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THE LAW OF INCITEMENT AND THE USE OF SPEECH TO INCITE OTHERS TO COMMIT CRIMINAL ACTS: GERMAN LAW IN COMPARATIVE PERSPECTIVE

Albin Eser*

I. INTRODUCTION

In the rest of the world, as in Israel, the assassination in 1995 of Prime Minister Yitzhak Rabin is still a painful memory. Not less disturbing is the fact that, prior to his death, fundamentalist opponents of the government called for the Prime Minister's murder. Might not this crime have been prevented if such exhortations to murder had not only been made criminal offences, but also resolutely and uncompromisingly prosecuted? Although this hypothetical question has no certain answer, one way or the other, because the assassin, on account of his own convictions, may not have needed to be incited by another, it is possible that the stirred-up atmosphere fuelled the discontent that led to the commission of the concrete act, and it is even more likely that such calls for acts of violence pose a threat to the general feeling of security in the community. Would it, then, not be better to prohibit the solicitation of criminal activities by spoken or written word and allow for the early intervention of criminal law, thereby making it possible to nip potential crimes in the bud?

Increased protection from crimes and solicitation is possible, but it is only one side of the coin; its price is a corresponding reduction in the freedom of expression. And even if a reduction in freedom, at least to some degree, is acceptable, the difficult task of establishing a boundary between permissible and forbidden expression remains. This task, in turn, is dependent upon various additional issues. To mention only a few:

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With regard to the various ways of causing someone to commit a crime - such as advising, commanding, counselling, encouraging, enticing, entreating, importuning, inciting, inducing, soliciting, etc. - which modes of expression should be prescribed?

In cases involving incitement (used as an umbrella term to cover all means of expression used to cause someone to commit a crime), to what extent should the solicitor be able to rely on the constitutionally guaranteed freedoms of expression and speech?

If boundaries are to be established, where and how should they be drawn? What goals justify the implementation of restrictions?

How concrete must such regulations be if they are to be as effective as possible but still be compatible with free expression?

How much weight should be attached to the circumstances in which an expression of opinion is made. In other words, how significant is it whether such an expression was made in public or in private, whether the potential victim was targeted by name or depicted more abstractly, whether the expression was made openly or secretly, *et cetera*?

Obviously, these questions touch upon both constitutional and criminal law, and I, as a professor of criminal law, can offer professional expertise only in the latter. Therefore, I would like first to present the relevant provisions of German criminal law (II) and then to make some comparative observations regarding other countries (III). Subsequently, I will take the liberty of addressing the complex relationship between these crimes and the constitutionally guaranteed rights of freedom of speech and of the press (IV) and will illustrate this relationship with several problematic German court decisions (V). To conclude, I will discuss several legal policy considerations (VI) and make some final remarks (VII).

II. SOLICITATION AND PROMOTION OF CRIMINAL ACTS IN GERMAN LAW

1. Overview

In German law, the solicitation and promotion of criminal acts is prohibited by a number of provisions in the German penal code (*StGB*), as well as in other legislation:

§26 StGB Instigation/*Anstiftung*¹

§30(1) StGB Attempted instigation of a felony/*Versuchte Anstiftung eines Verbrechens*²

§80(a) StGB Incitement of a war of aggression/*Aufstacheln zum Angriffskrieg*³

§89(1) StGB Interference with the activities of the armed forces and agencies of public security which is hostile to the Constitution/*Verfassungsfeindliche Einwirkung auf Bundeswehr und Öffentliche Sicherheitsorgane*⁴

§111 StGB Public incitement of crime/*Öffentliche Aufforderung zu Straftaten*⁵

§26 Instigation

Whoever intentionally incites another to intentionally commit an unlawful act shall be punished as an instigator in the same manner as the perpetrator.

(Unless otherwise indicated, translations of the German Penal Code are from Joseph J. Darby, *The Penal Code of the Federal Republic of Germany* (London: Rothman and Co./Sweet and Maxwell, 1987).)

§30(1) Attempt to enlist participation in crime

- (1) Whoever attempts to incite another to commit a felony or whoever instigates another to do so shall be punished in accordance with the provisions governing felony attempts.

§80(a) Incitement of a war of aggression

Whoever, within the area of applicability of this Code, publicly, in a meeting or by the distribution of writings (§11(3)), incites a war of aggression (§80), shall be punished by imprisonment from three months to five years.

§89 Interference with the activities of the armed forces of the Federal Republic of Germany and agencies of public security hostile to the Constitution of the Federal Republic of Germany

- (1) Whoever systematically influences members of the armed forces of the Federal Republic of Germany, or the agencies of public security, in order to undermine their professional readiness to protect the security of the Federal Republic of Germany or its constitutional system of government, and who thereby intentionally lends his support to efforts directed against the existence or security of the Federal Republic of Germany, or its constitutional principles, shall be punished by up to five years' imprisonment or by fine.

§111 Public incitement of crime

- (1) Whoever publicly, in a meeting or by the distribution of writings (§11(3)), incites to commit an unlawful act shall be punished as an accessory before the fact (§26).

§125(1) *StGB* Breach of the public peace/*Landfriedensbruch*⁶

§126 *StGB* Disturbing the public peace by threatening to commit crime/*Störung des Öffentlichen Friedens durch Androhung von Straftaten*⁷

§130(1) *StGB* Incitement of public hatred/*Volksverhetzung*⁸

- (2) Should the incitement fail, the offender shall be punished by up to five years' imprisonment or by fine. The punishment may not exceed that which could have been imposed had the incitement succeeded (subparagraph (1)).

§125 Breach of the peace

- (1) Whoever, whether as perpetrator or accomplice, participates in:
1. acts of violence against persons or things, or
 2. threats to persons to commit acts of violence, which are carried out by the combined forces of a mob of people in a way which endangers public safety, or whoever stirs up a mob of people in order to promote their willingness to take such action, shall be punished by up to three years' imprisonment or by fine, provided that the offence is not more severely punished under other provisions.

§126 Disturbing the peace by threatening to commit crime

- (1) Whoever, in a manner likely to disturb the public peace, threatens to commit:
1. one of the offences described in §125(a), sentence 2, Nos. 1-4,
 2. murder, manslaughter or genocide...,
 3. grievous bodily harm falling under §226...,
 4. an offence against personal liberty falling under §§234, 234(a), 239(a), or 239(b),
 5. robbery or extortion accompanied by violence...,
 6. a felony endangering the public falling under §306 to §306(c) or §307(1) to (3), §308(1) to (3), §309(1) to (4), §§313-314, or §315(3), §315b(3), §316(a)(1) or (3), §316(c)(1) or (3), or §318(3) or (4), or
 7. a misdemeanor endangering the public falling under §309(6), §311(1), §316b(1), §317(1), or §318(1), shall be punished by up to three years' imprisonment or by fine.

§130 Incitement of public hatred

- (1) Whoever, in a manner that is likely to disturb the public peace,
1. arouses hatred against segments of the population or foments violent or arbitrary action against them, or
 2. attacks the human dignity of others by insulting, maliciously degrading, or defaming, them shall be punished by imprisonment from three months to five years.

(Translation by Emily Silverman.)

§130(a)(1) and (2) *StGB* Instructional guidance to commit crime/*Anleitung zu Straftaten*⁹

§140 *StGB* Rewarding and approving of criminal activity/*Belohnung und Billigung von Straftaten*¹⁰

§53(1) No. 5 Weapons Law (*WaffG*) in combination with §37(1) No. 7 *WaffG* Instructional guidance for the production of weapons¹¹

⁹ §130(a) *Instructional guidance to commit crime*

- (1) Whoever distributes, publicly displays, posts up, presents, or otherwise makes accessible, any writings (§11(3)) which are capable of serving as instructional guidance for the commission of one of the unlawful acts mentioned in §126(1), and which by their content are designed to encourage, or to arouse in another, the willingness to commit such an act, shall be punished by up to three years' imprisonment or by fine.
- (2) Similar punishment shall be imposed on anyone who
 1. distributes, publicly displays, posts up, presents, or otherwise makes accessible, any writings (§11(3)) which are capable of serving as instructional guidance for the commission of one of the unlawful acts mentioned in §126(1), or
 2. publicly, or in a meeting, provides instructional guidance for the commission of one of the unlawful acts mentioned in §126(1) in order to encourage, or to arouse in another, the willingness to commit such an act.

¹⁰ §140 *Rewarding and approving of criminal activity*

Whoever

1. rewards, or
2. publicly, in a meeting, or by distribution of writings (§11(3)), in a manner likely to disturb the public peace, approves of one of the unlawful acts mentioned in §138(1) Nos. 1-5 and in §126(1), after they had been committed, or after criminally punishable attempts to commit them had been made, shall be punished by up to three years' imprisonment or by fine.

¹¹ §53(1) No. 5 *Weapons Law*

- (1) Imprisonment from six months to five years shall be imposed on anyone who...
 5. in violation of §37(1), sentence 3 provides instructional guidance for, or solicits the production of, objects described in §37(1) No. 7, or distributes, or makes available, component parts designed for the production of these objects...

2. *Diverse Proximity of Threat to the Protected Legal Interest (Rechtsgut)*

The aforementioned provisions prohibit a baffling multitude of behaviours that may contribute, directly or indirectly, to the promotion of criminal activity. Method, however, may be discerned in the proximity of the various criminalized actions to the actual harm inflicted on the protected legal interest (*Rechtsgut*).¹²

The crime showing the closest relationship to harm to the rights of others is instigation (§26 *StGB*), which relies upon the direct incitement of a concrete act by a particular actor, or at least by an actor who is part of a limited group of persons whose members can be personally identified.¹³

The requirements of the crime of public incitement of criminal acts (§111 *StGB*) as to the specificity of the act and the identity of the addressee are, according to prevailing opinion, significantly less demanding. The reason for this is that concrete predictability and manipulability of the causal chain is, to a great extent, impossible, because the inciter does not have a comprehensive overview of, and cannot directly control, the illegal behaviour of the person incited. The reason for the criminalization of public incitement does not lie in the participation of the inciter (as an accessory) in the criminal act of another, as in the case of instigation, but rather in the special dangerousness associated with the incitement of an indeterminate group of people. In the case of mere incitement, the inciter does not know exactly how his action will lead to the injury of a protected legal interest (*Rechtsgut*), i.e., he does not know who will actually be incited to commit the crime.¹⁴

In the case of instructional guidance to commit crime (§130(a) *StGB* and §53(1) No. 5 in combination with §37(1) No. 7 *WaffG*), explicit encouragement to commit an unlawful act is not required.

¹² For more on this point, see K. Rogall, 'Die verschiedenen Formen des Veranlassens fremder Straftaten,' *Goltdammer's Archiv für Strafrecht* (1979), pp. 11-26, at 26.

¹³ See H.-H. Jescheck and Th. Weigend, *Lehrbuch des Strafrechts, Allgemeiner Teil*, 5th edition (Berlin: Duncker and Humblot, 1996), p. 688; Rogall, *op. cit.*, p. 12.

¹⁴ On this point, see E. v. Bubnoff, in: B. Jähnke, H. W. Laufhütte and W. Odersky (eds.), *StGB, Leipziger Kommentar: §§110-122*, 11th ed., 12th installment (Berlin/New York: de Gruyter, 1994), §111, margin No. 5; E. Dreher, 'Der Paragraph mit dem Januskopf,' in: K. Lackner et al. (eds.), *Festschrift für Wilhelm Gallas zum 70. Geburtstag* ((Berlin/New York: de Gruyter, 1973), pp. 307-328, at 311 ff.; A. Eser, in: A. Schönke and H. Schröder, *Strafgesetzbuch Kommentar*, 25th ed. (Munich: Beck, 1997), §111, margin No. 3 ff.; Rogall, *op. cit.*, pp. 16 ff.

§140 *StGB*, a provision that criminalizes the rewarding and approving of crimes does not require encouragement either. This provision does not focus solely on the past, but rather, by prohibiting approval of criminal acts that have already been committed, attempts to prevent such acts from inspiring copycat crimes in the future. §140 *StGB* is also indirectly concerned with solicitation. According to prevailing opinion, this provision should 'hinder the creation of a psychological climate in which further offences of the same type as those approved or rewarded would flourish.'¹⁵ Accordingly, the basis of criminalization is neither the opinion, nor the expression of that opinion, as such.¹⁶

These criminal norms clearly illustrate the problem: the more remote the connection to a criminal act that might take place in the future, the more controversial the penalization of these kinds of behaviour in anticipation of actual harm to protected legal interests.¹⁷

3. *Kind and Degree of Influence upon Others*

Differences are apparent, too, with regard to the circumstances and the manner in which third parties are influenced - publicly or privately - or the degree of danger with which this takes place, whereby these differences are, in part, related to the proximity of the solicitation to the act solicited.

The closer the relationship to the final act, the less stringent the requirements regarding the size of the group of addressees or the public nature of the dissemination. Consequently, the various forms of instigation of a concrete act (§§26, 30 *StGB*), just as the subsequent rewarding of criminal activity (§140 No. 1 *StGB*), require neither public dissemination nor even a larger group of

¹⁵ See P. Cramer, in: Schönke and Schröder, *op. cit.*, §140, margin No. 1; K. Lackner, *Strafgesetzbuch mit Erläuterungen*, 22nd ed. (Munich: Beck, 1997), §140, margin No. 1.

¹⁶ See *BGHSt* (Decisions of the Federal Supreme Court, criminal jurisdiction) 22 (1969), pp. 282-289, at 286. On this point, see also U. Ebert, 'Zum Bedeutungswandel der Billigung begangener Straftaten,' in: M. Seebode (ed.), *Festschrift für Günter Spindel zum 70. Geburtstag* (Berlin/New York: de Gruyter, 1992), pp. 115-139, at 118.

¹⁷ See, e.g., G. Berman, *Meinungsfreiheit und Strafrecht* (Königstein: Athenäum, 1981), pp. 16 ff.; G. Jakobs, 'Kriminalisierung im Vorfeld einer Rechtsgutsverletzung,' 97 *Zeitschrift für die gesamte Strafrechtswissenschaft* (1985), pp. 751-785, at 779 ff.

addressees. On the contrary, all manner of instigation and rewarding will suffice - even, in some cases, if it takes place in secret.

The less identifiable the group solicited, the more stringent the requirement of the public nature of the solicitation, whereby opinions expressed during meetings and those disseminated by means of written materials are usually treated in the same way. This is the case, for example, for the crime of incitement of a war of aggression (§80(a) *StGB*) and public incitement and instructional guidance of crime (§§111, 130(a) *StGB*). The crime of breaching the peace, with its requirement that a mob of people be influenced, also requires a public act.

If, as in the case of interference with public security organs which is hostile to the Constitution (§89 *StGB*), 'systematic' activity is required, the statute relies more on the degree of persistence than on the public nature of the communication.

To the extent that the protection of the public peace rather than the protection of certain individual victims is at issue, the public nature of the agitation is less important than its actual negative effect upon the peace. Examples of this are threatening to commit crime (§126 *StGB*), incitement of hatred against segments of the population (§130 *StGB*) and the public approval of crimes after they have been committed (§140 No. 2 *StGB*).

These variations, too, show that not every abuse of freedom of speech or press will be treated like a crime, but rather that a crime is committed only when the abuse has a great deal of influence upon particular individuals, or when it has a particularly strong influence on the public at large.

III. COMPARATIVE SURVEY OF INCITEMENT PROVISIONS

Although the space available here is insufficient for a comprehensive comparative analysis, a brief glance across the border is worthwhile, if only to learn the extent to which German law is unique, whether it is representative of law abroad, or what paths other countries have chosen to follow.

1. *Analogous Provisions in Israeli Law*

The General Part of the Israeli Penal Law (PL) also contains regulations concerning instigation (Section 30)¹⁸ and attempted instigation (Section 34).¹⁹ Section 30 PL defines instigation as the prompting of another to commit an offence by demanding its commission, by urging or encouraging the addressee, or by any other means not amounting to duress or justification. In comparison to §26 *StGB*, the clarity in the Israeli Penal Law achieved by means of descriptive, explanatory examples is immediately apparent. All in all, Section 30 and Section 34 of the Israeli Penal Law are comparable to the corresponding provisions in German law.

However, in Israeli law, there so far exists no general incitement provision comparable to §111 *StGB*. Section 166 PL (incitement of hostilities against a friendly state)²⁰ is the only Israeli provision containing language similar to the German provision with regard to the incitement of an indefinite group of addressees. Unlike §111 *StGB*, however, Section 166 PL does not apply to the solicitation of criminal acts, but only to the incitement of hostile acts against foreign governments.

There are additional provisions that cover special forms of instigation, but they only apply when the incitement is directed at a particular addressee, or a definable group of addressees. Examples of such provisions designed to protect

¹⁸ *Section 30*

A person who prompts another to commit an offence by demanding its commission of him or by urging or encouraging him or by any other means not amounting to duress or justification is an instigator of the offence.

¹⁹ *Section 34*

An attempt to instigate a person to commit an offence shall be punishable with one quarter of the penalty prescribed to the commission of the offence; however, if the penalty so prescribed

- (1) is imprisonment for life, the penalty shall be a term of imprisonment of five to ten years,
- (2) is the death penalty, the penalty shall be a term of imprisonment of ten years,
- (3) is any other mandatory penalty, the penalty shall be a term of imprisonment between a quarter and a half of the term prescribed for the commission of the offence.

²⁰ *Section 166*

A person who, by making a speech in a public place, or at a public gathering, or by publishing any writing, endeavors to incite hostile acts against the government of a friendly state is liable to imprisonment for three years.

the army include Section 109 (incitement of evasion of duty)²¹ and Section 110 PL (incitement of disobedience).²² Section 289 PL (instigation to withhold compulsory payments)²³ is an example of a provision designed to protect the public service.

2. *Survey of Incitement Provisions in Other Countries*

In other countries, there exists a multitude of criminal provisions which focus on the solicitation and promotion of others to commit crime.

²¹ *Section 109*

- (a) A person who incites, or procures, a person liable to service in an armed force not to serve therein, or not to report for a military operation, is liable to imprisonment for five years.
- (b) A person who incites, or procures, or assists, a person serving in an armed force to desert his service or a military operation is liable to imprisonment for seven years.
- (c) A person who shelters, or assists in concealing, a person liable to service as specified in subsection (a), having reason to believe that such person is a deserter, is liable to imprisonment for three years.
- (d) A person who commits an offence under this section during a period in which armed hostilities are carried on by, or against, Israel is liable to imprisonment for fifteen years.
- (e) In this section, 'desertion' means absence from service in an armed force with intent not to return.

²² *Section 110*

A person who incites, or procures, a person serving in an armed force to disobey a lawful order is liable to imprisonment for one year; if he intends thereby to impair the security of the State, he is liable to imprisonment for five years. Where the offence is committed during a period in which armed hostilities are carried on by, or against, Israel, he is liable to imprisonment for seven years.

²³ *Section 289*

A person who by words either spoken or written, or by signs, or by visible representations, or otherwise, instigates expressly or by implication any person or class of persons not to make or to defer making a compulsory payment of which the Government has given notice in *Reshumot*, and a person who does any act intending, or knowing it to be likely, that any such means of instigation as aforesaid shall thereby be communicated directly or indirectly to any person or class of persons in any manner whatsoever, is liable to imprisonment for six months.

A. Instigation/*Anstiftung*

With regard to the instigation of a particular person to commit a particular crime, it is striking that, in contrast to German law, many legal orders do not differentiate between principal actors and inciters. Instead, they employ a uniform concept of parties to crime (*Einheitstäterbegriff*). Like in German law, the intentional incitement of another to commit an unlawful act is punishable in these countries as well.²⁴ Unlike German and Israeli law, where the method of instigation is left open, many legal systems include precise and definitive descriptions of instigative conduct.²⁵ Provisions identical to those in German law can be found in Cameroon, Costa Rica, Sweden, Portugal and Switzerland.²⁶

B. Attempted Instigation/*Versuchte Anstiftung*

Compared to the provisions governing instigation, deviations from German and Israeli law with regard to attempted instigation are greater. For example, some legal systems do not distinguish between felonies and misdemeanors. Instead, attempted instigation of both kinds of crime is punishable.²⁷ On the other hand, in some countries there exists no general criminal provision regarding attempted instigation whatsoever. In such instances, some criminal provisions include a special appendix, or the punishability of attempted instigation of various specific crimes is explicitly provided for in the law.²⁸

²⁴ This is the case, for example, in England: Accessories and Abettors Act 1861, Section 8; France: Art. 121-6, 121-7 *NCP*; Italy: Art. 110 *CP*; Latin America (with the exception of Costa Rica): Art. 46 *CP*, which is comparable to German law; Denmark: §23 Danish Penal Code; Austria: §12 Austrian *StGB*; and some U.S. states: e.g., §30 in association with §§31, 971 California Penal Code; §20.00 New York Penal Code.

²⁵ This is the case in many of the francophone countries in Africa (Madagascar: Art. 60(1) *CP*; Senegal: Art. 46(1) *CP*; and Zaire: Art. 21(3) *CP*); Belgium: Art. 66 (1), (4) *CP*; France: Art. 121-6, 121-7 *NCP*; and the Netherlands: Art. 47(1) No. 2, 47(2) Dutch Penal Code.

²⁶ See, e.g., Cameroon: Art. 97(1)(a) *CP*; Costa Rica: Art. 46 *CP*; Sweden: Cap. 23 §4 *BrB*; Portugal: Art. 26 *CP*; and Switzerland: Art. 24(1) Swiss Penal Code.

²⁷ See, e.g., Kenya: Penal Code Section 391, and some U.S. states: e.g., §100.000 New York Penal Code.

²⁸ This is the case in France, as well as in Italy: Art. 115(1) *CP*; Sweden: Cap. 23 §2(2) *BrB*; and California: §653(f) California Penal Code.

Nevertheless, there is widespread agreement that attempted instigation is an autonomous crime, independent of the possible commission of the target crime.²⁹ In most Latin American countries, however, there are simply no corresponding criminal provisions.

C. Incitement of a War of Aggression

Many legal systems contain criminal norms regulating incitement of a war of aggression. However, the norms frequently encompass only incitement of war against the promulgating state.³⁰

D. Interference with the Armed Forces and Agencies of Public Security

Provisions as general as the German provision for the protection of the Federal Armed Forces do not seem to exist in other legal systems. In this context, other systems only make it a crime to incite or rouse troops to mutiny, collective insubordination, or collective disregard of commands.³¹ In Turkey, however, it is already a crime to have ready documents in which the commission of the aforementioned crimes is solicited. A result of this is, of course, a significant criminalization of preparatory criminal activity.³²

E. Public Incitement of Crime

Regulations of this type can be found - with the exception of England, Chile and Costa Rica - in practically every legal system. Frequently, however, only the incitement of particular crimes is considered a crime.³³ On the other hand, some

²⁹ See, e.g., England: Criminal Law Act 1977, Section 1, and the regulation of incitement in common law.

³⁰ This is the case in Cameroon: Art. 103(a) *CP*; Denmark: §100 Danish Penal Code; Norway: §84 Norwegian Penal Code; and Spain: Article 581 *NCP*.

³¹ See, e.g., Kenya: Penal Code Section 47; Zaire: Art. 135 *ter CP*; England: Incitement to Mutiny Act 1797, Portugal: Art. 330 *CP*, and Spain: Art. 475 *NCP*.

³² See Art. 154 Turkish Penal Code.

³³ See, e.g., Kenya: Penal Code Section 96; the Ivory Coast: Art. 140(1) *CP*; Madagascar: Art. 77(2) *CP*; Norway: §94 Norwegian Penal Code; the federal law of the United States: 18 U.S.C. §2385; and §240.15 New York Penal Code.

countries have broad provisions penalizing incitement of any infringement of the law.³⁴ In this context, the unusual approach of the French is noteworthy. In France, all methods of incitement are not alike, rather, there is a definitive list of the punishable methods of incitement, just as there is for instigation.³⁵

F. Approval of Crime

Approval of crime, an offence closely related to incitement, is often addressed by provisions that punish indirect incitement. In Belgium,³⁶ for example, the Code Pénal encompasses each and every exhortation of crime.³⁷ In France,³⁸ the public justification of certain enumerated crimes is itself a crime. Public approval of crime is regulated in a general manner in the Danish,³⁹ Portuguese⁴⁰ and Turkish penal codes.⁴¹

G. Disturbing the Peace and Public Incitement of Hatred

Most penal codes contain regulations similar to those found in German law. At first glance, there are no provisions exhibiting particularly noteworthy attributes.

H. Instructional Guidance for the Commission of Crime

Provisions as broad as Germany's §130(a) *StGB* are found only in the Ivory Coast⁴² and Belgium.⁴³

³⁴ See, e.g., Malawi: Penal Code Section 124; Zaire: Art. 135 bis *CP*; and Austria: §281 Austrian *StGB* (in §282, the Austrian *StGB* also penalizes incitement of criminal acts).

³⁵ See Art. 23 *Loi du juillet 1881 sur la liberté de la presse*.

³⁶ See Art. 66(1), (4) *CP*.

³⁷ The same applies in Italy: Art. 414 *CP*; and Norway: §94 Norwegian Penal Code.

³⁸ See Art. 24 *Loi du juillet 1881 sur la liberté de la presse*.

³⁹ See §136 Danish Penal Code.

⁴⁰ See Art. 298 *CP*.

⁴¹ See Art. 312(1) Turkish Penal Code.

⁴² See Art. 174 *CP*.

⁴³ See Art. 66(1), (4) *CP* and Art. 1(1) *Loi portant de la provocation à commettre des crimes ou des délits* (25 March 1891).

I. Instructional Guidance for the Production of Weapons

On the one hand, unlawful production of weapons is a crime in almost all legal systems. On the other hand, provisions regulating instructional guidance for production are rare. Only the federal law of the United States contains a provision comparable to Germany's weapons law.⁴⁴ Norway is also noteworthy in that, in addition to instructional guidance, offering, threatening or publicly encouraging the commission of a felony with the aid of a weapon is punishable conduct.⁴⁵

Interestingly, African common law nations do not punish instructional guidance for the production of weapons. Instead, in these countries, instructional guidance for the use of weapons is a crime.⁴⁶

3. *Main Features of the Legislative Approach to Incitement of Crime*

As was the case in German law with regard to the proximity of the incitement to the threatened legal interest and the kind and degree of its influence on others,⁴⁷ similar groupings can be found in these numerous provisions. The gradations, however, differ from country to country.

Nevertheless, there is one global common factor: apparently, no system of criminal law is willing to wait in every case until a crime has actually been committed. Under certain circumstances, activity in the 'foreground' of any injury to a protected legal interest may be more or less extensively criminalized. For this reason - using a universally protected interest, life, as an example - criminal law has elected not to wait to intervene until after the principal actor has struck a mortal blow, but rather has chosen to try to guard life at an earlier point in time by making it a crime, under certain circumstances, to incite or encourage murder.

To be sure, to the extent that this represents a restriction of the freedom of expression, it may lead to conflict between criminal and constitutional law.

⁴⁴ See 18 U.S.C. §231.

⁴⁵ See §160 Norwegian Penal Code.

⁴⁶ See, e.g., Kenya: Penal Code Section 64; Malawi: Penal Code Section 59; and Zambia: Penal Code Section 66.

⁴⁷ See *supra* II.2 and II.3.

IV. CRIMINAL LAW PROVISIONS THAT RESTRICT EXPRESSION VERSUS FREEDOM OF SPEECH AND PRESS: A COLLISION COURSE

As has already been mentioned, the ban on the expression or dissemination of certain opinions, orally or in writing, may clash with the constitutionally guaranteed rights of free speech and press. How is this conflict to be averted? From the German perspective, it is important to take note of the following steps.

1. *Function and Extent of Constitutionally Guaranteed Freedom of Expression*

In the German constitution (Article 5(I), sentence 1 *Grundgesetz (GG)*), people have the right 'freely to express and disseminate their opinions orally, in writing, or visually.' This basic right has been characterized by the Federal Constitutional Court as 'the most direct expression of the human personality in society' which makes it 'one of the noblest of all human rights', in some sense 'the very foundation of freedom'.⁴⁸ This protection is by no means limited to private expressions of opinion, rather, it also applies to public and, not least importantly, political opinions as well.⁴⁹ Consequently, freedom of expression plays a significant role in political events and in the democratic state. It facilitates a 'continual intellectual debate, a battle of opinions' that makes it indispensable to the process of building a democratic identity.⁵⁰ The Federal Constitutional Court characterizes the expression protected by this basic freedom as an element of the 'taking of a position, conviction, or view' within the framework of an intellectual debate or some other form of social communication.⁵¹

If these principles of intellectual debate are applied to the statements which were made prior to the murder of Yitzhak Rabin, there can be no doubt that indirect exhortations, at least, such as 'the prime minister should be killed', fall within the ambit of protected expression. For, as a matter of principle, as long as all statements involving an assessment are deemed to be deserving of protection,

⁴⁸ See *BVerfGE* (Decisions of the Federal Constitutional Court) 7 (1958), pp. 198-230, at 208: 'Lüth-Urteil'.

⁴⁹ See *I. v. Münch and Ph. Kunig, Grundgesetz Kommentar, Vol. 1*, 4th ed. (Munich: Beck, 1992), Art. 5, margin No. 8; Bemmman, *op. cit.*, p. 1.

⁵⁰ On this point, see *BVerfGE* 7, *op. cit.*, p. 208; *v. Münch and Kunig, op. cit.*, Art. 5, margin No. 1.

⁵¹ See *BVerfGE* 61 (1983), pp. 1-13, at 8 ff.; *BVerfGE* 65 (1984), pp. 1-71, at 41; and *BVerfGE* 71 (1986), pp. 162-183, at 179.

neither the 'ethical quality' of the statement nor its 'value' measured any other way is relevant.⁵² Therefore, even a general call for murder is basically protected expression.

Application of Article 10 of the European Convention on Human Rights (ECHR), or Article 19 of the United Nations Universal Declaration of Human Rights, both of which guarantee freedom of expression in a manner similar to that of the German constitutional law, would probably yield the same result.

2. *Limits on the Freedom to Express an Opinion*

Despite the protection due to certain forms of expression, they are not completely immune from state regulation: the state has not relinquished all authority to restrict protected speech and, when necessary, to punish transgressions. A system of law and state that guarantees certain basic rights must also make sure that these rights can be realized. If, in the exercise of their basic rights, people come into conflict with one another, the rights of one may not prevail at the cost of the rights of the other, at least not without further ado. If, to give a crude but very plain example, on the one hand, freedom of action is guaranteed, and, on the other hand, so is the right to life, one may not kill a person standing in one's way simply by referring to freedom of action. This is all the more true if basic rights, such as freedom of opinion, are construed not only as 'negative' rights against state interference, but actually require the state to take 'affirmative' protective action, as in the case of the rights to physical integrity and life.⁵³ Although this fundamental problem of conflicting rights cannot be addressed here in detail,⁵⁴ ultimately it is indisputable that, even in a democratic state, freedom of

⁵² See v. Münch and Kunig, *op. cit.*, Art. 5, margin No. 8; R. Herzog, in: Th. Maunz and G. Dürig, *Grundgesetz Kommentar*, Vol. 1, Arts. 1-12 (Munich: Beck, 1994), Art. 5(I), (II), margin No. 55(e).

⁵³ See the decision of the Federal Constitutional Court on abortion, *BVerfGE* 88 (1993), pp. 203-337. For an earlier decision, see *BVerfGE* 39 (1975), pp. 1-68; *BVerfGE* 46 (1978), pp. 160-165; and *BVerfGE* 49 (1979), pp. 89-147.

⁵⁴ On this point, see J. Isensee, 'Das Grundrecht als Abwehrrecht und als staatliche Schutzpflicht,' in: J. Isensee and P. Kirchhof (eds.), *Handbuch des Staatsrechts der Bundesrepublik Deutschland*, Vol. 5, *Allgemeine Grundrechtslehren* (Heidelberg: C.F. Müller, 1992), pp. 143-241, at 145 ff.

expression is not absolute, i.e., even protected expression may be subject to state regulation and, thus, to limitations.⁵⁵

But what should these restrictions look like? Different approaches to this question have been taken on the national and international levels. In German law, provisions of 'general legislation' (*allgemeine Gesetze*), provisions for the 'protection of young persons' and the 'right of personal respect' can be invoked to restrict speech (Article 5(II) GG). Criminal provisions that seek to prevent or punish the use of statements of opinion to solicit criminal acts must fall within one of these three categories. According to case-law of the Federal Constitutional Court, freedom of expression is a fundamental condition of democracy, whose singular value must always be kept in mind, especially when a restriction on speech is contemplated. A one-sided restriction of this basic right, imposed by means of 'general legislation', would, however, be incompatible with this value judgement. Instead, the relationship between 'general legislation' and this basic right must be 'interactive', i.e., a general statute, according to its wording, may restrict the basic right, but the statute itself must be interpreted in light of the significance of this basic right in a free and democratic state, and consequently its restrictive effect on the basic right will be limited.⁵⁶

Article 10(2) ECHR also permits restrictions on freedom of expression, so long as they are prescribed by law 'and are necessary in a democratic society, in the interests of national security, territorial integrity, or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or the rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.'

In contrast, Article 19 of the United Nations Universal Declaration of Human Rights itself contains no restrictions. However, Article 29 of the Declaration refers to the basic obligations of each person to society and

⁵⁵ For a decision directly on point, see *BVerfGE* 7, *op. cit.*, p. 234: 'The great significance that is due to the basic right of free expression of opinion in a free democracy does not mean that a person may express his opinion in every form and with every available means.'

⁵⁶ This approach was first taken in *BVerfGE* 7, *op. cit.*, pp. 208 ff.; since then it has become an established precedent, see, e.g., *BVerfGE* 12 (1962), pp. 113-132, at 124 ff.; *BVerfGE* 50 (1979), pp. 234-244, at 241; *BVerfGE* 54 (1981), pp. 129-139, at 137; *BVerfGE* 60 (1982), pp. 234-243, at 240; *BVerfGE* 61 (1983), pp. 1-13, at 10 ff.; *BVerfGE* 68 (1985), pp. 226-233, at 232; and *BVerfGE* 71 (1986), pp. 206-223, at 214. For more extensive comments, see v. Münch and Kunig, *op. cit.*, Art. 5, margin No. 75 ff.

designates certain restrictions on freedom that are to a great extent comparable to those of Article 10(2) ECHR.

3. *Consequences for the Pertinent German Criminal Provisions*

The provisions of the German penal code enumerated above appear to be 'general legislation' in terms of Article 5(II) *GG*.⁵⁷ In its case-law, the Federal Constitutional Court has designated as 'general legislation' those laws that 'do not prohibit an opinion as such, do not aim at the expression of an opinion as such, that rather... [serve] to protect a social value that has priority over the exercise of freedom of expression.'⁵⁸ Therefore, the crimes of instigation (§26 *StGB*) and of public incitement of crime (§111 *StGB*), of particular interest here, represent 'general legislation' in this sense.

V. SAMPLE CASES

As seen in practice, drawing boundaries is not always easy. As a result, conflicts arise again and again, some of which involve quite significant restrictions on freedom of expression. In some cases, criminal law has been misused as a weapon in a political battle against dissenters. Already in the 1870s, in the course of the incipient *Kulturkampf* (culture war), the so-called 'pulpit paragraph' (§130(a) *StGB*, old version) was added to the German penal code in an attempt to repress disfavoured political statements of the clergy in churches, or at religious gatherings.⁵⁹

⁵⁷ For a decision on, e.g., §89 *StGB*, see *BVerfGE* 47 (1978), pp. 130-143, at 143.

⁵⁸ *BVerfGE* 7, *op. cit.*, pp. 209 ff.; *BVerfGE* 28 (1970), pp. 282-295, at 292; similarly *BGHZ* (Decisions of the Federal Supreme Court, civil jurisdiction) 76 (1980), pp. 55-75, at 67; *BAG* (Federal Labour Court), 37 *Neue Juristische Wochenschrift* (1984), pp. 826-829, at 828.

⁵⁹ For the history and evolution of this paragraph, see U. Demski and H. Ostendorf, 'Vom Kanzelparagraph zur Anleitung zu Straftaten - Der §130(a) *StGB* - ein Paradebeispiel für ein politisch instrumentalisiertes Strafrecht,' 9 *Strafverteidiger* (1989), pp. 30-38, at 31 ff. This provision was revoked in 1953 and a new §130(a) *StGB* was introduced in 1987 as part of the Antiterrorism Act. This provision, on instructional guidance to commit crime, was added in response to the increase in attacks and acts of sabotage by militant branches of the peace and anti-nuclear energy movements (p. 36). See also v. Bubnoff, *op. cit.*, prenote to §130(a).

As late as 1931, the Supreme Court of the Weimar Republic treated the programmatic slogan 'War on war!' as incitement of desertion and failure to report for duty, punishable according to §111 *StGB*.⁶⁰ Even the more recent history of the Federal Republic provides examples of conflicts between the constitutionally guaranteed right of freedom of expression and criminal law: within the bounds of political reportage of RAF terrorism (especially the publication of the so-called 'Buback obituary') in the 1970s⁶¹ and, more recently, the calls to boycott the census⁶² and stage sit-down demonstrations.⁶³ These former two cases warrant closer examination.

1. The 'Buback Obituary'

The starting point for this case was an obituary first published in a student newspaper after the terrorist shooting of Germany's federal attorney general, Siegfried Buback. In the obituary, the anonymous author first described his 'quiet glee' at the 'knocking off of Buback' and then criticized governmental leaders for persecuting people with left-wing sympathies, before concluding that terror and violence are not acceptable means of fighting an authoritarian state. Indeed, the author expressly condemned acts of terrorist violence. Press coverage, however, was such that the public was lead to believe the opposite. This led subsequently to a kind of press campaign against critical students and professors, and ultimately against universities altogether.

The result, of interest here, was that countless trials were held involving students and professors who tried to set the record straight with regard to the 'Buback obituary'. Despite these efforts, they were accused, among other things, of approving of crime (§140 *StGB*) and incitement of public hatred (§130

⁶⁰ *RGSt* (Decisions of the Supreme Court of the German Reich, criminal jurisdiction (until 1945)) 65 (1931), pp. 200-202, at 202.

⁶¹ See Bemman, *op. cit.*, pp. 2 ff., for comprehensive references to decisions of courts of appeal.

⁶² See, e.g., *OLG* (Regional Court of Appeal) Celle, 41 *Neue Juristische Wochenschrift* (1988), pp. 1101-1102.

⁶³ See *BVerfGE*, 44 *Neue Juristische Wochenschrift* (1991), pp. 971; and *BVerfGE* 45 (1992), p. 2688; *BayObLG*, *Juristische Rundschau* (1993), pp. 117-120, with comments by K. Nehm, pp. 120-123; E. Graul, 'Nötigung durch Sitzblockaden,' *Juristische Rundschau* (1994), pp. 51-58; N. Kissel, *Aufrufe zum Ungehorsam und §111 StGB. Grundrechtlicher Einfluß bei der Feststellung strafbaren Unrechts* (Frankfurt a.M.: Peter Lang, 1996), pp. 31 ff.

StGB).⁶⁴ In the course of the criminal investigation, numerous searches were conducted of apartments of people completely unconnected to the case.⁶⁵

In this example, both the conflict and the difficulty of determining the point where protection of expression ends and legitimate criminal regulation begins are especially clear. Although initially there were many convictions, all defendants were acquitted on appeal. However, in order to prevent things from progressing this far, criminal provisions should be crafted so narrowly that 'they lose their dangerousness, even in the hands of a judge who does not think much of freedom of expression.'⁶⁶ Vagueness also presents the danger that the result of applying the norm will depend not only on the attitude of the presiding judge but also on the political classification of the defendant and, finally, on the political climate at the time of the conviction.⁶⁷ On the other hand, in the context of criminal law, legislative overreactions that could provoke violent activity must be avoided, for such overreactions could completely undermine the purpose of stricter criminal legislation, which is to impede the creation of a 'psychological climate' conducive to the commission of violent acts.⁶⁸

2. *The Call to Boycott the Census*

A good example of the broad spectrum of attempts to criminalize public statements of opinion was the prosecution of calls to boycott the census. Compared with the approval of murder in the 'Buback obituary' case (genuine or otherwise) and the associated danger of inciting further violence of the same type, these calls, made in 1987 by opponents of the census in Germany,⁶⁹ seem to be rather harmless. The goal of the opponents of the census was to persuade as many people as possible to remove the reference number and hence to

⁶⁴ They were also accused of defamation of the State (§90(a) *StGB*), defamation of the memory of the dead (§189 *StGB*) and insult (§185 *StGB*).

⁶⁵ For an in-depth discussion of this case, and for references to the various individual cases, see Bemman, *op. cit.*, pp. 2 ff.

⁶⁶ See Bemman, *op. cit.*, p. 16. This call was a result of the 'Buback obituary'.

⁶⁷ On this point, see G. Grünwald, 'Meinungsfreiheit und Strafrecht,' 12 *Kritische Justiz* (1979), pp. 291-301, at 298.

⁶⁸ See H. Jung, 'Zum Strafrechtsänderungsgesetz,' 16 *Juristische Schulung* (1976), pp. 477-478.

⁶⁹ For a determination of the constitutionality of these calls, see the decisions of the Federal Constitutional Court, 40 *Neue Juristische Wochenschrift* (1987), pp. 2805-2807; and 41 *Neue Juristische Wochenschrift* (1988), pp. 962-964.

'anonymize' the census forms which had been sent to them to be filled out. In this way, the forms were to be rendered useless and the census sabotaged.

The institutions of law enforcement tried to counteract the calls for a boycott by treating the removal of the reference number from a census form as 'damage to property' (§303 *StGB*).⁷⁰ Consequently, media and poster campaigns calling for the removal of the reference numbers were clear examples of 'public incitement of crime' and, as such, punishable according to §111 *StGB*.⁷¹

This is an illuminating example of how a legitimate political goal and a fundamentally unrelated illegal means can converge, in that a statement of opinion (intended to impede the census) can be obstructed by the indirect criminalization of the advocated means (damage to property) to that end. Whereas rejecting and impeding the census because of its perceived invasion of privacy is doubtless protected expression, the means used to reach that end, namely, the destruction of the property of another (rendering the questionnaires useless), is, as such, a crime. Even if each individual instance of this kind of property damage seems to be a *quantité négligeable* and of no interest except as the instrumental means to a completely different political end, on aggregate, even small offences can become a public danger.⁷² Therefore, even if it were to be determined that a restriction on advocating the destruction of census forms could not be justified by the 'general legislation' clause of Article 5(II) GG on the basis of §111 *StGB* (public incitement of crime), the clause would justify such a restriction based on §303 *StGB* (destruction of property).

⁷⁰ See C. Engelage, 'Ist das Abschneiden der Heftnummer auf Volkszählungsbögen strafbar?' 40 *Neue Juristische Wochenschrift* (1987), pp. 2801-2802, at 2802. For a comprehensive discussion, see Kissel, *op. cit.*, pp. 22 ff.

⁷¹ See, e.g., OLG Celle, 41 *Neue Juristische Wochenschrift* (1988), pp. 1101-1102; OLG Köln, 41 *Neue Juristische Wochenschrift* (1988), pp. 1102-1104, OLG Stuttgart, 38 *Die Justiz* (1989), pp. 165-166.

⁷² This explains why §111 *StGB* was included in the section of the penal code covering 'Resistance to State Authority'. See Eser, in: Schönke and Schröder, *op. cit.*, §111, margin No. 1; D. Zielinski, in: *Alternativ-Kommentar zum Strafgesetzbuch*, Vol. 3, §§80-145(d) (Darmstadt: Luchterhand, 1986), §111, margin No. 1.

VI. LEGAL POLICY CONSIDERATIONS

1. *The Search for the Legally Protected Interest (Rechtsgut)*

If it was not already plain, the census boycott clearly showed that the *ratio legis* of prohibitions is of great significance when criminal law is used to restrict the freedoms of speech and press. In this context, the question arises as to the nature of the legal interest protected by such criminal provisions. In Germany, this issue is the subject of great controversy.

A difference of opinion is apparent in the discussion of instigation (§26 *StGB*). A point of dispute is whether the criminalization of instigation is justified by the injury caused by the solicited target crime (*Haupttat*, in this case murder) to a legally protected interest (*Rechtsgut*, in this case life), or whether the criminalization is justified by the instigator's culpable inducement of the addressee.⁷³ In the context of public incitement of crime (§111 *StGB*) and similar offences, these issues are more complicated still. Most people recognize that the criminalization of these preliminary acts can no longer be justified solely by the need to defend the legally protected interest threatened by the final target crime (*Haupttat*).⁷⁴ However, there is no consensus concerning those interests that, either in combination with the aforementioned legally protected interest or taken alone, would suffice to justify the criminalization of these acts. Examples of interests that have been deemed worthy of protection are, on the one hand, the authority of the state,⁷⁵ and, on the other hand, the loyalty of the citizens to the law.⁷⁶ According to prevailing opinion, however, the most important interest to protect is the public peace of the community,⁷⁷ though it is not clear what is actually meant by this somewhat diffuse concept.⁷⁸

⁷³ For information concerning the various points of view, see Cramer, in: Schönke and Schröder, *op. cit.*, prenote 16 ff. to §§25 ff.

⁷⁴ But see Zielinski, *op. cit.*, §111, margin No. 4, who sees §111 *StGB* solely as a means of protecting the legal interest threatened by the suggested crime; similarly Lackner, *op. cit.*, §111, margin No. 1.

⁷⁵ See K. Stockmann, *Die Aufforderung zur Begehung rechtswidriger Taten, §111 StGB* (Diss. Berlin, 1980), pp. 43 ff.

⁷⁶ See R. Maurach, F.-Ch. Schroeder and M. Maiwald, *Strafrecht Besonderer Teil, Vol. 2, Straftaten gegen Gemeinschaftswerte*, 7th ed. (Heidelberg: C.F. Müller, 1991), p. 360.

⁷⁷ See BGHSi 29 (1980), pp. 258-269, at 267; Dreher, *op. cit.*, p. 312; Eser, in: Schönke and Schröder, *op. cit.*, §111, margin No. 1; Rogall, *op. cit.*, pp. 16 ff.

⁷⁸ For a extensive summary of the different opinions, see Kissel, *op. cit.*, pp. 118 ff.

An additional question is whether a relevant danger to public peace may be procured by the expression of an opinion, tending to promote a general 'psychological climate' in which crimes of the same type as those already committed thrive,⁷⁹ or whether a concrete infringement of the relevant protective norm (as viewed by the potential victim) is required.⁸⁰

2. *Criminal Law: The Ultima Ratio*

First of all, a response to the preceding questions is as follows. It is not the responsibility of criminal law to criminalize all actions that are considered harmful to society. Rather, criminal law should function solely as an *ultima ratio* to guard against serious injury to protected legal interests.⁸¹ The less serious the injury, the less appropriate the intervention of criminal law. This must always be kept in mind, especially with regard to 'criminalization of conduct in the foreground (*im Vorfeld*) of an injury to the legally protected interest.'⁸² In such cases, the criminalization encompasses not only those actions that ultimately injure protected legal interests, but also those that only endanger them. Herein lies a conscious expansion of the protective sphere of criminal law, the legitimacy of which must be established in particular.

3. *The Spectre of 'Thought Crime' (Gesinnungsstrafrecht)*

The spectre of a criminal law in which liability is based on personal 'attitudes' is repugnant. In Germany, this danger is especially evident in connection with §130(a)(2) *StGB* (Instructional guidance to commit crime). This provision requires only that the writing in question be capable of serving as instruction. The content, however, need not have been designed to solicit criminal activity.⁸³ Indeed, today the mere intention on the part of the offender to solicit will suffice. As a result, liability is no longer determined by specific, objective criteria but

⁷⁹ See BGHSI 22, *op. cit.*, pp. 285 ff.; Lackner, *op. cit.*, §140, margin No. 1.

⁸⁰ In support of this position, see Jakobs, *op. cit.*, pp. 773 ff.

⁸¹ See Demski and Ostendorf, *op. cit.*, p. 37.

⁸² See Jakobs, *op. cit.*, p. 751.

⁸³ §130(a) *StGB*, old version, did require design.

rather by subjective desire. 'It is the "evil" attitude of the actor that triggers the punishability of an otherwise "neutral" action'.⁸⁴

4. *Specifying the Goal of Protection*

Statutory provisions designed to prevent the solicitation of others to commit crimes by means of carefully crafted statements cannot be justified simply on the basis of the fact that, in general, they counteract the potential use of violence. Rather, their goal must be more specific than that: they must function to protect public peace, to protect the state as a viable institution and, not least, to protect individuals from the threat of violence.⁸⁵ Only if this is the case can the requirements that are legitimate prerequisites for limits on speech be satisfied.⁸⁶

Additionally, the extent to which the powers that be make use of their ability to restrict expression is a revealing indicator of just how democratic the conditions in their country actually are.⁸⁷

5. *Criminal Law and the Media*

In the deployment of criminal law in the fight against direct incitement of crime, it has already become apparent that legitimate restrictions on expression by 'general legislation' in favour of the system as a whole and the rights of others⁸⁸ must reflect the special individual and institutional significance of the right to free expression. Free expression is all the more valuable when the issue is not direct incitement of crime, but merely the media coverage of such an event. For example, it simply would not do to attempt - without closer scrutiny - to impose

⁸⁴ See Demski and Ostendorf, *op. cit.*, p. 38. For criticism of 'thought crime', see F. Dencker, 'Das Gesetz zur Bekämpfung des Terrorismus,' 7 *Strafverteidiger* (1987), pp. 117-122, at 121; F. Dencker, 'Kronzeuge, terroristische Vereinigung und rechtsstaatliche Strafgesetzgebung,' 20 *Kritische Justiz* (1987), pp. 36-53, at 47; F.-Ch. Schroeder, *Der Schutz von Staat und Verfassung im Strafrecht* (Munich: Beck, 1970), pp. 297 ff.

⁸⁵ See W. Stree, 'Strafrechtsschutz im Vorfeld von Gewalttaten,' 29 *Neue Juristische Wochenschrift* (1976), pp. 1177-1182, at 1177.

⁸⁶ See *supra* IV.2 for a discussion of Art. 5(II) GG, Art. 10(2) ECHR and Arts. 19, 29 of the Universal Declaration of Human Rights.

⁸⁷ See Bemman, *op. cit.*, p. 1.

⁸⁸ On this point, see Art. 10(2) ECHR.

criminal sanctions on every report of a solicitation of violence. More specifically, the mere publication or public distribution of writings of others can never support the presumption that the publisher has adopted the position expressed in the items published. Therefore, criminal liability is attached in such cases only if the method of reproduction, an express identification, or an additional statement made by the distributor, clearly indicates that he adopted the criminal content of the statements as his own.⁸⁹

As a result, and also in light of the right to information, truthful media reports, whose sole and recognizable purpose is to inform the public concerning the punishable statements of others, should not be punished. Freedom of information is, in such cases, equivalent to freedom of expression. It concerns the right to obtain, at any time and without hindrance, information from generally accessible sources. As such, it is protected along with freedom of expression by Article 5(I), sentence 1 GG, Article 10(1) ECHR and Article 19 of the United Nations Universal Declaration of Human Rights.

In addition, German law provides a so-called 'social-adequacy' clause for certain criminal provisions.⁹⁰ For example, according to §86(3) *StGB* an act (otherwise punishable as dissemination of the propaganda of unconstitutional organizations) is not punishable if it serves to promote the arts, science, research, teaching, or the reporting of contemporary events or history.⁹¹

6. Problems Raised by the Crime of Approval

In general, the 'law of incitement' tends to be associated with statements that solicit future criminal activity and are made with a corresponding subjective intent. Penalization of such statements is understandable to the extent that in so doing potential harm to protected legal interests may be prevented.⁹² This

⁸⁹ See *BGHSt* 36 (1990), pp. 363-372, at 367, 371; v. Bubnoff, *op. cit.*, §111, margin No. 10(a)-(c).

⁹⁰ E.g., for instructional guidance to commit crime (§130(a) *StGB*).

⁹¹ On this point, see H. Müller-Dietz, 'Vom Wort der Gewalt und der Gewalt des Wortes. Marginalien zu Theorie und Praxis heutiger Strafgesetzgebung,' in: R. Herren, D. Kienapfel and H. Müller-Dietz (eds.), *Kultur-Kriminalität-Strafrecht. Festschrift für Thomas Würtenberger zum 70. Geburtstag* (Berlin: Duncker & Humblot, 1977), pp. 167-186, at 180 ff.

⁹² This danger may not exist in cases of attempted instigation and unsuccessful incitement. However, the desire for future criminal behaviour is apparent in those cases as well.

justification, however, cannot be relied upon in the case of the rewarding or approval of crimes already committed (§140 *StGB*). In any event, in the 'psychological climate of willingness to commit crime' created by the rewarding or approval of criminal activity, some people see a threat to the public that requires attention.⁹³

Nonetheless, it is doubtful whether a concrete relationship to a future crime can be established in such cases. Therefore, in 1981, as a result of the 'Buback obituary', the abolition of §140 *StGB* was called for.⁹⁴ In the meantime, this particular section was amended by the 'anti-terrorism law' of 1987. The amendment, however, did not address the aforementioned criticism, i.e., the lack of concreteness of the provision.⁹⁵ It has been claimed that the 'criminal climate' brought about by the approval of criminal activity does not have a coercive effect on others and that, as a result, this offence is incompatible with 'the criminal law of a free state'.⁹⁶ What this criticism fails to appreciate, however, is that basically no incitement of crime - with the exception of a 'coercive emergency' - has a coercive effect on the potential future offender. Ultimately, not even the instigator knows if his solicitation will be successful.

Nevertheless, §140 *StGB* remains problematic. As a rule, a person who approves of a particular crime that has been committed does not necessarily hope to provoke further criminal acts of the same kind. Furthermore, the general promotion of crime, which is non-punishable, would be much more sensible from the perspective of the actor. It is highly likely that the general provocation of the legal order in the community is much more appealing to such a person.⁹⁷ It is, however, difficult to use criminal law to combat this kind of all-round discontent.

VII. CONCLUDING REMARKS

In today's democratic society, it is repeatedly emphasized that intellectual debate, the so-called 'market place of ideas', is the most important means of combating certain beliefs, such as the conviction that the use of violence is necessary to

⁹³ See *BGHSt* 22, *op. cit.*, p. 286; Cramer, in: Schönke and Schröder, *op. cit.*, §140, margin No. 1; Ebert, *op. cit.*, p. 118.

⁹⁴ See Bemman, *op. cit.*, p. 17; Grünwald, *op. cit.*, p. 299.

⁹⁵ With regard to the amendment, see K. Kühl, 'Neue Gesetze gegen terroristische Straftaten,' 40 *Neue Juristische Wochenschrift* (1987), pp. 737-747, at 745.

⁹⁶ See Jakobs, *op. cit.*, p. 783.

⁹⁷ See F.-Ch. Schroeder, *Die Straftaten gegen das Strafrecht* (Berlin/New York: de Gruyter, 1985), p. 7.

change society for the better. But how can this sort of debate take place if the mere articulation of such convictions is a crime? The confrontation with ideas that support the use of violence can hardly be performed by criminal law. Demski and Ostendorf hit the nail on the head when they said: 'If one wants to avoid awakening the willingness, especially in young people, to use violence as a "supposedly acceptable means of settling political differences", the always "violent means of criminal law" is truly inappropriate for this purpose. Criminal law is the "most intense" form of state power over its citizens.'⁹⁸

This could suggest the conclusion that all conduct in the private sanctum, as well any unobtrusive public conduct *per se*, should be free from state sanction, and that a private person should only then become answerable to criminal law when and if he oversteps these boundaries and behaves in a troublesome manner.⁹⁹ This sort of conclusion, however, would perhaps go too far. A more appropriate solution might possibly be found by going back to the 'theory of the spheres' (*Sphärentheorie*) supported by the Federal Constitutional Court. According to this theory, it is necessary to distinguish between the social, private and intimate spheres, whereby the high value of the freedom to express an opinion is to be afforded special attention in the latter two areas. Accordingly, the intimate sphere must provide the citizen with an inviolable area, which is off-limits to all public interference, and in which he may structure his life as he pleases.¹⁰⁰ Therefore, the intervention of criminal law against statements in the private sphere must be subject to more stringent requirements than in the case of statements made in public. However, intervention is oriented to the degree of danger. The more concretely a protected legal interest is endangered by statements in the private sphere, the more the state can be justified, indeed obligated, to intervene by means of criminal law. So, for example, xenophobic statements, even those made within a small, private group of friends, will overstep the limits of the tolerable, if the killing of a particular person, foreigner X, is called for. A possible corrective against an overcriminalization in the private sphere might consist of a requirement that such statements be unmistakable and intentional. In the final analysis, this would mean that the expression in private circles of an opinion calling for crimes would, as a rule, be punishable only if the requirements of instigation are satisfied.

⁹⁸ See Demski and Ostendorf, *op. cit.*, p. 38.

⁹⁹ In support of this position, see Jakobs, *op. cit.*, p. 762.

¹⁰⁰ Based on Arts. 2(I) and 1(I) GG; *BVerfGE* 6 (1957), pp. 32-45, at 41; *BVerfGE* 35 (1974), pp. 35-40, at 39; *BVerfGE* 38 (1975), pp. 312-325, at 320; *BVerfGE* 80 (1990), pp. 367-383, at 373 ff.

In contrast, the more the incitement of crime carries over into the social sphere and into the general public, leading to a corresponding decrease in the controllability of the spoken and written word, the more the state is justified and, if need be, even obligated to intervene by means of criminal law. To be sure, the requisite relationship to a specific legally protected interest must not be lost. Specifically, the mere repugnancy of a person's political goals may not be determinative for purposes of penalization if 'thought-crime',¹⁰¹ which is no less dangerous to democracy and the rule of law, is to be avoided.

¹⁰¹ See *supra* VI.3.