

Activists' conviction of defamation for comparing abortion to the Holocaust did not breach the Convention

In today's Chamber judgment in the case **Hoffer and Annen v. Germany** (application nos. 397/07 and 2322/07), which is not final¹, the European Court of Human Rights held, unanimously, that there had been:

A violation of Article 6 § 1 (right to a fair trial within a reasonable time) of the European Convention on Human Rights, and
No violation of Article 10 (freedom of expression).

The case concerned the applicants' conviction of defamation for statements made in an anti-abortion pamphlet they distributed in front of a medical centre.

Principal facts

The applicants, Collene Hoffer, an Australian and Italian national, and Klaus Annen, a German national, were born in 1945 and 1951 respectively and live in Heilbronn and Weinheim (Germany).

In October 1997, they distributed pamphlets outside a Nuremberg medical centre, which contained information about abortion and called a doctor at that centre a "killing specialist". The pamphlets called for stopping "the murder of children in their mother's womb" at the medical centre and included the phrase "then: Holocaust / today: Babycast".

On behalf of the medical centre and the doctor, the City of Nuremberg brought criminal charges against Ms Hoffer and Mr Annen for defamation. They were acquitted by the district court in July 1998, but in 1999 the Nuremberg-Fürth Regional Court quashed the judgment and convicted them of defamation to the detriment of the medical centre and the doctor. The court held that the statement "then: Holocaust / today: Babycast", seen in the context of the other statements made in the pamphlet, put the lawful activity performed by the physician on a level with the Holocaust, a synonym for the most abhorrent and unjustifiable crimes against humanity. While the two defendants were allowed, in the court's view, to pursue their political aim by using exaggerated criticism, that statement was not covered by their right to freedom of expression, as it debased the doctor in a way which had not been necessary in order to express their opinion and thus amounted to unjustifiable abusive insult. The court imposed a fine on both defendants. The judgment was upheld by the Bavarian Court of Appeal, and Ms Hoffer and Mr Annen lodged complaints in January 2000 with the Federal Constitutional Court.

¹ Under Articles 43 and 44 of the Convention, this Chamber judgment is not final. During the three-month period following its delivery, any party may request that the case be referred to the Grand Chamber of the Court. If such a request is made, a panel of five judges considers whether the case deserves further examination. In that event, the Grand Chamber will hear the case and deliver a final judgment. If the referral request is refused, the Chamber judgment will become final on that day.

Once a judgment becomes final, it is transmitted to the Committee of Ministers of the Council of Europe for supervision of its execution. Further information about the execution process can be found here: www.coe.int/t/dghl/monitoring/execution

In May 2006, the Federal Constitutional Court quashed the regional court's judgment as regards the conviction of defamation to the detriment of the medical centre and dismissed the remainder of the complaints. According to the court, Ms Hoffer and Mr Annen had not confined themselves generally to criticising the performance of abortions – which they remained free to do – but had directed their statements directly against the doctor. The court considered that while the statement about the Holocaust did not qualify as abusive insult it seriously infringed the physician's personality rights. Following the remittal of the case, the regional court re-assessed the fines and eventually imposed fines of 150 and 100 euros (EUR) respectively.

Complaints, procedure and composition of the Court

Ms Hoffer and Mr Annen complained that their criminal convictions for distributing the pamphlets had violated their right to freedom of expression under Article 10 and that the length of the proceedings before the Federal Constitutional Court had been incompatible with Article 6 § 1.

The application was lodged with the European Court of Human Rights on 22 December 2006.

Judgment was given by a Chamber of seven, composed as follows:

Peer **Lorenzen** (Denmark), *President*,
Karel **Jungwiert** (the Czech Republic),
Rait **Maruste** (Estonia),
Mark **Villiger** (Liechtenstein),
Isabelle **Berro-Lefèvre** (Monaco),
Zdravka **Kalaydjieva** (Bulgaria), *judges*,
Bertram **Schmitt** (Germany), *ad hoc Judge*,

and also Claudia **Westerdiek**, *Section Registrar*.

Decision of the Court

Article 10

Ms Hoffer's and Mr Annen's convictions, which indisputably amounted to an interference with their right to freedom of expression, were based on the German Criminal Code and thus "prescribed by law" for the purpose of Article 10. They were further designed to protect "the reputation or rights of others", namely the physician's reputation and personality rights.

As regards the remaining question whether the interference had been "necessary in a democratic society" for the purpose of Article 10, the Court noted that the German courts had been prepared to accept that all statements in the pamphlet except for the one "then: Holocaust / today: Babycast" constituted an acceptable element of a public debate falling within the scope of freedom of expression. The Court further observed that the impact an expression of opinion had on another person's personality rights could not be detached from the historical and social context in which it had been made; the reference to the Holocaust thus had to be seen in the specific context of the German past. The Court therefore accepted the German courts' conclusion that the statement in question constituted a very serious violation of the physician's personality rights. They had duly balanced the applicants' right to freedom of expression against the physician's personality rights. Moreover, the relatively modest criminal sanctions imposed had been proportionate. There had accordingly been no violation of Article 10.

Article 6 § 1

The Court considered that the length of the proceedings before the Federal Constitutional Court in the applicants' case, which had lasted almost six and a half years for one level of jurisdiction, had been excessive and failed to meet the "reasonable time" requirement. There had accordingly been a breach of Article 6 § 1.

Article 41

Under Article 41 (just satisfaction) of the Convention, the Court held that Germany was to pay each applicant EUR 4,000 in respect of non-pecuniary damage and EUR 1,000 in respect of costs and expenses.

The judgment is available only in English.

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The European Court of Human Rights was set up in Strasbourg by the Council of Europe Member States in 1959 to deal with alleged violations of the 1950 European Convention on Human Rights.