

CASE – MOOT COURT COMPETITION 2010

1. X-land is a country situated in Central Europe. It is a monist state that has signed and ratified the European Convention on the protection on fundamental rights and freedoms including all the optional protocols except Additional protocol 12. It is also a state party to the European Social Charter as well as most of the UN Conventions on Human Rights apart from the OPCAT, the UN Convention on the rights of people with disabilities and the Migrant Workers Convention. It has accepted the rights of its population to file individual complaints to all adopted conventions but has not accepted interstate complaints. In 2003 it was accepted as a member state of the European Union.
2. In X-land there is an established but momentarily a bit unsteady democracy. It has a volatile and violent current history that contain mass abuses, including enforced disappearances, incommunicado detentions and torture as well as structural discrimination against minorities in the country. Its majority population, which is religiously homogenised is no longer as dominant in number as in the past but is still controlling the political scene. However, the entry into the European Union has among other things somewhat changed the country's demographics, not least because X-land borders to non-member states. During the last three to four years, mainly due to the Dublin Convention and its following Directive X-land has become a first country of asylum for many third state citizens seeking refugees in the EU. Even though X-land does not have the most generous rules on the right to asylum and residence permit in the EU, it is committed to the UN Convention Relating to the status of refugees (1951). It has also developed a system allowing for temporary residence permit for individuals who can find their own livelihood in the country. A migrant worker does however not enjoy the same rights as the permanent population does.
3. After the atrocities about 50 years ago, the population had diminished considerably when many of its intellectuals, artists and legal scholars had fled the country. Most of them were from different minority groups who now live scattered around the world. After a number of warnings from the international community X-land agreed to allow for international presence in the country. After 10 years and the first democratic election for almost 20 years, the last UN-forces left the country. During the coming two decades X-land received considerable economic and technical aid in order to rebuild the country. It however remained military unattached. Since the military had however proven to be guilty of the worst abuses during the national turmoil a demilitarisation was considered to be of outmost importance for the democratization of the country. Instead the new X-land developed a strong police force. The change however left a number of former military leaders powerless and, for many, unemployed. Many had also been charged and served sentences for atrocities during the internal conflict. The more or less collective punishment against former militaries, which severely affected their families, was, by everyone, considered a necessary measure at the time but it also planted a seed of detestation in their offspring.
4. During the second decade of X-land's democratisation, the country flourished and brought in new work forces from abroad. It developed a system of guest workers both for labour and white collar jobs. This system stopped after 15 years and was more or less

transformed into the above mentioned temporary residence permits. During this period the country was run by a coalition of parties but as time past the different ideologies became more and more difficult to unite. For the last 20 years the political environment in X-land has consisted of a conservative and a liberal party with a number of small parties to the left and the right, which during more financially constrained times tend to grow strong but then fall back into popularity when times get better. The stronger parties have however never been able to form government alone but have had to rely on the more zealous parties for support. Even though both the liberals and the conservatives have a steady constituency, many citizens in X-land are disloyal to one party and tend to vote both to the left and to the right to show their dissatisfaction with the state of affairs.

5. For the last five to six years X-land has however had severe financial problems affecting the budgets for health care, social services and education. Unemployment has grown sky high and people find it more and more difficult to pay their bills, house mortgages and rental fees. It has left more and more people literally on the streets. The recession has mostly affected immigrants and in particular those with temporary residence permit. Since a job is needed in order for them to be allowed to stay in the country as migrant workers, many have instead applied for asylum. Most of them have been waiting for years for a reply during which they have not been able or allowed to work but to depend on social benefits. But also part of the majority population has been affected, not least some of the descendents of the former military leaders who have had a hard time establishing themselves in the society of new X-land.
6. In order to reconcile with the past and to ensure that the same atrocities as 50 years ago do not happen again, X-land undertook a number of legal changes and afforded monetary compensation to the victims of the atrocities and their families. For the last 15 years it has had a blanket prohibition against the use of some of the nationalistic symbols that were used by the majority population during the national conflict. Exposing the symbol in public is a crime unless it is done for educational reasons. In order to abide by the international convention against racism, X-land has forbidden all racist organizations defining racism as an ideology declaring one race, religion, ethnic, descent, national, social group as superior to others. The somewhat more extended grounds for racism in X-land than in the CERD are also a consequence of its past. In x-land it is also prohibited to incite to or advocate violence and hatred through the dissemination of racist propaganda, criminalizing hate speech even if the person expressing the views does not have an intention to cause physical harm to any person. Hate speech is nevertheless only considered a crime if it is uttered or written in public. Depending on the spreading of the expression, the intent of the person delivering the speech and the severity of the speech a person can face up to two years in prison. If the expression has proven to be an incitement to a violent crime, it is considered as aiding and abetting, conspiracy or accomplice to a crime and punished accordingly.
7. The laws have on numerous occasions been called into question arguing that they limit the freedom of speech to such an extent that instead of reducing hate between different parts of the population, it in fact increases tension. The laws on hate crimes are currently undergoing a review in order to investigate if it violates the right to freedom of expression as described in the European Convention and recent jurisprudence by the Court.
8. According to the Law on Criminal Procedures, a person suspected of a crime always has the right to free legal aid and a defence lawyer unless the unlawful act committed can be considered a petty crime. The right to appeal a petty crime is also limited and is only

allowed if the verdict in the Magistrate's Court contains a prison sentence or if is in the interest of justice. Leave of appeal is decided by one designated Appeals Court and appeals against a decision not to grant free legal aid is determined by the Appeals Court situated in the region where the crime was committed.

9. During the last couple of years the more radical political parties have been visible and their popularity have also been recognized by the polls and thus gained new voters and or recaptured old ones. In the back draft of the increased attractiveness of parties to the left and right, there has also been an augmented interest in even more extreme but so far very small political parties, in particular a revived nationalist party with, what at least its opponents describe as, xenophobic ideas. Publicly the nationalists have recently targeted the immigration and refugee laws calling for a stop to further influx of foreign nationals to the country. One of the suggested concerns of the party is the current recession that has influenced in particular old and sick people that are natives and/or citizens in X-land. A further flood of aliens to the country would be financially devastating and affect vulnerable citizens even further, according to the party. Opponents to the party claim that they are only using the established discussions on immigration laws to purport a racist ideology and that they should be banned according to the existing laws on hate crimes. Other parties however have silently recognized the fact that voters now seemingly lend their ears to more extreme political views and have started to change their language and politics in order to win back their voters. In all it has created an atmosphere with a political language that some consider to be more open than before, while others describe it as abusive and that it is rather immigrants and asylum seekers that are the targets of the nationalists rather than the laws on migration.
10. As politics has altered its idiom so however, has the language among part of the majority population. It is contended that in private conversations xenophobic ideas have become more and more commonly heard. It has extended to branding anything that is not of X-land, majority origin and heterosexuals as suspicious. As some believe that the membership in the EU has created an unendurable situation, they also express an opinion of wanting to leave the Union. They claim that many of the laws including the ones on limitations on freedom of expression are laws that were involuntary imposed on them after the internal conflict. The atmosphere has created a growing concern among members of different religious and social groups in the country. Civil Liberties organization and anti-racist organizations have at the same time organized demonstrations, frequently published op-eds and called upon the government and parliamentarians to stand strong and not be influenced by the vulgarization of politics.
11. After a debate on national television about migration laws and a new equal opportunities law, to which all political and registered parties were invited, a crowd of people attacked the politicians when they were leaving the TV-station shouting slogans such as "X-land for X-land citizens", "Rights are for straights, not for weird queers." The crowd could only be scattered after a forceful intervention by the police. No person or member of the police was however charged with any crime after the event. Anti-racist and LGBT organizations claimed that the slogans should be considered as hate speeches, but the prosecutor's office publicly stated that not only could it not be determined who shouted what, but also that the slogans did not amount to hate speech as such, since it should be seen as a comment in an on-going debate and not as a statement of superiority or incitement to hate.

12. The decision by the prosecutor upset foremost anti-racist groups and the minority community. A number of demonstrations took place in different places in X-land the following week accusing the police of not wanting to investigate the event properly.
13. Shortly after the demonstration outside the television station and the subsequent protests, one of the tabloids in the country decided to run a series of articles on, what it argued was, the right to freedom of expression in X-land. It decided to interview representatives from both registered and non-registered political parties as well as persons representing some of the religious convictions in X-land. According to the tabloid one of the purposes for running the articles was to open the can, and let people say what was on their minds. In one of the articles a religious leader expressed concern for the development regarding the rights of persons with other sexual orientation than heterosexual. The representative from one of the non-registered parties was worried about the unwillingness from the government to even discuss reduced immigration because of the financial situation, since he considered that state funds first and foremost should benefit nationals and not non-nationals.
14. The articles stirred up a lot of emotions and debates both on the meaning of freedom of expression and on the material issues at hand. According to the annual reports by the Victims' support Group, people belonging to different minorities reported having been increasingly subjected to anonymous threats and hate speech after the articles and the subsequent debates. However most events were never reported to the police, and those who were, were dismissed mostly due to the fact that no person could be identified. The Victims' Support Group claimed that the hidden numbers behind their reports were even greater and that people were subjected even to violence but were afraid to report it.
15. The extremist groups rather considered the debate to have been wholesome for democracy. Since no acts of violence had been reported and no one had been convicted for hate speech, this proved that X-land now was mature enough to discuss even delicate matters openly, and that there really was no need for extra protection for minorities as had been the case before. The view of the non-registered parties oozed its way into the parliament and both the liberals and conservatives, albeit for different reasons, opened a discussion on narrowing down the regulations concerning hate speech. It was suggested that hate speech should only be punished if it was disseminated in connected to situations where there was a "clear and present danger" that a crime would be committed. But during the debate the Parliament was divided on the issue and many wanted to keep the language of the law in place.
16. At the same time as the debate on the laws was going on in the House of Parliament, one of the leaders of the nationalist party, Mr Y, gave a speech in the street in front of the parliamentary building. Mr Y:s is a descendant to one of the military leaders who were imprisoned after the conflict. In it he attacked the immigration laws and the demands from EU which he believed had "destroyed" the country. He then directed his attention directly at a smaller minority in the country, the Malackas, which he claimed was nothing else than a "bunch of criminals, who beat up their wives and sponge on society as a whole. The Malackas are disturbing tolerance and stability in the country. X-land should never have allowed them to live in the country had it not been for the EU-directives. We are better off without the EU and we would be better off if the Malackas would disappear from the soil of our great nation."

17. A number of antiracist who also were demonstrating outside the House of Parliament reported Mr Y's speech to the police. He was later charged with having advocated and incited hatred against an ethnic group. The prosecutor called for a harsh sentence, prison for 1 year, due to the fact that he was suspected of intentionally targeting a very vulnerable group in society. According to the prosecutor it could not be mistaken that he was directly or indirectly inciting to violence against the members of that group. Mr Y was never in custody but only deprived of his liberty during the period when he was called in for questioning, i.e. two days.
18. As Hate Speech is a crime that ordinarily would amount to a sentence of fines or other punishments that did not entail deprivation of liberty, Mr Y was not afforded a lawyer, instead the court would make sure that his case was properly presented. Mr Y appealed the decision of not having the right to free legal aid but the appeal was rejected. Instead he borrowed some money and hired his own lawyer to present him before the Court. Mr Y was found guilty of advocating and inciting hatred and sentenced to 8 months in prison. He appealed both the verdict and the sentence but the Appeal's court made the same judgement as the Magistrate's Court and on December 21, 2008 sentenced him to prison for 8 months.
19. The Court found that: "Mr Y has publicly disseminated misleading and contemptuous information about a minority group in order to promote racial hatred. This can never be accepted in a democratic society. The speech was given in an open place with the intent and affect of disseminating the message to the public. The fact that the speech was intentionally given at a time where many people were present outside the Parliamentary Building his words could be heard, voluntarily or involuntarily by a large amount of people. Because of the history of violence and repression against minorities in X-land, not least performed by state officials, it is utterly important to suppress every form of provocation against vulnerable groups in the state. On these grounds and for these reasons, Mr Y is found guilty of advocating and inciting hatred and is sentenced to 8 months in prison."
20. Mr Y claimed that he did not incite or advocate hatred since his statement was not racist and did not claim superiority to any race, nationality, ethnic or social group. He claimed that his expression concerning the criminality of the Malackas was supported by recent research from the National Crime Investigation Bureau that only the week before presented information on current criminality in X-land. It was also, according to Mr Y, a well known and documented fact that the Malackas were over represented receiver of social welfare benefits. It was clear, according to Mr Y, that X-land was not the best environment for the Malackas. The fact that he had said that X-land was better off without the Malackas, should not be perceived as an incitement or advocacy of violence or hatred, he did not have such intent and it could not be proven that any violence had been committed against the Malackas as a consequence of his statement. Mr Y appealed to the Supreme Court, which however on January 18, 2009, decided not to take up the case.
21. Six months after the decision by the Supreme Court not to try the case, Mr Y turned to the European Court for Human Rights. He claimed that the conviction was an infringement of his right to freedom of expression, article 10 of the convention, which in particular protects political speeches. There was, according to Mr Y, now a consensus even in Parliament that the current laws on Hate Speech were too restrictive and that development during the recent years had proven that X-land could manage an open

debate on even the most delicate matters. The restrictions on freedom of expression did not pursue a legitimate aim and was not necessary in a democratic society. He also questioned if the law in fact was sufficiently clear and thus not in accordance with the requirements set out by the European Court. Finally, he argued that the conviction and the severe punishment was a violation of the prohibition against discrimination. He claimed that the only reason that he had been indicted was due to the fact that international pressure had been brought upon the state following the decision not to prosecute anyone for the disturbances outside the TV-station. The only reason he was prosecuted was because he was a descendent to a former military leader and the state wanted to prohibit him from acting politically.

22. Mr Y further claimed that X-land had violated his right to a fair trial according to article 6 since he was not appointed a public defender in such a principally important case and, as it turned out; a prison verdict was handed down.
23. X-land replied that it considered the application to be manifestly ill-founded and that it should not be admissible. The verdict was not an infringement of Mr Y:s freedom of expression, since this right is not absolute but subdued to a number of legal restrictions allowed for in the Convention and to international laws on Human Rights that the state had to adhere to. In this case, the restrictions were legitimate and necessary. And further more, the expressions that Mr Y had used could, considering the violent past in X-land, be prohibited also on the grounds that they attempt to destroy the fundamental rights of others. According to the government Mr Y could not argue special consideration due to the fact that he gave a political speech since he belonged to an un-registered political party with questionable motives. The state also contested arguments on discrimination, stating that the prosecutor had acted according to the law. Also, there is no right according to the European Convention guaranteeing free legal aid. Accordingly, Mr Y:s application should be dismissed.
24. The Court decides that there are legal conditions to try the case and asks the applicant and the State to develop their grounds and arguments further in one writing. The parties are not bound by the articles that so far have been evoked but are free to expand on or reduce their grounds as they see fit.

ADDENDUM

Criminal Code of X-land

Section 210

Incitement to hatred

- (1) Every one who, by communicating statements in public advocates or incites hatred against an identifiable group is guilty of an indictable offence and is liable to fines or imprisonment for a term not exceeding two years.
- (2) Every one who, by communicating statements other than in private communications, knowingly promotes racist propaganda is guilty of an indictable offence and is liable to fines or imprisonment for a term not exceeding two years.

(3) No person shall be convicted of an offence under subsection (2) if, in good faith, he intended to point out, for the purpose of removal, matters producing or tending to produce feelings of hatred toward an identifiable group in X-land.

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(5) In this section, "identifiable group" means any section of the public distinguished by colour, race, religion, ethnic or national origin or social belonging; "communicating" includes communicating by telephone, broadcasting or other audible or visible means; "public place" includes any place to which the public have access as a right or by invitation, express or implied; "statements" includes words spoken or written or recorded electronically or electromagnetically or otherwise, and gestures, signs or other visible representations.

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(10) When considering the appropriate punishment of a crime according to paragraph 1 of this section, the following circumstances may be taken into consideration:

- (a) the purpose of the crime
- (b) the direct effects of the crime
- (c) the dissemination of the speech

A more severe punishment shall be used if it can be established that the purpose of the accused was to incite racial hatred against an identifiable group, if the speech directly inspired to violent crimes or if the speech was widely spread among the public in general.