

Case:

BVerfGE 82, 272 1 BvR 1165/89 Stern/Strauß -decision (coerced democrat case)

Date:

26 June 1990

Judges:

Herzog, Henschel, Seidl, Grimm, Söllner, Dieterich, Kühling, Seibert.

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HEADNOTES:

1. The protection of expressions of opinion that represent insults of a third person will routinely yield to the protection of personality.
2. An expression of opinion must be viewed as an insult when it strays beyond polemical and overstated criticism into belittlement of the person.

Order of the First Panel of 26 June 1990 – 1 BvR 1165/89 – in the proceedings concerning the Constitutional Complaints of 1) the Publisher G.. ("Complainant One"), and 2) of Mr. G... ("Complainant Two") ... against the 28 July 1989 judgment of the Munich Superior Land Court – 21 U 2745/88 –.

DECISION:

The 28 July 1989 judgment of the Munich Superior Land Court - 21 U 2745/88 - violates Complainant One's basic right under the Basic Law's Art. 5(1), second sentence, and violates Complainant Two's basic right under the Basic Law's Art. 5(1), first sentence. It is vacated. The matter is remanded to the Superior Land Court.

The Free State of Bavaria must compensate the Complainants for the necessary costs.

EXTRACT FROM GROUNDS:

A.

The Constitutional Complaint is directed against a judgment that enjoined the Complainants from making and disseminating a particular statement regarding the late Bavarian Prime Minister Strauss.

I.

1. Complainant Two is an author and journalist. In various publications and television broadcasts, he dealt primarily with analyzing the Nazi past in the Federal Republic. In his 1987 book *The Second Guilt, or On The Burden of Being German*, he gave expression to his concern about the understanding of democracy in Germany. He took the opinion that not all representatives of the German federal order were genuine democrats, convinced of the system's advantages. He used the term "coerced democrat" in this context and related it to (among others) the now deceased Plaintiff of the original suit. On this point, he stated inter alia that a strong yearning existed in the Federal Republic for a "strongman", and that

Strauss, a politician from the Christian Social Union, had become the focal figure of this yearning and its chief symbol. A comparison between Strauss and Hitler, however, was as absurd as the assertion that Strauss wanted to transform the democratic republic into a dictatorship. In the book *Vote - But For Whom?*, published by Stern Magazine at the same time, Complainant Two also used the term coerced democrat, but again rejected a comparison between Strauss and "the real strong man between 1933 and 1945".

2. Upon the death of Rudolf Hess, Complainant One published an interview with Complainant Two in its illustrated weekly magazine Stern. The text was printed under the title, "Rudolf Hess and the Germans Second Guilt". Complainant Two responded as follows to questions on the topic of "coerced democrats":

For me these are people who allowed themselves to be converted to democracy only under coercion or for opportunistic reasons, and who use this form of state at best formally. Franz Josef Strauss is for me the personification of the this type.

Stern: The political resume of this Bavarian proves that we are indeed better democrats than we appear to be it - for he in fact did not make it.

C...:

It is correct that Strauss did not reach his goal. The second German democracy domesticated him. But that does not change the fact that this type - I would like to depersonalize it, because it by no means refers only to Franz Josef Strauss - that this type is very much alive in the Federal Republic. To be sure, the seeds he planted never grew to see the light of day; the leftover yearning for a strongman, so to speak the federal-German offshoot of the Nazi "Führer" cult, was not fulfilled. Nevertheless, I hold the coerced democrat type to be very dangerous. It's not that this type can overwhelm our democracy, but it certainly can harm it.

II.

1. Prime Minister Strauss obtained a preliminary injunction against the Complainants. This forbid them inter alia from asserting and disseminating the contention that Strauss was the personification of that type of person who allowed himself to be converted to democracy only under coercion or for opportunistic reasons, and who used this form of state at best formally.

In the original suit's complaint, Strauss argued that Complainant Two's statement in the magazine interview was an "insulting criticism whose malice and defamation cannot be outdone". To the contrary, he asserted, he had always been for parliamentary democracy and had viewed it as the best form of state. The false assertion of the opposite violated his right of personality and his human dignity.

2. The Land Court enjoined the Complainants, under threat of a fine or alternatively of arrest, from asserting or disseminating the contention that Strauss was the personification of that type of person who allowed himself to be converted to democracy only under coercion or out of opportunistic reasons, and who used this form of state at best formally.

In addition, Complainant One was sentenced to do the following: publish Section One of the operative portion of this judgment in the next issue of Stern Magazine that has not yet been readied for publication and to do so, in the magazine's same section and in the same print format as the article objected to in Stern Number 36, issued on 27 August 1987, on pages 21 E and 21 G under the subheading, "Rudolf Hess and the German's Second Guilt".

The court gave the following reasons for its decision: It was true that in dealing with the explanation in a magazine interview it was dealing with an expression of opinion that, as a rule, the Basic Law's Art. 5(1) protected. However, this strayed far beyond the border that

separates such expression from insulting criticism. Strauss, as a politician and statesman whom the people democratically elected and who took an oath of allegiance to the constitution, was severely defamed and belittled in terms of his honour. He was falsely accused of not identifying himself with democracy, but instead of enduring it at best unwillingly and under coercion, as well as of basically working in opposition to the state bound by the rule of law. Complainant One had to accept attribution of the statements to it, since its editors had provoked and discernibly approved of Complainant Two's declaration.

3. During pendency of the appeal, the Plaintiff in the underlying proceedings died. His heirs took over its prosecution.

The Superior Land Court partially altered the Land Court's decision. The Complainants were enjoined, under threat of a fine or alternatively of arrest, from making and/or disseminating the following statement:

Coerced democrats. For me these are people who allowed themselves to be converted to democracy only under coercion or for opportunistic reasons, and who use this form of state at best formally. Franz Josef Strauss is for me the personification of this type,

when this statement was made or disseminated in connection with the following statement:

It's correct that Strauss didn't reach his goal. The second German democracy domesticated him. But that does not change the fact that this type - I would like to depersonalize it, because it by no means refers only to Franz Josef Strauss - that this type is very much alive in the Federal Republic. To be sure, the seeds he planted never grew to see the light of day; the leftover yearning for a strongman, so to speak the federal-German offshoot of the Nazi "Führer" cult, was not fulfilled. Nevertheless, I hold the coerced democrat type to be very dangerous. It's not that it can overwhelm our democracy, but it certainly can harm it.

The Superior Land Court gave the following reasons for its decision: The protection of the affected person's right of personality extended beyond his death and was based on the Basic Law's Art. 1(1); the right to an injunction could be asserted still by the deceased's heirs.

Complainant Two had issued a value judgment that Complainant One had made its own. In its concrete form, this value judgment constituted an improper insulting criticism and therefore was not protected by the Basic Law's Art. 5(1). Protection of freedom of opinion and of the press did allow sharp, unsparing, "abusive" criticism, so long as it remained issue-related. But the basic right did not cover an insulting criticism that crosses the boundary into an intentional wounding of a person's honour. One could speak of insulting criticism, however, only when the expression contained a surplus of no longer endurable depreciation (insult) that justified its injunction.

Here this threshold had been crossed. Complainant Two's statement contained an intentional wounding of Strauss' honour. A coerced democrat was one who had allowed himself to be converted to democracy only under coercion or for opportunistic reasons, and who used this form of state at best formally. In the interview's next paragraph the former Plaintiff had been branded a sympathizer of Nazism and characterized as "so to speak the federal-German offshoot of the Nazi 'Führer' cult". This constituted the false accusation that he would have continued the Nazi Führer cult, had the majority not prevented this.

This reproach was not justified even from Complainant Two's point of view. This followed from a comparison of the statements in both books with the magazine interview. In his book *The Second Guilt ...*, Complainant Two had expressly deemed it absurd to compare Hitler with the former Plaintiff. This showed that even in Complainant Two's view the criticism stated in the interview had no usable basis and therefore was arbitrary. The comparison made it clear that the interview no longer concerned the issue, but only an insult.

Of course persons in public life were greater targets of public criticism. Whoever has given cause in the public struggle of opinions for a depreciatory judgment had to endure a sharp reaction. But even here attacks were not allowed to degenerate into insulting criticism, i.e. into intentional wounding of a person's honour. The Complainants did not enjoy any right of reply. Even a permissible sharpness of expression could not justify suggesting that the former Plaintiff was a Nazi sympathizer. The protection of the deceased provided by the Basic Law's Art. 1(1) had not yet dissipated.

Finally, what was being prohibited was not the meaning of the Complainants' contested statements, but merely the statement itself, issued verbatim and in a certain context. This impinged less than any other measure upon freedom of opinion and of the press. Of course, in order to protect free speech, restraint had to be exercised when imposing sanctions upon spontaneous statements. But this concept could not be relied upon to justify the insult of the former Plaintiff. At issue were not spontaneous remarks, but statements about questions that Complainant Two, in his books, already had thought through.

There was, however, no right to publication of the formulation of the decision; a retraction was no longer needed.

III.

1. In their Constitutional Complaint, the Complainants assert a violation of the Basic Law's Art. 5(1). They have argued in essence as follows.

The expression of opinion was wrongly categorized as an insulting criticism; the court gave the statements a meaning that they did not possess. The object of the declaration was an appraisal of political developments in the Federal Republic; it involved a contribution to the intellectual struggle of opinions over an issue of essential importance to the public. In his book, *The Second Guilt, or On The Burden of Being German*, Complainant Two had coined the term "coerced democrat" and had applied it inter alia to the former Plaintiff. But on the other hand, Complainant Two had expressly characterized as absurd the view that Strauss wanted to transform the democratic republic into a dictatorship. The interview had referred to these literary labours of Complainant Two.

Freedom of expression of opinion deserved preeminence as against protection of the deceased's personality, which the Basic Law's Art. 1(1) guaranteed only to a limited extent. The Superior Land Court's balancing was based upon a fundamentally inaccurate view of the significance of protection of personality, which was limited. It further was based upon an incorrect categorization of the statement as an insulting criticism. Hence the result of this balancing likewise could not be correct. The statement was by no means characterized by an intent to vilify and to affront, since Complainant Two had focussed here, as in his books, on the issues. Moreover, the Superior Land Court discerned an intent to insult, not from the passage of the interview objected to, but instead from a different part, to which the Plaintiff had not objected. The Superior Land Court gave this other textual portion a meaning that strayed beyond its grammatical construction and wording. It did so when it explained that the former Plaintiff was being characterized as "so to speak the federal-German offshoot of the Nazi 'Führer' cult". In truth the sentence concerning the remaining yearning for the strongman had criticized not the Plaintiff, but rather the 'Führer' cult. The Superior Land Court had impermissibly associated this passage about the 'Führer' cult with the opinion, expressed two sentences previously, that democracy had domesticated Strauss. Only by doing so did the court manage to interpret the statements as containing the false accusation that the Plaintiff would have continued the 'Führer' cult, had the majority set against him not prevented this. In cases of doubt, a presumption always spoke in favor of the permissibility of free speech. The Superior Land Court had misperceived the importance of this presumption. Moreover, its reasoning, according to which the intent to insult followed from the discrepancy between the interview and the statements quoted from Complainant Two's book, was based on this mistaken interpretation. Even if one wished to understand the interview as stating that the

former Plaintiff shared the yearning for the strongman, this was a permissible expression of opinion that could be substantiated by published declarations of the former Plaintiff. Given his preferred speaking style, he had to endure overstatements.

The injunction of the statement constituted a particularly acute infringement of both Complainants' rights. Complainant Two was forced to forsake conceptual portions of his declaration, and yet the court reached this result only by wrongfully assuming what the statement meant. This bore with it a danger of intimidation.

2. The Bavarian State Ministry of Justice and the Plaintiff were given opportunity to state their views. The Minister took the position that the judgments did not violate the Basic Law's Art. 5(1), and argued as follows. The Superior Land Court adjudged, in a constitutionally unobjectionable manner, Complainant Two's statement to be an insulting criticism. But such an insulting criticism strayed beyond the boundaries of the basic right of Art. 5(1).B.

The Constitutional Complaint is well-founded. The Superior Land Court's decision violates Complainant One's basic right under the Basic Law's Art. 5(1), second sentence, and violates Complainant Two's basic right under Art. 5(1), first sentence.

I.

1. a) The Superior Land Court's injunctive judgment limits the Complainants' basic right of freedom of opinion. Of course, under the Basic Law's Art. 5(2), this basic right may be limited by general statutes, by statutory provisions that protect youths, and by the right of personal honour, to which belong the provisions upon which the Superior Land Court based its decision, namely the Civil Code's §§823(1) and 823(2) in connection with both that code's §1004 and the Criminal Code's §185. But the statutes that limit basic rights must themselves be interpreted and applied in light of the limited basic right, so that its value-setting significance for private law can take effect also at the stage of the law's application (cf. BVerfGE 7, 198 [208]; consistent holdings). The Superior Land Court did not in sufficient measure take account of this requirement.

b) The basic rights' influence does not remove from the proceedings the character of a private legal action (cf. BVerfGE, id., p. 205f.). Therefore, for this Court's constitutional review of the civil courts' decisions as well, the rule applies that in principle the shaping of the proceedings, the determination and appraisal of factual elements, the interpretation of ordinary law, and the application of that law in individual cases all are matters for the responsible special courts, and are not reviewable by this Court. This Court may intervene only when the special courts, in doing so, have misperceived the affected right's significance and reach (cf. BVerfGE 18, 85 [92]).

When infringements of freedom of opinion are involved, however, this can be the case, simply when a statement is inaccurately comprehended or valued. The basic right's influence is misperceived when courts base an adverse judgment on an incorrect version of a statement; or when they give the statement a meaning that, in light of the wording found by the court, it objectively does not have; or when, from among several objectively possible interpretations, they choose the one that leads to an adverse judgment, without excluding the others on the basis of explicit and convincing grounds (cf. BVerfGE 43, 130 [136f.]; Decision of 19 April 1990 - 1 BvR 40/86 and 1 BvR 42/86 - slip opinion p.15). Further, freedom of opinion's significance and reach are misperceived when the courts inaccurately categorize a statement as a factual assertion, as a formal vilification, or as an insulting criticism, so that it cannot partake of the basic right's protection to the same extent as statements that must be viewed as value judgments, lacking any vilifying or insulting character (cf. BVerfGE 60, 234 [242]; 61, 1 [10]; Decision of 19 April 1990 - 1 BvR 40/86 and 1 BvR 42/86 - slip opinion p.13). Factual findings and applications of law that have such content can from the outset block access to the realm which the basic right protects. Therefore, they must be fully

reviewable by this Court, lest protection of freedom of opinion be unacceptably reduced (cf. BVerfGE 43, 130 [136f.]; 54, 208 [215]).

The adverse judgment against Complainant Two is based on a certain understanding of his interview and on the evaluation that it is an insult of the deceased Prime Minister Strauss, so that, as a consequence, freedom of opinion must yield to protection of honour. The full scope of the factual understanding and the legal evaluation of the statement, therefore, are subject to constitutional review.

2. a) The Basic Law's Art. 5(1), first sentence protects freedom of opinion both in the interest of the individual's personal development, with which it is closely allied, and in the interest of the democratic process, for which it has a constitutive importance (cf. BVerfGE 7, 198 [208]). The extent of the protection, however, can depend on the statement of opinion's purpose. Contributions to debate concerning issues that are of essential importance to the public enjoy greater protection than statements that merely serve the pursuit of private interests (cf. BVerfGE 54, 129 [137]; 61, 1 [11]; 66, 116 [139]). The former enjoy a presumption in favor of free speech (cf. BVerfGE 7, 198 [208]). Criticism expressed in overstated and polemic form must be endured particularly in public debate, especially in the political struggle of opinions, because any other result would threaten to paralyse or narrow the opinion-forming process (cf. BVerfGE 54, 129 [139]; 60, 234 [241]). An interpretation of the statutes limiting freedom of opinion is not compatible with the Basic Law, therefore, if it places overly heavy demands on the admissibility of public criticism in political debate (cf. BVerfGE 42, 163 [170]; 54, 129 [137ff.]; 60, 234 [240]; 68, 226 [232]).

b) That the Superior Land Court found the characterization of the original suit's Plaintiff as a "coerced democrat" to be a belittlement and an affront, however, is constitutionally unobjectionable. The claim to social effectiveness of a democratically structured state's elected Prime Minister is indeed significantly harmed when he is characterized as a "coerced democrat", and even, in the sense that Complainant Two uses this term, as the personification of this type. The affected person is thereby subjected to the reproach that, while he outwardly sets himself up as a democrat under pressure of circumstances, inwardly he leans toward undemocratic forms of state.

All the more laden with belittling character is the statement that the Superior Land Court gleaned from the interview of Complainant Two, namely that the former Plaintiff sympathizes with Nazism and would have continued the Nazi 'Führer' cult, had the majority of the people not prevented this. Nazism not only dedicated itself to a model order that is thoroughly opposed to the Basic Law's free democratic order, but it also pursued its ends with detestable means. For a politician who claims to be a democrat, it therefore is highly demeaning to be portrayed as a sympathizer of Nazism.

c) However, it was only by violating the Basic Law's Art. 5(1), first sentence that the Superior Land Court reached the conclusion that Complainant Two's statements were to be understood in this sense. The court interpreted the last segment of the enjoined statement as a characterization of the former Prime Minister Strauss as "the federal-German offshoot of the Nazi 'Führer' cult"; this simultaneously suggested a certain sympathy for Nazism and forced him to put up with the false accusation that he would have continued the Nazi Führer cult, had the majority not prevented this. That is not, however, the only possible meaning of this segment of text. Rather, it also can be understood as follows: portions of the Federal Republic's population are the subject of the "yearning for the strongman, so to speak the federal-German offshoot of the Nazi 'Führer' cult", and the underlying proceedings' Plaintiff is merely the object of their yearning. The statement, then, does not unequivocally assert that the affected person himself strove for this goal. If the part of the interview that relates to the Nazi 'Führer' cult were to be understood in this sense, then this alone would raise doubt about its belittling effect on the underlying proceedings' Plaintiff.

Such an interpretation, which suggests itself from the text alone, also could find support in Complainant Two's book *The Second German Guilt, or On the Burden of Being German*, upon which the court drew in a different context. In that book, Complainant Two likewise counted the underlying proceedings' Plaintiff among the coerced democrats. But he then characterized him as the focal figure, i.e. the object, of this yearning for the strongman, and he expressly rejected a comparison with Hitler. There is no indication in the Superior Land Court's findings that he retreated from this opinion in the interview that followed publication of his book.

d) The classification of the statement as an insulting criticism also does not stand up under constitutional review. A statement of opinion does not become an insult simply due to its belittling effect on others. An overdone or even abusive criticism do not by itself make a statement a insult. Instead, a belittling statement takes the character of an insult only when it places in the foreground defamation of the person, rather than debate over the issue. It must stray beyond polemical and overstated criticism into belittlement of the person (cf. BGH, NJW 1974, p. 1762 f.; Lenckner in: Schönke/Schröder, StGB, 23. Aufl., §193 Rdnr. 16 and citations therein; BVerfGE 54, 129 [137]).

If one takes as a basis this narrowly drawn concept of insult, then the factual indications drawn upon by the Superior Land Court do not suffice to support a classification of the statement as an insult. With the enjoined statement, Complainant Two sought primarily to point out the endangerment to the democratic order posed by persons who only outwardly recognize this form of state, but who inwardly reject it. Since they would pass themselves off as being democratic only under coercion, their undemocratic leanings could, upon a change of circumstances, quickly be activated. It was only in this context that Complainant Two first named the underlying proceedings' Plaintiff as an example of the "coerced democrat" type. This statement about the issue remained in the foreground, and the Plaintiff was brought in only to illustrate who corresponds to the type portrayed. Within the contours of debate on the issues, even a democratic politician must put up with the reproach contained in the characterization "coerced democrat".

Complainant Two's statements that followed also maintained such a focus on the issues. This is true even if one sees therein, as did the Superior Land Court, an assertion that the underlying proceedings' Plaintiff secretly subscribed to the 'Führer' cult. Complainant Two expressly made it clear that he was concerned only with the coerced democrat type, which he said was very much alive in the Federal Republic and by no means embodied in the Plaintiff alone. To the extent that he subsequently spoke of a "yearning for the strongman", a federal-German "offshoot of the Nazi Führer cult", his statements also do not permit the interpretation that they no longer are meant to state an opinion on the issues - however overstated and passionately urged - but instead to personally affront the former Plaintiff. Rather, outweighing the latter here again is a warning, both against too quickly deciding that the Federal Republic's democratic order is secure and against underestimating the dangers that threaten it.

e) Given the appellate judgment's reasoning, the Superior Land Court's decision in favor of the deceased's personality protection and against Complainant Two's freedom of opinion rests both on an insufficiently substantiated interpretation of the statement and on an incorrect evaluation of it as an insulting criticism. Under these circumstances, one cannot exclude the possibility that the appellate court, when paying sufficient attention to the Basic Law's Art. 5(1), first sentence, will reach a different result in its balancing.

II.

For Complainant One, the judgment represents an encroachment upon freedom of the press under the Basic Law's Art. 5(1), second sentence. Since this encroachment is supported only by the incorrect assumption that the statement made by Complainant Two and printed here must be viewed as an insult, to this extent, too, the decision violates the Basic Law.

Judges: Herzog, Henschel, Seidl, Grimm, Söllner, Dieterich, Kühling, Seibert.

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