

## The Desire for Public Safety and How "Judge Merciless" Became a State Senator

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[*Editors' Note:* After the editorial deadline for this issue had passed, the *Landgericht* (Regional Court) Hamburg found Ronald Schill, aka "Judge Merciless," not guilty of the perversion of justice charges that had been brought against him pursuant to § 339 *Strafgesetzbuch* (StGB – German Criminal Code). Applying, on remand, the standard established by the decision of the *Bundesgerichtshof* (BGH – Federal Court of Justice), the Regional Court found the evidence of Schill's intention to defer the proceeding insufficient to support a conviction.]

[1] 11 September 2001 had many effects on many spheres of our lives. One of these effects was used to great personal effect by Ronald Barnabas Schill, a criminal law judge at the Hamburg *Landgericht* (Regional Court). In July, 2000, he founded an eponymous political party, the "Schill-Partei," to run for the Senate of *Bundesland* (Federal State) Hamburg in the elections of 23 September 2001. (1) His party, essentially, has a one –issue platform: public safety. Having the highest crime rate of all German cities, (2) this topic is very important in Hamburg. Schill's party fills a gap in the political market in Hamburg and polled 10% in surveys leading up to the September election. Certainly, some of these votes can be accounted for as protest votes, aiming more for political change in the city-state's politics than serving as a ringing endorsement of Schill. Schill seems to have especially benefited from the events of 11 September. Schill, well known as "Judge Merciless," (3) was able to hit the nerves of the voters by playing on their fear and the shock, particularly spinning the fact that two of the terrorists had lived in Hamburg. The nickname "Judge merciless" had been created by the press because of Schill's rigorous execution of the law and his often outlandish behavior towards the accused and spectators at his trials over which he presided. (4) He is identified with "law and order" or zero tolerance politics Schill focused the last weeks of his campaign on claims that their city had become a nest of terrorism; now more than ever, offering his strict brand of politics emphasizing public safety as the answer. This campaign strategy seems to have been successful, increasing Schill's vote in the election to 20% and guaranteeing that his party a share in the new government along with the State Senator of the Interior position for Schill. In spite of this success, Schill was recently indicted for the crime of perversion of justice pursuant to § 339 *Strafgesetzbuch* (StGB -- German Criminal Code). (5)

[2] The accusation was based on the following circumstances, (6) which demonstrate Schill's keen understanding of law and his strategic methods for putting to his own use. Some spectators at one of his trials who clearly sympathized with the accused disturbed the trial. One of them, in particular, refused to stand up during the proclamation of sentence. Schill ordered the spectator to stand up and asked him if he was handicapped. The man still refused to stand up and Schill ordered his immediate arrest and had him jailed for three days. This order was followed by a tumult in the courtroom during which another spectator hit a courtroom guard, an act which also led to an immediate arrest and three-day jail sentence. The imposition of these sanctions, by itself, is probably permissible and justifiable. (7) But Schill did not transmit to the Hamburg *Oberlandesgericht* (Higher Regional Court) the complaints he received against these orders, complaints filed just one hour after the end of the trial. The morning of the following day he was away from his office; in the afternoon he dictated for his secretary his version of what had happened during the previous day's trial. Instead of picking up the completed protocol from her, he asked her to leave it in his mailbox. He did not return to the matter until the morning of the next day, thereby necessarily deferring the transmission of the complaints to the Higher Regional Court until the early evening. After receiving the protocol, the Higher Regional Court suspended the terms of imprisonment because of formal defects.

[3] On the basis of these facts, Schill was accused of the perversion of justice pursuant to § 339 of the German Criminal Code. The Regional Court in Hamburg found Schill guilty and ordered him to pay a fine amounting to DM 12.000. (8) Against this conviction Schill and the Office of the Public Prosecutor appealed on a point of law, passing the case along to the *Bundesgerichtshof* (BGH -- Federal Court of Justice). (9) In its decision the Federal Court of Justice determined that slowly processing a complaint within an objectively justifiable timeframe may constitute a perversion of justice if it is the intention of the judge to prejudice a complainant. That means that a perversion of justice is also possible when procedural law is injured. (10) On the one hand, the imperative of a quick proceeding which is part of the principle of the rule of law established by Article 19.4 of the *Grundgesetz* (Basic Law) (11) may be violated. On the other hand, the independence of a judge, as a constitutional principle established by Article 97 of the Basic Law, must also be respected. (12) Thus, Schill's handling of the complaints leads to the question, how independent is a judge and where are the limits between his independence and the perversion of justice. In this case, a legal protection would not be effective because the imprisonment (and thus, the constitutional violation) had already occurred when the Higher Regional Court was able to consider the matter. But the objective prohibition of the legal protection, unto itself, is not enough to fulfill the matter of fact pursuant to § 339 of the German Criminal Code. The willful slowing by the judge based on reasons outside the law and the intention to violate the discretionary power must

be proven. (13) The reason why the Federal Court of Justice suspended the convictions by the Regional Court and remanded the hearing back is that, in the first trial against Schill, the Regional Court had not proven the element of willful slowing. In the new hearing, the Regional Court must verify that Schill had the *intention* to prejudice one of the complainants, that is, that he wanted to violate the right of legal protection. As proof of this element, the Federal Court of Justice was not satisfied with Schill's statement to a journalist that he would not "jump, when the lawyers want him to do something." It was also not sufficient that he told other judges during lunch that he could not process the complaints because the protocol has not yet been completed by his secretary. (14) Not accepting this evidence as sufficient proof of Schill's intent to prejudice the complainants, the Federal Court of Justice set a high standard on the subjective elements of perversion of justice. Therefore, the judge hearing the case on remand will, absent a "smoking gun" establishing Schill's prejudicial intent, have a hard time finding him guilty.

[4] From the point of view of the Federal Court of Justice, the reasoning of the Regional Court was not sufficient to convict Schill. But it is also not necessary to read between the lines of the Federal Court of Justice's decision to see how the court perceives Schill's behavior. It is remarkable how clearly the Federal Court of Justice underlined that his behavior and his understanding of the law is not adequate to the work of a judge. For example, the Federal Court of Justice pronounced that a faster processing of the complaints would be desirable and reasonable. Particularly, the Court noted, Schill's private activities should have been deferred, otherwise it can be assumed that he does not embrace his judicial independence. Also his domineering manner with regard to the complainants' lawyers was inappropriate. (15) These statements seem to be a warning for Schill not to continue to pursue his antagonistic judicial style and an open criticism of his work.

[5] Whatever Schill's style might mean to his future as a judge, it's been a successful part of his move into politics. Having achieved a very good result in the elections in Hamburg, he plans to run candidates from his party in other federal states, especially in the East, where polls show he is popular. The question arises: why does such a controversial person become so popular and what does that mean for German legal culture? For the twenty to twenty-five percent who vote for Schill, he is the "law-and-order" candidate. Representing security and the fight against delinquency, he is seen as a man and politician whose words are followed upon by deeds. In this time of international terrorism and rising crime rates Schill speaks to an important and legitimate popular concern. Questionable as his methods may be, his methods seem to be less the focus than the fact that he addresses the topic where the main parties have it on the margin of their platforms. Still, Schill has chosen to concentrate, in his methodology, on condemning crime rather than address the causes. For Schill, and at least his constituents, the threats are so menacing that every instrument seems to be justifiable. And what, exactly, is the popular theme of his party. He wants to start a new offensive against crime with the law. Now Schill is the Senator of the Interior of Hamburg. In this position he can realize his ideas. Criticizing Schill's politics, the opposition in Hamburg asked if the stronger state, in Schill's mind, is still a constitutional state governed by the rule of law? This is a legitimate critique. At the very least, Schill's arrogant use of power under the label of the law is not the right way to build a more secure society. On the contrary, the use of the law for hard-edged and obviously political ends poses new dangers for the constitutional order German has so carefully shaped; worse, it does not eliminate the causes of crime.

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(1) Hamburg, though a city, like Berlin and Bremen also constitutes one of Germany's 16 Federal States.

(2) See, Bundeskriminalstatistik, available at <http://www.bka.de/pks/pks1999/index2.html> (last visited at 19 December 2001).

(3) A representative article *Angst machen lohnt sich*, can be found under: [http://www.zeit.de/2001/40/Politik/200140\\_hamburg-wahl.html](http://www.zeit.de/2001/40/Politik/200140_hamburg-wahl.html) (last visited at 19 December 2001).

(4) See, footnote 3.

(5) *Landgericht* (Regional Court) Hamburg, decision of 13 October 2000, 603 KIs 6/00 – 3502 Js 368/99.

(6) *Bundesgerichtshof* (Federal Court of Justice) decision of 4 September 2001, published in: NEUE JURISTISCHE WOCHENSCHRIFT 2001, p. 3275.

(7) Diemer, in: KK-StPO, 4th ed., § 178 GVG annotation no.: 3.

(8) See, *Landgericht* (Regional Court) Hamburg, decision of 13 October 2000, 603 KIs 6/00 – 3502 Js 368/99.

(9) See, *Bundesgerichtshof* (Federal Court of Justice) decision of 4 September 2001, published in: NEUE JURISTISCHE WOCHENSCHRIFT 2001, p. 3275.

(10) Permanent legal practice, *see e.g.*, BGHSt 32, 357.

(11) *See*, Schulze-Fielitz in: Dreier, GRUNDGESETZ KOMMENTAR, Band I, 1996, Art. 19 IV, annotation no.: 83 et seq.

(12) *See*, Schulze-Fielitz in: Dreier, GRUNDGESETZ KOMMENTAR, Band III, 2000, Art. 79, annotation no.: 14 et seq.

(13) *See*, *Bundesgerichtshof* (Federal Court of Justice) decision of 4 September 2001, published in: NEUE JURISTISCHE WOCHENSCHRIFT 2001, p. 3275.

(14) *See*, *Bundesgerichtshof* (Federal Court of Justice) decision of 4 September 2001, published in: NEUE JURISTISCHE WOCHENSCHRIFT 2001, p. 3275.

(15) *See*, *Bundesgerichtshof* (Federal Court of Justice) decision of 4 September 2001, published in: NEUE JURISTISCHE WOCHENSCHRIFT 2001, p. 3275, 3277.