European Court of Human Rights: Hans Burkhard Nix v. Germany

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A recent decision by the European Court of Human Rights (ECtHR) confirms the limits of freedom of expression in Germany in relation to the publication of Nazi-symbols. A German blogger complained under Article 10 of the European Convention of Human Rights (ECHR) about his criminal conviction for the offence of using symbols of unconstitutional organisations; however the ECtHR recently found no violation of his right to freedom of expression.

The applicant, Mr Nix, has a blog in which he writes about certain matters concerning economics, politics and society. One of his blog posts contained a picture of former SS chief Heinrich Himmler in SS uniform with the badge of the Nazi party, a swastika on his front pocket and a swastika armband. The picture, accompanied by a quotation by Himmler, was meant to illustrate the blog post in which Mr Nix accused a public official of acting in a racist and discriminatory manner towards his daughter, who is of German-Nepalese origin, with regard to a registration for a vocational training course. Parts of the post were written in vulgar and offensive language. The Munich prosecution authorities instituted criminal proceedings against Mr Nix, charging him with the offence of using symbols of unconstitutional organisations. After long proceedings, Mr Nix was ordered to pay EUR 10 per day for a period covering 120 days in application of Article 86a of the German Criminal Code that prohibits the publication of symbols of unconstitutional organisations. A constitutional request on the grounds that the Regional Court and the Court of Appeal had not examined his right to freedom of expression as protected by Article 5 of the German Basic Law, and Article 10 ECHR, was dismissed by the Federal Constitutional Court. In his complaint, Mr Nix referred to the case of Vajnai v. Hungary, in which the ECtHR had found that the applicant's criminal conviction for wearing a red star at a demonstration constituted a violation of Article 10 ECHR. The Federal Constitutional Court, however, considered the constitutional complaint inadmissible. Finally, Mr Nix lodged a complaint before the ECtHR, referring to his right to freedom of expression under Article 10 ECHR. He submitted, in essence, that the domestic courts had not taken all the circumstances of the case into account and had thus failed to consider that his blog post had constituted a protest against discrimination against children with a migrant background and against the working methods of the employment office, which he deemed to resemble those employed by the Nazis.

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The ECtHR reiterated that Article 10 ECHR applies to the Internet as a means of communication and that the publication of photographs on an Internet site falls under the right to freedom of expression. It considered that Mr Nix's conviction for having displayed a picture of Himmler in SS uniform with a swastika armband in his blog post amounted to an interference with his right to freedom of expression, as guaranteed by Article 10 ECHR; such interference would infringe the ECHR if it did not meet the requirements of Article 10 section 2. It was therefore to be determined whether Mr Nix's conviction was "prescribed by law", whether it pursued one or more of the legitimate aims set out in that paragraph and whether it was "necessary in a democratic society" in order to achieve those aims.

The ECtHR noted that the purpose of Article 86a of the German Criminal Code was to prevent the revival of prohibited organisations and the unconstitutional ideas pursued by them, to maintain political peace, and to ban symbols of unconstitutional organisations in German political life. It therefore considered that the interference in question was in accordance with the law and pursued the legitimate aim of the prevention of disorder. Although there is little scope under Article 10 section 2 ECHR for restrictions on political expression or on debating questions of public interest, the ECtHR reiterated that it had always been sensitive to the historical context of the High Contracting Party concerned when reviewing whether there existed a pressing social need for interference with rights under the Convention. In the light of their historical role and experience, states which experienced the Nazi horrors may therefore be regarded as having a special moral responsibility to distance themselves from the mass atrocities perpetrated by the Nazis. The ECtHR considered that the legislature's choice to criminally sanction the use of Nazi symbols, to ban the use of such symbols from German political life, to maintain political peace, and to prevent the revival of Nazism, must be seen against this background. It observed that the picture and symbol used in Mr Nix's blog post could not be considered as having any meaning other than that of Nazi ideology, which differentiated this case from the findings on the use of the red star in the Vajnai v. Hungary and Fratanoló v. Hungary cases.

The ECtHR accepted that Mr Nix had not intended to spread totalitarian propaganda, to incite violence, or to utter hate speech, that his expression had not resulted in intimidation, and that he may have intended to contribute to a debate of public interest. It noted, however, that the gratuitous use of the picture at issue was exactly what the provision sanctioning the use of symbols of unconstitutional organisations was intended to prevent; it was meant to pre-empt anyone becoming used to certain symbols by banning them from all means of communication. Having regard to the circumstances of the case, the ECtHR saw no reason to depart from the domestic courts' assessment that the applicant did not clearly and obviously reject Nazi ideology in his blog post, and while the criminal conviction of 120 day-fines was not negligible, the ECtHR noted that the

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sentence had been reduced from a prison sentence to a fine in the course of the proceedings and that Mr Nix had been convicted of a similar offence only a few weeks before he published the blog post at issue.

The ECtHR found, in light of all the circumstances of the case and referring to the historical experience of Germany, that the German authorities had adduced relevant and sufficient reasons and had not overstepped their margin of appreciation when interfering with Mr Nix's right to freedom of expression. The interference was proportionate to the legitimate aim pursued and was thus "necessary in a democratic society". Therefore, the application was considered manifestly ill-founded and was rejected as inadmissible.

Decision by the European Court of Human Rights, Fifth Section, case of Hans Burkhard Nix v. Germany, Application No. 35285/16, 13 March 2018, notified in writing on 5 April 2018

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