EUROPEAN COURT OF HUMAN RIGHTS

FIRST SECTION

APPLICATION NO. 70434/12

Sousa GOUCHA

Applicant

v.

PORTUGAL

Respondent

WRITTEN OBSERVATIONS OF THIRD PARTY INTERVENER:

Alliance Defending Freedom

Filed on
28 November 2014

(a) Introduction

1. Alliance Defending Freedom ("ADF") is an international legal organization dedicated to protecting fundamental freedoms including freedom of religion and freedom of expression. As a legal alliance of more than 2,200 lawyers dedicated to the protection of fundamental human rights, it has been involved in over 500 cases before national and international forums, including the Supreme Courts of the United States of America, Argentina, Honduras, India, Mexico and Peru, as well as the European Court of Human Rights and Inter American Court of Human Rights.

2. ADF has also provided expert testimony before several European parliaments, as well as the European Parliament and the United States Congress. ADF has Special Consultative Status with the Economic and Social Council of the United Nations, as well as accreditation with the Organization for Security and Cooperation in Europe, the European Union (the European Union Agency for Fundamental Rights and the European Parliament) and the Organization for American States.

3. This brief is divided into three parts which, it is submitted, mirror the questions that must be asked in a case involving Articles 8 and 10. The first part will analyse the Court's case law on Article 8 and demonstrate that it should not inevitably be applied where a private person speaks in such a way as to cause subjective offense to another. The second part will consider that in those cases which *do* fall within the scope of Article 8, it is nonetheless a qualified right, and that the foundational rights guaranteed in Article 10 will need to be properly considered. The final section of the brief develops those countervailing considerations under Article 10 by demonstrating the negative consequences of restricting freedom of speech.

(b) Article 8 is not Inevitably Applicable

4. Article 8 protects, *inter alia,* "private life" which has been described as "a broad term not susceptible to exhaustive definition, which covers the physical and psychological."[1] The Article provides that,

> Everyone has the right to respect for his private and family life, his home and his correspondence … (2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

5. While the text of Article 8 clearly enumerates four areas of protection - private life, family life, home and correspondence – the right has been interpreted relatively widely affording protection to areas as diverse as public information

[1] *Axel Springer AG v. Germany* [GC], no. 39954/08, § 83, 7 February 2012.

held by State authorities[2], stop and search powers[3] and residents living in close proximity to a high-risk chemical factory.[4]

6. The protection that Article 8 guarantees is unique in the Convention in that it confers a right to "respect" for the areas in question. This has accounted, at least in part, for the wide margin of appreciation granted to contracting States in the application of Article 8.

7. This Court has held that the "right to protection of reputation is a right which is protected by Article 8 of the Convention as part of the right to respect for private life."[5] However, even apart from competing Article 10 arguments, Article 8 will not inevitably be applicable where a private person speaks in such a way as to cause subjective offense to another. This must be the case given that the Convention is concerned with protecting "fundamental freedoms" (of which a "right not to be offended" is not one), something reinforced by the ratification of Protocol no. 14 to the Convention[6] which codifies a test for *de minimis non curat.*[7] However, even before this, the same principle can be seen in the context of Article 6: "[having] regard to the disproportion between the triviality of the facts…and the extensive use of court proceedings…",[8] Article 3: "ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3"[9] and Article 8, "the Court does not find that the sources of inconvenience the applicant complained of are sufficient to raise an issue of failure to respect private life."[10]

8. There is clearly therefore a threshold which must be met before Article 8 can even be applied, and so in cases in which the applicant complains that the speech of another has violated his rights under Article 8, the first question would be whether or not the article is applicable, that is to say, whether the issue raised is within the scope of the article. If it is not within the scope then the question of a possible breach does not arise.

Article 8: Level of seriousness

9. In the context of speech, this Court has concluded that, "an attack on a person's reputation must attain a certain level of seriousness and in a manner causing prejudice to personal enjoyment of the right to respect for private life."[11] The two elements are therefore the level of seriousness and fact of prejudice caused to the person in question which must also surpass a minimum threshold.

10. *A. v. Norway*[12] exemplifies speech which *does* attain the requisite level of seriousness and prejudice to an individual. In that case, the applicant complained that the unfavourable outcome of his defamation suit against a newspaper constituted a failure to protect his right of reputation under Article 8. The Court found a violation, taking into account the fact that the news report in

[2] *Rotaru v. Romania* [GC], no. 28341/95, ECHR-2000-V.
[3] *Gillan and Quinton v. the United Kingdom*, no. 4158/05, ECHR 2010.
[4] *Guerra and Others v. Italy*, 19 February 1998, Reports of Judgments and Decisions 1998-I.
[5] See *Axel Springer*, cited above, § 83.
[6] CETS No. 194.
[7] *See* Art. 12 of Protocol No. 14 which introduces a test of "significant disadvantage."
[8] *Block v. Germany* (dec.), no. 22051/07, 19 January 2010.
[9] *Ireland v. the United Kingdom*, 18 January 1978, § 45, Series A no. 25.
[10] *Stjerna v. Finland*, 25 November 1994, § 42, Series A no. 299-B.
[11] See *Axel Springer*, cited above, § 83.
[12] See *A. v. Norway,* cited above.

question would have left in the reader's mind the incorrect impression that the applicant was the main suspect in the rapes of an eight and ten year old girl.

11. At the other end of the spectrum would be speech which merely "disrupts" an individual's everyday life, as held in *Sentges v. the Netherlands*,

> Article 8 cannot be considered applicable each time an individual's everyday life is disrupted, but only in the exceptional cases where the State's failure to adopt measures interferes with that individual's right to personal development and his or her right to establish and maintain relations with other human beings and the outside world. It is incumbent on the individual concerned to demonstrate the existence of a special link between the situation complained of and the particular needs of his or her private life.[13]

Article 8: Circumstances which are self-inflicted

12. Moreover, another factor which may render Article 8 inapplicable is where the circumstances complained of arise out of the applicant's own conduct. In *McFeeley v. United Kingdom,*[14] Article 8 was held not to be applicable in relation to the conditions of the applicants' detention because they had been "self inflicted." Similar reasoning supported the decision in relation to a recent Article 10 application.[15]

13. Specifically in relation to Article 8, this Court has held that, "Article 8 cannot be relied on in order to complain of a loss of reputation which is the foreseeable consequence of one's own actions…."[16]

(c) Fundamental Nature of Freedom of Expression

14. In those cases in which the threshold is passed and the speech therefore falls within the scope of Article 8, it is important to note that this is a qualified right. Under Article 8(2), the right to private life can lawfully be restricted on the grounds of: (a) national security; (b) public safety; (c) the economic well-being of the country; (d) the prevention of disorder or crime; (e) for the protection of health or morals; and (f) for the protection of the rights and freedoms of others.

15. Moreover, it is clear that Article 8 cannot be read in isolation and that the Convention must be read as a whole:

> Whilst [the Commission] acknowledges that the Convention must be read as one document, its respective provisions must be given appropriate weight where there may be implicit overlap, and the Convention organs must be reluctant to draw inferences from one text which would restrict the express terms of another.[17]

16. It is in the context of those possible justifications that the foundational rights protected elsewhere in the Convention by Article 10 fall to be considered, given that freedom of expression is a "right and freedom of [another]." This Court has repeatedly held that,

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[13] *Sentges v. the Netherlands* (dec.), no. 27677/02, 8 July 2003.
[14] *McFeeley v. the United Kingdom* (dec.), no. 8317/78, 15 May 1980.
[15] *Gough v. the United Kingdom*, no. 49327/11, §§ 175-176, 28 October 2014.
[16] See *Axel Springer*, cited above, § 83.
[17] *E.M. Kirkwood v. the United Kingdom,* no. 10479/83, p. 184, 12 March 1984.

> freedom of expression constitutes one of the essential foundations of a democratic society, one of the basic conditions for its progress and for each individual's self-fulfillment.[18]

17. The Court has also held on numerous occasions that freedom of expression must be protected in order to safeguard tolerance, broadmindedness and pluralism.[19]

18. Subject only to the limitations of paragraph 2 of Article 10, freedom of expression is,

> applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of pluralism, tolerance and broadmindedness without which there is no 'democratic society.'[20]

19. In addition, the Court has stated that while freedom of expression is subject to exceptions, these exceptions "must, however, be construed strictly, and the need for any restrictions must be established convincingly."[21]

20. Protection for freedom of expression applies to all views and opinions and to all forms of media or publication.[22] The protections afforded to freedom of expression in Europe have been interpreted very broadly in a number of cases. In one example, Article 10 has been extended so far as to protect a filmmaker in the United Kingdom who made a pornographic film depicting Catholic Saints in sexual activities.[23] In another case, this Court has also extended its protections to paintings of a sexually explicit nature.[24]

21. Ideas have also generally enjoyed strong protection. The Court has held that the dissemination of ideas, even those strongly suspected of being false, enjoy the protections of Article 10.[25] The responsibility of discerning truth from falsehood has in this sense been placed on the proper figure, the listener. The Court has thus recognized that the cure to bad speech is more speech and intelligent dialogue.

Parody, public figures and necessity in a democratic society

22. Turning to the question of speech in the context of a public figure, the Court has been clear that a distinction *does* exist between private individuals unknown to the public and public figures such as celebrities.[26] The Court has held that not

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[18] *Dichand and Others v. Austria*, no. 29271/95, § 37, 26 February 2002. *See also Lingens v. Austria*, 8 July 1986, § 41, Series A no. 103; *Şener v. Turkey*, no. 26680/95, § 39, 18 July 2000; *Thoma v. Luxembourg*, no. 38432/97, § 43, ECHR 2001-III; *Maronek v. Slovakia*, no. 32686/96, § 52, ECHR 2001-III;

[19] See e.g., *Handyside v. the United Kingdom*, no. 5493/72, Series A no. 24.

[20] *Ibid.*, § 49.

[21] See Şener, cited above, § 39. *See also Thoma*, cited above, §§ 43, 48; *See also Observer and Guardian v. the United Kingdom*, 26 November 1991, § 59, Series A no. 216.

[22] See *Handyside,* cited above, § 48.

[23] *Wingrove v. the United Kingdom*, 25 November 1996, *Reports of Judgments and Decisions* 1996-V.

[24] *Muller and Others v Switzerland,* 24 May 1988, Series A no. 133.

[25] *Salov v. Ukraine*, no. 65518/01, ECHR 2005-VIII.

[26] *Minelli v. Switzerland* (dec.), no. 14911/02, 14 June 2005.

only does the media enjoy wide latitude to impart information and ideas on all matters of public interest, but that the public also has a right to receive them.[27] The Court has noted that even the taking of photographs of public figures in the sphere of their private lives was protected by Article 10 and that States enjoyed a wide margin of appreciation where those photos contribute to a public debate and where they are not offensive to the point of justifying their prohibition.[28]

23. The distinction between published materials directed towards public figures and those not known to the public was highlighted in the Von Hannover cases. This Court ruled that photos relating to the children of Princess Caroline of Hanover, who were not public figures, enjoyed the protections of Article 8 and that their publication could not be justified by relying on Article 10.[29] However, photos of the Royal Family of Monaco, well known figures to the public, did enjoy a high level of protection under Article 10 because of their celebrity status.[30] Through the cases involving Princes Caroline, the Court has adopted a five prong test to determine the extent to which a public figure's private life is subject to media coverage and the protections afforded under Article 10: (a) whether the information imparted contributes to a debate of general interest; (b) the notoriety of the person concerned; (c) the prior conduct of the person concerned; (d) the content, form and consequences of the publication; and (e) the circumstances to which the publication is concerned.[31]

24. Comparative jurisprudence confirms this approach as universally accepted. In one of the most often-cited opinions in free speech history, the United States Supreme Court held that defamation and liable cases brought by public figures against the media would not stand unless a standard of actual malice was met.[32] Precisely stated, this standard requires that the person show that the media outlet in question acted with knowledge that the information it distributed was false or did so with reckless disregard for the truth.[33] The judgment sided heavily with promoting freedom of the press to safeguard the media from any self-censorship aimed at avoiding potential libel and defamation suits against them.

25. Similarly, the United States Supreme Court, in a unanimous ruling, defended the use of paradoy to prohibit the award of damages to a public figure complaining of intentional infliction of emotional distress.[34] The Court opined that a reasonable person would not take the parody in question to contain factual statements. The Court of Justice of the European Union, in *Deckmyn v. Vandersteen*,[35] has also chosen to interpret parody in a very wide and flexible manner. The Court held that parody will be accepted so long as it is noticeably different from the original subject matter and that it expresses humour or mockery.[36]

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[27] *Von Hannover v. Germany (no. 2)* [GC], nos. 40660/08, 60641/08, § 102, ECHR 2012.
[28] *Ibid.*, §§ 117, 123.
[29] *Von Hannover v. Germany,* no. 59320/00, ECHR 2004-VI.
[30] See *Von Hannover* cited above; *Von Hannover v. Germany* (No. 3), no. 8772/10, 19 September 2013.
[31] *See Axel Springer,* cited above.
[32] *New York Times Co. v. Sullivan*, 376 U.S. 254, 265-292 (1964).
[33] *Ibid.*
[34] *Hustler Magazine, inc. v. Falwell*, 485 U.S. 46 (1988).
[35] Case C-201/13.
[36] *Ibid.*, § 20.

26. The Court has also acknowledged the particularly wide margin of appreciation associated with parody in the context of artistic expression noting that those who create parody contribute to the exchange of ideas and opinions which are essential to a democratic society.[37] This Court has held that "satire is a form of artistic expression and social commentary and, by its inherent features of exaggeration and distortion of reality, naturally aims to provoke and agitate."[38]

27. In *Vereinigung Bildender Kunstler v. Austria*, the Court ruled that an injunction by an Austrian Court prohibiting the display of paintings depicting a politician in various sexual positions alongside similar depictions of Mother Teresa, Cardinal Hermann Groer and Jorg Haider was a violation of Article 10 of the Convention in that an interference with the public display of the satirical pieces of artwork in question was not necessary in a democratic society and was not proportionate to the aim of protecting morals and the rights and reputation of others.[39] Similarly, in the case of *Eon v. France*, the Court found a violation of Article 10 for the criminal conviction of a private citizen who held up a placard in front of the President of France repeating an insulting phrase which the President himself had famously uttered.[40] The Court found that the interference with the applicant's conduct would have a chilling effect on satirical forms of expression relating to topical issues which can play a very important role in open discussion of matters of public concern, an indispensable feature of a democratic society.[41]

28. In *Nikowitz*[42] the Court cemented its jurisprudence holding to a "reasonable" reader standard when approaching satirical material, refusing to interfere with freedom of expression for the sake of protecting the reputation of others as relates to unfocussed readership. The article, a piece dealing with the injury of Austrian ski star Hermann Maier, satirically quoted one of his main competitors as suggesting that he hope Maier slip on his crutches and break his other leg too. The Court reasoned that within the context of the article, the reasonable reader could discern that the attributed quote was meant to be a parody rather than a factual statement.

29. In *Alfantakis v. Greece,*[43] the First Section of this Court similarly upheld comments which were insulting in nature. The applicant, a lawyer, criticized the public prosecutor on live television relating to a criminal case his client's wife was involved in claiming he laughed when he read the report and that the report was "literary opinion showing contempt for his client." The domestic courts awarded the public prosecutor damages holding that the comments impugned his reputation and ability to represent the justice system in Greece. This Court however, found again for freedom of expression, holding that the Greek courts took a subjective approach to understanding the comments outside of their context, ascribing to the applicant intentions he may not have had when making the comments. This Court further noted that the national courts had failed to make a distinction between facts and value judgments. The First Section also held that in the context of the wide array of media coverage following the case, the comments were clearly aimed at defending his client rather than injuring the reputation of the public prosecutor.

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[37] *Vereinigung Bildender Kunstler v. Austria*, no. 68354/01, § 26, 25 January 2007.
[38] *Ibid.*, § 33.
[39] *Ibid.*, § 26-39.
[40] *Eon v.* France, no. 26118/10, §§ 50-62, 14 March 2013.
[41] *Ibid*., § 61.
[42] *Nikowitz & Verlagsgruppe News GmbH v. Austria*, no. 5266/03, 22 February 2007.
[43] *Alfantaakis v. Greece,* no. 49330/07, 11 February 2010.

30. It is therefore clear from the existing jurisprudence of this Court, as well as the corresponding comparative jurisprudence, that public forms of expression aimed at public figures, particularly in the context of parody, enjoy robust protection under Article 10 of the Convention and that this should weigh very heavily against censorship under the guise of an Article 8 claim.

(d) Negative Consequences of Restricting Freedom of Speech

31. That freedom of expression constitutes one of the essential foundations of a democratic society can further be seen by analyzing the negative consequences that ensue when this freedom is unduly restricted.

32. In most European countries, the primary means by which freedom of speech is restricted is so-called "hate speech" laws – that is, laws that prohibit "offensive", "insulting" or "hateful" speech. Before turning to the consequences of such laws, several observations can be made.

33. Firstly, most "hate speech" laws are vaguely worded and therefore have the potential to be incredibly far reaching. This Court has stated on numerous occasions that the laws of domestic nations must be of a sufficient "quality" in order to be considered valid. In the seminal free speech case of *Sunday Times v. the United Kingdom*, the Court stated that domestic law which restricts freedom of speech "must be adequately accessible: the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case."[44] Moreover, the law must be "formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able - if need be with appropriate advice - to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail."[45] It is difficult to see how laws that criminalize "insults" could possibly meet this threshold.[46]

34. Secondly, "hate speech" laws contain a large subjective element. Rather than merely assessing whether the speech was unlawful when comparing it to a well understood standard, "hate speech" laws turn the attention on to the perception of the listener.

35. Thirdly, "hate speech" laws do not necessarily require falsehood. While defences to the traditional understanding of defamation always include "fair" or "honest" comment, people can be convicted of a "hate speech" offence without the truthfulness of their statement even being considered. As section 192 of the German Criminal Code makes clear, "if the existence of an insult arises" then "proof of the truth of the alleged or disseminated fact does not preclude punishment."[47]

36. Fourthly, "hate speech" laws are arbitrarily enforced. The vague terminology of the laws combined with well-motivated and well-funded special interest groups enables the laws to be used to push a certain agenda - often closing down debate on controversial issues of public interest. Notably, in *Hasan & Chaush v.*

[44] *Sunday Times v. the United Kingdom* (no. 1), 26 April 1979, Series A no. 30.
[45] *Ibid*.
[46] This view is shared by the OSCE Representative on Freedom of the Media, who has been working for the repeal of insult laws for over a decade. *See* OSCE Representative on Freedom of the Media, *Ending the Chilling Effect: Working to Repeal Criminal Libel and Insult Laws* (Paris, 24-25 November 2003).
[47] Winfried Brugger, 'The Treatment of Hate Speech in German Constitutional Law (Part I)', (2003) 4 German Law Journal 1, 15.

Bulgaria, this Court held that a restriction on human rights was not valid because "it was arbitrary and was based on legal provisions which allowed an unfettered discretion to the executive and did not meet the required standards of clarity and foreseeability."[48] Given clear instances of the arbitrary application of "hate speech" laws, their legal validity must be questionable under the Court's jurisprudence.

37. Thus, given the inherent problems with "hate speech" laws, it is little wonder that their application in Europe gives rise to significant problems. While much has been written on the negative effects of restricting freedom of speech through "hate speech" laws, a number of points can be summarized in this submission.[49]

The slippery slope

38. Once the premise is accepted that the State must monitor, regulate and censor public debate by use of the criminal law, the restrictions that may be placed on free speech lack any discernible or logical stopping point. This is a classic "slippery slope", resulting in more and more restrictions on speech. In the past decades the original concept of banning the most extreme forms of racist speech has expanded to include other forms of speech, such as "religious hatred" and "homophobic hatred." For the willing, however, there is plenty of room for further expansion.[50] For example, in 2010 the European Union Agency for Fundamental Rights wrote that, "There is currently no adequate EU binding instrument aimed at effectively countering *expression of negative opinions* against LGBT people."[51] The comment is all the more remarkable for appearing under a section headed "Protection from anti-LGBT expression and violence *through criminal law*."[52]

39. Thus, as the scope of "hate speech" laws expand, so too will the type of speech that is prohibited – leading to the censorship of mainstream, not just "extreme", views. For example, in the last three years, several senior Catholic clergymen have been investigated by police for comments made during sermons or homilies that were fully in line with the teaching of the Catholic Church,[53] something unthinkable just a few years ago. Similarly, in countries where the definition of marriage has been debated, those holding the traditional view of marriage have had their views labelled as "homophobic", leading to the shutting down of debate.[54]

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[48] *Hasan & Chaush v. Bulgaria* [GC], no. 30985/96, ECHR 2000-XI. *See also*, *Herczegfalvy v. Austria*, no. 10533/83, 24 September 1992.

[49] *See* Paul B Coleman, *Censored: How European "Hate Speech" Laws Threaten Freedom of Speech* (Kairos Publications, Vienna 2012).

[50] *See* The United Nations Office at Geneva, *Human Rights Committee Report of Iceland* (10 July 2012): The Committee recommended that Iceland adopt "anti- hate speech" legislation to address "negative gender stereotypes" – including "a belief that a builder could only be a man and a nurse could only be a woman."

[51] Fundamental Rights Agency, *Homophobia, transphobia and discrimination on grounds of sexual orientation and gender identity* (2010) pp.36-37. Emphasis added.

[52] *Ibid*., Emphasis added.

[53] For example, police investigations have been made against Bishop Philip Boyce of Ireland, Bishop Juan Antonio Reig Plà of Madrid, Spain, and the Spanish Cardinal-elect Fernando Sebastian Aguilar.

[54] For example, when marriage was being debated in the United Kingdom between 2011 to 2013, Adrian Smith, a housing manager in Manchester, was demoted for supporting the legal definition of marriage; retired politician, Gordon Wilson, was voted off the board of Dundee's Citizens Advice Bureau for holding the same view; bus driver, Arthur

The role of the State

40. A further consequence of restricting freedom of expression through the criminal law is the enhanced powers that are given to the State to be the moderator of public discourse. As one writer has noted, the "swirl of speech-law charges, lawsuits, and investigations" is now sustained by an entire industry.[55] Accordingly, dozens of "anti-hate" groups "readily file complaints and suits and sometimes are the direct beneficiaries when fines are imposed. Their complaints provoke investigations by an alphabet soup of government agencies ... These in turn feed into the court system."[56]

41. This can clearly be seen in the case of British hoteliers, Ben and Sharon Vogelenzang. The Vogelenzangs were charged with the criminal offence of using "insulting words" after a Muslim guest complained about their breakfast conversation on the merits of their respective faiths. After a yearlong investigation, the case eventually reached the courtroom. One senior prosecutor and two high-ranking police officers appeared to testify against the Vogelenzangs. Behind them sat a team of six officers from the specialist "hate crime unit" who had been assigned to the case.[57] Although the hotel owners were eventually acquitted, the investigation and trial ultimately destroyed their business. Sharon Vogelenzang explained that "many people thought that when we won in court, everything would be OK. In reality, it has brought us to the brink of destruction, so it has not been a victory at all."[58]

42. Hence, even in the case of an acquittal, the process ended up being the punishment. Because it was considered the State's role to determine the legality of a peaceful breakfast conversation, a business was destroyed and the estimated costs to the State were tens of thousands of Euros.

The chilling effect

43. Perhaps the biggest consequence of restrictions on speech is the culture of self-censorship that this creates – also known as "the chilling effect."

44. While the criminal law is used to punish wrong behaviour, the law also plays a part in shaping culture. Thus, when a society's criminal law heavily restricts freedom of speech, it is fair to assume that the culture of such a society will also adopt a restrictive attitude to freedom of speech – resulting in increased restrictions in areas of life such as broadcasting codes, workplace rules, and university campus regulations. For example, in the last two years, an employee has been demoted for posting his views on marriage on his personal *Facebook* page,[59] a doctor has been told that he cannot mention his religion in the

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McGeorge, was threatened with disciplinary action after distributing a petition supporting the legal definition of marriage during his work break; and Christina Summers was expelled as a Green Party Councillor after she voted against a motion supporting same-sex marriage.

[55] Gerard Alexander, *Illiberal Europe* (American Enterprise Institute for Public Policy Research 2006) p.3.

[56] *Ibid*., p.3-4.

[57] *See* Jon Gower Davies, *A New Inquisition* (Civitas, London 2010).

[58] Quoted in Jonathan Petre,'We're selling our hotel, say Christian couple in row with Muslim guest' *The Daily Mail* (London, 27 March 2010).

[59] Louise Gray, 'Christian demoted for views on gay weddings', *The Daily Telegraph* (London, 24 October 2011).

workplace,[60] a conference hosted by a senior judge was prevented from meeting at its chosen location because the theme of upholding the then-legal definition of marriage "sat uncomfortably" with the venue's "diversity policy,"[61] and a high profile debate on abortion was cancelled by Oxford University, apparently because even having the debate was too controversial.[62] No law compelled such action to be taken, but in a culture of censorship, such restrictions on public debate will no doubt continue to spread.

45. Thus, the harmful effects of "hate speech" laws are clear to see. They create a chilling effect on free speech that benefits those who seek to shut down public debate, and the vague wording of the laws allows for arbitrary enforcement and the silencing of controversial views. So long as "hate speech" laws remain in force, it is impossible for the citizens of Europe to predict what the outcome of any particular speech may be, and self-censorship is the likely outcome. As one writer has concluded, "the real danger posed by Europe's speech laws is not so much guilty verdicts as an insidious chilling of political debate, as people censor themselves in order to avoid legal charges and the stigma and expense they bring."[63]

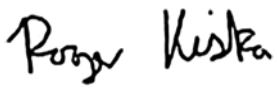
(e) Conclusion

46. The vast majority of cases in which the Court has had to reconcile the conflict of rights claimed under Articles 8 and 10 have been brought by an organization prohibited from publishing or distributing the offending material. However, the approach should not differ when the application is brought by the offended person. This Court has held that, "the outcome of the application should not, in principle, vary according to whether it has been lodged with the Court under Article 10…by the publisher…or under Article 8 … by the person who was the subject of the article."[64]

47. Given the foundational nature of Article 10 and the importance of the rights guaranteed therein to a free and democratic society, the Intervener submit that due regard should be had to the stifling effect of "hate speech" laws. In particular, in evaluating a claim under Article 8, the Court should be slow to conclude that mere speech can fall within the scope of the private life protections. Furthermore, where the Court concludes that Article 8 is nonetheless applicable, the subsequent balancing exercise should take into account not just the individual impact on Article 10 rights but the wider societal impacts of criminalizing, or otherwise deterring, speech which is merely subjectively objectionable.

[60] Victoria Ward and John Bingham, 'Judge tells doctor it is "inappropriate" to say he is a Christian at work' *The Daily Telegraph* (London, 3 May 2012).
[61] John Bingham, 'Storm as Law Society bans conference debating gay marriage' *The Daily Telegraph* (London, 11 May 2012).
[62] Tim Stanley, 'Oxford students shut down abortion debate. Free speech is under assault on campus' *The Daily Telegraph* (London, 19 November 2014).
[63] *See Illiberal Europe,* cited above.
[64] See *Axel Springer*, cited above, § 87.

For the Intervener:



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