Federal Court of Justice (BGH) Convicts Foreigner for Internet Posted Incitement to Racial Hatred

Suggested Citation: *Federal Court of Justice (BGH) Convicts Foreigner for Internet Posted Incitement to Racial Hatred*, 2 German Law Journal (2001), *available at*
http://www.germanlawjournal.com/index.php?pageID=11&artID=67

A. Holocaust-Denial as Persecuted Crime in the Internet

[1] The case that the Federal Court of Justice (Bundesgerichtshof - BGH) recently had to decide, involved the applicability of German Criminal law with regard to the highly disputed matter of so-called "Holocaust-denial" (Section 130 German Criminal Code – GCC). The intricacies of the case before the Court were especially amplified by the fact that the "denial" had been published and distributed from an Australian Internet homepage and that the case was tried before a German Court. The defendant, an Australian national, born 1944 in Germany, moved to Australia in 1954, came back to Germany in the Seventies to study and formed in 1996 – together with other Australians - the "Adelaide Institute". The organization is openly dedicated to the promotion of revisionist ideas, and the defendant authored and published likewise material on the Holocaust since 1992. The *FCJ* affirmed the District Court's conviction of the defendant to imprisonment for 10 months. The conviction is based on three of the defendant's publications, the main thrust of which is to call the existence of gas chambers in Nazi concentration camps into question.

[2] The German Criminal Code incriminates the offence of Incitement to Racial Hatred or Violence ("Volksverhetzung", § 130 Strafgesetzbuch – StGB, enacted in 1960), an offence substantially revised in 1985 and in 1994, ultimately giving way to fines or imprisonments up to 5 years for the publicly expressed applause, denial or misrepresentation of Nazi crimes if the allegations are of the quality to endanger public peace or, else, imprisonment from 3 months up to 5 years in cases either incitement to hate or violence against parts of the population or in the case of attacking another's human dignity by degrading parts of the population. Most notably, the 1994 legislator, in a special section incriminating the act of downplaying, denying or ridiculing the particular crimes connected with the Holocaust (Section 130 para. 3 GCC), dropped the earlier requirement that the action lead to an attack on human dignity. This legislation, that was preceded by a likewise revision of Section 194 GCC (granting the authorities a right to prosecution of incitement cases without the need of the victim's complaint), took place in the aftermath of the 1990 German reunification and amidst a heightened public debate that was concerned with the very disturbing experience of racially motivated aggression and assaults against foreigners, mainly in the territory of the former German Democratic Republic. Another, yet closely connected issue arose from the "Deckert" decisions of the Landgericht (Regional Court) Mannheim and the Bundesgerichtshof.(1) Underlying this debate, undeniably, was not only the query of how to reckon with the difficulty to find adequate political and legal answers to these offenses, but this very difficulty clearly was connected to the growing awareness among West Germans that the time of remembering the transitory years after 1945 in West Germany might have come. These questions triggered an intensive debate all across the public and throughout the academic disciplines, and it is evident from the recent years that the debate carries on.(2) Indeed, besides many other particular legal issues, it seems highly questionable whether the criminal persecution and litigation of related cases can be successful without a close connection to another, particularly interdisciplinary, open and "public" exploration of the possibilities of political and historical acknowledgment and some form of possibly individual or collective remembrance.(3) While there has been, for some time now, a wide spread concern with Germany's historical heritage in the Humanities as well as among lawyers, it appears as if there is still a great need for information and communication. One focus of ongoing debates ought to be on the appropriateness of legal persecution of this past as there might possibly be other, alternative modes of dealing with issues of racism and nazism. Often enough, however, this debate is either confined to the boundaries of a specific discipline or, else, it is somewhat interdisciplinary but largely limited to a very academic circle.

B. Questions of Substance and of Procedure

[3] What makes the recent *FCJ*-case especially interesting, however, is the array of questions concerning both law of substance as well as issues of procedure. The Judges on the one hand had to illuminate whether the publications constituted an incitement to racial hatred and violence, a question which the Court seemingly had no great difficulty in affirming. More attention was given on the other hand to the question of how to account for the fact that the incriminated publications were distributed through the Internet. Therefore, the difficult issue before the Court was how to interpret those Sections of the GCC that deal with the principle of territoriality, i.e. whether the Code is applicable to crimes committed outside the German borders. The border transgressing quality of the Internet raises quite a number of intricacies as to the applicability of German Criminal law. Among others, the Internet raises the question of how to define the place where the crime is committed in accordance to Section 9 GCC when precisely these parameters of place and location appear to be in outright contradiction with the nature of the *world wide web*. The Court, drawing on a considerable amount of scholarship, held that there was applicability with respect to the effects of the web-

publication in German territory.

[4] Though this might reflect the Court's sensitivity to nature of the beast's, *i.e.* the particularity of the internet's quality with respect to fundamental principles in Criminal law, one might still ask whether the allusions made by the Court, *e.g.* to border-crossing environmental harm, are altogether very persuasive. Indeed, it must appear highly questionable to compare the spreading of gases or rays through *space* with the proliferation of opinions through the Net,. *i.e. cyberspace*.(4)

[5] Behind this lies the crucial question of how to appropriate different national orders of criminal law, especially when they express different incrimination policies, as is the case, for example, with the US-American and the German law of incitement to racial hatred.(5) The choice of one legal order to intervene and to persecute a crime committed in the *www* inevitably leads to a conflict of norms and values. This is amplified by the fact that this very conflict so much rejects the internet's unterritorial quality. Nevertheless, the case decided now by the *FCJ* can be seen as another step in the attempt to appropriate a legal order, that was designed and framed against the sociological and political background of the "nation state" and its corresponding sets of references, to the challenges of the internet.(6)

[6] The *FCJ* outlines the jurisprudence concerning incitement to racial hatred from a series of earlier seminal decisions up to the present.(7) These decisions dealt with cases of the so-called *Auschwitz-denial* in form of a simple lie or as a "qualified lie" connected with an attack on human dignity.(8) The cases involved oral or written accounts denying the existence of the gas chambers at Auschwitz and the destruction program executed by the Nazis against Jews and other persecuted parts of the population. The offence of *Auschwitz-denial* is given in cases in which verbal or written attacks on Jews not merely reflected a severe form of disrespect and dismissal but moreover show that they were meant to create a particularly hostile attitude towards Jews living in Germany.

[7] The *FCJ* finds the defendant guilty in this respect. By putting down members of the Jewish faith by denying their specific fate under Nazi Rule in Germany between 1933 and 1945, the defendant is found to be guilty under Section 130 para. 1 no. 1 and 2 and Section 130 para. 3 GCC. The Court finds the defendant's publications to be an attack on Jews` human dignity as they give prove of a particular quality of disrespect and degradation. The Court finds the defendant as having suggested that the "findings" made by him and others effectively proved that there were no gas chambers and that these findings supposedly reject accounts whereby the fate of Jews under the Nazi Rule had been a hopeless one. The defendant declared these findings to be triumphant devices for calling into question the alleged truthfulness of historical accounts and their possible misuse to discredit German people. Finally, the Court sees the defendant's allegations as an outright denial of historical crimes committed under Nazi Rule and as recognized by the German Criminal Code (in Section 220a para. 1 GCC).

[8] The *FCJ* raises the question whether there is room to apply the exclusion clause in Section 130 para. 5 GCC in connection with Section 86 para. 3 GCC. Under this provision, similar utterances may be excluded from criminal persecution if they are made within a specific project tied into scientific research of education. The *FCJ* rejects the applicability of this clause by holding that the publications do not fall under the constitutional protection of scientific findings, research or education. The *FCJ* also rejects a violation of the defendant's right of freedom of expression ("Free Speech"), as protected under Article 5 para. 1 of the German Basic Law, as the defendant's published allegations do not fall within the reach of protection under this constitutional provision.(9)

[9] The Court then has to answer the question whether a) the allegations made by the defendant were of the concrete quality to endanger peace (Section 130 para. 1 GCC) and b) whether this law also applied when these allegations are made in the internet, especially on a homepage established in Australia. The Court answers both questions in the affirmative.

[10] The Court first points to the quality of Section 130 GCC which must be understood as an "offence of *abstract-concrete endangerment*" [abstrakt-konkretes Gefährdungsdelikt]. For crimes in that category, the law demands that the publication or utterance of racial incitement are of the quality to endanger public peace in a concrete case. The Court rightly interprets this Section to be applicable even before any danger *per se* has occurred, because it suffices that the specific doing was apt to bring about this danger in a concrete manner.(10) There must be, in other words, *justified* and *concrete reasons* to fear that the verbal or written account will destabilize the trust into public legal peace ("öffentlicher Rechtsfrieden"). The Court finds these prerequisites to be met and therefore holds that the defendant's doings were consequently of the quality to endanger public peace. Looking at the internet and its reigning regime of access to information as the medium of communication used by the defendant, the Court holds that there was reason to believe that the defendant's utterances could easily have been received, read or downloaded in Germany.

[11] Obviously, access for German or other Internet-users to the information provided by the defendant, was not problematic. The Court underlines that the defendant - by "participating" in an ongoing debate about German history and the Nazi-crimes - intently addressed his publication to German readers. Thereby, the Court finds that the

defendant created a source of information that was of the quality to endanger the communal life between Jews and other groups of the population.

[12] The Court affirms the applicability of German Criminal Law to these acts of the defendant with respect to the GCC, which the Court finds to incriminate deeds violative of German law, even if committed in another country (Section 9 para. 1 var. 3 GCC). This norm reads:

§ 9 StGB Place of Offence
(1) An offence is committed at every place at which the offender acted (var. 1) or, in the case where the offender refrained from an action to which he was obligated, the place at which he should have acted (var. 2) or the place in which the action showed its effects or should have shown its effects in the offender's intention (var. 3).

(2) (...)

[13] The *FCJ* reconstructs the legislator's political will as having been driven by the idea to protect the political climate from offences that play down the weight and significance of the Nazi rule and the crimes committed thereunder. By incriminating actions of this kind, the legislator aimed at establishing a criminal offence already when these actions carried in them the potential to poison the political climate in Germany. The Court rejects a strong line of critique from lower Courts as well as from the academy with respect to the danger of blurring the boundaries between action and effects therefrom. The Court highlights the particular quality of Section 130 GCC which, in the Court's view, demands a wide interpretation of Section 9 para. 1 var. 3 GCC. Having pointed to Section 130 as being an abstract-concrete offence in German Criminal law doctrine, the Court affirms the applicability of this norm to the Internet publication. The publication, the Court finds, can be persecuted under German Criminal law because though it was published on a server located in Australia, the action was directed against Germany and addressed to a German public.

[14] This interpretation of the law risks bluring the boundaries between wrongful doing and success as established in Section 9 para. 1 GCC. Meanwhile, the difficulty the Court had to face, if not necessitated surely provoked an interpretation by which the Court meant to embrace the particular quality of Internet publishing. In approximating the publication on the one hand and its effect on the public peace in Germany on the other, the Court might just have found an interpretation that is in accordance with the nature of an Internet publication. At the same time, the result can be viewed entirely differently: in that the Court affirmed the publication's effect by almost exclusively basing its decision on the fact of the publication actually having been put on the web, the Court does little if any justice to the complex relationship between the National legal system in which it grounds its verdict on the one hand and the borderless virtual space of the Internet on the other. This becomes overwhelmingly obvious when the Court puts forward the *special connection* between the defendant's action and the protected good (German public peace). The Court declares the protected good to be closely tied to Germany, especially with regard to German history. The Court holds this connection to be a further legitimatization of the applicability of German Criminal law to the Internet publication in light of International Public law. This does, indeed, resonate with different voices in German scholarship, but also with the Common Measure taken by the European Council in 1996 with regard to fighting racism and hostility against foreigners.(11) As much as this points to the respectable efforts in International and in European law towards a harmonization of criminal law for the protection of values shared by different nations - *see*, for example, the International Convention on the Elements of All Forms of Racial Discrimination - CERD of 1965 - the question still deserves further elaboration whether at this stage of an International Criminal law a national Court should claim authority for persecuting Internet offences.(12) This being done partly in the name of common efforts in International law and partly with respect to national particularities and interests ("climate protection"), that, as was the case with the German legislation, can inspire other legislators, the decision more than anything else reflects the difficulty the Court faced when confronted with the question.

C. Perspectives

[15] We might wish to say, along with Stanford's law professor *Lawrence Lessig*, that "There is a need for the constitutional protection that the [Holocaust-denial] case represents only because there is a real constraint on publishing."(13) The question touched upon by Professor *Lessig* is possibly *the* central question concerning the regulability of the internet. It goes like this: how do we account for the sheer openness of communicative space in the Net and still maintain a certain degree of regulatory input with regards to doings considered as damaging and criminal? In other words: if the Net allows anyone to publish anything, it can well be that there is just as much nonsense being put out as there as material with some merit. If, however, our focus is on the *truth* in reports published and distributed in the Net, we might want to consider ways of how to make it impossible for wrong or misleading material to appear in the web. Obviously, such a claim must be discarded from the beginning: the claim to truth and objectivity connected herewith defies any sense of scientific critique, that we ought to take as our starting point. In the meantime, we might come to the conclusion that there ought to be no *credibility-control* or, that such

control is even possible. Rather, the issue we are still concerned with concerns the understanding that a national legal culture has gained and expressed with regard to a specific problem. If a legal system reflects the political will to outlaw a certain behavior, it must be asked how to make this political intent compatible with the seemingly unrestrained realm for free speech as existent in the Net. The matter becomes especially intriguing when the decision to incriminate a specific behavior is closely tied to the history of the Nation state that wishes to enact or keep a statute aimed against this particular doing.

[16] Indeed, the decision handed down by the *FCJ*, like many previous ones, does resonate an important and yet endangered and fragile belief in what might be a national conscience regarding the crimes committed under the Nazis. The way in which this expression of political and historical conscience finds its way into the legal argument made by the Court, is everything but easy to decipher. The Court ponders at length upon the question of whether Section 9 GCC (crime's effects in German territory) allows a persecution even when the incriminated publication was distributed from a web-site erected in Australia. At the same time, the Court appears to take the matter of the Holocaust denial itself and its incrimination in the Net almost for granted. The political will that backs the incrimination of Holocaust denial is seen by the Court to justify a criminal persecution - even into the wide virtual realms of the Net. As a consequence, the particular quality of the Internet and the effects this has on the matter of free speech is not only ignored by the Court, but in fact made a "non-issue" by placing the decision exclusively within the reference system of German substantive and procedural Criminal law.

[17] As German Law professor *Eric Hilgendorf* of Konstanz noted, the matter may be looked at from the other side as well: if we can see German Criminal law as claiming a policeman's role for wrongdoing in the Internet, we need to, for a moment, imagine a foreign country incriminating a German national writing in favor of human rights protection in the Internet.(14) This clearly would be the flip-side to a claim made by German authorities to persecute Internet publications, even when launched "abroad". Professor *Hilgendorf* instead suggests the applicability of German Criminal law only in those cases where a specific connection of the offence to Germany is given. This proposal of "territorially specified crimes", however, again begs the question of how to define in a satisfactory manner just when this territorial connection is given. In order to meet the reasonable claim made by the members of the International community for clear boundaries to one state wishing to persecute crimes committed outside its territory, there must be a way both to allow and to limit the reach of a Nation state's Criminal law statutes. Yet, by taking refuge in a seemingly simple territorial aspect of the crime, the questions of how to establish this territorial effect in a concrete case remains unanswered. While this is obviously a task for International law and Criminal law doctrine, as Professor *Hilgendorf* notes, the territorial argument might prove too weak. Even if the intent of the perpetrator to address a German audience is stronger than, say, the simple use of the German language, we cannot deny that it will remain a highly arbitrary procedure by which the territoriality of a crime can be established.

[18] We might want to consider the territoriality proposal in a different light: if we look at the contexts in which the legislator decided to enact a criminal statute, we find traces of a political debate that preceded the statute's enactment and thus provide it with a minimal degree of legitimacy. If we begin to inquire whether there is a territorially specified connection of a particular offence to Germany, we might understand this as our attempt to reevaluate the deliberative processes that preceded the statute. It might well be then in some cases that the contrast between the statute's scope and the behavior found in the Net is too striking as the inadequacy of our (or another Nation state's) Criminal law becomes evident with regard to the nature of the Internet. The process thus is twofold: the first question of whether we still adhere to the statute's *intent* is one that can and needs to be deliberated well before the implications following from the Internet with its specifics of publication and distribution come under scrutiny. Maybe, though, there is little space for such reevaluation. The border-less world as existing in the Internet seems quite squared with any such *national* worries. While the Internet, however, like other features of a globalized world, seems to bluntly ask for a drastic revisal or innovation of our legal instruments as they appear outdated and inappropriate, the paradox lies in the fact that we can only go about this ship repair on high seas with these very instruments.(15) Therefore, the difficult exploration into the adequacy or inadequacy of our legal answers to these questions should not make us believe in a *tabula rasa* with regard to our prior legal experience and memory. Moreover, our task may lie in facing this conflict in its paradoxical nature and in taking a "step back" before we either blindly apply what we have learned to what we don't know or to capitulate before the overwhelming complexity and newness of how things appear to be.

For more information:

Decision of the Decision of the Federal Court of Justice (Bundesgerichtshof - BGH) of December 12, 2000, Reg. No. 1 StR 184/00, published in: NEUE JURISTISCHE WOCHENSCHRIFT 2001, p. 624-628.

Decision of the Federal Court of Justice (Bundesgerichtshof - BGH), March 15, 1994; Reg. No. 1 StR 179/93, published in: NEUE JURISTISCHE WOCHENSCHRIFT 1994, p. 1421 and in BGHSt 40, 97.

Decision of the Federal Constitutional Court (Bundesverfassungsgericht), published in: NEUE JURISTISCHE WOCHENSCHRIFT 1994, p. 1779.

Decision of the Federal Constitutional Court (Bundesverfassungsgericht), September 6, 2000 - 1 BvR 1056/95: published in: NEUE JURISTISCHE WOCHENSCHRIFT 2001, p. 61 "Jude".

Karin Cornils, Der Begehungsort von Äußerungsdelikten im Internet, in: JURISTENZEITUNG 1999, p. 394.

Eric Hilgendorf, Überlegungen zur strafrechtlichen Interpretation des Ubiquitätsprinzips im Zeitalter des Internet, in: NEUE JURISTISCHE WOCHENSCHRIFT 1997, p. 1873

Friedrich Kübler, Äußerungsfreiheit und Rassistische Propaganda. Grundrechtskonflikte im Zugwind der Globalisierung. Sitzungsberichte der Wissenschaftlichen Gesellschaft an der Johann Wolfgang Goethe- Universität Frankfurt am Main, Franz Steiner Verlag: Stuttgart 2000.

Lawrence Lessig, CODE AND OTHER LAWS OF CYBERSPACE, New York: Basic Books 1999.

Mari Matsuda/Charles E. Lawrence III/Richard Delgado/Kimberle Crenshaw, Words That Wound - Critical Race Theory, Assaultive Speech, and the First Amendment, Boulder, CO: Westview Press 1993.

Peer Zumbansen, Die vergangene Zukunft des Völkerrechts, in: 34 KRITISCHE JUSTIZ 46 (2001).

The German Basic Law [Grundgesetz] online:
http://www.uni-wuerzburg.de/law/gm00000_.html

(1) See the Decision of the Federal Court of Justice (Bundesgerichtshof - BGH), March 15, 1994; Reg. No. 1 StR 179/93, published in: NEUE JURISTISCHE WOCHENSCHRIFT 1994, p. 1421 and in BGHSt 40, 97 "Deckert".
(2) *See*, e.g. Decision of the Federal Constitutional Court [Bundesverfassungsgericht - BVerfG], September 6, 2000 - 1 BvR 1056/95: published in: NEUE JURISTISCHE WOCHENSCHRIFT 2001, p. 61 "Jude"; *Friedrich Kübler*, Äußerungsfreiheit und Rassistische Propaganda. Grundrechtskonflikte im Zugwind der Globalisierung, Stuttgart 2000 (citing all relevant American jurisprudence and literature); *Eric Stein*, "History Against Free Speech", 85 Mich. Law Rev. 277 (1986); *Stefan Huster*, Das Verbot der „Auschwitzlüge", die Meinungsfreiheit und das Bundesverfassungsgericht, in: NEUE JURISTISCHE WOCHENSCHRIFT 1996, p. 487; *Simone Dietz*, Die Lüge von der „Auschwitzlüge" - Wie weit reicht das Recht auf Meinungsäußerung?, in: 28 KRITISCHE JUSTIZ 210 (1995); *Günter Bertram*, Entrüstungsstürme im Medienzeitalter - der BGH und die „Auschwitzlüge", in: NEUE JURISTISCHE WOCHENSCHRIFT 1994, p. 2002; *Karl Josef Partsch*, Neue Maßnahme zur Bekämpfung von Rassen- und Fremdenhaß, in: EUROPÄISCHE GRUNDRECHTEZEITSCHRIFT [EuGRZ] 1994, p. 429; *see also Mari Matsuda/Charles E. Lawrence III/Richard Delgado/Kimberle Crenshaw*, Words That Wound, Boulder, CO 1993.
(3) *Cf.* Gary Smith/Avishai Margalit (eds.), Amnestie oder die Politik der Erinnerung, Frankfurt: Suhrkamp 1997; *Norbert Frei*, Vergangenheitspolitik. Die Anfänge der Bundesrepublik und die NS-Vergangenheit, München: C.H.Beck 1996; *Lutz Niethammer*, Deutschland danach. Postfaschistische Gesellschaft und nationales Gedächtnis, Bonn: Dietz 1999; *Norbert Frei/Dirk van Laak/Michael Stolleis (eds.)*, Geschichte vor Gericht. Historiker, Richter und die Suche nach Gerechtigkeit, München: C.H.Beck 2000; *Ulrich Herbert/Olaf Groehler*, Zweierlei Bewältigung. Vier Beiträge über den Umgang mit der NS-Vergangenheit in den beiden deutschen Staaten, Hamburg: Ergebnisse 1992; *Johannes Heil/Rainer Erb (eds.)*, Geschichtswissenschaft und Öffentlichkeit. Der Streit im Daniel Jonah Goldhagen, Frankfurt: Fischer 1998.
(4) *See Karin Cornils*, Der Begehungsort von Äußerungsdelikten im Internet, in: JURISTENZEITUNG 1999, p. 394, *at* 395.
(5) *See* Kübler (*supra* note 2), at 169-171, quoting *R.A.V. v. City of St. Paul* 505 U.S. 377 (1992) [Scalia] as possibly the last step in pushing back state restriction of Free Speech.
(6) *See, Lawrence Lessig*, Code and other laws of Cyberspace, New York: Basic Books 1999, pp. 164 et seq.; *Eric Hilgendorf*, Überlegungen zur strafrechtlichen Interpretation des Ubiquitätsprinzips im Zeitalter des Internet, in: NEUE JURISTISCHE WOCHENSCHRIFT 197, pp. 1873 *et seq*.
(7) *See* the "Deckert"-Decision of the *FCJ* (*supra* note 1); *see* already the *FCJ's* important decision in BGHZ 75, p. 160; Decision of the Federal Constitutional Court (Bundesverfassungsgericht), published in: NEUE JURISTISCHE WOCHENSCHRIFT 1994, p. 1779.
(8) See Decision of the Bundesgerichtshof, in: Neue Zeitschrift für Strafrecht [NStZ] 1994, 140 and 390 (= NJW 1994, 1421).
(9) The Court quotes the decision of the Federal Constitutional Court (*FCC*) in 1994, published in NEUE

JURISTISCHE WOCHENSCHRIFT 1994, p. 1779 and affirmed in its decision of September 6, 2000, published in NEUE JURISTISCHE WOCHENSCHRIFT 2001, p. 61)
(10) *Cf. Cornils*, Der Begehungsort von Äußerungsdelikten im Internet (*supra* note 3), *at* 395.
(11) *See* Gemeinsame Maßnahme des Rates der Europäischen Union betreffend die Bekämpfung von Rassismus und Fremdenfeindlichkeit vom 15. Juli 1996, published in: Amtsblatt der Europäischen Gemeinschaften Nr. L 185 S.5.
(12) See Friedrich Kübler, Äusserungsfreiheit und rassistische Propaganda (*supra* note 1), *at* 155.
(13) *See Lessig*, Code (*supra* note 4), *at* 170 (in the original quote, Lessig refers to the Pentagon Papers case, decided by the Supreme Court in 1971: 403 US 713 (1971) *The New York Times Company v. United States*.
(14) *See Hilgendorf*, Überlegungen zur strafrechtlichen Interpretation des Ubiquitätsprinzips im Zeitalter des Internet (*supra* note 4), *at* 1876.
(15) For an elaboration of this idea, *see Peer Zumbansen*, Die vergangene Zukunft des Völkerrechts, in: 34 KRITISCHE JUSTIZ 46 (2001).