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German Court Injunction Banning Political Leaflet Violated Article 10:

Brosa v. Germany

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In a victory for free expression, the European Court has ruled that a court-imposed injunction banning a political activist from distributing leaflets targeting a political candidate violated Article 10 of the European Convention. The Court in [*Brosa v. Germany*](#) criticised the German courts for refusing to hold that the leaflet was a fair comment on a matter of public interest, as the threshold for proving fair comment was “disproportionately high.”

The case arose when Ulrich Brosa, a 64-year-old activist, wrote a newspaper op-ed arguing that a local organisation, Berger 88, was an extremist right-wing organisation. The newspaper also published a letter from a town councillor (F.G.), who defended the organisation, arguing it had no extremist tendencies. The councillor was also standing in the upcoming mayoral elections, and Brosa decided to distribute leaflets opposing his candidacy, which read: “Don’t vote for an agitator. Amöneburg is the seat of several neo-Nazi organisations. Particularly dangerous is Berger 88, for which F.G. is providing cover.”

The councillor considered the leaflets defamatory, and he successfully applied to a district court for a permanent injunction, restraining Brosa from further distributing the leaflets. The injunction was upheld on appeal, with the courts holding that the leaflets contained allegations of fact: (a) that the association was a particularly dangerous neo-Nazi organisation, and (b) F.G. was aware of this fact, but nevertheless publicly supported the organisation. Any violation of the injunction could result in a 250,000 euro fine, or a six-month prison sentence.

Brosa had argued that he was not alleging the councillor was a neo-Nazi, and claimed his statements constituted opinion, which were based on a number of factors, including that: (i) Berger “88” was written in runes font, which was a well-known neo-Nazi reference to Heil Hitler, with “H” being the eighth letter of the alphabet, (ii) Berger 88 members wearing their insignia had been present at the councillor’s election campaign, (iii) some Berger 88 members had criminal convictions, and (iv) the German intelligence service had classified Berger 88 as a “fraternity” that it would “keep an eye on.” However, the German courts held that while these factors might not be a “mere coincidence,” and “raised a suspicion,” the allegations required “compelling proof,” and Brosa had failed to satisfy this standard.

The European Court agreed to review the injunction, and unanimously held that it violated Brosa's right to freedom of expression. The Court criticised the German courts for categorising the leaflet's statements as allegations of fact, "without further discussion." First, on Berger 88 being a "particularly dangerous neo-Nazi organisation," the Court held this was Brosa's opinion based on his own assessment of the facts, "which might be accurate or not." The opinion was "not devoid of a factual basis," having regard to the German intelligence service's continued monitoring of Berger 88 on suspicion of extremism. Moreover, use of the term "neo-Nazi" was not an allegation of fact, given that there are "different notions as to its content and significance," especially where "particularly dangerous" precedes the term.

Second, on the councillor having "covered" for Berger 88, the Court held that it "[could not] endorse" the German court's view that this was an allegation of fact without a sufficient factual basis. The councillor's letter to the editor arguing that Berger 88 had no right-wing tendencies was a "sufficient factual basis." It followed that the standard of proof adopted by the German courts was "disproportionately high."

Comment

The *Brosa* judgment essentially turned on the degree of factual proof the German courts required in order for an opinion to constitute a fair comment. For the European Court, "compelling proof" was too high a threshold, and people should be allowed to express opinions "which might be accurate or not," especially where they target public officials. This holding is consistent with the Court's powerful rhetoric that politicians are subject to "wider limits of acceptable criticism," coupled with there being "little scope" for restrictions on political expression under Article 10.

Of note, the most striking aspect of *Brosa* is how there is no mention of the "right to reputation" under Article 8, and no mention of the "fair balance" test, where the Court must assess whether the German courts properly balanced the Article 8 right to reputation with the Article 10 right to free expression ([Axel Springer v. Germany](#)). Indeed, equally striking is how all the principal case law the Court relies upon in *Brosa* is pre-2004 (before reputation was recognised as a Convention right in [Radio France v. France](#)).

This abandonment of *Axel Springer* as a template for determining defamation cases is consistent with recent cases from other Sections of the Court, and instead applying the old "most careful scrutiny" test, where reputation is "interpreted narrowly," and "strictly construed" (see, e.g., [Ümit Bilgiç v. Turkey](#), [Welsh and Silva Canha v. Portugal](#), [Jean-Jacques Morel v. France](#) and [Soltész v. Slovakia](#)). It implicitly recognises the problems associated with applying Article 8 to public-interest expression concerning public officials, and confirms that Article 8 is only triggered when statements "focus on purely personal or private details," ([Pipi v. Turkey](#)) or "attain a certain level of seriousness and in a manner causing prejudice to personal enjoyment of the right to private life" ([Karakó v. Hungary](#) and [Polanco Torres and Movilla Polanco v. Spain](#)).

Finally, and while the *Brosa* opinion is an excellent precedent concerning the fair comment defence to defamation, it may be suggested that more could have been said about the injunction granted. It must be remembered that (a) the injunction not only banned distribution of the leaflet, but also any "assertions of fact which might depict F.G as a supporter of neo-Nazi organisations," (b) had Brosa violated the injunction, he was subject to a possible

250,000 euro fine, or a six-month prison sentence, and (c) the injunction applied not only during the election period, but was a permanent injunction.

The Fifth Section in *Brosa* had little to say about the injunction, and this contrasts sharply with the Second Section's recent judgment in [Cumhuriyet Vakfi v. Turkey](#), which also concerned an injunction granted to protect a public official's reputation. The Court in *Cumhuriyet Vakfi* took into account (a) the scope of the injunction, (b) the duration of the injunction, and (c) "the severity of the punishment" had the injunction been violated. Moreover, we can only speculate on what the Court would have held had Brosa violated the injunction, continued to distributed his leaflets, and been subjected to a fine or imprisonment. Imprisonment for defamatory speech on a matter of public interest is absolutely prohibited under Article 10 ([Cumpănă and Mazăre v. Romania](#) and [Belpietro v. Italy](#)).

The *Brosa* judgment is a striking example of the dangers associated with defamation injunctions, and prior restraint in general. German voters were denied the opportunity of being exposed to Brosa's political expression, and his reasons for not voting for a political candidate. The German courts effectively censored Brosa, preventing the public from "learning about, and forming an opinion on, the ideas and attitudes of political leaders," (*Cumhuriyet Vakfi*), and violated the principle in [Bowman v. UK](#) that "it is particularly important in the period preceding an election that opinions and information of all kinds are permitted to circulate freely."