Comparing Abortion to the Holocaust

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Amid all the discussion regarding the ***A., B. and C. v. Ireland*** judgment, it is interesting to note that last week, in one of its first freedom of expression judgments of 2011, the European Court of Human Rights was called upon to consider an interesting issue surrounding abortion, namely the conviction for defamation of an anti-abortion activist for comparing abortion to the Holocaust.

The applicants in ***Hoffer v. Germany*** were anti-abortion activists who had handed out 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: Babycaust*

The doctor and the medical centre 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: Babycaust"* 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. The Court applied its usual preliminary assessment under Article 10: it considered that the convictions amounted to an "interference" with the applicants' freedom of expression, were "prescribed by law", and pursued the legitimate aim of protecting "the reputation or rights of others".

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 (para. 44). 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 (para. 45).

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

> *[46] 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.

[47] 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.

[48] 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.

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.

Comment

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*** where the 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* (para. 90); (ii) that campaign groups play a legitimate and important role in stimulating public discussion (para. 95); 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 (para. 89).

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 the message concerned abortion, an important issue of public interest, and which has historically been the subject of extremely provocative debate. Freedom of expression has long been held to protect speech which "*offends, shocks and disturbs*" (***Lindon v. France***, para. 45).

Secondly, while the Court expressly recognised that the statement was an opinion, the Court fails 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.*" (***Lindon v. France***, para. 55). 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. Criminal convictions deter such activity.

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.