

## **Chapter I: What is Equality in the Law?**

## **Chapter II: What is Inequality? – Proving Discrimination**

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New note 6

One of the problems Justice Souter is concerned with in the Hicks case is the problem of unequal knowledge. The employer knows what it did (and perhaps why), and can freely interview its employees and agents for more information; the employee (and particularly the applicant) is in the dark. This could be described as the Lilly Ledbetter problem, after the plaintiff in *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007). Ledbetter had worked for Goodyear as a salaried manager in 1979, but didn't discover that she was being paid substantially less than her male colleagues until 1998, at which point she sued for sex discrimination. The Court held that her Title VII claim could only go back 180 days, as the statute of limitations had run on earlier potential claims. Justice Alito reasoned that she should have filed her charge when the unequal paycheck was issued. In response, Congress amended Title VII to provide that a violation of Title VII "occurs each time compensation is paid pursuant to the discriminatory compensation decision." P.L. 111-2 (2009) ("Lilly Ledbetter Fair Pay Act of 2009"). Does the amendment cure the problem of unequal knowledge in other kinds of cases, such as hiring cases where the applicant doesn't know who else was considered for the job, or what criteria were used?

## **Chapter III: Equality & Discrimination in Employment**

## **Chapter IV: Equality & Affirmative Action**

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New note 7

In *Determining the (In)Determinable: Race in Brazil and the United States*, 14 Mich. J. of Race & Law 143 (2009), D. Wendy Greene replies to critics of Brazilian affirmative action who complain that race is so malleable in Brazil that affirmative action will be permeated by fraud. Professor Greene argues that in both Brazil and the U.S., race is determined primarily by appearance and context, and that similar systemic inequality perpetuated by racism justifies affirmative action and makes it workable in both countries.

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2012 Supreme Court of Brazil case

[Editors' note] On April 26, 2012 the Court unanimously approved of affirmative action quotas for university admissions. The case concerned the University of Brasilia, which had a quota of 20% for Afro-Brazilians, plus a small number of places reserved for indigenous peoples. From the press release, the court justified the plan as proportionate and as necessary to comply with the constitutional requirement of equality. One justice (Luiz Fux) relied on the justification of

reparations. We do not yet have an English translation of the decision, but we here reprint a copy of the Court's English language press release.

Press Release, Supremo Tribunal Federal (Federal Supreme Court of Brazil)

STF declared the constitutionality of the quota system at the University of Brasilia  
Thursday, April 26th, 2012

The en banc Federal Supreme Court (STF) has declared the constitutionality of the policy of racial quotas in student's admission process at University of Brasilia (UnB). By unanimity, the ministers held invalid the ADPF 186, filed in court by Democratas Party (DEM).

The ministers followed the vote of the judge-rapporteur, Minister Ricardo Lewandowski. In yesterday's session (April 25th), in which the analysis of the case was initiated, the judge-rapporteur stated that the affirmative policies adopted by UNB set a plural and diversified academic environment, and aim at overcoming social distortions once historically consolidated. Besides, according to him, the means employed and the ends pursued by UNB are distinguished by proportionality, reasonableness and also, policies are transient, including a periodic review of its results.

"In the case of the University of Brasilia, the reservation of 20% of its vacant places for afro-Brazilian students and 'a small portion of it' for Indians from all Brazilian States, due for a period of 10 years, constitutes, in my opinion, an adequate and proportionate measure, to achieving the aforementioned objectives. The affirmative policy adopted by the University of Brasilia does not seem to be disproportionate or non-reasonable, and seems also to be compatible with the values and principles of the Constitution", said Minister Lewandowski.

DEM's request

In the legal action brought in 2009, the DEM party questions the administrative acts of the Teaching, Research and Extension of the University of Brasilia (CEPE/UnB), resulting in the reservation of places offered by the university. The party claimed the quota system adopted by UNB would harm several fundamental principles of the Federal Constitution, as the principle of human dignity, repudiation to racism and equality and others, as well as provisions that allow the universal access to education.

Votes

The ministers followed the vote of the judge-rapporteur, Minister Ricardo Lewandowski. The first to vote in the plenary session this Thursday (April 26th), the suite of the voting, Minister Luiz Fux argued that the Federal Constitution requires reparation of past losses imposed to Afro-Brazilian people, on account of Article 3, I, of the Constitution, which establishes a fair, free, solidary society.

In his opinion, the institution of racial quotas satisfies the constitutional mission determining the State the responsibility for the educational system, securing “access to the higher levels of the education, research and extension, according to one’s capability”.

Minister Rosa Weber argued that it is the State’s duty to “penetrate in the world of social relations and correct distortions so the formal equality regains its beneficial role”. In the justice’s opinion, throughout the years, through the system of racial quotas, the universities have been able to expand the proportion of Afro-Brazilian students in their ranks, enlarging the social representation in the university’s system, that becomes utterly more plural and democratic.

On her turn, Minister Carmen Lúcia Antunes Rocha highlighted the fact that the quota system at UnB is clearly compatible with the Constitution because both proportionality and social function of the university are observed. “Affirmative action policies are not the best option, yet they are a step towards. The best scenario would be if every person were equal and free”, she pointed, calling the attention to the fact the countervailing policies must be accompanied by other measures so the prejudice is not reinforced. She also pointed out the affirmative policies are part of the social responsibility of the State, in order to obey the equality principle.

In agreement with the judge-rapporteur, Minister Joaquim Barbosa claimed that the vote of Minister Lewandowski ended the debate. Despite, he pointed out that “one can not lose track of the fact that World History does not record, in Contemporary Era, a single example of a nation to rise from the condition of a peripheral nation to the condition of a political and economical power, respectable in the international arena, by maintaining, in the domestic, a politics of exclusion regarding a substantial amount of its population”.

Following the voting, Minister Cezar Peluzo said it is an undoubted historical fact the educational and cultural deficit amid the Afro-Brazilian population, due to institutional obstacles in the access to the sources of formal education. He concluded that there is a “duty, not only an ethical one, but also a legal one, from the society and from the State, in the face of such inequality, in the light of the fundamental objectives of the Constitution and the Republic, on account of article 3 of the Constitution”. This provision calls for a caring society, the eradication of social marginalization and inequality, and promoting the welfare of all, without prejudice of color.

Minister Gilmar Mendes recognized the fact that the affirmative action policies are a means of setting the principle of equality. He highlighted in his vote that the reduced number of Afro-Brazilian students in the universities is the result of a historical process, due to a slavery-based model and to the low quality of public education, in addition to the “nearly-random” opportunities in student’s admission process. Therefore, the single racial criterion may lead, in his opinion, to an unwanted situation, such as allowing Afro-Brazilian in good socioeconomical condition to benefit from the quota system.

Also pronouncing for the invalidity of ADPF-186, Minister Marco Aurélio said the affirmative action policies must be used to correct inequalities, noting that the quota system must be extinguished as soon as those differences are eliminated. “Yet we are far from this”, he warned, “let us do what is at our reach, which is foreseen in the Constitution”.

Senior of the STF, Minister Celso de Mello sustained that the system adopted by UnB obeys the Federal Constitution and also the international treaties on human rights defense. “The challenge is not only a mere formal proclamation recognizing the commitment to respect the basic rights of the human being, but the concrete realization in terms of material achievement of the burden taken”.

Closing the voting session, the president of the court, Minister Ayres Britto, asserted that the Constitution has given legitimation to every public policy promoting historically and culturally marginalized social sections. “Those are affirmative policies entitling every human being the right to an equal and respectful treatment. This is the way we build up a nation”, he concluded.

Minister Dias Toffoli recused himself from the case and did not take part in the voting.

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## **Chapter IX: Equality and Hate Speech**

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**CASE OF VEJDELAND AND OTHERS v. SWEDEN** (*Application no. 1813/07*) JUDGMENT – STRASBOURG -- 9 February 2012

1. The case originated in an application (no. 1813/07) against the Kingdom of Sweden lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by four Swedish nationals, Mr Tor Fredrik Vejdeland, Mr Mattias Harlin, Mr Björn Täng and Mr Niklas Lundström (“the applicants”), on 4 January 2007.

3. The applicants alleged that the Supreme Court judgment of 6 July 2006 constituted a violation of their freedom of expression under Article 10 of the Convention. They further submitted that they were punished without law in violation of Article 7 of the Convention.

### THE FACTS

#### I. THE CIRCUMSTANCES OF THE CASE

7. The applicants were born in 1978, 1981, 1987 and 1986 respectively. The first applicant lives in Gothenburg and the other applicants live in Sundsvall.

8. In December 2004 the applicants, together with three other persons, went to an upper secondary school (*gymnasieskola*) and distributed approximately a hundred leaflets by leaving them in or on the

pupils' lockers. The episode ended when the school's principal intervened and made them leave the premises. The originator of the leaflets was an organisation called National Youth and the leaflets contained, *inter alia*, the following statements:

“Homosexual Propaganda (*Homosexpropaganda*)

In the course of a few decades society has swung from rejection of homosexuality and other sexual deviances (*avarter*) to embracing this deviant sexual proclivity (*böjelse*). Your anti-Swedish teachers know very well that homosexuality has a morally destructive effect on the substance of society (*folkkroppen*) and will willingly try to put it forward as something normal and good.

-- Tell them that HIV and AIDS appeared early with the homosexuals and that their promiscuous lifestyle was one of the main reasons for this modern-day plague gaining a foothold.

-- Tell them that homosexual lobby organisations are also trying to play down (*avdramatisera*) paedophilia, and ask if this sexual deviation (*sexuella avart*) should be legalised.”

9. For distributing the leaflets, the applicants were charged with agitation against a national or ethnic group (*hets mot folkgrupp*).

10. The applicants disputed that the text in the leaflets expressed contempt for homosexuals and claimed that, in any event, they had not intended to express contempt for homosexuals as a group. They stated that the purpose of their activity had been to start a debate about the lack of objectivity in the education dispensed in Swedish schools.

11. On 11 July 2005 the District Court (*tingsrätten*) of Bollnäs found that the statements in the leaflets had clearly gone beyond what could be considered an objective discussion of homosexuals as a group and that the applicants' intention had been to express contempt for homosexuals. It therefore convicted the applicants of agitation against a national or ethnic group, and sentenced the first and second applicants to two months' imprisonment, the third applicant to a suspended sentence (*villkorlig dom*) combined with a fine, and the fourth applicant to probation (*skyddstillsyn*) combined with 40 hours of community service.

12. The applicants as well as the prosecutor appealed against the judgment to the Court of Appeal (*hovrätten*) for Southern Norrland. \* \* \*

15. On 6 July 2006 the Supreme Court convicted the applicants of agitation against a national or ethnic group. The majority of judges (three out of five) first considered decisive for the outcome of the case whether the interference with the applicants' freedom to distribute the leaflets could be considered necessary in a democratic society and whether the interference with their freedom of expression could be deemed proportionate to the aim of protecting the group of homosexuals from the violation that the content of the leaflets constituted. The majority then held:

“In the light of the case-law of the European Court of Human Rights regarding Article 10, in the interpretation of the expression “contempt” in the provision regarding incitement against a group, a comprehensive assessment of the circumstances of the case should be made, where, in particular, the following should be considered. The handing out of the leaflets took place at a school. The accused did

not have free access to the premises, which can be considered a relatively sheltered environment as regards the political actions of outsiders. The placement of the leaflets in and on the pupils' lockers meant that the young people received them without having the possibility to decide whether they wanted to accept them or not. The purpose of the handing out of the leaflets was indeed to initiate a debate between pupils and teachers on a question of public interest, namely the objectivity of the education in Swedish schools, and to supply the pupils with arguments. However, these were formulated in a way that was offensive and disparaging for homosexuals as a group and in violation of the duty under Article 10 to avoid as far as possible statements that are unwarrantably offensive to others thus constituting an assault on their rights, and without contributing to any form of public debate which could help to further mutual understanding. The purpose of the relevant sections in the leaflets could have been achieved without statements that were offensive to homosexuals as a group. Thus, the situation was in part different from that in NJA 2005 p. 805, where a pastor made his statements before his congregation in a sermon based on certain biblical quotations. The above-mentioned reasons taken together lead to the conclusion that Chapter 16, Article 8 of the Penal Code, interpreted in conformity with the Convention, permits a judgment of conviction, given the present circumstances of this case."

16. The minority (two judges) found that convicting the applicants would not be proportionate to the aims pursued and would therefore be in violation of Article 10 of the Convention. Hence, the minority wanted to acquit the applicants but gave separate reasons for this conclusion, at least in part. \* \* \*

17. The first three applicants were given suspended sentences combined with fines ranging from SEK 1,800 (approximately 200 euros (EUR)) to SEK 19,000 (approximately EUR 2,000) and the fourth applicant was sentenced to probation.

## II. RELEVANT DOMESTIC LAW AND PRACTICE

18. Chapter 16, Article 8 of the Penal Code (*Brottsbalken*, SFS 1962:700) provides that a person who, in a disseminated statement or communication, threatens or expresses contempt for a national, ethnic or other such group of persons with allusion to race, colour, national or ethnic origin, religious beliefs or sexual orientation, should be convicted of agitation against a national or ethnic group. The offence carries a penalty of up to two years' imprisonment. If the offence is considered minor the penalty is a fine, and if it is considered to be aggravated the penalty is imprisonment for no less than six months and no more than four years.

19. Agitation against homosexuals as a group was made a criminal offence by an amendment of the law that came into effect on 1 January 2003. According to the preparatory work on that amendment, as reproduced in Government Bill 2001/02:59 (pp. 32-33), homosexuals constitute an exposed group which is often subjected to criminal acts because of their sexual orientation, and national socialist and other racist groups agitate against homosexuals and homosexuality as part of their propaganda. The preparatory work also stated that there were good reasons to assume that the homophobic attitude that had caused certain offenders to attack individuals on account of their sexual orientation derived from the hate, threat and inflammatory propaganda against homosexuals as a group that was spread by the majority of Nazi and other right-wing extremist groups in the country.

## THE LAW

### I. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

## B. Merits

### 1. The submissions of the parties

#### (a) The applicants

23. The applicants maintained that their conviction constituted an unjustified interference with their right to freedom of expression under Article 10 § 1 of the Convention.

24. They also argued, albeit in conjunction with their complaint under Article 7, that the law on agitation against a national or ethnic group was so unclear that it was not possible for them to ascertain whether or not their act was criminal.

25. Further, in the applicants' view, the text in the leaflets was not disparaging or insulting to homosexuals and hence could not justify a restriction of their right to freedom of expression pursuant to Article 10 § 2.

26. The applicants contended that the wording in the leaflets was not hateful and did not encourage anyone to commit hateful acts. In their view, the leaflets rather encouraged the pupils to discuss certain matters with their teachers and provided them with arguments to use in these discussions.

27. They further submitted that freedom of speech should be limited only in its content and not as regards how and where it was exercised, pointing out that they were found guilty for agitation against a national or ethnic group and not for trespassing or littering.

28. In this connection they did not consider Swedish schools to be relatively sheltered from the political actions of outsiders. On the contrary, they alleged that Swedish schools had a tradition of letting political youth parties spread their messages, especially during election years.

29. The applicants further stated that the pupils at the school in question were between the ages of 16 and 19 and hence of an age to understand the content of the leaflets.

30. Lastly, they emphasised that their case should be compared to the Swedish case NJA 2005 p. 805, in which a pastor who had offended homosexuals in a sermon was acquitted by the Supreme Court of agitation against a national or ethnic group with reference to Articles 9 and 10 of the Convention.

#### (b) The Government

31. The Government agreed that Article 10 of the Convention was applicable to the present case and that the criminal conviction of the applicants constituted an interference with their right to freedom of expression as prescribed under the second section of that Article. However, the Government submitted that the criminal conviction and the sentence imposed were proportionate to the legitimate aims pursued, and thus necessary in a democratic society.

32. The Government stressed that the applicants were convicted of the crime of agitation against a national or ethnic group, in accordance with Chapter 16 Section 8 of the Penal Code, and that all five

justices of the Supreme Court reached the conclusion that this penalty was prescribed by law within the meaning of Article 10 § 2 of the Convention.

33. The Government also contended that the interference with the applicants' right to freedom of expression served legitimate aims within the meaning of Article 10 § 2, with particular emphasis on "the protection of the reputation or rights of others", that is, homosexuals as a group.

34. In the Government's opinion several factors in the present case called for the conclusion that the domestic courts enjoyed a particularly wide margin of appreciation when examining the issue of whether the applicants' conviction was proportionate to the legitimate aims pursued. They also argued that the same factors should be taken into account when examining whether the interference was necessary in a democratic society.

35. In this regard, the Government first pointed out that the circumstances of the present case differed from those prevailing in several of the cases where the Court had ruled on the proportionality of measures interfering with the right to freedom of expression under Article 10. Many of those cases had dealt with the conviction of journalists and editors who had written or published "defamatory" statements in newspaper articles. The Government thus submitted that the Court's abundant case-law insisting on the essential role of a free press and of the press as a "public watchdog" was not of immediate relevance to the present case.

36. Secondly, the Government argued that it followed from the Court's case-law that the limits of acceptable criticism were wider as regards, for example, governments, politicians or similar actors in the public domain than for private individuals. In the Government's view, there was no reason why a group of individuals targeted by certain statements owing to a common denominator which distinguished them from other individuals – for example regarding sexual orientation or religion – should be required to display a greater degree of tolerance than a single individual in the equivalent situation.

37. Thirdly, the Government maintained that a certain distinction should be made between the present case and cases dealing with the area of political speech and statements made in the course of a political debate, where freedom of expression was of the utmost importance and there was little scope for restrictions. The reason for this was that the leaflets were distributed in a school, that is, an environment relatively sheltered from the political actions of outsiders.

38. Fourthly, the Government stressed that the Court had emphasised that balancing individual interests protected under the Convention that might well be contradictory was a difficult matter, and that Contracting States must have a broad margin of appreciation in this regard.

39. The Government also argued that the outcome of the domestic proceedings – where the applicants were convicted by the District Court, acquitted by the Court of Appeal and convicted again by three out of five justices of the Supreme Court with reference to, *inter alia*, Article 10 § 2 of the Convention – clearly showed that the task of balancing the different interests involved and interpreting Swedish criminal legislation in the light of the Convention and the Court's case-law had proved particularly difficult and delicate in the present case. They contended that in these circumstances the national authorities, by reason of their direct and continuous contact with the vital forces of their countries, were in a better position than international judges to give an opinion on the exact content of the concept "the



protection of the reputation or rights of others” and to assess whether a particular measure would constitute an unjustified interference with the right to freedom of expression under Article 10 § 2.

40. The Government further emphasised that the domestic courts had made a careful and thorough investigation of the requirements of the Convention and the Court’s case-law and had carried out a proportionality test in full conformity with the standards set by the Convention and the principles embodied in Article 10.

(c) The third-party intervener

41. INTERIGHTS (the International Centre for the Legal Protection of Human Rights) and the International Commission of Jurists, referring to the Court’s case-law, *inter alia*, submitted the following.

42. Despite the prevalence of homophobic hate speech, there has been a failure to adopt particularised standards to address the problem, at both the European and the international political level. While the 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 has, however, repeatedly held that discrimination based on sexual orientation is as serious as discrimination based on “race, origin or colour” or sex. The Court has also found incompatible with the Convention laws concerning same-sex conduct, the age of consent, military service, adoption, child custody and inheritance that discriminate on the basis of sexual orientation.

43. When the Court comes to the “proportionality” analysis under Article 10 § 2 of the Convention, the means of communication 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. However, as the Court has noted, where children and adolescents are concerned certain restrictive measures may be necessary to prevent pernicious effects on the morals of that group.

44. The present case provides an opportunity for the 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. A clear analogy can be drawn between racism and xenophobia – which have been the subject matter of much of the Court’s jurisprudence – and sexual orientation.

45. 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.

46. When a particular group is singled out for victimisation 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. 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.

## 2. The Court's assessment

47. The Court finds, and this is common ground between the parties, that the applicants' conviction amounted to an interference with their freedom of expression as guaranteed by Article 10 § 1 of the Convention.

48. Such an interference will infringe the Convention if it does not meet the requirements of Article 10 § 2. It should therefore be determined whether it was "prescribed by law", whether it pursued one or more of the legitimate aims set out in that paragraph and whether it was "necessary in a democratic society" in order to achieve those aims.

50. It remains for the Court to consider whether the interference was "necessary in a democratic society".

51. The test of "necessity in a democratic society" requires the Court to determine whether the interference complained of corresponded to a "pressing social need". In this respect, the Contracting States enjoy a margin of appreciation in assessing whether such a need exists, but it goes hand in hand with a European supervision, embracing both the legislation and the decisions applying it, even those given by an independent court. The Court is therefore empowered to give the final ruling on whether a "restriction" is reconcilable with freedom of expression as protected by Article 10 (see, among other authorities, *Pedersen and Baadsgaard v. Denmark* [GC], no. 49017/99, § 68, ECHR 2004-XI).

52. In reviewing under Article 10 the decisions taken by the national authorities pursuant to their margin of appreciation, the Court must determine, in the light of the case as a whole, including the content of the comments held against the applicants and the context in which they made them, whether the interference at issue was "proportionate" to the legitimate aim pursued and whether the reasons adduced by them to justify the interference are "relevant and sufficient" (see, among other authorities, *Pedersen and Baadsgaard*, cited above, §§ 69 and 70, and *Kobenter and Standard Verlags GmbH v. Austria*, no. 60899/00, § 29, 2 November 2006).

53. The Court further reiterates 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. As set forth in Article 10, this freedom is subject to exceptions, which must, however, be construed strictly, and the need for any restrictions must be established convincingly (see, among other authorities, *Pedersen and Baadsgaard*, cited above, § 71).

54. The Court notes that the applicants distributed the leaflets with the aim of starting a debate about the lack of objectivity of education in Swedish schools. The Court agrees with the Supreme Court that even if this is an acceptable purpose, regard must be paid to the wording of the leaflets. The Court observes that, according to the leaflets, homosexuality was "a deviant sexual proclivity" that had "a morally destructive effect on the substance of society". The leaflets also alleged that homosexuality was one of the main reasons why HIV and AIDS had gained a foothold and that the "homosexual lobby" tried to play down paedophilia. In the Court's opinion, although these statements did not directly recommend individuals to commit hateful acts, they are serious and prejudicial allegations.

55. Moreover, the Court reiterates that inciting to hatred does not necessarily entail a call for an act of violence, or other criminal acts. Attacks on persons committed by insulting, holding up to ridicule or

slandering specific groups of the population can be sufficient for the authorities to favour combating racist speech in the face of freedom of expression exercised in an irresponsible manner (see *Féret v. Belgium*, no. 15615/07, § 73, 16 July 2009). In this regard, the Court stresses that discrimination based on sexual orientation is as serious as discrimination based on “race, origin or colour” (see, *inter alia*, *Smith and Grady v. the United Kingdom*, nos. 33985/96 and 33986/96, § 97, ECHR 1999-VI).

56. The Court also takes into consideration that the leaflets were left in the lockers of young people who were at an impressionable and sensitive age and who had no possibility to decline to accept them (see, *mutatis mutandis*, *Handyside v. the United Kingdom*, 7 December 1976, § 52, Series A no. 24). Moreover, the distribution of the leaflets took place at a school which none of the applicants attended and to which they did not have free access.

58. Finally, an important factor to be taken into account when assessing the proportionality of an interference with freedom of expression is the nature and severity of the penalties imposed (see *Ceylan v. Turkey* [GC], no. 23556/94, § 37, ECHR 1999-IV; *Tammer v. Estonia*, no. 41205/98, § 69, ECHR 2001-I; and *Skajka v. Poland*, no. 43425/98, §§ 41-42, 27 May 2003). The Court notes that the applicants were not sentenced to imprisonment, although the crime of which they were convicted carries a penalty of up to two years’ imprisonment. Instead, three of them were given suspended sentences combined with fines ranging from approximately EUR 200 to EUR 2,000, and the fourth applicant was sentenced to probation. The Court does not find these penalties excessive in the circumstances.

59. Having regard to the foregoing, the Court considers that the conviction of the applicants and the sentences imposed on them were not disproportionate to the legitimate aim pursued and that the reasons given by the Supreme Court in justification of those measures were relevant and sufficient. The interference with the applicants’ exercise of their right to freedom of expression could therefore reasonably be regarded by the national authorities as necessary in a democratic society for the protection of the reputation and rights of others.

60. The foregoing considerations are sufficient to enable the Court to conclude that the application does not reveal a violation of Article 10 of the Convention.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the complaint under Article 10 admissible and the remainder of the application inadmissible;
2. *Holds* unanimously that there has been no violation of Article 10 of the Convention.

Done in English, and notified in writing on 9 February 2012, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

CONCURRING OPINION OF JUDGE BOŠTJAN M. ZUPANČIČ

1. It was with some hesitation that I voted for no violation of Article 10 of the Convention. I would agree with the finding in this case without any impediment were the judgment based predominantly on its paragraph 56. There we maintain that it ought to be considered “*that the leaflets were left in the lockers of young people who were at an impressionable and sensitive age and had no possibility to decline to*

*accept them. ... Moreover, the distribution of the leaflets took place at a school which none of the applicants attended and to which they did not have free access."*

2. In this respect, the case before us may relevantly be compared to *Snyder v. Phelps et al*, 562 U.S.\_\_\_\_(2011), decided last year by the Supreme Court of the United States. In *Snyder* an anti-homosexual demonstration far more insensitive than the events in the case at hand took place about 300 metres from the church where the funeral of Mr. Snyder's son, Corporal Matthew Snyder, who was killed in Iraq in the line of duty, was taking place. There is no need to repeat here the contents of the offensive picketing signs displayed by the members of the congregation of the Westburo Baptist Church, who were in the habit of picketing military funerals in order to communicate their belief that God hates the United States for its tolerance of homosexuality, particularly in America's military.

3. It is interesting to note that the American Supreme Court takes a very liberal position concerning the contents of the controversial messages. That the statement is arguably of inappropriate or controversial character "*... is irrelevant to the question of whether it deals with a matter of public concern*"<sup>11</sup>. In other words, freedom of speech in *Snyder* – a *fortiori* as a tort case, not a criminal case – was not to be impeded by considerations of proportionality as long as the statement in question could be "*fairly considered as relating to any matter of political, social, or other concern to the community*". "*Speech on public issues occupies the highest rank of the hierarchy of First Amendment values, and is entitled to special protection*".<sup>12</sup>

4. Moreover, the American Supreme Court has set a higher standard for the applicable law in such cases to be facially constitutional. First, it must avoid *content* discrimination (i.e., the State cannot forbid or prosecute inflammatory speech only on *some* "disfavoured" subjects) and, second, it must avoid *viewpoint* discrimination (i.e., forbidding or prosecuting inflammatory speech that expresses one particular view on the subject).<sup>13</sup> Thus, for example, the legislator may impose a general ban on the public use of rude racial slurs; it cannot, however, criminalise their use solely in race-related public discourse, or their use in order to express only a racist viewpoint. It is interesting to note that if this American double test were applied to the present case, the applicable law (Chapter 16, Article 8 of the Swedish Penal Code) would not pass muster on either count, especially the second: had the applicants defended homosexuality and railed against "wicked homophobes" in their leaflets, they would probably not have been convicted.

5. In our case we have relied on a different kind of logic as did the Swedish Supreme Court, among others (although divided three to two), which considered the relatively inoffensive language of the leaflets to be a cause for *criminal* prosecution and eventually for conviction and punishment.

6. It is interesting to note that speech inflaming national, racial, etc. hatred was first incriminated in the 1952 Criminal Code of Communist Yugoslavia and this has since been copied by many other jurisdictions, and cited in leading American case books on criminal law, for example. Therefrom developed the notion of hate speech subject to criminal prosecution where one protected class of people was "*unwarrantably offensive to others thus constituting an assault on their rights, and without contributing to any form of public debate which could help to further mutual understanding*." If we compare the two cases we might find that the American approach to free speech deriving from the First Amendment is perhaps insensitive. On the other hand, we might certainly also conclude that the above quotation from the Swedish Supreme Court judgment of 6 July 2006 demonstrates an oversensitivity in collision with free speech postulates.

7. This in my opinion is a culturally predetermined debate and is not necessary in a situation where even the Swedish Supreme Court, in its famous pastor's sermon speech case (*NJA* 2005 p.805), acquitted the defendant, considering that his conviction would be contrary to the Convention.<sup>14</sup>

8. In comparative constitutional law terms, the Swedish pastor's sermon case would be based on the notion of a captive audience.<sup>15</sup>

9. A captive audience is one that finds itself in an inescapable situation and is bombarded with information that is offensive to some of the members of that audience. If a church audience is in that sense captive because an individual cannot escape being subjected to a verbal assault, then in the case of a school audience, where leaflets were distributed – as we do emphasise in § 56 – in the young people's lockers, that is certainly a decisive consideration. A church is in essence a public place accessible to everybody. School grounds, on the other hand, are more protected and are in this sense a non-public place, requiring an intrusion in order to distribute any information of whatever kind that has not been previously approved by the school's authorities. Coming back to the Supreme Court of the United States, it has held that "*the undoubted freedom to advocate unpopular and controversial views in schools and classrooms must be balanced against the society's countervailing interest in teaching students the boundaries of socially appropriate behaviour*".<sup>16</sup>

10. Admittedly high-school grounds may not be seen primarily as the setting for a captive audience in the same sense as in the pastor's sermon case, yet they are definitely a protected setting where only those authorised to distribute any kind of information may do so. This is the key difference between the pastor's sermon case of the Swedish Supreme Court and the case before us and this is why I maintain that I would be in perfect agreement with the judgment were it based solely (or at least predominantly) on the considerations contained in paragraph 56 of the judgment.

11. For my controversial concurring opinion in *von Hannover v. Germany*, I have been repeatedly attacked for the phrase mentioning the fetishisation of the freedom of the press under American influence.<sup>17</sup> Recent events in the United Kingdom, where serious abuses on the part of the Murdoch press have been uncovered, tend to vindicate the position taken in the *von Hannover* case.

12. Nevertheless, we seem to go too far in the present case – on the grounds of proportionality and considerations of hate speech – in limiting freedom of speech by over-estimating the importance of what is being said. In other words, if exactly the same words and phrases were to be used in public newspapers such as *Svenska Dagbladet*, they would probably not be considered as a matter for criminal prosecution and condemnation.

[Concurring opinions by Judge Spielmann joined by Judge Nußberger, and Judge Yudkivska joined by Judge Villiger, omitted.]