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**ARTICLE:** LIGHT SHINING DARKLY: COMPARING POST-CONFLICT CONSTITUTIONAL STRUCTURES CONCERNING SPEECH AND ASSOCIATION IN GERMANY AND RWANDA

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**LEXISNEXIS SUMMARY:**

... To address these questions, this Article compares Rwandan constitutional and statutory limits on speech and expression with those of Germany, a country that has similarly experienced a genocide and post-war transition to democracy. ... While mindful of the differences between the countries, their similarities are noteworthy and form the basis for a discussion of freedom of speech, freedom of association, and constitutionalism in post-conflict societies. ... These provisions are far less specific in laying out the concerns of the drafters than the constitutions of Rwanda and Germany. ... The focus of the German discussion is the ability to ban political parties under Article 21 of the Grundgesetz and laws prohibiting propaganda and the display of symbols of banned organizations. ... However, because this Article focuses on laws addressing social stability in the post-genocide context and the holocaust denial laws are generally rationalized on the basis of protecting dignity rights, that comparison is not the focus of this Article. ... As enacted, the law states: Article 2: Definition of "genocide ideology"

The genocide ideology is an aggregate of thoughts characterized by conduct, speeches, documents and other acts aiming at exterminating or inciting others to exterminate people basing sic on ethnic group, origin, nationality, region, color, physical appearance, sex, language, religion or political opinion, committed in normal periods or during war. ... The Rwandan laws have been harshly criticized for their perceived vagueness, their failure to include explicit links to other legal standards such as that between the definition of genocide and the definition of genocide ideology, their lack of intent requirements, and

their penalties. ... In sum, many of the criticisms leveled against the texts of the Rwandan divisionism, negationism, and genocide ideology laws are less troubling when compared against similar German laws that have not encountered the same degree of criticism.

**TEXT:**

[\*5] In July 2008, the author traveled to Rwanda. While there, he had the opportunity to witness four criminal trials. n1 All of these trials involved *pro se* defendants. Two of the trials involved the ordinary business of criminal law throughout the world: theft and statutory rape. The remaining two trials involved charges of "genocide ideology." In the first, a man had made a statement to a friend or acquaintance on a holiday to commemorate the genocide. The statement was something to the effect of "your parents were killed and you get a memorial, my parents were killed and I don't get anything." This was, the court found, a statement that increased the pain of the victims. The man agreed that he had said this, claimed that he had been drunk, and asked for forgiveness. He was scheduled for sentencing.

The events leading to the second case also occurred on a genocide memorial day. The man was around fifty years old and had eleven children. He was asked to give a prayer at the memorial day and, in this prayer, he included words to the effect of "bless those [\*6] who saved us from the genocide who also committed a genocide." n2 The author understood this to refer to the Rwandan Patriotic Front (RPF), Rwanda's current ruling party. The man claimed that he did not have any control over his statements because he was guided by the Holy Spirit. The judge was not persuaded by this explanation and gave the defendant a stern speech about how the prayer was, in effect, asking for a blessing of the *genocidaires*. Both of these defendants faced sentences that ranged from fifteen to thirty years. n3

These experiences raised a number of questions, which have led to the present Article. Were these experiences typical of the treatment of those accused of genocide ideology? Was the large proportion of genocide ideology charges representative of the Rwandan justice system as a whole? These questions led to still others about the role of the genocide ideology laws on Rwandan society generally and the relationship between free expression and the development of a stable constitutional democracy in the wake of genocide. Particularly, there is the question of the role of the genocide ideology law. Is the genocide ideology law truly an effective means of combating threats to stability, or is it just a means to enforce political conformity? And if it is used politically, is there any possibility that it might change?

To address these questions, this Article compares Rwandan constitutional and statutory limits on speech and expression with those of Germany, a country that has similarly experienced a genocide and post-war transition to democracy. While mindful of the differences between the countries, their similarities are noteworthy and form the basis for a discussion of freedom of speech, freedom of association, and constitutionalism in post-conflict societies. This comparison is also mindful of the criticisms leveled against the [\*7] Rwandan government. n4 However, the Rwandan constitution and Rwandan officials state their commitment to the rule of law alongside the need for unity and political stability. n5 In doing so, they are publicly setting the bar for their success. To the extent that Germany provides a meaningful comparison, it will defuse unwarranted criticism, provide a clearer basis for criticism that is warranted, and offer real solutions that take into account both societal stability and individual freedoms.

There are a number of critiques of comparative law from so-called "relativists," particularly with regard to standards of human rights. The issues raised by Professor Schauer's article *Free Speech and the Cultural Contingency of Constitutional Categories* are particularly relevant in light of this Article's focus on comparing approaches to the regulation of free speech. n6 Schauer explicitly addresses the difficulties and implications of censoring Nazi speech, comparing the different approaches in Germany and the United States. n7 He notes that despite similarities in constitutional texts that seek to protect expression, "the prelegal instantiations of terms like 'political' and 'free speech' will vary dramatically from culture to culture." n8 These, he concludes, will be reflected in individual legal cultures so that "so long as cultural differences are reflected in categorical differences, differences in the scope of constitutional protections can be expected to vary far more than might be expected merely by inspecting the relevant constitutional language." n9 Nevertheless, accepting claims of cultural particularity and [\*8] necessity n10 without inquiry is to effectively ignore potential abuses of speech and associational rights.

Given this challenge, a broad comparative approach to human rights and free speech, n11 as one finds in scholarship contrasting German and U.S. approaches to hate speech laws, n12 is appealing. Yet, taking such an approach would also be a mistake. It would not take seriously the vast differences, nor the particular commonalities, between Germany and Rwanda. n13 As noted above, this Article was spurred by specific questions about particular laws and the ways that those laws interact with democratic development. Approaches focusing on international human rights norms suffer from the imprecision of international human rights law on freedom of expression. n14 Furthermore, broad-based comparative approaches do not allow for an in-depth analysis of the particular challenges facing countries in the wake of genocide. n15 This comparison of Germany and Rwanda seeks to address these concerns.

[\*9] This approach seeks to gain the benefits of comparativism, n16 while taking Rwandan and German differences seriously. First, while the constitutional texts of Rwanda and Germany are the starting point, this Article uses those texts as the basis for the broader discussion of constitutional norms embodied in the laws and judicial decisions of those countries. This Article is not, therefore, an opportunity to project from constitutional language alone but an attempt to analyze constitutional language in the context of social and historical differences and the legal structure that has subsequently developed. Second, the selection of Rwanda and Germany is based on their common experience of post-genocide redevelopment. To the extent that "constitutions deal with centrally important social and political subjects" which will lead to different "political and social presuppositions," n17 their social and political commonalities (the defining experiences of war, genocide, and postconflict reconstruction) should lend themselves to comparison. Finally, to the extent that Rwandan officials seek to actively compare their situation to that of post-war Germany, n18 they invite the comparisons that this Article seeks to engage. Rather than minimizing the differences between Rwanda and Germany, the comparison allows for a nuanced understanding of constitutionalism in post-conflict societies.

With these concerns in mind, the Article begins with a brief description of the social context of these two countries including their experiences of genocide, pre-war constitutional cultures, and processes of rebuilding. Section II discusses German and Rwandan constitutional provisions and focuses on provisions that limit or protect speech and freedom of association. Section III describes the legal structures that have arisen in Rwanda and Germany. The [\*10] prohibitions of divisionism, n19 genocide ideology, n20 and negationism n21 are the focus of the Rwandan discussion. The German discussion addresses the bans on certain political parties under the German Basic Law (*Grundgesetz*) n22 and related laws prohibiting propaganda n23 and the display of symbols of banned organizations. n24 Section IV analyzes the similarities and differences in the Rwandan and German legal structures. The Article concludes with a series of recommendations for the Rwandan government and for international observers.

The comparison of Rwanda and Germany indicates that while the Rwandan laws may be used to suppress speech and association, Germany's laws feature many of the same qualities that spark criticism of Rwandan law. The comparison also makes clear that it is the application of the laws, and more specifically, their current application, that is most troubling. In addition, Germany provides a successful example of the type of government Rwanda professes to be building, a democracy that has successfully balanced rights of speech and association with the need for political stability. As such, it offers lessons that will assist Rwanda's development into a stable and democratic nation and assist the international community's support of that development. Specifically, the German experience suggests that Rwanda would benefit from clarifying and amending its laws and, most importantly, continuing to develop judicial independence and procedural safeguards.

#### [\*11] I. TRANSITIONAL DEMOCRATIC CULTURE IN RWANDA AND GERMANY

Establishing the cultural context for legal and constitutional comparison is, as Professor Schauer notes, important. In the post-genocide context, it is absolutely critical. As Professor Sheri Rosenberg has stated:

[A] legal academic seeking to redress the harm suffered by the people in Rwanda cannot do her job if she cannot name that harm. We cannot name the harm unless we understand the myriad ways harm was inflicted and continues to traumatize its victims. For that, we need other disciplines, such as psychology,

anthropology, history, politics, to help give meaning and context to both the immense suffering and what is needed to repair that suffering for individuals in the Rwandan society as a whole. n25

Directed to countries emerging from the experience of genocide, this statement applies equally to the experience and legal development of the post-war German state.

Mass slaughter and war are the obvious parallels between Rwanda and Germany and constitute defining elements in the creation of both countries' current constitutional orders. n26 In Rwanda, during the thirteen weeks between the assassination of President Habyarimana and the Tutsi-led Rwandan Patriotic Front's (RPF) victory, "at least half a million people perished in the Rwandan genocide, perhaps as many as three quarters of the Tutsi population." n27 As Alison Des Forges noted, the "genocide resulted from the deliberate choice of a modern elite to foster hatred and fear to keep itself in power." n28 The ideology propounded by this elite contributed to a genocide where "the daily killing rate was at least [\*12] five times that of the Nazi death camps" n29 with around 10% of the country left dead. n30 Of course, Hitler's Nazi Party (NSDAP) destroyed the Weimar Republic, spread pervasive anti-Semitism and killed millions in the Holocaust in addition to millions of other civilians and soldiers during World War II. n31 By the time of the German surrender, fighting had killed "600,000 German civilians and left seven and a half million people homeless . . . All the major German cities were destroyed, and many of the smaller ones, as well." n32 It is this set of parallels--war, ethnic hatred, genocide, and the attempt to establish a new order in their wake--that immediately connects Rwanda and Germany.

In the wake of World War II, the German Parliamentary Council developed the *Grundgesetz* "to avoid what they saw as 'the serious structural mistakes' of the Weimar Constitution" n33 or, in the words of the first president of the Federal Republic of Germany, to "wean the Germans of the habits of cheap nationalism." n34 Although Germany was still under the direct military rule of the occupying powers, it was the German leaders of the western zone of occupation who drafted the *Grundgesetz*. n35 Ultimately, the experiences of World War II drove the framers of the *Grundgesetz* to create "a powerful system of judicial review that could successfully defend individual human dignity against invasions by the state." n36

In Rwanda, after the RPF had driven the previous government into Zaire (now the Democratic Republic of Congo), they formed a coalition government with other parties that had opposed the genocide. Prior to the 2003 Constitution, the 1991 Constitution, the 1992 and 1993 Arusha Accords, and the Organic Law of August 30, 1996 (reviving a variety of civil liberties) collectively served as the nation's legal foundation. This "legislative 'patchwork' [made] it [\*13] increasingly complicated to determine the legal status of human rights protection." n37 This confusion prompted the drafting of the 2003 Rwandan constitution. n38

One major difference between Rwanda and Germany is the preexisting constitutional culture in Germany. While Rwanda adopted a new constitution in 1991, n39 which included multiparty democracy, n40 the development of this constitution was largely due to pressure from international donors, local civil society, and the invasion of the RPF. n41 The inclusion of multiparty democracy was resisted by much of the political elite then in power, n42 and then-President Habyarimana attempted at various points to co-opt rival factions and maintain his control. n43 By contrast, Germany had experience with limited forms of separation of powers dating back to 1849, n44 and the Weimar Republic, whatever its flaws, did encourage multiparty democracy. n45

The different regional situations in the two countries are also notable. The Federal Republic of Germany existed for forty years alongside communist East Germany and was at the front lines of the cold war. Nevertheless, Western Europe was able to develop into a prosperous region during the period. n46 By contrast, Rwanda's neighbors include the Democratic Republic of Congo (formerly Zaire), [\*14] Uganda, Burundi, and Tanzania. Of these, only Tanzania has avoided serious turmoil since the early 1990s. n47 In particular, the Democratic Republic of Congo has been engaged in a long and brutal war in which Rwanda has been a significant actor. n48

The similarities between Rwanda and Germany are quite basic: both are attempting to build coherent constitutional

orders that will prevent a repetition of the crises that preceded the current regime. Germany has, for all appearances, succeeded in doing exactly that. For Rwanda, however, success is far from assured. While the differences are notable, the common impetus of post-conflict reconstruction provides a basis for constitutional and legal comparisons of Rwanda and Germany.

## II. FREEDOMS AND LIMITATIONS ON LIBERTY IN THE CONSTITUTIONS OF RWANDA AND GERMANY

The German and Rwandan constitutions are shaped by their role in post-conflict societies. Three elements of the constitutions bear particular notice: first, the particular references to the crisis that preceded the constitutions' development; second, the guarantees of free speech and association; and third, the explicit limitations on the exercise of those rights.

The *Grundgesetz* begins with a principle of human dignity, stating that "[h]uman dignity shall be inviolable. To respect and protect it shall be the duty of all state authority. The German people therefore acknowledge inviolable and inalienable human rights as the basis of every community, of peace and of justice in the world." n49 As Professor Markovits notes:

In the end, the idea of a historical introduction to the constitution was dropped. The Basic Law's Preamble begins, "Aware of its responsibility before God and men," but does not specify how that responsibility had been forsaken in the past. Still, without that past, the [\*15] Parliamentary Council's Constitution would have looked very different. n50

The 2003 Rwandan constitution does include such a historical reference. Its preamble begins by stating "[i]n the wake of the genocide that was organized and supervised by unworthy leaders and other perpetrators and that decimated more than a million sons and daughters of Rwanda," n51 and resolves "to fight the ideology of genocide and all its manifestations and to eradicate ethnic, regional and any other form of divisions." n52 These provisions introduce the constitution's preamble and place the historical context of genocide at the heart of the new constitutional order. Even more clearly than the *Grundgesetz*, the Rwandan constitution is a reaction to history and an attempt to avoid its repetition.

The *Grundgesetz* guarantees both freedom of speech and freedom of association. Article 5 states "[e]very person shall have the right freely to express and disseminate his opinions in speech, writing and pictures, and to inform himself without hindrance from generally accessible sources." n53 Article 9 states, "[a]ll Germans shall have the right to form corporations and other associations." n54 Yet in both cases, immediate limits are placed on these rights. The right of association in Article 9 is limited by the claim that, "[a]ssociations whose aims or activities contravene the criminal laws, or that are directed against the constitutional order or the concept of international understanding, shall be prohibited." n55 Similarly, the rights to free speech "find their limits in the provisions of general laws, in provisions for the protection of young persons, and in the right to personal honour." n56 This limitation, linked as it is to honor, is guided by Article 1's claim that "[h]uman dignity shall be inviolable" n57 and that these dignity rights lead to the "inviolable and inalienable human rights [at] the basis of every community . . . ." n58

The Rwandan constitution displays a similar structure, recognizing various freedoms, although placing limits on those freedoms in the name of social order. Article 34 states that "[f]reedom [\*16] of the press and freedom of information are recognized and guaranteed by the State [but that f]reedom of speech and freedom of information shall not prejudice public order and good morals, the right of every citizen to honour, good reputation and the privacy of personal and family life." n59 Similarly, "[f]reedom of association is guaranteed and shall not require prior authorization [but s]uch freedom shall be exercised under conditions determined by law." n60

Both constitutions also add additional limitations on personal liberty derived from the experiences of Nazi rule and the 1994 genocide. The *Grundgesetz* at Article 21 states that "[p]arties that, by reason of their aims or the behaviour of

their adherents, seek to undermine or abolish the free democratic basic order or to endanger the existence of the Federal Republic of Germany shall be unconstitutional. The Federal Constitutional Court shall rule on the question of unconstitutionality." n61 Article 18 states that persons who abuse the freedoms granted under the *Grundgesetz* "in order to combat the free democratic basic order shall forfeit these basic rights. This forfeiture and its extent shall be declared by the Federal Constitutional Court." n62 The provisions in Articles 18 and 21 are the basis for what the Federal Constitutional Court, in the Communist Party Case, n63 called "militant democracy" (*Streitbare Demokratie*), ensuring that "the principle of democracy in the Basic Law offers no refuge to the enemies of democracy." n64 The Rwandan constitution places this philosophy within the text of the constitution, stating that "[r]evisionism, negationism and trivialisation of genocide are punishable by the law." n65 It lists "fighting the ideology of genocide and all its manifestations" n66 and "eradication of ethnic, regional and [\*17] other divisions and promotion of national unity" n67 as among the fundamental principles of the Rwandan state.

The Rwandan and German constitutions are not unique in their inclusion of some limits on the freedoms recognized therein. Countries from Algeria n68 to Switzerland n69 have constitutional language limiting the freedoms of expression and association. As Professor Schauer notes, "[a]lthough some provisions are slightly more specific than others, majestic indeterminacy is the order of the day, and no national constitution specifies the contours of freedom of speech, press, and opinion with anything approaching the detail that those constitutions often use to express other rights or structures." n70

Certainly, as Professor Schauer points out, constitutional language is generally under-determinative regarding what level of protection is afforded to speech and association. Nevertheless, even other countries that do include such limiting language have very different constitutions from the Rwandan and German texts discussed above. This can be seen in the examples of Canada and Denmark that Schauer himself selects. n71 The Canadian Charter of Rights and Freedoms states that the freedoms granted are subject to "reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." n72 The Danish Constitution states that "[a]ssociations employing violence, or aiming at attaining their object by violence, by instigation to violence, or by similar punishable influence on people of other views, shall be dissolved by court judgment" and that "[a]ny person shall be entitled to publish his thoughts in printing, in writing, and in speech, provided that he may [\*18] be held answerable in a court of justice." n73 These provisions are far less specific in laying out the concerns of the drafters than the constitutions of Rwanda and Germany. Further, the concerns that are reflected in the text obviously do not reflect a post-genocide context.

That the Rwandan and German constitutional texts bear a common focus on the experience of genocide and avoiding the repetition of the crises that preceded them is hardly surprising. While those texts are not determinative of the legal orders erected around them, they are nevertheless the basis for those legal orders and are indicative of the concerns that motivate the societies implementing them (or at least the individuals drafting the constitutions). For these reasons, the similarities between Rwanda and Germany, more than, for example, comparisons between Rwanda and Canada, are particularly instructive.

### III. RWANDAN AND GERMAN LEGAL ORDERS CONCERNING PRO-GENOCIDE AFFILIATION

Statutory, judicial, and political legal structures have built upon the Rwandan and German constitutions. This section describes the laws in each country limiting speech and association in the name of political stability. A detailed description of these laws, their uses, and their development provides the basis for comparison and identifies their role in post-conflict reconstruction. As mentioned in the introduction, the Rwandan laws criminalizing sectarianism, negationism, and genocide ideology are the most important elements of this legal structure. The focus of the German discussion is the ability to ban political parties under Article 21 of the *Grundgesetz* and laws prohibiting propaganda and the display of symbols of banned organizations. While the use of the Rwandan laws has been widespread and their development has not been driven by judicial interpretation, the recent provenance of these laws makes future development uncertain. Germany, by contrast, has a long history of using these laws and the German judiciary has, over the past sixty years, limited their use significantly.

[\*19] Rwanda's genocide ideology law has been compared by Rwandan authorities to holocaust denial laws n74 such as the German law prohibiting holocaust denial. n75 However, because this Article focuses on laws addressing social stability in the post-genocide context and the holocaust denial laws are generally rationalized on the basis of protecting dignity rights, that comparison is not the focus of this Article. For example, in the Holocaust Denial Case n76 the Federal Constitutional Court, drawing on the dignity rights of Article 1 of the *Grundgesetz*, found that holocaust denial was "a serious violation" of Jewish "personality" because it denied their persecution. n77 While the holocaust denial law may limit expression and may also be of particular concern to Germans due to their experiences in World War II, the fact that the law is judicially rationalized based on group dignity rights, n78 rather than more explicitly on the stability of the new political order, takes it outside the direct focus of this Article.

#### A. Rwanda: Laws on Sectarianism or Divisionism, Negating the Genocide, and Genocide Ideology

The three laws most explicitly related to the political redevelopment of Rwanda are the 2001 law on divisionism or sectarianism, the 2003 law criminalizing negationism, and the 2008 law criminalizing genocide ideology. These laws set forth a legal structure that builds upon the language of the Rwandan constitution, such as the fundamental principle that promotes "fighting the [\*20] ideology of genocide and all its manifestations." n79 Other laws, such as the 2002 Press Law n80 and the 2008 Organic Law on Nongovernmental Organizations, n81 reflect this structure but the three laws mentioned above create the legal order. The import of this structure is debated. Some argue that the laws are part of the constant vigilance necessary to avoid a repetition of the horrors of 1994. n82 Others claim that these laws are primarily a method for the RPF to maintain political control over the country. n83

The Rwandan law on divisionism criminalizes "any speech, written statement or action that causes conflict that causes an uprising that may degenerate into strife among people." n84 Like the negationism and genocide ideology laws, it has been criticized as a tool for repressing dissent and maintaining the RPF's political control. n85 The divisionism law was the first of the laws enacted as part of the Rwandan government's reconciliation policy and is part of an overall attempt to build a new non-ethnic Rwanda. n86 Legal scholars have particularly noted that it has been used to outlaw identification of Hutu, Tutsi, or Twa ethnic groups in favor of a single Rwandan ethnicity. n87 While the law is linked to the genocide, the [\*21] underlying rationale for the law is to prevent discrimination, n88 and it does so through its focus on speech "that may degenerate into strife." n89 The preamble reinforces this focus, specifying that the law's motivation was the fact "that no one has ever been prosecuted and punished for sowing divisions and discrimination among citizens, but this practice was instead encouraged until it was abused by those who prepared and perpetrated the genocide and massacres, which befell the country in 1994." n90

The 2003 law criminalizing negationism is part of the law on the crimes of genocide, war crimes, and crimes against humanity. The relevant portion states:

Shall be sentenced to an imprisonment of ten (10) to twenty (20) years, any person who will have publicly shown, by his or her words, writings, images, or by any other means, that he or she has negated the genocide committed, rudely minimised it or attempted to justify or approve its grounds, or any person who will have hidden or destroyed its evidence.

Where the crimes mentioned in the preceding paragraph are committed by an association or a political party, its dissolution shall be pronounced. n91

As with the German Holocaust denial laws, some commentators focus on the need to fight negationism in order to protect the dignity of genocide survivors. n92 However, scholars also recognize that the law is an effort to "lay the foundations of a fair and stable society" n93 and that, by including negationism as part of the criminalization of genocide, the Rwandan government has linked the [\*22] prohibition of genocide denial with the need to prevent a future genocide. Reconciliation, while still a focus of this law, is presented in tandem with the goal of creating political stability.

Following the passage of the 2003 law, the government began to focus increasingly on "genocide ideology." n94 Since then, the phrase "genocide ideology" has been applied to conduct that includes negationism and sectarianism generally. n95 Based on this informal definition, the Rwandan government released a 2004 report detailing the extent of genocide ideology in Rwanda. n96 In addition to the 2004 report, the Rwandan government has since released two more parliamentary reports detailing various areas where genocide ideology was seen in Rwanda. n97 The most recent report, issued in 2007, focused on the role of students and teachers. n98

The 2004 report gave a region-by-region description of the activities of NGOs, n99 churches, n100 and schools n101 allegedly engaged in propagating genocide ideology. It also documented reports of [\*23] corruption n102 alongside direct evidence of violence against genocide survivors and against individuals who testified or planned to testify in genocide trials. n103 The report denounced the BBC and the Voice of America, and it accused international organizations such as Care International, Norwegian People's Aid, and the Irish Catholic Church's development arm of "[s]ewing division within the Rwandan population." n104 Meanwhile, the government also used local media to accuse teachers and students of genocide ideology. n105

The 2004 report prompted considerable reaction from the groups accused. n106 The European Union also responded, releasing a statement in which it "concur[red] with the report's conclusion that those responsible for intimidating and killing survivors and witnesses should be brought to justice" but expressed concern "at the liberal use of the terms 'ideology of genocide' and 'divisionism' and impress[ed] upon the government the need to clarify the definition of these terms and how they relate to the laws on discrimination and sectarianism and to the freedom of speech in general." n107 Criticism of the report is buttressed by the fact that the report links political dissent with genocide ideology, stating that negationists "are characterized by dissatisfaction and do not admire the achievements of the government of Rwanda." n108

[\*24] In 2008, the Rwandan government passed a law criminalizing genocide ideology. As enacted, the law states:

#### Article 2: Definition of "genocide ideology"

The genocide ideology is an aggregate of thoughts characterized by conduct, speeches, documents and other acts aiming at exterminating or inciting others to exterminate people basing [sic] on ethnic group, origin, nationality, region, color, physical appearance, sex, language, religion or political opinion, committed in normal periods or during war.

#### Article 3: Characteristics of the crime of genocide ideology

The crime of genocide ideology is characterized in any behaviour manifested by facts aimed at dehumanizing [sic] a person or a group of persons with the same characteristics in the following manner:

- 1 [degrees] threatening, intimidating, degrading through diffamatory [sic] speeches, documents or actions which aim at propounding wickedness or inciting hatred;
- 2 [degrees] marginalising, laughing at one's misfortune, defaming, mocking, boasting, despising, degrading[,] createing [sic] confusion aiming at negating the genocide which occurred, stiring [sic] up ill feelings, taking revenge, altering testimony or evidence for the genocide which occurred;
- 3 [degrees] killing, planning to kill or attempting to kill someone for purposes of furthering genocide ideology. n109

The penalties for the crime range from ten to twenty-five years of imprisonment. n110 The penalties increase if the dissemination of genocide ideology occurs through the media, n111 if the person charged is a recidivist, n112 or if a person is also convicted of genocide n113 or murder. n114

[\*25] In addition to penalties for adults, the law also provides punishment for children, their parents, and NGOs who are found to have spread genocide ideology. Children who are found guilty of genocide ideology may be sent to "rehabilitation centres." n115 Children under twelve found guilty will be sent to the centers for a maximum of one year. n116 Children between twelve and eighteen are subject to half the penalties for adults, with the possibility of spending some of that time in a rehabilitation center. n117 Where "the guardian, the tutor, the teacher or the school headmaster of the child" is found to have instructed the child in genocide ideology, that person is subject to a fifteen to twenty-five year sentence. n118 NGOs found guilty of genocide ideology are to be dissolved and are subject to a fine of five to ten million Rwandan francs. n119

During the debate over the law, a number of organizations criticized the law for vagueness and overbreadth. Of particular note, the Joint Governance Assessment, a joint project between the Rwandan government and a variety of international partners, including states and NGOs, n120 stated:

It is doubtful whether [the genocide ideology and sectarianism laws] fulfil [sic] the requirements of legal certainty . . . . The absence of a requirement of intentionality . . . in the provisions adds to the problem of vagueness and leaves the provisions open to abuse and less effective in tackling the problem that they are designed [\*26] for. . . . Other problems with the proposed legislation are the rigid specification of penalties that do not leave any judicial discretion in sentencing to reflect the facts of each case, and provisions on the sentencing of children. n121

These suggestions appear to have been completely ignored before passage of the bill.

Other international observers have likewise criticized the bill both prior to and since its passage. Human Rights Watch complained that the bill aggravates the already-existing imprecision and confusion surrounding the term "genocide ideology" n122 and that it would criminalize internationally protected speech. n123 The NGO Article 19 found that the law "is so contrary to international human rights law and humanitarian values that it is fundamentally flawed" and called for its immediate repeal. n124 Additionally, the U.S. Department of State found that the genocide ideology, negationism, and divisionism statutes, "discourage citizens from expressing viewpoints that might be construed as promoting societal divisions." n125

The defenses of the law have come solely from Rwandans. n126 These defenses include the argument that by defining the offense, the government is putting people on notice and thereby laying the [\*27] groundwork for reconciliation. n127 President Kagame has written that "revisionists must receive justice for their crimes against historical truth and the affront of their fraudulent narratives to Rwandan people and every survivor of the genocide . . . ." n128 These and other defenses have basically avoided the text of the law itself in favor of claims, such as Tom Ndahiro's argument, that because "denial of the genocide seeks to erase all memory of the Tutsi who were slaughtered . . . there should be justice and accountability for those who deny genocide, as well as for those who perpetrate it." n129 Other claims stress the particularly Rwandan nature of this problem n130 implying that international observers have little to offer by way of criticism.

In analyzing the legal structure that includes the divisionism, negationism, and genocide ideology laws, both formal charges brought under the laws and their broader societal role are critical. Reports on genocide ideology indicate that the use of negationism and divisionism charges is widespread. *The New Times*, a Rwandan English-language newspaper, n131 reported that following the 2004 genocide ideology report, more than 600 cases were brought to punish individuals who spread genocide ideology and targeted genocide survivors. n132 In 2007-08, there were 1,304 cases of genocide [\*28] ideology, of which 243 were negationism or revisionism charges. n133 The U.S. Department of State human rights report for 2008 states that a "special protection bureau in the Prosecutor General's Office investigated 794 cases, 269 of which were filed in court." n134 While these numbers are significant and point to widespread use of such laws, these figures also make it difficult to differentiate between instances where a charge is based on a murder committed in the name of Hutu power n135 and where the charge is based on an instance of "laughing at one's misfortune." n136

Observers agree that it is not only formal charges that stifle dissent, but informal accusations as well. n137 Front-line, the International Foundation for the Protection of Human Rights Defenders, has documented the investigation and aftermath of the 2004 Parliamentary Report on the *Ligue Rwandaise pour la Promotion et la De'fense des Droits de l'Homme* (Rwandan League for the Promotion and Defense of Human Rights). n138 After being accused of genocide ideology, much of the leadership of the organization fled the country and the new leadership issued a formal apology for those actions that allegedly constituted genocide ideology. n139 More recently, other organizations such as Freedom House have argued that "[a]ccusations of [genocide ideology and divisionism] are used to [\*29] intimidate and silence journalists." n140 A two-month suspension of the BBC for alleged genocide ideology was particularly criticized. n141 Critics of the Rwandan government also point to attempts to use charges of genocide ideology to disrupt opposition political groups and groups critical of the government. n142 Critics found it especially galling that Dr. Alison Des Forges, the "brilliant scholar, activist, and writer whose dedication to the people of Rwanda and the Great Lakes region for over 30 years [was] unmatched," n143 was accused of spreading genocide ideology. n144

This review of Rwandan law and the surrounding reports and commentary does clarify a few matters. The similarity of the text of the 2008 law (characterizing the crime of genocide ideology as "marginalising, laughing at one's misfortune, defaming, mocking, boasting, despising, degrading, [and] createing [sic] confusion aiming at negating the genocide which occurred") n145 and the 2003 law on negationism ("she has negated the genocide committed, rudely minimised it or attempted to justify or approve its grounds . . .") n146 indicates that most, if not all, actions that are now punishable as genocide ideology were punishable in the past. n147 Second, equating the RPF's actions with genocide is definitely within the scope of the criminal penalties based on the 2004 genocide ideology report's focus [\*30] on belief in a "double genocide" n148 and more recent comments by the President. n149

It is less clear whether there is a pattern of legal development between 2003 and the present, and if so, what exactly it is. The enactment of the 2008 genocide ideology law might be the culmination of the various parliamentary reports and an increasingly harsh and politicized stance against the prohibited expressions. Alternatively, it could be an attempt at increased clarity that is another step in a continuing effort that predates the drafting of the 2003 constitution. If so, the law is more of a continuation of previous practice than any actual clarification. However, the increase in penalties between the 2003 and 2008 laws is slight, and while the 2008 law has been criticized for vagueness and overbreadth, n150 the negationism and divisionism laws have been similarly criticized. n151 Thus, while Rwanda has not significantly restricted the use of genocide ideology charges, whether the genocide ideology law signals an increase in politically motivated prosecutions remains unclear.

#### B. Germany: Actions Banning Parties Under Article 21 of the *Grundgesetz* and Laws Prohibiting Symbols and Propaganda of Banned Organizations

Like Rwanda, Germany also has a series of laws that limit expression and association to preserve the constitutional order. Militant democracy is implemented through *Strafgesetzbuch* (the German Criminal Code) Sections 86 and 86a and in Article 21 of the [\*31] *Grundgesetz*. n152 However, where the Rwandan laws are relatively recent and exist in a context of political involvement with the judiciary, the German laws have a long history and have been increasingly limited by the courts. While Germany continues to face new questions about the use of these laws as the country has stabilized, the courts have actively limited their scope and application.

An examination of the German laws limiting freedom of expression and association begins with the application of the *Grundgesetz* itself. Article 21 empowers the German Constitutional Court to hear cases seeking a ban on political parties. n153 In applying this provision,

the Federal Constitutional Court may institute proceedings for the prohibition of a party only if the Bundestag, the Bundesrat, the Federal Government or--in the case of a party confined to a single Land--a Land government makes an application to that effect. It is left to their discretion whether they make such an application. They may decide not to do so if they consider it better to combat a party they regard as

unconstitutional by political means, above all by public discussion during an election campaign. n154

The Constitutional Court has examined three cases where a party was alleged to "seek to undermine or abolish the free democratic basic order or to endanger the existence of the Federal Republic of Germany." n155 In the two cases where the Court reached the merits, the parties were found illegal.

[\*32] In the first case heard by the Court, the Socialist Reich Party Case, it stated that the framers of the *Grundgesetz* "had to consider whether principles governing every democracy should limit the absolute freedom to establish parties on the basis of any political idea." n156 The court linked the rights of association in Article 9 to the establishment of political parties in Article 21. It determined that the court "is justified in eliminating them from the political scene if, but only if, they seek to topple supreme fundamental values of the free democratic order." n157 Determining this is a matter of considering all relevant facts. n158 In the case of the Socialist Reich Party, the recruitment of former NSDAP (Hitler's Nazi party) members "who have 'remained true to themselves,'" the duplication of NSDAP organizational structures, and the commitment to "a revival of the mythical notions of an indestructible Reich and German racial superiority" n159 all compelled a decision that the party was unconstitutional within the meaning of Article 21(2).

In 1956, the Constitutional Court addressed an action against the Communist Party of Germany (KPD). n160 The German government had originally sought a declaration of unconstitutionality in 1951. "The delay reflected the growing feeling among some of the justices that the Adenauer government's action against the KPD was premature and that it would be more prudent to allow the party to bury itself in an open political contest than have it banned by judicial decree." n161 When finally addressing the case, the Court engaged in "an exhaustive analysis of Marxism-Leninism and the history of German communism . . . [and] found, as a matter of ideology and fact, that the KPD directed all of its operations against the existing constitutional system." n162 As a result, the party was dissolved along with "all of its surrogate organizations, current and future." n163 It is worth noting that the KPD reorganized as the German Communist Party (DKP) in 1968 and, while it could also have been banned under Articles 9 and 21, "[i]n practice, if not in theory, the use of Article 21, section 2, to ban a party has been abandoned when the party's antidemocratic goals are not [\*33] accompanied by illegal actions or preparation for the use of force." n164 The rarity of these cases (two in the 1950s, one related case in 1978, n165 and one in 2003 discussed below) indicates that there has been a "lessening fear of radical parties" n166 and a decreasing willingness to find constitutional violations when addressing those groups. n167

Professor Kommers echoed this sentiment in 1989, writing that "it is unlikely that the federal government or parliament will seek to have a party declared unconstitutional in the present political climate." n168 However, in 2001, the German government, the Bundesrat and the Bundestag filed motions with the Federal Constitutional Court "seeking a constitutional ban of the extreme right-wing National Democratic Party of Germany (NPD)." n169 Observers hoped that the decision to take up the case would shed light on "how--in the view of the Court--a modern consolidated and stabilised [\*34] democratic state has to and is allowed to react to parties or other associations seeking to undermine the established power." n170

In 2003, however, the Court issued a decision dismissing the case n171 that has been described as "surprising" n172 and "a banana skin episode of the highest order." n173 The Court found that a large proportion of the party leadership was, in fact, employed by German intelligence. Because a party ban was "the 'sharpest weapon of a constitutional democracy' the proceedings before the Court required the 'highest possible degree' of procedural transparency and predictability, which could only be guaranteed if all undercover intelligence surveillance of the respondent were excluded." n174 Although this was a decision by a minority of members of the Court, the Court found that it was "established that the applications to outlaw the respondent cannot be successful." n175 In dismissing the case, the Court left unanswered the numerous legal questions scholars had hoped might be answered, but the decision did indicate that the Court was increasingly unwilling to utilize that "sharpest weapon of a constitutional democracy." n176

The Article 21 provisions are related to restrictions on propaganda and the display of political symbols. Section 86 of the *Strafgesetzbuch* prohibits propaganda by four categories of organizations: n177 parties or substitute parties declared unconstitutional by the Federal Constitutional Court, organizations opposed to the democratic order or international understanding, a government in alliance with one of the above groups, and the National Socialists. n178 Section 86a prohibits distribution or public use of those organizations' symbols. n179 The statute specifies "flags, insignia, uniforms, slogans, and forms of greeting" as the relevant [\*35] symbols as well as "[s]ymbols which are so similar as to be mistaken for those" otherwise prohibited. n180 The penalty for these crimes is up to three years imprisonment or a fine. n181 The laws are not based on a dignity right as in the case of hate speech, n182 instead, they fall under the *Strafgesetzbuch's* heading of "Endangering the Democratic Rule of Law." n183

The Federal Constitutional Court addressed the prohibition on symbols of illegal organizations in the Nazi Symbols Case. n184 The case involved t-shirts "featuring 'Adolph Hitler's body in a uniform jacket with a swastika armband'" and displayed various dates of World War II as a "European Tour." n185 The Court n186 found that the t-shirts qualified as artistic expression under Article 5(3). n187 The Court's analysis rested on a willingness to "examine in detail the laws in question" and their effect on the basic right of expression, thus developing a balancing test to determine the scope of the prohibition. n188 The Court notably did not focus on the principles of militant democracy. This may be part of the Court's increasing stress on the notion that "fundamental rights had importance not only as subjective rights of citizens against the state, but also as society's most important values." n189

German courts have also addressed Section 86a in other circumstances, including the use of symbols within specifically anti-Nazi contexts. Section 86 creates an exception for otherwise-banned propaganda that serves "to further civil enlightenment, to avert [\*36] unconstitutional aims, to promote art or science, research or teaching, reporting about current historical events or similar purposes" n190 but there is no explicit exemption for anti-Nazi use of Nazi symbols. n191 In 2007, the Federal Criminal Court took up the question and reversed lower courts that had ruled that "selling buttons with a crossed-out swastika [was] indictable and [was] not privileged" due to the danger of possible social habituation to the prohibited symbols. n192 Instead, the Court found that "[t]he use of a symbol of an unconstitutional organization in a statement whose contents are obviously and clearly in opposition to the organization and are fighting their ideology runs counter to the protective purpose of the provision and is therefore contrary to the exclusion of section 86a StGB." n193 In doing so, the Court was willing to graft an additional, extratextual exemption onto the statute.

This series of cases, including the Court's reasoning in the Nazi Symbols Case, n194 evinces a general unwillingness to simply [\*37] apply a viewpoint-discriminatory reading of Section 86a. One scholar complains that the Federal Criminal Court's decision made punishment dependant upon a particular set of beliefs and therefore runs counter to Section 86a because the statute, "in order to avoid any interference with freedom of expression, does not relate to a belief but to the ban of an unconstitutional organization." n195 Nevertheless, from its relation to Section 86 (and supported by the restrictions within Articles 9 and 21 of the *Grundgesetz*), viewpoint discrimination seems closer to the original intent.

In conclusion, one can see a series of patterns in the German jurisprudence dealing with Article 21 and *Strafgesetzbuch* Sections 86 and 86a. First, the cases display an increasing unwillingness to restrict speech and associational rights. While there are some inherent barriers to these prosecutions (such as the requirement of Article 21 that a branch or arm of the federal government brings suit), the judiciary has imposed additional procedural hurdles and applied an increasingly strict analysis to prosecutions under these provisions. Second, this increasingly strict interpretation serves to avoid the question of whether, in fact, these groups or symbols threaten the German constitutional order. Third, the move away from a stress on militant democracy and social order raises new questions about how these provisions are integrated into a system that is increasingly hostile to viewpoint discrimination. Notably, all of these developments rely on Germany's evolution as a stable constitutional democracy, a development that cannot be taken for granted in Rwanda. While the two countries display numerous constitutional and historical similarities, the implementation of their legislation differs markedly.

#### IV. PARALLELS AND DIFFERENCES IN RWANDAN AND GERMAN REGULATION OF SPEECH AND ASSEMBLY

The historical and legal parallels between Germany and Rwanda are, at least on the surface, readily apparent. As part of their redevelopment, both countries have enacted laws that limit rights to speech and association. Both Germany and Rwanda have been motivated by twin goals of promoting stability and democratic development. It would be foolish to suggest that Rwanda will [\*38] necessarily develop in a manner parallel to Germany. Yet Rwanda's constitution n196 and officials n197 state their commitment to the rule of law and protection of individual liberties. While critics complain of the Rwandan government's crackdown on dissent, n198 public statements by Rwandan officials and the text of their constitution set the bar far higher. To the extent that Rwanda can live up to its ideals, it is the self-acknowledged responsibility of Rwandan officials to attempt it and of the international community to encourage it. Having similar laws, motivated by similar concerns, and having nevertheless built a robust constitutional democracy, Germany offers important lessons for Rwanda to do the same.

The comparison that follows draws on textual provisions, procedures, and the role of the judiciary, as well as criticisms the countries have faced. It shows that the Rwandan laws are problematic, particularly in their clarity and the penalties they prescribe. However, it also shows that the texts of the laws will not necessarily preclude democratic development. Rather than the laws' textual provisions, the most important differences are seen in their use and the procedures surrounding that use.

The texts are the obvious starting point in a comparison, and there are important similarities. Germany proscribes as unconstitutional organizations whose aim is to undercut the democratic basis of German society, n199 while Rwanda mandates the [\*39] dissolution of organizations that promote genocide ideology. n200 Germany prohibits propaganda n201 and the display of symbols of unconstitutional organizations. n202 Rwanda prohibits "diffamatory [sic] speeches, documents or actions which aim at propounding wickedness or inciting hatred." n203 Similarly, both countries' laws target the ideologies that supported the genocidal regimes: the Hutu power ideology in Rwanda n204 and the Nazi government in Germany. n205 Both legal regimes provide for limits to speech and associational rights in the name of a stable post-conflict society.

The differences between these legal texts are also notable and readily apparent. The language of the German laws is tightly focused on "flags, insignia, uniforms, slogans, and forms of greeting" n206 or writings "directed against the free, democratic constitutional order or the idea of the comity of nations." n207 The Rwandan laws, by contrast, characterize genocide ideology n208 as "marginalising, laughing at one's misfortune, defaming, mocking, boasting, despising, degrad[ing], createing [sic] confusion aiming at negating the genocide which occurred, stirring up ill feelings, taking revenge, altering testimony or evidence for the genocide which occurred." n209 The Rwandan characterization of genocide ideology and the proscription of "rudely minimis[ing]" the genocide, n210 are far broader and less clear than the actions outlawed by the corresponding German laws. Second, the [\*40] German laws exempt expressions that serve "to further civil enlightenment, to avert unconstitutional aims, to promote art or science, research or teaching, the reporting about current or historical events or similar purposes." n211 The Rwandan laws include no such exemptions.

The Rwandan laws have been harshly criticized for their perceived vagueness, their failure to include explicit links to other legal standards such as that between the definition of genocide and the definition of genocide ideology, their lack of intent requirements, and their penalties. In each case, an examination of the parallels and distinctions between the German and Rwandan laws will demonstrate the extent to which such criticisms are justified.

International observers of Rwanda have complained that "a very broad, imprecise and even confusing array of activities and expressions is covered by the notion of genocide ideology." n212 Professor Sheri Rosenberg has stated that

[w]hile we heard quite a bit about genocide ideology while we were in Rwanda and since then, no official we asked could define it. The Rwandan Minister of Justice memorably described it as a spirit. The 2008 law on genocide ideology . . . gives some content to this term of genocide ideology, but is quite

broad, leaving room for what some suggest may be arbitrary application. n213

However, the German laws are vague in important respects as well. As Professor Kommers notes, "[t]he language of Article 21 . . . is far from clear. What, in truth, is the meaning of 'free democratic basic order'? How much resistance to the democratic [\*41] order is required to trigger a decision of unconstitutionality by the Federal Constitutional Court?" n214 These questions are not answered by the text. Nor is it clear from *Strafgesetzbuch Sections 86 and 86a* when material can be said to be "directed against the free, democratic constitutional order or the idea of international understanding" n215 so as to be considered propaganda. Nor does the text clarify how the context of a display of forbidden symbols matters or, as described in Part III.B. *supra*, whether anti-Nazi use of Nazi symbols falls under the Section 86a ban. The context in which these laws have been used is important, but that is a different question than whether the laws are particularly vague. The repression of Communist organizations in Germany following the Communist Party Ban Case n216 suggests that it is not only Rwanda where the executive can use these provisions for "punishing criticism of government policies." n217

A second set of criticisms launched by international observers relates to the apparent disconnect between the behaviors criminalized by the genocide ideology law n218 and the goals of avoiding a recurrence of "Hutu power" ideology and genocide. Human Rights Watch states that the genocide ideology law "is largely disconnected from the crime of genocide itself," n219 and Article 19 expresses similar concerns. n220 While the German laws only include those writings "directed against the free, democratic constitutional order or the idea of international understanding," n221 there is no reference in the laws to genocide, to the Nazi regime, or to any particular international legal standard. Nor is there any requirement in the law on the display of banned symbols beyond those for the organizations falling into one of [\*42] the categories prohibited in Section 86 of the *Strafgesetzbuch*. n222 To the extent that the Rwandan laws leave the possibility of political misuse on this basis, the German laws do as well.

A third point of comparison between the Rwandan and German laws is the penalties they prescribe. The distinction between the three-year maximum placed on violations of Sections 86 and 86a in Germany n223 and the ten to twenty-five year sentences for genocide ideology in Rwanda n224 are stark. The far greater penalties in Rwanda also increase the threat of political influence. The prospect of spending three years in jail is not trivial. However, where the threat of prosecution alone is likely to curb dissent, there is far more potential for political misuse. That misuse is far more likely where the offense carries a ten-year minimum sentence than where the statute explicitly provides for no sentence in the event of a *de minimus* violation. n225 However, the sentences must be compared in context. The U.S. State Department notes that Rwandan "[p]enalties for breaking the law can be more severe than in the United States for similar offenses." n226 A more concrete example is Rwanda's statutory rape charge, n227 which carries a twenty-year sentence, while Germany imposes a maximum sentence of three years. n228 Thus, while generally more severe penalties may increase the possibility of political misuse, the penalty for genocide ideology alone does not clearly indicate a goal of stifling dissent.

The fourth point of comparison between the provisions of the Rwandan and German laws is the question of what level of intent, or *mens rea*, is required for conviction. International NGOs have criticized the genocide ideology law for "not requir[ing] that the [\*43] perpetrator intend to assist or facilitate genocide, or be aware of any planned or actual acts of genocide." n229 Likewise, the Joint Governance Assessment found that the "absence of a requirement of intentionality . . . in the provisions adds to the problem of vagueness and leaves the provisions open to abuse and less effective in tackling the problem that they are designed for." n230 However, these arguments face two problems. The first is that the text of the genocide ideology law itself does at least suggest an intent requirement, as the definition of genocide ideology in Article 2 is "an aggregate of thoughts characterized by conduct, speeches, documents and other acts *aiming at* exterminating or inciting others to exterminate people." n231 The use of the phrase "aiming at" does indicate a requirement of intentionality. This is made more confusing by the "characterization" provisions without any intent requirement in Article 3, n232 but an attentive judge applying the law should be bound by the requirements of Article 2.

In addition, the German laws governing symbols and propaganda have no requirement of intentionality either.

n233 The text of the German laws does not require the intent to further the aims of the banned organizations. One who "disseminates [propaganda] or produces, stocks, imports or exports or makes [it] publicly accessible through data storage media" violates Section 86. n234 A Section 86a violation occurs where one "distributes or publicly uses" or "produces, stocks, imports or exports" the prohibited symbols or greetings. n235 The fact that the 2007 decision of the Federal Criminal Court was needed to address the question of anti-Nazi use of the swastika underlines the lack of any textual intent requirement. n236 Because similar laws without an intent requirement escape criticism in Germany, the criticisms of the Rwandan laws are less than wholly persuasive.

[\*44] The distinctions between the procedural requirements for German and Rwandan prosecutions are a greater distinction between the laws relating to free speech and association. Because an executive or legislative branch of the federal government must implement Article 21 proceedings and because those proceedings must be conducted before the Federal Constitutional Court, there are significant barriers to bringing actions to ban political parties in Germany. Rwandan law, by contrast, allows the government to seek dissolution of organizations convicted of genocide ideology without any special requirements for seeking such a dissolution. n237 But again, this distinction only goes so far. While bringing an Article 21 action may be difficult, many of the related actions are not. The dissolution of all NSDAP organs had occurred under the occupation government n238 and subsidiary organizations may also be dissolved without going through the Constitutional Court. n239 Similarly, prosecutions under Sections 86 and 86a are normal criminal prosecutions. n240

The most important distinction, however, is Germany's development of a constitutional culture, one that cannot be described as a place "where the judiciary remains largely subordinate to the executive branch and even to elite unofficial actors who enjoy both economic and partisan political power." n241 Germany's Constitutional Court "has propelled the development of case law forward, and acts in an increasingly open manner politically." n242 Of course, Rwanda has not had the same amount of time to develop independent institutions. Human Rights Watch notes that Rwanda has "improved the delivery of justice in the last five years, a noteworthy achievement given the problems they faced" n243 and that it is "more [\*45] efficient and staffed with more highly trained jurists than ten years ago." n244 However, the decision to limit judges to a four-year once-renewable term poses a threat of additional outside pressure. n245 In addition, the executive and legislative branches have been far more prominent than the judiciary in shaping the legal debate over genocide ideology. n246 The reports of politicized charges of genocide ideology are troubling, and despite the progress Rwanda has seen, serious questions remain concerning the development of Rwanda's constitutional culture. This is a marked difference from the robust judicial role created by the *Grundgesetz* and seen in the Federal Constitutional Court's jurisprudence.

A final comparison worth noting is that of the significant difference between the criticism directed at these laws. International NGOs and scholars state flatly that the laws on "divisionism" and "genocide ideology" are particularly subject to political influence" n247 and that "[t]he law defines divisionism in sweeping terms . . . ." n248 That is, it is not only the uses of these laws but their language that has received sweeping condemnation. By contrast, Article 19's assessment of Germany found that "Articles 130 and 131 of the Strafgesetzbuch, which make punishable racist speech and incitement to racial hatred, constitute an acceptable attempt to strike a fair balance between the state's obligation" to protect human dignity and freedom of speech. n249 Likewise, Professor Brugger notes that "international acclaim [for Germany's constitutional order] extends to Germany's treatment of hate speech, which, on the whole, exemplifies the position taken by most European countries and by [\*46] international law--hate speech must be effectively eliminated." n250 The distinction in tone and content between discussions of Rwanda and Germany highlights the perception by Rwandans that the progress they have seen and dangers they face are not recognized by the international community. n251

In sum, many of the criticisms leveled against the texts of the Rwandan divisionism, negationism, and genocide ideology laws are less troubling when compared against similar German laws that have not encountered the same degree of criticism. The potential for vagueness, the lack of intentionality requirements, and the few ties to international standards are all present in German as well as Rwandan laws. The comparison does highlight some unclear language in the Rwandan legislation, particularly the link between the definition and the characterization of genocide ideology.

Nevertheless, many of the criticisms leveled against the Rwandan laws are far less potent than their international critics would make them out to be. Of more concern is Rwanda's legal culture. While Germany has developed an independent legal culture that reigns in the effects of textual vagueness and the potential for abuse that exists within its laws, Rwanda has yet to do so.

#### V. THE BENEFITS OF USING GERMANY AS A MODEL FOR RWANDA

Given the historical and legal parallels between Germany and Rwanda and the sixty-five year development of the German legal system, Germany offers a number of lessons for Rwanda as it implements its laws on genocide ideology, negationism, and sectarianism. Germany has successfully balanced concerns of individual freedom and political stability and is a model Rwanda might profitably emulate. The German-Rwandan comparison offers two, interrelated benefits for both Rwandans and international observers. First, a careful comparison of Germany and Rwanda avoids much of the contentiousness that has surrounded [\*47] international criticism of the Rwandan laws. Second, the German experience allows a clearer assessment of which aspects of the Rwandan legal structure are particularly troubling and helps identify particular suggestions for reform. Specifically, the German experience indicates that the Rwandan laws might be clarified and simplified to minimize the risk of political prosecution. It further indicates that judicial and procedural reforms can be effective in reigning in the extreme breadth of the laws as written without compromising Rwanda's continued commitment to political stability in the wake of the 1994 genocide.

One of the most frustrating elements of the criticisms of the Rwandan laws is the failure to provide solutions that address Rwandan concerns for stability. Article 19 seeks an immediate repeal of the genocide ideology law and full compliance with the requirements of the ICCPR n252 as it interprets them. n253 Freedom House recommends that the Rwandan government "give a clear and restricted definition to the crimes of promoting 'divisionism' or 'genocide ideology'" n254 and Lars Waldorf offers "a plea that we make clear distinctions between revisionism, negationism, hate speech, and genocide ideology. And that we reserve genocide ideology, and the punishment of genocide ideology, to a very narrow and well-defined crime." n255 What these arguments fail to do, or fail to do adequately, n256 is offer practical suggestions of how Rwanda is to comply with those [\*48] demands, what the final laws will look like, and how to respond to the concerns of Rwandans in avoiding a slide back into violence. n257

This is not to exempt the Rwandan government from criticism. The reports of politicized prosecutions, such as the prosecutions of the attorney Celestin Sindikubwabo n258 and the more recent charges against presidential candidate Victoire Ingabire, n259 as well as the suppression of voices critical of the government, are highly troubling. n260 Lars Waldorf is absolutely correct that the campaign against genocide ideology has "inadvertently trivialized the genocide" by targeting human rights advocates as deniers of the Rwandan genocide. n261 The challenge is to offer tangible solutions. These solutions should address Rwandan concerns for stability and take into account the ongoing threat of ethnic violence, while also protecting freedom of speech and association. Ultimately, these proposals should embody the mandates of the Rwandan constitution, both preventing a repetition of past horrors and protecting freedom of speech and association.

One benefit of comparing German and Rwandan laws that limit political speech is simply that the comparison already exists and is drawn on by both Rwandans n262 and international observers. n263 [\*49] That scholars and policymakers already make this comparison suggests that it is intuitive and can offer suggestions that have already been shown to work in the German context. While it is true that these parallels only go so far, n264 the German model provides common ground from which further, more productive discussion can occur.

Second, because of the common experience of genocide and rebuilding, Germany offers a model that takes those experiences into account. In responding to international criticism, Rwandans have repeatedly stressed that their concerns about stability are not given sufficient credit. n265 Germany and Rwanda both emphasize the need to create a political atmosphere that moves beyond the political structures of the past. Just as the German constitution was drafted to "wean the Germans off the habits of cheap nationalism," n266 one of the Rwandan constitution's fundamental principles is the "eradication of ethnic, regional and other divisions, and promotion of national unity." n267 The

parallels between German and Rwandan redevelopment give credit to Rwandans' concern for stability as well as their desire to protect freedom of speech and meet international obligations, such as those under the ICCPR and the African Charter on Human and Peoples' Rights. n268

[\*50] Third, the German model highlights the role of both the Rwandan people and the international community. The Rwandan government and its representatives have used the particularities of the Rwandan experience to dismiss international criticism. n269 Because Germany has faced many (though by no means all) of these same particularities, using the German experience as a model allows international observers to actively engage Rwandan policy-makers without being dismissed for not being Rwandan.

Finally, international NGOs seek to hold Rwanda not just to international standards but to international standards as enunciated in Western Europe. n270 The German model offers some perspective about the time-frame required to meet such standards. Less than fifteen years elapsed between the Rwandan genocide and the adoption of the genocide ideology law. Fifteen years after the end of World War II, Germany had banned the Communist Party and had moved strongly against various adjunct organizations. n271 Using Germany as a model for Rwanda keeps that time-frame in mind, though it also stresses the need for development. To the extent that Rwanda has seen an increase in the politically-motivated use of divisionism and genocide ideology charges, n272 the German comparison encourages honest criticism based on the steady development of the German legal structures.

However, the German model does more than simply offer rhetorical benefits. The German experiences suggest particular, practical modifications to the Rwandan legal structure. First, the German laws reinforce criticisms that the Rwandan laws are too vague and too disconnected from the particular challenges that they are trying to address. The clarity of Sections 86 and 86a of the *Strafgesetzbuch* provide a marked contrast to the standards in the [\*51] laws on divisionism, negationism, and genocide ideology. While Sections 86 and 86a are not entirely clear, their simplicity allows courts to judicially limit their scope without overruling them completely. One starting point for Rwandan legislative revisions would be to clarify the distinction between the definition and "characterization" of genocide ideology, perhaps removing the characterization provisions altogether. n273 In doing so, the Rwandan statute would take an important step towards addressing concerns about the clarity of the genocide ideology law. n274

Second, the German laws have developed over time through the exclusion of *de minimis* infractions n275 and exemptions where "means of propaganda or the act serves to further civil enlightenment, to avert unconstitutional aims, to promote art or science, research or teaching, reporting about current historical events or similar purposes." n276 The exceptions have been central to the German judiciary's move to a more restrictive legal interpretation. Amending the Rwandan statutes to allow for such exceptions allows courts to differentiate between productive criticism by human rights advocates and the Hutu power rhetoric that contributed to the 1994 genocide. While the laws would still not require an intent to incite violence, these exemptions would limit their reach and protect speech and associational rights.

Third, German procedural safeguards have reigned in overuse of their statutes as much as the legal definitions of the offenses. The structures contained within Article 21 of the *Grundgesetz* have limited the use of that procedure to a few, particular cases. The requirements that cases are referred by a Land government or arm of the Federal Government and that unconstitutionality of a party be found by a two-thirds majority of the Court ensure deliberation and unanimity before placing additional restrictions on the rights of association. By contrast, there are no such structures in place for even the most important actions under the Rwandan genocide ideology law. Further, the definition of genocide ideology has been enforced as much by informal accusations and parliamentary reports as it has through judicial [\*52] interpretation. n277 The development of even limited procedural safeguards to regulate the use of the genocide ideology law would create more room for deliberation and more likelihood that prosecutors and judges would articulate the necessary legal standards.

Most importantly, the German example shows the importance of an independent judiciary. The German Constitutional Court has, over the course of more than fifty years, significantly narrowed the scope of the German laws. German legal standards have evolved over this time, increasingly protecting liberties while accounting for the

constitutional and democratic development of the German state. Rwandan judicial reform has been a focus of international organizations, and Rwanda has made significant progress since 1994. n278 However, international organizations' analyses of the Rwandan judiciary are often rooted in international law and international norms rather than comparing Rwanda with other post-conflict societies. n279 Most issues raised by international organizations are equally applicable to a comparison with Germany, including the increasing professionalization of the judiciary, n280 development and maintenance of separation of powers, n281 and the creation of safeguards against politicized prosecutions. n282

However, the German-Rwandan comparison highlights the necessity for a judiciary and bar that will actively raise those issues necessary to clarify the scope of laws like the genocide ideology law. n283 The comparison thus contributes to the already strong case [\*53] that Rwanda "should take steps to ensure free legal assistance for those who do not have the means to pay for a defense lawyer . . . ." n284 This is not only Rwanda's responsibility under article 14 of the ICCPR, n285 but is also a means to create the legal space necessary for a limiting interpretation of the genocide ideology, negationism, and sectarianism laws. n286 Without lawyers to ensure that legal ambiguities within the laws are raised, courts have not addressed them. With greater judicial willingness to act independently, Rwandan judges will be more likely to create a body of law that will balance security and individual rights, as Germany has. Rwandan and international attention to judicial independence, even more than the text of the laws under discussion, will preserve individual rights.

"The political will and the ownership by Rwandans of their own development agenda, and the collaboration and support from development partners are essential elements of the eventual [Rwandan] success." n287 This statement, made by the President of the Rwandan High Court describing the challenges of judicial development, reinforces the value of the German comparison. The comparison of Rwanda and Germany develops from the common experience of rebuilding a society in the wake of genocide. Both have introduced laws that limit individual rights in the name of stability. Germany has created a legal structure where Nazi symbols may be prohibited, even "without the requirement that the speaker be proven to have intended that his words incite, and that incitement [\*54] was the foreseeable and imminent result of those words." n288 This has occurred without major international objection and, indeed, with the support of NGOs like Article 19. n289

The comparison indicates specific reforms Rwanda might undertake to limit their laws' impact on the right to free speech and free association without simply repealing them. However, the comparison also makes clear that it is the use of the laws, as much as their textual provisions, that is particularly troubling. Developing a culture of judicial independence will be key to the continuing democratic development of Rwanda. Germany has successfully developed a democratic culture in the wake of conflict and has created robust safeguards for individual freedoms. Rwanda has the opportunity to learn from German constitutional culture and promote democratic development without compromising their political and social stability.

### **Legal Topics:**

For related research and practice materials, see the following legal topics:

Constitutional Law  
Bill of Rights  
Fundamental Freedoms  
Freedom of Association  
Constitutional Law  
Bill of Rights  
Fundamental Freedoms  
Freedom of Speech  
Scope of Freedom  
Education Law  
Faculty & Staff  
Freedom of Speech  
Freedom to Teach

### **FOOTNOTES:**

n1 Aidan Leonard traveled with the author and witnessed these trials as well. This account generally comports with Mr. Leonard's memory of the events and their details. E-mail from Aidan Leonard to the Author, Feb. 9,

2010 (on file with the author).

n2 Mr. Leonard remembers this as "bless those who saved us from a genocide and then committed another one."  
*Id.*

n3 This figure was provided by a translator but does not seem to comport with the range of permissible sentences under either the 2003 law prohibiting negationism, which provides for a 10 to 20-year sentence, or the 2008 genocide ideology law, which provides for a 10 to 25-year sentence and which was not yet in effect. *See* Law No. 33 bis/2003 of 6 September 2003 Repressing the Crime of Genocide, Crimes Against Humanity and War Crimes, Official Gazette of the Republic of Rwanda, Nov. 1, 2003; Law No. 18 of 23 July 2008 Relating to the Punishment of the Crime of Genocide Ideology, Official Gazette of the Republic of Rwanda, Oct. 1, 2008.

n4 *See generally* Filip Reyntjens, *Rwanda, Ten Years On: From Genocide to Dictatorship*, 103 Afr. Aff. 177 (2004) (criticizing the Rwandan government for ethnic discrimination, concentration of power, and suppressing political opposition).

n5 *See* Const. of the Republic of Rwanda, 2003, art. 9 ("The State of Rwanda commits itself to . . . promotion of national unity [and] . . . building a state governed by the rule of law, a pluralistic democratic government . . ."); U.N. Human Rights Comm., *Consideration Of Reports Submitted By States Parties Under Article 40 of the Covenant, Third Periodic Report, Rwanda*, PP 11, 12, 122, 292, U.N. Doc. CCPR/C/RWA/3 (Nov. 27, 2007) [hereinafter *Third Periodic Report, Rwanda*] (discussing the establishment of and institutional support for the rule of law in Rwanda).

n6 Fredrick Schauer, *Free Speech and the Cultural Contingency of Constitutional Categories*, 14 *Cardozo L. Rev.* 865, 868 (1993).

n7 *See id.* at 877-89 (discussing the enactment of a Nazi speech ban in Germany and the absence of such a ban in the United States).

n8 *Id.* at 879.

n9 *Id.*

n10 *See, e.g.*, Alfred Ndabarasa, Counsellor, Permanent Mission of Rwanda, United Nations, Opening Remarks at the Healing the Wounds: Speech, Identity, and Reconciliation in Rwanda Conference (Mar. 30, 2009) (transcript on file with the author) [hereinafter Healing the Wounds Conference] ("It's only Rwandans who are capable of designing a system that is suitable for Rwanda. It's the Rwandans who have to do this."); *see also* President Paul Kagame, *Preface* to *After Genocide: Transitional Justice, Post-Conflict Reconstruction and Reconciliation in Rwanda* xxv (Philip Clark & Zachary Kaufman, eds. 2009) [hereinafter *After Genocide*] ("Sadly, sections of the international community have ignored the need for locally relevant responses to the genocide, and have tried instead to impose on the Rwandan population institutions and processes that fail to address the particular needs of our society.").

n11 For an overview of the universalist position, *see* Sujit Choudhry, *Globalization in Search of Justification: Toward a Theory of Comparative Constitutional Interpretation*, 74 *Ind. L.J.* 819, 833-35 (1999).

n12 *See, e.g.*, Robert A. Kahn, *Cross-Burning, Holocaust Denial and the Development of Hate Speech Law in the United States and Germany*, 83 *U. Det. Mercy L. Rev.* 163 (2006); Claudia E. Haupt, *Regulating Hate Speech--Damned If you Do and Damned if You Don't: Lessons Learned from Comparing the German and U.S. Approaches*, 23 *B.U. Int'l L. J.* 299 (2005); Yulia A. Timofeeva, *Hate Speech Online: Restricted or Protected? Comparison of Regulations in the United States and Germany*, 12 *J. Transnat'l L. & Pol'y* 253 (2003).

n13 *See infra*, Part I.

n14 *See* Gerry J. Simpson, *Is International Law Fair?*, 17 *Mich. J. Int'l L.* 615, 629 (1996) ("The incoherence of [international] free speech [doctrine] stems from the extremely open-textured and heavily qualified nature of the right as laid out in Article 19 of the International Covenant on Civil and Political Rights.")

n15 *See* Donna E. Arzt, Nuremberg, *Denazification and Democracy: The Hate Speech Problem at the International Military Tribunal*, 12 *N.Y.L. Sch. J. Hum. Rts.* 689, 752 (1995) ("The meaning of expressive speech can vary enormously, in reference to both types of context, over time and place.").

n16 *See generally* Norman Dorsen et al., *Comparative Constitutionalism: Cases and Materials* 1-10 (2003) (describing the "uses, benefits, rewards, drawbacks, and pitfalls of comparative analysis in constitutional law").

n17 Schauer, *supra* note 6, at 879.

n18 For example, regarding denial of the Rwandan genocide, Minister of Justice Tharcisse Karugarama has argued that "[a]nyone who denies the occurrence of the Holocaust is severely punished, yet those who deny the Rwandan genocide are simply said to be exercising their rights to freedom of expression . . ." *Rwandan Minister Accuses West of Supporting Genocide Deniers*, African Press Int'l (May 15, 2008), <http://africanpress.wordpress.com/2008/05/15/rwandan-minister-accuses-west-of-supporting-genocide-deniers/>.

n19 Law No. 47/2001 of 18 December 2001 Instituting Punishment for Offences of Discrimination and Sectarianism, Official Gazette of the Republic of Rwanda, Feb. 15, 2002. The phrase "divisionism" is used synonymously with "sectarianism" in reports on Rwanda and scholarly literature. Lars Waldorf, *Mass Justice For Mass Atrocity: Rethinking Local Justice As Transitional Justice*, 79 *Temp. L. Rev.* 1, 35 n.188 (2006).

n20 Law No. 18 of 23 July 2008.

n21 Law No. 33 bis/2003 of 6 September 2003 Repressing the Crime of Genocide, Crimes Against Humanity And War Crimes, Official Gazette of the Republic of Rwanda, Nov. 1, 2003.

n22 *See* Grundgesetz für die Bundesrepublik Deutschland [Grundgesetz] [GG] [Basic Law], May 23, 1949, BGBl. I, art. 21(2) (Ger.).

n23 *See* Strafgesetzbuch [StGB] [Penal Code], Nov. 13, 1998, Bundesgesetzblatt [BGBl. I] 945, § 86 (Ger.).

n24 *Id.* § 86a.

n25 Professor Sheri Rosenberg, Director, Program in Holocaust and Human Rights Studies, Benjamin N. Cardozo School of Law, Opening Remarks at the Healing the Wounds Conference, *supra* note 10.

n26 While a detailed historical discussion is beyond the scope of this Article, having three paragraphs devoted to the death of millions and the subsequent rebuilding of two separate countries seems especially inadequate. Nevertheless, attention to the larger legal parallels necessitates brevity.

n27 Alison Des Forges, Human Rights Watch, *Leave None to Tell the Story: Genocide in Rwanda* 1 (1999); *see also* Mark A. Drumbl, *Punishment, Postgenocide: From Guilt to Shame to Civis in Rwanda*, 75 *N.Y.U. L. Rev.* 1221, 1222 n.1 (2000) ("It is difficult to estimate the number of victims, but the figure of 800,000 appears regularly in the literature.").

n28 Des Forges, *supra* note 27, at 1.

n29 Gerard Prunier, *The Rwanda Crisis: History of a Genocide* 261 (1995).

n30 Philip Gourevitch estimates at least 800,000 dead in a country with a pre-war population of 7.5 million. Philip Gourevitch, *We Wish to Inform You That Tomorrow We Will Be Killed with Our Families: Stories from Rwanda* 3 (1998).

n31 *See generally* Martin Gilbert, *The Second World War: A Complete History* (1991) (describing the course and effects of World War II).

n32 Philip Marchand, *Shadows of War*, *Toronto Star*, Feb. 23, 2003, at D12.

n33 Inga Markovits, *Constitution Making After National Catastrophes: Germany in 1949 and 1990*, 49 *Wm. & Mary L. Rev.* 1307, 1310 (2008).

n34 *Id. at 1313.*

n35 *Id. at 1308-11*; Donald P. Kommers, *The Basic Law: A Fifty Year Assessment*, 53 *SMU L. Rev.* 477, 477 (2000).

n36 Markovits, *supra* note 33, at 1312.

n37 Lone Lindholt & Hans-Otto Sano, *The Danish Centre for Human Rights, 1997: An Analysis of Human Rights and Politics 5* (1998), *available at* <http://www.humanrights.dk/files/pdf/Publikationer/RWANDA%201997%20AN%20ANALYSIS%20OF%20HUMAN%20RIGHTS%20AND%20POLITICS.pdf>.

n38 Const. of the Republic of Rwanda, June 4, 2003.

n39 Const. of the Republic of Rwanda, May 30, 1991.

n40 Des Forges, *supra* note 27, at 52.

n41 *Id. at 51-52.*

n42 *Id. at 55.*

n43 Gourevitch, *supra* note 30, at 92-93.

n44 Donald P. Kommers, *The Constitutional Jurisprudence of the Federal Republic of Germany* 6 (2d ed. 1997).

n45 Gerhard Anschutz, Speech to the Annual Gathering of the University of Heidelberg: Three Guiding Principles of the Weimar Constitution (Nov. 22, 1922), in *Weimar: A Jurisprudence of Crisis* 132, 144 (Arthur J. Jacobson & Bernhard Schlink eds., 2002) ("[E]lections to [the Weimar] constitutional assembly took place on the basis of an extremely free right to take part in the full electoral process and with the participation of all political parties . . .").

n46 J. Bradford De Long & Barry Eichengreen, *The Marshall Plan: History's Most Successful Structural Adjustment Program*, in *Postwar Economic Reconstruction and Lessons for the East Today* 189 (Rudiger Dornbusch et al. eds., 1993) (describing postwar growth in Western Europe as "an extraordinary success").

n47 Jon Lunn, H.C. Library, Res. Paper No. 06/51, International Affairs and Defense Section, *The African Great Lakes Region: An End to Conflict?* 3 (2006), available at <http://www.parliament.uk/commons/lib/research/rp2006/rp06-051.pdf>.

n48 Jeffrey Gettleman, *Rwanda Stirs Deadly Brew of Troubles in Congo*, N.Y. Times, Dec. 3, 2008, at A6, available at <http://www.nytimes.com/2008/12/04/world/africa/04congo.html>.

n49 GG art. 1.

n50 Markovits, *supra* note 33, at 1313-14.

n51 Const. of the Republic of Rwanda, 2003, pmb. para. 1.

n52 *Id.* pmb. para. 2.

n53 GG art. 5(1).

n54 *Id.* art. 9(1).

n55 *Id.* art. 9(2).

n56 *Id.* art. 5(2).

n57 *Id.* art. 1(1).

n58 *Id.* art. 1(2).

n59 Const. of Rwanda, 2003, art. 34.

n60 *Id.* art. 35. *But see* Organic Law No. 55/2008 of 9 October 2008 Governing Non-Governmental Organizations, Official Gazette of Rwanda, Dec. 1, 2008 (requiring nongovernmental organizations "to not distort public order or commit affront [sic] to public decency").

n61 GG art. 21(2).

n62 *Id.* art. 18. This provision has never been successfully used. *Arzt*, *supra* note 15, at 735.

n63 Communist Party Case, Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Aug. 17, 1956, 5 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 86 (Ger.).

n64 Kommers, *supra* note 44, at 38.

n65 Const. of the Republic of Rwanda, 2003, art. 13.

n66 *Id.* art. 9(1).

n67 *Id.* art. 9(2).

n68 Const. of the People's Democratic Republic of Algeria, November 28, 1996, art. 42 (providing "[t]he right to create political parties is recognized and guaranteed" but limiting the right where it would "violate the fundamental liberties, the fundamental values and components of the national identity, the national unity, the security and the integrity of the national territory, the independence of the country and the People's sovereignty as well as the democratic and Republican nature of the State.").

n69 Bundesverfassung der Schweizerischen Eidgenossenschaft [BV] [Constitution], April 18, 1999, SR 101, art. 36 (Switz.) (specifying that restrictions on fundamental rights must be proportionate but may be justified by "the public interest or for the protection of the fundamental rights of others").

n70 Schauer, *supra* note 6, at 871.

n71 *Id.* at 870-71.

n72 Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, Schedule B to the Canada Act, 1982 (U.K.), 1982, c. 11, art. 1 (U.K.), § 1.

n73 Danmarks Riges Grundlov [DRG] [Denmark Constitutional Act], June 5, 1953, pt. VIII, §§ 77-78.

n74 See Human Rights Watch, Law and Reality: Progress in Judicial Reform in Rwanda 42 (2008), *available at* <http://www.hrw.org/en/reports/2008/07/24/law-and-reality> [hereinafter Law and Reality] (discussing efforts to reform Rwandan law and the Rwandan judiciary, along with obstacles to such efforts).

n75 StGB § 130(3) (criminalizing anyone who "publicly or in a meeting approves of, denies or renders harmless an act committed under the rule of National Socialism of the type indicated in Section 6(1) of the Code of International Criminal Law 220a [the German criminal statute on genocide] subsection (1), in a manner capable of disturbing the public peace").

n76 Holocaust Denial Case, Bundesverfassungsgericht [BVerfGE] [Federal Constitutional Court], Apr. 13, 1994, 90 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 241 (Ger.).

n77 *Id.* at 252.

n78 The Court also distinguished between curtailing speech based on opinion while "[a]ssertions of facts proved to be incorrect are not an interest worthy of protection." *Id.* at 247.

n79 Const. of the Republic of Rwanda, 2003, art. 9(1).

n80 Law No. 18/2002 of 11 May 2002 Governing the Press, Official Gazette of the Republic of Rwanda, July 1, 2002, art. 85; *see also* Enrique Armijo, *Building Open Societies: Freedom of the Press in Jordan and Rwanda*, 2 J. Int'l Media & Ent. L. 105, 122-23 (2008) (describing the use of divisionism charges against the press).

n81 Organic Law No. 55/2008 of 9 October 2008, art. 4.

n82 See Ndabarasa, *supra* note 10.

n83 See Lars Waldorf, *Revisiting Hotel Rwanda: Genocide Ideology, Reconciliation, and Rescuers*, 11 J. Genocide Res. 101, 118 (2009) ("[A]ny criticism of government policy is interpreted as an attack on its platform of 'unity and reconciliation' and hence an expression of divisionism and/or genocide ideology.").

n84 Law No. 47/2001 of 18 December 2001, art. 3.

n85 See Karol C. Boudreaux & Puja Ahluwalia, *Cautiously Optimistic: Economic Liberalization and Reconciliation in Rwanda's Coffee Sector*, 37 *Denv. J. Int'l L. & Pol'y* 147, 172-73 (2009) (discussing the Rwandan government's accusations, intimidation and violence toward critics of *gacaca*, Rwandan reporters and genocide survivors, practices condemned by Amnesty International and Human Rights Watch).

n86 See Waldorf, *supra* note 83, at 103 (describing the interrelationship of the divisionism law, charges of genocide ideology, and the government's goal of reconciliation).

n87 See Eugenia Zorbas, *Reconciliation in Post-Genocide Rwanda*, 1 *Afr. J. Legal Stud.* 29, 43-44 (2004) (noting the possibility of criminal charges for the use of identity references other than *Banyarwanda*, or "the people of Rwanda").

n88 The law criminalizes discrimination first and defines sectarianism in reference to that discrimination. See Law No. 47/2001 of 18 December 2001 (defining sectarianism as actions likely to cause "an uprising which might degenerate into strife among people based on discrimination mentioned in article one 1").

n89 *Id.* art. 1(2).

n90 *Id.* pmb1.

n91 Law No. 33 bis/2003 of 6 September 2003, art. 4.

n92 See Tom Ndahiro, *Genocide-Laundering: Historical Revisionism, Genocide Denial, and the Role of the Rassemblement Republicain pour la Democratie au Rwanda*, in *After Genocide*, *supra* note 10, at 101, 101-02 (focusing on the impact of genocide denial as a continuing victimization of survivors).

n93 See Martin Ngoga, *The Institutionalisation of Impunity: A Judicial Perspective on the Rwandan Genocide*, in *After Genocide*, *supra* note 10, at 321, 328 (noting that genocide ideology and revisionism, including negationism, "send a message that future criminals can commit atrocities without fear of sanction").

n94 See Waldorf, *supra* note 83, at 109 (describing charges of "genocide ideology" starting in 2003); Law and Reality, *supra* note 74, at 34-35 (noting the casual usage of the term "genocide ideology" to describe various types of ostensibly criminal conduct).

n95 See Waldorf, *supra* note 83, at 109 ("'[G]enocide ideology' has become the dominant accusation, a catch-all phrase that seems to encompass negationism and divisionism."); see also Human Rights Watch, *Rwanda*, in *World Report 2010* 148, 150 (2010), available at <http://www.hrw.org/world-report-2010> (follow "Download Full Report" hyperlink) [hereinafter Human Rights Watch, *Rwanda*] (describing the widespread practice of accusing opponents of government policies of genocide ideology").

n96 Commission Parlementaire, *La Ou L'Ideologie Genocidaire Se Fait Observer Au Rwanda [Where Genocide Ideology is Observed in Rwanda]* (2004) (on file with the author); see also Law and Reality, *supra* note 74, at 38.

n97 See Law and Reality, *supra* note 74, at 38.

n98 Kezio-Musoke David, *MPs in Bid to Stamp Out 'Genocide Ideology,'* The Nation, Jan. 18, 2008, available at [http://www.rwandagateway.org/article.php?id\\_article=7887](http://www.rwandagateway.org/article.php?id_article=7887).

n99 See Commission Parlementaire, *supra* note 96, at 36, 43, 48, 51-52, 66, 86-87 (describing alleged acts of genocide ideology by NGOs in various provinces).

n100 See *id.* at 36, 43, 46, 52, 56-57, 65-66, 74-75, 84, 86, 95, 115-16, 118, 125-26, 146-48 (describing alleged acts of genocide ideology by churches in various provinces).

n101 See *id.* at 31, 36-37, 44, 56-57, 67, 74-75, 91, 100, 116, 118, 125-26, 158, 165 (describing alleged acts of genocide ideology by schools in various provinces).

n102 See *id.* at 42 (describing reports of corruption in the province of Kigali Ngali).

n103 See *id.* at 60-61, 106-07 (describing the killing of witnesses in the provinces of Cyangugu and Gisenyi).

n104 Lars Waldorf, Univ. of London, Address during the panel "Freedom of Speech and the Legislation of Memory" at the Healing the Wounds Conference, *supra* note 10.

n105 See *id.*

n106 Front Line--The International Foundation for the Protection of Human Rights Defenders, *Front Line Rwanda: Disappearances, Arrests, Threats, Intimidation and Co-option of Human Rights Defenders 2001-2004 27 (2005)* [hereinafter *Front Line Rwanda*] ("In July 2004, Rwanda's Catholic Bishops issued a public response. Calling the report 'hastily prepared', the Bishops warned that it 'could serve as a pretext to spread rumours, pre-judge people, and to generate interminable hatred.'").

n107 Declaration, Presidency of the Council of the European Union, Declaration by the Presidency on Behalf of the European Union on the Statement of the Rwandan Government to the Parliamentary Report on Genocidal Ideology (Oct. 6, 2004), *available at* [http://www.eu-un.europa.eu/articles/fr/article\\_3869\\_fr.htm](http://www.eu-un.europa.eu/articles/fr/article_3869_fr.htm).

n108 *See* Commission Parlementaire, *supra* note 96, at 139 ("Ils sont caracterises par une insatiabilite et de ne pas admirer les realisations du gouvernement d'union des rwandais . . .").

n109 Law No. 18/2008 of 23 July 2008, arts. 2-3.

n110 *Id.* art. 4.

n111 *Id.* art. 8 (providing for a penalty of 20 to twenty-five years).

n112 *Id.* art. 4 (doubling the penalties for recidivists). As the only word used is "recidivism," it appears that the increased penalties only apply to repeat offenders under the genocide ideology crime. The results are less clear where previous convictions occurred under the negationism or divisionism statutes.

n113 *Id.* art. 12 (providing for life imprisonment with no possibility of mitigating circumstances).

n114 *Id.* art. 5 (providing for life imprisonment).

n115 *Id.* art. 9.

n116 *Id.*

n117 *Id.*

n118 *Id.* art. 11.

n119 *Id.* art. 7. At an average exchange rate of 571.4 Rwandan Francs to the U.S. dollar (the exchange rate as of Jan. 1, 2010), the fines would range from approximately \$ 8,750 to \$ 17,500. Historical Exchange Rates for USD-US dollar, Nat'l Bank of Rwanda (Feb. 13, 2010), <http://www.bnr.rw/currencyrates.aspx?code=USD>.

n120 *See* Gov't of Rwanda, Joint Governance Assessment Report 34 (2008), *available at* [http://www.minaloc.gov.rw/IMG/pdf\\_JGA\\_PGF\\_23-09-08.pdf](http://www.minaloc.gov.rw/IMG/pdf_JGA_PGF_23-09-08.pdf) [hereinafter Joint Governance Assessment] (stating that the steering committee included representatives of foreign states, development agencies such as the World Bank and USAID, a variety of ministries within the Rwandan government, and local NGOs).

n121 *Id.* at 34; *see also* Waldorf, *supra* note 83 (arguing that the law conflates defamation and other lesser crimes with genocide ideology, resulting in harsh penalties).

n122 Law and Reality, *supra* note 74, at 41.

n123 *See id.* at 42.

n124 Article 19, Comment on the Law Relating to the Punishment of the Crime of Genocide Ideology of Rwanda 3 (2009), *available at* <http://www.article19.org/pdfs/analysis/rwanda-comment-on-the-law-relating-to-the-punishment-of-the-crime-of-genocid.pdf>.

n125 Bureau of Democracy, Human Rights, and Labor, U.S. Dep't of State, 2008 Human Rights Reports: Rwanda (2009), *available at* <http://www.state.gov/g/drl/rls/hrrpt/2008/af/119019.htm>.

n126 There are statements from otherwise strenuous critics of the genocide ideology law who argue that "[n]o one would dispute the urgent need for strict laws in a place like Rwanda to counter hate speech, genocide denial, and genocide ideology." Waldorf, *supra* note 83; *see also* Peter Molnar, Professor, Central European University, Address during the panel "Freedom of Speech and the Legislation of Memory" at the Healing the Wounds Conference, *supra* note 10 (proposing a "compromise" that would nevertheless "keep the system restricted in some ways"). However, these statements are not defenses of the 2008 law but a recognition that Rwanda has legitimate concerns in building a stable society. The author has been unable to find an unambiguous defense of the 2008 law by a non-Rwandan.

n127 *See* Jacqueline Bakamurera, Assistant Attorney General, Ministry of Justice, Rwanda, Address during the panel "Freedom of Speech and the Legislation of Memory," Healing the Wounds Conference, *supra* note 10.

n128 Kagame, *supra* note 10, at xxiv.

n129 Ndahiro, *supra* note 92, at 103; *see also* Ngoga, *supra* note 93, at 328 ("Legislation outlawing divisionism and denial of the genocide displays the dedication of the Rwandan government to combating impunity via a comprehensive approach to post-genocide justice.").

n130 Kagame, *supra* note 10, at xxv ("Rebuilding Rwandan society requires responses to conflict that draw upon our own culture. Efforts to achieve justice, peace, healing and reconciliation must derive from concepts and practices that the Rwandan population recognises and can own."); Gasheegu Muramila, *Genocide Ideology Still Unclear--Kagame*, New Times (Apr. 27, 2007), available at <http://allafrica.com/stories/200704270339.html> ("Kagame emphasised that Rwanda has methods that can solve its own problems and therefore it would be improper for the foreigners to value policies in Rwanda much more than Rwandans themselves whose problems the policies directly solve.").

n131 About Us, New Times, <http://www.newtimes.co.rw/index.php?issue=14156&t=5> (last visited Oct. 5, 2010).

n132 Felly Kimenyi, *Makuza Tasked over 2003 Kaduha Killings*, New Times (Feb. 7, 2007), available at <http://allafrica.com/stories/200702070650.html>.

n133 *Rwandan Official Proposes Rehabilitation of Persons Convicted for Genocide*, Hirondele News Agency (May 30, 2008) available at <http://www.hirondellenews.com/content/view/6063/309/>.

n134 U.S. Dep't of State, *supra* note 125, § 1(a).

n135 *See* Law No. 18/2008 of 23 July 2008, arts. 3(3), 12 (providing for life imprisonment with no possibility of mitigating circumstances for murder committed in the name of Hutu power).

n136 *Id.* art. 3(2).

n137 *See* Jennie E. Burnet, Freedom House, *Rwanda, in* Countries at the Crossroads 2007 571, 579 (2008), available at <http://www.freedomhouse.org/uploads/cct/country-7259-8.pdf> ("[T]he government has used accusations of divisionism to weed out dissent from government or RPF policy."); U.S. Dep't of State, *supra* note 125, § 2(a) ("suspending secondary school students on accusations of engaging in genocide ideology.").

n138 Front Line Rwanda, *supra* note 106.

n139 *Id.* at 23-24; Conclusions Du Gouvernement Sur Le Rapport De La Commission Parlementaire Chargee D'enqueter Sur Les Assassinats De Gikongoro Et Sur L'Ideologie De Genocide Dans Le Pays (Communique Rendu Public Le 19/09/2004) [Press Release, Conclusions of the Government on the Report of the Parliamentary Commission Investigating the Killings in Gikongoro and Genocide Ideology (Sept. 19, 2004)] (on file with the author); *see also* Front Line Rwanda, *supra* note 106, at 2.

n140 Burnet, *supra* note 137, at 5.

n141 Press Release, Reporters Without Borders, Government Urged to Lift Ban On BBC's Local Broadcasts (Apr. 30, 2009), available at <http://www.rsf.org/Government-urged-to-lift-ban-on,32881.html>.

n142 *E.g.*, Hereward Holland, *Rwanda Opposition Denies Genocide Ideology Charge*, Reuters (Dec. 15, 2009), available at <http://af.reuters.com/article/topNews/idAFJJOE5BE0FS20091215> (charges leveled against opposition leader Bernard Ntaganda); Zorbas, *supra* note 87, at 43 n.50 (detailing the charges of divisionism against the *Mouvement Democratique Republicain* and independent presidential candidate Faustin Twagiramungu in 2003).

n143 Rosenberg, *supra* note 25.

n144 Waldorf, *supra* note 83, at 112-13 ("If Des Forges could be labeled a proponent of genocide ideology, how much easier would it be to level the same accusation against any Rwandan who testifies in defence of genocide suspects?").

n145 Law No. 18/2008 of 23 July 2008, art. 3(2).

n146 Law No. 33 of 6 September 2003, art. 4.

n147 *But see* Waldorf, *supra* note 104 (arguing that the 2003 law was clearer than both the 2008 law and the language in the constitution).

n148 *See, e.g.*, Commission Parlementaire, *supra* note 96, at 39, 95, 98, 99, 111, 115, 117, 124, 138.

n149 "Even worse than denial of the genocide, some sources accuse the RPF, the force that halted the genocide, of seeking to exterminate the Hutu population." Kagame, *supra* note 10, at xxiii. "To try to construct a case of moral equivalency between genocide crimes and isolated crimes committed by rogue RPF members is morally bankrupt and an insult to all Rwandans . . ." *Id.*

n150 See, e.g., Law and Reality, *supra* note 74, at 41 (noting that "the 'criteria' of 'genocide ideology'[] only aggravates the already-existing imprecision and confusion surrounding the term."); Article 19, *supra* note 124.

n151 See, e.g., Waldorf, *supra* note 19, at 35 n.188 ("Since 2002, prosecutors, police, and government officials have used vague charges of divisionism and negationism to criminalize and suppress perceived political dissent, human rights defenders, and the independent media."); Helen Hintjens, *Reconstructing Political Identities in Rwanda, in After Genocide*, *supra* note 10, at 77, 88.

n152 See Communist Party Case, 5 BVerfGE 85 (linking GG art. 21 to militant democracy); see also David A. Jacobs, *The Ban of Neo-Nazi Music: Germany Takes on the Neo-Nazis*, 34 *Harv. Int'l L. J.* 563, 564 n.12 (1993) (describing the links between the concept of militant democracy and GG art. 21, StGb 86, and StGb 86a).

n153 GG art. 21 § 2.

n154 Dr. Gotthard Wohrmann, *The Federal Constitutional Court: an Introduction Law on the Federal Constitutional Court* (Sigrid Born ed., 1996), available at <http://www.iuscomp.org/gla/literature/Inbverfg.htm>.

n155 GG art. 21 § 2; Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Mar. 18, 2003, 107 *Entscheidungen des Bundesverfassungsgerichts [BVerfGE]* 339; Communist Party Case, 5 BVerfGE 85; Socialist Reich Party Case, Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Oct. 23, 1952, 2 *Entscheidungen des Bundesverfassungsgerichts [BVerfGE]* 1 (47), translated in part in Kommers, *supra* note 44, at 218.

n156 Socialist Reich Party Case, 2 BVerfGE 1.

n157 *Id.* at 220.

n158 *Id.*

n159 *Id.* at 220-22.

n160 Community Party Case, 5 BVerfGE 85.

n161 Kommers, *supra* note 44, at 222.

n162 *Id.* at 223.

n163 *Id.*

n164 Dan Gordon, *Limits on Extremist Political Parties: A Comparison of Israeli Jurisprudence With That of the United States and West Germany*, 10 *Hastings Int'l. & Comp. L. Rev.* 347, 376-77 (1987). Note, however, that Gordon was writing before the complaint against the NPD and specifically contemplated the possibility of such a complaint, noting that "[t]he toleration of the DKP and NPD probably reflects a sense that it would be improper to move to ban parties within the liberal democratic system, even when they clearly aim to have that system replaced by an illiberal, antidemocratic one." *Id.* at 376.

n165 Radical Groups Case, Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Feb. 14, 1978, *Entscheidungen des Bundesverfassungsgerichts* 47 [BVerfGE] 198 (Ger.), translated in part in Kommers, *supra* note 44, at 224 (voiding a prohibition on political campaign ads from a variety of parties including the DKP).

n166 Kommers, *supra* note 44, at 227.

n167 See Thilo Rensmann, *Procedural Fairness in a Militant Democracy: The "Uprising of the Decent" Fails before the Federal Constitutional Court*, 4 German L.J. 1117, 1134 (2003) available at <http://www.germanlawjournal.com/article.php?id=332> ("The real victim of the [NPD] decision, however, is the normative authority of Article 21 para. 2 of the Basic Law. At least as long as the minority judges remain in

office and wield their veto power, the possibility of a successful application to ban a political party in Germany is for all intents and purposes excluded, save in exceptional cases of clear and present danger to the 'free democratic basic order.'").

n168 Donald P. Kommers, *The Constitutional Jurisprudence of the Federal Republic of Germany* 231 (1st ed. 1997). This quote was removed from the second edition, Kommers, *supra* note 44, at 223-34, perhaps because of the increasing potential for a case against the NPD.

n169 Felix Hanschmann, *Federal Constitutional Court to Review NPD Party Ban Motion*, 2 German L. J. 17, P 1 (2001) available at <http://www.germanlawjournal.com/article.php?id=104>.

n170 *Id.*

n171 107 BVerfGE 339 (Ger.).

n172 Alexander Hanebeck, *FCC Suspends Hearing in NPD Party Ban Case*, 3 German L.J. 2, P 1 (2002), available at <http://www.germanlawjournal.com/article.php?id=129>.

n173 Allan Hall, *Quest to Ban Neo-Nazis Ends in Farce*, *Scotsman*, Mar. 19, 2003, at 15, available at <http://news.scotsman.com/farrightineurope/Quest-to-banneoNazis-ends.2411710.jp> (quoting a source within German intelligence).

n174 Rensmann, *supra* note 167, at 1126.

n175 107 BVerfGE 339 (§ 62).

n176 *Id.* § 86.

n177 StGB § 86.

n178 *Id.* § 86(1).

n179 *Id.* § 86a. The law does not include the prohibition within StGB § 86 on foreign governments. *Id.* § 86a(1).

n180 *Id.* § 86a(2).

n181 *Id.* §§ 86(1), 86a(1).

n182 *Id.* § 130.

n183 StGB, Special Part, Title III.

n184 Nazi Symbols Case, Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Oct. 23, 1952, Entscheidungen des Bundesverfassungsgerichts 82 [BVerfGE] 1, *translated in* 2 Federal Constitutional Court, Decisions of the Bundesverfassungsgericht 458 (1998) [hereinafter Decisions of the Bundesverfassungsgericht].

n185 Ronald J. Krotosyznski, The First Amendment in Cross-Cultural Perspective: A Comparative Legal Analysis of the Freedom of Speech 128 (2006).

n186 Decisions of the Bundesverfassungsgericht, *supra* note 184, at 461-462.

n187 GG art. 5 § 3; Decisions of the Bundesverfassungsgericht, *supra* note 183, at 461, 462.

n188 Decisions of the Bundesverfassungsgericht, *supra* note 184, at 458, 461.

n189 Bernard Schlink, *German Constitutional Culture, in* Constitutionalism, Identity, Difference, and Legitimacy: Theoretical Perspectives 197, 204 (Michel Rosenfeld ed., 1994).

n190 StGB § 86(3).

n191 *Id.* § 86a(3) (specifying that the "civil enlightenment" exemption in § 86 (3) applies but § 86 is otherwise a complete ban on the use of symbols).

n192 Andreas Stegbauer, *The Ban of Right-Wing Extremist Symbols According to Section 86a of the German Criminal Code*, 8 *German L.J.* 173, 182 (2007) (citing *Oberlandesgericht [OLG] [Higher Regional Court] Stuttgart May 18, 2006, 1 Ws 120/06*, (unreleased); *Landgericht [LG] [Regional Court] Stuttgart Sept. 29, 2006, 18 KLS 4 Js 63331/05* (unreleased)). Notably, in 2009, Artist Ottmar Horl was investigated for possible violation of StGB § 86a for displaying a garden gnome giving the Nazi salute. *Germany Opens 'Nazi' Gnome Case*, BBC News (July 17, 2009), <http://news.bbc.co.uk/go/pr/fr/-/2/hi/europe/8155542.stm>. The BBC quoted a spokesman for the Nuremberg public prosecutor's office, who said, "[W]e're checking to see if garden gnomes fall into the same clear category as posters that show the swastika crossed out." *Id.* This is a somewhat odd statement, as an art exhibit would fall far more clearly within the scope of the Nazi Symbols Case than the relatively more recent decision regarding swastikas crossed out. Horl was ultimately not charged. Tristana Moore, *The Curious Case of the Nazi Gnome*, Time Magazine, Aug. 12, 2009, available at <http://www.time.com/time/world/article/0,8599,1911626,00.html>.

n193 "Der Gebrauch des Kennzeichens einer verfassungswidrigen Organisation in einer Darstellung, deren Inhalt in offenkundiger und eindeutiger Weise die Gegnerschaft zu der Organisation und die Bekämpfung ihrer Ideologie zum Ausdruck bringt, läuft dem Schutzzweck der Vorschrift ersichtlich nicht zuwider und wird daher vom Tatbestand des § 86 a StGB nicht erfasst." Bundesgerichtshof [BGH] [Federal Court of Justice] Mar. 15, 2007, 51 Entscheidungen des Bundesgerichtshofes in Strafsachen [BGHSt] 244 (P 12).

n194 The same pattern is evident in a series of cases determining whether altered symbols or symbols of less well known organizations may be banned under § 86a. Banning such symbols requires an objective determination of "broad and permanent use . . . which, in the public consciousness, definitely turns them into the symbols of the NSDAP." Stegbauer, *supra* note 192, at 179.

n195 *Id.* at 180.

n196 Const. of the Republic of Rwanda, 2003, art. 9(4) (listing, as one of the fundamental principles, "building a state governed by the rule of law, a pluralistic democratic government, [and] equality of all Rwandans and between women and men").

n197 *See, e.g., Third Periodic Report, Rwanda, supra* note 5, at PP 11, 12, 122, 292; Paul Kagame, Interactive Session with Participants at the Leadership Training Programme, Kigali, Rwanda (Jan. 9, 2010), <http://www.paulkagame.com/speeches09-01-2010.php> ("When we give voice to every Rwandan and encourage political participation of all citizens through decentralised entities, it is because we see convergence of human rights and socio-economic development, and because governance without human rights is not governance.").

n198 *See* Human Rights Watch, *Rwanda, supra* note 95, at 148 (complaining of "increasing government restrictions on political space and individual freedoms [and] growing intolerance of criticism of state policies"); *see also* Reyntjens, *supra* note 4, at 179-87 (detailing the "evolution towards authoritarian rule and renewed structural violence"); Amnesty International, *Rwanda Urged To Ensure Opposition Leader Receives Fair Trial* (Apr. 28, 2010), <http://www.amnesty.org/en/news-and-updates/rwanda-urged-ensure-oppositionleader-receives-fair-trial-2010-04-28>.

n199 GG art. 21.

n200 Law No. 18 of 23 July 2008, art. 7.

n201 StGB § 86.

n202 *Id.* § 86a.

n203 Law No. 18 of 23 July 2008, art. 3 § 1.

n204 Justine Uvuza, Former Rwandan Ministry of Gender and Women in Development and current Ph.D Candidate, Newcastle University, address during the panel, "The Way Forward" at the Healing the Wounds Conference, *supra* note 10 ("It's a complex situation to talk about the genocide ideology. . . . When you start looking at the other people as the other, and then you have the us and the other, that's where it starts from, and that's what has destroyed our society as Rwandans.").

n205 David Weiss, *Striking a Difficult Balance: Combatting the Threat of Neo-Nazism in Germany while Preserving Individual Liberties*, 27 Vand. J. Transnat'l Law 899, 936 (1994) ("The legal measures adopted by West Germany in the period immediately following World War II have been used to combat the resurgence of Nazism nearly a half century later.").

n206 StGB § 86a(2).

n207 *Id.* § 86(2).

n208 Indeed, there is no corresponding "characterization" within the German laws.

n209 Law No. 18 of 23 July 2008, art. 3, § 2.

n210 Law No. 33 bis/2003 of 6 September 2003, art. 4.

n211 StGB §§ 86(3), 86a(3).

n212 Article 19, *supra* note 124, at 6; *see also* Law and Reality, *supra* note 74, at 35 (noting that "genocide ideology" has been defined loosely to include "several kinds of conduct referred to in the Constitution of 2003 and made criminal in the 2003 law punishing genocide"); Waldorf, *supra* note 19, at 35-36, n.188, citing Front Line, *Rwanda: Disappearances, Arrests, Threats, Intimidation and Co-Option of Human Rights Defenders 2001-2004* at 12-13, 46 (2005), available at: [http://www.frontlinedefenders.org/pdfs/1965\\_Front%20Line%20Rwanda%20Report.pdf](http://www.frontlinedefenders.org/pdfs/1965_Front%20Line%20Rwanda%20Report.pdf) ("Since 2002, prosecutors, police, and government officials have used vague charges of divisionism and negationism to criminalize and suppress perceived political dissent, human rights defenders, and the independent media.").

n213 Rosenberg, *supra* note 25; *see also* Law and Reality, *supra* note 74, at 34 ("When asked to define 'divisionism,' not one judge interviewed by Human Rights Watch researchers was able to do so, despite each having adjudicated and convicted defendants on divisionism charges.").

n214 Kommers, *supra* note 44, at 218.

n215 StGB § 86(2).

n216 Kommers, *supra* note 44, at 224 ("In the years following the original decree, security officials stepped up their crack-down on subversive activities throughout the Federal Republic while the Office for the Protection of the Constitution proceeded to publicly identify organizations that opposed the constitutional order.").

n217 Law and Reality, *supra* note 74, at 42.

n218 *See* Law No. 18 of 23 July 2008, art. 3 (including the "marginalising, laughing at one's misfortune, defaming, mocking, boasting, despising, [and] degrading" mentioned in Article 3 of the genocide ideology law); *see also* Article 19, *supra* note 124, at 6 (criticizing those terms).

n219 Law and Reality, *supra* note 74, at 42.

n220 Article 19, *supra* note 124, at 7 ("[T]his law suffers from a lack of connection with international law on the crime of genocide.").

n221 StGB § 86(2).

n222 *Id.* § 86a.

n223 . *Id.* §§ 86(1), 86a(1).

n224 Law No. 18 of 23 July 2008, art. 4.

n225 StGB §§ 86(4), 86a(3).

n226 U.S. Dep't of State, Rwanda: Country Specific Information (Feb. 26, 2010), [http://travel.state.gov/travel/cis\\_pa\\_tw/cis/cis\\_1007.html](http://travel.state.gov/travel/cis_pa_tw/cis/cis_1007.html).

n227 Statutory rape was chosen as a point of comparison here as one of the other trials witnessed by the author was a statutory rape charge.

n228 StGB § 180(1). *But see* StGB § 176(1) (providing a maximum ten-year sentence for a person over eighteen who "completes an act of sexual intercourse" with a minor under fourteen). The Rwandan statute is similar to those of other, surrounding countries. Kenya's statutory rape provisions, entitled "defilement," allows a life sentence for offenses against children under the age of eleven and a minimum of fifteen years imprisonment for children between eleven and eighteen. The Sexual Offences Act, No. 3 (2006), Kenya Gazette Supplement No.

52 § 8.

n229 Law and Reality, *supra* note 74, at 42; *see also*, Article 19, *supra* note 124, at 9 ("Article 3 does not spell out the requirement for an intention to promote hatred publicly or an imminent risk of discrimination, hostility or violence.").

n230 Joint Governance Assessment, *supra* note 120, at 34.

n231 Law No. 18 of 23 July 2008, art. 2 (Rwanda) (emphasis added).

n232 *Id.* art. 3.

n233 Article 21 of the Grundgesetz, however, does require that parties "*seek* to undermine or abolish the free democratic basic order or to endanger the existence of the Federal Republic of Germany." GG art. 21 (emphasis added).

n234 StGB § 86(1).

n235 *Id.* § 86a(1)-(2).

n236 *See supra* notes 191-94 and accompanying text.

n237 Law No. 18 of 23 July 2008, art. 7.

n238 Law No. 5 on Dissolution of Nazi Party, Military Government Gazette, Germany, United States Zone, Issue A, at 17-19 (June 1, 1946).

n239 StGB §§ 85, 129.

n240 *Id.* at §§ 86(1) (defendant "shall be liable to imprisonment of not more than three years or a fine"), 86a(1) (defendant "shall be liable to imprisonment of not more than three years or a fine").

n241 Law and Reality, *supra* note 74, at 44.

n242 Schlink, *supra* note 189, at 220.

n243 Law and reality, *supra* note 74, at 1; *see also* Redress and African Rights, Extraditing Genocide Suspects from Europe to Rwanda 30-36 (2008), *available at* [http://www.redress.org/downloads/publications/Extradition\\_Report\\_Final\\_Version\\_Sept\\_08.pdf](http://www.redress.org/downloads/publications/Extradition_Report_Final_Version_Sept_08.pdf) (summarizing evaluations by William Schabas, Sam Rugege, and Alison Des Forges of the Rwandan judicial system with Schabas and Rugege defending Rwanda's progress and Des Forges expressing concern).

n244 *Id.* at 44.

n245 Const. of the Republic of Rwanda, 2003, art. 142; *see, e.g.*, Amnesty Int'l, International Report 2009: The State of the World's Human Rights 275 (2009), *available at* <http://report2009.amnesty.org/sites/report2009.amnesty.org/files/documents/air09-en.pdf> (describing the legislative amendment which shortened judicial tenures from life to four years as "potentially compromising the independence of the judiciary.").

n246 *See supra* notes 94-106 and 137-144 and accompanying text.

n247 Law and Reality, *supra* note 74, at 47.

n248 Lars Waldorf, *Censorship and propaganda in post-genocide Rwanda*, in *The Media and the Rwanda Genocide* 404, 407 (Allan Thompson ed., 2007).

n249 Rainer Hofmann, *Incitement to National and Racial Hatred: The Legal Situation in Germany*, in *Striking a Balance: Hate Speech, Freedom of Expression and Non-Discrimination* 159, 170 (Sandra Coliver et al. eds., 1992).

n250 Winfried Brugger, *The Treatment of Hate Speech in German Constitutional Law (Part I)*, 4 *German L.J.* 1, 2-3 (2003), available at <http://www.germanlawjournal.com/index.php?pageID=11&artID=212>.

n251 See, e.g., Gasheegu Muramila, *RDF, NURC score highly in unity efforts*, *New Times*, Apr. 30, 2007, available at [http://www.rwandagateway.org/article.php?id\\_article=5332](http://www.rwandagateway.org/article.php?id_article=5332) (describing the release of the Rwandan Senate's 2006 report on Genocide Ideology, including its finding that "research shows that foreigners perceive differently from Rwandans the causes of the ideology and strategies that should be taken in eradicating it").

n252 International Covenant on Civil and Political Rights, *opened for signature* Dec. 16, 1966, art. 1, S. Exec. Doc. E, 95-2 (1978), 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) [hereinafter ICCPR].

n253 Article 19, *supra* note 124, at 12-13.

n254 Burnet, *supra* note 137, at 7.

n255 Waldorf, *supra* note 104.

n256 Professor Peter Molnar of Central Eastern University has suggested that applying the *Brandenburg* standard of imminent harm might allow an appropriate balance between protection of speech and stability in Rwanda as the threats of imminent harm are much more immediate in a post-genocide context. Molnar, *supra* note 126 (citing *Brandenburg v. Ohio*, 395 U.S. 444 (1969)). Molnar, to his credit, grapples seriously with the particularities of the Rwandan experience and attempts to offer a solution. The problem with this suggestion, however, is that it either allows judges to find the threat of imminent harm in any statement simply because of the Rwandan context or it exempts expressions that may threaten political stability in the longer term. A single Nazi rally in Germany in 1950 might not have threatened the political order immediately but would fall into a category of expressions that could legitimately be banned.

n257 This paper avoids a discussion of whether Rwandan policies are particularly wise with regard to the creation of a "Rwandan" identity and the displacement of the Hutu, Tutsi, and Twa identities. While beyond the scope of this paper, a number of scholars have claimed that Rwandan policies reinforce the ethnic lines they seek to dismantle. *See, e.g.*, Professor Timothy Longman, Vassar College, Address during the panel "Constructing Post-Genocide Identity in Rwanda" at the Healing the Wounds Conference, *supra* note 10; Hintjens, *supra* note 151, at 72-74; Zorbas, *supra* note 87, at 43-47. Even if one accepts those criticisms, the German model still offers ways in which critics might constructively engage with Rwandan policymakers.

n258 Law and Reality, *supra* note 74, at 40-41.

n259 Jeffrey Gettleman & Josh Kron, *Presidential Candidate Is Arrested in Rwanda*, N.Y. Times, Apr. 21, 2010, at A12, available at <http://www.nytimes.com/2010/04/22/world/africa/22rwanda.html>.

n260 *See supra* notes 137-144 and accompanying text.

n261 Waldorf, *supra* note 104.

n262 *See, e.g.*, Kagame, *supra* note 10, at xxiv; Ndahiro, *supra* note 92, at 120; David, *supra* note 98; *Rwandan Minister Accuses West of Supporting Genocide Deniers*, *supra* note 18.

n263 See, e.g., Waldorf, *supra* note 19, at 31 n.166; Law and Reality, *supra* note 74, at 42; Obote Odora, Immediate Office of the Prosecutor, United Nations International Criminal Tribunal for Rwanda, Address at the 13th Commemoration of the Rwanda Genocide: Understanding and Fighting Genocide Ideology (April 7, 2007), available at [http://69.94.11.53/ENGLISH/commeomration\\_13/Genocide%20Ideology.pdf](http://69.94.11.53/ENGLISH/commeomration_13/Genocide%20Ideology.pdf).

n264 Suzanne Buckley-Zistel, *We are Pretending Peace: Local Memory and the Absence of Social Transformation and Reconciliation in Rwanda*, in *After Genocide*, *supra* note 10, at 125, 138-39 ("What was peculiar to the German experience, though, was that only a small number of Jewish survivors remained in the country, thus avoiding much direct confrontation between victims and perpetrators, which would have required an immediate resolution. Rwanda, however, does not have this luxury of time and distance.").

n265 See, e.g., Jean-Paul Kimonyo, Noel Twagiramungu, & Christopher Kayumba, *Supporting the Post-Genocide Transition in Rwanda: The Role of the International Community* 55-57 (Democratic Transition in Post-Conflict Socs. Project, Working Paper No. 32, 2004), available at [http://www.clingendael.nl/publications/2004/20041200\\_cru\\_working\\_paper\\_32.pdf](http://www.clingendael.nl/publications/2004/20041200_cru_working_paper_32.pdf) (noting that the "press freedom" rating of Rwanda in 2004 was actually lower than that prior to the genocide and concluding that the "inescapable conclusion here is that despite consistent aid for human rights activities and various tangible achievements . . . the problem of social and political spaces for human rights in Rwanda is still controversial").

n266 Markovits, *supra* note 33, at 1313 (quoting Theodor Heu [beta]).

n267 Const. of the Republic of Rwanda, 2003, art. 9.

n268 ICCPR, *supra* note 252, art. 19 (acceded to by Rwanda Jul. 16, 1975); African Charter on Human and Peoples' Rights, *adopted* June 27, 1981, art. 9, 1520 U.N.T.S. 217, 247 (entered into force Oct. 21, 1986) (acceded to by Rwanda May 6, 2003).

n269 See *supra* note 130 and accompanying text.

n270 Article 19, *supra* note 124, at 9-10 (citing European Court of Human Rights cases).

n271 Kommers, *supra* note 44, at 222-224 (describing the crackdown on groups affiliated with the KPD after the Communist Party Case).

n272 *See supra* notes 137-144 and accompanying text; Human Rights Watch, *Rwanda*, *supra* note 95, at 148 ("In 2009, Rwanda saw increasing government restrictions on political space and individual freedoms, growing intolerance of criticism of state policies, and a refusal to allow any discussion of ethnicity, leading to concerns of heightened repression among human rights groups and several international donors.").

n273 Law No. 18 of 23 July 2008, arts. 2-3.

n274 Joint Governance Assessment, *supra* note 120, at 34.

n275 StGB § 86(4).

n276 *Id.* § 86(3).

n277 *See, e.g.*, Front Line Rwanda, *supra* note 106, at 23; Law and Reality, *supra* note 74, at 37-40.

n278 *See generally* Law and Reality, *supra* note 74 (Part VI "Creating a Modern Professional Judicial System" at p. 23; Part VIII "Independence of the Judiciary" at p. 44; and Part IX "Challenges to Fair Trial Standards" at p. 70).

n279 *See, e.g., id.* at 2-3 ("Long after the end of prosecutions for genocide, the precedent of such inappropriate practices may well continue to burden the Rwandan judicial system as it attempts to bring its courts into conformity with international standards of due process.").

n280 *Id.* at 23-24.

n281 Sam Rugege, *Judicial Independence in Rwanda*, 19 Pac. McGeorge Global Bus. & Dev. L.J. 411, 412-13 (2007).

n282 *Id.* at 413-14; Law and Reality, *supra* note 74, at 47.

n283 Mauricio Garcia-Villegas, *Law as Hope: Constitutions, Courts, and Social Change in Latin America*, 16 *Fla. J. Int'l L.* 133, 139 (2004) ("[A] new legal culture of protection of rights . . . must be brought about through both the implementation of a new legal education in law schools and the elaboration of a new legal doctrine, particularly a judicial legal doctrine, that favors social change.").

n284 *Third Periodic Report, Rwanda*, *supra* note 5, at P 18; *see also* U.S. Dep't of State, 2008 Human Rights Report: Rwanda (2009), available at <http://www.state.gov/g/drl/rls/hrrpt/2008/af/119019.htm> ("The government did not provide indigent persons with free access to lawyers, but a Legal Aid Forum . . . provided legal aid services to indigent and vulnerable groups. Such resources were insufficient to provide lawyers to every indigent person.").

n285 International Covenant on Civil and Political Rights, *supra* note 252, art. 14(3)(d).

n286 Donald Kommers, *Autonomy Versus Accountability: The German Judiciary*, in *Judicial Independence in the Age of Democracy: Critical Perspectives from Around the World* 131, 142 (David M. O'Brien & Peter H. Russell eds., 2001) (describing the evolution of the German judiciary into "one of the most powerful and authoritative institutions in Germany's governmental system" which has "struck down untold numbers of laws, both federal and state").

n287 Johnston Busingye, *Reality and Challenges of Legal and Judicial Reconstruction in Rwanda*, in *Legal and Judicial Reform in Post-Conflict Situations and the Role of the International Community* 18, 24 (2006), available at [http://www.cilc.nl/Post\\_Conflict\\_Situations.pdf](http://www.cilc.nl/Post_Conflict_Situations.pdf).

n288 Law and Reality, *supra* note 74, at 42.

n289 *See generally* Hofmann, *supra* note 249, at 170 (arguing the limits on the use of Nazi symbols strikes the appropriate balance between the state's responsibility to protect both human dignity and freedom of speech).