AS TO THE ADMISSIBILITY OF

Application No. 30339/96
by Rolf BOSSI
against Germany

The European Commission of Human Rights (First Chamber) sitting in private on 15 April 1997, the following members being present:

Mrs. J. LIDDY, President
MM. E. BUSUTTIL
A. WEITZEL
C.L. ROZAKIS
L. LOUCAIDES
B. MARXER
B. CONFORTI
I. BÉKÉS
G. RESS
A. PERENIC
C. BÎRSAN
K. HERNDL
M. VILA AMIGÓ
Mrs. M. HION
Mr. R. NICOLINI

Mrs. M.F. BUQUICCHIO, Secretary to the Chamber

Having regard to Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms;

Having regard to the application introduced on 6 November 1995 by Rolf BOSSI against Germany and registered on 28 February 1996 under file No. 30339/96;

Having regard to the report provided for in Rule 47 of the Rules of Procedure of the Commission;

Having deliberated;

Decides as follows:

THE FACTS

The applicant, born in 1923, is a German national and resident in Munich. He is a lawyer by profession. In the proceedings before the Commission, he is represented by Mr. E. Eyl, a lawyer practising in Strasbourg.

The facts of the case, as submitted by the applicant, may be summarised as follows.

In 1988 Mr. H. was involved in a traffic accident and was paralysed as a consequence of his serious injuries. Preliminary investigations on charges of reckless and drunken driving were instituted against Mr. C., the owner of the car. In 1989 the Niebüll District Court (Amtsgericht), sitting with the Single Judge R., refused to commit Mr. C. for trial on the ground that there was not sufficient evidence against him. Following further investigations, the competent Prosecutor's Office (Staatsanwaltschaft) preferred a new indictment against Mr. C. Mr. H., represented by the applicant, applied to intervene in these criminal proceedings against Mr. C. On 2 July 1992 Judge R. admitted Mr. H. as intervener and again refused to commit Mr. C. for trial. In the reasoning, it is stated that there was still no sufficient probability that the accused would be convicted after a trial, namely that it could be proven that he had driven the car. In

a concluding remark, it was added that "the mere fact that, without a criminal conviction, the seriously injured intervener could not obtain from the liability insurance any compensation for his material and immaterial damages, could not justify to hold doubts against the accused" ("Denn allein der Umstand, daß der schwergeschädigte Nebenkläger ohne eine Verurteilung zu keinem Schadensersatz bzw. Schmerzensgeldanspruch gegenüber dem Haftpflichtversicherer des Unfallfahrzeuges kommt ..., kann nicht dazu führen, daß die aufgrund der Beweissituation bestehenden Zweifel zu Ungunsten des Angeschuldigten berücksichtigt werden.").

The applicant, on behalf of Mr. H., lodged an appeal against the decision of 2 July 1992. In his written pleadings, the applicant commented in detail on the reasoning of the decision. He further raised the question "whether or not the lack of Judge R.'s moral strength was more or less flagrant as compared to his obvious incompetence to act as a judge" ("ob der Mangel an charakterlicher Eignung größer oder kleiner sei als die zutage getretene Unfähigkeit zur Ausübung des Richteramtes"). Referring to the above-mentioned last sentence of the decision, he also stated that "District Court Judge [R.], as a result of his ignorance of the law and of the relevant case-law, had become the accomplice of the accused" ("[h]ier macht sich der Richter am Amtsgericht [R.] mangels Kenntnis der Gesetzeslage und der dazu vorliegenden höchstrichterlichen Rechtsprechung zum Komplizen des Angeschuldigten").

In January 1993 the Flensburg Regional Court (Landgericht) quashed the decision of 2 July and ordered that Mr. C. be committed for trial. In the ensuing proceedings, Mr. C. was convicted of reckless driving and of having caused bodily harm. He was sentenced to four months' imprisonment on probation.

On 17 May 1994 the Niebüll District Court convicted the applicant of insult, pursuant to S. 185 of the German Penal Code (Strafgesetzbuch) and imposed a fine of DM 3,000 upon him.

The District Court noted the course of the criminal proceedings against Mr. C. and the contents of the applicant's appeal submissions of 21 July 1992. The Court found that the applicant had attacked the reputation of Judge R. in that, firstly, he had raised the question whether or not the lack of the Judge's moral strength was more or less flagrant as compared to his obvious incompetence to act as a judge and, secondly, had stated that District Court Judge [R.], as a result of his ignorance of the law and of the relevant case-law, had become the accomplice of the accused.

As regards the applicant's defence that he had acted for the protection of Mr. H.'s rightful interests (Ausübung berechtigter Interessen), the District Court considered that the insulting remarks at issue had been unnecessary and inappropriate. The applicant had not intended to raise, even harsh, criticism regarding the court decision of 2 July 1992, but had insulted the Judge concerned. Even if the last sentence in the said court decision was redundant, it did not amount to a provocation justifying the insulting remarks.

In fixing the sentence, the District Court found that the incriminated statements had to be seen against the situation of the intervener who had not yet received and, as a consequence of the decision of 2 July 1992, was further refused any compensation payments.

On 11 October 1994 the Flensburg Regional Court dismissed the applicant's appeal (Berufung). The Regional Court confirmed that the incriminated statements amounted to insult and were not justified for the protection of rightful interests. In this respect, the Regional Court considered that, in the circumstances of the case, the applicant's remarks did not constitute an appropriate means to protect his client's interests. Rather, there was a right to appeal against

the decision of 2 July 1992 and the applicant, on behalf of the intervener, availed himself of this remedy. This remedy was eventually successful. The applicant was entitled to raise, in his appeal submissions, harsh criticism regarding the attacked decision and express his and his client's disappointment and resentment. However, insulting attacks on the judge's personal integrity were neither appropriate nor necessary. In this respect, the Regional Court, having regard to the case-law on the right to freedom of expression, considered that the applicant's remarks went beyond permissible criticism.

On 29 March 1995 the Schleswig Court of Appeal (Oberlandesgericht) dismissed the applicant's appeal on points of law (Revision).

On 31 August 1995 the Federal Constitutional Court (Bundesverfassungsgericht) refused to entertain the applicant's constitutional complaint (Verfassungsbeschwerde). The decision was served on 11 September 1995.

COMPLAINT

The applicant complains under Article 10 of the Convention about his conviction of insult by the Niebüll District Court on 17 May 1994, as confirmed by the Regional Court on 11 October 1994 and by the Court of Appeal on 29 March 1995. He considers that the incriminated statements in his written pleading of 21 July 1992 did not go beyond the limits of permissible criticism regarding the competent judge's performance.

THE LAW

The applicant complains that his conviction of insult by the Niebüll District Court on 17 May 1994, as confirmed by the Regional Court on 11 October 1994 and by the Court of Appeal on 29 March 1995, infringed his right to freedom of expression. He invokes Article 10 (Art. 10) of the Convention which provides as follows:

> "1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority ...
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, ... for the protection of the reputation or rights of others ..."

The Commission notes that on 17 May 1994 the Niebüll District Court found the applicant guilty of insult. The Disciplinary Court considered that, in written appeal submissions, the applicant had attacked the reputation of Judge R. The applicant's conviction was confirmed upon appeal by the Flensburg Regional Court and the Schleswig Court of Appeal.

The Commission finds that this measure constituted an interference with the exercise of the applicant's freedom of expression. Such interference is in breach of Article 10 (Art. 10), unless it is justified under paragraph 2 of Article 10 (Art. 10-2), i.e. it must be "prescribed by law", have an aim or aims that is or are legitimate under Article 10 para. 2 (Art. 10-2) and be "necessary in a democratic society".

The legal basis of the interference under consideration was S. 185 of the German Penal Code. The interference complained of was,

therefore, "prescribed by law" for the purposes of Article 10 para. 2 (Art. 10-2).

Moreover, the decisions complained of aimed to protect "the reputation or rights of others", namely the judge affected by the applicant's statements, which is a legitimate aim under Article 10 para. 2 (Art. 10-2).

It remains to be determined whether the interference complained of was "necessary in a democratic society" and proportionate to the legitimate aim pursued.

The Commission recalls that the adjective "necessary" within the meaning of Article 10 para. 2 (Art. 10-2) implies the existence of a "pressing social need". The Contracting States have a certain margin of appreciation in assessing whether such a need exists, but it goes hand in hand with a European supervision (cf. Eur. Court HR, Observer and Guardian v. the United Kingdom judgment of 26 November 1991, Series A no. 216, pp. 29-30, para. 59; see also No. 14622/89, Dec. 7.3.91, loc. cit.).

The Commission notes that criminal proceedings were conducted against the applicant for having insulted Judge R. in written appeal statements relating to criminal proceedings in which he had represented the victim of the offence.

The Commission considers that both the District Court and the Regional Court, in detailed reasoning, examined the applicant's submissions which were considered to be of an insulting nature. The Courts had regard to the applicant's concern to protect the rightful interests of his client. However, they considered that the insulting remarks in question had been unnecessary and inappropriate, and went beyond permissible criticism. The applicant's constitutional complaint with the Federal Constitutional Court remained unsuccessful.

The Commission finds that the Courts duly balanced the applicant's concern to protect the rightful interests of his client and right to formulate criticism against the necessity, in a democratic society, to protect the reputation and rights of others, here a judge, against insult. Having considered the impugned statements, the Commission finds that there were relevant and sufficient reasons for the applicant's conviction of insult.

Moreover, the sanction chosen, i.e. a fine amounting to DEM 3,000 does not appear disproportionate to the legitimate aim pursued.

In these circumstances, the interference complained of was "necessary in a democratic society" within the meaning of Article 10 para. 2 (Art. 10-2) of the Convention.

Accordingly, there is no appearance of a violation of the applicant's right under Article 10 (Art. 10) of the Convention.

It follows that the application is manifestly ill-founded with the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

For these reasons, the Commission, by a majority,

DECLARES THE APPLICATION INADMISSIBLE.

M.F. BUQUICCHIO
Secretary
to the First Chamber

J. LIDDY
President
of the First Chamber