **heavy protests** of various interest groups and probably also because of the government's con-

²¹ Whereas the EU keeps on using the term race, it distances itself from the underlying theories in the preliminary comments to the guideline: "The European Union rejects theories trying to prove the existence of various human races. The usage of the term "race" in this guideline does not imply the acceptance of such theories." [own translation] (Richtlinie 2000/43 EG of the Council).

²² "World view" has to be differentiated from "belief" as religious belief.

cerns that the anti-discrimination bill might have a negative impact on the election, as it was after all not a "winner-type sort of law" (see Kahlweit 2002), the passing of the law has been postponed to the next parliamentary term (see also chapter 4.2.2.).

With the Act for the Prevention of Discrimination in Civil Law the two EU guidelines are to be translated in national law, at least partly. But in this law draft only the merely **contractual legal regulations** are established. Regulations concerning labour law and the question of access and participation in trade unions and employers' unions are to be implemented in a special labour law-oriented anti-discrimination act though. A draft for this law is not available yet. It is the objective of the law to considerably extend the general protection from discrimination in the German legal system by protecting persons in danger of discrimination more strongly. Up to now there is no explicit regulation in the German legal system imposing a ban on individuals regarding discrimination of others on the basis of "race" or ethnic origin.

Central aspects of the new regulation:

By the civil law anti-discrimination bill particularly the Civil Code (*Bürgerlichen Gesetzbuch BGB*) as the central document of civil law will be modified. It is planned to introduce the following paragraphs under the subtitle "Prohibited discrimination":

§ 319a Prohibited discrimination

§ 319b Definition of terms

§ 319c Regulation of the burden of proof

§ 319d Accepted differentiation

§ 319e Legal Claim for failure, elimination of results and compensation.

According to **§319a** nobody must be directly or indirectly discriminated or pestered on the basis of "race", ethnic origin, sex, religion or belief, handicap, age or sexual identity regarding 1. the reasoning, termination and formulation of **contracts** which are publicly offered or which are concerned with **employment, medical care or education**, or regarding 2. access to or participation in organisations with members of a particular occupational group²³. In this respect the draft goes beyond the discrimination features "race" and ethnic origin in the guideline and includes other features as well.

In **§319b** the terms indirect and direct discrimination as well as pestering are defined more precisely. "A **indirect** discrimination exists when a person is treated, has been treated or would be treated in a less favourable way than another person in a comparable situation on the basis of one feature listed in §319a section 1 BGB" [own translation] (§319b Abs.1 BGB). Indirect discrimination is therefore a type of discrimination, which occurs due to differing treatment. This is different from direct discrimination where discrimination usually occurs when 'unequals' are treated equally: "A **direct discrimination** exists when seemingly neutral

²³ Here neither trade unions nor employers' unions are meant, because those will be subject to separate regulations. This regulation aims at, for example, organisations consisting of self-employed members.

regulations, criteria or proceedings might discriminate persons in a special way on the basis of one or several features listed in §319a section 1 BGB, if the regulations, criteria or proceedings in question help a legitimate request and the means are appropriate and necessary to fulfil this request” [own translation].²⁴ All in all the wording of the paragraphs in the draft largely sticks to the formulations in the EU guidelines.

§319c BGB contains regulations to **simplify the provision of proof** as well as the shifting of the burden of proof in favour of victims of discrimination demanded in article 5 of the guideline 2000/43/EG. If the victim can make facts credible which lead to the assumption that the discrimination ban has been violated by a certain person, the person reproached with this accusation has to prove that this is not a case of discrimination.

In **§319d BGB** exceptional matters are established which allow for differentiation. According to section 1 No. 1 a **permissible differentiation** exists for contractual relationships between employer and employee, for example, if the ethnic origin or another feature listed in §319a section 1 BGB constitutes an important occupational precondition and the existence or non-existence of this feature is appropriate and required for carrying out this occupation. According to §319d section 1 No.2 BGB a permissible differentiation for other contracts does only exist if it is justified by objective reasons. Race and ethnic origin are excluded from that which implies that no objective reasons exist for the differentiation on the basis of race and ethnic origin. Section 3 of this paragraph is also of significance: ”A permissible differentiation does additionally exist in all cases of §319 section 1 BGB, if unequal treatment serves the interest of establishing full equality in the prevention or reduction of discrimination or pestering of a person or group of persons affected” [own translation]. By this, it is taken into account that there are certain groups in society that are discriminated and require special protection. Measures which, for example, aim at the vocational training of young migrants can therefore be continued without the concern that other groups might take legal action in order to obtain the right to participate, too, on the basis of the anti-discrimination bill.

§319e describes the **legal consequences** of the ban. These primarily consist of a legal claim for refraining from discrimination and on a treatment free of discrimination (**elimination of consequences**). If the discrimination cannot be eliminated, the person affected has the right to claim an amount of money as an appropriate compensation (**compensation for damage**). Whereas it was planned in the previous draft of the anti-discrimination bill to delete the claim for elimination of consequences, ”if on the contents stipulated in the contract a contract with a third party has already been closed.” [own translation] (Bundesministerium der Justiz 2001, 6), this half sentence has been deleted in the new draft.

By modifying **§2 of the Act on Applications for Restrictive Injunctions** (*Unterlassungsklagengesetz*) by adding section 3 not only the person affected has the right to claim the

²⁴ The third half sentence of § 319b Section 2 BGB allows for a considerable scope which has to be more precisely defined by the courts in jurisdiction. It remains to be seen – if the law will be passed in the current version - to what extent this paragraph can indeed contribute to a reduction of discrimination.

refraining from discrimination, but also organisations with legal capacities which have made it their task to defend the interests of disadvantaged groups of persons that might be affected by discriminations, by counselling and providing information (**Civil Law Petition of Associations**).

4.2.2 Statements on the law draft

In the discussion on the draft of a law for the prevention of discrimination in civil law **two opposing opinions** can be noted. For organisations working in social work with migrants, anti-discrimination activities or similar areas the law draft was principally too restrictive. From the side of employers' associations or organisations of proprietors who rent out residential buildings as well as from the side of some political parties, the catholic and the protestant church the draft was strongly criticised. In the following the central aspects of both positions will be presented.²⁵

The main argument of the opponents²⁶ of the law draft was **the inclusion of the discrimination features** sex, religion or beliefs, handicap, age and sexual identity. Whereas these features were only considered for the labour market in the EU guidelines, discrimination will also be banned in the other areas (e.g. contracts of purchase, rent or insurance, medical care, education) on the basis of these features according to the German draft. Beside the accusation that this extension would violate EU law (see Deutscher Anwaltverein 2002)²⁷ or that this law principally mistrusts the citizens (see Geis 2001), mainly a massive **limitation of the freedom for contracts** of citizens as well as entrepreneurs has been criticised (see *ibid.* Deutscher Anwaltverein 2002, Haus & Grund Online). Also the two Christian churches expressed serious reservations (the Central Council of Jews, however, supported the idea of protection from religious discrimination), as the law would make it impossible for them to preferentially accept persons with a certain denomination, e.g. in kindergartens. In the statement by the German Lawyers' Association (2002) the question was raised to what extent such a limitation would be anti-constitutional. The claim for equal treatment is indeed embodied as a principle

²⁵ It is not possible to discuss all the individual statements on the law draft in every detail here. An overview of various statements can be found on the website of the Anti-Racism Information Centre (ARIC) at <http://www.aric-nrw.de/>.

²⁶ In the discussion about the anti-discrimination law one cannot really talk about opponents and supporters as a ban of discrimination has in principle been considered positive and necessary by all sides. Nevertheless, we will refer to those groups demanding a limitation of the discrimination ban as opponents of the law draft. On the other hand, we will refer to those groups supporting an extension of the discrimination protections as supporters of the law, even if they criticise the current draft as being too restrictive.

²⁷ Beside the fundamental question whether the making of an anti-discrimination law is under the jurisdiction of the EU at all, especially the German interpretation of the EU guideline has been criticised. It was argued that the EU intended to avoid an extension of the discrimination features, otherwise it would not have presented two different guidelines. As soon as the German draft exceeds the scope of the guidelines, it would no longer be legitimised by the EU guidelines and therefore would have to legitimise itself. This would not be possible without a constitutionally required consideration whether the personal freedom would be violated by the legislator (e.g. freedom of contracts). Especially because it is not clearly determined in the second guideline that measures by the individual state have to be taken into consideration which "are necessary for the protection of the health and for the protection of rights and freedom" [own translation] (see Guideline 2000/78/EG of the Council).

in the Basic Law, but also the freedom for contracts is guaranteed for every individual by the constitution. Freedom for contracts, however, means "the freedom of the individual to decide on the closure or non-closure freely in one's own estimation and that means that the decision might also be made on the basis of un-objective reasons or arguments that might be disapproved of." [own translation] (ibid.)

In the wake of this fundamental ban of discrimination the opponents of the law draft were concerned about a **flood of court trials**, which might be pouring on the responsible courts. For example, atheists were mentioned who might take legal action in order to obtain access into medical care centres run by the church, it might also become impossible to deny extreme organisations the possibility to rent meeting rooms or it might happen that young people take legal action to obtain privileges that are now reserved for senior citizens. The concern of a large number of court trials is even deepened by the shifting of the burden of proof contained in the law.

Above all, the opponents of the anti-discrimination bill criticised that apart from the features race and ethnic origin the discrimination features sex, religion or beliefs, handicap, age and sexual identity, too, were included in the draft. Religion and beliefs as well as age were considered especially problematic.

Exactly this extension of the discrimination features is one of the aspects that was welcomed by the supporters of the law draft. Additionally, however, the draft was criticised as being not resolute enough – if not even totally insufficient. The organisations demanding a **tightening of the discrimination ban** were mainly non-governmental organisations working with migrants.²⁸ Most organisations considered it very problematic that **the term race is used** in the German draft. Whereas race is used as a political category in the international or particularly English-speaking discourse and refers to those persons who are a target group of racism, the term "race" in German-speaking countries is exclusively used as a biological concept (see Leskien cited in Forum gegen Rassismus). It was therefore demanded to replace the term race by other terms, such as skin colour, language or the usage of "racist discrimination" instead of "discrimination on the basis of race". At least, however, the law should distance itself from theories that give biological reasons for the existence of various human races.

Another criticised aspect was that some points fixed in the guidelines by the EU have not at all **or only insufficiently** been **considered** in the German law draft. Concrete details on the implementation of norm adjustment proceedings or on the establishment of bureaus for equal treatment are missing, for example. Regulations on how a victimisation of prosecuting parties

²⁸ Examples for organisations that have provided a statement on the draft by the Federal Ministry of Justice are the Intercultural Council in Germany e.V. (Interkultureller Rat in Deutschland e. V.), the Office against Age Discrimination (Büro gegen Altersdiskriminierung e. V.) the Arbeiterwohlfahrt (AWO), Pro Asyl, various anti-discrimination initiatives in NRW, the German Association of Trade Unions (Deutscher Gewerkschaftsbund DGB) or the German Association of Female Lawyers (Deutscher Juristinnenbund). The statements are of differing emphasis and intensity, so that in this report only the central aspects can be presented which have been addressed by several supporting groups.

or witnesses can be avoided are also not contained in the current draft. In addition, an extension of the regulations to areas under public law as well as to the labour market are demanded²⁹. An immediate inclusion of the labour market would have made it possible to develop a uniform bill on anti-discrimination which would have led, beside a **more extensive symbolic significance**, to a much **easier handling** for the persons affected.

Whereas the opponents of the anti-discrimination bill predict a considerable flood of court trials on the basis of the shifting of the burden of proof, the supporters of the law reject this assertion. On the one hand, experiences with the relief of the burden of proof (such as in giving equal rights to males and females) show that this does not necessarily result in a sharp increase in court trials. In addition, it would cause disproportionately more difficulties, for example in laws of landlord and tenants, to supply credible facts that discrimination has occurred than, for example, in labour law. Whereas it is possible via trade unions and work committees to obtain information on discrimination in a company, this is very difficult to achieve in other areas of life. For that reason a **genuine shift of the burden of proof** is demanded (see e.g. Deutscher Juristinnenbund; Deutscher Gewerkschaftsbund 2002b) and on the other hand, the possibility of joint petitions has been welcomed and the **extension** of the possibility of petitions of associations to other groups, e.g. anti-discrimination bureaus and to a larger number of cases, e.g. against private persons, has been recommended (see e.g. AWO). From the side of the opponents of the anti-discrimination bill in its current version the possibility of a petition of associations is seen very critically. Too many associations would have the possibility to take legal action and, in addition, it would have to be put in more concrete and detailed terms when exactly a petition of an association is possible, e.g. only in cases of the danger of repetition (see Deutscher Anwaltsverein).

The **possible sanctions** that are suggested in the draft by the federal Ministry for Justice are discussed controversially, too. Whereas the opponents of the draft consider the sanctions too excessive (see *ibid.*) and criticise, above all, the possibilities of claims for compensation of damage (see e.g. Geis 2001, Haus & Grund Online), the supporters of the law think that the sanction do not go far enough. Apart from the limited possibility for compensation of damage they demand an extensive right of **compensation for caused pained and suffering** as well as further sanctions, such as the **withdrawal of licences** for restaurants (see e.g. Interkultureller Rat in Deutschland e.V. 2002; Antidiskriminierungsinitiativen aus NRW). In addition, it is demanded in several initiatives to include discrimination crimes as factual criminal offences in the penal code, not least as a political signal against discrimination. (see e.g. Büro gegen Altersdiskriminierung e.V.; Antidiskriminierungsinitiativen aus NRW). All in all, the majority of organisations working in anti-discrimination activities consider the draft a **small step** in "the direction of a protection from discrimination for private persons based on individual

²⁹ It is criticised by opponents as well as by groups that support the law in principle that the areas of the labour market that come under the scope of the law are not clearly defined. Whereas in § 319a section 1 No.1b employment is included in the first place, it is excluded again in § 319a section 2. Here, the interest groups call for an unambiguous regulation.

rights” which, however, ”only keeps on legitimising existing structural discrimination.” [own translations] (Antidiskriminierungsinitiativen aus NRW).

To what extent the law can have any concrete impact depends on the **jurisdiction** though, as several areas – at least in the current law draft – leave large scope for interpretation, such as the question of what might be counted as religion and belief or the question what sort of objective reason justifies unequal treatment.

When and in which form the law draft will come to the vote is not clearly foreseeable yet. A decision can be expected soon, however, as the EU guidelines have to be translated into national law by **mid 2003**. According to a statement by the speaker for legal affairs of the SPD parliamentary party, Alfred Hartenbach, it is very likely that the law draft will be modified in its contents. The discrimination features **religion, belief and age** will probably not be included in the law.

Whereas the draft for a civil law anti-discrimination bill is available – although a decision on it has not been made – the legislative has not made any suggestions yet for **a labour law-related anti-discrimination act**. There are, however, anti-discrimination programmes in some larger companies (e.g. at BASF). In addition, agreements against discrimination and racism have been closed between the management and the work committee in numerous companies since the mid-nineties (e.g. at Ford, Opel, VW, Fraport, Thyssen, Jenoptik)³⁰. Legal action can be taken at a labour court for the observance of these agreements. With regard to the EU guideline which has to be translated into national law by the German legislative body by the end of 2003 the DGB has developed a **Model Works Agreement** which has been enclosed to this report.

5. International agreements

On 4 November, 2000, the federal government signed **protocol no. 12** on the European Convention for the Protection of Human Rights and Fundamental Freedoms (EMRK) (*Europäische Konvention zum Schutz der Menschenrechte und Grundfreiheiten*). The 12th protocol renders the ban on discrimination, which was limited to conventional human rights in article 14 of the EMRK, into a general ban on discrimination. It thus constitutes a significant amendment to the EMRK and brings with it a strengthening of its control mechanism.

On 31 August, 2001, the federal government signed in a corresponding statement **article 14 of the Convention on the Elimination of All Forms of Racial Discrimination (CERD)** (*Abkommen zur Beseitigung jeder Form von Rassendiskriminierung*) of the United Nations. In doing so, it acknowledged the responsibility of the committee for the elimination of all forms of racial discrimination to accept and deal with complaints from individuals or groups of people who are subject to German sovereignty and who claim to be victims of a breach of one of the laws determined in this convention (the individual complaint procedure, as it is known) (cf. Bundesregierung 2002b, pp. 40ff).

³⁰These agreements are accessible via the website of the IG Metall (www.igmetall.de).

In this context, mention should be made of the **independent German Institute for Human Rights** (*Deutsches Institut für Menschenrechte*), which was founded in March 2001 on the recommendation of the German parliament. The federal government thus followed the 'Paris Principles' (*Pariser Grundsätze*), as they are known, in which the United Nations recommended that every member state should set up institutions dealing with human rights. This institute is to provide information on the state of human rights both at home and abroad and to contribute to preventing breaches of human rights as well as promoting and protecting them. The institute has the following **duties**:

- Information and documentation
- Research to qualify work on human rights
- Advising politics and the society on questions relating to human rights and the development of strategies for action
- Educational work with reference to human rights such as the development of teaching programmes for professional groups, administrative bodies and schools or the further training of qualified personnel for civilian conflict management, the police and military.
- International co-operation with other national human rights institutions and human rights bodies in the European Union, the European parliament, the Organisation for Security and Co-operation (OSZE) (*Organisation für Sicherheit und Zusammenarbeit in Europa*) and the United Nations
- Promotion of dialogue and co-operation in questions relating to human rights in Germany

Within the framework of these fields of duties, the Institute for Human Rights is also to contribute to combating racism, xenophobia and discrimination in Germany.

In addition, an **independent committee** of the German parliament was set up in 1998 on human rights policies and humanitarian aid which also now concerns itself with the human rights situation within Germany.³¹ In this context, the combating of racism and xenophobia plays an increasingly greater role (cf. Bundesregierung 2002a, pp. 14ff).

6. Verdicts

As EU guidelines have not yet been implemented in Germany and bans on discrimination are only beginning to become part of other laws, it is not surprising that there are only **a few legal judgements** which explicitly relate to discrimination (cf. here also the European Monitoring Centre on Racism and Xenophobia 2002, p. 9). This topic is most frequently made a subject of discussion with regard to the labour market, not least because on the basis of works agreements on the combating and removal of discrimination against foreign workers and on the

³¹ Until 1998, the Human Rights Committee of the parliament was a sub-committee of the Foreign Committee which solely dealt with the protection of human rights in relationships overseas.

promotion of equality in the workplace, greater protection against discrimination exists than in other fields.

Although numerous cases of discrimination in the workplace are not made public as those affected often remain silent for **fear of the consequences**, some cases of discrimination do reach the courts. Some of this limited number of cases are mentioned in the following:

Frankfurt Regional Court (*Landgericht*) ruled in March, 2001 that the termination of employment of the manager of a limited liability company solely on the basis of his ethnic origin was **contrary to public policy** and hence invalid. This lawsuit, filed by a British citizen of Indian origin against the German subsidiary of a Turkish bank, was thus successful (File number 3-13 O 78/00).

In some cases coming before a court, the question is raised whether an employer has to allow a Muslim woman to wear a headscarf whilst working.³²

The Federal Industrial Court (BAG) (*Bundesarbeitsgericht*) decided on 10 October, 2002 in a verdict that wearing a headscarf for religious reasons was not grounds for dismissal (BAG 2 AZR 472/01). Thus the court found in favour of a Muslim woman who was dismissed by her employer, a department store, after she had announced that she would in future also be wearing a headscarf at work due to her Islamic faith. The plaintiff had subsequently lodged an appeal against unfair dismissal. She considered the dismissal to be inadmissible as it was a disproportionate encroachment upon her freedom of faith. The defendant maintained the view that the plaintiff's working with an 'Islamic headscarf' could not be justified because of the calibre of the department store. After the lower instance had agreed with the employer, the plaintiff's appeal at the Federal Industrial Tribunal was successful.

In contrast, the opinions of the courts differ when it comes to the employment of Muslim **female teachers** who wear a headscarf during their lessons.

In a case in October 2000 in the Administrative Court (*Verwaltungsgericht*) in Lüneburg, the court decided in favour of the plaintiff. The 42-year-old German, who had converted to Islam, won the case and had to be taken on as a teacher despite wearing a headscarf (File number: 1A 98/00). The court decided that wearing a headscarf, as an expression of religious conviction was **not in conflict** with her suitability and aptitude as a teacher.

The judgement of a case before the High Administrative Court (VGH) (*Verwaltungsgerichtshof*) Baden-Württemberg in June 2001 was a different one, however (File number: 4S 1439/00). The VGH decided that wearing a 'Islamic headscarf' was not a question of clothing, but of a **religious symbol** and consequently banned the teacher from wearing the headscarf in class. The teacher, a Muslim who originally came from Afghanistan, appealed against this verdict, but the Federal Administrative Court (*Bundesverwaltungsgericht*) confirmed this judgement of the lower court. The court decided on 4 July, 2002 that the employment as a teacher for primary and secondary modern schools (Hauptschule) as a civil servant for a pro-

³² Whilst some people and organisations term the banning of wearing headscarves while teaching a form of discrimination, there are others who merely see it as an attempt to exclude political and religious controversies from the classroom. These two positions are reflected in the legislation on this matter.

bationary period may be rejected if the applicant is not willing to refrain from wearing an 'Islamic headscarf' while teaching (reference: BverwG 2 C 21.01). The court justified its verdict by saying that civil servants are obliged to be **neutral** in questions of faith and, in addition, pupils had the right 'not to be exposed by the state to the influence of a foreign religion, not even in the form of a symbol without having the chance to avoid it' [own translation]. This fundamental freedom was deemed by the judges to be of a higher value than the right to freely practice one's religion. The judgement by the Federal Administrative Court is not without its critics, though (cf., for example, Rux 2002). It is to be assumed that the plaintiff will lodge a constitutional complaint.

Whilst more subtle forms of discrimination are less frequently dealt with by the courts, instances of xenophobic or **racist attacks in the workplace** or in factories against employees of non-German origin appear more frequently in the courts. Employment law expressly provides the chance to dismiss employees who are seen to make (xenophobic or racist) attacks (verbal or physical) on migrant fellow-employees. "This includes both individual legal regulations, such as warnings and dismissal, as well as collective legal provisions, especially the new norms of the Works Council Constitution Law (BetrVG) (*Betriebsverfassungsgesetz*)" [own translation] (Opolony 2001, 456). However, those affected frequently do not take action against such actions themselves for fear of the consequences, but the employers issue notices of dismissal against the 'perpetrators'. Thus, an employer can dismiss an employee if the latter creates a xenophobic or anti-Semitic atmosphere by means of xenophobic or extreme right-wing utterances or acts and consequently disturbs the peace in the workplace.

In recent years, judgements relating to employment law have increasingly dealt with cases involving racist occurrences, especially cases of **insults** or racist utterances towards migrant workmates. Correspondingly, appeals are increasingly filed against dismissals because of xenophobic behaviour. Here, too, there have been differing rulings according to the individual case.

The following should serve as an example of a judgement passed at the highest level of the court system: the Federal Industrial Court (BAG) (*Bundesarbeitsgericht*) (judgement of 1.7.1999 - 2 File number: 676/98) ruled **in favour**³³ of the **dismissal** without prior warning of a trainee who, during his working hours, had made a metal sign with the words "Work makes one free - Turkey beautiful country" and affixed it to the workbench of a Turkish workmate. He had also sung songs with an anti-Semitic and Nazi content whilst still in the workplace.

Two years previously, the State Industrial Court (*Landesarbeitsgericht*) of Rhineland-Palatinate had ruled that xenophobic behaviour at work is a cause for dismissal (File number: 6 Sa 309/97). The court rejected the appeal of a machine operator against his dismissal for confronting a Turkish fellow-employee with xenophobic utterances and drawings. For exam-

³³ However, the BAG did point out in its decision that 'there is no such reason for dismissal as 'xenophobia' as such. In the individual case, the decision had to be taken whether the behaviour of an employee detracted from the solidarity within the company in an unjustified manner' [own translation] (Opolony 2001, 457).

ple, he had threatened his Turkish workmate that he would be "strung up as soon as the order came from above".

7. Good Practice

Fundamental work, in the sense of 'good practice' projects, does not play such a great role in the field of legislation as it does, for example, in fields of education or the labour market, for the pure and simple reason that those addressed by the respective law are **obliged** to apply the new regulations. Thus, the law or decree itself can already be termed 'good practice' in cases where it has an anti-discriminatory effect. Nevertheless, there naturally still remain initiatives and measures within the field of legislation which can clearly be described as '**good practice**'. On the one hand, these include organisations which publicly support the rights of migrants and minorities. On the other hand, particular institutions may be named that advise victims of right-wing violence and discrimination and who accompany them in demanding their rights.³⁴ This is particularly significant as it is not only important that laws on anti-discrimination, for example, exist, but that these laws are applied consistently and the rights are claimed by those affected.

NGOs which act on a world-wide scale, such as Amnesty International, but also a plethora of national organisations (such as the Internationaler Bund, Diakonie) or citizens' action groups discuss and investigate the **discriminatory and anti-discriminatory effects** in German laws, decrees and bills. In addition to their practical work with migrants, numerous bodies have also taken on the task of observing developments in German legislation with regard to integration and anti-discrimination. In this context, **informational meetings** are offered for migrants in which help is offered on legal matters. Moreover, many of these bodies comment publicly on this matter and make clear **political demands**, such as more lenient conditions for entry into Germany or for naturalisation.

Of particular importance, however, is another main task of these institutions, namely offering **legal advice** for migrants. On the one hand, mention may be made of advice in cases of conflicts with the German immigration and asylum legislation; on the other hand, there is the advice given to victims of right-wing violence and discrimination. Particularly these **victim support centres** have grown in number in recent years, not least to meet demands made by the federal government. Within the framework of the CIVITAS programme, for example, up to November 2001, six mobile advisory teams and eight victim support centres had been es-

³⁴ In addition to these organisations which expressly act against racism and discrimination and who advise migrants with regard to these aspects, the many organisations which have been active for decades in offering social advice for migrants should, of course, not go unmentioned. Here reference is particularly made to the work of the charities (especially the *Arbeiterwohlfahrt*, *Caritas*, *Diakonie*) which shortly after the arrival of the first migrants who came to Germany to work started to look after them and since then have been involved in integration and anti-discrimination work. The many-sided support for migrants has included legal advice, for example, in questions relating to the laws on residence, even if this advice on legal matters was not their only task (for more precise information on the work of the charities, cf. Bosswick/Bronnenmeyer 2001).

established in the new federal states.³⁵ The aim of the victim support centres is, on the one hand, to advise and assist victims of racist and extreme right-wing attacks and, on the other hand, to inform the general public from the perspective and in the interests of those affected.³⁶ More concretely, the victim support centres offer their clients legal advice, support in finding witnesses, assistance and documentation whilst going to the authorities and to legal proceedings and establishing contacts with medical and psychological help. The victims are assisted in applying for compensation and, if need be, in obtaining legal aid to meet court costs. If possible, contact is made with local action groups offering support for victims. At the same time, known local cases of extreme right-wing violence are documented in chronologies.

In spring 2002, the majority of these support centres joined together into the 'Working Group of Advisory Projects for Victims of Racist, Extreme Right-wing and Anti-Semitic Violence' (**agora**) [own translation] (Arbeitsgemeinschaft der Beratungsprojekte für Opfer rassistischer, rechtsextremistischer und antisemitischer Gewalt). The aim of this working group is to provide quick and focused help for victims as well as to present the perspectives of the victim to others by means of lobbying and public relations work. In addition, the exchange of expert knowledge is to be promoted between the members.³⁷

Several German **lawyers** also concern themselves with the topics of right-wing radicalism and xenophobia. Their work is not only limited to the interpretation of the law or bills, but they actively attempt to support victims of xenophobic violence as well. One may mention here the association 'Lawyers Against the Right' [own translation] (**Anwälte gegen Rechts**) (cf. <http://www.anwaelte-gegen-rechts.de/>) or the 'DAV Foundation Against the Extreme Right-wing and Violence' [own translation] (**DAV Stiftung contra Rechtsextremismus und Gewalt**) (cf. http://www.anwaltverein.de/03/02/2000/32_00.html), established by the Association of German Lawyers (DAV) [own translation] (Deutscher Anwalt Verein), with the purpose of allowing victims of extreme right-wing and politically motivated violence to quickly seek their rights through legal assistance.

³⁵ This put into action a cross-party request of March 2001 to the federal government to establish support centres for victims of extreme right-wing violence.

³⁶ Cf. <http://www.abad-th.de/index.html>.

³⁷ Cf. <http://www.agora-info.de>.

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9 Appendix: Model Works Agreement

For the combating and eradication of discrimination against migrant employees and fostering equality in the workplace.

1. Purpose and status of the works agreement

1.1.

In the following works agreement, practical guidelines are agreed which are to help the management and workers' representatives of the company _____ to combat or eradicate social discrimination against migrant employees in the workplace. Moreover, binding agreements are entered into in order to implement a policy of equality in the company _____.

1.2.

The regulations of this works agreement have a legally binding character.

1.3.

All other legal regulations regarding the implementation of the principle of equality remain unaffected.

2. Applicability of the works agreement

2.1.

This works agreement is valid for the whole physical area of the company _____ and its subsidiaries and, regarding its content, for all measures relating to the selection and treatment of its employees. In addition, the regulations are also valid for access to training, further education and training within the company and for the treatment of those taking part in training courses.

2.2.

All those involved should take the required measures in close co-operation with each other to realise equal opportunities in the workplace. All employees of the company _____ and its subsidiaries should profit in like manner from equal opportunities irrespective of their skin colour, race, nationality, religion, ethnic or national origin.

3. Implementation of a policy of equal opportunity within the company

3.1

The management of the company _____ obliges itself, in co-operation with the workers' council, to implement forthwith the following measures to ensure a policy of equal opportunity:

- 1) The management shall inform all employees in writing - in translation, if required - on the content of this works agreement.
- 2) In order to realise equal opportunities, aims and measures shall be fixed for the areas of employment, treatment in the workplace, access to training, further education and training, professional promotion and the allocation of company housing, and their implementation shall be monitored.

3) The entire responsibility for the implementation of the company policy of equal opportunity is borne by the management of the company _____. A commission on equal terms shall be formed from representatives of the company _____ and the workers' council which shall be responsible for the exercising of duties resulting from this works agreement. The progress which is to be registered through the implementation of the aims determined for equal opportunity shall be monitored by this commission and the existing deficits shall be identified.

4. Evaluation of the effectiveness of the policy of equal opportunity

4.1.

On the basis of the knowledge gained on still existent discrimination, the commission shall suggest the necessary measures to improve the situation to the employers.

4.2.

The results of measures to implement equal opportunities are to be made known to the representatives of the employers (for example, in meetings of works councils, via the company newsletter and other publications).

5. Employment of staff

5.1.

In a job advertisement posted within the company, it is to be ensured that this advertisement appears in the main languages represented in the company and that it can be read by workers with a migrant background. In internal as well as external job offers, applicants with a migrant background are to be treated equally in line with the demands for qualifications.

5.2.

In selection criteria and grouping, comparable qualifications and professional experience attained outside of Germany are to be considered appropriately. In selective tests, only those questions may be asked that result from the profile of the respective job.

5.3.

In interviews, if so desired, members of the commission can also be invited to attend.

6. Allocation of duties and professional promotion/ equal treatment of migrant workers in cases of a change in the organisation of work

6.1.

Personnel managers and company heads who make decisions regarding the allocation of duties and their respective areas as well as the selection of those who take part in further education and training measures are to apply their criteria in the spirit of this works agreement. It may not be assumed that certain tasks are 'reserved' for members of specific ethnic groups. In the case of a shift in duties which belong to a higher pay bracket or in cases where participation in on-the-job training takes place, members of ethnic minorities may not be excluded or disadvantaged.

6.2.

The evaluation of achievement and professional promotion shall take place according to uniform criteria. Employees with a migrant background are to be treated in the same way as all other employees in the allocation of new duties and workplaces which especially result from

changes in the organisation of work. The organisation and structure of work may not be lead to a reduction in the proportion of migrant workers in the total number of employees.

7. Training, further education and training / support measures

7.1.

In the evaluation of applications for apprenticeships, the national or ethnic origin shall be disregarded. It shall be ensured by appropriate measures (by information in the applicants' native tongue, if required) that sufficient information is supplied to the higher classes at school regarding future-oriented professions, that places are allocated for work experience and, in co-operation with the career advisory services, if required, specific professional training is fostered for young migrants.

7.2.

It shall be ensured that all measures for training, further education and training carried out by the company _____ shall be made known to all employees, irrespective of their origin. Further training and qualification measures are to be co-ordinated in such a way that appropriate duties are offered within the framework of the qualification.

7.3.

The members of ethnic and national minorities shall be encouraged and supported by the company (through appropriate information campaigns, in workers' meetings or by offers of subject-related language teaching) to utilise the opportunities for further training, especially those which facilitate entry to those areas of work in which they are underrepresented.

8. Allocation of company housing

It is to be ensured that in allocating or procuring company housing that employees with a migrant background are treated in the same way as all other employees. More precise details can be regulated in a specific works agreement.

9. Complaints procedure / Measures in the case of discrimination against employees with a migrant background

Possible complaints regarding discrimination against employees with a migrant background are to be dealt with immediately. The manager or personnel manager responsible shall pursue the complaint and immediately report their resolution to the commission.

10. Evaluation

Attempts should be made to evaluate the company policies on anti-discrimination and equal treatment in the sense of the 'Joint Statement on the Prevention of Racial Discrimination and Xenophobia as well as the Promotion of Equality in the Workplace' as passed at the Summit on Social Dialogue on 21 October, 1995 in Florence [own translation].

The publication of this evaluation should be attempted with the help of financial support from the European Commission.

Closing statement

This works agreement becomes effective from _____ and may be terminated at the earliest after three years.

Signed for the Management

Signed for the Workers' Council

Enclosures

Please send this form for information purposes to:

IG Metall Vorstand
Abt. Ausländische Arbeitnehmer
Lyoner Str. 32

60519 Frankfurt(Main)

REPORT FORM

Between the company _____ and the workers' council, a works agreement has been entered into 'for the combating and eradication of discrimination against migrant employees and fostering equality in the workplace'.

10 Appendix II: Additional Data for the Peer Review

11.1 Background information on different groups of migrants

Table 3: Migration in- and outflows of EU-nationals to and from Germany: 1990 -2001¹

	total inflows	inflows of EU-nationals ¹	percentage	total outflows	outflows of EU-nationals ¹	percentage
1990 ²	1,256,593	118,421	9.4	574,378	85,108	14.8
1991	1,198,978	128,142	10.7	596,455	96,727	16.2
1992	1,502,198	120,445	8.0	720,127	94,967	13.2
1993	1,277,408	117,115	9.2	815,312	99,167	12.2
1994	1,082,553	139,382	12.9	767,555	117,486	15.3
1995	1,096,048	175,977	16.1	698,113	140,113	20.1
1996	959,691	171,804	17.9	677,494	154,033	22.7
1997	840,633	150,583	17.9	746,969	159,193	21.3
1998	802,456	135,908	16.9	755,358	146,631	19.4
1999	874,023	135,268	15.5	672,048	141,205	21.0
2000	841,158	130,683	15.5	674,038	126,360	18.7
2001	879,217	120,590	13.7	606,494	120,408	19.9

Source: Federal Statistical Office

1) Nationals of the following 14 EU member states: Austria, Belgium, Denmark, Finland, France, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain, Sweden and the United Kingdom (German citizens are not included).

2) as of 1990: the „old“ Laender.

Table 4: Migration inflows of *Spätaussiedler* according to source territory: 1990 - 2002

Source territory	1990	1991 ³	1992	1993	1994	1995	1996	1997	1998	1999	2000	2001	2002
Poland	133,872	40,129	17,742	5,431	2,440	1,677	1,175	687	488	428	484	623	553
Former Soviet Union	147,950	147,320	195,576	207,347	213,214	209,409	172,181	131,895	101,550	103,599	94,558	97,434	90,587
Yugoslavia ¹	961	450	199	120	182	178	77	34	14	19	0	17	4
Romania	111,150	32,178	16,146	5,811	6,615	6,519	4,284	1,777	1,005	855	547	380	256
(Former) CSSR	1,708	927	460	134	97	62	14	8	16	11	18	22	13
Hungary	1,336	952	354	37	40	43	14	18	4	4	2	2	3
other countries ²	96	39	88	8	3	10	6	0	3	0	6	6	0
Total	397,073	221,995	230,565	218,888	222,591	217,898	177,751	134,419	103,080	104,916	95,615	98,484	91,416

Source: Federal Administrative Office (Bundesverwaltungsamt), Federal Ministry of the Interior

1) Including Croatia, Slovenia, Bosnia-Herzegovina and Macedonia, which all gained independence in 1992 and 1993 respectively.

2) „Other countries“ plus inflows to Germany via a third country.

3) Figures after January 1, 1991 are for East and West Germany together.

Table 5: Decisions of the Federal Office for the Recognition of Foreign Refugees between 1990 and 2002

year	number of decisions	entitled to political Asylum according to Art. 16/16a Basic Law	% ¹	protected against deportation according to §51Par.1 Aliens Act	% ²	impediments to deportation according to §53 Aliens Act ³	%	rejected	% ⁴	other completed cases ⁵	% ⁶
1990	148,842	6,518	4.4	n.a.	n.a.			116,268	78.1	26,056	17.5
1991	168,023	11,597	6.9	n.a.	n.a.			128,820	76.7	27,606	16.4
1992	216,356	9,189	4.2	n.a.	n.a.			163,637	75.6	43,530	20.1
1993	513,561	16,396	3.2	n.a.	n.a.			347,991	67.8	149,174	29.0
1994 ⁷	352,572	25,578	7.3	9,986	2.8			238,386	67.6	78,622	22.3
1995	200,188	18,100	9.0	5,368	2.7	3,631	1.8	117,939	58.9	58,781	29.4
1996	194,451	14,389	7.4	9,611	4.9	2,082	1.1	126,652	65.1	43,799	22.5
1997	170,801	8,443	4.9	9,779	5.7	2,768	1.6	101,886	59.7	50,693	29.7
1998	147,391	5,883	4.0	5,437	3.7	2,537	1.7	91,700	62.2	44,371	30.1
1999	135,504	4,114	3.0	6,147	4.5	2,100	1.6	80,231	59.2	42,912	31.7
2000	105,502	3,128	3.0	8,318	7.9	1,597	1.5	61,840	58.6	30,619	29.0
2001	107,193	5,716	5.3	17,003	15.9	3,383	3.2	55,402	51.7	25,689	24.0
2002	130,128	2,397	1.8	4,130	3.2	1,598	1.2	78,845	60.6	43,176	33.2

Source: Federal Office for the Recognition of Foreign Refugees (BAFl: Statistics on Administrative Cases)

- 1) In order to obtain the rate of approval, the total of individual cases is divided by the number of people entitled to asylum.
- 2) Percentage of asylum applicants that are protected against deportation, in relation to total of asylum decisions.
- 3) Since 1999, impediments to deportation according to §53 Aliens Act have been statistically registered as a separate category. In the years 1995 to 1998, respective figures were not included in the total of decisions.
- 4) Percentage represents quotient of rejections and total of asylum decisions.
- 5) This category comprises, among other things, withdrawn applications (e.g. because of return or transit migration).
- 6) Proportion of „other completed cases“ to total decisions on persons.
- 7) Only since April 1994 have persons that are protected against deportation according to §51 Par.1 Aliens Act been statistically registered as a separate category. In previous years, their percentage amounted to 0.3% to 0.5% of all decisions (figures based on manual count).

Table 6: Asylum applicants from selected source countries: 1990 - 2002

Year	Total	Europe	Africa	America and Australia ²	Asia	Stateless persons and others
1990	193,063	101,631	24,210	402	60,900	5,920
1991 ¹	256,112	166,662	36,094	293	50,612	2,451
1992	438,191	310,529	67,408	356	56,480	3,418
1993	322,599	232,678	37,570	287	50,209	1,855
1994	127,210	77,170	17,341	214	31,249	1,236
1995 ³	127,937	67,411	14,374	235	45,815	102
1996	116,367	51,936	15,520	380	45,634	2,897
1997	104,353	41,541	14,126	436	45,549	2,701
1998	98,644	52,778	11,458	262	31,971	2,176
1999	95,113	47,742	9,594	288	34,874	2,615
2000	78,564	28,495	9,593	338	37,239	2,899
2001	88,287	29,473	11,893	263	45,622	1,027
2002	71,127	25,631	11,765	187	32,746	792

Sources: Federal Office for the Recognition of Foreign Refugees, Federal Ministry of the Interior

- 1) Since 1991 figures are for the whole of Germany.
- 2) 1997 and 1998 America only (without Australia).
- 3) Since 1995, the BAFl statistics differentiate between initial and follow-up applications. For the years after 1995 data refers to initial applications.

11.2 Background information on national minorities in Germany

In Germany, national minorities are those groups of German citizens who are traditionally resident in the Federal Republic of Germany and live in their traditional/ancestral settlement areas, but who differ from the majority population through their own language, culture and history - i.e. an identity of their own - and who wish to preserve that identity. These are: the Danish minority, the Sorbian people, the Friesians in Germany, and the German Sinti and Roma. It is to be noted, however, that the Sinti and Roma more or less live in all parts of Germany, mostly in rather small numbers. The Danes, the members of the Sorbian people, and the German Sinti and Roma are designated as national minorities, while the term of "Friesian ethnic group" reflects the wish of the large majority of Friesians not to be classed as a national minority, but as a Friesian ethnic group (cf. Bundesregierung 1999, p. 17).

As statistical data based on ethnic criteria are not gathered in Germany, the number of members of the national minorities can only be estimated. In addition, it is considered a personal decision whether an individual belongs to one of those groups, which consequently is neither registered, reviewed nor contested by the German state (cf. Bundesregierung 1999, p. 18).

The Danish minority

The number of members of the Danish minority living in the Schleswig region of the Land of Schleswig-Holstein is estimated at some 50,000 persons.

The Sorbian people

The number of persons who consider themselves Sorbs is not known. The estimated number is about 60,000 Sorbs, of whom two thirds live in Saxony, and one third in Brandenburg. In some local communities, the majority of the inhabitants are Sorbs. Approximately 35,000 Sorbs have a command of written and spoken Sorbian; all Sorbs speak German as well.

The ethnic group of Friesians

About 60,000 to 70,000 persons consider themselves Friesians on account of their ethnic descent and their sense of personal identity. They are living in the North Sea region of the federal states of Lower-Saxony and Schleswig-Holstein.

The German Sinti and Roma

In 1997 German Sinti and Roma were recognised as a national minority. The German Sinti and Roma are estimated to number up to 70,000 persons. Some of the Sinti organisations put the numbers even higher (between 150,000 and 200,000). The majority of the German Sinti and Roma live in the big cities of the „old federal states“ including Berlin. The German Sinti and Roma only represent a small, not quantifiable, share of the population in all of their settlement areas. The Romany spoken by the German Sinti and Roma is the language of those members of this national minority who traditionally live in Germany.

Moreover it is estimated, that up to 100,000 Roma who do not possess the German citizenship reside in Germany (which are not part of the national minority). Among these, the majority are Romani refugees from southeastern Europe, very few of whom have been awarded a permanent resident status. The total Sinti and Roma population constitutes only a small percent of the total population of approximately 82 million (cf. Open Society Institute 2002, p. 146).

Minority Rights

With the ratification of the Framework Convention for the Protection of National Minorities (FCNM) and the European Charter for Regional and Minority Languages (CRML), Germany undertook an obligation to support the right of its four recognised minority groups (Danes, Friesians, Sinti/Roma, and Sorbs) to maintain and foster their identity, language and culture. However, Sinti and Roma often face serious obstacles to enjoyment of these rights in practice. The FCNM (in force since 1998) and the CRML (in force since 1999) are subordinate to the Basic Law, although as Federal laws they take precedence over state laws, and as the more specific laws override other Federal laws.

Aside from these conventions, there is no specific Federal legislation stipulating the rights of minorities, with the exception of the Declaration on the Rights of the Danish Minority of 29 March 1955. On the basis of this declaration the *Südschleswigsche Wählerverband SSW* (Electoral association of Southern Silesia) is exempted from the 5% clause, which is obligatory for political parties to enter the state parliament. In addition, the German Danes run schools and kindergartens of their own.

Provisions on the Federal level cited as applicable for minority protection in the State FCNM Report (1999) are Article 2 of the Basic Law, which guarantees the right to personal self-fulfilment, and Article 3, which bans discrimination by State agencies. The leader of the Central Council for German Sinti and Roma has demanded that minority rights protection should be written into the Basic Law, but no such initiative is intended.

Legislation on cultural matters, including language and education, is a prerogative of the federal states. As of August 2002, only five of 16 states had adopted legislative provisions regarding minority protection: Article 25 of the Constitution of Brandenburg, Article 18 of the Constitution of Mecklenburg-West Pomerania, Articles 5.2 and 6 of the Constitution of Saxony, Article 37.1 of the Constitution of Saxony-Anhalt, and Article 5 of the Constitution of Schleswig-Holstein. In addition, the school laws of Brandenburg and Saxony make it possible for Sorbian pupils to learn the Sorbian language³⁸. None of these articles specifically mentions Sinti and Roma, although the other three recognised minority groups (Danes, Friesians, and Sorbs) are specifically mentioned in the legislation of the states in which individuals belonging to these groups reside. “Given the federal structure of Germany and the fact that the Sinti and Roma population is widely dispersed throughout the country, international legal experts have recommended the adoption of public law agreements between minority organisations and the Government as a means of ensuring specific and enforceable minority rights for German Sinti and Roma” (cf. Open Society Institute 2002, p. 202).

11.3 Articles of Penal codes on racial violence; Legal proceedings and convictions

German criminal law includes regulations which allow the prosecution not only of offences and crimes such as intimidation, grievous bodily harm, arson and murder, which are not necessarily related to the culprit’s political motivation, but also of so-called “communication or propaganda” offences.

In the following table, investigations are listed according to the elements of an offence which, in the opinion of the judicial authorities, possess an extreme right-wing or xenophobic background.

³⁸ At the moment 74 public schools offer the Sorbian language as a school subject.

Table 7: Investigations according to the elements of an offence 1995 to 2000

Crimes	1995	1996	1997	1998	1999	2000
Propaganda crimes §§ 86, 86a Penal Code	8,291	9,363	11,158	12,827	10,966	15,824
Incitement of the people and glorification of violence §§ 130, 131 Penal Code	2,422	2,381	2,592	2,917	2,533	5,672
Crimes resulting in death §§ 211, 212 Penal Code	23	15	17	21	12	16
Bodily harm §§ 223 ff. Penal Code	617	634	695	774	915	1,060
Violation of the public peace §§ 125, 125a Penal Code	211	442	507	395	271	331
Arson §§ 306 ff. Penal Code	59	46	33	52	33	47
Anti-semitic actions (desecration of graves etc.)	319	238	321	224	331	540
Other crimes	1,678	1,277	1,320	1,514	1,421	1,785
Total number	13,620	14,396	16,643	18,724	16,482	25,275
Total of above due to offences against foreigners ¹	2,389	2,160	2,495	2,480	2,180	3,083

Source: Printed matter of German parliament 14/4464, 14/8703

1) Since the second half of 1999 the federal state Brandenburg does not register criminal acts against foreigners statistically any more.

In the judicial statistics, as in the Criminal Investigation Registration Service (KPMd), the propaganda crimes and incitement of the people clearly outweigh the other crimes with extreme right-wing background. Among these crimes are:

§ 86 Penal Code („Distribution of propaganda material of anticonstitutional organisations“) makes the distribution of Nazi slogans and flyers an offence. It is therefore prohibited to distribute "propaganda material" of an anticonstitutional party/organisation or of a former National Socialist party or to prepare the distribution by certain actions. This material must neither be produced nor kept in stock or be imported or exported or kept in data files (keyword: internet) and must not be made available to a great number of people. The mere possession and the production of such material without the intention to distribute it, however, does not constitute an offence. "Propaganda materials" are such texts, or something similar, which contain statements that are against democracy and understanding between nations. Anyone could be sentenced to up to three years in prison who commits one of these offences, for example, not only the author of flyers, but also the printer and distributor or somebody who stores the material in his apartment in order to distribute it later.

§ 86a Penal Code („Using of symbols of anticonstitutional organisations“) makes the using of swastika or other Nazi symbols an offence. Anybody who uses symbols - particularly flags, military insignia, parts of uniforms, slogans and salutations - of a former National Socialist organisation in public, in a meeting or in publications, commits an offence: swastika in various forms, the Horst-Wessel-song, Hitler salutations, portraits of the "Führer" or SS runes as well as the finishing slogan "with the German salute" when the rest of the letter shows an extremist tendency, could be sentenced with prison up to three years. In the meantime it has also become an offence to use symbols that are extremely similar to symbols of anticonstitutional organisations.

According to **§ 130 Penal Code ("incitement of the people")** anyone can be sentenced to prison between three months and five years who calls on hate and violence against parts of the population (for example non-Germans or Jewish people) or "against a national, racial, religious group or a group defined by national customs and traditions" (own translation) or who abuses, disparages or slanders these groups and thereby attacks human dignity.

According to **§ 131 Penal Code („glorification of violence“)** the production and distribution of texts is prohibited which illustrate the cruel or otherwise inhuman violence against people of all kind in a way that expresses a glorification or plays down such acts of violence.³⁹

³⁹ Cf. for the individual paragraphs in more detail: Hessische Landeszentrale für politische Bildung 2000

The table 7 illustrates an increase in the overall number of legal proceedings from 1995 to 2000 by 86%. In addition, the table shows a continuous increase of the number of investigations because of bodily harm between 1995 and 2000 (by 72%). The majority of the investigations was opened because of various propaganda crimes. The increase in these areas can also be attributed to the growing number of internet criminality. The number of web site run by German right-wingers rose in 2001 to about 1,300 (2000: 800, 1999: 330). In the case of web sites which offend against paragraphs of the Penal Code, the following model has been agreed upon: the place in which the crime was reported is the scene of the crime. If someone in Bamberg comes across a web site with extreme right-wing propaganda while surfing the Internet and reports this to the police in Bamberg, then the latter will start their investigations until the 'real scene of the crime' has been found. In larger cases or as a consequence of 'research without a concrete cause' by the State Office of Criminal Investigation (LKA), then this will be carried out by the central Federal Prosecutor as a collective proceeding. It becomes problematic, however, if the provider is in the USA, for example, where Nazi propaganda is not prohibited. The Federal Court, however, has pronounced judgement (Az 1 StR 184/00) that under certain circumstances German law can be applied to web sites which have been put on the internet abroad. This is the case, for instance, when the contents of these web sites can be used to violate public peace in Germany. In practice, however, such investigations are mostly difficult and frequently become stuck.

Whereas the number of opened investigations because of crimes against non-Germans remained relatively constant from 1995 to 1999, a clear increase can be stated in 2000. A similar development can be seen with investigations against anti-Semitic actions (an increase of 63% in 2000 compared to the previous year).

Table 8: Completed cases 1995 to 2000 (extreme right-wing as well as xenophobic crimes)

	1995	1996	1997	1998	1999	2000
Dismissal according to § 170 Section 2 Code of Criminal Procedure (StPO) in total	8,867	8,488	9,423	10,780	9,932	14,242
of which perpetrators not determined	5,503	5,398	5,756	6,517	5,848	8,224
Dismissal according to §§ 153 ff. StPO	844	910	1,105	1,282	1,225	1,549
Dismissal according to §§ 45, 47 Juvenile Court Procedure (JGG)	562	622	873	1,024	949	1,191
Total number of convictions	1,484	1,425	1,478	2,177	1,929	2,325
of which offences against non-Germans	422	335	295	395	375	509
Acquittals	148	146	128	138	108	135
Other decisions / by other means	1,527	1,676	1,962	1,925	1,513	3,477
In total	13,432	13,267	14,969	17,326	15,656	22,919

Source: Printed matters of German parliament 14/4464, 14/8703

Table 8 illustrates that only slightly more than 10% of all opened investigations have been completed with convictions. About a fifth of the convictions are criminal acts against non-Germans. The majority of the investigations are dismissed, mostly because the incident is not sufficient to justify preferring charges (§170 Abs. 2 StPO), for example because the perpetrator could not be determined. Numerous cases are also dismissed according to §§ 153 ff StPO (with youths §§ 45, 47 JGG). According to § 153a charges might not be pressed in case the accused will be given certain directives and instructions⁴⁰. The degree of guilt, however, must not be too high in these cases.

⁴⁰ As directives or instructions the following might be considered: 1. carrying out certain tasks in compensation for the damage caused by the crime, 2. paying a certain amount of money to a charitable institution or to the treasury, 3. carrying out other charitable tasks, 4. paying a certain amount of maintenance costs or 5. making a serious effort for compensation with the victim (perpetrator - victim - compensation) by making amends for the crime completely or partly or to seek its compensation (§ 153a StPO).

Table 9: Convictions 1995 to 2000 (extreme right-wing as well as xenophobic criminal acts)

	1995	1996	1997	1998	1999	2000
Total number of convictions	1,484	1,425	1,478	2,177	1,929	2,325
Convictions resulting in detentions or imprisonment	486	419	392	559	506	660
Total of above under 6 months	147	142	132	175	162	223
Total of above on probation	107	107	99	119	107	145
Total of 6 months to 1 year	174	149	151	209	176	237
Total of above on probation	142	117	119	177	146	194
Total of 1 to 2 years	128	107	66	142	122	160
Total of above on probation	83	62	46	95	83	94
More than 2 years	37	21	43	33	46	40
Total on probation	332	286	264	391	336	433

Source: Printed matters of the German parliament 14/4464, 14/8703

In 30% of the cases the accused are sentenced with youth detention or imprisonment, though the majority is put on probation. Only very few of the convictions to imprisonment are longer than two years; a detailed differentiation of the sentences cannot be made on the basis of the printed matter of the German parliament.