COUR EUROPÉENNE DES DROITS DE L'HOMME
EUROPEAN COURT OF HUMAN RIGHTS

COURT (CHAMBER)

CASE OF OBERSCHLICK v. AUSTRIA

(Application no. 20834/92)

JUDGMENT

STRASBOURG

1 July 1997

In the case of Oberschlick v. Austria (no. 2)[1],

The European Court of Human Rights, sitting, in accordance with Article 43 (art. 43) of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") and the relevant provisions of Rules of Court B[2], as a Chamber composed of the following judges:

Mr R. RYSSDAL, President,
Mr Thór VILHJÁLMSSON,
Mr F. MATSCHER,
Mr C. RUSSO,
Mr A. SPIELMANN,
Mr R. PEKKANEN,
Mr J.M. MORENILLA,
Mr M.A. LOPES ROCHA,
Mr P. KURIS,

and also of Mr H. PETZOLD, *Registrar*, and Mr P.J. MAHONEY, *Deputy Registrar*,

Having deliberated in private on 21 March and 25 June 1997,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case was referred to the Court by an Austrian national, Mr Gerhard Oberschlick ("the applicant"), on 18 March 1996, within the three-month period laid down by Article 32 para. 1 and Article 47 of the Convention (art. 32-1, art. 47). It originated in an application (no. 20834/92) against the Republic of Austria lodged with the European Commission of Human Rights ("the Commission") under Article 25 (art. 25) by Mr Oberschlick on 15 September 1992.

Mr Oberschlick's application to the Court referred to Article 48 of the Convention (art. 48) as amended by Protocol No. 9 (P9), which has been ratified by Austria. The object of his application was to obtain a decision as to whether the facts of the case disclosed a breach by the respondent State of its obligations under Article 10 of the Convention (art. 10).

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[1] The case is numbered 47/1996/666/852. The first number is the case's position on the list of cases referred to the Court in the relevant year (second number). The last two numbers indicate the case's position on the list of cases referred to the Court since its creation and on the list of the corresponding originating applications to the Commission.

[2] Rules of Court B, which came into force on 2 October 1994, apply to all cases concerning the States bound by Protocol No. 9 (P9).

2. On 28 June 1996 the Court's Screening Panel decided not to decline consideration of the case and to submit it to the Court for consideration (Article 48 para. 2 of the Convention) (art. 48-2).

3. In response to the enquiry made in accordance with Rule 35 para. 3 (d) of Rules of Court B, the applicant stated that he wished to take part in the proceedings. On 29 August 1996 the President of the Court gave him leave to present his own case, with the assistance of a lawyer, during the written proceedings, it being understood that the latter would have to represent him at the hearing (Rule 31 para. 1). On the same day the President gave them leave to use the German language (Rule 28 para. 3).

4. The Chamber to be constituted included ex officio Mr F. Matscher, the elected judge of Austrian nationality (Article 43 of the Convention) (art. 43), and Mr R. Ryssdal, the President of the Court (Rule 21 para. 4 (b)). On 7 August 1996, in the presence of the Registrar, the President drew by lot the names of the other seven members, namely Mr Thór Vilhjálmsson, Mr R. Macdonald, Mr C. Russo, Mr A. Spielmann, Mr J.M. Morenilla, Mr M.A. Lopes Rocha and Mr L. Wildhaber (Article 43 in fine of the Convention and Rule 21 para. 5) (art. 43). Subsequently Mr R. Pekkanen and Mr P. Kuris, substitute judges, replaced Mr Wildhaber and Mr Macdonald, who were unable to take part in the further consideration of the case (Rules 22 para. 1 and 24 para. 1).

5. As President of the Chamber (Rule 21 para. 6), Mr Ryssdal, acting through the Registrar, consulted the Agent of the Austrian Government ("the Government"), the applicant's lawyer and the Delegate of the Commission on the organisation of the proceedings (Rules 39 para. 1 and 40). Pursuant to the order made in consequence, the Registrar received the applicant's memorial on 13 January 1997 and the Government's memorial on 7 February 1997. On 11 March 1997 the Commission produced the file on the proceedings before it, as requested by the Registrar on the President's instructions.

6. In accordance with the President's decision, the hearing took place in public in the Human Rights Building, Strasbourg, on 20 March 1997. The Court had held a preparatory meeting beforehand.

There appeared before the Court:

(a) for the Government

Mr W. OKRESEK, Head of the International Affairs Division, Constitutional Department, Federal Chancellery, *Agent*,

Mr S. BENNER, Department of Criminal Affairs and Pardons, Federal Ministry of Justice, *Adviser*;

(b) for the Commission

Mr L. LOUCAIDES, *Delegate*;

(c) for the applicant

Mr H. TRETTER, *Counsel*,

Mr G. OBERSCHLICK, *Applicant*.

The Court heard addresses by Mr Loucaides, Mr Tretter, Mr Okresek, Mr Benner and Mr Oberschlick.

AS TO THE FACTS

I. CIRCUMSTANCES OF THE CASE

7. Mr Oberschlick, a journalist living in Vienna, was at the material time editor of the periodical Forum.

8. On 7 October 1990 on the occasion of a "peace celebration" (Friedensfeier) at the foot of the Ulrichsberg, Mr Haider, leader of the Austrian Freedom Party (Freiheitliche Partei Österreichs - FPÖ) and Governor (Landeshauptmann) of the Land of Carinthia, gave a speech glorifying the role of the "generation of soldiers" who had taken part in the Second World War. In it he said that all soldiers, including those in the German army, had fought for peace and freedom and that people should therefore not differentiate between "good" and "bad" soldiers of that generation but should rather be grateful to all of them for having founded and built today's affluent, democratic society. Mr Haider then criticised an Austrian writer who had, in his view, disparaged all those killed in the Second World War, and continued as follows:

> "Ladies and gentlemen, freedom of opinion is taken for granted in a democracy, but it reaches its limits where people lay claim to that spiritual freedom they would never have got if others had not risked their lives for them so that they may now live in democracy and freedom."

9. This speech was reproduced in full in Forum and commented on by the applicant and the aforementioned Austrian writer. Mr Oberschlick's passage, entitled "P.S.: 'Trottel' statt 'Nazi'" ("P.S.: `Idiot' instead of `Nazi'"), read as follows:

> "I will say of Jörg Haider, firstly, that he is not a Nazi and, secondly, that he is, however, an idiot. That I justify as follows: [L.] [...] wholly convinced me that being called a Nazi is an advantage to Jörg Haider. That is why I ask my friends to forgive my abstaining from using that description for that very good reason.
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> ...
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> As [Haider] denies those of us who in his eyes did not have the legitimising good fortune [legitimierende Glück] to have risked our lives in the uniform of honour [Ehrenkleid] of the Third Reich for the Hitlerian freedom to wage wars of conquest [Raubkrieg] and impose the final solution, [and as he denies us] the right 'to lay claim to a purely "spiritual" freedom of opinion', let alone a "political freedom", and he himself has never had the good fortune to serve in the uniform of honour of the SS or

the German army [Wehrmacht], thus excluding himself along with the vast majority of Austrians from any exercise of freedom, he is, in my eyes, an idiot."

10. On 26 April 1991 Mr Haider brought an action for defamation (üble Nachrede) and insult (Beleidigung) against the applicant in the Vienna Regional Criminal Court (Landesgericht für Strafsachen - "the Regional Court"). He also applied for an order for the immediate seizure of the relevant issue of the periodical and for an announcement of the institution of proceedings to be published in Forum.

11. On 30 April 1991 the court allowed the application for an announcement to be published, but on 21 May 1991 Mr Oberschlick appealed against that decision.

12. On 23 May 1991 the court found the applicant guilty under Article 115 of the Criminal Code (see paragraph 19 below) of having insulted Mr Haider and sentenced him to pay twenty day-fines of 200 Austrian schillings (ATS), with ten days' imprisonment in default. In the court's view, the word Trottel was an insult (Schimpfwort) and could only ever be used as a disparagement (Herabsetzung); it therefore could never be used for any objective criticism (sachliche Kritik). In the written version of the judgment the court ordered the seizure of the relevant issue of Forum.

13. On 30 August 1991 the applicant lodged an appeal (Berufung) against that judgment. In his submission, the court had held that the expression in question constituted an insult to Mr Haider because it had disregarded the context in which it had been used. If the court had taken into account the whole of the article and its line of argument, it would have realised that the term complained of was justified since it served as a conclusion to the finding that Mr Haider had in his speech excluded himself from the enjoyment of freedom of opinion.

Mr Oberschlick also complained that the seizure of the relevant issue of Forum had not been ordered when judgment was given.

14. On 16 September 1991 the applicant asked for the record of the hearing to be rectified and supplemented.

15. On 18 October 1991 the Regional Court rectified part of the record and refused the further amendments sought by the applicant as irrelevant. On 10 December he lodged an appeal (Beschwerde) against that decision.

16. In the meantime, on 5 December 1991, the Regional Court had rectified its judgment and removed from it the order for the seizure of Forum.

17. On 18 March 1992 the Vienna Court of Appeal (Oberlandesgericht) dismissed the applicant's appeal against the order to publish an announcement about the proceedings instituted by Mr Haider (see paragraph 11 above). On the same day the Court of Appeal declared inadmissible the appeal against the decision to rectify the record of the hearing (see paragraph 15 above).

18. On 25 March 1992 the Court of Appeal upheld the Regional Court's judgment but reduced the rate of the day-fine to ATS 50 (see paragraph 12 above).

It noted that the word in issue appeared in the title of the article. Only those who had read not just the lines written by the applicant but also Mr Haider's speech and the comments accompanying it in Forum would understand that Mr Oberschlick had called the speaker an "idiot" as, in his view, he had in his speech excluded himself and the vast majority of Austrians from the enjoyment of freedom of opinion. Those who had not would link the term Trottel not with the conclusion that could be drawn from Mr Haider's words but with his own person. It thus amounted to an insult that overstepped the limits of acceptable objective criticism (die Grenze sachlich zulässiger Kritik) and Mr Oberschlick must have been aware of that. At the most, he could have described the consequences of Mr Haider's remarks as stupid (vertrottelt).

Admittedly, politicians who supported opinions that were open to criticism had to accept that they would be subject to especially hard-hitting attacks, even personal ones. The right to freedom of opinion must not, however, lead to insults replacing arguments of substance in political debate. The fact that a politician resorted to insults did not justify his detractors doing the same, unless personally provoked. Taking Article 10 of the Convention (art. 10) as the basis for a right to insult someone would bring about a general debasement (generelle Verrohung) of political debate.

I. RELEVANT DOMESTIC LAW

19. The relevant provisions of the Criminal Code read as follows:

Article 111

"1. Anyone who, in such a way that it may be noticed by a third person, attributes to another a contemptible characteristic or sentiment or accuses him of behaviour contrary to honour or morality and such as to make him contemptible or otherwise lower him in public esteem shall be liable to imprisonment not exceeding six months or a fine ...

2. Anyone who commits this offence in a printed document, by broadcasting or otherwise in such a way as to make the defamation accessible to a broad section of the public shall be liable to imprisonment not exceeding one year or a fine ...

3. The person making the statement shall not be punished if it is proved to be true. In the case of the offence defined in paragraph 1 he shall also not be liable if circumstances are established which gave him sufficient reason to believe that the statement was true."

Article 115

"1. Anyone who, in public or in the presence of several others, insults, mocks, mistreats or threatens to mistreat a third person, shall be liable to imprisonment not exceeding three months or a fine ... unless he is liable to a more severe penalty under another provision.

...

3. Anyone who, solely from indignation at the behaviour of another person, allows himself to be provoked into insulting, mistreating or threatening to mistreat that person in a way that is excusable in the circumstances, shall have a defence if his indignation is understandable to the average person, regard being had in particular to the time that has elapsed since the event that provoked it."

PROCEEDINGS BEFORE THE COMMISSION

20. In his application (no. 20834/92) of 15 September 1992 to the Commission, Mr Oberschlick alleged that his conviction had been contrary to Article 10 of the Convention (art. 10) and that the procedure adopted by the Austrian courts had been in breach of Article 6 (art. 6).

21. On 6 April 1995 the Commission (First Chamber) declared the application admissible as to the complaints under Article 10 (art. 10) and declared the remainder of the application inadmissible. In its report of 29 November 1995 (Article 31) (art. 31), it expressed the opinion by fourteen votes to one that there had been a violation of that provision (art. 10). The full text of the Commission's opinion is reproduced as an annex to this judgment[3].

FINAL SUBMISSIONS TO THE COURT

22. In their memorial the Government asked the Court to "hold that there had been no violation of the rights Mr Oberschlick was relying on under Article 10 of the Convention (art. 10)".

23. In his memorial the applicant asked the Court to "hold that Austria had violated Article 10 of the Convention (art. 10) [in] convicting him of a criminal offence".

[3] For practical reasons this annex will appear only with the printed version of the judgment (in Reports of Judgments and Decisions 1997-IV), but a copy of the Commission's report is obtainable from the registry.

AS TO THE LAW

I. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION (art. 10)

24. Mr Oberschlick argued that the decisions in which he was held to be guilty of insult had infringed his right to freedom of expression as secured in Article 10 of the Convention (art. 10), which provides:

> "1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article (art. 10) shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
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> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

25. His conviction by the Vienna Regional Court on 23 May 1991 (see paragraph 12 above), upheld by the Vienna Court of Appeal on 25 March 1992 (see paragraph 18 above), had indisputably amounted to an "interference" with the exercise of freedom of expression.

Those appearing before the Court also agreed that the interference was "prescribed by law" - Article 115 of the Criminal Code (see paragraph 19 above) - and its purpose was to protect "the reputation or rights of others", within the meaning of Article 10 para. 2 (art. 10-2).

The oral argument dealt with the question whether the interference was "necessary in a democratic society" in order to achieve that end.

26. In the applicant’s submission, the word Trottel (idiot) had not been used by chance; it was the only word that could both draw public attention to how outrageous the arguments in Mr Haider’s speech were and sum up the criticism of him in the article in issue. Both the words and the tone had been chosen to show Mr Haider and readers just how illogical, unreasonable and dangerous his words at the Ulrichsberg had been in that they were such as to deprive the speaker himself and most citizens of the right to freedom of opinion. That being so, it was in the public interest to warn people at large against the ideas of the person who was at that time Governor of the Land of Carinthia and was even regarded as a possible candidate for the position of Federal Chancellor. In sum, the word Trottel had been directed not against the speaker but against what he had said, as any average reader had been able to see.

27. The Commission accepted that the word in issue could be considered insulting but was of the view that in the circumstances of the case and regard being had in particular to the views expressed by Mr Haider, the applicant's conviction represented a disproportionate interference with the exercise of his freedom of expression.

28. The Government pointed out that the conviction in question related not to Mr Oberschlick's criticism of Mr Haider but merely to the use of the word Trottel. Far from being able to be regarded as the expression of an opinion, it was nothing but an insult used to denigrate and disparage an individual in public. That was not acceptable in a democratic society, even where the person being attacked had defended extreme opinions which were intended to provoke. In order to maintain a minimum level in political debate, certain basic rules had to be observed. Insults, denigrations and offensive language could not enjoy general, unlimited protection under the Convention as they made no positive contribution to the political development of society. They were more likely to poison the climate by prompting a desire for retaliation. In its own interests a democratic society could not tolerate such an escalation.

29. The Court reiterates that, subject to paragraph 2 of Article 10 of the Convention (art. 10-2), freedom of expression is applicable not only to "information" and "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb.

These principles are of particular importance with regard to the press. While it must not overstep the bounds set, inter alia, for "the protection of the reputation of others", its task is nevertheless to impart information and ideas on political issues and on other matters of general interest.

As to the limits of acceptable criticism, they are wider with regard to a politician acting in his public capacity than in relation to a private individual. A politician inevitably and knowingly lays himself open to close scrutiny of his every word and deed by both journalists and the public at large, and he must display a greater degree of tolerance, especially when he himself makes public statements that are susceptible of criticism. He is certainly entitled to have his reputation protected, even when he is not acting in his private capacity, but the requirements of that protection have to be weighed against the interests of open discussion of political issues, since exceptions to freedom of expression must be interpreted narrowly (see, in particular, the Oberschlick v. Austria (no. 1) judgment of 23 May 1991, Series A no. 204, pp. 25-26, paras. 57-59, and the Vereinigung demokratischer Soldaten Österreichs and Gubi v. Austria judgment of 19 December 1994, Series A no. 302, p. 17, para. 37).

30. The Court notes that Mr Oberschlick was convicted for having insulted Mr Haider by describing him as a Trottel in the title and in the main body of the article he published in Forum. The Regional Court considered

that the word itself was insulting and that its mere use was enough to justify the conviction (see paragraph 12 above). The Vienna Court of Appeal took the view that the mere fact that the word in question also appeared in the title of the article made it insulting since readers who had read neither the article nor Mr Haider's speech and the comments on it would link the word not with what Mr Haider had said but with his own person (see paragraph 18 above).

31. The Court disagrees. It wishes to point out in this connection that the judicial decisions challenged before it must be considered in the light of the case as a whole, including the applicant's article and the circumstances in which it was written (see the Oberschlick (no. 1) judgment cited above, p. 26, para. 60).

The most important of these is Mr Haider's speech, which Mr Oberschlick was reporting on in his article. In claiming, firstly, that all the soldiers who had served in the Second World War, whatever side they had been on, had fought for peace and freedom and had contributed to founding and building today's democratic society and in suggesting, secondly, that only those who had risked their lives in that war were entitled to enjoy freedom of opinion, Mr Haider clearly intended to be provocative and consequently to arouse strong reactions.

32. As to Mr Oberschlick's article, it was published together with the speech in question and an article by a writer who was also reacting to what Mr Haider had said. In his article the applicant briefly explained, in some twenty lines, why Mr Haider's remarks had prompted him to describe him as a Trottel rather than as a Nazi - mainly because in his speech Mr Haider had excluded himself from enjoying any freedom of opinion.

33. In the Court's view, the applicant's article, and in particular the word Trottel, may certainly be considered polemical, but they did not on that account constitute a gratuitous personal attack as the author provided an objectively understandable explanation for them derived from Mr Haider's speech, which was itself provocative. As such they were part of the political discussion provoked by Mr Haider's speech and amount to an opinion, whose truth is not susceptible of proof. Such an opinion may, however, be excessive, in particular in the absence of any factual basis, but in the light of the above considerations that was not so in this instance (see, as the most recent authority, the De Haes and Gijsels v. Belgium judgment of 24 February 1997, Reports of Judgments and Decisions 1997-I, p. 236, para. 47).

34. It is true that calling a politician a Trottel in public may offend him. In the instant case, however, the word does not seem disproportionate to the indignation knowingly aroused by Mr Haider. As to the polemical tone of the article, which the Court should not be taken to approve, it must be remembered that Article 10 (art. 10) protects not only the substance of the ideas and information expressed but also the form in which they are

conveyed (see among other authorities, the Oberschlick (no. 1) judgment cited above, p. 25, para. 57).

35. In conclusion, the Court considers that the necessity of the interference with the exercise of the applicant's freedom of expression has not been shown.

There has therefore been a breach of Article 10 (art. 10).

II. APPLICATION OF ARTICLE 50 OF THE CONVENTION (art. 50)

36. Article 50 of the Convention (art. 50) provides:

> "If the Court finds that a decision or a measure taken by a legal authority or any other authority of a High Contracting Party is completely or partially in conflict with the obligations arising from the ... Convention, and if the internal law of the said Party allows only partial reparation to be made for the consequences of this decision or measure, the decision of the Court shall, if necessary, afford just satisfaction to the injured party."

A. Pecuniary damage

37. Mr Oberschlick sought 23,394.80 Austrian schillings (ATS) in respect of pecuniary damage, that is to say reimbursement of the fine and of Mr Haider's costs for court fees and legal representation, which the applicant was ordered to pay by the Vienna Court of Appeal (see paragraph 18 above).

38. The Government agreed in the event of a finding that there had been a violation. The Delegate of the Commission made no observations.

39. As payment by the applicant of the sums in question was a direct consequence of his wrongful conviction, the Court considers the claim justified.

B. Costs and expenses

40. Mr Oberschlick sought ATS 194,998.84 in respect of the costs and expenses relating to his legal representation in the domestic courts and before the Convention institutions.

41. The Government agreed to pay ATS 132,000 if a violation was found. The Delegate of the Commission made no observations.

42. Making its assessment on an equitable basis, the Court awards the applicant ATS 150,000 under this head.

C. Default interest

43. According to the information available to the Court, the statutory rate of interest applicable in Austria at the date of adoption of the present judgment is 4% per annum.

FOR THESE REASONS, THE COURT

1. Holds by seven votes to two that there has been a breach of Article 10 of the Convention (art. 10);

2. Holds unanimously
   (a) that the respondent State is to pay the applicant, within three months, 23,394 (twenty-three thousand three hundred and ninety-four) Austrian schillings and 80 (eighty) groschen in respect of pecuniary damage and 150,000 (one hundred and fifty thousand) schillings for costs and expenses;
   (b) that simple interest at an annual rate of 4% shall be payable from the expiry of the above-mentioned three months until settlement.

3. Dismisses unanimously the remainder of the claim for just satisfaction.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 1 July 1997.

Rolv RYSSDAL
President

Herbert PETZOLD
Registrar

In accordance with Article 51 para. 2 of the Convention (art. 51-2) and Rule 55 para. 2 of Rules of Court B, the dissenting opinion of Mr Matscher, joined by Mr Thór Vilhjálmsson, is annexed to this judgment.

R. R.
H. P.

DISSENTING OPINION OF JUDGE MATSCHER, JOINED BY JUDGE THÓR VILHJÁLMSSON

(Translation)

I cannot concur in either the reasoning of the majority of the Chamber or the conclusion they have reached. They have ignored the fundamental distinction between a criticism or value judgment on the one hand, and an insult on the other; the first two are covered by the freedom of expression secured in Article 10 of the Convention (art. 10), whereas an insult is not.

Mr Oberschlick and Forum were at liberty to criticise severely Mr Haider's remarks in his speech at the traditional ex-servicemen's reunion at the Ulrichsberg in Carinthia on 7 October 1990. Moreover, what Mr Haider said on that occasion was in substance what speakers usually say at such meetings in all the European countries where there is a military tradition.

Mr Oberschlick did not, however, simply criticise; he went further, uttering vulgar insults aimed at Mr Haider, calling him a Trottel (idiot). Despite an ingenious attempt to present things differently, the average reader must have understood Mr Oberschlick's words as an insult intended to ridicule Mr Haider.

The context in which an insult is uttered is of no consequence, except where it is held to be an immediate reaction to a provocation or affront (this is the idea underlying Article 115 para. 3 of the Austrian Criminal Code). That was not the case here. What Mr Haider had said became public knowledge at the latest on the day after the reunion of 7 October 1990 and Mr Oberschlick did not publish the article in question until March 1991, in other words five months after the event.

We may wonder if it was wise for a politician to lodge a complaint about an insult of this kind. If, however, the person concerned (whether a politician or an ordinary citizen) feels offended, he has the right to do so. Accordingly, the Austrian courts had to find Mr Oberschlick guilty, given that the offence of insult as defined in Article 115 para. 1 of the Austrian Criminal Code had been made out. Moreover, the fine imposed on Mr Oberschlick (ATS 1,000) was a small one, not to say a nominal one.

Looked at from this point of view, the arguments set out in paragraph 33 of the judgment are not valid, as they apply only to value judgments, and an insult can never be a value judgment.

Lastly, the purpose of Article 10 of the Convention (art. 10), in my opinion, is to allow a real exchange of ideas, not to protect primitive, fourth-rate journalism which, not having the qualities required to present serious arguments, has recourse to provocation and gratuitous insults to attract potential readers, without making any contribution to an exchange of ideas worthy of the name.