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## ANTI-ABORTION PROTEST AND FREEDOM OF EXPRESSION IN EUROPE

Rónán Ó Fathaigh\*

### I. INTRODUCTION

In the recent case of *Hoffer v. Germany*<sup>1</sup> the European Court of Human Rights<sup>2</sup> was called upon to determine whether the conviction for defamation of an anti-abortion activist for comparing abortion to the Holocaust was a violation of the right to freedom of expression.

Article 10 of the European Convention on Human Rights<sup>3</sup> guarantees the right to freedom of expression;<sup>4</sup> however, the European Court held there had been no violation Article 10 in *Hoffer*. The purpose of this article is to provide a critique of the judgment in *Hoffer* and demonstrate that it represents an aberration from the usually robust protection afforded to freedom of expression by the European Court.

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\* Ph.D. Candidate at the Faculty of Law, University of Ghent, Belgium. LL.B., LL.M., National University of Ireland, Galway. Former Legal Researcher at Raidió Teilfís Éireann (R.T.É.), Dublin.

<sup>1</sup> *Hoffer and Annen v. Germany*, App. Nos. 397/07 and 2322/07, (Eur. Ct. H.R.) (2011), available at <http://www.bailii.org/eu/cases/ECHR/2011/46.html> (subject to editorial review ) (last visited Mar. 26, 2011).

<sup>2</sup> The European Court of Human Rights [hereinafter European Court] was established under Article 19 of the The Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, Rome, 213 U.N.T.S. 221, available at <http://www.coe.int> (last visited Mar. 26, 2011)[hereinafter European Convention] to determine all matters concerning the interpretation and application of the European Convention. See generally DAVID J. HARRIS ET AL., LAW OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS (2d ed. 2009).

<sup>3</sup> The European Convention has been ratified by the 47 member states of the Council of Europe. For a current list of member states, see <http://conventions.coe.int/default.asp> (last visited (Mar. 26, 2011).

<sup>4</sup> *Id.* at art. 10

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 and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

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, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

## II. HOFFER V. GERMANY

The applicants in *Hoffer* were anti-abortion activists who had distributed pamphlets outside a medical clinic in Nuremburg. The pamphlets urged support for ending abortion in Germany; however, the pamphlets also named a doctor at the clinic, Dr. F., describing him as a “Killing specialist for unborn children.” Moreover, the back page of the pamphlet included the following statements: “Stop the murder of children in their mother’s womb on the premises of the Northern medical centre. Then: Holocaust; Today: Babycast.”

The doctor and the medical center initiated criminal proceedings for defamation against the applicants. At first instance, the German courts held that the actions should fail, as the pamphlet was not intended to debase Dr. F., and only conveyed the applicants’ general rejection of abortion. However, on appeal, it was held that the statement “Then: Holocaust /Today: Babycast” had to be interpreted as putting the lawful activity of Dr. F. on a level with the Holocaust, qualifying him as a mass murderer, which amounted to abusive insult. The applicants were convicted of defamation and fined.

The applicants made an application to the European Court, arguing that the convictions violated their right to freedom of expression under Article 10 of the Convention. When considering whether there has been a violation of Article 10, the European Court applied its usual four-step test: (i) whether there had been an interference with a Convention right; (ii) whether the interference was prescribed by law (i.e. law was foreseeable); (iii) whether the law pursued a legitimate aim; and (iv) whether the interference was necessary in a democratic society (i.e. proportional).

The Court held that the conviction represented an “interference” with the right to freedom of expression; the law of defamation was sufficiently clear to be “prescribed by law”; and the conviction pursued the legitimate aim of protecting the reputation of Dr. F.<sup>5</sup>

The main question was therefore whether the convictions were “necessary in a democratic society”. Firstly, the Court noted that it must have regard to the special degree of protection afforded to expression of opinions which were made in the course of a debate on matters of public interest.<sup>6</sup> Secondly, the Court noted that the German courts had accepted that all other statements in the pamphlet, except the Holocaust reference, were acceptable elements of public debate.<sup>7</sup>

The crucial passages in the Court’s reasoning were as follows:

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<sup>5</sup> *Hoffer* and, *supra* note 1, at ¶¶ 40-41.

<sup>6</sup> *Id.*, at ¶ 44.

<sup>7</sup> *Id.* at ¶ 45.

“In the view of the domestic courts the applicants, by comparing the performance of abortions to the mass-homicide committed during the Holocaust, had violated the physician’s personality rights in a particular serious way and could have been expected to express their criticism in a way which was less detrimental to the physician’s honour.

The Court further notes that the Federal Constitutional Court acknowledged the fact that the applicants’ statement could be interpreted in different ways, but considered that all possible interpretations amounted to a very serious violation of the physician’s personality rights.

The Court observes that the impact an expression of opinion has on another person’s personality rights cannot be detached from the historical and social context in which the statement was made. The reference to the Holocaust must also be seen in the specific context of the German past.”<sup>8</sup>

Thus, the Court concluded that there had been no violation of Article 10 as the convictions had represented an adequate balance between the applicants’ right to freedom of expression and the doctor’s personality rights.

### III. DISCUSSION

The reasoning in *Hoffer* is questionable in a number of respects: Firstly, in considering the meaning to be attributed to the Holocaust reference, the Court makes no reference to the fact the impugned statements were contained in a pamphlet, and distributed by campaign activists. In this regard, the Court failed to refer to its previous case law on campaigning leaflets, namely *Steel and Morris v. The United Kingdom*<sup>9</sup> where the European Court laid down three pertinent principles: (i) that in a campaigning leaflet a certain degree of hyperbole and exaggeration is to be tolerated, and even expected;<sup>10</sup> (ii) that campaign groups play a legitimate and important role in stimulating public discussion;<sup>11</sup> and (iii) that there exists a strong public interest in enabling campaign groups outside the mainstream to contribute to public debate on matters of public interest.<sup>12</sup>

The applicants were entitled to use provocative language to convey their disapproval of abortion, and it is to be expected that pamphlets will use such language. This view is supported by the fact that the message concerned abortion, an important issue of public interest, and which has historically been the subject of extremely provocative debate.

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<sup>8</sup> *Id.* at ¶¶ 46-48.

<sup>9</sup> *Steel and Morris v. The United Kingdom*, App. No. 68416/01, 41 Eur. H.R. Rep. 22 (2005), available at <http://www.bailii.org/eu/cases/ECHR/2005/103.html> (last visited March 28 2011).

<sup>10</sup> *Id.*, at ¶ 90.

<sup>11</sup> *Id.*, at ¶ 95.

<sup>12</sup> *Id.*, at ¶ 89.

Freedom of expression has long been held by the European Court to include speech which offends, shocks and disturbs.<sup>13</sup>

Secondly, while the Court expressly recognised that the statement was an opinion, the Court failed to apply the well established principle that: “in order to assess the justification of an impugned statement, a distinction needs to be made between statements of fact and value-judgments. While the existence of facts can be demonstrated, the truth of value judgments is not susceptible of proof.”<sup>14</sup> Comparing abortion to the Holocaust is a value judgment, not susceptible to proof. It is not for a court to determine the reasonableness of this view, and punish a person for holding such a view. While the main issue was whether the Holocaust reference was meant to refer to Dr. F., it being a value-judgment should have entered into the equation.

Thirdly, it is worth noting that a criminal conviction (albeit in the form of a fine) was imposed on the applicants. The Court does not consider the chilling effect a criminal conviction will have on activists generally, and discourage participation in similar leafleting campaigns, in direct contradiction to the statement in *Steel and Morris* that there is a strong public interest in enabling campaigners to contribute to society generally.<sup>15</sup> Criminal convictions deter such activity.

Finally, the Court failed to refer to its previous judgment in *Scharsach v. Austria*<sup>16</sup> where the Court held that calling someone a “closet Nazi” was a permissible value judgment, despite its special stigma.<sup>17</sup>

#### IV. CONCLUSION

All in all, the judgment in *Hoffer* is particularly bereft of reasoning: failing to place the statements in the context of a pamphlet, where hyperbole is to be expected; and failing to place importance on the statement being a value-judgment. When these issues are considered together, it is highly questionable whether attributing the meaning of such a statement to refer to a particular doctor, and not to abortion generally, is consistent with the high degree of protection afforded to freedom of expression under Article 10 on matters of public debate. It is hoped that *Hoffer* will not be followed in the future and the European Court will have an opportunity to realign its principles with the jurisprudence referred to above.

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<sup>13</sup> *Lindon, Otchakovsky-Laurens and July v. France*, App. Nos. 21279/02 and 36448/02, 46 Eur. H.R. Rep. 35, ¶ 45 (2008), available at <http://www.bailii.org/eu/cases/ECHR/2007/836.html> (last visited March 28 2011).

<sup>14</sup> *Id.*, at ¶ 55.

<sup>15</sup> *Steel and Morris*, *supra* note 5, at ¶ 89 (2005).

<sup>16</sup> *Scharsach and News Verlagsgesellschaft mbH v. Austria*, App. No. 39394/98, 40 Eur. H.R. Rep. 22 (2005), available at <http://www.bailii.org/eu/cases/ECHR/2003/596.html> (last visited March 28 2011).

<sup>17</sup> *Id.*, at ¶¶ 41, 43.