



SUBMISSION
by Homosexual Initiative (HOSI) Vienna
to
Council of Europe's Commissioner for Human Rights
THOMAS HAMMARBERG
on the occasion of his visit to Austria
(21 May 2007)

We would like to draw the Commissioner's attention to the following human rights concerns:

1. Right to freedom of expression

In the late 1990s and during the period of the conservative/right wing (ÖVP/FPÖ/BZÖ) government between 2000 and 2006, the situation regarding freedom of expression and opinion had substantially deteriorated. Politicians of Jörg Haiders "Freedom Party" (FPÖ) had filed hundreds of law suits for libel/defamation against critical journalists, representatives of other political parties or critical NGOs. The sheer number is unbelievable.

This has also caused harsh criticism expressed in the 2000 report of the three wise men Martti Ahtisaari, Jochen Frowein and Marcelino Oreja, mandated by Austria's 14 European Union partners to examine thoroughly the commitment of Austria's (then) Government to the common European values.

In paragraphs 93-103 of their report, the three wise men actually describe and heavily criticise how the FPÖ had systematically used libel procedures and court cases to intimidate journalists and political opponents and, thus, to suppress criticism and freedom of opinion and expression. FPÖ party-leader Jörg Haider's "personal" lawyer, Dieter Böhmendorfer, whose law firm was dealing with most of these libel suits, later became Federal Minister for Justice. This intimidating practice was highlighted in one of the three wise men's general conclusions (para. 112 of the report).

The situation was aggravated by the fact that certain judges would only apply the relevant case law and jurisprudence established by the European Court of Human Rights (ECtHR) in cases where libel suits were filed against FPÖ politicians by their left-wing opponents. Again, this bias was strongly criticised by the three wise men.

The avalanche of law suits against critical journalists and representatives of civil society and political opponents had a devastating impact on freedom of expression in the country. Only a few rich and powerful media could afford to get dragged into these costly and long lasting court cases. As a result of this systematic intimidation, many journalists and media exercised an extensive self-censorship and refrained from any critical reporting about the government in general and the FPÖ and their activities in particular. This situation has improved only last year with the Freedom Party and its split-off, the BZÖ, voted out of government.

In addition, the first judgments of the ECtHR in Strasbourg dealing with convictions by Austrian courts in such libel cases were recently handed down, and Austria was convicted, on a long series of occasions, for violating the European Human Rights Convention. Austria's record of convictions by the Strasbourg Court for violating the Convention's article 10 is the second highest, after Turkey, among all 47 Council of Europe member states.

ECtHR president Jean-Paul Costa called this situation of the judiciary a “weakness of the system” in an interview published by the Austrian daily newspaper *Salzburger Nachrichten* on 5 May 2007.

In its “advance summary” of concerns to the United Nations Human Rights Committee which will soon consider Austria's fourth periodic report submitted to this Committee pursuant to Article 40 of the International Covenant on Civil and Political Rights, the London-based NGO **ARTICLE 19 – Global Campaign for Free Expression** writes:¹

*We are concerned that this is indicative of a **systematic failure in the Austrian domestic legal and justice system** to strike the correct balance between freedom of expression and the protection of reputation. Defamation continues to be a criminal offence in Austria, which we strongly believe is a problem in itself and potentially one of the root causes of the failure of the system. Two other issues raise concern: the high numbers of claims brought by politicians, and an apparent judicial bias towards them; and a recent trend in members of the judiciary suing for defamation.*

There was an unprecedented number of cases brought by politicians after the right-wing Freedom Party (FPÖ) entered into a coalition government with the People's Party (ÖVP) in 2000. The formation of the new coalition government and the subsequent imposition of EU sanctions led to heated debate. Dozens of media, intellectuals, artists and even student groups who expressed criticism of the new government were sued for defamation or insult, particularly by politicians of the Freedom Party and their former leader, Jörg Haider, and got convicted. Examples include university professor Anton Pelinka, who was convicted for blaming Haider of 'down-playing' National Socialism; the Socialist Youth for writing that Haider 'tolerated' and 'allowed' a certain 'closeness' of himself and his party 'to the tradition of fascism'; and the Green party's newspaper for publishing a caricature of a FPÖ politician in a brown Nazi shirt making an obscene

¹ www.article19.org; www.ohchr.org/english/bodies/hrc/hracs89.htm

gesture. Even the producers of the game 'Trivial Pursuit' were sued and convicted for defamation for printing on one of the game's playing cards that Haider consistently referred to concentration camps as 'punishment camps', thereby generating public anger.

Libel/defamation is still a criminal offence in Austria. The relevant provisions of the penal code provide for a maximum penalty of up to one year in prison! Both the Council of Europe and the Organization for Security and Co-operation in Europe (OSCE) have made recommendations to their member states as to repeal such provisions in the criminal code. Civil law procedures are considered to be sufficient to protect one's reputation against libel and defamation.

We, therefore, appeal to the Council of Europe to urge Austria to repeal the criminal law provision against libel/defamation.

2. Marriage and Family

In July 2003, the European Court of Human Rights published its judgment in the case of *Karner v. Austria* (application no. 40016/98). Karner challenged a provision in the Austrian Rent Act that would exclude a domestic partner of the same sex from the right to succeed to the tenancy of a deceased partner – a right granted to non-married partners (“life companions”) of the opposite sex. The Court held that there had been a violation of Article 14 (prohibition of discrimination) taken together with Article 8 (right to respect for home) of the European Human Rights Convention. The Court reiterates its findings that “differences based on sexual orientation require particularly serious reasons by way of justification” (para. 37 of the judgment).

This judgment has a vast impact. Since there are no “serious reasons” imaginable to argue a different treatment of non-married same-sex and non-married opposite-sex partners in any legal matter, Austria must be expected to grant equal rights to all non-married (domestic) partners and, therefore, to extend any legal right of non-married opposite-sex couples to non-married same-sex couples. As a consequence, in November 2005, the Federal Constitutional Court ruled that a different treatment of non-married same-sex partners in the public social security system (i. e. co-insurance of a non-married partner who is not covered by an own social health insurance) is unconstitutional.

Still, the Austrian Government and Parliament have failed to this very day to bring all relevant legislation in line with the ruling of the Strasbourg Court in *Karner v. Austria*.

Moreover, Austria discriminates against same-sex couples by reserving certain rights to married couples while, at the same time, restricting marriage to two partners of different sex, and not even providing same-sex partners with the opportunity to enter into an alternative legal institution that would guarantee the same rights as marriage such as registered partnership – this, again, is a recommendation adopted by the Council of Europe's Parliamentary Assembly.