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Criminal prosecution of Holocaust denial in Germany

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Abstract. Currently, they are attracting public attention and causing public resonance problems associated with the reassessment of the feat of the Soviet people in World War II. Various kinds of insinuations arise related to the denial of the persecution and mass extermination of Jews living in Germany, in the territory of its allies and in the territories occupied by them during the Second World War; the systematic persecution and extermination of European Jews by Nazi Germany and collaborators during 1933–1945. Practice shows that those guilty of Holocaust denial try to avoid criminal liability and influence judicial practice, referring to freedom of speech enshrined in Art. 5 Abs. 1 of the Basic Law of Germany. The *purpose of the article*. Investigate the institution of criminal responsibility for Holocaust denial in Germany. Based on an analysis of the norms of criminal law and judicial practice in Germany in specific criminal cases, investigate the difficulty of delimiting criminal liability for denying the Holocaust freedom of expression. *Methodology and methods.* For the purposes of this article, the author uses the methods of analysis, synthesis, induction, diduction, as well as comparative legal, historical legal and historical comparative methods. *Conclusions.* After conducting a study, the author concludes that in Germany the issue of criminal liability for Holocaust denial is complex. The article points out the fact of heterogeneity of court decisions, analysis of judicial practice shows that this issue is resolved extremely ambiguously. Despite this, the author points out the high role of the legislator and the practice of law enforcement in shaping the right attitude to historical events, the high role of peoples in certain significant facts that are part of the foundation of historical and cultural heritage. *Scope of the results.* This work may be of interest to students of higher educational institutions, as well as graduate students interested in criminal law of foreign countries. The article can be used by teachers of law schools as an addition to the educational material.

Keywords: Criminal Code of Germany, the Basic Law of Germany, fascism, the Holocaust, criminal liability, qualifications, freedom of expression

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Уголовное преследование отрицания холокоста в ФРГ

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Аннотация. В настоящее время привлекают внимание общественности и вызывают общественный резонанс проблемы, связанные с переоценкой подвига советского народа во Второй мировой войне. Возникают различного рода инсинуации, связанные с отрицанием преследования и массового уничтожения евреев, живших в Германии, на территории ее союзников и на оккупированных ими территориях во время Второй мировой войны; систематичное преследование и уничтожение европейских евреев нацистской Германией и коллаборационистами на протяжении 1933–1945 гг. Практика показывает, что лица, виновные в отрицании холокоста пытаются избежать уголовной ответственности и повлиять на судебную практику, ссылаясь на свободу слова, закрепленную в ст. 5 абз. 1 Основного закона ФРГ. **Цель статьи.** Исследовать институт уголовной ответственности за отрицание холокоста в Германии. На основании анализа норм уголовного права и судебной практики ФРГ по конкретным уголовным делам исследовать сложность отграничения уголовной ответственности за отрицание холокоста от свободы выражения своего мнения. **Методология и методы.** В настоящей статье автор использует методы анализа, синтеза, индукции, дедукции, а также сравнительно-правовой, историко-правовой и историко-сравнительный методы. **Выводы.** Проведя исследование, автор приходит к выводу, что в Германии вопрос уголовной ответственности за отрицание холокоста носит комплексный характер. В статье указывается на факт существования многочисленных судебных решений. При этом анализ судебной практики показывает, что данный вопрос решается крайне неоднозначно. Несмотря на это, автор указывает высокую роль законодателя и практики правоприменения в формировании правильного отношения к историческим событиям, высокой роли народов в тех или иных значимых фактах, входящих в фундамент исторического и культурного наследия. **Область применения результатов.** Данная работа может представлять интерес для студентов высших учебных заведений, а также аспирантов, интересующихся уголовным правом зарубежных стран. Статья может быть использована преподавателями юридических вузов в качестве дополнения к учебно-методическому материалу.

Ключевые слова: Европейский суд по правам человека, Основной закон ФРГ, УК ФРГ, фашизм, холокост, уголовная ответственность, квалификация, свобода выражения мнения

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INTRODUCTION

Due to this, many foreign countries provide criminal prosecution of Holocaust denial (from the English holocaust, from Ancient Greek Ὀλοκαύστος – “burnt offering”). It is understood in the broad and narrow sense of the word. Thus, in the first sense, the Holocaust means persecution and mass extermination by the Nazis of representatives of various ethnic groups (for example, the so-called by Nazis “impaired” ones, such as Jews and Gypsies, or people of a certain nationality: Poles, Russians, Ukrainians, Belarusians) and social groups (Soviet prisoners of war, homosexual men, masons, hopelessly sick and disabled people, etc.) during the period of Nazi Germany. In the second, narrow sense – the persecution and mass extermination of Jews who lived in Germany in the period indicated above. Along with the Armenian Genocide in the Ottoman Empire, this extermination of the Jewish people during the years of Nazi Germany is one of the most famous examples of genocide in the 20th century. Sometimes this

term is used in a broad sense with a lowercase letter, and in a narrower one with a capital one.

Criminal prosecution of Holocaust denial is a system of measures formed after the Second World War and the Nuremberg Tribunal, and aimed at criminalizing Holocaust denial, existing and evolving within the framework of more general criminal law measures implemented primarily in European countries (as the most affected by Nazi ideology and National Socialist regimes of the period before and during World War II) and aimed at banning National Socialism and neo-Nazism.

Thus, as a result of implementation of the above measures, in such European countries as Austria, Belgium, Germany, Lithuania, Liechtenstein, Luxembourg, Poland, Portugal, Russia, Slovakia, Slovenia, France, Czech Republic, Switzerland, as well as in Canada and Israel there have been adopted and are being applied the laws expressly prohibiting the public denial, understatement, approval or justification of crimes committed by the Nazis. In 2010, a law punishing the denial of crimes of totalitarian regimes

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(although it is more appropriate to say that in this case the National Socialist regime is considered as totalitarian) was adopted in Hungary. Holocaust denial is not punishable in the United States, as free expression of one's views is protected by the First Amendment to the Constitution.

To consider the criminal liability for Holocaust denial in Germany, which is the subject of our study, it is necessary, first of all, to pay attention to the basic constitutional provisions of this country. Thus, Article 5 of the Basic Law protects freedom of speech, but with three restrictions. It may be limited by "provisions of general laws", legislative provisions on the protection of youth or the right for dignity of an individual. "General laws" are laws that do not prohibit a certain opinion, for example, "Stuttgart football team – freaks." They must, observing the neutrality of views, serve a specific purpose, namely, the protection of another legal good.

In addition, it should be noted that criminal liability for the Holocaust, understood as genocide (Völkermord), is established in paragraph 6 of the Code of International Crimes (VStGB) of 2002, applicable in Germany.

What norms of the Criminal Code of Germany criminalize the Holocaust denial? It should be noted that when analyzing this problem, there are several points of view. An important role in such a discussion is, in our opinion, a different understanding of the relationship between Holocaust denial and freedom of opinion.

CRIMINAL LIABILITY UNDER THE CRIMINAL CODE OF GERMANY

So, according to most researchers, the criminal legal liability for justification of the Holocaust is established in paragraph 3 of clause 130 of the Criminal Code of Germany, which is called "Harassment of population groups". The disposition of this norm is formulated as follows:

1. Who by any means violates public order:
 - incites hatred towards any national, racial, religious group or in connection with its ethnic origin, towards part of the population or an individual in connection with belonging to a particular group or to a part of population indicated above, or calls for violence or arbitrariness against it or;
 - encroaches on the human dignity of another person in such a way that it degrades the dignity of a part of population, maliciously defames or slanders it;
 - the applicable sentence is deprivation of liberty for a term of up to five years.
2. Deprivation of liberty for a term of up to three years or a fine shall be applied to a person who:
 - relating written materials (cl. 11, par. 3) that incite racial hatred towards a part of population or a certain group characterized by national, racial, religious characteristics or other characteristics of a nationality, call for commission of violence or arbitrariness against that group, maliciously defame or slander them:
 - a) distributes;
 - b) publicly exhibits, offers, imports or otherwise makes available;
 - c) manufactures, receives, delivers, procures, offers, notifies, advertises, imports or exports in order

to use these publications or to make such use possible by another person, or

- d) transmits the information with a specified in par. 1 content by the radio, media or television.
3. Deprivation of liberty for a term of up to five years or a fine shall be applied to a person who, guided by the ideas of National Socialism, publicly or at a meeting approves, disputes or understates the seriousness of the criminal offense provided for in cl. 6 par. 1 of the Criminal Code on international crimes of the kind, in any way that violates public order.
4. Imprisonment for a term of up to three years or a fine shall be applied to a person who publicly or at a meeting violates public peace by assaulting the human dignity of the victim, by endorsing, elevating or justifying the National Socialist ideas of violence and arbitrariness.
5. Paragraph 2 also applies to written materials (cl. 11, par. 3) with the content specified in par. 3 and 4.
6. In the events provided for in par. 2, also in connection with par. 5, and in the events provided for in par. 3 and 4, cl. 86, par. 3 it is applied accordingly.

Cl. 130 par. 3 of the Criminal Code of Germany, provides criminal liability for the Holocaust denial for a person who approves, denies or conceals a crime under cl. 6 of the Criminal Code on international crimes, as indicated above, i.e. for genocide. In Germany, this means else the Holocaust or slander against the Holocaust.

JUDICIAL PRACTICE

Note that the judicial practice of Germany often faces the problem of delimiting criminal liability for Holocaust denial and freedom of expression, freedom of speech, proclaimed by Art. 5 par. 1 of the Basic Law of Germany. So, at present, with the development of digital communication technologies, certain statements that deny the Holocaust increasingly appear on social networks. We believe that in such a situation, one should distinguish insults, slander, value judgments and separate them from each other, which, unfortunately, is not easy. Freedom of speech also allows polemic, provocative and sharp statements, and sometimes erroneously understood judgments. Therefore, a prerequisite for this category of cases is a thorough examination by the court of the specific circumstances of the case, including motives of persons accused of committing crimes.

As follows from the materials of the criminal case, a resident of the German city of Stendal posted on Facebook a photograph of Adolf Hitler and wrote the following under it: "bastards, they just killed pigs, this is how our taxes disappear, and we still have to give the children money for food." District Court of the city of Stendal found in the actions of the defendant the signs of a criminal offense provided for in par. 130 of the Criminal Code of Germany – bullying groups of population – and sentenced the man to a fine of 130 daily rates of 30 euros (3900 euros) each.

HOLOCAUST DENIAL

Another group of opinions regarding the liability for the Holocaust denial should include the opinion that in this case it is necessary to apply cl. 140 of the Criminal Code of Germany, which establishes criminal liability in form

of imprisonment for up to three years or a fine for acquittal or approval of criminal acts. According to this norm, those who:

- 1) justifies or
- 2) in another way that may violate public order, publicly, at a meeting or by distributing written materials (cl. 11, par. 3), approves the commission of unlawful acts referred to in cl. 138, par. 1, Nos. 2-4 and 5 and in cl. 126, par. 1, or in cl. 176, par. 3, cl. 176a and 176b, cl. 177, par. 4-8 or 178 after this unlawful act has been committed or has been attempted, is punishable by criminal law.

Thanks to this reference to these norms, there are an established list of criminal acts which the defendant justifies or approves.

Encouragement within the meaning of par. 140 of the Criminal Code of Germany takes place when a criminal, after committing a crime, provides an accomplice directly or indirectly with certain, unconditional in advance benefit.

Since the benefit must not have material value, demonstrative incentive measures may be sufficient for a *corpus delicti*, while the usual praise is not.

It is necessary to indicate those characteristics or interpretations that are used by German jurists and law enforcers for such a thing as "Approval", which means, mainly, "recognition of an already committed act as correct."

In addition, it is emphasized that the attribute of the *corpus delicti* of a criminal offense "considering, not least of all, the principle of certainty and the nature of the last argument, specific for criminal law, should not be interpreted restrictively. Thus, the relevant signs of the *corpus delicti* of the criminal act are only those statements that are "understandable by themselves" and "perceived as such directly and without interpretation" [1: 140]. "Approval implies that the speaker declares his/her disposition to the fact of committing the act, and thereby, in moral terms, (s)he her/himself stands behind the back of the offender."

It is in those cases where the statements are not limited to direct and isolated favor, but are embedded in a wider context and, in some cases, describe in more detail the reasons for the corresponding act, this may prevent classification of the act as "approval" within the meaning of par. 140 of the Criminal Code of Germany: thus, statements reflecting the committed predicate crime, and weighing all its pros and cons, constitute evidence of *corpus delicti* approval only if the disposition to the crime comes to the forefront.

Also, approval is not available when the statement can be understood as part of a critical substantive consideration of the possible causes of the corresponding act.

The spoken out approval, in the end, must be expressed in such a way as to be able to disrupt the peaceful existence of society, which is understood as a state of general legal order and peaceful coexistence of citizens, as well as a sense of security based on the population's belief that such a state will exist in the future.

Subject to proper investigation and establishment in each particular case, taking into account the actual circumstances of the case, an assessment of whether or not there are the about signs, "it is not only the content

of the statement that matters itself. The specific circumstances of the situation in which the approval was announced should also be taken into account. Accordingly, in order to qualify a statement as capable of violating a peaceful state, it is necessary to understand the extent to which the statement was distributed, who are included in the mentioned circle of recipients, and also in what social conditions and behavioral conditions of groups of people (considered within the framework of crowd psychology) it was done. Only if, taking all these aspects into account, the approval carries a justified threat of violating the population's faith in the stability of legal benefits or creating an environment conducive to the commission of such crimes, it can be considered as a violation of public order."

JUDICIAL PRACTICE

In 2017, the Berlin Supreme Court found not guilty one of the most active Antifa participants since the late 1970s, who, on the basis of statements made by him in a media interview, was charged with approving the criminal offenses stipulated by par. 2 art. 140 of the Criminal Code of Germany. We believe that in making such a decision, the court proceeded from the specific circumstances of the case that excluded application of this norm [4].

It should be indicated that the *corpus delicti* provided for in par. 2 cl. 140 of the Criminal Code of Germany, can take place only if the approved act was either so specifically described in the statement that it can comply with the characteristics of cl. 140, and is included in the list of crimes specified in cl. 140 of the Criminal Code of Germany. In case of the accused, who favorably spoke out about attacks on the structures of the weekly newspaper *Junge Freiheit*, there were no such signs [4].

Also in 2017, the Karlsruhe Supreme Regional Court found not guilty under cl. 140 of the Criminal Code of Germany the defendant who spoke out in the comments on the website regarding arson of refugee shelters [5; 6; 7].

If there is possibility of an ambiguous interpretation of the statement, in the light of protected by the provision fixed in sentence 1 of par. 1 of Art. 5 of the Basic Law, freedom of speech, interpretation can be considered punishable only upon the condition that other interpretations that do not entail imposition of punishment, can be excluded with convincing justification. If the statement of the defendant is, in principle, just a descriptive statement in the spirit of an explanatory model of the way the citizens react in case of allegedly insufficient participation in political life, the conviction under cl. 140 of the Criminal Code of Germany is not considered.

In 2016, the Federal Constitutional Court of Germany [11] considered a request for a conviction under cl. 140 of the Criminal Code of Germany. In the decision not to accept the case for consideration, the court ruled that the conviction under cl. 140 of the Criminal Code of Germany was based on the posting in public places of posters that contained a reference to the crimes committed in the Hamburg quarter of *Schantzviertel* and an appeal "To depreciate *Schantz!*" (*Schanze abwerten!*) which is not a violation of freedom of speech.

The criminal legal qualifications of Holocaust denial under German law will be incomplete without mentioning the legal position of the European Court of Human Rights

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(ECHR), on the basis of which Holocaust denial cannot be justified by the freedom of speech. In confirmation of which we will give the following example from its practice.

The ECHR (application no. 55225/14 dated October 03, 2019) [10] ruled that a person cannot justify by the right to freedom of speech the denial of the facts of the persecution and mass extermination of representatives of a Jewish ethnic group during the existence of Nazi Germany – an event known as the Holocaust.

Udo Pastours is a German politician who chairs the National Democratic Party of Germany, as a member of the Mecklenburg-Vorpommern state land legislature, delivered a speech on January 28, 2010 (the day after Holocaust Remembrance Day), stating that “the so-called Holocaust is used for political and commercial purposes,” also he stated that there was a “propaganda lie” in covering the story. In particular, he said: “With the exception of the corrupted groups whose cooperation you have acquired, it is unlikely that anyone will really take part in your horror theater. And why is this so? Because people feel that the so-called Holocaust serves political and commercial purposes... After the end of World War II, the Germans were subjected to an endless series of criticism and propaganda lies, cultivated primarily by dishonest representatives of the so-called democratic parties... In addition, the event, which you organized here yesterday at the castle was nothing more than the imposition of your projections of Auschwitz on the German people in a cunning and cruel way. Ladies and gentlemen, you hope for the triumph of lies over the truth” [12].

On August 16, 2012, the Schwerin District Court convicted Udo Pastours for violating the memory of the dead and defamation using the above statements, and sentenced him to eight months of imprisonment.

Having studied the full speech, the German court found that Pastours used terminology whose purpose was to deny “the systematic, racially motivated mass extermination of Jews carried out in Auschwitz during the existence of the Third Reich”. The court then noted that the defendant cannot justify by the freedom of speech the denial of historical facts about the Holocaust.

QUALIFICATION ISSUES

The decision was unsuccessfully appealed to the Schwerin Court of Appeal and on March 25, 2013 the court dismissed the complaint as unsubstantiated. At the same time, the court examined the statements in general and stated that “the applicant alleged that the extermination of Jews associated with Auschwitz did not happen, or at least not in the way that historians reported. The atrocities associated with Auschwitz were lies and projections. The lies around Auschwitz have been used since the end of World War II for various political and economic purposes.” The Court of Appeal concluded that the applicant thereby efficiently deny the systematic, racially motivated mass extermination of Jews in Auschwitz during the Third Reich (qualifizierte Auschwitzleugnung) and considered that the applicant had first spoken about the “propaganda lies” that the Germans were subjected to after the end of World War II, and mentioned “the projection of Auschwitz” as an example.

From a linguistic point of view, he used the terms “lie” and “projection” in close sequence as having the same alleged meaning that can be seen in the structure of the sentence. He used the term “Auschwitz projection” in a sequence that also contained the terms “propaganda lies”, “dishonest” and “lies”, connected with the word “also”. Regarding the perpetrators and motives regarding the “Auschwitz lies”, he stated that the propaganda lie “is being cultivated in an unfair manner, primarily by representatives of the so-called democratic parties” and that “the so-called Holocaust is being used for political and commercial purposes”. The Court of Appeal noted that the terms such as “the lie about Auschwitz,” “the myth of Auschwitz,” and “the baton of Auschwitz,” were used repeatedly in connection with the assertion that there were no murders of millions of Jews during the Third Reich, and the term “the projection of Auschwitz” served the same purpose.

The decision of the mentioned courts was appealed in a third instance – the Rostock Court of Appeal on the ground of the applicant’s disagreement with the “decision of August 16, 2013, since such a decision violates his right to be heard regarding his appeal on legal issues”, but the appeal was rejected in November 2013.

On June 05, 2014 the German Federal Constitutional Court, agreeing with the position of the lower courts, rejected the applicant’s claim on the merits.

Referring to Article 10 (freedom of expression) and clause 1 Article 6 (right to a fair trial) of the European Convention on Human Rights (hereinafter referred to as the Convention), Pastours stated that the German authorities violated his right to express a value judgment as a parliamentarian, and the criminal process itself and the procedure of its subsequent appeal was carried out improperly and filed a complaint to the ECHR.

Regarding his speech on 28 January 2010, the applicant noted that the national jurisdiction erroneously interpreted his speech, allegedly having selected for analysis only a small part of it without taking into account the general context. Thus, in his opinion, the text should not be perceived as the Holocaust denial, but as a criticism of the current polemic around commemorative practices in Germany. That is, based on the modern understanding of commemoration, as a memory stored in the public mind about significant events of the past [1], in which “the past appears not as a loan of itself, but as a special phenomenon, formed based on the current needs of society and deciding the tasks significant for it, including the tasks of education, the formation of certain values and patterns of behavior” [7: 80].

CONCLUSION

Representatives of the German authorities stated that the applicant’s assessment judgment, that is, the denial of the Holocaust, is contrary to the text and spirit of the Convention, in connection with which he could not appeal to Art. 10 of the Convention, and the national court found Pastours guilty of a criminal offense which constitutes “justifiable interference in accordance with cl. 10 Art. 2 of the Convention”.

Agreeing with the arguments of the German courts, the Strasbourg court ruled that the applicant had intentionally included false facts in his speech with

the aim of “discrediting the Jewish people and the fact of persecution to which they were subjected during the Second World War”.

Thus, the court noted, Pasteurs’ speech affected the dignity of the Jews to such an extent that the interference of German authorities with the subsequent initiation of a criminal case and punishment in form of imprisonment had sufficient grounds and was proportionate to the legitimate aim pursued.

Accordingly, there was no violation of Art. 10 of the Convention; the complaint must be rejected as manifestly ill-founded in accordance with cl. 3 (a) and 4 Art. 35 of the Convention.

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FINAL CONCLUSIONS

Summing up the research conducted in this article, we should note that the Holocaust denial in Germany is a criminal act. The author’s findings confirm that in Germany, the issue of criminal responsibility for Holocaust denial is complex. In judicial practice, this issue is resolved ambiguously. However, in modern society, where often arise opinions and judgments that are different from the prevailing notions of historical events, in particular denial of the role of certain peoples, legislative experience and the practice of law enforcement in foreign countries, including Germany, become particularly relevant.

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