

EUROPEAN COURT/GERMANY: Freedom of expression and abortion

Freedom of expression does not give the right to label abortions performed by designated doctors "aggravated murder"

Registrar of the European Court (20.09.2018) – <https://bit.ly/2zCSIdu> – In today's Chamber judgments¹ in the cases of *Annen v. Germany* (nos. 2 to 5) (application nos. 3682/10, 3687/10, 9765/10 and 70693/11) the European Court of Human Rights held, unanimously, that there had been:

no violation of Article 10 of the European Convention on Human Rights.

The cases concerned a series of complaints by an anti-abortion activist, Klaus Günter Annen, over civil court injunctions on various actions he had taken as part of an anti-abortion campaign. The plaintiffs in the domestic proceedings were four doctors who performed abortions.

The Court held in particular that the injunctions had interfered with Mr Annen's freedom of expression, but had been necessary in a democratic society. When examining whether there had been a need for such interferences in the interests of the "protection of the reputation or rights of others", namely of the doctors, the Court's role was only to ascertain whether the domestic courts had struck a fair balance when

protecting the freedom of expression guaranteed by Article 10 and the right to respect for private life protected by Article 8 of the Convention.

In sum, the Court considered that the injunctions had not been disproportionate to the legitimate aim pursued and that the reasons given by the domestic courts had been relevant and sufficient. It pointed out that the domestic authorities had carried out a detailed analysis of the leaflets and webpage set up by Mr Annen and that the accusations by Mr Annen against the various abortion doctors had not only been very serious but might also have incited hatred and aggression. In this regard, the Court found the domestic courts' conclusion acceptable that Mr Annen's statements, in particular by using the term "aggravated murder", could be understood as personalised accusations against the doctors of having perpetrated the criminal offence of aggravated murder.

Principal facts

The applicant, Klaus Günter Annen, is a German national who was born in 1951 and lives in Weinheim (Germany). The domestic courts issued four civil injunctions against Mr Annen, prohibiting particular aspects of his anti-abortion campaign.

In the first case (application no. 3682/10) Mr Annen was ordered to refrain from referring on his webpage to abortions performed by a doctor, Dr Q., as "aggravated murder" and

comparing them with the Holocaust.

While the first-instance court in May 2006 rejected Dr Q's application on the grounds that it was a fact that Dr Q. performed abortions and that the remainder of the website's content was covered by Mr Annen's freedom of expression, the Karlsruhe Court of Appeal granted an injunction in February 2007 after Dr Q. appealed. It pointed out that Mr Annen had insinuated, by using the term "aggravated murder" on the website, that Dr Q. had committed criminal offences and had compared abortions with the Holocaust. Furthermore, he had not referred to section 218a of the Criminal Code which exempted abortions as performed by Dr Q. from criminal liability. In sum, it was possible to interpret his statements as a personal accusation against Dr Q. of perpetrating aggravated murder.

At the origin of the second case (application no. 3687/10) was a public statement on a leaflet by Mr Annen that another doctor, Dr. S., had performed unlawful abortions in his practice, outside of which Mr Annen had also distributed various leaflets in November/December 2004 and in September 2005. They contained statements such as "Near you: unlawful abortions ... and you are silent about the aggravated murder of our children?"

Subsequently, Dr. S. made a request for a civil injunction which was granted by the Karlsruhe Regional Court on 4 November 2005. It held that the statements had a "pillory effect" and amounted to a serious interference with Dr S.'s personality rights, which was not justified by Mr Annen's freedom of expression. The court underlined that Mr Annen had singled out Dr S. by mentioning him by name and distributing the leaflets in the vicinity of his practice, that he had

implied that Dr S. had committed the criminal offence of aggravated murder and that he had associated Dr S. with the Holocaust.

Both parties appealed. In February 2007 the Karlsruhe Court of Appeal confirmed the reasoning of the Regional Court and held that the wording of Mr Annen's statements showed that he had described the abortions performed by Dr S. as aggravated murder, which could not be tolerated. It reiterated that by singling out Dr S., Mr Annen had created an unacceptable "pillory effect". In that regard, the court noted that Dr S. had not been involved in the public debate about abortions in any way. Since Mr Annen had not clarified that he had only been criticising abortions, which according to the case-law of the Federal Constitutional Court were unlawful but not subject to criminal liability, he had exceeded the limits of justifiable criticism.

In the third case (application no. 9765/10) the application for an injunction was lodged by Dr St. because Mr Annen had approached passers-by and possible patients in the vicinity of Dr St.'s medical practice in April 2005, while distributing leaflets. The leaflets had stated that the abortions performed by Dr St. were unlawful and compared them with the Holocaust.

The injunction was granted in October 2005 by the Mannheim Regional Court whose decision was upheld by the Karlsruhe Court of Appeal in February 2007. Both courts referred to a previous decision of the Federal Court of Justice in which it had confirmed a civil injunction against similar conduct by Mr Annen. Mr Annen had attacked Dr St.'s legal professional activities by implying that he had committed criminal acts and had interfered with the relationship of trust between doctor

and patient. The injunction order was justified in view of the massive “pillory effect” he had created by singling out Dr St. and criticising him in a harsh way in the immediate vicinity of his practice.

The fourth case (application no. 70693/11) dealt with a civil injunction and an order to pay damages against Mr Annen because of statements which he had made on an anti-abortion website. The website had implied that abortions amounted to aggravated murder, compared doctors performing abortions to concentration camp commanders and in general had equated abortions with the Holocaust. A link on the website directed readers to a list of doctors who performed abortions, mentioning, among others, Dr F., the plaintiff in this case.

The complaints by Mr Annen against the injunctions in all four cases were ultimately dismissed by the Federal Constitutional Court.

Complaints, procedure and composition of the Court

Relying on Article 10 (freedom of expression) Mr Annen complained that the injunctions had interfered with his freedom of expression, without being justified by the protection of the doctors’ personality rights. His website and leaflets contributed to a public debate and he had not personally accused the doctors of perpetrating aggravated murder; rather he had criticised the legal framework in Germany regarding abortions.

The applications were lodged with the European Court of Human Rights on 15 January 2010, 8 February 2010 and 26 October 2011.

The judgments were given by a Chamber of seven judges, composed as follows:

Yonko **Grozev** (Bulgaria), President,

Angelika **Nußberger** (Germany),

André **Potocki** (France),

Síofra **O'Leary** (Ireland),

Mārtiņš **Mits** (Latvia),

Lətif **Hüseynov** (Azerbaijan),

Lado **Chanturia** (Georgia),

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

Decision of the Court

Article 10

The Court underlined that its task under Article 10 was to look at the interference complained of in the light of the case as a whole and determine whether it had been “proportionate to the legitimate aim pursued” and whether the reasons adduced by the national authorities to justify it had been “relevant and sufficient”. Where a balancing exercise had been undertaken by the national authorities in conformity with the Court’s case-law, the Court would require strong reasons to substitute its view for that of the domestic courts.

Turning to the first case (application no. 3682/10), the Court accepted the domestic Court of Appeal’s conclusion that Mr Annen’s statements had been ambiguous and could be understood as an accusation that Dr Q. had perpetrated the criminal offence of aggravated murder. Distinguishing the present case from the case of its previous judgment *Annen v. Germany* (no. 3690/10, 26 November 2015), it noted that Mr Annen had not provided the additional information that the abortions performed by Dr Q. had not been subject to criminal liability. Furthermore, there had been no factual foundation for the very serious criminal allegations made by Mr Annen. Lastly, the Court observed that Mr Annen had not been ordered to pay damages or convicted but had only had to refrain from calling the abortions “aggravated murder”.

Having regard to the second case (application no. 3687/10), the Court agreed with the domestic courts observations that while – strictly speaking – calling abortions unlawful was correct, the statement by Mr Annen read in conjunction with the rest of the leaflet could be understood as an allegation that Dr S.’s professional activities constituted aggravated

murder. It had to be noted that in this case too Mr Annen's accusations against Dr S. were very serious and that he, nonetheless, was not per se prohibited from campaigning against abortions or criticising doctors that performed abortions. Since the domestic courts had thoroughly discussed various possibilities of interpreting the statements in light of the freedom of expression, the Court found no violation of Article 10.

In the third case (application no. 9765/10) the Court firstly agreed with the domestic court's finding that the applicant had vilified Dr St. by implying that he had committed criminal acts. It secondly observed that Mr Annen had singled out Dr St. from all the doctors that had performed abortions and had thereby created a "pillory effect". Even though Dr St. had been involved in various legal disputes in the past, the domestic courts had concluded that this did not have any substantial effects on Dr St.'s profile and could not redound to his disadvantage. Having regard to their direct contact with their societies, the Court found that it was primarily for the domestic courts to assess how well-known a person was. In conclusion, the Court saw no reason to call the domestic courts' reasoning into question. It thirdly held that Mr Annen's "pavement counselling" had severely disrupted the relationship of trust between Dr St. and his patients.

Lastly, since Mr Annen had not been convicted for slander or ordered to pay damages, the Court held that the level of interference with his freedom of expression had been relatively low and had been "proportionate to the legitimate aims pursued". Therefore, in the Court's view, the national courts had thoroughly assessed the conflicting interests by referring to the previous judgment of the Federal Court of Justice and considering the factual and legal differences of

the cases.

The Court also found no violation of Article 10 of the Convention in the fourth case (application no. 70693/11). It found that there was not a sufficient factual basis for calling abortions as performed by Dr F. “aggravated murder”. Furthermore, distinguishing the present case from the case of its previous judgment *Annen v. Germany* (no. 3690/10, 26 November 2015), the Court observed that Mr Annen had equated the medical activities of Dr F. with the unjustifiable atrocities inflicted on Jews under the Nazi regime and had even stated that “Equating the Babycast with the Holocaust would mean relativising today’s abortion murders”. These accusations were very serious and had severely undermined Dr F.’s reputation. Based on the national courts’ detailed reasoning, the Court considered therefore that both the injunction and the order to pay damages against Mr Annen had not fallen outside their margin of appreciation and had not been disproportionate. Accordingly, there had been no violation of Article 10 of the Convention in any of the four cases.

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