

European Court of Human Rights: Annen (No. 6) v. Germany

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*Dirk Voorhoof
Human Rights Centre, Ghent University and Legal Human Academy*

In a new judgment with regard to Internet content, the European Court of Human Rights (ECtHR) found that a criminal conviction for insult was a justified interference with the right to freedom of expression as guaranteed under Article 10 of the European Convention on Human Rights (ECHR). The case of Annen (No. 6) v. Germany concerns a conviction for posting a press release on the Internet and distributing leaflets with insulting statements about a German professor at the University of Bonn, professor B., who was conducting embryonic stem cell research. Annen is a campaigner against abortion and operates an anti-abortion website. In line with the criticism of a catholic Bishop, Annen referred to the similarity between the team of scientists around professor B. carrying out stem cell research and the Nazis who had performed experiments on humans. The text mentioned that professor B. 'uses embryos - people - that were murdered in Israel and then sold to Germany for significant sums of money for research purposes at the University of Bonn. During Nazi times, German scientists performed research experiments on Jews and then murdered them'. Annen's press release also expressed the opinion that the professors of Bonn University 'appear to have forgotten that these experiments were performed in Nazi times by willing doctors and scientists. These doctors and scientists, who were clearly in bondage to the rogue State and subservient to it, also carried out their research solely 'for the good of the people'. The research performed during the Nazi regime took place at a later stage of human life. The present-day research takes place at an earlier stage of human life.'

Annen was convicted of insult and sentenced to a penalty of thirty daily fines of EUR 15 each. This sentence was imposed by a district court and later confirmed by the regional court. The German courts acknowledged Annen's right to freedom of expression and to impart to others his beliefs that the fusion of an egg and a sperm represented the beginning of human life and that research using imported stem cells from terminated embryos involved the destruction of human life. They also acknowledged that his statements contributed to a debate of public interest. The courts however found that referring to professor B. by name and to the criminal and dehumanising medical experiments under the Nazi-regime had been equivalent to linking his professional conduct to the atrocities committed by the Nazis, which represented a serious infringement of his personality. After exhausting all national remedies in Germany, Annen complained to the ECtHR

that his criminal conviction for insult had violated his right to freedom of expression as provided in Article 10 ECHR.

At the outset, the ECtHR observed that the criminal conviction interfered with Annen's right to freedom of expression, that it was prescribed by law - namely Article 185 of the Criminal Code - and that it pursued the legitimate aim of protecting the reputation or rights of others. It therefore remained to be determined whether the interferences were 'necessary in a democratic society'. It further reiterated that the right to protection of reputation is guaranteed by Article 8 ECHR as part of the right to respect for private life, and that in order for Article 8 ECHR to come into play, an attack on a person's reputation must attain a certain level of seriousness and be made in a manner causing prejudice to personal enjoyment of the right to respect for private life. The ECtHR also repeated that it had to ascertain whether the domestic authorities had struck a fair balance when protecting two values guaranteed by the Convention which may come into conflict with each other in certain cases, namely on the one hand freedom of expression protected by Article 10 ECHR, and on the other the right to respect for private life enshrined in Article 8 ECHR. It also emphasised that a clear distinction had to be made between criticism and insult: 'If the sole intent of a particular form of expression is to insult a person, an appropriate sanction would not, in principle, constitute a violation of Article 10 ECHR'. The ECtHR referred in particular to some statements in Annen's press release expressing a comparison between modern-day stem cell research and experiments carried out on humans during the Nazi regime, with a reference to Auschwitz. Given these statements, the ECtHR saw no reason to call into question the domestic courts' conclusion that Annen did indeed directly link the work of the scientists - and in particular of professor B. - to the atrocities committed during Nazi times. Even if, as in the instant case, regarded as value judgment, such serious and particularly offensive comparisons demand a particularly solid factual basis. While the ECtHR accepted that the moral responsibility of scientists was the issue discussed, this alone did not provide a solid factual basis for personally targeting professor B.'s scientific work. The ECtHR found the comparison with the Nazi atrocities not only shocking and disturbing, but also transgressing the limits of any acceptable criticism. It found that even though the intention behind Annen's press release was not mainly to defame the scientists, by naming professor B. it still had a stigmatising and defaming effect. Furthermore, in the German historical context, the attack on professor B.'s reputation was serious. Notwithstanding the fact that Annen's statements sought to contribute to a public debate and that professor B. had entered the public stage to a certain degree, the ECtHR concluded that the German courts had provided relevant and sufficient reasons for the criminal conviction of Annen. It found that the decisions by the domestic courts were based on a reasonable assessment of the statements in question, the rights of professor B. and of the circumstances of the present case. Lastly, the ECtHR observed that the sanction was criminal in nature, which is - in view of the existence of other means of intervention and rebuttal, particularly through civil

remedies - one of the most serious forms of interference with the right to freedom of expression. The ECtHR recalled that criminal sanctions for insult or defamation must not be such as to dissuade the press or others who engage in public debate from taking part in the discussion of matters of legitimate public concern. The ECtHR noted however that Annen was sentenced (only) to a penalty of 30 daily fines of EUR 15 each and thereby to a sentence at the lower end of the possible criminal sanctions for insult. The ECtHR found this penalty moderate, having regard to the seriousness of the violations of professor B.'s personality rights and the nature of the personalised attacks, when seen in the historical context. Therefore, there had been no violation of Article 10 ECHR.

Judgment by the European Court of Human Rights, Fifth Section, case of Annen (no. 6) v. Germany, Application no. 3779/11, 18 October 2018

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