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Bivolaru v. Romania

Excessive length of criminal proceedings concerning a conviction for sexual relations with a minor

Registrar of the Court (02.10.2018) - In today's Chamber judgment1 in the case of Bivolaru v. Romania (no. 2) (application no. 66580/12) the European Court of Human Rights held, unanimously, that there had been:

no violation of Article 6 § 1 (right to a fair trial) of the European Convention on Human Rights regarding the complaint of a failure by the High Court to take steps to hear Mr Bivolaru in person, and a violation of Article 6 § 1 (right to a fair trial within a reasonable time) with regard to the length of the proceedings.

The case concerned criminal proceedings in which Mr Bivolaru – leader of a movement known as the "Movement for spiritual integration in the absolute" ("MISA") – was sentenced to six years' imprisonment for sexual relations with a minor.(*)

Mr Bivolaru left for Sweden, where he acquired political refugee status, while criminal proceedings against him were pending in Romania. He did not appear in person before the Romanian courts but was represented by lawyers of his choice. He was acquitted at first instance and on appeal, but convicted by the High Court, which could not hear him in person.

The Court found that the High Court had taken all the steps that could reasonably have been expected of it to ensure that Mr Bivolaru was questioned and that it could not be criticised for lack of diligence in any respect. Firstly, the High Court had offered to question Mr Bivolaru by video link but he had refused. Secondly, it had agreed to question him following a formal request for judicial assistance in Sweden, thus sending a request to the Swedish authorities and a list of questions to be put to Mr Bivolaru. However, the Swedish authorities had delayed in implementing the request despite a number of reminders from the Romanian authorities stressing its urgency. The Court also held that the overall length of the criminal proceedings had been unreasonable and that the delays had been attributable to the national authorities. In particular, the length of the first instance case (five years and three months) had had a decisive impact on the overall length of the proceedings (nine years, two months and two weeks). Mr Bivolaru also considered that he had been tried in absentia. He also complained of a violation of

his right to respect for his private life on account of telephone tapping. The Court rejected those complaints.

Principal facts

The applicant, Gregorian Bivolaru (alias Magnus Aurolsson), is a Romanian national who was born in 1952. In March 2004 the Bucharest public prosecutor's office ordered criminal proceedings against Mr Bivolaru on charges of sexual relations with a minor and sexual perversion. The applicant was remanded in pre-trial detention from 30 March to 1 April 2004. After his release, on an unknown date, he travelled to Sweden, where, in 2006, he was granted political refugee status and given a new identity. In the meantime, the Bucharest public prosecutor's office committed him for trial in absentia. Mr Bivolaru, who was represented by lawyers of his choice throughout the proceedings, was acquitted at first instance and on appeal. The public prosecutor's office successfully lodged an appeal on points of law with the High Court, which concluded that the law had been wrongly applied. The High Court also decided that it should examine directly the evidence as well as the merits of the case.

In November 2012 the High Court offered to allow Mr Bivolaru to be questioned via video link, but he refused, preferring to be questioned following a formal request from a court for judicial assistance. The High Court therefore sent the Swedish authorities a request for judicial assistance and a list of questions to put to Mr Bivolaru. However, as the Swedish authorities delayed in implementing the request despite a number of reminders, the High Court decided that it was no longer necessary to wait for their reply. On 14 June 2013 it convicted Mr Bivolaru of sexual relations with a minor, basing its decision on the evidence in the file (witness statements, documents, recordings of telephone conversations).

In February 2016 Mr Bivolaru was arrested by the French authorities in Paris and in July 2016 he was surrendered to the Romanian authorities, who remanded him in custody. He was released on licence in September 2017. His application to have the criminal proceedings reopened was dismissed.

In the meantime, in June 2012, Mr Bivolaru had brought tort proceedings against the State regarding the telephone tapping. The district court found in his favour on the grounds that the warrants authorising the telephone tapping had infringed his right to respect for his private life. The court awarded him the symbolic amount of 1 Romanian leu (RON, approximately 0.30 euros (EUR)) for the non-pecuniary damage suffered.

Complaints, procedure and composition of the Court

Relying on Article 6 (right to a fair trial), Mr Bivolaru complained that he had been convicted in absentia without having been heard in person by the High Court. He also complained about the length of proceedings and the refusal of the Romanian authorities to reopen the criminal proceedings.

Relying on Article 8 (right to respect for private and family life), he complained about the tapping of his telephone. In that regard he also relied on Article 13 (right to an effective remedy), alleging that he had had no access to an effective remedy.

The application was lodged with the European Court of Human Rights on 8 October 2012. Judgment was given by a Chamber of seven judges, composed as follows:

Ganna **Yudkivska** (Ukraine), President,
Paulo **Pinto de Albuquerque** (Portugal),
Krzysztof **Wojtyczek** (Poland),
Egidijus **Kūris** (Lithuania),

Gabriele **Kucsko-Stadlmayer** (Austria),
Carlo **Ranzoni** (Liechtenstein),
Marko **Bošnjak** (Slovenia),
and also Andrea **Tamietti**, Deputy Section Registrar.

Decision of the Court

Article 6 (right to a fair trial/within a reasonable time)

Regarding the complaint about being convicted in absentia, the Court dismissed the complaint on the grounds that it was manifestly ill-founded. The Court observed, inter alia, that Mr Bivolaru had been notified of the criminal charges against him, that he had been represented throughout the proceedings by lawyers of his own choice with whom he had maintained permanent contact for the preparation of his defence, and that he had known that criminal proceedings had been brought against him. The Court also noted that there had been no denial of justice and that the Romanian justice system allowed proceedings to be reopened where the accused had been tried in absentia. In that connection it observed that the district court that had dealt with Mr Bivolaru's request to have the proceedings reopened, had carried out a detailed examination of the grounds submitted by him, and had relied on logical arguments with no trace of arbitrariness before rejecting his request.

With regard to Mr Bivolaru's conviction by the High Court without having been heard in person and following his acquittal on the merits and on appeal, the Court found that the High Court had taken all the steps that could reasonably have been expected of it within the existing legal framework to ensure that Mr Bivolaru was questioned and that it could not be criticised for lack of diligence in any respect. There had therefore been no violation of Article 6 § 1 of the Convention.

The High Court had had recourse to international judicial assistance to hear evidence from Mr Bivolaru. Two possibilities had been open to it: la video link or a formal request for judicial assistance. Firstly, Mr Bivolaru, with the advice of his lawyers, had expressly refused to be questioned by video link, although that method of questioning could have been an appropriate means of hearing him directly and properly.

Secondly, the High Court had granted Mr Bivolaru's request to be questioned in Sweden following a formal request for judicial assistance, but on account of delays by the Swedish authorities in examining that request and the lack of information regarding when the questioning could take place, it had decided not to hear the applicant. Nor had the Swedish authorities provided an explanation for failing to comply with the successive time-limits set by the Romanian authorities.

After approximately six months of exchanges between the High Court and the Swedish authorities, examination of the request for judicial assistance had still been in its initial stage and there had been uncertainty both regarding its outcome and the date when, in the event of a positive response, the applicant would be questioned. The High Court had informed the Swedish authorities that its request was urgent. Moreover, the Swedish authorities had not informed the Romanian authorities of any procedural error in the formulation of their request for judicial assistance and the High Court had not had any other means of expediting the procedure in that regard.

Lastly, given the time taken to examine that request, which, in the light of the Swedish authorities' response, had not appeared likely to succeed, the High Court's decision not to follow the relevant procedure, made after a number of reminders had been sent to the Swedish authorities, did not, in the Court's view, appear unreasonable. The Court therefore considered that the High Court had taken reasonable steps to offer Mr Bivolaru

an opportunity to be heard following a formal request for judicial assistance. Furthermore, the High Court was able to hear the applicant's submissions through his lawyers, who had been present during the examination of the appeal and had made their submissions before it and effectively defended their client's interests.

With regard to the length of the proceedings, the Court found that the length of the first-instance case had had a decisive impact on the overall length of proceedings, which, in the present case, was unreasonable. There had therefore been a violation of Article 6 § 1 of the Convention. The Court noted that the criminal proceedings had lasted approximately nine years, two months and two weeks before three levels of court (from March 2004 to June 2013). The case had been pending for approximately five years and three months before the Sibiu District Court on the grounds, inter alia, that many adjournments had been necessary because witnesses had not been lawfully summoned and the procedure for bringing the accused before the judge had not been correctly used. With regard to the length of the proceedings on appeal and before the High Court, the Court considered that these had been conducted diligently.

Articles 8 and 13 (right to respect for private and family life/right to an effective remedy)

With regard to the complaint concerning the right to respect for Mr Bivolaru's private life on account of telephone tapping, the Court considered that Mr Bivolaru could not claim to be a victim of a violation of Article 8 of the Convention. The complaint was therefore incompatible ratione personae with the provisions of the Convention. The Bucharest Court, in its final judgment of 23 June 2015, had expressly recognised a violation of Mr Bivolaru's right to respect for his private life. In that connection the Court held that although the amount awarded by the court in respect of nonpecuniary damage had been symbolic (ROL 1), the compensation thus established was not at odds with the Court's case-law: in recent cases in which the Court had found a violation on account of incompatibility of the domestic law with Article 8 of the Convention, the Court had held that the finding of a violation in itself represented sufficient redress for the non-pecuniary damage suffered.

With regard to the effectiveness of the domestic remedy, the Court found that the complaint was manifestly ill-founded: Mr Bivolaru had had an effective remedy before the domestic courts, which had found and given redress for the violation alleged in the tort proceedings brought before them.

Article 41 (just satisfaction)

The Court held, by six votes to one, that Romania was to pay the applicant 1,200 euros (EUR) in respect of non-pecuniary damage and EUR 5,000 in respect of costs and expenses.

Separate opinion

Judge Kūris expressed a separate opinion which is annexed to the judgment.

The judgment is available only in French.

(*) HRWF Footnote

See our report about MISA school and Grigorian Bivolaru, including the case of his alleged sexual relations with a minor. HRWF interviewed her in 2013 in the presence of her husband who was her fiancé at the time of the alleged facts and she denied any such sexual relations with Grigorian Bivolaru: http://hrwf.eu/wp-content/uploads/2014/11/MISA-Gregorian-Bivolaru-Yoga-Practitioners-in-Romania.pdf

Freedom of expression and abortion

Freedom of expression does not give the right to label abortions performed by designated doctors "aggravated murder"

Registrar of the European Court (20.09.2018) - https://bit.ly/2zCSIdu - In today's Chamber judgments1 in the cases of Annen v. Germany (nos. 2 to 5) (application nos. 3682/10, 3687/10, 9765/10 and 70693/11) the European Court of Human Rights held, unanimously, that there had been:

no violation of Article 10 of the European Convention on Human Rights.

The cases concerned a series of complaints by an anti-abortion activist, Klaus Günter Annen, over civil court injunctions on various actions he had taken as part of an anti-abortion campaign. The plaintiffs in the domestic proceedings were four doctors who performed abortions.

The Court held in particular that the injunctions had interfered with Mr Annen's freedom of expression, but had been necessary in a democratic society. When examining whether there had been a need for such interferences in the interests of the "protection of the reputation or rights of others", namely of the doctors, the Court's role was only to ascertain whether the domestic courts had struck a fair balance when protecting the freedom of expression guaranteed by Article 10 and the right to respect for private life protected by Article 8 of the Convention.

In sum, the Court considered that the injunctions had not been disproportionate to the legitimate aim pursued and that the reasons given by the domestic courts had been relevant and sufficient. It pointed out that the domestic authorities had carried out a detailed analysis of the leaflets and webpage set up by Mr Annen and that the accusations by Mr Annen against the various abortion doctors had not only been very serious but might also have incited hatred and aggression. In this regard, the Court found the domestic courts' conclusion acceptable that Mr Annen's statements, in particular by using the term "aggravated murder", could be understood as personalised accusations against the doctors of having perpetrated the criminal offence of aggravated murder.

Principal facts

The applicant, Klaus Günter Annen, is a German national who was born in 1951 and lives in Weinheim (Germany). The domestic courts issued four civil injunctions against Mr Annen, prohibiting particular aspects of his anti-abortion campaign.

In the first case (application no. 3682/10) Mr Annen was ordered to refrain from referring on his webpage to abortions performed by a doctor, Dr Q., as "aggravated murder" and comparing them with the Holocaust.

While the first-instance court in May 2006 rejected Dr Q's application on the grounds that it was a fact that Dr Q. performed abortions and that the remainder of the website's content was covered by Mr Annen's freedom of expression, the Karlsruhe Court of Appeal granted an injunction in February 2007 after Dr Q. appealed. It pointed out that Mr Annen had insinuated, by using the term "aggravated murder" on the website, that Dr Q. had committed criminal offences and had compared abortions with the Holocaust. Furthermore, he had not referred to section 218a of the Criminal Code which exempted abortions as performed by Dr Q. from criminal liability. In sum, it was possible to

interpret his statements as a personal accusation against Dr Q. of perpetrating aggravated murder.

At the origin of the second case (application no. 3687/10) was a public statement on a leaflet by Mr Annen that another doctor, Dr. S., had performed unlawful abortions in his practice, outside of which Mr Annen had also distributed various leaflets in November/December 2004 and in September 2005. They contained statements such as "Near you: unlawful abortions ... and you are silent about the aggravated murder of our children?"

Subsequently, Dr. S. made a request for a civil injunction which was granted by the Karlsruhe Regional Court on 4 November 2005. It held that the statements had a "pillory effect" and amounted to a serious interference with Dr S.'s personality rights, which was not justified by Mr Annen's freedom of expression. The court underlined that Mr Annen had singled out Dr S. by mentioning him by name and distributing the leaflets in the vicinity of his practice, that he had implied that Dr S. had committed the criminal offence of aggravated murder and that he had associated Dr S. with the Holocaust.

Both parties appealed. In February 2007 the Karlsruhe Court of Appeal confirmed the reasoning of the Regional Court and held that the wording of Mr Annen's statements showed that he had described the abortions performed by Dr S. as aggravated murder, which could not be tolerated. It reiterated that by singling out Dr S., Mr Annen had created an unacceptable "pillory effect". In that regard, the court noted that Dr S. had not been involved in the public debate about abortions in any way. Since Mr Annen had not clarified that he had only been criticising abortions, which according to the case-law of the Federal Constitutional Court were unlawful but not subject to criminal liability, he had exceeded the limits of justifiable criticism.

In the third case (application no. 9765/10) the application for an injunction was lodged by Dr St. because Mr Annen had approached passers-by and possible patients in the vicinity of Dr St.'s medical practice in April 2005, while distributing leaflets. The leaflets had stated that the abortions performed by Dr St. were unlawful and compared them with the Holocaust.

The injunction was granted in October 2005 by the Mannheim Regional Court whose decision was upheld by the Karlsruhe Court of Appeal in February 2007. Both courts referred to a previous decision of the Federal Court of Justice in which it had confirmed a civil injunction against similar conduct by Mr Annen. Mr Annen had attacked Dr St.'s legal professional activities by implying that he had committed criminal acts and had interfered with the relationship of trust between doctor and patient. The injunction order was justified in view of the massive "pillory effect" he had created by singling out Dr St. and criticising him in a harsh way in the immediate vicinity of his practice.

The fourth case (application no. 70693/11) dealt with a civil injunction and an order to pay damages against Mr Annen because of statements which he had made on an anti-abortion website. The website had implied that abortions amounted to aggravated murder, compared doctors performing abortions to concentration camp commanders and in general had equated abortions with the Holocaust. A link on the website directed readers to a list of doctors who performed abortions, mentioning, among others, Dr F., the plaintiff in this case.

The complaints by Mr Annen against the injunctions in all four cases were ultimately dismissed by the Federal Constitutional Court.

Complaints, procedure and composition of the Court

Relying on Article 10 (freedom of expression) Mr Annen complained that the injunctions had interfered with his freedom of expression, without being justified by the protection of the doctors' personality rights. His website and leaflets contributed to a public debate and he had not personally accused the doctors of perpetrating aggravated murder; rather he had criticised the legal framework in Germany regarding abortions.

The applications were lodged with the European Court of Human Rights on 15 January 2010, 8 February 2010 and 26 October 2011.

The judgments were given by a Chamber of seven judges, composed as follows:

Yonko **Grozev** (Bulgaria), President,

Angelika **Nußberger** (Germany),

André **Potocki** (France),

Síofra **O'Leary** (Ireland),

Mārtiņš **Mits** (Latvia),

Lətif **Hüseynov** (Azerbaijan),

Lado **Chanturia** (Georgia),

and also Claudia **Westerdiek**, Section Registrar.

Decision of the Court

Article 10

The Court underlined that its task under Article 10 was to look at the interference complained of in the light of the case as a whole and determine whether it had been "proportionate to the legitimate aim pursued" and whether the reasons adduced by the national authorities to justify it had been "relevant and sufficient". Where a balancing exercise had been undertaken by the national authorities in conformity with the Court's case-law, the Court would require strong reasons to substitute its view for that of the domestic courts.

Turning to the first case (application no. 3682/10), the Court accepted the domestic Court of Appeal's conclusion that Mr Annen's statements had been ambiguous and could be understood as an accusation that Dr Q. had perpetrated the criminal offence of aggravated murder. Distinguishing the present case from the case of its previous judgment Annen v. Germany (no. 3690/10, 26 November 2015), it noted that Mr Annen had not provided the additional information that the abortions performed by Dr Q. had not been subject to criminal liability. Furthermore, there had been no factual foundation for the very serious criminal allegations made by Mr Annen. Lastly, the Court observed that Mr Annen had not been ordered to pay damages or convicted but had only had to refrain from calling the abortions "aggravated murder".

Having regard to the second case (application no. 3687/10), the Court agreed with the domestic courts observations that while - strictly speaking - calling abortions unlawful was correct, the statement by Mr Annen read in conjunction with the rest of the leaflet could be understood as an allegation that Dr S.'s professional activities constituted aggravated murder. It had to be noted that in this case too Mr Annen's accusations against Dr S. were very serious and that he, nonetheless, was not per se prohibited from

campaigning against abortions or criticising doctors that performed abortions. Since the domestic courts had thoroughly discussed various possibilities of interpreting the statements in light of the freedom of expression, the Court found no violation of Article 10.

In the third case (application no. 9765/10) the Court firstly agreed with the domestic court's finding that the applicant had vilified Dr St. by implying that he had committed criminal acts. It secondly observed that Mr Annen had singled out Dr St. from all the doctors that had performed abortions and had thereby created a "pillory effect". Even though Dr St. had been involved in various legal disputes in the past, the domestic courts had concluded that this did not have any substantial effects on Dr St.`s profile and could not redound to his disadvantage. Having regard to their direct contact with their societies, the Court found that it was primarily for the domestic courts to assess how well-known a person was. In conclusion, the Court saw no reason to call the domestic courts' reasoning into question. It thirdly held that Mr Annen's "pavement counselling" had severely disrupted the relationship of trust between Dr St. and his patients.

Lastly, since Mr Annen had not been convicted for slander or ordered to pay damages, the Court held that the level of interference with his freedom of expression had been relatively low and had been "proportionate to the legitimate aims pursued". Therefore, in the Court's view, the national courts had thoroughly assessed the conflicting interests by referring to the previous judgment of the Federal Court of Justice and considering the factual and legal differences of the cases.

The Court also found no violation of Article 10 of the Convention in the fourth case (application no. 70693/11). It found that there was not a sufficient factual basis for calling abortions as performed by Dr F. "aggravated murder". Furthermore, distinguishing the present case from the case of its previous judgment Annen v. Germany (no. 3690/10, 26 November 2015), the Court observed that Mr Annen had equated the medical activities of Dr F. with the unjustifiable atrocities inflicted on Jews under the Nazi regime and had even stated that "Equating the Babycaust with the Holocaust would mean relativising today's abortion murders". These accusations were very serious and had severely undermined Dr F.'s reputation. Based on the national courts' detailed reasoning, the Court considered therefore that both the injunction and the order to pay damages against Mr Annen had not fallen outside their margin of appreciation and had not been disproportionate. Accordingly, there had been no violation of Article 10 of the Convention in any of the four cases.

Nagorno-Karabakh : Sargsyan v. Azerbaijan

In the absence of a political solution to the Nagorno-Karabakh conflict, the Court awarded the applicants aggregate sums in just satisfaction

ECtHR Registrar (12.12.2017) - http://bit.ly/2AgcoCR - In today's **Grand Chamber** judgment1 in the case of **Sargsyan v. Azerbaijan** (application no. 40167/06) the European Court of Human Rights ruled on the question of just satisfaction. It held, unanimously, that the Azerbaijani Government had to pay the applicant 5,000 euros (EUR) in respect of pecuniary and non-pecuniary damage and EUR 30,000 in costs and expenses.

The case concerned an Armenian refugee's complaint that, after having been forced to flee from his home in the Shahumyan region of Azerbaijan in 1992 during the conflict over Nagorno-Karabakh, he had since been denied the right to return to his village and to have access to and use his property there.

The Court observed that the principle of subsidiarity underpinned the system of the European Convention on Human Rights. Thus, Armenia and Azerbaijan had given undertakings prior to their accession to the Council of Europe, committing themselves to the peaceful settlement of the Nagorno-Karabakh conflict. The Court could only underline that it was their responsibility to find a solution on a political level to the conflict. Without prejudice to any compensation to be awarded to the applicant as just satisfaction, the effective execution of the principal judgment called for the creation of general measures at national level.

The Court also noted that the damage did not lend itself to precise calculation. Certain difficulties in assessing the damage derived from the passage of time: the time element made the link between a breach of the Convention and the damage less certain.

In conclusion, the Court underlined the responsibility of the two States concerned to find a resolution to the Nagorno-Karabakh conflict. Pending a solution on the political level, the Court considered it appropriate to award the applicant an aggregate sum for pecuniary and non-pecuniary damage.

Principal facts

The applicant, Minas Sargsyan, an Armenian national, was born in 1929 and died in 2009 in Yerevan after having lodged his complaint with the European Court of Human Rights in 2006. His widow, Lena Sargsyan, his son, Vladimir, and his daughters, Tsovinar and Nina Sargsyan pursued the application on his behalf. Lena Sargsyan died in 2014. Vladimir and Tsovinar Sargsyan pursued the proceedings on the applicant's behalf.

Mr Sargsyan stated that he and his family, ethnic Armenians, used to live in the village of Gulistan, in the Shahumyan region of the Azerbaijan Soviet Socialist Republic, where they had a house and a plot of land. According to his submissions, his family had been forced to flee from their home in 1992 during the Nagorno-Karabakh conflict.

In a judgment delivered on 16 June 2015 the Grand Chamber dismissed the Government's preliminary objections and held that there had been continuing violations of Article 1 of Protocol No. 1 (protection of property), Article 8 (right to respect for home and private and family life) and Article 13 (right to an effective remedy) of the Convention. With respect to Article 1 of Protocol No. 1, it accepted that throughout the period within its jurisdiction, that is, from 15 April 2002 – the date on which Azerbaijan had ratified the Convention – refusing civilians, including the applicant, access to the village had been justified by safety considerations given that it was situated in an area of military activity. However, it considered that the fact that the respondent State had not taken any alternative measures to restore the applicant's property rights or to provide him with compensation for the loss of their enjoyment had placed an excessive burden on him.

As the question of just satisfaction was not ready for decision, the Court reserved it and invited the parties to submit their written observations on that issue and to notify the Court of any agreement they might reach.

Complaints, procedure and composition of the Court

Relying on Article 41 (just satisfaction), the applicant sought just satisfaction in respect of pecuniary and non-pecuniary damage resulting from the violations found in the present case, as well as reimbursement of the costs and expenses incurred in the proceedings before the Court. The application was lodged with the European Court of

Human Rights on 11 August 2006. On 11 March 2010 the Chamber to which the case had been assigned relinquished jurisdiction in favour of the Grand Chamber2. The Armenian Government were granted leave to intervene as a third party. A first hearing was held on 15 September 2010.

In a decision of 14 December 2011, the Court declared the application partly admissible. A second Grand Chamber hearing on the merits of the case was held on 5 February 2014. The Grand Chamber delivered its judgment on the merits on 16 June 2015.

Today's judgment on just satisfaction was given by the Grand Chamber of 17 judges

Decision of the Court

Article 41

In its principal judgment the Court referred to the exceptional nature of the case, owing to a number of features.

The case related to an ongoing conflict situation and the parties had still not reached a peace agreement. Despite a ceasefire agreement concluded 23 years ago, the ceasefire was still not observed. Whereas the events that had led the applicant to flee his property and home had occurred in June 1992, the Republic of Azerbaijan had not ratified the Convention until ten years later, on 15 April 2002. The Court concluded that from the date of entry into force of the Convention in respect of Azerbaijan, the latter had been responsible for continuing violations of the applicant's rights under Article 1 of Protocol No. 1 and Articles 8 and 13 of the Convention.

The Court was thus dealing with a continuing situation which had its roots in the unresolved conflict over Nagorno-Karabakh and the surrounding territories and still affected a large number of individuals. More than 1,000 individual applications lodged by persons who had been displaced during the conflict were pending before the Court, slightly more than half of them being directed against Armenia and the remainder against Azerbaijan. The applicants in those cases represented just a small portion of the persons, estimated to exceed one million, who had had to flee during the conflict and had since been unable to return to their properties and homes or to receive any compensation.

The Court reiterated the importance of the principle of subsidiarity.

As to the political dimension, Armenia and Azerbaijan had committed themselves prior to their accession to the Council of Europe, to the peaceful settlement of the Nagorno-Karabakh conflict. By now, some 15 years had passed since the ratification of the Convention by the two States without a political solution of the conflict being in sight. The Court could only underline that it was their responsibility to find a solution to the conflict on a political level.

With regard to the legal dimension, the Court reiterated that the principle of subsidiarity underpinned the Convention system. By virtue of Article 1 (obligation to respect human rights), the Contracting States had to secure the rights and freedoms guaranteed by the Convention to everyone within their jurisdiction, while, in accordance with Article 19 (establishment of the Court), it was for the Court to ensure the observance of the engagements undertaken by the States. It was precisely a failure on the part of the Government which obliged the Court to act as a court of first instance, establishing the relevant facts, evaluating evidence in respect of property claims and finally assessing monetary compensation.

Without prejudice to any compensation to be awarded as just satisfaction, the effective execution of the principal judgment called for the creation of general measures at national level. Guidance as to appropriate measures had been given in the principal judgment, where the Court had stated that pending a comprehensive peace agreement,

it appeared particularly important "to establish a property claims mechanism, which should be easily accessible and provide procedures operating with flexible evidentiary standards, allowing the applicants and others in their situation to have their property rights restored and to obtain compensation for the loss of their enjoyment".

The Court concluded overall that the applicant was entitled to compensation for certain pecuniary losses and for non-pecuniary damage, the pecuniary and non-pecuniary damage being closely connected in the present case.

The Court noted, however, that the damage sustained did not lend itself to precise calculation. Certain difficulties in assessing the damage derived from the passage of time: the time element made the link between a breach of the Convention and the damage less certain. The violation of the right to respect for possessions was a continuing one and almost ten years had elapsed between the applicant's displacement from Gulistan and the entry into force of the Convention in respect of Azerbaijan, and some 15 years had elapsed thereafter. The Court considered that an award could still be made, notwithstanding the large number of imponderables involved.

Lastly, the Court reiterated that it was the responsibility of the two States concerned to find a resolution to the Nagorno-Karabakh conflict. Pending a solution on the political level, it considered it appropriate to award an aggregate sum for pecuniary and non-pecuniary damage.

Just satisfaction (Article 41)

The Court held that Azerbaijan was to pay Vladimir Sargsyan and Tsovinar Sargsyan EUR 5,000 jointly in respect of pecuniary and non-pecuniary damage, and EUR 30,000 in respect of costs and expenses.

Separate opinion

Judge Hüseynov expressed a concurring opinion, which is annexed to the judgment.

Nagorno-Karabakh : Chiragov and Others v. Armenia

In the absence of a political solution to the Nagorno-Karabakh conflict, the Court awarded the applicants aggregate sums in just satisfaction

ECtHR Registrar (12.12.2017) - http://bit.ly/2Az3hl7 - In today's **Grand Chamber** judgment1 in the case of **Chiragov and Others v. Armenia** (application no. 13216/05) the European Court of Human Rights ruled on the question of just satisfaction. It held, unanimously, that the Armenian Government had to pay 5,000 euros in respect of pecuniary and non-pecuniary damage to each of the applicants and a total amount of 28,642.87 pounds sterling for costs and expenses.

The case concerned the complaints by six Azerbaijani refugees that they were unable to return to their homes and property in the district of Lachin, in Azerbaijan, from where they had been forced to flee in 1992 during the Nagorno-Karabakh conflict.

The Court observed that the principle of subsidiarity underpinned the system of the European Convention on Human Rights. Thus, Armenia and Azerbaijan had given undertakings prior to their accession to the Council of Europe, committing themselves to the peaceful settlement of the Nagorno-Karabakh conflict. The Court could only underline that it was their responsibility to find a solution on a political level to the conflict. Without prejudice to any compensation to be awarded to the applicants as just satisfaction, the effective execution of the principal judgment called for the creation of general measures at national level.

The Court also noted that the damage did not lend itself to precise calculation. Certain difficulties in assessing the damage derived from the passage of time: the time element made the link between a breach of the Convention and the damage less certain. In conclusion, the Court underlined the responsibility of the two States concerned to find a resolution to the Nagorno-Karabakh conflict. Pending a solution on the political level, the Court considered it appropriate to award the applicants aggregate sums for pecuniary and non-pecuniary damage.

Principal facts

The applicants, Elkhan Chiragov, Adishirin Chiragov, Ramiz Gebrayilov, Akif Hasanof, Fekhreddin Pashayev and Qaraca Gabrayilov are Azerbaijani nationals. The sixth applicant died in 2005; the application was pursued on his behalf by his son.

The applicants submitted that they were Azerbaijani Kurds who lived in the district of Lachin, in Azerbaijan. They stated that they were unable to return to their homes and property there, after having been forced to leave in 1992 during the conflict over Nagorno-Karabakh. Since then they had not been able to return to their homes and properties because of the Armenian occupation. In a judgment of 16 June 2015 the Court held that there had been continuing violations of Article 8 (right to respect for home and private and family life) and Article 13 (right to an effective remedy) of the European Convention on Human Rights and of Article 1 of Protocol No. 1 (protection of property) to the Convention. With respect to Article 1 of Protocol No. 1, it concluded that, as from 26 April 2002 – the date on which Armenia had ratified the Convention – no aim had been indicated which could justify the denial of access of the applicants to their property and the lack of compensation for that interference. The Court found the Republic of Armenia responsible for the breaches of the applicants' rights.

As the question of just satisfaction was not ready for decision, the Court reserved it and invited the parties to submit their written observations on that issue and to notify the Court of any agreement they might reach.

Complaints, procedure and composition of the Court

Relying on Article 41 (just satisfaction), the applicants sought just satisfaction amounting to several million euros in respect of damage sustained and of costs and expenses.

The application was lodged with the European Court of Human Rights on 6 April 2005. On 9 March 2010 the Chamber to which the case had been assigned relinquished jurisdiction in favour of the Grand Chamber. The Azerbaijani Government were given leave to intervene as a third party. A first Grand Chamber hearing was held on 15 September 2010.

In a decision of 14 December 2011, the Court declared the complaints admissible. A second hearing was held on 22 January 2014. The Grand Chamber delivered its judgment on the merits on 16 June 2015.

Today's judgment on just satisfaction was given by the Grand Chamber of 17 judges.

Decision of the Court

Article 41

In its principal judgment the Court referred to the exceptional nature of the case, owing to a number of features. The case related to an ongoing conflict situation and the parties had still not reached a peace agreement. Despite a ceasefire agreement concluded 23 years ago, the ceasefire was still not observed. Whereas the events that had led the applicants to flee their property and homes had occurred in May 1992, the Republic of Armenia had not ratified the Convention until ten years later, on 26 April 2002. The Court

concluded that from the date of entry into force of the Convention in respect of Armenia, the latter had been responsible for continuing violations of the applicants' rights under Article 1 of Protocol No. 1 and Articles 8 and 13 of the Convention.

The Court was thus dealing with a continuing situation which had its roots in the unresolved conflict over Nagorno-Karabakh and the surrounding territories and still affected a large number of individuals. More than 1,000 individual applications lodged by persons who had been displaced during the conflict were pending before the Court, slightly more than half of them being directed against Armenia and the remainder against Azerbaijan. The applicants in those cases represented just a small portion of the persons, estimated to exceed one million, who had had to flee during the conflict and had since been unable to return to their properties and homes or to receive any compensation.

The Court considered it appropriate to emphasise the principle of subsidiarity. As to the political dimension, Armenia and Azerbaijan had committed themselves prior to their accession to the Council of Europe, to the peaceful settlement of the Nagorno-Karabakh conflict. By now, some 15 years had passed since the ratification of the Convention by the two States without a political solution of the conflict being in sight. The Court could only underline that it was their responsibility to find a solution to the conflict on a political level.

With regard to the legal dimension, the Court reiterated that the principle of subsidiarity underpinned the Convention system. By virtue of Article 1 of the Convention (obligation to respect human rights), the Contracting States had to secure the rights and freedoms guaranteed by the Convention to everyone within their jurisdiction, while, in accordance with Article 19 (establishment of the Court), it was for the Court to ensure the observance of the engagements undertaken by the States. It was precisely a failure on the part of the Government which obliged the Court to act as a court of first instance, establishing the relevant facts, evaluating evidence in respect of property claims and finally assessing monetary compensation.

Without prejudice to any compensation to be awarded as just satisfaction, the effective execution of the principal judgment called for the creation of general measures at national level. Guidance as to appropriate measures had been given in the principal judgment, where the Court had stated that pending a comprehensive peace agreement, it appeared particularly important "to establish a property claims mechanism, which should be easily accessible and provide procedures operating with flexible evidentiary standards, allowing the applicants and others in their situation to have their property rights restored and to obtain compensation for the loss of their enjoyment".

The Court concluded overall that the applicants were entitled to compensation for certain pecuniary losses and for non-pecuniary damage, the pecuniary and non-pecuniary damage being closely connected in the present case.

The Court noted, however, that the damage sustained did not lend itself to precise calculation. Certain difficulties in assessing the damage derived from the passage of time. The time element made the link between a breach of the Convention and the damage less certain. The period over which the Court had jurisdiction had started 15 years ago in April 2002, that is, ten years after the military attack and the applicants' flight in May 1992. The Court considered that an award could still be made, notwithstanding the large number of imponderables involved.

Lastly, the Court reiterated that it was the responsibility of the two States concerned to find a resolution to the Nagorno-Karabakh conflict. Pending a solution on the political level, it considered it appropriate to award aggregate sums for pecuniary and non-pecuniary damage.

Just satisfaction (Article 41)

The Court held that Armenia was to pay each of the applicants 5,000 euros (EUR) covering all heads of damage, plus 28,642.87 pounds sterling to all the applicants in respect of costs and expenses.

Russia passes law to overrule European human rights court

BBC (04.12.2015) - http://bbc.in/1NBb40i - Russia has adopted a law allowing it to overrule judgements from the European Court of Human Rights (ECHR).

The vote in the Duma, Russia's lower house of parliament, came the same day as the ECHR ruled against Russia's Federal Security Service over spying.

The European court said Russia had violated privacy rights with a system to secretly intercept mobile phone communications.

The Russian constitution takes precedence under the new Duma law.

The measure was fast-tracked, giving the constitutional court the right to declare international court orders unenforceable in Russia if they contradict the constitution.

It specifically aims to "protect the interests of Russia" in the face of decisions by international bodies responsible for ruling on human rights, according to Tass news agency.

Also on Friday, the ECHR ordered Russia to pay Roman Zakharov, editor-in-chief of a publishing company, €40,000 (£29,000) in expenses in a case over state spying.

It agreed with Mr Zakharov that Russia's FSB security service had violated his rights to privacy by installing secret surveillance systems, and denying him the ability to resist potential monitoring.

Russia ratified the European Convention on Human Rights in 1998, and is one of 47 member states in the Council of Europe, which monitors compliance with the convention. This year Russia contributed nearly €33m to the CoE's €306m budget.

But Russia has often taken issue with rulings against it, including one by the ECHR last year ordering Moscow to pay more than $2bn (£1.3bn; €1.8bn) in compensation to shareholders in the defunct Russian oil firm, Yukos.

In a separate development on Friday, Hungarian prosecutors said they had questioned a Hungarian MEP suspected of spying on EU institutions for Russia.

Chief Prosecutor Imre Keresztes said Bela Kovacs, a member of Hungary's far-right Jobbik party, denied the spying allegations and made a case for his defence.

The European Parliament lifted Mr Kovacs' immunity in October, which Jobbik said would help clear the MEP's name.

Investigators have until 20 December to bring charges, according to reports.

The European Court of Human Rights and free-speech schizophrenia

By Tommaso Virgili

American Thinker (12.08.2012) - The European Court of Human Rights (ECHR), a supranational tribunal based in Strasbourg, France, which was set up in the framework of the Council of Europe, is increasingly determining important speech cases involving Islam-related topics. This Court's jurisdiction covers alleged violations of human rights, as enshrined in the European Convention of Human Rights, by the states-parties. Unlike cases in a European nation's courts, a case before this court may be triggered either by individuals, provided that the latter have exhausted their domestic remedies, or by another state acting as a party. Technically, the ECHR is empowered to grant individuals more protection than they are legally entitled to enjoy based on their own states' laws.

In practice, however, the ECHR rarely provides additional speech protection. This is especially so when it deals with the very sensitive issue of "religious sentiment" -- which is not a human right present in the Convention -- where the Court has often dismissed challenges to censorship codes and speech convictions, sometimes in a way very hard to justify from a legal point of view.

Although this idea may sound strange to Americans, in Europe, the concept that the right to free speech should be balanced against the possibility of the speech offending the religious sentiment or sensibilities of a person, which could in turn upset the social order, is far from new. It stems from other Court decisions involving other minorities, such as Gay News Ltd. and Lemon v. UK and Otto-Preminger-Institute v. Austria. The argument also consists of conflating a questionable and dubious right -- i.e., the "respect of the sensibility of the believer," -- with a paramount freedom such as the freedom of religion, as if a supposed offense to religious sensibilities, realized through outrage or satire, could actually prevent or interfere with a believer practicing his/her faith. By the way, this is exactly the same censorial technique used by Islamists at any level -- with the OIC leading the battle under the magic formula of "Islamophobia."

This desire to protect religious sentiments is clearly visible in ÏA v. Turkey, a case concerning blasphemy against Islam in Turkey, which has accepted the jurisdiction of the ECHR. The applicant -- i.e., the appellant -- was the director of a Turkish publishing house, responsible for the publication of a novel containing expressions of mockery and contempt for Islam and its prophet. The blasphemy charges were prompted by references in the novel to Islam in terms of "desert mirage," "desert ecstasy," and "primitivism," and to religions in general as "performances," "pathological imaginary projections," and "fanciful stories." God was described as a "sadist" and "murderous," while the Koran was depicted as a "triangle of fear, inequality and inconsistency." Muhammad was portrayed as a kind of sexual maniac, who invented the words of the Koran while "inspired in a surge of exultation, in Aisha's arms," who "broke his fast through sexual intercourse" and "did not forbid sexual relations with a dead person or a live animal."

In its ruling, the ECHR began positively from a free speech point of view by mentioning the case Handyside v. UK, to recall that 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." This is the very substance of free speech, both for the individual and the society's advancement. However, the Court then totally contradicted the premise of Handyside and its defense of free speech by declaring that speech may be limited in order "to punish improper attacks on objects of religious veneration." This ruling demonstrated this limitation, as the ECHR held that since "the present case concerns not only comments that offend or shock, or a

'provocative' opinion, but also an abusive attack on the Prophet of Islam," these comments were so severe that that the speech could be punished in response to "pressing social need" -- e.g., the need for social peace.

The Court's sacrifice of free speech on the altar of maintenance of "social peace" is, paradoxically, the same argument invoked by authoritarian Muslim rulers and thinkers themselves to justify restrictions of free speech -- lest otherwise society be destroyed. Hence, in the absence of a clear and present danger, this decision was based not on legal arguments, related to the intrinsic content of the right of freedom of expression, but on political ones.

Three out of the seven judges strongly dissented, criticizing the ECHR majority for looking to (impossibly) square the circle by protecting the provocative, shocking, offensive speech...as long as it does not provoke, shock, or offend. They stated that the Handyside doctrine must not "become an incantatory or ritual phrase but should be taken seriously." They also observed that since only 2,000 copies of the book were printed, it could not have had much impact on the Turkish general public, so the risk of shocking or offending a mostly religious populace was not a sufficient reason in a democratic society to punish a book's editor; "otherwise, the above dictum from Handyside would be deprived of all effect." The dissenters also stressed that no Turk was obliged to read the novel. Further, they were particularly distressed that the censorship came from the public authorities in the name of God, a justification which the judges felt was more suitable for a theocratic society than for a democratic one. They also wrote that the fact that the punishment was light was totally irrelevant, since it had nonetheless produced a chilling effect of self-censorship liable to discourage from any publication those materials not "politically (or religiously) correct." This was particularly dangerous in that it could be read as an "implicit encouragement of blacklisting or 'fatwas.'"

In Tatlav v. Turkey, another Turkish case concerning the conviction of a journalist for criticism against Islam, the ECHR once again balanced free speech rights and religious sensitivities. In this case, a Turkish journalist accused Islam of being a religion sustained only by crude repression of free thinking, and the mere product of an illiterate's invention of a God who is "meddling in everything, from the number of sticks to be inflicted to the adulterer, to the thief's body parts to be amputated." He also portrayed Muhammad as a psychotic, incapable of distinguishing reality from dreams, who consequently spouted insane verses and made violence the trademark of his politics. The journalist derided the Koran as nothing more than a conglomerate of "tedious repetitions, even more primitive than the most part of the more ancient books." In this case, the Court came out in favor of protecting this free speech, because it reasoned that the ultimate goal of the applicant was to criticize the religion for its use as a justification for social injustice and because the criticism was absent an "insulting tone against believers" or an "abusive attack against the sacred symbols." The ECHR held that if this speech were censored, the "chilling effect" of a criminal conviction would pose an unacceptable threat to pluralism.

However, the ECHR also muddied the waters in Tatlav, as it admitted that "Muslims might have been offended by such caustic comments on their religion." It is thus impossible to understand where the border lies between legitimate "criticism" and illegitimate "abusive attack"; the Court merely assumed such a distinction but never really tried to demonstrate/explain it in the light of an univocal paradigm. In fact, it is hard to distinguish the facts of this case from those in ÏA v. Turkey, as in both cases the Islamic religion, the Koran, and the Muslim prophet are all depicted in terms of insanity, primitivism, and violence. The only difference is the final decision: in Tatlav v. Turkey, the Court recognizes what it denied in ÏA v. Turkey -- that there can be a legitimate expression of criticism of religion that cannot be censored.

This privileged protection of "religious sensitivity," invented by the ECHR to the detriment of free speech, opens to two different scenarios, neither of which is to be desired by a

free society. In the first scenario, the state is bestowed with the authoritative power of arbitrarily selecting which sentiments are worthy of protection, thus privileging the religious ones while discriminating against the others, which are left exposed to the elements in the "marketplace of ideas." In the second scenario, where all the creeds are equally protected, the government must set up a huge spider web of censorship capable of trapping and devouring anyone who offends any sensitivities whatever with his or her speech.

But regardless of the scenario, theorizing that a purely subjective negative feeling in a person is a sufficient cause to censor free speech in a democratic society means that the state assumes the paternalistic role of establishing what is too stinging for the delicate beholders' ears and that such offensive speech must be silenced in conformity. And when the state tramples on pluralism by creating a "state orthodoxy" made of collective values and undeniable truths, thereby burning the heretics who refuse to conform, the boundary line between liberty and tyranny of the majority (or even of the minority) becomes inevitably blurred.

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The problem with European 'human rights'

Judges at the court in Strasbourg have assumed an activist role for too long

By Jacob Mchzngama and Aaron Rhodes

Wall Street Journal European Opinion (25.04.2012) - Last week ministers from the Council of Europe met in Brighton to consider British proposals on reforming the European Court of Human rights. The meeting concluded with agreements for timid tweaks to the tribunal, but didn't touch the serious problems it faces. This is not surprising, given that the court's judges and leading human-rights organizations are all resistant to meaningful change. But it is disappointing, because the same problems that hobble the European court in Strasbourg are endemic throughout the rest of the international human-rights machinery.

The U.K. failed to achieve fundamental reform in part because it did such a poor job of articulating the urgency of the task. Conservative leaders and pundits chafe under the court's rulings that they consider intrusive, for instance its judgments constraining how Britain may deal with terrorists. The British proposals focused on making the court more deferential to the rulings of national courts, and thus fed the impression (however unfair) that they were driven solely by concerns over sovereignty rather than principle. Proponents of the court counter that shortening its reach or weakening its independence would harm its ability to address serious human-rights violations in Russia and other non- or partly free members of the Council of Europe.

The president of the court, British Judge Sir Nicholas Bratza, said reform was unnecessary and has criticized the U.K.'s modest proposals as an attempt to "dictate" the tribunal's case law. As evidence that some reform is clearly necessary, Westminster points to a backlog of more than 150,000 dockets. But according to Mr. Bratza, the solution is more financial resources, not changing the way the court operates. Major nongovernmental human-rights organizations have piled on against the reform proposals, arguing that the case overload only confirms the need for the court's work.

Missing from the debate is any discussion of what is in fact the court's most important problem: Judges who have assumed an activist role in interpreting the European Convention of Human Rights. The convention was adopted by the 10 founding members of the Council of Europe in 1950. Its original purpose was to codify the freedoms

protected by liberal European democracies and thus serve as a bulwark against the reemergence of totalitarianism. But in the 1970s, the court began treating the convention as a "living instrument," a development that has accelerated ever since. Judges have continuously interpreted the convention far beyond its wording and original purpose, inventing new rights and obligations that elected state officials never accepted and that have little to do with safeguarding liberty and the rule of law.

This trend has had a number of unfortunate consequences. By inflating the notion and legal definition of "human rights," the court has diluted attention from serious human-rights abuses, while taking up trivial ones such as noise pollution that should not be adjudicated within the matrix of human rights.

Other rulings disguise social-policy choices as human-rights issues. For instance, the court has decided that the right to "peaceful enjoyment of possessions" includes a right to welfare benefits. But protecting welfare benefits as a right to property is a corruption of both language and concept. Belgian Constitutional Court Judge Marc Bossuyt noted as much in 2010, when he told the Gazet van Antwerpen: "If social support has become a property right, then the judges in Strasbourg have succeeded in making an owner of he who owns nothing. Even Marx had not been able to do that." The court's involvement in the allocation of resources has effectively made it a political actor, though not a democratic one. Moreover, if the use of torture is on par with slashing benefits, why should repressive governments fear the stigma of adverse rulings?

Outside Strasbourg, international human-rights bodies have become increasingly subject to ideological influences, particularly since the 1990s. One need look no further than the recent statements of Amnesty International, indistinguishable from "Occupy Wall Street" fare. In January the human-rights major spent its time and resources on a campaign ahead of the World Economic Forum in Davos to warn that "Corporate malpractice has been allowed to flourish by government policies of deregulation and limited oversight. In the pursuit of profit, financial institutions have been given a free pass to create systems that expose the most vulnerable groups to exploitation."

Everyone's grievances can thus be transformed into human-rights violations. U.N. human-rights institutions and leaders include everything from a clean environment to world peace—yet they insist that all human rights are equal and indivisible. That puts one's right to "equal opportunity. . . to be promoted in his employment to an appropriate higher level," for instance, right alongside one's right to live.

By and large, all cadres of human-rights professionals have embraced this trend, making human rights a growth industry for political activists and international civil servants. But victims of real human-rights abuses around the world—those who can not speak or pray or earn a living without fearing for their freedom or lives—are ill-served by this charade. International institutions and civil-society groups must once again become responsible custodians of the precious concept of human rights. Hopefully the botched Brighton meeting won't end the reform effort.

Mr. Mchangama is head of legal affairs at the CEPOS think-tank in Copenhagen and co-founder of the newly formed Freedom Rights Project. Mr. Rhodes is former director of the International Helsinki Federation for Human Rights and co-founder of the Freedom Rights Project.

The European Court of Human Rights versus freedom of expression

The glaring discrepancy between the Court's invention of new rights nowhere to be found in the ECHR and its hostility towards free speech underscores the urgent need for reform

By Jacob Mchangama*

The Commentator (21.02.2012) - The European Court of Human Rights has rightly been criticized for dramatically expanding the scope of the European Convention on Human Rights (ECHR) by affording convicted terrorists, prison inmates, welfare recipients, and neighbors of noisy nightclubs with rights that are nowhere to be found in the convention.

Yet while the Court has expanded the rights in the ECHR and distorted the concept of human rights beyond recognition, it has simultaneously limited the most important of human rights: free speech. On February 9th the Court decided that Sweden did not violate freedom of expression by convicting four people for distributing leaflets with "homophobic" content.

Once again, the Court has misinterpreted its role as that of enforcing politically correct restrictions on what Europeans are allowed to say rather than defending fundamental freedoms.

The leaflets, which were distributed at a high school, called homosexuality a "deviant sexual proclivity" that has "a morally destructive effect on the substance of society" and accused homosexuals of bearing responsibility for the spread of HIV/AIDS. The Court found these statements to be "serious and prejudicial allegations". Though the leaflets did not advocate violence, "insulting, holding up to ridicule or slandering specific groups of the population" justified suppressing "irresponsible" speech.

The decision is an extension of the Court's existing case law on blasphemy and hate speech, which has seen it refuse to protect expressions deemed "gratuitously offensive" to religious believers or insulting or hurtful to immigrants or ethnic and racial minorities.

Coming from Europe's top human rights court, the decision has huge significance for the protection of freedom of expression in the 47 member states of the Council of Europe who are bound by the Court's decisions. Unlike Americans protected by the Supreme Court's principled defense of the First Amendment, Europeans will be at the mercy of the sensibilities of politicians and judges when speaking out on controversial issues.

The judgment has been hailed as a major victory for equality and anti-discrimination by gay rights and human rights groups who can use this precedent to foment further prosecutions in the name of tolerance and anti-discrimination. But the decision is no victory for human rights.

It is true that tolerance and anti-discrimination are paramount in a democratic society. It is surely a sign of emancipation that in most Western countries, homosexuals are no longer prosecuted for their lifestyle and can live in the open without fear. Homosexuals, and indeed all minorities, must be protected against legal discrimination and violence.

But tolerance and equality before the law are not principles that give the state the right to change the moral outlook of others or force their conscience on moral issues such as homosexuality. Tolerance means suffering that with which you strongly disagree. It is perfectly understandable that most open-minded citizens feel offended by the thinly veiled bigotry expressed in the leaflets. But a free society must tolerate that an

increasingly marginal part of the population finds homosexuality morally objectionable, just as those opposed to homosexuality must tolerate gay pride parades and gay people showing affection for one another in the public.

A right not to be offended drastically curtails the right to freedom of expression and affords the state a dangerous power to determine the limits of public discourse. Indeed, protecting groups from offense has been used as a justification by some Eastern European governments to ban the "promotion of homosexuality". Such a nefarious development is the unfortunate yet unavoidable outcome when free speech is held captive to vague and subjective standards such as "offence".

The US Supreme Court has avoided this danger by holding that "the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable". Accordingly, grieving Americans must tolerate the picketing of military funerals by protesters with signs attacking homosexuals, religion and their deceased ones in language much more hurtful than the Swedish leaflets.

The steady enlargement of different groups protected by hate-speech laws should also tell us something important about how and when minority groups can hope to obtain "recognition" through the law. Only when such groups have been accepted and received sufficient political influence can they hope to be afforded specific legal protection against hate-speech.

It is precisely because homosexuality has become accepted and homophobia a social faux pas in the West that homosexuals have been able to persuade political elites and judges that they deserve specific legal protection. If Swedish homosexuals were a vulnerable and marginalized minority persecuted by the state and other citizens, they would be very unlikely to obtain special recognition. But fortunately Sweden is not Uganda, where anti-gay violence is common and politicians have considered introducing capital punishment for homosexuals.

No minority group, whose members know the pain and humiliation of intolerance, should wish to be afforded respect and recognition through limiting the freedom of expression of others. It is a disturbing reflection of the erosion of our concept of human rights when human rights courts sacrifice the most important freedoms in the name of a perverted form of tolerance.

The glaring discrepancy between the Court's invention of new rights nowhere to be found in the ECHR and its hostility towards free speech underscores the urgent need for reform.

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