

I. Introduction

These written comments are submitted by INTERIGHTS (the International Centre for the Legal Protection of Human Rights) and the International Commission of Jurists pursuant to leave granted by the President of the Chamber in accordance with Rule 44 § 2 of the Rules of Court.¹

INTERIGHTS is an international human rights law centre with extensive experience of human rights litigation, including in the fields of equality and non-discrimination.² The ICJ is a non-governmental organisation working to advance understanding and respect for the rule of law. The ICJ has developed significant expertise in the application of international human rights law to violations based on sexual orientation and gender identity.³

This case concerns the arrest and conviction of four Swedish nationals, who distributed approximately a hundred leaflets in an upper secondary school. The leaflets made a series of statements about “homosexuals” and “homosexual propaganda.” The men were convicted under the Penal Code, which provides that a person is guilty of agitation against a group when making a statement or otherwise spreading a message that threatens or expresses contempt. The law provides that a group may be defined according to sexual orientation. The Supreme Court upheld the convictions. The first three men were given conditional sentences with fines of approximately 200 € and the fourth applicant was sentenced to probation.

This case concerns the degree to which restrictions on freedom of expression are permissible in the context of hate speech directed against a person or class of persons on account of their sexual orientation. It raises critical issues which fundamentally affect the extent to which the Convention provides meaningful protection from hate speech and whether all persons and groups within the jurisdiction of the Convention are able to enjoy and exercise the substantive rights guaranteed therein. While this Court has well-developed case law with respect to permissible restrictions on freedom of expression, it has not had the opportunity to develop a comprehensive approach to hate speech directed against a person or class of persons because of their sexual orientation.

The Court’s jurisprudence offers a sound basis to affirm that individuals of all sexual orientations, including lesbian, gay, bisexual and transgender (LGBT) persons, have the right to receive legal protection from *certain* kinds of speech. This is especially important because the international and regional commitments on hate speech have focused exclusively on racism and xenophobia. Yet hate speech directed at people because of their sexual orientation is no less severe an infringement of human rights.

II. Homophobic Hate Speech in Europe

Any analysis of the nature of permissible restrictions on hate speech must start from an understanding of the reality and prevalence of homophobia throughout Europe. Homophobic hate speech is a common problem within Council of Europe Member States. In a 2008 report on homophobia within EU Member States, the Fundamental Rights Agency recognized that:

Hate speech against LGBT persons takes place, among other contexts, in political debates concerning LGBT rights or during counter-demonstrations at public LGBT events such as Pride.

¹ Letter of the Section Registrar dated 3 December 2009.

² Alone and jointly with other organisations, INTERIGHTS has submitted written comments in a number of cases before this Court, most recently in *Opuz v. Turkey*, *Rantsev v. Cyprus and Russia* and *Orsus v. Croatia*.

³ The ICJ has recently submitted written comments in the cases of *Finogenov v. Russia*, *Boumediene v. Bosnia and Herzegovina* and *Schalk & Kopf v. Austria*.

*Homophobic statements by political and religious figures appear in the media. In such statements, LGBT persons are often depicted as unnatural, diseased, deviant, linked to crime, immoral or socially destabilising.*⁴

Despite the prevalence of homophobic hate speech, there has been a failure to adopt particularized standards to address the problem, at both the European and international political level. Although the Committee of Ministers defines “hate speech” in open-ended terms as “all forms of expression which spread, incite, promote or justify racial hatred, xenophobia, anti-Semitism or other forms of hatred based on intolerance, including: intolerance expressed by aggressive nationalism and ethnocentrism, discrimination and hostility against minorities, migrants and people of immigrant origin,” it does not explicitly include expressions of intolerance, discrimination and hostility directed at people because of their real or perceived sexual orientation.⁵ Other international instruments, as well as decisions of this Court, recognize the need to curtail many other types of expression, and especially racist and xenophobic speech, but they do not expressly address expression directed at individuals or groups because of their sexual orientation.⁶

The lack of international standards that include sexual orientation and gender identity is problematic. In its report on homophobia, the Fundamental Rights Agency (FRA) recommended that the European Commission consider proposing EU legislation to cover “homophobic hate speech and homophobic hate crime.” FRA noted, “Homophobic hate speech and hate crime are phenomena which may result in serious obstacles to the possibility for individuals to exercise their free movement rights and other rights in a non-discriminatory manner. These phenomena need to be combated across the European Union ensuring minimum standards of effective criminal legislation.”⁷

Similarly, Andreas Gross, Special Rapporteur for the Parliamentary Assembly Legal Affairs and Human Rights Committee, observed that the “refusal by some leading politicians, opinion leaders and religious leaders to accept that LGBT people are entitled to the same human rights” as other people leads to “a high degree of homophobic and transphobic discourse in the public sphere . . . and gives legitimacy to those state actors . . . who fail to uphold, or even attack, the rights of LGBT people.”⁸

⁴ European Union Fundamental Rights Agency, *Homophobia and Discrimination on Grounds of Sexual Orientation in the EU Member States: Part II – The Social Situation*, 31 March 2009, at p. 11.

⁵ Committee of Ministers, Recommendation No. R (97) 20, 30 October 1997, Appendix. Note that the Committee of Ministers has cited Recommendation No. R (97) 20 in responding to questions concerning incidents of hate speech directed at people because of their sexual orientation. See Reply from the Committee of Ministers, adopted at the 1066th meeting of the Ministers’ Deputies (23 September 2009), Parliamentary Assembly Doc. 12030; Reply from the Committee of Ministers, adopted at the 1023rd meeting of the Ministers’ Deputies, 2 April 2008, Parliamentary Assembly Doc. 11557.

⁶ See Article 20 of the International Covenant on Civil and Political Rights (prohibiting “Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law”); Article 4 of the U.N. Convention on the Elimination of Racial Discrimination (providing, in part, that States shall criminalize “all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin”); The European Union Council Framework Decision 2008/913/JHA of 28 November 2008 (requiring Member States to take necessary measures to punish acts of “publicly inciting to violence or hatred directed against a group of persons or a member of such a group defined by reference to race, colour, religion, descent or national or ethnic origin”). Similarly, the European Commission on Racism and Intolerance has called for the criminalization of statements “inciting to hatred, discrimination or violence against racial, ethnic, national or religious groups or against their members on the grounds that they belong to such a group.” ECRI General Policy Recommendation 1.

⁷ FRA, *Part I – Legal Analysis*, at p. 156.

⁸ Andreas Gross, *Discrimination on the basis of sexual orientation and gender identity*, Committee on Legal Affairs and Human Rights, Parliamentary Assembly, 8 December 2009, Doc. 12087, at para. 25.

III. The Court's Approach to Freedom of Expression and Hate Speech

A. Freedom of Expression Generally

The Court has consistently stated that freedom of expression, as provided under Article 10 of the Convention, constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for an individual's self-fulfilment.⁹ Article 10 has been interpreted as being 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.¹⁰ Such expression is protected in view of interests such as pluralism, tolerance and non-discrimination, which are the features of democratic societies.

However freedom of expression may be restricted on the grounds included in the second paragraph of Article 10. Restrictions on freedom of expression have also been imposed under Article 17 where the Court has stated that the provisions of the Convention should not be relied upon to weaken or destroy the ideals and values of a democratic society.¹¹ In relation to Article 10 (2) the Court has established a strict three-part test¹² for the restriction of freedom of expression, and for a restriction to be legitimate all three parts of the test must be complied with:

- (i) the restriction must be "prescribed by law";
- (ii) the restriction must pursue the legitimate aim be 'proportional' to that aim; and
- (iii) the restriction must be "necessary in a democratic society". The word "necessary" means that a restriction must relate to a pressing social need and must not merely be "useful" or "reasonable".

The Court may attach significance to a number of elements in its 'proportionality' analysis. The means of communication used is a relevant factor, since the impact of speech is proportional to the size of the audience it is likely to reach. It follows that when the impugned speech reaches a wider audience more caution is demanded in using that means of communication.¹³ However the setting within which the communication takes place must also be relevant and the court has noted, in the context of children and adolescents, that certain restrictive measures "may be necessary to prevent pernicious effects on the morals of that group."¹⁴

B. Hate Speech

In considering the scope of freedom of expression, the Court has repeatedly and consistently

⁹ *Sürek v. Turkey (No.1)* [GC], no. 26682/95, § 58, ECHR 1999-IV.

¹⁰ *Handyside v the United Kingdom*, 7 December 1976, §49, Series A no.24.

¹¹ *Refah Partisi (the Welfare Party) and Others v. Turkey* [GC], nos. 41340/98, 41342/98, 41343/98 and 41344/98, §§ 86-89, ECHR 2003-II.

¹² The Court summarized its approach in *Zana v. Turkey* [GC], 25 November 1997, §51, *Reports 1997-VII* wherein it stated [T]his freedom is subject to exceptions, which must, however, be construed strictly, and the need for any restrictions must be established convincingly ...The adjective 'necessary'; within the meaning of Article 10 para. 2, implies the existence of a 'pressing social need' ...[T]he Court must look at the impugned interference in the light of the case as a whole, including the content of the remarks held against the applicant and the context in which he made them. In particular, it must determine whether the interference in issue was 'proportionate to the legitimate aims pursued' and whether the reasons adduced by the national authorities to justify it are relevant and sufficient ... in doing so, the Court has to satisfy itself that the national authorities applied standards which were in conformity with the principles embodied in Article 10 and, moreover, that they based themselves on an acceptable assessment of the relevant facts.

¹³ *Ibid*, § 32.

¹⁴ *Handyside v. The United Kingdom*, cited above, § 52.

condemned racism, xenophobia and other forms of intolerance in view of the dangers they present to the fundamental values of democratic societies. It has emphasised “that tolerance and respect for the equal dignity of all human beings constitute the foundations of a democratic, pluralistic society. That being so, as a matter of principle it may be considered necessary in certain democratic societies to sanction or even prevent all forms of expression which spread, incite, promote or justify hatred based on intolerance (including religious intolerance), provided that any “formalities”, “conditions”, “restrictions” or “penalties” imposed are proportionate to the legitimate aim pursued.”¹⁵ The Court has found that it is sometimes necessary to restrict expression for the protection of the reputation and rights of others. This is a legitimate aim under the second paragraph of Article 10.¹⁶ In *Féret v. Belgique*, for example, the Court held that the dissemination of pamphlets that criticized immigrants in Belgium and accused a refugee center of “poisoning” the lives of those who lived nearby fell within Article 10(2). The Court noted that the pamphlets clearly incited racial hatred and that incitement was not necessarily a call to a specific act of violence or crime. “The harm to people is committed by insulting, ridiculing and defaming certain groups of the population . . . Political discourse that incites hatred based on religious, ethnic or cultural prejudices represents a danger to the social peace and political stability of democratic states.”¹⁷

In a number of ‘revisionist speech’ cases the Court has stated that where such speech is “incompatible with democracy and human rights”, “infringe the rights of others” and “constitute a serious threat to public order” it may be subject to justified interference.¹⁸ It has also stated that there is “an obligation to avoid as far as possible expressions that are gratuitously offensive to others and thus an infringement of their rights, and which therefore do not contribute to any form of public debate capable of furthering progress in human affairs.”¹⁹

Hate speech laws are typically designed to meet an essential human rights objective: protecting the right to equality, the right to mental and physical integrity, the right to be free from discrimination, and ultimately the right to life, as hate speeches have long been associated with ethnic cleansing, war, and genocide. From this standpoint, hate speech regulations, when tailored to that important objective, constitute a legitimate and potentially necessary restriction to freedom of expression.²⁰

In its recent case law the Court has also relied on Article 17 to justify restrictions on expression. Originally Article 17 had been applied to remove Holocaust denial and related questioning of Nazi atrocities from the protection afforded by Article 10.²¹ *Norwood v. UK*²² marked a major change in the Court’s approach to the interpretation of Article 17, and a return to the Commission’s initial position, as set out in *Glimmerveen and Hagenbeek v. the Netherlands*.²³ In the latter case the applicants, members of an extreme-right party that advocated for a racially-pure population and the removal of all non-white people from the Netherlands, complained that their conviction and imprisonment for incitement to racial discrimination represented a breach of their freedom of expression. The Commission declared that the complaint was inadmissible based on Article 17

¹⁵ *Gündüz v. Turkey* no. 35071/97, 4 December 2003, § 40.

¹⁶ See, e.g., *Lindon, Otchakovsky-Laurens et July v. France*, 22 Oct 2007 and *Féret v. Belgique*, no. 15616/07, 16 July 2009.

¹⁷ *Féret v. Belgique*, no. 15615/07, 16 July 2009, at para. 73.

¹⁸ See for example, *Garaudy v. France*, cited above.

¹⁹ *Otto-Preminger-Institut v. Austria*, 20 September 1994, §49, Series A no. 295-A.

²⁰ *Féret v. Belgique* at para. 36

²¹ *Garaudy v. France* (dec.), no. 65831/01, ECHR 2003-IX.

²² *Norwood v. the United Kingdom* (dec.), no.23131/03, ECHR 2004-XI.

²³ *Glimmerveen and Hagenbeek v. the Netherlands*, nos. 8348/78 and 8406/78, Commission decision of 11 October 1978, Decisions and Reports 18, p.187.

given that the applicants' policies were discriminatory and that they were destructive of the rights and freedoms of others.

In undertaking its analysis of whether there exist permissible restrictions on freedom of expression two elements in particular stand out in the Court's case-law on hate speech; the aim of the author and the contents of the expression at issue.

Aim and intent - The Court pays attention to the original aim of the author of the statement, including whether it was intended to spread racist or intolerant ideas through the use of hate speech or whether there was an attempt to inform the public about an issue of general interest. This in turn may determine whether the impugned speech falls within the scope of Article 10, or is so destructive of the fundamental values of the Convention system that it is excluded from the protection of the Convention on the basis of Article 17.²⁴ In *Garaudy v. France*,²⁵ the Court held that the real purpose of a book denying the Holocaust was "to rehabilitate the National-Socialist regime and as a consequence, accuse the victim themselves of falsifying history." In *Jersild v. Denmark*, lack of racist intent was the central consideration for a finding in favour of a journalist who aired a programme containing racist statements.²⁶

Content - The Court has been particularly firm in its condemnation of racism which is seen as a threat to pluralism, one of the fundamental values of the Convention system. In *Norwood v. UK*,²⁷ the Court stated that the 'hate speech' at issue "was incompatible with the values proclaimed and guaranteed by the Convention, notably tolerance, social peace and non-discrimination." The Court stated "it is particularly conscious of the vital importance of combating racial discrimination in all its forms and manifestations"²⁸. The applicant complained in relation to his prosecution for having displayed a poster containing a photograph of the Twin Towers in flame and the words "Islam out of Britain – Protect the British People." The Court applied Article 17 in this case and declared the application inadmissible:

Such a general, vehement attack against a religious group, linking the group as a whole with grave act of terrorism, is incompatible with the values proclaimed and guaranteed by the Convention, notably tolerance, social peace and non-discrimination. The applicant's display of the poster in his window constituted an act within the meaning of Article 17, which did not, therefore, enjoy the protection of Articles 10 or 14.

The Court reached the same conclusion in the case of *Ivanov v. Russia*. The applicant had been convicted of incitement to racial hatred for publications that called for the exclusion of Jews from social life, alleged a link between social, economic and political discomfort and the activities of Jews, and portrayed the "malignancy" of Jews. The Court noted, "Both in his publications and in his oral submissions at the trial, he consistently denied the Jews the right to national dignity, claiming that they did not form a nation." The Court found the application inadmissible.²⁹

Thus the Court has emphasised the importance of restricting speech where the aim of the speech is to incite hatred towards a particular group along racial or national lines and where it constitutes a threat to public order.³⁰ The Court has recognised that "treatment which is grounded upon a

²⁴ *Jersild*, at para. 33.

²⁵ Cited above.

²⁶ *Jersild v. Denmark*, cited above, §33.

²⁷ Cited above. See also *Pavel Ivanov v. Russia* Application no. 35222/04 §2

²⁸ *Jersild v. Denmark*, cited above, § 30.

²⁹ *Pavel Ivanov v. Russia* Application no. 35222/04 §2, at para. 1.

³⁰ *Norwood* and *Garaudy*, cited above.

predisposed bias on the part of a heterosexual majority against a homosexual minority of the nature described above could, in principle, fall within the scope of Article 3.³¹ Deliberate incitement to racial hatred is outside the protection of Article 10 and certain expressions directed against the Convention's underlying values, such as democracy, tolerance, human dignity or non-discrimination, falling under Article 17, do not enjoy the protection afforded under Article 10 of the Convention.³²

IV. Comparative Law on Hate Speech

In the absence of regional or international instruments that recognize the various forms of discrimination, including hate speech, experienced by LGBT people, some member States have enacted domestic laws that criminalize certain forms of expression directed at people because of their sexual orientation. For example, in Belgium, Denmark, Germany, Estonia, Spain, France, Iceland, Ireland, Lithuania, the Netherlands, Norway, Portugal, Romania, Sweden, and the United Kingdom (Northern Ireland and England and Wales), the law makes it a criminal offence to incite to hatred, violence or discrimination on the grounds of sexual orientation.³³ In Serbia, the Public Information Law prohibits the publication of "ideas, information or opinions that encourage discrimination, hatred or violence" against a person or group on the basis of sexual orientation.³⁴ These States are part of a growing international trend toward extending criminal laws on hate speech to include the protection of LGBT people.³⁵

In some countries, even prior to the enactment of laws prohibiting homophobic hate speech, courts have upheld important principles of dignity, non-discrimination and equality. Thus in the case of *Van Zijl v. Goeree*, the Dutch Supreme Court (Hoge Raad) found that a minister who published a pamphlet that described AIDS as a "consequence of homosexuality" and accused the government of "leading the country into ruin" by legalizing homosexuality had harmed the plaintiff's right to equal treatment.³⁶ The Dutch Constitution prohibits discrimination on any grounds whatsoever and the right to equal treatment, the Supreme Court concluded, outweighed the defendant's right to free expression. In the United Kingdom, prior to the recent amendment of the Public Order Act, an appellate court upheld the conviction of an individual for displaying a sign with the words, "Stop Immorality," "Stop Homosexuality," and "Stop Lesbianism" on each side.³⁷ The Court agreed that the words were insulting within the meaning of the Public Order Act 1986. Analyzing the defendant's conviction in terms of the European Convention, the court held that the magistrates had

³¹ *Smith and Grady v. the United Kingdom*, nos. 33985/96 and 33986/96, §97, ECHR 1999-VI, at para. 121.

³² "La tolérance et le respect de l'égalité de tous les êtres humains constituent le fondement d'une société démocratique et pluraliste." *Féret v. Belgium*, no. 15615/07, § 64, 16 July 2009.

³³ See generally Fundamental Rights Agency, *Part 1 – Legal Analysis*, at nn. 253-264. For Ireland, see the Prohibition of Incitement to Hatred Act 1989. For Denmark, see art. 266b of the Penal Code. For Iceland, see Article 233a of the Penal Code. For Norway see Section 135a of the Penal Code. For the England and Wales, Part 3 A of the Public Order Act 1986 was amended in 2008 to add "hatred against a group of persons defined by reference to sexual orientation." See Section 74 of the Criminal Justice Immigration Act 2008, available at www.opsi.gov.uk/acts/acts2008/ukpga_20080004_en_1. For Northern Ireland, see Part 3 of the Public Order (Northern Ireland) Act 1987.

³⁴ Article 38, Public Information Law, Official Gazette, 43/03, available at www.legislationline.org/topics/country/5/topic/4. The criminal law, however, does not include sexual orientation within the hate speech provision.

³⁵ Although the United States does not have any hate speech laws, both the federal law and the laws of thirty-one states and the District of Columbia impose higher penalties for offenses motivated by sexual orientation. See Matthew Shepard and James Byrd Jr. Hate Crimes Prevention Act. For information on state laws, see www.hrc.org/issues/hate_crimes/state_laws.asp.

³⁶ *Van Zijl v. Goeree*, 1990 RvdW Nr. 41 (HR Neth). This description of the case is drawn from the following article: Astrid A.M. Mattijssen & Charlene L. Smith, *Dutch Treats: The Lessons the U.S. Can Learn from How the Netherlands Protects Lesbians and Gays*, 4 Am. U. J. Gender & L. 303 (1995-1996).

³⁷ *Hammond v. Department of Public Prosecutions*, High Court, (2004) EWHC 69, 13 January 2004.

properly judged that the “need to show tolerance to all sections of society” was a pressing social need. Similar decisions have been reached by courts in Germany. In a 2004 case, the Braunschweig magistrates’ court gave a suspended sentence for incitement and defamation to a man who called for the “nuclear eradication” of homosexuals. The court found that the man’s speech was against human dignity, which limited the right to free expression.³⁸ In Romania, the National Council on Combating Discrimination, an administrative body, has imposed fines on newspapers for articles that created a “hostile, degrading and humiliating environment” for homosexuals or infringed the right to dignity.³⁹

Outside Europe, a growing number of States also protect against hate speech directed against a person’s sexual orientation. In Uruguay, Section 149bis of the Criminal Code prohibits incitement to hatred, contempt or any form of mental or physical violence against one or more persons because of, *inter alia*, their “sexual orientation or gender identity.” In Canada, Section 319(2) of the Criminal Code provides: “Everyone one who, by communicating statements, other than in private conversation, willfully promotes hatred against any identifiable group” is guilty of a criminal offense.” Identifiable group” is defined as “any section of the public distinguished by colour, race, religion, ethnic origin or sexual orientation.”⁴⁰

In addition, many Canadian provincial human rights codes prohibit expression that “exposes or tends to expose to hatred, ridicules, belittles or otherwise affronts the dignity of any person or class of persons on the basis of” a number of personal characteristics including sexual orientation.⁴¹ For example, in the 2007 case of *Whatcott v. Saskatchewan Human Rights Tribunal*, the Queen’s Bench for Saskatchewan reviewed a tribunal decision concerning the distribution of flyers that had titles such as “Keep Homosexuality out of Saskatoon’s Public Schools!”⁴² The flyers stated, “Now the homosexuals want to share their filth and propaganda with Saskatchewan’s children” and “Sodomites are 430 times more likely to acquire Aids and 3 times more likely to sexually abuse children!” The court upheld the tribunal’s finding that such statements violated the Saskatchewan Human Rights Code.

In Australia, the laws of New South Wales, the Australian Capital Territory, Queensland and Tasmania prohibit homophobic hate speech, which is termed “vilification.”⁴³ Typically, the laws prohibit any form of communication or symbolic conduct to the public that incites “hatred towards, serious contempt for, or severe ridicule of, a person or group of persons on the ground of the homosexuality of the person.”⁴⁴ In *Burns v. Laws*, an appellate tribunal explained the reason for the homosexual vilification law:

“Anti-vilification laws seek to furnish a degree of protection to groups of people historically the

³⁸ *The social situation concerning homophobia and discrimination on grounds of sexual orientation in Germany*, FRA National Report, March 2009, at para. 73. See also Hamburg magistrates’ court case described in para. 74.

³⁹ *Asociatia Attitude v. SmM., Gazeta de Club, Decision No. 207, 14 July 2003; SA v. Ziari Atac*, Decision No. 231, 29 August 2005, available at Fundamental Rights Agency Information Portal. See infoportal.fra.europa.eu/InfoPortal/caselawFrontEndAccess.do?homePage=yes.

⁴⁰ See Sections 318 and 319, Criminal Code, R.S.C. 1985 c. C-46.

⁴¹ See, e.g., Section 14 of the Human Rights Code of Saskatchewan.

⁴² 2007 SKQB 450 (11 December 2007).

⁴³ See Section 49ZT of the Anti-Discrimination Act of New South Wales (prohibiting homosexual vilification); Section 66 of the Discrimination Act of 1991 of the Australian Capital Territory (prohibiting vilification on the grounds of sexuality, transsexuality, and HIV/AIDS status); Section 124A of Anti-Discrimination Act 1991 of Queensland (prohibiting vilification on grounds of race, religion, sexuality and gender identity); Section 19 of the Anti-Discrimination Act 1998 of Tasmania (prohibiting the incitement of hatred towards, serious contempt for, or severe ridicule of a person or a group of persons on a number of enumerated grounds including sexual orientation).

⁴⁴ Section 49ZT of the Anti-Discrimination Act of New South Wales.

*subject of unlawful discrimination and deep-seated prejudice resulting in them being treated unequally as compared to other members of the community not having those characteristics. . . [T]he Parliamentary debates on this legislation make it clear that considerable concern was felt over the influence that homophobic comments have in stirring up ill will towards homosexuals and producing a social environment in which at least some people are emboldened to marginalise homosexual persons or act violently towards them.*⁴⁵

In *Collier v. Sunol*, statements published on the internet that referred to homosexuals with derogatory terms, described them as being “evil,” and alleged that the “Gay Lobby” was “out to destroy society” were held to violate the vilification provision.⁴⁶ The Administrative Decisions Tribunal of New South Wales found that the statements could not be categorized as “for religious instruction” or “in the public interest,” two exceptions under the statute. Rather, they were “nothing more than sweeping generalisations of a highly insulting and offensive nature.”⁴⁷

V. The Court’s Approach to Sexual Orientation and Discrimination

The Court has repeatedly held that that discrimination based on sexual orientation is as serious as discrimination based on ‘race, origin or colour’ or sex.⁴⁸ The Court has found incompatible with the Convention laws concerning same-sex conduct, age of consent, military service, adoption, child custody and inheritance that discriminate on the basis of sexual orientation.⁴⁹

The vulnerability of the group against whom discrimination takes place has been a factor in the Court’s analysis. Thus, in *D.H. v Czech Republic*, the Court reiterated that ‘the vulnerable position of Roma/Gypsies means that special consideration should be given to their needs and their different lifestyle both in the relevant regulatory framework and in reaching decisions in particular cases.’⁵⁰ The Court has also observed in this regard “that there is an emerging international consensus amongst the Contracting States of the Council of Europe recognising the special needs of minorities and an obligation to protect their security, identity and lifestyle,⁵¹ not only for the purpose of safeguarding the interests of the minorities themselves but to preserve a cultural diversity that is of value to the whole community.”⁵² Such consideration must also extend to members of the LGBT community who face deeply rooted prejudices, hostility and widespread discrimination all over Europe.⁵³ The elements common to the findings of the Court where it has condemned hate speech against certain vulnerable minorities are equally applicable to hate speech directed at individuals on the basis of their sexual orientation. It is further submitted that there is a need for criminal sanctions in some instances and that this can be done in a manner consistent with the framework governing freedom of expression that has been elaborated by the Court.

⁴⁵ *Burns v. Laws* (EOD) 2008 NSWADTAP 32 (16 May 2008) paras. 67, 129.

⁴⁶ 2006 NSWADTAP 51, 27 September 2006 (affirming Administrative Decisions Tribunal decision).

⁴⁷ 2005 NSWADT 261, 17 November 2005, at para. 74.

⁴⁸ *Smith and Grady v. the United Kingdom*, nos. 33985/96 and 33986/96, §97, ECHR 1999-VI and *Salgueiro da Silva Mouta v. Portugal*, no. 33290/96, §36, ECHR 1999-IX, *L & V v. Austria* para 45 (sex discrimination); *S.L. v. Austria*, no. 45330/99, §37, ECHR 2003-I.

⁴⁹ See *Dudgeon v. United Kingdom*, Application No. 7525/76, 22 October 1981; *S.L. v. Austria*, Application No. 45330/99, 9 January 2003; *Lustig-Prean and Beckett v. United Kingdom*, Application No. 32377/96, 27 September 1999; *E.B. v. France*, Application No. 43546/02, 22 January 2008; *Salgueiro da Silva Mouta v. Portugal*, Application No. 33290/96, 21 December 1999; *Karner v. Austria*, Application No. 40016/98, 24 July 2003.

⁵⁰ *D.H. and Others v. the Czech Republic* [GC], no. 57325/00, §181, 13 November 2007.

⁵¹ See in particular the Framework Convention for the Protection of National Minorities.

⁵² *Muñoz Diaz v. Spain*, no. 49151/07, §60, 8 December 2009.

⁵³ See Fundamental Rights Agency, *Homophobia and Discrimination on Grounds of Sexual Orientation in the EU Member States: Part II – The Social Situation*, 31 March 2009.

VI. Comparative Law on Sexual Orientation and Discrimination

Comparative jurisprudence demonstrates that courts consider gays and lesbians in the context of other disadvantaged and disempowered groups that are protected by anti-discrimination laws. That statements of a homophobic nature contribute to an atmosphere of hostility and violence against sexual minorities was recognised in a recent decision of the European Committee of Social Rights, concerning the provision of sexual and reproductive health education in schools. The Committee referred to certain passages available in educational materials provided by the state which said “*Nowadays it has become evident that homosexual relations are the main culprit for increased spreading of sexually transmitted diseases (e.g. AIDS)*”, and “*The disease [AIDS] has spread amongst promiscuous groups of people who often change their sexual partners. Such people are homosexuals because of sexual contacts with numerous partners, drug addicts because of shared use of infected drug injection equipment and prostitutes*”. The Committee noted that “these statements stigmatize homosexuals and are based upon negative, distorted, reprehensible and degrading stereotypes about the sexual behaviour of all homosexuals.”⁵⁴

In a series of cases the Supreme Court of Canada has held that the equal rights guarantee under section 15 of the Canadian Charter of Rights and Freedoms includes not only the specifically enumerated grounds of race, national or ethnic origin, colour, religion, sex, age and mental or physical disability, but also “analogous grounds.”⁵⁵ In *Egan v. Canada*, the Supreme Court held, “Sexual orientation is a deeply personal characteristic that is either unchangeable or changeable only at unacceptable personal costs, and so falls within the ambit of s. 15 protection as being analogous to the enumerated grounds.”⁵⁶

Courts in the United States have developed a similar analysis regarding sexual orientation under the equal protection clause of the federal and state constitutions. In *Kerrigan v. Commissioner of Public Health*, the court concluded that “gay persons” were entitled to heightened protection because they had been “subjected to and stigmatized by a long history of purposeful and invidious discrimination” and because their sexual orientation bore “no logical relationship to their ability to perform in society.”⁵⁷

Similarly, the California Supreme Court has noted that lesbians and gay men “share a history of persecution comparable to that of Blacks and women. . . Outside of racial and religious minorities, we can think of no group which has suffered such ‘pernicious and sustained hostility’ and such ‘immediate and severe opprobrium’ as homosexuals.”⁵⁸ The Court relied on such a finding in holding that lesbians and gay men were a protected class.

VII. Conclusion

⁵⁴ Resolution CM/ResCHs (2009) 7 complaint no.45/2007, *INTERIGHTS v. Croatia*.

⁵⁵ See *Miron v. Trudel*, [1995] 2S.C.R. 418, 25 May 1995 (finding marital status to be an analogous ground).

⁵⁶ *Egan v. Canada*, [1995] 2S.C.R. 513, 514, 25 May 1995 (finding sexual orientation to be an analogous ground under the Charter but upholding the exclusion of same-sex partners from the definition of spouse in the Old Age Security Act); see also *Vriend v. Alberta*, [1998] 1S.C.R. 493, 2 April 1998 (reading “sexual orientation” into the prohibited grounds of discrimination in the Individual’s Rights Protection Act).

⁵⁷ *Kerrigan v. Commissioner of Public Health*, 957 A.2d 407, 432 (Conn. 2008).

⁵⁸ *In re Marriage Cases*, 43 Cal. 4th 757, 841-842 (Cal. 2008), superseded in part by constitutional amendment, (citing *People v. Garcia*, 77 Cal. App. 4th 1269, 1276, 1279 (21 January 2000) (finding that gays and lesbians constituted a “cognizable group” for purposes of jury selection)); see also *Varnum v. Brien*, 763 NW2d 862 (Iowa 2009) (comparing sexual orientation to factors such as race, national origin, and sex in concluding that gay and lesbian people were entitled to heightened protection).

It has long been the position of this Court that the European Convention must provide practical and effective protection for human rights. The broad language of Article 10 has evolved over time, to respond to changes in the understanding of discrimination and to provide increasing protection against members of vulnerable section of society. It is respectfully submitted that this Court should establish a framework for protection pursuant to Article 10 that allows those most marginalised in society to use the law meaningfully to combat hate speech and to ensure that they are able to access, exercise and enjoy the fundamental rights set out in the Convention to the same extent as others within its jurisdiction.

This case provides a critical opportunity for this Court to consolidate an approach to hate speech directed against a person or class of persons because of their sexual orientation that is elaborated in such a way so as to ensure that they are protected from the harmful effects of such expression. In order to do so, this Court must acknowledge that a clear analogy can be drawn between racism and xenophobia, which have been the subject matter of much of the court's jurisprudence in this area, and sexual orientation. Sexual orientation should be treated in the same way as categories such as race, ethnicity, and religion, which are commonly covered by hate speech and hate crime laws, because sexual orientation is a characteristic that is fundamental to a person's sense of self. It is, moreover, used as a marker of group identity. When a particular group is singled out for victimization and discrimination, hate speech laws should protect those characteristics that are essential to a person's identity and that are used as evidence of belonging to a particular group.⁵⁹

Restrictions on freedom of expression must therefore be permissible in instances where the aim of the speech is to degrade, insult or incite hatred against persons or a class of person on account of their sexual orientation, so long as such restrictions are in accordance with the Court's well-established principles. Such an approach will allow for effective legal protection to be extended in a way that is entirely in accordance with the aim of the Convention. The Court should acknowledge the right of States to prohibit public statements that expose a person or class of persons to hatred or contempt because of their sexual orientation.

Padraig Hughes, Lawyer
INTERIGHTS

Allison Jernow, Lawyer
International Commission of Jurists

⁵⁹ See OSCE-ODIHR, *Hate Crime Laws: A Practical Guide* (Warsaw 2009) at 38-39.