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### **Short Introduction**

This paper deals with the tension between freedom of expression (opinions, press, broadcasting and other media, art [Art. 5(1), (3) Basic Law = GG]) and criminal provisions of German criminal law restricting it. Although certain acts may be covered by the sphere of freedom of Art. 5(1), (3) GG, this paper will not deal with provisions establishing criminal liability for certain types of pornography (§ 184c: distributing, acquiring and possessing pornographic content for minors; § 184e: organising and attending child and youth pornographic performances; § 184k: violation of the intimate sphere by image recordings). Their necessity is beyond question. It is also conceivable that in certain societies such penal provisions are used to build up inadmissible pressure in the democratic struggle of opinions (for example, critical journalists or opposition politicians are foisted with such pornographic content, corresponding evidence is possibly falsified). This is - thank God! - not the situation in Germany, so that the following account can neglect this aspect of the "dirty" battle of opinions. In other countries, the situation may be different. In that case, however, the focus is not on the punishability of pornography that is harmful to children and young people, but on its misuse in political debates.

The paper is an attempt to give an account of those utterance offences in German criminal law where a tension may arise between criminal law on the one hand and freedom of expression, freedom of the press, freedom of broadcasting and freedom of the arts on the other. The comments made on the individual provisions represent the personal opinion of the author and are far from complete.

## Recent Developments: New Criminal Provisions against Hate Speech

One recent characteristic of Germany's society is the fact that populists of any kind are rising<sup>1</sup> - often stocky or mixed up with conspiracy theories. On the other hand, there are the right-wing extremists, who like to use populist catchphrases or make use of conspiracy theories when they coincide with their views. They mirror political currents on the right edge of the political spectrum. Their protagonists use xenophobic, anti-Semitic, neo-fascist and anti-democratic statements<sup>2</sup>, and join forces with tinged conspiracy theorists. That got visible to everybody at the last year's summer end: The storming of the Reichstag Building in Berlin on August 29<sup>th</sup>, 2020, when right-wing participants of a peaceful demonstration against containing measures at the end of the demonstration stormed the stairs of the Reichstag Building while waving the "Reich Flag" and the "Reich War Flag". Police prevented them from forcefully entering the Parliament Building by the police. The incident even prompted *Federal President* Frank-Walter Steinmeier to speak out publicly about his worries<sup>3</sup>. What a coincidence: Six months later, similar groups violently stormed into Washington's Capitol Building.

Right-wing extremists in Germany seek their advantages in expressions of legitimate civil disobedience. But this is only one piece in the mosaic of the right-wing scene in the Republic and elsewhere in Europe. The right-wing tendencies<sup>4</sup> and their political protagonists have nothing in common with legitimate demonstrations. Furthermore, extremist ideology from the right-wing scene is unfortunately in the process of becoming a commonplace perception in Germany<sup>5</sup>. Anyone who

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<sup>1</sup> Pierre **Rosanvallon**, *Das Jahrhundert des Populismus. Geschichte – Theorie – Kritik*, Hamburg 2020.

<sup>2</sup> Gideon **Bosch**, *Rechtsextremismus als politische Praxis. Umriss einer akteurorientierten Rechtsextremismusforschung*, in: Christoph Kopke/Wolfgang Kühne (ed.), *Demokratie, Freiheit und Sicherheit, Festschrift zum 65. Geburtstag von Hans-Gerd Jaschke*, Baden-Baden 2017, p. 131 et seqq.; Christoph **Kopke**, *Gewalt und Terror von rechts in der Geschichte der Bundesrepublik Deutschland*, in: Christoph Kopke/Wolfgang Kühne (ed.), *Demokratie, Freiheit und Sicherheit, Festschrift zum 65. Geburtstag von Hans-Gerd Jaschke*, Baden-Baden 2017, p. 147 et seqq.

<sup>3</sup> Michael **Sommer**, *Falscher Alarm*, in: Cicero. Magazin für politische Kultur, September 1<sup>st</sup>, 2020 – to be retrieved from <https://www.cicero.de/innenpolitik/Sturm-auf-den-Reichstag-Corona-Demo-Reichsbuerger-Demokratie/>

<sup>4</sup> Wilfried **Schubarth**/Richard **Stöss** (ed.), *Rechtsextremismus in der Bundesrepublik Deutschland. Eine Bilanz*, Opladen 2001; Armin **Pfahl-Traughber**, *Rechtsextremismus in der Bundesrepublik*, München 1999; Andreas **Kläerner**/Michael **Kohlstruck** (ed.), *Moderner Rechtsextremismus in Deutschland*, Hamburg 2006; Eckhard **Jesse**, *Rechtsextremismus in Deutschland: Definition, Gewalt, Parteien, Einstellungen*, *Neue Kriminalpolitik* 29 (2017), p. 15 – 35; **Council of Europe**, *ECRI – Bericht über Deutschland (Sechste Prüfungsrunde) of December 10<sup>th</sup>, 2019 – published on March 17<sup>th</sup>, 2020*, p. 20 – 28; *Deutscher Bundestag, Wissenschaftliche Dienste, Rechtsradikalismus in Deutschland unter besonderer Berücksichtigung der neuen Bundesländer – WD1 – 3000 – 159/14*, Berlin 2016; **Institut für Demokratie und Zivilgesellschaft**, *Hassliebe. Muslimfeindlichkeit, Islamismus und die Spirale gesellschaftlicher Polarisierung*, Jena/London/Berlin 2018; Caroline Y. **Robertson-von Trotha** (ed.), *Rechtsextremismus in Deutschland und Europa. Rechts außen – rechts „Mitte“?*, Baden-Baden 2011.

<sup>5</sup> Heinrich **Bedford-Strohm**, *Konsequent gegen Hass*, *DRiZ* 2020, p. 251; Uwe **Backes**/Sebastian **Gräfe**/Anna-Maria **Haase**/Michael **Logrinov**/Sven **Segelke**, *Rechte Hassgewalt in Sachsen. Entwicklungstrends und Radikalisierung. Berichte und Studien no 82*, ed. by Thomas Lindenberg/Clemens Vollnhals im Auftrag des Hannah-Arendt-Instituts für Totalitarismusforschung e. V., Göttingen 2019; Britta **Schellenberg**, *Wenn der Staat versagt. Pfade*

opposes those right-wingers must expect himself to become a target of attack. This affects Jewish fellow citizens<sup>6</sup> as well as Muslim communities, in fact all those, whom the right-wing scene considers to be “different” or “foreign”. Politicians of democratic parties on all levels and critical journalists<sup>7</sup> are regularly verbally attacked; these attacks often include their family members. Representatives of the authorities, even if they “only” fulfil their (legal) duties, are showered with threats<sup>8</sup>. Most of those threats are sent via anonymous email accounts<sup>9</sup>. Unfortunately, it does not stop at these e-mail threats. The murder of the Regional President of North Hesse *Walter Lübcke* on June 1<sup>st</sup>, 2019<sup>10</sup>, or the assassination attempt on Cologne's mayor *Henriette Reker* on October 17<sup>th</sup>, 2015<sup>11</sup>, show appalling examples of the horrors that constant hate ideology can lead to.

It is questionable whether sufficient public awareness has already developed that every ordinary citizen runs the risk of being targeted by right-wing extremist violence or hate speech if such right-wingers feel them not sharing their views. It is not possible to foresee under which specific circumstances threats and violence will occur and become reality<sup>12</sup>. The protagonists of this kind of violence do not

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zum „hausgemachten“ Terrorismus, in: Karl-Siegbert Rehberg/Franziska Kunz/Tion Schlinzig: PEGIDA-Rechtspopulismus zwischen Fremdenangst und „Wende“-Enttäuschung?, Analysen im Überblick, Bielefeld 2016, p. 323 – 336; Olaf **Sundermeyer**, Rechter Terror in Deutschland. Eine Geschichte der Gewalt, München 2012; Britta **Schellenberg**, Hassrede Vorurteils kriminalität und rechte Radikalisierung in Deutschland, in: Wolfgang Benz (ed.), Fremdenfeinde und Wutbürger. Verliert die demokratische Gesellschaft ihre Mitte?, Berlin 2016, p. 99 – 116; Christoph **Apstel**, Hate Speech – zur Relevanz und den Folgen eines Massenphänomens, Kriminalpolitische Zeitschrift (KriPoZ) 2020, p. 287 – 292.

<sup>6</sup> Hannes **Ladyga**, Rasse als Rechtsbegriff, NJW 2021, p. 911 – 914.

<sup>7</sup> Madlen **Preuß**/Frederik **Tetzlaff**/Andreas **Zink** (Institut für interdisziplinäre Konflikt- und Gewaltforschung der Universität Bielefeld), Hass im Arbeitsalltag Medienschaffender. Studie zur Wahrnehmung von Erfahrungen mit Angriffen unter Journalist\_innen, Berlin 2019; die **medienanstalten-ALMGBR** (ed.), Der Ton wird härter. Hass, Mobbing und Extremismus. Maßnahmen, Projekte und Forderungen aus Sicht der Ländermedienanstalten, Berlin 2019.

<sup>8</sup> Dietrich **Mittler**, Mehr Schutz für Kommunalpolitiker, in: Süddeutsche Zeitung no 150 of July 2<sup>nd</sup>, 2020, p. R13.

<sup>9</sup> Rebecca **Zipursky**, Nuts About NETZ: The Network Enforcement Act and Freedom of Expression, Fordham International Law Journal Vol. 42, Issue 4 (2019), p. 1325 – 1374.

<sup>10</sup> On January 28<sup>th</sup>, 2021, the Frankfurt Higher Regional Court sentenced the main perpetrator to life imprisonment for murder and in doing so also determined the particular severe nature of his guilt (case no: 5-2 StE 1/20-5a-3/20). The verdict is not finally valid.

<sup>11</sup> On July 1<sup>st</sup>, 2016, the Düsseldorf Higher Regional Court sentenced the perpetrator on two counts of attempted murder with grievous bodily harm, negligent bodily harm and grievous bodily harm to a total prison sentence of 14 years (case no. III-6 StS 1/16). By order of December 21<sup>st</sup>, 2016, the Federal Supreme Court of Justice dismissed the defendant's appeal as ill-founded (case no. 3 StR 454/16).

<sup>12</sup> In the meantime (**Deutscher Bundestag**, Maßnahmen der Bundesregierung und Unternehmen gegen Hassreden und weitere strafbare Äußerungen im Internet of March 21<sup>st</sup>, 2016 [BT-Ds 18/7941]), the legislator has reacted with the Federal Act to Combat Right-wing Extremism and Hate Crime (Bundestags Drucksache 19/17741). The law passed on June 18<sup>th</sup>, 2020 (Ronen **Steinke**, Schärfere Gesetze gegen Hass und Hetze, in: Süddeutsche Zeitung no 235 of October 12<sup>th</sup>, 2020, p. 6; Anja **Schiemann**, Änderungen im StGB durch das Gesetz zur Bekämpfung des Rechtsextremismus und der Hasskriminalität, Kriminalpolitische Zeitschrift [KriPoZ] 2020, p. 269 – 276; Tobias **Ceffinato**, Hate Speech zwischen Ehrverletzungsdelikten und Meinungsfreiheit, JuS 2020, p. 495 et seqq.; Philipp **Eckel**/Christian **Rottmeier**, „Liken als Haten“: Strafverfolgung von Hate Speech in sozialen Netzwerken, NSTZ 2021, p. 1 et seqq.; Gudula **Genther**, Mit den Mitteln des Strafrechts, DRiZ 2020, p. 4 et seqq.; Maximilian **Heim**, Verschärfte Strafen für Hass und Hetze im Internet, NJW-Special 2020, p. 440 et seqq.; Claudia **Haupt**, Regulating Speech Online: Free Values in Constitutional Frames [February 28<sup>th</sup>, 2021], North Eastern University

all walk around in combat boots and military clothing. Such hate orators live as bourgeois citizens among us and in unidentified anonymity<sup>13</sup>. No sections of the

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School of Law Paper No. 402/2021, Washington University Law Review. Forthcoming. Available <https://ssrn.com/abstract=3794884>; Albert **Ingold**, Meinungsmacht des Netzes, MMR 2020, p. 82 et seqq.; Burkhard **Jung**, Hass und Gewalt keinen Raum geben, DRiZ 2020, p. 95 et seqq.; Reto **Mantz**, Die Entwicklung des Internetrechts, NJW 2021, p. 516 et seqq.; Alexander Yoshi **Matsumoto**, Der strafprozessuale Zugriff auf Fahrzeugdaten gegenüber Automobilunternehmen vor dem Hintergrund des Regierungsentwurfs zum Gesetz gegen Rechtsextremismus und Hasskriminalität, RAW 2020, p. 118 et seqq.; Tobias **Reinbacher**, Die Beleidigung im Internet – Der Regierungsentwurf eines Gesetzes zur Bekämpfung des Rechtsextremismus und der Hasskriminalität, NK 2020, p. 186 et seqq.; Satiye **Salim**, Hate Speech or Free Speech? Grenzen der Meinungsfreiheit im gesellschaftlichen Wandel, KJ Kritische Justiz vol. 53 [2020], p. 256 et seqq.; Eric **Simon**, Das Gesetz zur Bekämpfung von Rechtsextremismus und Hasskriminalität, JR 2020, p. 599 et seqq.; Ronen **Steinke**, Gegen den Hass, DRiZ 2020, p. 342 et seqq.; Fabian **Virchow**, Medien als ‚Agenturen der Dekadenz‘ und als Kampfplatz für <deutsche Interessen>, in: Christoph Kopke/Wolfgang Kühne [ed.], Demokratie, Freiheit und Sicherheit, Festschrift zum 65. Geburtstag von Hans-Gerd Jahnke, Baden-Baden 2017, p. 221 et seqq.; Marc **Bohlen**, Der zivilrechtliche Auskunftsanspruch bei der Bekämpfung von Hass im Internet, NJW 2020, p. 1999 et seqq.; Martin **Wiacek**, Strafbarkeit rechts motivierter Cyberkriminalität in sozialen Netzwerken. Deutsches und Europäisches Strafprozessrecht und Polizeirecht Vol. 11, Baden-Baden 2019; Sven **Großmann**, Der Beleidigungstatbestand: Partielle Reform oder grundlegende Revision?, GA 2020, p. 546 – 563) has been submitted to the *Federal President* for promulgation according to article 82(1), 1<sup>st</sup> sentence of the German Basic Law of May 23<sup>rd</sup>, 1949 (BGBl., p. 1) – last amended by article 1 of the Act of November 15<sup>th</sup>, 2019 (BGBl. 2019 I, p. 1546), the German Constitution (hereinafter: BL). The Act is aimed at improving the investigation and securing of traffic data, but also at tightening substantive criminal law. However, prior to the adoption of the law by the legislative bodies, the *Federal Constitutional Court* had tightened the requirements for access to retained data by its decision of May 27<sup>th</sup>, 2020. This decision became public on July 17<sup>th</sup>, 2020 (case no 1 BvR 1873/13 and 1 BvR 2618/13 – retrieved from: [https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2020/05/rs20200527\\_1bvr187213.html](https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2020/05/rs20200527_1bvr187213.html)). Due to the requirements of the Constitutional Court, the *Federal President* had doubts about the substantive constitutionality of the legislative resolution before him and felt prevented from promulgating the law (Georg **Mascolo**/Ronen **Steinke**, Bedenken in Bellevue, in: Süddeutsche Zeitung no 216 of September 18<sup>th</sup>, 2020 p. 7; Wolfgang **Janisch**, Name, Anschrift, IP-Adresse, in: Süddeutsche Zeitung no 215 of September 17<sup>th</sup>, 2020 p. 5). The right of the *Federal President* to review the constitutionality of federal laws before they are enacted and promulgated is disputed among scholars (Fritz **Ossenbühl**, Verfahren der Gesetzgebung, in: Josef Isensee/Paul Kirchhoff [ed.], Handbuch des Staatsrechts der Bundesrepublik Deutschland, vol. 5: Rechtsquellen, Organisation, Finanzen, 3<sup>rd</sup> ed., Heidelberg 2007, p. 252 – 255; Torsten **Stein**, Der Bundespräsident als „pouvoir neutre“?, ZaöRV 69 [2009], p. 249 – 256; Stefanie **Berger**, Materielles Prüfungsrecht des Bundespräsidenten?, Zeitschrift für Parlamentsfragen vol. 2 [1971], p. 3 – 11; Joachim **Mewing**, Die Prüfungskompetenz des Bundespräsidenten bei der Gesetzesausfertigung, insbesondere bei teilmächtigen Gesetzen, Schriften zum Öffentlichen Recht vol. 333, Berlin 1977; Richard **Hopkins**, Inhalt und Reichweite bundespräsidialer Verfassungsmäßigkeitsprüfung im Gesetzgebungsverfahren, StudZR 2007, p. 437 – 463; Walther Maximilian **Pohl**, Die Prüfungskompetenz des Bundespräsidenten bei der Ausfertigung von Gesetzen, Verfassungsrecht in Forschung und Praxis vol. 2, Hamburg 2001). In the meantime, the *Federal President* and the *Federal Government* have agreed on re-drafting the Act and to submit the new draft to both Houses of Parliament for adoption (Wolfgang **Jänisch**, Das könnt ihr besser. Bundespräsident lässt Gesetz zu „Hate Speech“ überarbeiten, in: Süddeutsche Zeitung no 233 of October 9<sup>th</sup>, 2020, p. 5). On March 30<sup>th</sup>, 2021, after the two Houses had adopted necessary amendments the *Federal President* signed and promulgated the Act (Press Release of the Federal President’s Office of March 30<sup>th</sup>, 2021 and Süddeutsche Zeitung of March 31<sup>st</sup>, 2021, no 75 p. 6), which is now to enter into force.

<sup>13</sup> See Kai **Kaspar**/Lars **Gräßer**/Aycha **Riffi** (ed.), Online Hate Speech. Perspektiven auf eine neue Form des Hasses, Schriftenreihe zur digitalen Gesellschaft NRW, vol. 4, Düsseldorf/München 2017.

society are immune to right-wing extremist ideas. Even security-relevant professional groups, such as the military or the Police<sup>14</sup>, make negative headlines<sup>15</sup>. Other countries share similar experiences<sup>16</sup>.

Hate speech and extreme right-wing ideology in all its forms have become an alarming social phenomenon in Europe<sup>17</sup> demanding our full attention. A "laissez-faire" attitude is anything but appropriate. If we let our attention falter, we should not be surprised that we figuratively hold out the words "Mene mene tekel u-par-sim" (מנא, מנא, תקל, ופרסינ)<sup>18</sup>. Babylon's King Belshazzar and the divine warnings to him are perhaps far away in time. Closer to us is the history of the 20<sup>th</sup> century, in which, at the end of the 1920s at the latest, there were signs of coming disaster, which the democratic forces either did not understand or did simply neglect<sup>19</sup>. The

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<sup>14</sup> Christian **Wernicke**, Rechtsextremes Netzwerk bei der Polizei in NRW, *Süddeutsche Zeitung* no 215 of September 17<sup>th</sup>, 2020, p. 5; Christian **Wernicke**, „Das trifft die Polizei bis ins Mark“, in: *Süddeutsche Zeitung* no 215 of September 17<sup>th</sup>, 2020, p. 1; Christian **Wernicke**, Wo die Geduld endet, in: *Süddeutsche Zeitung* no 216 of September 18<sup>th</sup>, 2020, p. 2; Benedikt **Müller-Arnold**, Neue Kultur gesucht, in: *Süddeutsche Zeitung* no 216 of September 18<sup>th</sup>, 2020, p. 2; Jana **Stegemann**, 100 rechte Verdachtsfälle bei NRW-Polizei, in: *Süddeutsche Zeitung* no 222 of September 25<sup>th</sup>, 2020, p. 1: Police officers of the State Police of North Rhine-Westphalia had founded a private WhatsApp group and used this forum in order to send anti-Semitic, neo-Nazi and other news from the extreme right-wing spectrum to group members. Most of the group members behaved passively and "only" received the criminally relevant news and pictures. However, they remained silent for years and failed to report the incidents to their superiors. All 30 officials were suspended from duty with immediate effect. Criminal and disciplinary proceedings are still ongoing. Their aim is to remove all officials from service. The incident in the police district of Mülheim/Ruhr is unfortunately not an isolated incident but represents the sad culmination of a worrying gain of knowledge in the security sector in recent years (see further **Deutsche Presseagentur**, "Speerspitze" gegen rechts, in: *Süddeutsche Zeitung* no 223 of September 26<sup>th</sup>/27<sup>th</sup>, 2020, p. 7; **Deutsche Presseagentur**, Mit fremden Stimmen, in: *Süddeutsche Zeitung* no 223 of September 26<sup>th</sup>/27<sup>th</sup>, 2020, p. 6; **Bundesamt für Verfassungsschutz**, Rechtsextremismus in Sicherheitsbehörden. Lagebericht, Köln, September 2020.

<sup>15</sup> With view on racial discrimination and US policing see Christian **Ruh**, Antidiskriminierung und Racial Profiling, *DRiZ* 2020, p. 246.

<sup>16</sup> Cf. David **Bromell**, After Christchurch: Hate, harm and the limits of censorship, in: Institute for Governance and Policy Studies, Working Paper 21/05, March 2021, Wellington/New Zealand.

<sup>17</sup> With view on the Europe-wide networking of extreme right-wingers see Florian **Flade**/Georg **Mascolo**, Grenzüberschreitende Hetze, in: *Süddeutsche Zeitung* no 163 of July 17<sup>th</sup>, 2020, p. 7; Michael **Minkenberg**, Die europäische radikale Rechte und Fremdenfeindlichkeit in West und Ost: Trends, Muster und Herausforderungen, in: Ralf Melzer/Sebastian Serafin (ed.), *Rechtsextremismus in Europa. Länderanalysen, Gegenstrategien und arbeitsmarktorientierte Ausstiegsarbeit*, Friedrich-Ebert-Stiftung Forum Berlin, Berlin 2013, p. 9 -38; Britta **Schellenberg**, *ibid.*, p. 39 – 78, Vassiliki **Georgiadou**, *ibid.*, p. 79 – 106; Roberto **Chiarini**, *ibid.*, p. 107 – 138; Riccardo **Marchi**, *ibid.*, p. 139 – 164; Rafal **Pankowski**/Marcin **Kornak**, *ibid.*, p. 165 – 180; Radu **Cinpoes**, *ibid.*, p. 181 – 212; Mridula Ghosh, *ibid.*, p. 213 – 246; András Biró **Nagy**/Tamás **Boros**/Zoltán **Vasali**, *ibid.*, p. 247 – 272; Nora **Langenbacher**/Britta **Schellenberg** (ed.), *Europa auf dem „rechten“ Weg? Rechtsextremismus und Rechtspopulismus in Europa*, Friedrich-Ebert-Stiftung, Berlin 2011; Alexander **Häusler**/Michael **Fehrenschild**, *Faschismus in Geschichte und Gegenwart. Ein vergleichender Überblick über die Tauglichkeit eines umstrittenen Begriffs*. Erarbeitet vom Forschungsschwerpunkt Rechtsextremismus/Neonazismus der Hochschule Düsseldorf (FORENA), ed. by Rosa-Luxemburg-Stiftung, Berlin 2020. See further with respect to Corona and violent developments in Italy Oliver **Meiler**, Ende der Harmonie, in: *Süddeutsche Zeitung* no 249 of October 28<sup>th</sup>, 2020, p. 5.

<sup>18</sup> **Daniel** 5: Counted and weighed, but perceived as too light (the prophecy of the fall of the Babylonian Empire and the death of its King Belshazzar).

<sup>19</sup> Doris **Liebscher**/Kristin **Pietzyk**/Sergey **Lagodinsky**/Benjamin **Steinitz**, Antisemitismus im Spiegel des Rechts, *NJOZ* 2020, p. 897 et seqq. with regards to the current situation.

social and economic circumstances in those days surrounding the rise of fascism<sup>20</sup> might have been different from nowadays. However, it was the ignorance, negligence and missing vigilance of democratic forces, which drove Europe into the abyss of the Second World War<sup>21</sup>. „*Principiis obsta. Sero medicina parata, cum mala per longas convaluere moras*“<sup>22</sup>.

The Federal Government of Germany has understood the warning and initiated a package of amendments to the German Criminal Code in order to better prosecuting such hate speeches. The German Parliament adopted the package and the amendments have entered into force on April 1<sup>st</sup>, 2021. We only can hope that the amendments stop sawing off the supporting beam of democracy<sup>23</sup>. Because: *Constant dripping wears away the stone*.

## **Respective Provisions of the German Criminal Code (= StGB) with Short Comments**

### **Principles of Sentencing (§ 46)**

*(1) The culpability of the offender is the basis for the assessment of the penalty. The effects that the punishment is expected to have on the offender's*

*future life of the offender in society shall be taken into account.*

*(2) In sentencing, the court shall weigh the circumstances that speak for and against the offender against each other. In this context, the following shall be taken into consideration:*

*the motives and aims of the perpetrator, in particular racist, xenophobic, antisemitic or other or other inhumane ones,*

*the attitude that speaks from the act and the will expended in the act,*

*the degree of breach of duty,*

*the manner in which the act was carried out and its consequences,*

*the previous life of the offender, his personal and economic circumstances, and*

*his conduct after the offence, in particular his efforts to repair the damage, as well as the efforts of the offender to*

*the offender's efforts to reach a settlement with the injured party.*

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<sup>20</sup> Reinhard **Kühnl**, *Der deutsche Faschismus in Quellen und Dokumenten*, 4<sup>th</sup> ed., Köln 1979, p. 85 et seq.; Ernst **Nolte**, *Die faschistischen Bewegungen. Die Krise des liberalen Systems und die Entwicklung der Faschisten*, 3<sup>rd</sup> ed., München 1971, p. 49 et seq.

<sup>21</sup> Best demonstrated for Germany by Philipp **Austermann**, *Der Weimarer Reichstag. Die schleichende Ausschaltung, Entmachtung und Zerstörung eines Parlaments*, Köln 2020, p. 98 et seq.

<sup>22</sup> Publius **Ovidius** Naso (\* March 20<sup>th</sup>, 43 BC in Sulmo; † probably 17 AC. in Tomis), *Remedia Amoris*. 91: "Resist the beginnings! Too late the medicine is prepared when the evils are strengthened by long hesitation." Carl **Severing**, the then Reich Minister of the Interior (SPD), made a pugnacious statement on the occasion of the tenth anniversary of the constitution day of the Weimar Republic on August 11<sup>th</sup>, 1929: "The German people's state would be bogged down with a nation of sleepyheads. ... Practice, resist, fight!" (*Deutsche Einheit – Deutsche Freiheit. Gedenkbuch der Reichsregierung zum 10. Verfassungstag 11. August 1929*, Berlin 1929, p. 159, 166, 220 et seq.).

<sup>23</sup> Ernst **Nolte**, *Die faschistischen Bewegungen. Die Krise des liberalen Systems und die Entwicklung der Faschisten*, München 1966.

*(3) Circumstances that are already features of the statutory offence may not be taken into account.*

The above-mentioned legislative package introduced the anti-Semitism of the act or the attitude of the perpetrator as a now explicitly mentioned sentencing factor in § 46 StGB. Whether its explicit mention was actually necessary can be questioned. After all, the attitude and the xenophobic and anti-minority attitude were already included in the Criminal Code before. However, it can be expected that naming this factor will make it easier for judges to justify their decisions. The explanatory memorandum to the law states: For the interpretation of the term "anti-Semitic", existing definitions and explanations of terms can be used. In particular, the definition by the Independent Expert Group on Anti-Semitism can serve as a point of reference. According to this, anti-Semitism is defined as "a collective term for all attitudes and behaviours that ascribe negative characteristics to individuals, groups or institutions perceived as Jews on the basis of this affiliation. Such a case exists in particular when the aversion against a Jewish person results from his or her assignment to the Jewish religious group. For guidance, reference can also be made to the working definition used by the International Holocaust Remembrance Alliance (IRHA), which was noted by the Federal Cabinet on 20 September 2017 and recommended to be taken into account in school and adult education as well as in training in the areas of justice and the executive. ... It reads: "Anti-Semitism is a certain perception of Jews, which can be expressed as hatred towards Jews. Anti-Semitism is directed in word and deed against Jewish and non-Jewish individuals and/or their property, as well as against Jewish communal institutions and religious bodies. ... In the explanations to this definition, which also gives some examples for illustration, there is also a clarifying statement on anti-Semitic offences. Insofar as offences are not already determined as such by the law to be anti-Semitic offences (for example, in some countries the denial of the Holocaust or the dissemination of anti-Semitic materials), according to this, offences are anti-Semitic "if the targets of attack, be they persons or objects - such as buildings, schools, places of worship and cemeteries - are chosen because they are Jewish, perceived as such or associated with Jews". The characteristic feature is therefore - as with other motives of "hate and prejudice crime" - group-related misanthropy, in which the supposed otherness of a group of people is misused as a justification for violating the human dignity of the victims. .... The background of the crime is less personal, situational motives, but rather the overarching motivation of exclusion, oppression and discrimination of an entire group or community as a result of dislike, prejudice or "hate". ...

## **Dissemination of propaganda material of unconstitutional organisations (§ 86)**

*(1) Whoever disseminates in Germany or produces, stocks, imports or exports or makes publicly available through data storage media for dissemination in Germany or abroad the propaganda material*

*1. of a political party which has been declared unconstitutional by the Federal Constitutional Court or a political party or organisation which has been held by final decision to be a surrogate organisation of such a party,*

*2. of an organisation which has been banned by final decision because it is directed against the constitutional order or against the concept of international understanding or which has been held by final decision to be a surrogate organisation of such a banned organisation,*

*3. of a government, organisation or institution outside the territorial scope of this statute which is actively pursuing the objectives of one of the political parties or organisations referred to in nos. 1 and 2 or*

*4. propaganda material the content of which is intended to further the activities of a former National Socialist organisation incurs a penalty of imprisonment for a term not exceeding three years or a fine.*

*(2) Propaganda material within the meaning of subsection (1) is only material (§ 11 (3)) whose content is directed against the free democratic basic order or the concept of international understanding.*

*(3) Subsection (1) does not apply if the propaganda material or the act serves civic information, to prevent unconstitutional activities, to promote the arts or science, research or teaching, reporting about current or historical events, or similar purposes.*

*(4) If the degree of guilt is minor, the court may dispense with imposing a penalty under this provision.*

## **Use of symbols of unconstitutional organisations (§ 86a)**

*(1) Whoever*

*1. disseminates the symbols of one of the political parties or organisations designated in § 86(1) nos. 1, 2 and 4 in Germany or uses them publicly, in a meeting or in material (§ 11(3)) disseminated by themselves or*

*2. produces, stocks, imports or exports objects which depict or contain such symbols for dissemination or use in Germany or abroad in a manner referred to in no. 1 incurs a penalty of imprisonment for a term not exceeding three years or a fine.*

*(2) Symbols within the meaning of subsection (1) are, in particular, flags, insignia, uniforms and their parts, slogans and forms of greeting. Symbols which are so similar as to be mistaken for those referred to in sentence 1 are deemed to be equivalent to them.*

*(3) § 86(3) and (4) applies accordingly*

The provisions of §§ 86, 86a StGB owe their origin to the coming to terms with National Socialism and its organisations, first and foremost the NSDAP itself and secondly SS, as well as to the bans on organisations imposed by the Allies after 8 May 1945 against the NSDAP and its subdivisions, which the Allies rightly classified as criminal. However, the regulations are not limited to National Socialist-influenced behaviour, even though they have not lost their significance to

this day. With right-wing extremism spreading not only in Germany, which in turn does not deny its closeness to Germany's Nazi past even outside of Germany, it is to be feared that the importance of the regulations in this area, especially of § 86a StGB, will increase again. However, the provisions go further; they must also be seen in the context of § 84 StGB, which criminalises the continuation of a party that the Federal Constitutional Court has declared unconstitutional or a party that the Federal Constitutional Court has determined to be a substitute organisation of a banned party. It may serve as an explanation that political parties in Germany are privileged in many respects. They can only be banned as unconstitutional by the government, but only - after a very elaborate procedure, by the way - by the Federal Constitutional Court. This has happened in two cases in Germany. In 1952, the Federal Constitutional Court banned the Socialist Reich Party, founded in 1949, which had openly succeeded the National Socialists, followed in 1956 by the banning of the Communist Party of Germany. This was followed by attempts to have the National Democratic Party of Germany banned by the Federal Constitutional Court. In the last NPD case, the Federal Constitutional Court refrained from a ban because it considered the NPD so - politically - insignificant that a ban was no longer pronounced. In terms of content, however, the court found that the party was unconstitutional. As a result, the party financing law was amended, with the consequence that state subsidies for the NPD ceased to exist. The party fell into insignificance.

In addition to banned parties, §§ 86; 86a StGB also apply to associations which the Federal Minister of the Interior or a Minister of the Interior of the Länder has declared to be banned on the basis of provisions of the Federal Associations Act. These bans have been issued in large numbers. They concern associations on the extreme left as well as on the extreme right of the spectrum. A prominent example, which is certainly also known in Central Asia, should be cited, namely the ban of the *Partiye Karkerêu Kurdistanê* (PKK), which never appeared as a party in Germany and is also listed as a terrorist organisation. It is not a criminal offence in Germany to demonstrate for the goals of a liberated Kurdistan. However, it is a punishable offence if the demonstrators wave the flags of the PKK and wear its symbols as badges on their clothes.

If one looks at the individual cases that occur, one is struck by their right-wing bias. SS symbols are tattooed on the naked skin and shown while bathing at the lake. T-shirts with Nazi slogans are worn in narrow-minded nostalgia. Swastikas are smeared on walls. What foreign visitors to Germany do not bring with them is the awareness that Nazi history is largely a taboo zone for German criminal

law. With advanced alcohol consumption, these foreign visitors then shout "Sieg Heil!" while raising their right hand in the air for the "German salute". The contact with the police officers is sobering for them. But Germans often forget themselves too. The fact that SS memorabilia is not always freely available is no wonder given the historical oblivion of many contemporaries. All this can be subsumed under § 86a StGB.

It is obvious that the offence variants of § 86a StGB can collide with freedom of opinion in individual cases. SS uniforms play a role in theatres as a means of alienation, so that freedom of art under Article 5(3) GG can also be affected. Here, too, the circumstances of the individual case are the decisive ones. In any case, plays with alienating Nazi symbols have not given the public prosecutor cause to intervene in recent decades. This is because the sphere of influence of the art must be taken into consideration. Another, namely that of good taste, is whether such alienating means must necessarily be used. However, the artist alone is responsible for this at first hand. It is true that § 86a StGB does not require an "evil intention or malicious intent". As a rule, the contextual circumstances already objectively reveal what the perpetrator is trying to achieve with the use of the symbols.

### **Defamation of the Federal President (§ 90)**

*(1) Whoever vilifies the Federal President in public, at a meeting or by distributing publications shall be punished with imprisonment from three months to five years.*

*(2) In less serious cases, the court may mitigate the penalty at its discretion if the requirements of § 188 StGB (= defamation and slander against persons in political life) are not met.*

*(3) The penalty is imprisonment from six months to five years if the act is defamation or if the perpetrator, through the act, intentionally promotes efforts against the existence of the Federal Republic of Germany or against constitutional principles.*

The legal value protected by § 90 StGB is the office and the person of the Federal President, but only during his term of office<sup>24</sup>. According to the conception GG, the Federal President is a head of state who is largely limited to representational duties and generally plays no role in the political events of the Federal Republic of Germany. As a symbol of the state - without political possibilities of a counter-reaction - the Federal President is particularly vulnerable. Thus, it can also be said that any unjustified attack on the personal honor of the Federal President<sup>25</sup> also

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<sup>24</sup>BGHSt 16, 338

<sup>25</sup> BGHSt 11, 13

impairs him in his official effectiveness<sup>26</sup>. By disparagement is meant particularly gross violations of the honor of the Federal President or a particularly gross disregard for his office. In the less serious cases, it should be noted that criminal liability under the general provisions of §§ 185 - 187 StGB must then also be considered.

The provision does not have much practical significance. This may be due to the effectiveness of most previous and of the current Federal Presidents, who fulfilled their office in such a way that they enjoyed respect among the population. They are and were viewed quite positively; criticism of their conduct of office is virtually imperceptible. Compared with other countries, everyday political life in the Federal Republic of Germany is rather quiet; some even consider it boring. If at all, the head of government is the focus of public criticism, which is sometimes very unsavory. Moreover, the crime of denigrating the Federal President can only be prosecuted with his authorization (§ 90(4) StGB). Presidents would be well advised to make only restrained use of this authorization. After all, no Federal President attaches any value to reporting from the courtrooms of a district court if violations of his personal honor or the dignity of his office are being tried there. At the end of these brief considerations on § 90 StGB, it must not be overlooked that § 90 StGB constitutes special criminal law. § 90 StGB might collide with freedom of opinion and press according to Article 5(1) GG.

### **Disparagement of state and denigration of symbols (§ 90a)**

*(1) Whoever publicly, in a meeting or by disseminating material (section 11 (3)) 1. uses abusive language against or maliciously disparages the Federal Republic of Germany or one of its Länder or its constitutional order or 2. denigrates the colours, flag, coat of arms or the anthem of the Federal Republic of Germany or one of its Länder incurs a penalty of imprisonment for a term not exceeding three years or a fine.*

*(2) Whoever removes, destroys, damages, renders unusable or defaces, or commits defamatory mischief on a flag of the Federal Republic of Germany or of one of its Länder which is on public display or a national emblem which has been mounted in a public place by an authority of the Federal Republic of Germany or one of its Länder incurs the same penalty. The attempt is punishable.*

*(3) The penalty is imprisonment for a term not exceeding five years or a fine if the offender, by committing the act, intentionally supports activities directed against the continued existence of the Federal Republic of Germany or against its constitutional principles.*

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<sup>26</sup> Mark **Steinsiek**, Leipziger Kommentar zum Strafgesetzbuch, Vol. 7, 7<sup>th</sup> ed., Berlin 2021, § 90 margin. 1; Detlev **Steinberg-Lieben**, Schönke-Schröder, Strafgesetzbuch Kommentar, 30<sup>th</sup> ed., München 2019, § 90 margin. 2; Thomas **Fischer**, Strafgesetzbuch, 68<sup>th</sup> ed., München 2021, § 90 margin. 2

This regulation is constitutional<sup>27</sup>. In particular, it infringes neither freedom of opinion and freedom of the press (Article 5 (1) GG) nor freedom of the arts (Article 5 (3) GG)<sup>28</sup>. It is an abstract offence of endangerment, which has the protection of the free democratic basic order in mind. The offence must therefore be suited to cause such a threat. Insofar as criticism is levelled at the provision, it must be borne in mind that an unresponsive acceptance of the slurs can, at least in part, be misunderstood as a weakness of the state that inhibits identification<sup>29</sup>. Intent is only required in the case of qualification according to § 90a para. 3 StGB<sup>30</sup>.

Insulting means a particularly crude expression of disrespect in terms of form or content. Mere criticism of authorities or the state is not sufficient. Name-calling can be found in factual assertions as well as in value judgements<sup>31</sup>. The reproduction of another's statements may also be sufficient if the offender indicates that he adopts the other's insult. The decisive factor is not what the offender intended to say, but how his statement must be objectively and reasonably understood. How the addressees understood the utterance is irrelevant<sup>32</sup>.

Disparagement is to be understood as any manifestation which makes the object of protection concerned appear unworthy and unworthy of the respect of the citizens of the state<sup>33</sup>. The call for a non-violent overthrow is said to be covered by Article 5(1) GG. The contempt must be malicious<sup>34</sup>.

Malice is present if, despite knowledge of the injustice, the defamation is motivated by a reprehensible motive<sup>35</sup>, namely if it is based on a hostile attitude<sup>36</sup>. The

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<sup>27</sup> BVerfGE 47, 232 f.; 92, 12; NJW 1999, p. 205

<sup>28</sup> Detlev **Steinberg-Lieben**, cit. loc., § 90a margin no. 1

<sup>29</sup> BGH, NSTZ 98, p. 408; **Schroeder**, JR 79, p. 80; Thomas **Würtenberger**, JR 1979, p. 313; Detlev **Steinberg-Lieben**, cit. loc., § 90a margin. 1; different view M. **Vormbaum**, Strafbare Nationalismus-Kritik? Zur Verunglimpfung staatlicher Symbole (§ 90a para. 1 no. 2 StGB), GA 16, p. 609 ff., who considers criminal liability to be rather counter-productive, but not necessary in terms of criminal policy.

<sup>30</sup> Detlev **Steinberg-Lieben**, cit. loc., § 90a margin 1.

<sup>31</sup> RGSt 65, 423

<sup>32</sup> RGSt 61, 155; Detlev **Steinberg-Lieben**, cit. loc., § 91a margin. 5

<sup>33</sup> BGHSt 3, 346; 7, 110; NSTZ 2003, p. 145; VGH Mannheim, NJW 1976, p. 2177 – characterization of the Bundestag election as a fraud manoeuvre.

<sup>34</sup> Detlev **Steinberg-Lieben**, cit. loc., § 91a margin. 7

<sup>35</sup> BayObLG, NJW 1953, 874

<sup>36</sup> BGH, NJW 1964, p. 1483; OLG Hamburg, NJW 1975, p. 1088; OLG Bremen, JR 1979, p. 120; Detlev **Steinberg-Lieben**, cit. loc., § 90a margin. 9

protection of the 3<sup>rd</sup> verse of the German national anthem is disputed<sup>37</sup> because neither the constitution nor any law mentions it. It goes back to a simple exchange of letters between Federal President Heuss and Federal Chancellor Adenauer and also has its tradition<sup>38</sup>. The isolated federal eagle is not equivalent to the official coat of arms of the Federal Republic<sup>39</sup>.

In contrast to BVerfG, NJW 2009, p. 908<sup>40</sup>, the designation of the federal flag as "black-red-mustard" also constitutes a denigration of the federal flag in view of the historical significance of the battle slogan of the opponents of the Weimar Republic and in its context of the glorification of the German Reich<sup>41</sup>.

The relationship between § 90a StGB, in particular, the freedom of art under Article 5(3) GG is problematic<sup>42</sup>. The freedom of art does not take precedence over the protection of the state and its symbols per se, since the unconditionally guaranteed freedom of art - even its own guarantee presupposes, like any other fundamental rights guarantee - a functioning state order that protects fundamental rights. It therefore finds its limits in the fundamental rights of third parties as well as in other concrete protected interests GG<sup>43</sup>. Artistic freedom is not a *carte blanche* for defamation. In individual cases, therefore, a balancing of interests is necessary, taking into account the particularities of artistic activity and the effect of works of art. The balance lies in the practical concordance of the conflicting legal interests<sup>44</sup>. The situation is similar in the case of the conflict between § 90a StGB and the freedom of opinion under Article 5(1) GG<sup>45</sup>. According to BVerfG, NJW 2009, p. 908, in the case of ambiguous statements, a conviction should only be handed down in the required consideration of the individual case if possible interpretations that do not lead to a conviction are ruled out on viable grounds. In the case of restrictions on freedom of opinion, it must always be borne in mind

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<sup>37</sup> BVerfGE 81, 298/308; **Hellenthal**, NJW 1988, p. 1294; Buscher, NVwZ 1997, p. 1064; **Gusy**, JZ 1990, p. 641; **Karpen/Hofer**, JZ 1992, p. 1065; **Allgauer**, MDR 1988, p. 1022; **Spendel**, JZ 1988, p. 744; OLG Hamm, GA 63, p. 28 (shouts of "Pfui" during the singing of the anthem).

<sup>38</sup> Contesting the legal protection **Hümmerich/Beucher**, NJW 1987, p. 3227). On the protection of state symbols in general: **Burkiczak**, Der straf- und ordnungswidrigkeitenrechtliche Schutz der deutschen Staatssymbole, JR 2005, p. 50 ff.

<sup>39</sup> OLG Frankfurt, NJW 1991, p. 117; see also Detlev **Steinberg-Lieben**, cit. loc., § 90a margin. 10

<sup>40</sup> with critical comment by **Preisner**, NJW 2009, p. 897, M. **Vornbaum**, JR 2009, p. 127

<sup>41</sup> Detlev **Steinberg-Lieben**, cit. loc., § 90a margin. 11; on the affixing of a swastika to the federal flag: BGH, NJW 1970, p. 1693

<sup>42</sup> BVerfGE 47, 231; 69, 269; BGHSt 19, 311; VGH Mannheim, NJW 1976, p. 2176; Volk, JR 1980, p. 294

<sup>43</sup> BVerfGE 30, 193; 81, 278, 298 with comment **Gusy**, JZ 1990, p. 640; **Hufen**, JuS 1991, p. 687; BGH, NSTZ 1998, p. 408

<sup>44</sup> BVerfGE 30, 191; 77, 253; 81, 278; 83, 143

<sup>45</sup> cf. BVerfG, NJW 2012, 1273; NJW 1985, p. 263; OLG Frankfurt, NJW 1984, p. 1128

that it has its democratic value because it has historically grown out of criticism of power<sup>46</sup>.

### **Anti-constitutional disparagement of constitutional organs (§ 90b)**

*(1) Whoever publicly, in a meeting or by disseminating material (section 11 (3)) disparages a constitutional organ, the Federal Government or the Federal Constitutional Court, the government or constitutional court of one of the Länder or one of its members in this capacity and in a manner which tarnishes the reputation of the state, and thereby intentionally supports activities directed against the continued existence of the Federal Republic of Germany or against its constitutional principles, incurs a penalty of imprisonment for a term of between three months and five year.*

*(2) The offence may be prosecuted only upon authorisation by the constitutional organ or member affected.*

What has been said about § 90a StGB applies here accordingly. It should be added that the object of protection of this provision is the highest state organs against subversion of the state. The personal honour of the members of these organs is not subject to § 90b StGB. Therefore, the offence must always be related to the official conduct of the affected organ or one of its members<sup>47</sup>.

### **Disparagement of symbols of the European Union (§ 90c)**

*(1) Whoever disparages the flag or the anthem of the European Union in public, at a meeting or by disseminating a content (§ 11(3)) shall be punished with imprisonment for not more than three years or a fine.*

*(2) Whoever removes, destroys, damages, renders unusable or unrecognisable a publicly displayed flag of the European Union or commits insulting mischief on it shall also be punished. The attempt is punishable.*

### **Violation of flags and emblems of foreign states (§ 104)**

*(1) Whoever removes, destroys, damages or renders unrecognisable a flag of a foreign state which is publicly displayed on the basis of legal provisions or according to recognised custom, or whoever removes, destroys, damages or renders unrecognisable a national emblem of such a state which has been publicly displayed by a recognised representation of that state, or whoever commits insulting mischief on it, shall be punished with imprisonment for not more than two years or with a fine. Likewise, whoever publicly destroys or damages the flag of a foreign state and thereby disparages it shall be punished. Flags that are confusingly similar to the flags mentioned in sentence 2 shall be deemed equivalent to the flags mentioned in sentence 2.*

*(2) The attempt is punishable.*

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<sup>46</sup> Detlev **Steinberg-Lieben**, cit. loc., § 90a margin. 19

<sup>47</sup> Detlev **Steinberg-Lieben**, cit. loc., § 90b margin. 1 and 2

### **Requirements for criminal prosecution (§ 104a)**

*Offences under this section shall only be prosecuted if the Federal Republic of Germany maintains diplomatic relations with the other state and a request for prosecution has been made by the foreign government.*

In terms of content, the criminal liability provisions under §§ 90c; 104 also belong to these previously described criminal provisions. Their relationship of tension to the freedoms of expression is not different, so that reference can be made to the explanations in this regard. It should be noted, however, that the criminal law protection of the symbols of foreign states is not discretionary, but is required by customary international law. With regard to the protection of the EU flag and anthem, the German legislator can be granted that the EU symbols are at least as worthy of protection as those of foreign states. On the other hand, there is a lack of protective regulations for other international organisations, although they appear to be worthy of protection in the same way. The burning of the UN flag, for example, is not punishable by German criminal law. On the other hand, the protection of international symbols must not become inflationary. The question then is, where do you start and where can you stop?

### **Instructions for committing serious violent offence endangering state (§ 91)**

*(1) Whoever*

*1. extols or gives another person access to material (section 11 (3)) whose content is of such a nature as to serve as instructions for committing a serious violent offence endangering the state (section 89a (1)) if the circumstances of its dissemination are conducive to promoting or encouraging others' preparedness to commit a serious violent offence endangering the state,*

*2. obtains material of the kind designated in no. 1 for the purpose of committing a serious violent offence endangering the state incurs a penalty of imprisonment for a term not exceeding three years or a fine.*

*(2) Subsection (1) no. 1 does not apply if*

*1. the act serves the purpose of civic information, protection against anti-constitutional activities, the arts and science, research or teaching, reporting about current or historical events, or similar purposes or*

*2. the act solely serves the performance of lawful professional or official duties.*

*(3) If the degree of guilt is minor, the court may dispense with imposing a penalty under this provision.*

This provision, which also affects the freedoms of communication, has its background in the widespread practice in extremist Islamist circles of disseminating detailed instructions for terrorist acts of violence. This includes instructions on how to build bombs as well as on the question of what maximum damage suicide attacks can achieve. The provision is internally related to § 89a StGB, which provides for criminal liability for preparing a serious act of violence endangering the

state. Through the provisions of §§ 89a and 91 StGB, the Federal Republic of Germany has also accomplished obligations under international law to criminalise certain forms of action that precede a terrorist act under §§ 129a and 129b StGB, but are not themselves covered by them. The shifting of punishability to the purely endangering area is not undisputed in the legal literature of the Federal Republic of Germany. However, it is not possible to go into this in depth within the framework set by the exchange of ideas for reasons of time. § 91 StGB refers to writings according to § 11(3) StGB, which also covers instructions on the internet. Thus, the reference to freedom of opinion and freedom of the press under Article 5(1) GG is already given. The dangerous instructions are in fact not a question of the area of freedom, but of their restrictions according to Art. 5(2) GG. The collisions between freedom of opinion and freedom of the press under Article 5(1) GG and criminal liability under § 91 StGB are largely defused by § 91(2) StGB, which expressly excludes certain professional activities from criminal liability. Moreover, it must not be forgotten in this context that the instructions in question are usually disseminated anonymously. In my opinion, anonymous opinions do not deserve protection under fundamental rights.

### **No Special Criminal Regime for Insults to Foreign Heads of State and Government (former § 103)**

Until January 1<sup>st</sup>, 2018, the German Criminal Code contained a provision under the heading "Insulting Organs and Representatives of Foreign States" in § 103, according to which anyone who insults a foreign head of state or who, with reference to their position, insults a member of a government who is in the country in an official capacity, or a head of a foreign diplomatic representation who is certified in the territory of the Federal Republic of Germany, is punished with imprisonment of up to three years or with a fine, and in the case of defamatory insult, with imprisonment of three months to five years. The provision was only applied under the conditions of § 104a StGB, namely if the Federal Republic of Germany maintained diplomatic relations with the other state, reciprocity was guaranteed, there was a request for prosecution by the foreign government, and the federal government granted authorization for prosecution. § 103 StGB was generally seen as a norm by which the Federal Republic of Germany protects its foreign relations

with foreign states in a special way<sup>48</sup>. The provision had only little practical significance in criminal law practice<sup>49</sup>. One has to go back very far into the history of the Federal Republic of Germany to be able to determine a relevance that was effective in public. In June 1967, the Iranian Shah Reza Pahlavi toured Europe and also paid a visit to Germany, which led to riots in Berlin. At the height of these riots in Berlin, which must be seen in the context of the general student protests in Germany at the end of the 1960s, a right-wing radical shot the student Benno Ohnesorg. In connection with the Shah's visit, the Iranian government demanded that any perpetrators also be prosecuted for anti-Shah statements. The German government at the time tried not to add fuel to the fire of the already heated situation and therefore tried to dissuade the Iranian government from making formal demands for prosecution. This was largely successful<sup>50</sup>. After that, the provision fell into a slumber, from which it was suddenly kissed awake in 2016. Turkish President *Recep Tayib Erdoğan* has a tendency to provoke foreign countries as well. For some time, Germany was also the focus of his provocations, which he never understood as such and against which the Turkish government always vehemently defended itself. Public perception in Germany, however, was quite different. In this heated German-Turkish situation in spring of 2016, the German satirist *Jan Böhm* published a satirical poem about *Recep Tayib Erdoğan*, which in my view was in bad taste, on German public television. This led to the government of the Republic of Turkey formally demanding that Jan Böhm be punished for insult under § 103 StGB. A public outcry went through Germany. Since the requirements of § 104a StGB were met, the German Federal Government granted the necessary authorization to prosecute. This in turn brought public criticism to German Chancellor Dr. Angela Merkel. However, I do not see what the German government could have done differently in the situation. To formally refuse to grant the authorization would have further strained relations between Berlin and NATO member Turkey. Burying one's head in the sand would certainly not have been a solution either. The criminal proceedings against Jan Böhm were later dropped by the locally responsible public prosecutor's office in Mainz in accordance with § 170(2) of the German Code of Criminal

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<sup>48</sup> Hans-Heinrich **Jescheck**, Straftaten gegen das Ausland, in: Siegfried Hohenleitner/Ludwig Lindner/Friedrich Nowakowski [Hrsg.], Festschrift für Theodor Rittler zu seinem 80. Geburtstag, Innsbruck 1957, p. 275; Gerhard **Simon**, Der Ehrenschutz ausländischer Staatsoberhäupter, Diplomaten und Staatssymbole im Lichte der Rechtsvergleichung, in: Hans Lüttger/Hermann Blei/Peter Hanau [Hrsg.], Festschrift für Ernst Heinitz zum 70. Geburtstag am 1. Januar 1972, Berlin 1972, 737; Hans **Lüttger**, Bemerkungen zu Methodik und Dogmatik des Strafschutzes für nichtdeutsche öffentliche Rechtsgüter, in Joachim Herrmann/Theo Vogler u. a. [Hrsg.], Festschrift für Hans-Heinrich Jescheck zum 70. Geburtstag, Berlin 1985, p. 121/130; Markus **Deiters**, in: Markus Thiel [ed.], Wehrhafte Demokratie. Beiträge zum Schutz der freiheitlichen demokratischen Grundordnung, Tübingen 2003, pp. 291, 293; Karl Lackner/Kristian **Kühl**, Strafgesetzbuch, Kommentar, 25<sup>th</sup> ed., München 2005, margin. 1 vor § 102

<sup>49</sup> Federal Government – BT-Ds 18/10980, S. 6

<sup>50</sup> BT-Ds 18/10980, S. 6

Procedure (StPO). The reasoning of the decision is not a legal bright spot, because the prosecution thought that they did not find sufficient evidence for Böhmermann having acted with intent - this for a satirist who also made fun of the alleged size of *Erdogan's* genitals in his tasteless poem! What the Turkish government certainly did not want to achieve with its demand for punishment against *Böhmermann* occurred after long discussions<sup>51</sup>, which were held under the heading: Abolish the punishability of *lèse majesté*!<sup>52</sup>: By Act of July 17<sup>th</sup>, 2017, § 103 StGB was deleted from the penal code (effective from January 1<sup>st</sup>, 2018)<sup>53</sup>. However, the repeal of § 103 StGB does not mean that foreign heads of state and of government as well as foreign ambassadors are now "fair game" in Germany. It is still possible to prosecute insults, defamation and slander to their detriment under §§ 185 to 188 StGB<sup>54</sup>.

### **Propaganda against the Bundeswehr (§ 109d)**

*Whoever, against his better knowledge, makes untrue or grossly distorted allegations of a factual nature, the dissemination of which is likely to interfere with the activities of the Bundeswehr, for the purpose of dissemination, or disseminates such allegations, knowing them to be untrue, in order to obstruct the Bundeswehr in the performance of its task in national defense, shall be punished by imprisonment for not more than five years or by a fine.*

At any rate, in peacetime the provision of § 109d StGB is practically meaningless<sup>55</sup>. In the case of defense, this may be different. The provision protects, on the one hand, the will of the population of the Federal Republic of Germany to defend itself and, as its basis, on the other hand, the ability of the Bundeswehr to function<sup>56</sup>. In the case of criminal provisions related to the defense capability of the Federal Republic of Germany, it is appropriate to look at predecessor provisions

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<sup>51</sup> cf. Helmut **Satzger**, Strafbare Beleidigung eines ausländischen Staatsoberhauptes durch politische Satire? – Was kann Deutschland aus dem Fall Böhmermann lernen?, JfT 2-4/2017, S. 707 – 716; Alexander **Thiele**, Erlaubte Schmähhkritik? Die verfassungsrechtliche Dimension der causa Jan Böhmermann, verfassungslog.de/erlaubte-Schmaehkritik-die-verfassungsrechtliche-dimension-der-cause-boehmermann of April 11<sup>th</sup>, 2016 – retrieved on May 5<sup>th</sup>, 2021; Alexander **Heinze**, Mehr Zynismus wagen! Aspekte der causa Böhmermann, HRJ 2016, S. 81 – 95; Wolfgang **Mitsch**, Zwischenruf: § 103 StGB – ist das noch Recht oder kann das weg?, KriPoZ 2016, S. 101 – 105; Luise **Winkler**, Zur Frage der Abschaffung des Straftatbestands der Beleidigung von Organen und Vertretern ausländischer Staaten (§ 103 StGB), Juli 2016 retrieved from: [https://www2.duisburg.de/micro2/europe\\_direct/m Medien/bindata/Zur\\_Frage\\_der\\_Abschaffung\\_des\\_103\\_StGB.pdf](https://www2.duisburg.de/micro2/europe_direct/m Medien/bindata/Zur_Frage_der_Abschaffung_des_103_StGB.pdf) on May 5<sup>th</sup>, 2021; Bernd **Heinrich**, Über die Entbehrlichkeit der Tatbestände der §§ 103, 353a StGB, ZStW 2017, S. 425 -432

<sup>52</sup> See §§ 94 – 104 Reichsstrafgesetzbuch of May 15<sup>th</sup>, 1871

<sup>53</sup> BGBl. 2017 I S. 2439; BT-Ds 18/10980 of January 25<sup>th</sup>, 2017: Draft Law on the Deletion of § 103 StGB

<sup>54</sup> BT-Ds 18/10980, S. 7 referring to International Law not requiring a special regime for insults of foreign Heads of State (**Kreß** in Münchner Kommentar zum Strafgesetzbuch, 2<sup>nd</sup> ed., München 2012, Vor §§ 102 ff., margin. 2 et seq.).

<sup>55</sup> Peter **Greiser**, Eine bedeutungslose Strafbestimmung, NJW 1973, p. 231; Thomas **Fischer**, cit. loc., § 109d margin. 1

<sup>56</sup> Albin **Eser**, in: Schönke/Schröder, Strafgesetzbuch Kommentar, 30<sup>th</sup> ed., München 2019, § 109d margin. 1 - 3

because of the experiences in the Third Reich. The Kriegssonderstrafrechts-Verordnung did contain provisions that can be found today - in a mitigated form - in §§ 109; 109a StGB and in §§ 16; 19 WStG. However, there is no model for § 109d StGB in the history of German criminal law<sup>57</sup>.

§ 109d of the German Criminal Code is about "intellectual sabotage". The provision is thus in tension with freedom of opinion and freedom of the press under Article 5(1) GG, the German constitution. The opinion of Thomas Fischer (op. cit.) that these guarantees of freedom are not affected at all because it follows from Article 5(2) GG that no one has carte blanche to deliberately disseminate untruths may be questioned. The fundamental rights under Article 5(1) GG leave it up to the individual and the individual press organ to decide in undisturbed freedom whether to participate in the public discourse with the truth or with the untruth. The risk they thereby take upon themselves is part of freedom and may result in the legal consequences from the limits of Article 5(2) GG. The broad concept of freedom of opinion and freedom of the press will have to be questioned in view of current developments on the Internet, where anonymous "fake news" is popularly disseminated<sup>58</sup>. Since Article 5(1) GG envisages open and public discourse as an essential element of liberal democracy, anonymous disseminators of news cannot enjoy constitutional protection. This is because in public discourse, one shows one's face; incidentally, there is no fundamental right to anonymity.

Taking an evaluative overall view of Section 109d StGB, it may be said: The requirements for punishability are so high that it is hardly conceivable that at some point - even in a state of defense - someone will be punished under this provision.

### **Public incitement to commit offences (§ 111)**

*(1) Whoever publicly, in a meeting or by disseminating material (section 11 (3)) incites the commission of an unlawful act incurs the same penalty as an abettor (section 26).*

*(2) If the incitement is unsuccessful, the penalty is imprisonment for a term not exceeding five years or a fine. The penalty may not be more severe than if the incitement had been successful (subsection (1)); section 49 (1) no. 2 applies.*

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<sup>57</sup> Albin Eser, cit. loc., § 109d margin 1 – 3

<sup>58</sup> Christoph Coen, in Leipziger Kommentar zum Strafgesetzbuch, vol. 7, 7<sup>th</sup> ed., Berlin 2021, § 109d margin. 3

The provision is a supplement to the provisions on participation in the offence (instigation and aiding and abetting). Its practical significance is low. The provision protects domestic peace, but also the legal interest that is called upon to be infringed<sup>59</sup>. It is an offence of utterance and covers the declaration directed at third parties to do or refrain from doing something that is punishable. The mere advocacy of criminal offences or the expressed sympathy for a certain criminal conduct is generally not sufficient<sup>60</sup>. The addressees of the incitement understood in this way do not have to be specific<sup>61</sup>. The act that is called upon does not have to be determined in the legal sense. It is sufficient that its punishability can also be derived from the circumstances referred to<sup>62</sup>. However, if the additionally referenced circumstances only occur after the request, they are irrelevant<sup>63</sup>. The contextual connections are, however, also important with regard to freedom of expression and freedom of the press, which are also relevant in § 111. In these cases, it must be determined whether the appeal contains legitimate criticism of certain conditions, such as the appeal to soldiers to refuse to obey orders because the participation of the Bundeswehr in foreign missions is considered to be contrary to international law<sup>64</sup>. However, whether Art. 5(1) and (3) GG can provide a general ground for justification is under disputed<sup>65</sup>.

### **Disturbing the public peace by threats of criminal offences (§ 126)**

*(1) Whoever, in a manner likely to disturb the public peace,*

- 1. one of the cases of breach of the peace referred to in § 125a sentence 2 nos. 1 to 4,*
- 2. an offence against sexual self-determination in the cases referred to in § 177, paragraphs 4 to 8, or § 178*
- 3. murder (§ 211), manslaughter (§ 212) or genocide (§ 6 of the International Criminal Code) or a crime against humanity (§ 7 of the International Criminal Code) or a war crime (§§ 8, 9, 10, 11 or 12 of the International Criminal Code),*
- 4. a dangerous bodily injury (§ 224) or a grievous bodily harm (§ 226),*
- 5. an offence against personal liberty in the cases of § 232, paragraph 3, sentence 2, § 232a, paragraph 3, 4 or 5, of § 232b subsection (3) or (4), of § 233a subsection (3) or (4), in each case insofar as they are crimes of §§ 234, 234a, 239a or 239b,*
- 6. a robbery or a predatory extortion (§§ 249 to 251 or 255),*
- 7. a crime of public danger in the cases of §§ 306 to 306c or 307 subsections 1 to 3, § 308 subsections 1 to 3, § 309a or 309b subsections 1 to 3, of § 309 subs. 1 to 4, of §§ 313, 314 or 315 subs. 3, of § 315b subs. 3, of § 316a subs. 1 or 3, of § 316c (1) or (3) or of § 318 (3) or (4),*  
*or*

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<sup>59</sup> Thomas **Fischer**, cit. loc., § 111 margin. 1 and 2

<sup>60</sup> Thomas **Fischer**, cit. loc., § 111 margin. 4

<sup>61</sup> Thomas **Fischer**, cit. loc., § 111 margin. 5

<sup>62</sup> E. g. burning fields planted with genetically modified vegetables Thomas **Fischer**, cit. loc., § 111 margin. 7 and 8.

<sup>63</sup> Thomas **Fischer**, cit. loc., § 111 margin. 8

<sup>64</sup> Thomas **Fischer**, cit. loc., § 111 margin. 9

<sup>65</sup> Thomas **Fischer**, cit. loc., § 111 margin. 14

8. an offence dangerous to the public in the cases of § 309(6), § 311(1), § 316b(1), § 317 subsection (1) or § 318 subsection (1)

*shall be punished with imprisonment for not more than three years or with a fine.*

*(2) Any person who, in a manner likely to disturb the public peace, pretends against his or her better knowledge that one of the unlawful acts referred to in paragraph 1 is about to take place.*

Not much of comment is needed on § 126 StGB. The offence is an offence of utterance, but in court reality tensions with freedom of opinion, freedom of the press and freedom of art are hardly conceivable, since the offences listed § 126 StGB are serious crimes, the mere threat of which is capable of disturbing the public peace. It is obvious that they must be prohibited according to the limits of freedom under Article 5(2) GG. The threat to the peace does not have to occur; with the type of offences threatened, their endangerment is usually obvious.

### **Incitement of masses (§ 130)**

*(1) Whoever, in a manner which is suitable for causing a disturbance of the public peace,*

*1. incites hatred against a national, racial, religious group or a group defined by their ethnic origin, against sections of the population or individuals on account of their belonging to one of the aforementioned groups or sections of the population, or calls for violent or arbitrary measures against them or 2. violates the human dignity of others by insulting, maliciously maligning or defaming one of the aforementioned groups, sections of the population or individuals on account of their belonging to one of the aforementioned groups or sections of the population incurs a penalty of imprisonment for a term of between three months and five years.*

*(2) Whoever*

*1. disseminates material (§ 11 (3)) or makes it available to the public, or offers, supplies or makes available to a person under 18 years of age material (§ 11 (3)) which*

*a) incites hatred against one of the groups referred to in subsection (1) no. 1, sections of the population or individuals on account of their belonging to one of the groups referred to in subsection (1) no. 1, or sections of the population,*

*b) calls for violent or arbitrary measures against one of the persons or bodies of persons referred to in letter (a) or c) attacks the human dignity of one of the persons or bodies of persons referred to in letter (a) by insulting, maliciously maligning or defaming them,*

*2. makes content referred to in no. 1 (a) to (c) available to a person under 18 years of age or to the public through broadcasting or telemedia services or*

*3. produces, purchases, supplies, stocks, offers, advertises or undertakes to import or export material (section 11 (3)) of such content referred to in no. 1 (a) to (c) in order to use it or parts obtained from it within the meaning of no. 1 or 2 or to facilitate such use by another incurs a penalty of imprisonment for a term not exceeding three years or a fine.*

*(3) Whoever publicly or in a meeting approves of, denies or downplays an act committed under the rule of National Socialism of the kind indicated in § 6(1) of the Code of Crimes against International Law in a manner which is suitable for causing a disturbance of the public peace incurs a penalty of imprisonment for a term not exceeding five years or a fine.*

*(4) Whoever publicly or in a meeting disturbs the public peace in a manner which violates the dignity of the victims by approving of, glorifying or justifying National Socialist tyranny and arbitrary rule incurs a penalty of imprisonment for a term not exceeding three years or a fine.*

*(5) Subsection (2) no. 1 and no. 3 also applies to material (§ 11 (3)) of such content referred to in subsections (3) and (4). Whoever makes content referred to in subsections (3) and (4) available to a person under 18 years of age or available to the public through broadcasting or telemedia services incurs the same penalty specified in subsection (2) no. 2.*

*(6) In the cases under subsection (2) nos. 1 and 2, also in conjunction with subsection (5), the attempt is punishable.*

*(7) In the cases under subsection (2), also in conjunction with subsection (5), and in the cases under subsections (3) and (4), § 86(3) applies accordingly.*

§ 130 StGB has a long history in the criminal law debate on inflammatory, subversive expressions of opinion, since the provision was originally directed against "incitement to class struggle" (RGSt 22, 293; 35, 96), and had its significance in the debate with social democracy, the trade unions and then, in the 1920s, with the German Communist Party and its subsidiary organisations. Especially after the October Revolution in Russia, it was thus a protective regulation against leftist revolutionary efforts and served to protect the constitutional order first of the Empire (directed against the Social Democracy, because the left-wing socialists had not yet organised themselves as a Communist Party) and then of the new democratic Weimar Republic, which in its early years had a hard time against left-wing extremist efforts. In the struggle against the then burgeoning National Socialism, the regulation did not play a similarly prominent role - a topic that is historically interesting but would go beyond the scope given here. After the Second World War, the provision was given a different objective, namely in the fight against anti-Semitic and neo-fascist aspirations. With the rise of right-wing extremism in Germany, which has become increasingly widespread since German reunification, the importance of applying the provision increased noticeably. This is evidenced by my own experience as a judge at the Bavarian Supreme Court, where appeal proceedings for convictions under section 130 StGB have increased to a remarkable extent. Among the contemporaries covered by § 130 StGB are also the notorious Holocaust deniers, who are not only noticeable in the organised right-wing scene. It must be made clear at this point that the fight against anti-Semitism (and other inhuman insults against minorities, such as the "German Turks", the "Gypsies") in Germany became the inner creed of the German Republic after 1945.

§ 130 StGB is by its nature an abstract endangerment offence. The offence does not have to have been committed. For example, the offence of insulting foreign states can cause alarm among the population living in Germany if this insult endangers the nationals of the insulted state living in Germany. This also indicates that the provision primarily aims to protect public peace in German society. If it is about the members of the attacked minorities, their human dignity is also protected at least indirectly<sup>66</sup>. Furthermore, the peaceful coexistence of peoples is

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<sup>66</sup> Thomas Fischer, cit. loc., § 130 margin. 2

also protected, not only because foreign members of the minorities are often affected by the inciting insults, but also because revanchist statements are often connected to the incitement - for example, when "the" Poles are described as inferior, who have appropriated "German soil".

Further remarks on this important provision of the German offence of utterance are omitted; its significance is clear from the facts of the case. It should only be noted that this core provision is not readily apparent to foreign visitors to Germany - not even in its meaning of application. Even in concentration camps, the observer often has to experience how carelessly visitors, including foreign visitors, express themselves there in a way that is relevant to the offence of § 130 StGB.

### **Instructions for committing criminal offences (§ 130a)**

*(1) Whoever disseminates or makes available to the public content (§ 11(3)) which is likely to serve as an instruction to commit an unlawful act referred to in § 126(1) and is intended to promote or arouse the willingness of others to commit such an act shall be liable to a custodial sentence not exceeding three years or to a monetary penalty.*

*(2) Similarly, anyone whoever*

*1. disseminates or makes available to the public any content (§ 11(3)) that is likely to serve as instruction for an unlawful act referred to in § 126(1); or*

*2. gives instructions in public or at a meeting to commit an unlawful act referred to in § 126(1), in order to promote or arouse the willingness of others to commit such an act.*

*(3) § 86(3) shall apply mutatis mutandis.*

### **Depictions of violence (§ 131)**

*(1) Whoever*

*1. takes material (§ 11 (3)) which describes cruel or otherwise inhuman acts of violence against humans or humanoid beings in a manner which glorifies or downplays such acts of violence or which represents the cruel or inhuman aspects of the event in a manner which violates human dignity and*

*a) disseminates or makes it available to the public,*

*b) offers, supplies or makes it available to a person under 18 years of age or*

*2. makes content referred to in no. 1 available through broadcasting or telemedia services to*

*a) a person under 18 years of age,*

*b) the public or 3. produces, obtains, supplies, stocks, offers, advertises or undertakes to import or export material (§ 11 (3)) of such content referred to in no. 1 in order to use it or parts obtained from it within the meaning of no. 1 (a) or (b), or no. 2, or to facilitate such use by another incurs a penalty of imprisonment for a term not exceeding one year or a fine. In the cases under sentence 1 no. 1 and no. 2, the attempt is punishable.*

*(2) Subsection (1) does not apply if the act serves the reporting about current or historical events.*

*(3) Subsection (1) sentence 1 no. 1 (b) and no. 2 (a) does not apply if it is the person having the duty of care and custody of another person who acts; this does not apply if the person having the duty of care and custody grossly breaches the duty of care and upbringing by offering, supplying or making available such material.*

In the cases of these regulations, there is not much to say. They are offences of utterance in the form of endangering offences, whereby in the case of § 131 StGB,

the protection of minors is also added as a legal interest particularly worthy of protection. Especially in the case of § 131 StGB, cases of tension with the freedom of the press and broadcasting as well as with artistic freedom are conceivable. Reporting by the press and radio on scenes of violence that are actually relevant is helped by § 131(2) StGB. They are expressly included from the criminal liability. Insofar as art processes violent scenes (in particular, sequences glorifying violence on film and the internet), adult consumers are free to consume them. Ultimately, this is a question of taste. However, the undisturbed development of children and adolescents is a constitutional value under Article 6 GG, which sets limits to artistic freedom under Article 5(3) GG.

### **Reward and approval of criminal offences (§ 140)**

*Whoever after the commitment or the attempt of offences referred to in § 138(1) no. 2 to 4 and 5, last alternative, in § 126(1) and pursuant § 176(3) or §§ 176a and 176b*

*1. rewards such a deed or*

*2. assents to them in a manner likely to disturb the public peace, publicly, in a meeting or by dissemination of a content (§ 11 subsection 3),*

*shall be liable to imprisonment not exceeding three years or to a fine.*

§ 140 No. 2 StGB is part of the above-mentioned legislative programme to combat hate crime. Previously, it was necessary that the offences had been committed when their reward was given. Now, the punishability is also directed towards the future and is designed as an abstract endangerment offence. It is now sufficient to endanger public peace by assenting to the offence, even if it has not yet been committed.

The official explanatory memorandum to the amendment states: According to § 140 StGB, the reward and approval of certain criminal offences is punishable under the current legal situation, provided that the offence to which the reward and approval relates has been committed or attempted in a punishable manner. The aim of the provision is to protect the general public from the creation of a psychological climate in which new offences of this kind can flourish. .... However, if the offence is one that has not yet been committed or attempted in a punishable manner, § 140 StGB is not applicable under the current legal situation. Cases of future offences are now covered, at least in part, by § 111 StGB, which criminalises public incitement to commit offences, and by § 241 StGB, which covers threats to commit a crime. However, the acts of commission, namely rewarding and approving on the one hand and threats and threatening on the other, are not congruent, resulting in unjustified gaps in punishability. This becomes clear in the phenomenon, which can be observed especially in social media, of users approving the commission of a future illegal act without the act being threatened in a sufficiently concrete manner. If, for example, a user of a social network expresses in a comment under a political paper by an author that the author "ought to be made a head shorter", this is today as a rule just as unpunishable as the approval of other users of this idea. This is because even a threat in the sense of § 241 StGB,

which requires that the perpetrator holds out the prospect of committing a crime dependent on his or her will, .... is usually not present in such cases. Nevertheless, even such approving statements are capable of considerably shaking the state of general legal certainty if they occur publicly, in a meeting or by distributing writings.

Therefore, the draft provides for detaching the offence of approving criminal offences from the requirement that the offence must have been committed or attempted in a punishable manner. This opens up the possibility that the approval of a catalogue offence listed in § 140 StGB can be covered by the offence even if it is a future offence. In this context, the perpetrator of the approval does not have to be aware of all the concrete circumstances of the approved catalogue offence. Rather, it should be sufficient if the perpetrator outlines the catalogue offence in its essential features without knowing the details of the catalogue offence and acts in the awareness that by his conduct he is approving a catalogue offence of a principal perpetrator he does not necessarily know. Approval can also be given by an endorsement of such an act, in particular by a manifestation of the utterer's consent, by which he morally supports the offender. For the offence of reward, on the other hand, the requirement that the offence must have been committed or attempted in a punishable manner is maintained, since according to the usual usage of the language, a reward can only be given for acts that have already been committed and a need to extend criminal liability in this respect is not apparent.

### **Revilement of religious faiths and religious and ideological communities (§ 166)**

*(1) Whoever publicly or by disseminating material (§ 11 (3)) reviles the religion or ideology of others in a manner which is suitable for causing a disturbance of the public peace incurs a penalty of imprisonment for a term not exceeding three years or a fine.*

*(2) Whoever publicly or by disseminating material (§ 11 (3)) reviles a church or other religious or ideological community in Germany or its institutions or customs in a manner which is suitable for causing a disturbance of the public peace incurs the same penalty.*

Before we take a closer look at § 166 StGB, a fundamental clarification is needed. Germany is shaped by its Christian traditions, but is nevertheless a secular state in which a state church does not exist (as it did until the revolution of 1918) (Article 140 GG in conjunction with Article 137(1) of the Constitution of 11 August 1919). The faith or non-faith of the individual believer is of no concern to the state. That is the basic statement of Article 4 GG. Frederick II of Prussia said in the Age of Enlightenment that everyone should be blessed according “to his own façon”. This is indeed state doctrine in Germany. However, it cannot be disregarded that there are reciprocal interrelations between the two large churches, which represent about 50% of the German population, and the religious communities on the one side and the state on the other side. The churches and the offi-

cially recognised religious communities (the Jews in Germany, the Islamic religious communities) administer themselves, their interests often overlap with those of the state, for example in the areas of social or medical care, school education, etc., so that there are many forms of cooperation. The fact that state funds are also used in the process is the almost logical consequence. However, the state keeps out of the content of the faith. They are the exclusive domain of the churches and the individual. Criminal provisions against blasphemy<sup>67</sup>, for example, are inconceivable in Germany under the rule GG<sup>68</sup>.

For the sake of clarification, however, it must also be added that the attitude of the state towards confessions and their representatives described in this way does not provide *carte blanche* for agitations if these are directed against the Federal Republic of Germany, its Länder and the constitutional order. The problem exists with all extremist denominations. The state cannot forbid the individuals who profess them to speak, and certainly not the thinking on which they are based. However, action against extremist associations can be taken with the means of the Associations Act. If they are banned, their assets are usually confiscated, which means that extremist preachers lose their places of practice. In the worst case, the only remedy for foreign agitators who invoke freedom of religion is expulsion under the Residence Act. If the preachers continue their (forbidden) agitations, they are liable to prosecution under § 85 StGB. It should not be concealed that religiously motivated extremist agitations grew after the events of the so-called Arab Spring in 2010/2011, when extreme Islamist preachers openly joined or sympathised with IS and misused places of worship to recruit followers for IS by calling on their listeners to join IS in the crisis areas. Thus, under certain circumstances, they fulfilled the offence of supporting a terrorist organisation or advertising for it according to § 129a(5) StGB.

The provision of § 166 StGB is controversial. It is seriously questioned whether it is still up-to-date under the auspices of state secularism. The fact that it privileges churches and confessional communities over other associations cannot be disputed<sup>69</sup>. Attempts to delete the provision<sup>70</sup> were unsuccessful, as were attempts

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<sup>67</sup> For the legal history of the blasphemy provision see Michael **Pawlik**, Der Strafgrund der Bekenntnisbeschimpfung, in: Michael Hettinger/Jan Zopfs/Thomas Hillenkamp [ed.], Festschrift für Wilfried Küper zum 70. Geburtstag, Heidelberg 2007, p. 411/416 et seqq.

<sup>68</sup> Thomas **Fischer**, cit. loc., § 166 margin. 1

<sup>69</sup> cf. Thomas **Fischer**, GA 89, pp. 445 et seq.

<sup>70</sup> cf. e.g. BT-Drs 13/2087

to extend the criminal liability by deleting the clause "suitability for disturbing the public peace"<sup>71</sup>.

The protected legal value of § 166 StGB is public peace in both alternatives. The provision is an endangering offence. The success of a disturbance of the peace does not have to have occurred<sup>72</sup>. The offence must therefore be capable of producing effects in the public sphere. Acts that lack such an effect are irrelevant. Discussions within the church, for example about heresies or false doctrines, are irrelevant for § 166 StGB. § Section 166 StGB and the Basic Law leave it to the communities concerned to resolve such conflicts with their own internal means (Article 140 GG in conjunction with Article 137 paragraph 3 of the Constitution of August 11<sup>th</sup>, 1919), even if such conflicts trigger public interest. The affectedness of the individual in his or her sense of faith also plays no role in § 166 StGB. Vilification of the Pope, which has occurred frequently in Germany's history since the Reformation in 1517, is basically acceptable and not a criminal offence. However, the discussion is treading a very fine line.

The Muhammad cartoons have triggered violent protests in countries of Islamic faith. This has not yet happened in Europe, although Muslims now number millions here too. It is difficult to judge whether this is due to the moderating influence of the Islamic religious community, which, while expressing its incomprehension of the cartoons, has on the other hand worked towards moderation. It is not at all reassuring that other European countries do not have a provision comparable to § 166 StGB. It is also not reassuring that protests against Muhammad cartoons break out regardless of the punishability.

However, the tension between § 166 StGB and the freedoms of Article 5 GG is thus drawn. The undeniable conflict between § 166 StGB, if one objectively affirms one of the acts of insult, can only be resolved by balancing freedom of opinion, freedom of the press and freedom of the arts under Article 5(1), (3) GG. In this consideration, it will be necessary to adjust the importance that religious communities still have in Germany, even if the numbers of their members are in decline and society is on the way to becoming more atheistic or indifferent. It will also have to be borne in mind here that not only the religious communities but

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<sup>71</sup> cf. Thomas **Fischer**, cit. loc., § 166 margin. 1

<sup>72</sup> Thomas **Fischer**, cit. loc.; § 166 margin. 2

also the individuals are particularly vulnerable in their practice of faith. For neither the affected community nor the affected individual can return it in kind to the insulting perpetrator. In case of doubt, the denigrated contents of faith already stand in the way (Jesus' Sermon on the Mount: If you are hit on one cheek, turn the other cheek to the person hitting you!) The religious communities often refuse, also for political reasons, to get on the same level with the insulter. On the other hand, the importance of the freedoms mentioned will have to be weighed in the balance in a secular, democratic society. They are also characterised, among other things, by the fact that they have broken away from religious or religiously motivated paternalism, which characterised Christian Europe - whether Protestant or Roman Catholic - for centuries, often with great intolerance. The debate of opinions, which is so crucial for democracy, is non-violent according to constitutional ideas, but it cannot be required not to hurt. If we return to the Muhammad cartoons, the balance will, in case of doubt, be in favour of freedom of opinion, freedom of the press and freedom of art.

For people from countries with a perceived and lived Islamic influence, the result may be intolerable. The socio-cultural development there is different from that in Europe. Just as these countries do not want the different European or American (legal) culture to be imposed on them, countries of the European cultural sphere cannot accept that they are required to follow religious rules from a cultural sphere that is foreign to them. Respect for other cultural or religious ideas does not mean self-abandonment. In this respect, the differences will remain.

Another question that every individual, every press organ and every artist must answer for themselves was summed up by the Romans more than 2000 years ago: *Quidquid agis prudenter agas et respice finem!* When you act, act wisely and consider the end. Everyone who deals with religious content is called upon to consider whether certain insulting alienations are really necessary to achieve the goals they are pursuing. Less tastelessness would sometimes be more responsibility.

### **Insult (§ 185)**

*Insult is punishable by imprisonment for a term not exceeding one year or by a fine and, if the offence is committed in public, in a meeting, by dissemination of content (§ 11(3)) or by means of an assault by imprisonment not exceeding two years or a fine.*

### **Defamation (§ 186)**

*Whoever, in relation to another person, alleges or disseminates a fact which is intended to make that person contemptible or to disparage him or her in public opinion shall, unless the fact is demonstrably true, be liable to imprisonment for a term not exceeding one year or to a fine and, if the offence is committed in public, at a meeting or by dissemination of a content (section 11(3)), to imprisonment not exceeding two years or a fine.*

### **Libel (§ 187)**

*Whoever, against his better knowledge, asserts or disseminates an untrue fact in relation to another, which is likely to bring him into contempt or to disparage him in public opinion or to endanger his credit, shall be liable to a term of imprisonment not exceeding two years or to a fine, and, if the offence is committed in public, in a meeting or by disseminating a content (section 11, paragraph 3), with imprisonment for not more than five years or a fine.*

### **Insult, defamation and libel directed against persons in political life (§ 188)**

*(1) If an offence of insult (§ 185), of defamation (§ 186) or of libel (§ 187) is committed in public, in a meeting or by disseminating a content (§ 11(3)) against a person in the political life of the people for motives that are related to the person's position in public life, and if the offence is likely to make his or her public activities considerably more difficult, the penalty is imprisonment not exceeding three years or a fine. The political life of the people extends to the municipal level.*

*(2) Under the same conditions, defamation (§ 186) shall be punishable by imprisonment from three months up to five years, and libel (§ 187) shall be punishable by imprisonment for a term of six months to five years.*

§§ 185 - 187 StGB form the core provisions of the criminal law on utterances. They apply in particular to verbal slips in the personal-private sphere. However, it is a socially and criminally very worrying development that they are becoming increasingly important in the public sphere. This is where the hate problem described at the beginning becomes noticeable. Offences according to §§ 185 et seqq. StGB are part of everyday life in the criminal courts<sup>73</sup>. It should be noted in this context that their offences have been expanded by the reform package to combat hate speech, namely that attention is paid to the public dissemination of the incriminated content. As a rule, public includes the internet. If the offences are committed publicly, they are punishable with higher penalties. The offences are concerned with the protection of human respect, which is derived from human dignity (Art. 1(1) and (2) GG) and to which every human being is entitled. In the case of xenophobic statements, the perpetrators deliberately call into question precisely this anchoring of the right to respect in human dignity and attempt to exclude those affected from the legal circle of the holders of the right to respect.

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<sup>73</sup> It should be noted that the inhabitants of Germany are rather reluctant to file criminal charges. This applies in particular to the offences of utterance. Individuals are more likely to "swallow" the disrespect than to take the trouble to submit the annoying facts to the law enforcement authorities. The risk that the public prosecutor's office sees no particular public interest in prosecuting the reported offence and refers the person reporting the offence to private prosecution, where he or she must then appear as a private plaintiff with all the risks, also with regard to the costs, is also relatively high (Thomas **Fischer**, cit. loc., Vor §§ 185 - 200 margin. 6).

Regardless of the content of the statements, in my opinion it must always be examined whether it is sufficient for criminal liability under sections 185 et seq. StGB if this claim to respect is fundamentally called into question. In my opinion, this is already the point of criminal disrespect. In addition to the right to respect, §§ 186 and 187 StGB also protect against verbal disputes only being linked to true statements of fact. In this respect, the actual honesty of verbal disputes is also a protected legal interest. The bearer of the legal interests is the individual, also a deceased person because of the post-mortem protection of personality, but communities or collectives can also be violated in a criminally significant way by the offences of utterance if these communities can be sufficiently concretised in their individual composition. Whether the offender intended to affect all members of the collective is irrelevant. The determination of this concretisation is often enough a tightrope walk. Thus, the concretisability of insulting "the police" has been denied. If, on the other hand, the insult is directed against the police who were on duty on a certain day on the occasion of a certain event, concretisation is possible (for individual cases from the case law, Thomas Fischer, cit. loc. 10 - 12). There are - except for the special case of § 188 StGB - no particularly protected individuals or classes of particulars. The "insult to a public official", which used to be considered particularly despicable, no longer exists. Likewise, "family honour" is not a protected good, which also used to play a role if someone entered into sexual relations with a family member and the family rejected this or the perpetrator. Legal persons endowed with their own legal personality are also "capable of being insulted", even if their claim to respect cannot be traced back to the protection of human dignity. It finds its basis in other legal rights, such as creditworthiness or competitiveness. § Section 185 StGB can be realised by statements of fact as well as by value judgements. Contextual concomitants often play a decisive role in the necessary assessment of the facts. In Germany, for example, the correct form of address among people who do not know each other is "Sie". However, if someone uses the "Du" in certain situations towards a stranger, this can be an expression of contemptuous familiarity.

The offences under sections 185 - 187 StGB are committed by private individuals as well as by holders of press and broadcasting freedoms. Jurisprudence attempts to resolve the tension by balancing it out. Thus, one aspect is that public figures who position themselves in the public sphere are not without protection, but may have to pay the price for their "celebrity" if the tabloid press reports on private lives in an exaggerated manner, thus in the grey area between truth and untruth. Explicit vituperation is always insulting. However, defamation often occurs in disputes between private individuals and public authorities or companies. These often have a long history before the individual concerned derails with his verbal attacks. In such constellations, the perception of the justified or perceived justified insult can take away its defamatory character. An attacked judge, for example, does not have to allow himself to be called a "modern Roland Freisler" (Roland Freisler was the president of the Nazi People's Court and became notorious for his

inhumane show trials). However, those who are attacked in the public service are well advised to consider the criminal complaint required under section 194, paragraph 1, sentence 1 StGB, for example, under the aspects of who is the perpetrator (often psychologically conspicuous), what was the concrete insulting situation and what did the victim himself contribute to the occurrence of the situation. In ongoing proceedings, criminal charges are harmful anyway because they do not help but contribute to the final escalation. The balances between freedom of the press and broadcasting and impairments of the right to respect are similar. It is beyond the scope of this article to go into all the details. As far as the freedom of the press and art is concerned, the reference to § 193 StGB cannot be omitted. According to this, offences of utterance according to §§ 185 - 187 StGB can be exempt from punishment if the utterances were made to protect legitimate interests. An offending defense counsel protects the interests of his client in his closing speech and overreaches in his assessment of the criminal proceedings. In such a context, it becomes difficult to prove the offence, even if this defense lawyer distorts or misrepresents facts from the court proceedings. Nothing else applies to artistic freedom when facts are satirically bent to achieve the effect intended by the artist.

§ 188 StGB – as far as I know – was up to now without real practical relevance. The Criminal Law Amendment Package to Combat Hate Crime has reworded the provision and extended it to include elected officials at the municipal level. According to available criminal police findings, these are particularly affected by hate crime. It is therefore likely that § 188 StGB will have greater practical relevance in the future. The provision focuses its protection on the personal honour of the person concerned. These are particularly vulnerable because they are exposed, especially in community life. Indirectly, however, the provision also serves the functioning of municipal and other bodies<sup>74</sup>.

### **Threat (§ 241)**

*(1) Whoever threatens a person with the commission of an unlawful act against his or her sexual self-determination, physical integrity or personal liberty or against an object of significant value shall be liable to a penalty of imprisonment not exceeding one year or to a fine.*

*(2) Whoever threatens a person with the commission of a crime against him or her or a person close to him or her shall be liable to an imprisonment penalty not exceeding one year or to a fine.*

*(3) Same penalty is to be applied against any person who, against his or her better knowledge, deceives a person into believing that the commission of a crime against him or a person close to him is imminent.*

*(4) If the offence is committed in public, in a meeting or by disseminating a content (§ 11, subsection 3), the punishment in the cases of subsection 1 is an imprisonment sentence not exceeding two years or a fine, and in the cases of subsections (2) and (3), an imprisonment sentence not exceeding three years or a fine.*

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<sup>74</sup> Thomas **Fischer**, cit. loc., § 188 margin. 1

*(5) The provisions on the criminal complaint applicable to the offence threatened shall apply mutatis mutandis.*

The provision, which before the entry into force of the package of laws to combat hate crime already had individual legal peace and individual trust in legal certainty as its object of protection<sup>75</sup> has been extended by public forms of expression. The means of threat was previously the commission of a crime, i.e. a criminal offence which the law punishes with a custodial sentence of at least one year (§ 12(1) StGB). In this respect, too, criminal law protection has been expanded by the Hate Crime Prevention Act, because criminal police surveys in this respect have shown that threateners have expanded their threat potential, especially on the internet - with a preference for offences directed against the sexual self-determination of the victim or setting fire to cars or the like.

### **Final Remarks**

A compilation of over 30 pages on regulations of a foreign legal system with a completely different legal tradition is difficult to digest. I apologise for this. Conflicts between criminal law and civil liberties are prevalent and occur all over the world. In Germany, thanks to a very freedom-loving jurisprudence, they pose no real problem. Press and broadcasting operators do not like to take their conflicts to criminal courts, but rely on the legal protection offered by civil and administrative courts.

My personal concern revolves around the brutalisation of social mores and manners through the possibilities of the internet, where the often cowardly acting despisers of democracy bask in anonymity and collect the "likes" of their equally cowardly supporters like 10-year-old boys used to collect stamps. I am not interested in turning internet providers into private censors. That won't succeed in the long run, and as an internet user I don't want some equally anonymous company telling me what I can say and how I say it. The law to combat hate crime was overdue. However, its accomplishment can only be successful if police and prosecutors are strengthened accordingly. They have been given the procedural means to accomplish this in a second legislative package. Personally, nothing is more repulsive to me than the unspeakable stupidity that extremists of all provenance spread, and similarly stupid consumers absorb. If this continues unchecked, I may quote one of our great poets, Heinrich Heine, who once said: "When I think of Germany, I am deprived of sleep!"

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<sup>75</sup> Thomas **Fischer**, cit. loc., § 241 margin. 2