

BRIEF OF THE BECKET FUND FOR RELIGIOUS LIBERTY

(A NON-GOVERNMENTAL ORGANIZATION IN CONSULTATIVE STATUS WITH THE ECONOMIC AND SOCIAL COUNCIL (ECOSOC) OF THE UNITED NATIONS)

WASHINGTON, DC

USA

To

GOTTA SUPREME COURT

SWEDEN

CASE NUMBER 1987-07

INTRODUCTION

The Becket Fund for Religious Liberty is an international, interfaith, public interest law firm dedicated to protecting the free expression of all religious traditions. For over ten years, The Becket Fund has represented Buddhists, Christians, Hindus, Jews, Muslims, Sikhs, and others in American domestic courts and before international tribunals such as the European Court of Human Rights and the United Nations Human Rights Committee.

As a Non-Governmental Organization (NGO) in consultative status with the Economic and Social Council (ECOSOC) of the United Nations, The Becket Fund's global interest in protecting religious exercise and expression is implicated by the Swedish government's criminal punishment of Pastor Ake Green for expressing his religious beliefs. The Becket Fund respectfully submits this brief to inform this Court of Sweden's obligations to guarantee each of its citizens the religious liberty, freedom of expression, and equal protection of the laws secured by Articles 18, 19, and 26 of the International Covenant on Civil and Political Rights ("ICCPR"). Should this Court uphold Pastor Green's conviction—which was based *solely* upon the expression of his

religious beliefs in a sermon preached to his congregation—Sweden will be in violation of all three of these bedrock principles of international human rights law.

ARGUMENT

A. Sweden Is Bound to Adhere to the Terms of the ICCPR and Its Enforcement.

Article 26 of the Vienna Convention on the Law of Treaties (the “Vienna Convention”)¹ specifically provides that “[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith.” Article 27 further provides that adherence to domestic law is no justification for failure to perform the obligations of a particular agreement.² On December 6, 1971, Sweden officially ratified both the ICCPR³ and the Optional Protocol to the ICCPR.⁴ Accordingly, pursuant to the Vienna Convention, Sweden is bound to adhere to the terms of the ICCPR and the Protocol.

Moreover, in accordance with Article 1 of the Protocol, Sweden has recognized the authority and competence of the United Nations Human Rights Committee (“the Human Rights Committee”)⁵ to enforce the ICCPR in the event that the Swedish government violates any of its provisions. Article 1 also authorizes individuals to submit a communication to the Committee if they believe their rights under the ICCPR have

¹ Vienna Convention on the Law of Treaties, May 23, 1969, 8 I.L.M. 679, 1155 U.N.T.S. 331, *entered into force* January 27, 1980.

² International agreements, to which Sweden is bound, such as the ICCPR, preempt domestic law, such as the Criminal Code, under the doctrine of *lex superior*.

³ International Covenant on Civil and Political Rights, G.A. Res. 2200A, U.N. GAOR, 31st Sess., Supp. No. 16, at 52, U.N. Doc. A/6316 (1966), *entered into force* 23 March 1976.

⁴ Optional Protocol to the International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. No. 16, at 59, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 302, *entered into force* March 23, 1976.

⁵ The United Nations Human Rights Committee (HRC) is the designated interpreter of the International Covenant on Civil and Political Rights (ICCPR) by authority granted to it in ICCPR Article 28. Under Article 1 of the Optional Protocol to the ICCPR, the Committee is authorized to examine allegations of human rights violations by individual citizens against their state governments.

been violated. If the Human Rights Committee finds a violation on such a complaint, remedies include *release of those imprisoned* under the offending law, *compensation* for the victim of the violation, *and subsequent monitoring* of the Swedish government to assure compliance with the Committee's decision.

B. The Government's Conviction of Pastor Green for the Expression of His Religious Beliefs Violates the Guarantee of Religious Liberty Secured by Article 18 of the ICCPR.

Article 18 of the ICCPR provides in pertinent part as follows:

Everyone has the right to *freedom of thought, conscience, and religion*. This right shall include freedom to have or to adopt a religion or belief of his choice, and *freedom*, either individually *or in community with others and in public* or private *to manifest his religion or belief in worship, observance, practice and teaching*.

ICCPR art. 18(1) (emphasis added).⁶ Thus, ICCPR Article 18 protects not only the freedom to hold a religious belief of one's own choosing, but also the freedom to manifest that religious belief in public or private through worship and teaching it to others.

Here, Pastor Green's religious expression falls squarely within the protections of Article 18. In a sermon preached to his congregation, Pastor Green expounded upon and interpreted Christian Biblical texts addressing homosexuality and applied those texts to modern day Sweden. In doing so, he taught his congregation a particular religious viewpoint concerning homosexuality, thereby fulfilling his role as a leader of his congregants to further their faith by teaching Christian doctrine and applying it to their lives. Far from censoring the ability of religious leaders like Pastor Green to teach

⁶ Articles 1 and 18 of the Universal Declaration of Human Rights ("UDHR"), G.A. Res. 217A, U.N. GAOR, 3rd Sess., U.N. Doc. A/810 at 73 (1948), similarly identify the freedom of thought, conscience, and religion as a fundamental right to be protected and preserved.

religious views to a congregation, Article 18 expressly protects the “freedom . . . in community with others . . . to manifest his religion or belief in . . . *teaching*.” Nor was Pastor Green’s teaching of his religious beliefs concerning homosexuality removed from the protection of Article 18 by virtue of its public dissemination to his congregation and then to the Swedish community at large. To the contrary, Article 18 explicitly protects the freedom to teach and otherwise manifest one’s religion in “*public*.”

Because Pastor Green’s religious teaching is squarely protected by Article 18’s guarantee of religious liberty, the Government bears a heavy burden in order to sustain its effort to imprison Pastor Green for his religious teaching. Specifically, this censorship and imprisonment of Pastor Green is justified only if the Government can demonstrate that limiting religious freedom is “necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.” ICCPR art. 18(3). Simply put, however, there is *no* evidence in the record that Pastor Green engaged in any manifestation of his religion that posed any sort of direct threat to public safety or order, let alone threatened the fundamental rights and freedoms others. Far from engaging in any conduct that put others at risk, the evidence shows that Pastor Green did nothing more than proclaim a particular religious viewpoint.

To be sure, Pastor Green chose a controversial subject—homosexuality—on which to teach. Moreover, he taught a religious viewpoint—*i.e.*, that homosexuality is sinful—on that subject that is at odds with the beliefs of many of Sweden’s citizens. However, the fact that Pastor Green taught a controversial religious viewpoint that offended some people, including members of Sweden’s homosexual community, does not remove his religious teaching from Article 18’s protections. Article 18 does not exclude

from its scope the expression of religious views that are controversial. Nor does it deny protection to those views that may offend others by defining certain conduct to be immoral or sinful. Instead, Article 18's protection of the "right to freedom of thought, conscience and religion . . . is far-reaching and profound; it encompasses freedom of thoughts *on all matters*, . . . whether manifested individually or in community with others." General Comment⁷ to Article 18, No. 22[48](1) (emphasis added).⁸

Nor could it be otherwise. Many, if not all religions, make claims of absolute truth in prescribing certain views to be correct and certain conduct to be either moral or immoral. This propensity of religious views to make claims of absolute truth may inevitably cause offense when one citizen teaches that the conduct of another citizen is immoral. Article 18 is not blind to this reality. Instead, it embraces the reality that humans will inevitably differ in their quest to define what is absolutely true and good. Accordingly, Article 18 provides that it is not the role of a government composed of men to declare what is orthodoxy by punishing those who publicly teach one religious view of what is right, *even if* that view may offend others.

Bishop Desmond Tutu's religious teachings provide a good illustration of the virtue of Article 18's protections. Bishop Tutu taught the Christian, religious viewpoint that the Afrikaner white minority of South Africa was engaging in immoral, sinful

⁷ "General Comments are statements made by the [Human Rights Committee] in which it conveys to state parties its understanding of the meaning of the rights in the ICCPR." Conte, Alex et.al., *Defining Civil and Political Rights: The Jurisprudence of the United Nations Human Rights Committee*, England: 2004.

⁸ Furthermore, Comment 22[48](8) explicitly states that the "[l]imitations imposed . . . must not be applied in a manner that would vitiate the rights guaranteed in article 18." Consequently, even if Pastor Green's sermon did threaten the fundamental freedom of another or endanger the public order, criminalizing the message and imprisoning the orator is an excessive and overbroad limitation that will inevitably chill the rights of those considering whether to express other religious viewpoints that the government or society might deem controversial.

conduct. His Christian religious views were controversial in his home country; indeed they caused great offense to the people he accused of engaging in sin and were contrary to the view of South Africa's government. Accordingly, his government sought to censor and silence those teachings. Nonetheless, Bishop Tutu's religious teaching easily fell within the scope of Article 18's protection of the "freedom . . . in public or private to manifest his religion or belief in . . . teaching."

Not surprisingly, Swedish citizens seemed to recognize this fact in the case of Bishop Tutu's Christian teachings. They did not treat Bishop Tutu as a pariah, despite the controversy that his religious teachings accusing others of sin engendered in his own country. Instead, in 1984, Sweden welcomed Bishop Tutu as a Nobel Peace Prize winner. Sweden need not treat Pastor Green's religious teaching that homosexuality is sinful as worthy of a Nobel Prize. However, it must accept its obligation under Article 18 to protect, not criminalize, those like Bishop Tutu, Pastor Green, and countless other religious leaders throughout the world who publicly teach religious viewpoints that may cause controversy or offend others.

In sum, because Pastor Green was convicted based upon his expression of a religious viewpoint that falls squarely within the protection of Article 18, his conviction and sentence must be vacated.

C. The Government's Conviction of Pastor Green for the Expression of His Religious Beliefs Violates the Guarantee of Freedom of Expression Secured by Article 19 of the ICCPR.

Article 19 of the ICCPR provides in pertinent part as follows:

- (1) Everyone shall have the right to hold opinions without interference.
- (2) Everyone shall have the right to freedom of expression; this right shall include *freedom* to seek, receive and *impart information and ideas of all kinds*,

regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

ICCPR art. 19 (emphasis added).⁹ Thus, the scope of protection for free expression that ICCPR Article 19 affords is broad. Article 19 protects the right to “impart . . . ideas of all kinds . . . [in the] media of his choice.” Clearly, Pastor Green’s public expression of his religious viewpoint to his congregation concerning homosexuality falls within the scope of Article 19’s protections.

Moreover, the Human Rights Committee applies heightened scrutiny to attempts to limit the freedom of expression secured by Article 19 when the individual is speaking, as Pastor Green was in this case, in a *professional* capacity. For example, in *Victor Ivan Majuwana Kankanamge v. Sri Lanka*, a newspaper reporter was charged with defamation for articles that caused offense to government officials. The Committee held that because the reporter’s articles were “directly attributable to . . . his profession,” the government’s prosecution violated ICCPR article 19. *See* Communication No. 909/2000.

Not only does a religious leader’s profession require him to express views on human behavior and social trends, it requires that he or she do so in faithfulness to sacred texts. These texts often lay claim to eternal and absolute truths that do not bend according to societal mores or trends. As a pastor of a Christian church, Pastor Green’s professional obligation was to preach from the Bible, to relate its message to the lives of his parishioners, and to discuss the correlative issues facing Swedish society. Pastor Green’s expression of his views on homosexual behavior is directly attributable to his professional obligations as a pastor and is therefore entitled to a particularly high degree

⁹ *See also* UDHR, Article 19: “Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.”

of protection under ICCPR Article 19.

Despite the clear protection afforded Pastor Green's religious expression by Article 19, the lower court in this case sought to sustain the conviction of Pastor Green based merely upon the "offense" his speech might cause the homosexual community. In the lower court's view, it is permissible to toss aside the protections of freedom of expression secured by Article 19 when the speech at issue may cause feelings of "disrespect," "disdain," and "offense." *See* 29 June 2004 Verdict of Kalmar District Court (the "Verdict"). Accordingly, what is at stake in this case is whether the boundaries on an individual's right to freedom of speech can be drawn based upon the subjective emotional and psychological responses of the speech's audience. The answer is "no," for to do so would completely vitiate the freedom of expression.

As an initial matter, permitting censorship of expression merely because it may offend those who hear it would represent a radical expansion of the narrowly defined circumstances in which Article 19 permits limits on freedom of expression.¹⁰ In particular, those exceptions do not permit limitations that would "put in jeopardy the right itself." General Comment General Comment to Article 19, No. 10. But allowing censorship of speech based on the possibility of "offense" would place the right to free expression in great jeopardy because the speaker would never know in advance if his or her ideas would rise to the level of "offense" that would permit censorship and criminal punishment.

¹⁰ *See* ICCPR Article 19(3) ("The exercise of the rights provided for in paragraph 2 of [Article 19] carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

(a) For respect of the rights or reputations of others;

(b) For the protection of national security or of public order . . . or of public health or morals.")

Moreover, because there is no objective measure to determine what speech qualifies as “offensive,” the door would be open to an infinite number of limitations on the freedom of expression. Such a standard would greatly imperil the right to free speech itself. That, in turn, would place the security of democratic society at risk, which is secured upon the foundation of the freedom to express ideas of all sorts and debate that is robust, wide-open, and uninhibited.

For this reason, the United Nations has never limited the right to freedom of expression according to mere perceptions of felt offense. For example, in *Mr. Kenneth Riley et al. v. Canada*, the Human Rights Committee specifically refused to recognize an alleged harm which was based only on the psychological and emotional response of the observer. *See* Communication No. 1048/2002 (denying standing to Royal Canadian Mounted Police organization who opposed the wearing of turbans by Khalsa Sikh officers instead of Stetson hats).

Human rights are by definition *universal and inalienable* and not to be limited by relevance to a specific culture. Feelings of offense are not only personal and subjective, they are intrinsically related to one’s culture and era. Taboos vary between cultures. Stigmas change over time. Minority and majority status fluctuate constantly. In contrast, the right to freedom of speech is not cultural, it is universal; it is not temporary, it is inalienable. When a human right is made subject to the feelings of a particular group in a particular culture at a particular time, it ceases to be universal and inalienable.

One of the first things Hitler did after seizing power in early 1933 was to issue a presidential decree that severely limited the right to assemble and the right to a free press. Among other things, the Nazis decreed that any newspaper that “insult[ed] or

maliciously brings into contempt” “any religious society ... or its practices” could be shut down. See *Verordnung des Reichspräsidenten zum Schutze des Deutschen Volkes vom 4. February 1933* (*Reichsgesetzblatt I S. 35*) (“Decree of the Reichspräsident for the Protection of the German People”).¹¹ The Nazis were thus using a ban on defamation of a group, something that Sweden claims protects freedom, as a method of limiting freedom of speech and ultimately freedom of conscience. A clear lesson from this is that the right to enjoy a freedom is only as secure as it is for the smallest minority, in essence the individual.

The most effective way to promote an open, pluralistic society in which minority groups can flourish is to strenuously protect freedom of speech. In pluralistic societies, there are very few values shared by all. In fact, often times the only shared value is the notion that we must respect each other’s differences. The Committee has urged governments to respect differences by giving voice to more diverse viewpoints, not less. See *John Ballantyne and Elizabeth Davidson v. Canada* (“Ballantyne”); *Gordon McIntyre v. Canada* 359/1989;385/1989/Rev.1 (urging Canada to protect the “vulnerable position” of Francophones in ways that did not preclude the freedom of expression of Anglophones).

In sum, by preserving the right of one individual to speak freely, Article 19 protects the right of every individual to speak according to his or her conscience. Because Pastor Green was convicted based upon his expression of a religious viewpoint that falls squarely within the protection of Article 19, his conviction and sentence must be

¹¹ “[W]enn in ihnen eine Religionsgesellschaft des öffentlichen Rechts, ihre Einrichtungen, Gebräuche oder Gegenstände ihrer religiösen Verehrung beschimpft oder böswillig verächtlich gemacht werden.” (Decree at Section 9.1.6) This decree is available at http://www.lsg.musin.de/Geschichte/natsoz/Notverordnung4_Feb_33.htm

vacated.¹²

D. The Government’s Conviction of Pastor Green for the Expression of His Religious Beliefs Violates the Guarantee of Equal Protection of the Law Secured by Article 26 of the ICCPR.

Article 26 of the ICCPR provides:

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, *religion*, political *or other opinion*, national or social origin, property, birth or other status.

ICCPR art. 26 (emphasis added).¹³

Under ICCPR Article 26, discrimination may be either direct or indirect. A law is discriminatory if it has either the “purpose or effect” of discriminating against a religion. General Comment to Article 26, No. 18 [37]. *See also Simunek, Hastings, Tuzilova and Prochazka v. The Czech Republic*, Communication No. 516/1992 (“an act which is not politically motivated may still contravene article 26 if its effects are discriminatory”).

To sustain Pastor Green’s conviction in this case would be to apply Sweden’s laws in such a way as to discriminate not just against one religion, but against all religions that do not endorse homosexual behavior. Pastor Green’s views, though unpopular in modern Swedish society, are still considered orthodox by a variety of religions and in much of the world. Catholicism, Judaism, and Islam all teach that

¹² Under ICCPR Article 19(3) restrictions on the freedom of expression must be “necessary.” Even if the Government were justified in applying the Persecution Law to Pastor Green (which it is not), it is not “necessary” to imprison Pastor Green to protect the homosexual community from feeling “offended.” The lower court’s sentence of one month of imprisonment violates article 19(3). *See Mukong v. Cameroon*, Communication No. 458/1991, para. 9.7 (state party violated ICCPR 19 when it attempted to “muzzle” claimant’s advocacy by imprisoning him for legitimate goal of “safeguard[ing] an alleged vulnerable state of national unity”).

¹³ *See also* General Comment, No. 18[37] ¶ 1.

homosexual behavior is spiritual disobedience.¹⁴ Certain schools of Buddhism and Hinduism also forbid homosexual behavior.

While these beliefs may offend some, religious teachers have since time immemorial preached messages that caused offense. Their religious duty is to teach truth, not to teach that which will be well-received or inoffensive. However, the interpretation given to Sweden's Persecution Law by the lower court forces religious teachers, from Pastor Green to Pope John Paul XXIII, to choose between their clerical vows and obedience to the law. Members of religious congregations will similarly be forced to choose between obedience to church teaching and compliance with the Persecution Law. To sustain the lower court's decision and the conviction of Pastor Green would be to place a disproportionate burden upon people who maintain sincerely held religious beliefs. Because this would impermissibly discriminate against religion in violation of ICCPR Article 26, Pastor Green's conviction must be vacated.

¹⁴ The Catechism of the Catholic Church states that "homosexual acts [are] acts of grave depravity, tradition has always declared that "homosexual acts are intrinsically disordered." They are contrary to the natural law. They close the sexual act to the gift of life. They do not proceed from a genuine affective and sexual complementarity. Under no circumstances can they be approved." ll. 139-141 available at <http://www.catholicfirst.com/searchcatechism.cfm?action=search>. Judaism which relies on the first five books of Moses, the Torah, also teaches that homosexuality is "to'eva," an "abomination" or a "mistaken act." (Leviticus 18:22). The Muslim Qur'an states in Chapter 7 *sura 80-81* "Do ye commit lewdness such as no people in creation (ever) committed before you? For ye practice your lusts on men in preference to women: ye are indeed a people transgressing beyond bounds."

CONCLUSION

For the foregoing reasons, in compliance with the international obligations to which Sweden is bound, this Court should vacate the judgment below.

Respectfully submitted by:



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