

DRAFT



Advance Summary of Concerns  
on  
Respect for Freedom of Expression in  
Austria

Submission to the United Nations Human Rights  
Committee

March 2007

## 1. Introduction

This Submission summarises ARTICLE 19's concerns with regard to the protection of the right to freedom of expression and opinion in Austria, in the context of the consideration by the United Nations Human Rights Committee (the Committee) of Austria's Fourth Periodic Report on the implementation of the *International Covenant on Civil and Political Rights* (ICCPR).<sup>1</sup> At its 89<sup>th</sup> Session, in March 2007, the Committee will meet to draw up a list of issues and this Note is intended to assist the Committee in that task.

Austria is a long-standing member of the European Union and the Council of Europe and signatory to the European Convention of Human Rights as well as the International Covenant on Civil and Political Rights. While the right to freedom of expression is generally respected, we have serious concerns in three key areas:

- the large number of defamation cases in Austria, and the continuing disproportionately high number of findings against it in defamation cases by the European Court of Human Rights which indicates a systematic failure of domestic law in this area;
- the lack of diversity and pluralism in the media; and
- Austria's failure to implement fully the right of access to information.

We respectfully request that the Human Rights Committee includes these matters on its list of concerns for the consideration of Austria's 4th Report.

We offer a brief introduction to our concerns in the following sections, below. We will provide a more detailed report in time for the Committee's 90<sup>th</sup> Session.

## 2. Summary of Concerns

### **Defamation laws restrict legitimate public debate and criticism**

Austria is among the countries most frequently cited by the European Court of Human Rights for violating the right to freedom of expression. Between 1999 and 2005, Austria was found by the European Court for Human Rights to have violated the right to freedom of expression in no fewer than eleven cases. The overwhelming majority of these were defamation cases. Despite having been at the receiving end of the European Court's first defamation judgment, in 1984, the trend shows no sign of abating. In 2006 and January 2007 alone, Austria was convicted another four times for violating Article 10 in defamation cases.

We are concerned that this is indicative of a systematic failure in the Austrian domestic legal and justice system to strike the correct balance between freedom of expression and the protection of reputation. Defamation continues to be a criminal offence in Austria, which we strongly believe is a problem in itself and potentially one of the root causes of the failure of the system. Two other issues raise concern: the high numbers of claims brought by politicians, and an apparent judicial bias towards them;<sup>2</sup> and a recent trend in members of the judiciary suing for defamation.

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<sup>1</sup> UN Doc CCPR/C/AUT/4, 20 November 2006, available for download at <http://www.ohchr.org/english/bodies/hrc/hrcs89.htm>. Austria acceded to the *International Covenant on Civil and Political Rights*, the United Nations' flagship human rights treaty, on 10 September 1978. As a State Party, it is required to submit periodic reports to the UN Human Rights Committee on how it has implemented the rights guaranteed in the ICCPR.

<sup>2</sup> Interview with journalist Florian Klenk, 12 February 2007.

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There was an unprecedented number of cases brought by politicians after the right-wing Freedom Party (FPÖ) entered into a coalition government with the People's Party (ÖVP) in 2000. The formation of the new coalition government and the subsequent imposition of EU sanctions led to heated debate. Dozens of media, intellectuals, artists and even student groups who expressed criticism of the new government were sued for defamation or insult, particularly by politicians of the Freedom Party and their former leader, Jörg Haider, and got convicted. Examples include university professor Anton Pelinka, who was convicted for blaming Haider of 'down-playing' National Socialism; the Socialist Youth for writing that Haider 'tolerated' and 'allowed' a certain 'closeness' of himself and his party 'to the tradition of fascism'; and the Green party's newspaper for publishing a caricature of a FPÖ politician in a brown Nazi shirt making an obscene gesture. Even the producers of the game 'Trivial Pursuit' were sued and convicted for defamation for printing on one of the game's playing cards that Haider consistently referred to concentration camps as 'punishment camps', thereby generating public anger.<sup>3</sup>

While this wave of cases brought by politicians has subsided to some extent, criminal defamation laws continue to impinge on legitimate public debate. For instance, in April 2006, the Viennese NGO 'Homosexual Initiative of Vienna (HOSI Wien)' was convicted under both the criminal and civil defamation law for referring to an ÖVP politician as an 'intellectual descendent' of the Nazis in one of their press statements. The politician had defended and justified his party's refusal to amend the Federal Nazi Victims Compensation Act (Opferfürsorgegesetz – OFG) to include Nazi victims persecuted on the grounds of their homosexuality, which would have granted them a legal entitlement to compensation. HOSI has appealed the criminal conviction (the case is now pending at the second instance) but has refrained from pursuing the civil case because it cannot afford the legal costs. It is collecting donations to be able to take the case to the European Court of Human Rights in Strasbourg.<sup>4</sup>

We are also concerned at defamation cases brought by members of the judiciary. We believe that, like politicians, judges are public figures and ought to tolerate a high degree of criticism of their functioning. This principle does not appear to be implemented in Austria. For example, in 2005, Florian Klenk, a journalist with the Viennese weekly *Falter*, was convicted for criticising the judge in a trial against a security guard who had been accused of raping a Cameroonian woman in a refugee centre. Mr Klenk had stated that the judge appeared to be convinced of the woman's guilt.<sup>5</sup> In another recent example, in November 2006, the European Court of Human Rights found that the conviction of the *Standard* newspaper for criticising discriminatory remarks about homosexuality made by a judge during the course of a case violated the daily's right to freedom of expression.<sup>6</sup>

We are very concerned that this use of defamation law has a severe chilling effect on the exercise of the right to freedom of expression. Even though fines imposed usually are not existentially threatening and prison sentences are no longer applied, the legal costs of the court cases can be prohibitively high. Moreover, the possible criminal conviction is a harsh measure with serious consequences for the individual, and often grossly disproportionate to

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<sup>3</sup> "...um uns zu schikanieren", in: *Falter* (38/00), 20 September 2000, p.8

<sup>4</sup> See: <http://www.hosiwien.at/sos/>

<sup>5</sup> IHF Report: Human Rights in the OSCE Region, International Helsinki Federation, June 2006, [http://www.ihf-hr.org/documents/doc\\_summary.php?sec\\_id=3&d\\_id=4255](http://www.ihf-hr.org/documents/doc_summary.php?sec_id=3&d_id=4255)

<sup>6</sup> See: <http://www.ifj-europe.org/default.asp?index=4351&Language=EN>

the harm caused by the statement – even more so if applied for criticism that is legitimate in the context of political debate in a democracy.<sup>7</sup>

We therefore respectfully ask the Committee to include this issue on its list of concerns and take it up with the government.

### **Lack of pluralism in the media**

The media landscape in Austria is concentrated in the hands of a few, in violation of the public's right to receive information on matters of public interest from a variety of sources. This lack of pluralism is mainly due to three factors that shape the Austrian media landscape:

- a very high degree of concentration of media ownership;
- the failure of regulatory policies to support the development of independent broadcasters, in particular of non-commercial and community broadcasters; and
- considerable government influence over the public broadcaster and national broadcast regulator.

### High concentration of media ownership

Austria has one of the most concentrated media markets in the world. By far the most dominant newspaper is the tabloid *Neue Kronen Zeitung* which is read by nearly half the population above 14 years.<sup>8</sup> It exercises a significant and internationally near-unprecedented power over public opinion. The *Neue Kronen Zeitung* is part of a conglomerate that controls 63% of the circulation of all dailies, 100% of that of the political weekly magazines, and 62% of the circulation of all weekly publications in Austria.<sup>9</sup>

With the creation of private broadcasting in Austria in the 1990-ies, first only at a regional and local, and after 2001 also at the federal level, concentration of media further increased. The *Neue Kronen Zeitung* holds the country's sole private national radio broadcasting licence, and most regional broadcast licences are in the hands of the leading regional newspaper publishers, resulting in a further concentration of ownership.

We are strongly concerned that this breaches the public's right to know, and is generally unhealthy in a democracy.

### Broadcasting policies fail to support community broadcasting

The allocation of licences for private broadcasters has been criticised for being opaque and favouring existing media conglomerates.<sup>10</sup> Large commercial broadcasters have been awarded licences at the expense of small independent and community broadcasters, who exist in the margins of the media sector.

We strongly believe that independent and community broadcasters play a vital role in the realisation of the public's right to receive information on matters of public interest from a variety of sources. The large national or regional commercial broadcasters focus on programming that brings in advertising revenue, and as a result largely limit themselves to music and entertainment. The *Neue Kronen Zeitung*'s national radio station focuses on music,

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<sup>7</sup> Interview with media lawyer Dr. Maria Windhager, 18 December 2006.

<sup>8</sup> Kommunikationsbericht 2005, Rundfunk & Telekom-Regulierungs GmbH, p.145

[http://www.rtr.at/web.nsf/deutsch/Portfolio\\_Berichte\\_nach%20Kategorie\\_Berichte\\_KBericht2005/\\$file/KommBericht\\_2005\\_D.PDF](http://www.rtr.at/web.nsf/deutsch/Portfolio_Berichte_nach%20Kategorie_Berichte_KBericht2005/$file/KommBericht_2005_D.PDF) . See also [http://www.statistik.at/fachbereich\\_03/bevoelkerung\\_tab1.shtml](http://www.statistik.at/fachbereich_03/bevoelkerung_tab1.shtml).

<sup>9</sup> Media in Austria, Federal Press Service Vienna, 2006, p.11.

<sup>10</sup> Interview with a community radio maker in Vienna, 2 February 2007.

and the country's only national private television broadcaster, ATV, is mainly an entertainment channel. In-depth news or discussion programmes on issues relevant to local populations are rarely carried by them, and can in reality only be provided by independent and community stations. Yet, there is no national policy of support for community broadcasters.<sup>11</sup> Subsidies for non-commercial radio out of the federal budget were cut down to a third in 2000, and abolished completely in 2001.<sup>12</sup> At the regional level the picture is mixed: some provinces or municipalities provide subsidies, others don't. This lack of consistent public support makes it financially very difficult to operate community radio stations in Austria. For instance, multi-lingual Radio MORA in Burgenland, a province with a variety of ethnic minorities, had to close down after federal subsidies ceased in 2001.<sup>13</sup>

#### Political influence over the public broadcaster 'ORF' and the national broadcast regulator

On 17 May 2006, Armin Wolf, the anchorman of the Austrian public television's prime time news bulletin, heavily criticised the national public broadcaster ORF for the lack of editorial independence and lack of internal pluralism at an awards ceremony. He also criticised the direct pressure political parties in power put on individual members of the ORF governing board to ensure the parties' desired candidates get appointed to managerial and editorial positions within the corporation.<sup>14</sup> All Austrian governments so far have exercised such influence,<sup>15</sup> indicating that ORF is structurally insufficiently protected from political interests. A key weakness lies in the Foundation Council ('Stiftungsrat'), the board of governors of the ORF. This consists of as many as 35-members, half of which are direct government appointees, just under a third are political party nominees and just under a fifth are civil society representatives.<sup>16</sup> Although according to the ORF Act, Council members "shall not be bound by instructions and orders"<sup>17</sup> there is an unwritten, yet entirely public, rule in place that compels them to vote according to party discipline.<sup>18</sup> We are concerned that this harms the free flow of information and deprives the public from a high quality and independent broadcaster.

We are similarly concerned at government influence over the national broadcast regulator. KommAustria is a public authority under the direction of the Federal Chancellery. It is composed of civil servants and assisted by a Broadcasting Advisory Council ('Rundfunkbeirat') consisting of 6 members appointed by the Federal Government for a term of 6 years.<sup>19</sup> We are strongly concerned that this structure fails to protect the independence of

<sup>11</sup> The new coalition government that took office in January 2007 declared in its coalition agreement its intention to 'examine' the possibility of subsidising non-commercial private broadcasters. However, this declaration has yet to be put into practice.

<sup>12</sup> Veronika Leiner: „Die Freien Radios und ihr öffentlich-rechtlicher Auftrag“.

<http://kulturrat.at/debatte/zeitung/medien/leiner>

<sup>13</sup> Stories about Radio MORA and financial difficulties of other radio stations can be found on the website of Radio Freier Rundfunk Oberösterreich: <http://www.fro.at/frozine/index.php?channel=3>

<sup>14</sup> <http://www.diepresse.com/Artikel.aspx?channel=k&ressort=km&id=559636>

<sup>15</sup> See, for instance: Heinrich Neisser: "Aufforderung zur Perspektive", in: Der Auftrag – Öffentlich-rechtlicher Rundfunk – Positionen – Perspektiven – Plädoyers, Sonderzahl, Vienna 2006, p.10-12

<sup>16</sup> 18 members are directly appointed either by the Federal Government or by Provincial Governments, 6 are appointed by the Government on suggestion of the various political parties represented in Parliament, 5 by staff unions, who are also affiliated with political parties. 6 members are appointed by what is called the 'Viewers Council' ('Publikumsrat'), an advisory body consisting of representatives of various civil society groups.

<sup>17</sup> Section 19(2) of the ORF Act,

[http://www.rtr.at/web.nsf/lookuid/FC53C3160ACCDBEDC12571A1004FF880/\\$file/orfg-eng.pdf](http://www.rtr.at/web.nsf/lookuid/FC53C3160ACCDBEDC12571A1004FF880/$file/orfg-eng.pdf)

<sup>18</sup> The requirement for council members to vote according to party discipline is freely admitted in Austrian public debate as demonstrated by numerous media reports, for instance: "Linksruck im ORF-Stiftungsrat verzögert sich", in: *Der Standard*, 31 January 2007.

<sup>19</sup> Again, the coalition agreement of the new government contains a declaration of intent to strengthen the

the regulator, and violates international standards on independence of regulatory bodies that Austria has committed to.<sup>20</sup>

We are concerned that these three factors – media concentration, lack of independent broadcasting and government control over the public broadcaster and the regulatory body – combine to deprive Austrians from their right to media diversity. International human rights courts and bodies have often emphasised that States are under a positive obligation to take measures to ensure pluralism within the media.<sup>21</sup> Austria fails to fulfil this obligation and we respectfully request the Committee to include this issue on its list of concerns.

### **Ineffective access to information laws**

We are also concerned that Austrian law fails to fully guarantee the public's right to access to information. Many government and public institutions still operate in a culture of secrecy. Although the 1987 Federal Law on the Duty to Furnish Information (the '[Auskunftspflichtgesetz](#)') requires public authorities to respond to requests within 8 weeks, it is subject to very broadly phrased exemptions. As a result, the right of access to information is often illusory.

A prominent example is that of arms contracts. Austria is a significant producer and exporter of small arms, including - at times - to countries that have a problematic human rights record, such as Iran. There is very little transparency in this field. For instance, an Austrian platform of NGOs has been trying to get information from the government about their approval of certain transfers of arms and military technology, in order to assess whether these exports have been in line with the EU Code of Conduct on Arms Exports. The Code of Conduct, amongst other things, prohibits the export of arms where there is a risk they might be used for human rights abuses. The Ministry of Interior has given no concrete answers to any of the NGOs' questions saying, in the case of an arms export to Iran, no more than that the relevant legal criteria were scrutinised and that no reasons for rejecting the export licence were found. Such rudimentary information does not allow the public to scrutinise whether the licensing procedure was indeed conducted in line with the EU Code of Conduct.

The Austrian government, when justifying their reluctance to publish more information about exports, has in the past referred to concerns over personal data contained in documents. However, personal data protection cannot be a reason for retaining statistical information, and much of the information relating to licensing procedures will not contain any personal data.<sup>22</sup>

Another example is that of a local journalist and environmental activist in the Province of Tyrol who tried to obtain information about a large public contract concerning the lease of hydroplants to US firms from the public electricity company, TIWAG. He was denied access to the information, but eventually managed to obtain a copy of the contract from a confidential source and announced his intention to publish it on his website. He was immediately sued by the public company who argued that the contract constituted a business secret, and that disclosure could harm their business interests as well as violate personal data

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independence of the regulator. It is paramount that this process is done in a way that brings the regulator fully in line with international standards in this field.

<sup>20</sup> For instance EU Directive 'Television without Frontiers'

<sup>21</sup> European Parliament resolution on the risks of violation, in the EU and especially in Italy, of freedom of expression and information (2003/2237(INI)) P5\_TA(2004)0373

<sup>22</sup> Interviews with Saferworld, London, and Amnesty International Austria, 9 March 2007.

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protection. The court ordered the journalist's service provider to remove from the site parts of the text (which he had not written). The outcome of the main trial is still pending.<sup>23</sup>

Cases such as these highlight the urgent need for legislative reform in the area of access to information. We request the Committee to include this issue on its list of concerns and take it up with the government.

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<sup>23</sup> Interview with the environmental activist Markus Wilhelm, 14 February 2007. All documents relating to the trial are posted on the website in question: [www.dietiwag.at](http://www.dietiwag.at)