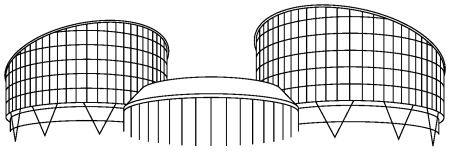

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

THIRD SECTION

# CASE OF GRA STIFTUNG GEGEN RASSISMUS UND ANTISEMITISMUS v. SWITZERLAND

*(Application no. 18597/13)*

JUDGMENT

STRASBOURG

9 January 2018

*This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.*

**In the case of GRA Stiftung gegen Rassismus und Antisemitismus v. Switzerland,**

The European Court of Human Rights (Third Section), sitting as a Chamber composed of:

Helena Jäderblom, *President,*
Branko Lubarda,
Helen Keller,
Pere Pastor Vilanova,
Alena Poláčková,
Georgios A. Serghides,
Jolien Schukking, *judges,*
and Fatoş Aracı, *Deputy Section Registrar,*

Having deliberated in private on 5 December 2017,

Delivers the following judgment, which was adopted on that date:

# PROCEDURE

1. The case originated in an application (no. 18597/13) against the Swiss Confederation lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by GRA Stiftung gegen Rassismus und Antisemitismus ("the GRA Foundation against Racism and Anti-Semitism" — "the applicant organisation"), on 13 March 2013.

2. The applicant organisation was represented by Mr A. Joset, a lawyer practising in Liestal. The Swiss Government ("the Government") were represented by their Agent, Mr F. Schürmann.

3. The applicant organisation alleged, in particular, that the civil courts had violated its right to freedom of expression by finding it liable for the infringement of a politician's personality rights.

4. On 12 October 2015 the application was communicated to the Government.

# THE FACTS

## I. THE CIRCUMSTANCES OF THE CASE

5. The applicant is a non-governmental organisation which promotes tolerance and condemns all types of racially motivated discrimination. It was established under Swiss law and registered in Zürich.

6. On 5 November 2009 the youth wing of the Swiss People's Party (*Junge Schweizerische Volkspartei*) held a demonstration in the train station square in the town of Frauenfeld concerning a public initiative to support the prohibition of the building of minarets in Switzerland. After the event the party published a report on its website, including the following excerpts:

> "In his speech in front of the Thurgau government building [*Thurgauer Regierungsgebäude*], B.K., the president of the local branch of the Young Swiss People's Party ["the JSVP"], emphasised that it was time to stop the expansion of Islam. With this demonstration, the Young Swiss People's Party wanted to take an extraordinary measure in an extraordinary time. The Swiss guiding culture ("*schweizerische Leitkultur*"), based on Christianity, cannot allow itself to be replaced by other cultures, B.K. added. A symbolic sign, such as the prohibition of minarets, would therefore be an expression of the preservation of one's own identity."

7. In response, the applicant posted an entry on its website in the section called "Chronology – Verbal racism", entitled "Frauenfeld TG, 5 November 2009", including the following extract:

> "According to the report of the event, B.K., the president of the local branch of the Young Swiss People's Party, emphasised that it was time to stop the expansion of Islam. He added further: 'The Swiss guiding culture, based on Christianity, cannot allow itself to be replaced by other cultures. A symbolic sign, such as the prohibition of minarets, would therefore be an expression of the preservation of one's own identity.' Swiss People's Party of Switzerland canton representative H.L. also spoke to the few people who attended; nevertheless, the Young Swiss People's Party speaks of a great success. (Verbal racism)"

8. On 29 November 2009 the popular initiative against the construction of minarets was accepted in a referendum and a constitutional amendment banning the construction of new minarets was introduced.

9. On 21 August 2010 B.K. filed a claim for the protection of his personality rights with the Kreuzlingen District Court (*Bezirksgericht Kreuzlingen*). He applied, firstly, to have the applicant organisation withdraw the entry in question from its homepage and, secondly, for it to be replaced with the court's judgment. The applicant organisation replied that the title of the Internet entry had to be considered as a value judgment, which could only lead to an infringement of personality rights if it entailed an unnecessarily hurtful and insulting attack on the person concerned.

10. On 15 March 2011 the Kreuzlingen District Court dismissed B.K.'s action. It held that the publication of the impugned article on the applicant's website had been justified since it had related to a political discussion on a matter of public interest.

11. On appeal, on 17 November 2011 the Thurgau Cantonal High Court (*Obergericht des Kantons Thurgau*) reversed the first-instance judgment. It held that classifying B.K.'s speech as "verbally racist" had been a mixed value judgment, which could lead to an infringement of personality rights if it was based on untruths. The High Court concluded that B.K.'s speech itself had not been racist. It therefore ordered that the impugned article be

removed from the applicant's website and replaced with the court's judgment.

12. On 25 January 2012 the applicant organisation filed an appeal with the Federal Supreme Court (*Bundesgericht*), reiterating its argument that any interference with B.K.'s personality rights had been justified. One of the applicant's main aims was to fight racism and to inform the public about hidden and open racist behaviour. Its website stated that public comments would be documented, even if they did not fall within the scope of the prohibition of racial discrimination enshrined in Article 261$^{bis}$ of the Swiss Criminal Code. To fulfil its role of watchdog in that sense, it published articles and interviews concerning current events relating to racism and anti-Semitism.

13. On 29 August 2012 the Federal Supreme Court dismissed the applicant organisation's appeal, finding as follows (unofficial translation):

> "3. The classification of and commenting on a person's statements as 'verbal racism' violate that person's honour. Not only in the context of the criminal offence of racial discrimination (Article 261$^{bis}$ of the Criminal Code) but more generally, the term in question is, in the eyes of the average reader, capable of deliberately debasing the person whose comments have been classified as 'verbally racist', accusing him or her of behaviour which is frowned upon by society in the form of an act which is, at the very least, questionable in constitutional terms (cf. BGE 127 III 481 E. 2b / aa p. 487, 129 III 49 E. 2.2 p. 51 and 715 E. 4.1 p. 722). The appellant referred to the respondent's speech at the public demonstration of 5 November 2009 on its website ... freely accessible on the Internet, commenting on the term 'verbal racism'. It thereby violated the respondent's honour as part of his personality within the meaning of Article 28 § 1 of the Civil Code. The infringement is unlawful if it is not justified by the consent of the injured party, by an overriding private or public interest or by law (Article 28 § 2 ZGB).
>
> 4. The main point in dispute is whether the appellant can rely on an overriding interest in classifying the respondent's comments as 'verbal racism'.
>
> 4.1. The case-law on press statements, on which the appellant relies, distinguishes between statements of facts on the one hand and value judgments on the other, and can be summarised as follows: ...
>
> 4.2. The appellant assigned the respondent's statements to the section entitled 'verbal racism' ... That was a mixed value judgment. It contains a substantive core and, at the same time, a value judgment. In order to justify the substantive core, it is necessary to examine whether the respondent's comments were indeed racist.
>
> 4.3. The term 'racism' is understood as 'a doctrine' which states that 'certain races or nations are superior to others in terms of their cultural capacity', and, on the other hand, a 'certain attitude, manner of thinking and acting towards people of (certain) other races or nations' (cf. Duden, The Great Dictionary of the German Language in Six Volumes, Vol. 5, 1980, p. 2099). The adjective 'verbal' describes racism as '[occurring] with words, with the help of language' (cf. Duden, The Great Dictionary of the German Language in Six Volumes, Vol. 6, 1981, p. 2730). Verbal racism is, therefore, no longer merely a certain attitude, but an attitude in the instant case which was expressed publicly through language (as opposed to, for example, through deeds). 'Verbal racism' could therefore mean racial discrimination in the criminal sense, as the respondent claims. What is decisive, however, as the second-instance court

correctly stated, is that the mere demonstration of a difference between two individuals or groups does not constitute racism. Racism begins where the difference amounts simultaneously to denigration of the victims and where the highlighting of differences is ultimately only a means to represent the victims negatively and to show disregard for their dignity.

4.4. The statements that led the appellant to conclude that there had been 'verbal racism' are the core phrases 'it is time to stop the spread of Islam ... The Swiss guiding culture ("*schweizerische Leitkultur*"), based on Christianity, cannot let itself be repressed by other cultures ... A symbolic sign, such as the prohibition of minarets, is therefore an expression of the preservation of one's own identity'.

4.4.1. In his public speech, the respondent expressed his opinion on the prohibition of minarets, which, in the opinion of the High Court, would not be compatible with freedom of religion and non-discrimination. He has, in that connection, compared his own beliefs ('Christianity') with foreign beliefs ('Islam'), delimited them ('to halt', 'preserving one's own identity') and described his own as worthy of protection and defence ('Swiss leading culture', 'not to be repressed'). For the average listener, that does not result in the blanket denigration of the followers of Islam or show fundamental contempt for Muslims.

4.4.2. On the whole, it cannot be said that the comments made by the respondent, as understood by the average listener, could be described as 'verbally racist'. Therefore, the substantive core does not apply and the assessment is not acceptable. It shows the respondent in the wrong light. Therefore, the mixed value judgment, which infringed personality rights, cannot be justified by any overriding interest within the meaning of Article 28 § 2 of the Civil Code.

4.4.3. That assessment cannot be altered by the fact that in the general interest of informing the public, there is an increased degree of publicity and a reduced level of protection for personality rights for people who engage in a political debate, such as the respondent in the campaign for the minaret initiative (see BGE 105 II 161 E. 3b p. 165, 107 II 1 E. 3b p. 5). That special framework allows for the assessment of breaches of honour on a somewhat different scale, but it can neither justify the dissemination of untruths nor the publication of value judgments that do not appear to be justified with regard to the underlying facts."

## II. RELEVANT DOMESTIC AND INTERNATIONAL LAW AND DOCUMENTS

14. The relevant part of Part One, Chapter One of the Swiss Civil Code, as in force at the material time, reads as follows:

**Article 28**

"Any person whose personality rights are unlawfully infringed may petition the court for protection against all those causing the infringement.

An infringement is unlawful unless it is justified by the consent of the person whose rights are infringed or by an overriding private or public interest or by law."

**Article 28a**

"The applicant may ask the court:

1. to prohibit a threatened infringement;

2. to order that an existing infringement cease;

3. to make a declaration that an infringement is unlawful if it continues to have an offensive effect.

In particular, the applicant may request that a rectification or court judgment be notified to third parties or published.

Claims for damages and satisfaction or for the handing over of profits are reserved, in accordance with the provisions which govern agency without authority."

15. The relevant part of the Swiss Criminal Code, as in force at the material time, reads as follows:

**Article 261bis**

**Racial discrimination**

"Any person who publicly incites hatred or discrimination against a person or a group of persons on the grounds of their race, ethnic origin or religion, any person who publicly disseminates ideologies that have as their object the systematic denigration or defamation of the members of a race, ethnic group or religion,

any person who with the same objective organises, encourages or participates in propaganda campaigns,

any person who publicly denigrates or discriminates against another or a group of persons on the grounds of their race, ethnic origin or religion in a manner that violates human dignity, whether verbally, in writing or pictorially, by using gestures, through acts of aggression or by other means, or any person who on any of those grounds denies, trivialises or seeks a justification for genocide or other crimes against humanity,

any person who refuses to provide a service to another on the grounds of that person's race, ethnic origin or religion, when that service is intended to be provided to the general public,

is liable to imprisonment of up to three years or to a fine."

16. In October 2008, the Swiss Federal Commission against Racism issued an opinion on the initiative against the construction of minarets, the relevant part of which reads as follows:

"The Federal Commission against racism recommends:

1. rejection of the initiative 'against the construction of minarets'...

The initiative against the construction of minarets ...

... discriminates against and defames Muslim men and women

1. The initiative and the arguments of those who support it equate to discrimination against Muslims. They are aimed at an outright ban on minarets, whereas Christians and members of other religions, such as Hindus, Buddhists and others, are not subject to a similar prohibition.

2. The initiative against the construction of minarets spreads and reinforces negative stereotypes concerning Islam and thereby defames Muslims. The minaret thereby

becomes, in one sweeping judgment, the symbol of a will to power which, according to the supporters of the initiative, calls into question fundamental rights guaranteed by the Constitution, for instance gender equality. The text suggests that part of a religious building is a risk to society. All Muslims are therefore criticised for dishonest and even unlawful behaviour. However, such reproaches are contradicted by the facts.

The initiative against the construction of minarets ...

...breaches fundamental and human rights

3. The intitiative violates the freedom of religion guaranteed by human rights and the liberty of conscience and faith guaranteed by the Federal Constitution (Article 15). A prohibition on constructing minarets limits the rights of Muslims to practise their religion alone and in community with others. No public interest justifies such a restriction ....

The initiative against the construction of minarets ...

... fuels fear and creates insecurity

6. The initiative fuels fear among members of the majority population and among minorities. Muslims are and feel limited in exercising their rights. There will be a greater feeling of insecurity in Muslim communities because they will wonder about the extent of the restrictions. Moreover, the supporters [of the initiative] fuel fears by talking about 'rampant Islamisation' which represents a danger for the country. They completely ignore the fact that in Switzerland there is no serious problem of the integration of Muslims as far it concerns the practice of their religion.

The initiative against the construction of minarets ...

...is an obstacle to integration

7. Spreading stereotypes encourages discrimination on an everyday basis. Young people looking for a place to learn are pushed to the sidelines if they have a name that makes people think they are Muslims because of a fear they will cause problems. Muslims are insulted in public or excluded by their neighbours, who fear them. Repeated instances of discrimination make young people less disposed to integrate ..."

17. The website of the Swiss Federal Commission against Racism has a "Definition of Racism", which reads as follows:

"Despite numerous studies on the subject, to date there is no universally accepted definition of racism. The one used most frequently is that of the French sociologist Albert Memmi:

'Racism is a generalising definition and evaluation of differences, whether real or imaginary, to the advantage of the one defining or deploying them, to the detriment of the one subjected to the act of definition, whose purpose is to justify hostility or privilege.'...

In addition to this strict definition of the term, which particularly applies to classic pseudo-biological racism, there is also racism in the wider sense, which relies on cultural, psychological, social or metaphysical arguments. ..."

18. In its General Policy Recommendation No. 7, adopted on 13 December 2012, the European Commission against Racism and Intolerance (ECRI) gave the following definition of racism:

"'Racism' shall mean the belief that a ground such as race, colour, language, religion, nationality or national or ethnic origin justifies contempt for a person or a group of persons, or the notion of superiority of a person or a group of persons...."

The relevant part of the Explanatory Memorandum to ECRI's General Policy Recommendation No. 7 stated as follows:

"6. In the Recommendation, the term 'racism' should be understood in a broad sense, including phenomena such as xenophobia, antisemitism and intolerance. As regards the grounds set out in the definitions of racism ..., in addition to those grounds generally covered by the relevant legal instruments in the field of combating racism and racial discrimination, such as race, colour and national or ethnic origin, the Recommendation covers language, religion and nationality. The inclusion of these grounds ... is based on ECRI's mandate, which is to combat racism, antisemitism, xenophobia and intolerance. ECRI considers that these concepts, which vary over time, nowadays cover manifestations targeting persons or groups of persons, on grounds such as race, colour, religion, language, nationality and national and ethnic origin. As a result, the expressions 'racism' and 'racial discrimination' used in the Recommendation encompass all the phenomena covered by ECRI's mandate."

19. The relevant parts of ECRI's Fourth report on Switzerland (CRI (2009) 32), published on 15 September 2009, read as follows:

"III. Racism in political discourse

... 88. ECRI is deeply concerned at the changes in the tone of political discourse in Switzerland since the publication of its previous report. These changes are very closely linked to the growth of the UDC party (*Union démocratique du centre/SVP Schweizerische Volkspartei*). In the latest parliamentary elections at federal level, the UDC obtained the highest score: 29% of the votes. With 62 elected members of the National Council – the second chamber of parliament – (55 during the 2003 parliamentary term), the UDC now occupies a significant position in Swiss politics. This party alone has made "foreigners" its key issue. The programme, positions, campaigns, posters and other material produced by the party are described by all anti-racism experts as xenophobic and racist....

94. ECRI is pleased to note that the federal authorities regularly and openly oppose various parliamentary motions and requests for referenda launched or supported by the UDC, explaining that they infringe or are likely to infringe human rights, as in the case of the request for a referendum intended to ban the construction of minarets. The Swiss people themselves, although 29% voted for this party, reject some of its more extreme positions in referenda. The Federal Commission against Racism, the Federal Commission for Migration Issues and other bodies constantly warn the general public about this threat to the country's social cohesion.

95. ECRI reiterates that unrestrained racist and xenophobic political discourse inevitably leads to a range of serious consequences – some of which can already be observed in Switzerland – including ill-conceived proposals which could disproportionately affect particular groups or their capacity for exercising their human rights in practice. Such discourse risks the undermining of social cohesion and an incitement to racial discrimination and racist violence....

V. Vulnerable / Target groups

... 119. In particular, ECRI is concerned to learn that, in recent years, some political parties, including the UDC, have considerably exploited and encouraged prejudice

and racist stereotypes concerning Muslims within the majority population, not only in their rhetoric but also in political campaign posters. As a result some parts of public opinion may equate the entire Muslim population with terrorists and religious extremists. The fear of seeing Switzerland 'swamped by Muslims' is also exploited. In some cases, this prejudice apparently leads to discrimination, notably in employment, since Muslims are refused jobs because of the suspicion surrounding them. In particular, women who wear the Islamic headscarf encounter difficulties of access to jobs, housing and goods and services for the public. Muslims are also vulnerable to discrimination in matters of naturalisation.

120. To take but one example of hostility towards Muslims displayed in recent years, reference can be made to the federal popular initiative 'against the construction of minarets', aimed at adopting through referendum a new provision in the Federal Constitution, whereby 'the construction of minarets is forbidden'. This initiative obtained the 100 000 signatures required and will therefore be submitted to the people and the cantons. It has, however, been deemed clearly incompatible with freedom of religion by the Federal Council, and hence in breach of the Swiss Constitution and international law as binding on Switzerland, and the Federal Council has called on the people and the cantons to reject it. The Federal Commission against Racism itself has stated that the initiative 'defames Muslims and discriminates against them.' However, it seems that, under Swiss law, only a popular initiative to amend the Constitution which violated 'mandatory international law' (jus cogens) would be invalid. ECRI regrets to learn that an initiative which infringes human rights can thus be put to the vote and very much hopes that it will be rejected. It regrets in particular the tone taken by the political discourse of the initiative's supporters with regard to Muslims, as it largely contributes to their stigmatisation and to the reinforcement of racist prejudice and discrimination against them by members of the majority community."

20. In its Concluding observations on the combined seventh to ninth periodic reports on Switzerland of 13 March 2014, the UN Committee on the Elimination of Racial Discrimination held as follows:

"C. Concerns and recommendations ...

Racism and xenophobia in politics and the media

The Committee is deeply concerned at racist stereotypes promoted by members of right-wing populist parties and sections of the media, in particular against people from Africa and south-eastern Europe, Muslims, Travellers, Yenish, Roma, asylum seekers and immigrants. It is also concerned at the display of political posters with racist and/or xenophobic content and of racist symbols, as well as at racist behaviour and at the lack of prosecution in such cases. The Committee is further concerned at the xenophobic tone of popular initiatives targeting non-citizens, such as the initiative 'against the construction of minarets', adopted in November 2009, the initiative on the 'expulsion of foreign criminals', adopted in November 2010, and the initiative 'against mass immigration', adopted in February 2014. The Committee notes that such initiatives have led to a sense of unease among the affected communities and in Swiss society generally ..."

# THE LAW

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

21. The applicant organisation complained that the domestic court's finding of an infringement of B.K.'s personality rights had violated its right to freedom of expression, as guaranteed in Article 10 of the Convention, which reads as follows:

> "1. Everyone has the right to freedom of expression. This right shall include freedom to ... impart information and ideas without interference by public authority ...
>
> 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 ... for the protection of the reputation or rights of others ..."

### A. Admissibility

22. The Government submitted that the applicant organisation had failed to exhaust the available domestic remedies as it had never expressly complained of a breach of its right to freedom of expression before the Federal Supreme Court.

23. The applicant organisation contested that argument. It had relied in its appeal to the Federal Supreme Court on its right to freedom of expression and reiterated that any interference with B.K.'s personality rights had been justified. Referring to its essential role as a public watchdog, the applicant organisation complained that the High Court's decision had prevented it from fulfilling its task of informing the public according to its statutory purpose and its publicly acknowledged standing. In general, it had contended before the Federal Supreme Court that there had been a breach of its right to pursue its information activities and thus a violation of its right to freedom of expression.

24. The Court observes that the purpose of the rule on exhaustion of domestic remedies is to afford the Contracting States the opportunity of preventing or putting right the violations alleged against them before those allegations are submitted to it (see, among many other authorities, *Selmouni v. France* [GC], no. 25803/94, § 74, ECHR 1999-V, and *Remli v. France*, 23 April 1996, § 33, *Reports of Judgments and Decisions* 1996-II).

25. The rule on exhaustion of domestic remedies must be applied with some degree of flexibility and without excessive formalism. At the same time, it requires, in principle, that the complaints intended to be made subsequently at international level should have been aired before those same courts, at least in substance and in compliance with the formal requirements and time-limits laid down in domestic law (see, among many other

authorities, *Vučković and Others v. Serbia* (preliminary objection) [GC], nos. 17153/11 and 29 others, § 72, 25 March 2014, and *Gherghina v. Romania* (dec.) [GC], no. 42219/07, §§ 84-87, 9 July 2015).

26. It is not necessary for the Convention right to be explicitly raised in domestic proceedings provided that the complaint is raised "at least in substance" (see *Fressoz and Roire v. Franc*e [GC], no. 29183/95, § 39, ECHR 1999-I, and *Azinas v. Cyprus* [GC], no. 56679/00, § 38, ECHR 2004-III). If the applicant has not relied on the provisions of the Convention, he or she must have raised arguments to the same or like effect on the basis of domestic law, in order to have given the national courts the opportunity to redress the alleged breach in the first place (see *Gäfgen v. Germany* [GC], no. 22978/05, § 142, ECHR 2010, and *Karapanagiotou and Others v. Greece*, no. 1571/08, § 29, 28 October 2010).

27. In the present case, the applicant organisation's principal argument before the Federal Supreme Court was that the publication of a text which had put B.K.'s statements in the category of "verbal racism" had been wrongly classified by the second-instance court as an infringement of his personality rights. The Federal Supreme Court, for its part, acknowledged that the applicant had relied on matters relating to freedom of the press and reviewed the case from the aspect of freedom of expression. It further emphasised that the rights to freedom of expression and freedom of the press had to be taken into consideration when interpreting Article 28 of the Swiss Civil Code, which was relied on in the case before it.

28. In those circumstances, the Court is satisfied that through the arguments it raised before the Federal Supreme Court, the applicant organisation did complain, albeit only implicitly, about its right to freedom of expression. In doing so, it raised, at least in substance, a complaint under Article 10 of the Convention before the Federal Supreme Court and the court examined that complaint. It follows that the applicant provided the national authorities with the opportunity which is in principle intended to be afforded to Contracting States by Article 35 § 1 of the Convention, namely of putting right the violations alleged against them (see *Muršić v. Croatia* [GC], no. 7334/13, § 72, ECHR 2016). The Government's objection concerning a failure to exhaust domestic remedies must therefore be dismissed.

29. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

## B. Merits

### *1. The parties' submissions*

#### (a) The applicant

30. The applicant submitted that the Federal Supreme Court had wrongly found the expression "verbal racism" to be a mixed value judgment which required proof of veracity. In any event, considering the socio-political context, the description of B.K.'s speech as an act of "verbal racism" could not be regarded as devoid of any factual basis.

31. The Federal Supreme Court found that because his statements were labelled as "verbal racism", B.K was implicitly being accused of a criminal offence under Article 261$^{bis}$ of the Swiss Criminal Code. However, in the applicant organisation's view, the criminal offence of "racial discrimination" could not be equated with the term "racism". The concept of racism was highly complex and often disputed and a brief reference by the Federal Supreme Court to a dictionary entry could not sufficiently explain its complexity.

32. The applicant organisation regularly wrote about racist incidents that did not fall within the meaning of a criminal offence. Its website clearly explained its wide understanding of the term "racism" and detailed the contents of the category "verbal racism" so that readers were well aware of what to expect. In the applicant organisation's view, prohibiting the term "racism" from being used to describe certain kinds of behaviour or statements if they did not amount to a criminal offence within the meaning of Article 261$^{bis}$ of the Criminal Code would be highly damaging to democratic society and in complete contradiction to various human rights standards.

33. In its role of "public watchdog", the applicant organisation argued that it deserved the same protection as the press and that the margin of appreciation of the respondent State should therefore be restricted. Moreover, it had exercised the degree of discretion required from all journalistic publications in the impugned Internet entry and had refrained from provocation.

34. The applicant stressed that the initiative against the construction of minarets had given rise to heated discussions in Switzerland. In its view, there was no doubt that that political initiative had been racist and discriminatory. That view had been confirmed by a number of renowned experts and bodies, which had held that the initiative was "racist" in nature, or at least racist-related.

35. The applicant organisation further argued that B.K., in his role as a politician, had to accept that he was more likely to become the subject of criticism than the average person, irrespective of his young age. Rejecting the Government's argument in that regard, the applicant organisation stated

that B.K. was an adult and thus bore full responsibility for his political activities.

36. Finally, the court proceedings at issue had had a chilling effect on the applicant organisation, not least in view of the considerable court and lawyers' fees it had been ordered to pay. Such actions had *de facto* put an end to its public watchdog activities as it now had to fear further court action. If it had not complied with the court order to remove the impugned entry from its website, the applicant organisation would have faced a fine of up to 10,000 Swiss francs (CHF) (around 9,200 euros (EUR)). Such costs were a serious threat to the applicant's right to freedom of expression, particularly in view of the fact that they could practically disable its functioning owing to its limited resources, which were earmarked for specific purposes.

**(b) The Government**

37. The Government submitted that the classification of B.K.'s statements as an act of "verbal racism" had constituted a mixed value judgment, which had to have a factual basis. The Federal Supreme Court had relied on the sense generally attributed to the notion of racism and the perception of B.K.'s statements that an average person would have had. In that regard, the Federal Supreme Court had referred to the definition in the reference dictionary for the German language, according to which racism related to the superiority of certain races or peoples over others due to their cultural capacity and, on the other hand, a corresponding attitude or behaviour towards other people belonging to certain races or peoples. A simple mention of the differences between two individuals or groups could not be interpreted as racism. Racism began where such a difference at the same time involved belittlement of the victim and where the highlighting of such differences was used to present the victim in a negative light and to denigrate them. In the Government's view, that definition corresponded to the one used by the Swiss Federal Commission Against Racism and the European Commission against Racism and Intolerance (ECRI).

38. The applicant organisation defined racism on its website and in the proceedings it had pointed out that the notion of racism had to be understood in a particularly wide sense so as to cover any grouping according to race, skin colour, origin, nationality, culture or religion. Nevertheless, the Government argued that in the context of the protection of reputation, the general sense attributed to the notion of racism had to be borne in mind, which implied in particular that the target group was of a lower value than one's own group. In his speech B.K. had only compared his own culture, founded on Christianity, with other cultures, including Islam. He had defined both of them and had designated his own culture as worthy of protection. His statements had not contained racist words

according to the generally accepted meaning of that term. Consequently, describing his statements as "verbal racism" had not had a factual basis.

39. The Government admitted that the applicant organisation could be described as a social "public watchdog" because of its objectives and area of work and that, consequently, it could benefit from the same protection as the press. They also agreed that B.K., as president of the local branch of a youth wing of a political party, having spoken publicly during a demonstration, had entered into the public arena and engaged in a political debate. Thus normally the limits of permitted criticism would need to be wider for him than for a private individual. Nevertheless, the Government argued that that principle had to be applied in a differentiated way because B.K. was only 21 years old at the time. He had been at the beginning of his political career and was unknown at national level. Those circumstances justified proper protection for his personality rights and reputation.

40. For the Government, even if it was accepted that both B.K.'s statements and the applicant organisation's Internet entry had been part of a political debate on a question of general interest, the impugned publication had not been a statement in a political debate but had merely been an account of a public gathering that was essentially factual in character. Furthermore, the applicant organisation had presented B.K.'s statements on the part of its website entitled "Chronology", which contained objective information rather than comments, thereby further increasing the factual component of its statement. The degree of exaggeration that was allowed in information of an essentially factual character was necessarily lower than that tolerated for ideas or opinions. The applicant's responsibility to supply exact and trustworthy information also took on particular importance when it came to the publication of a chronology. It had had the opportunity to prove the truth of the impugned statement, but had failed to do so.

41. The Government maintained that describing someone's words as "verbal racism" could generally decrease respect for that person and be associated by the average reader with an accusation of an offence punishable under criminal law. In the presence of words which equated to liability for criminal conduct, there had been a "pressing social need" to prevent people gaining the impression of such serious charges.

42. The sanctions against the applicant organisation had been of a civil nature and limited in scope. The ban on publishing the information in question on its website under the section "Chronology – Verbal racism" had not prevented the applicant organisation from publishing the information in question under another section or with another title.

43. In conclusion, there had been a pressing social need to take the impugned measure against the applicant organisation and the State had not overstepped the margin of appreciation it was afforded.

### *2. The Court's assessment*

#### (a) Whether there was an interference

44. It is not in dispute between the parties that the domestic courts' finding against the applicant organisation constituted an interference with its right to freedom of expression. Such interference will breach the Convention if it fails to satisfy the criteria set out in the second paragraph of Article 10. The Court must therefore determine whether the interference was "prescribed by law", pursued one or more of the legitimate aims listed in that paragraph and was "necessary in a democratic society" in order to achieve the aim sought.

#### (b) Whether it was prescribed by law

45. The applicant argued that Article 28 of the Swiss Civil Code had lacked foreseeability in view of its general lack of unspecific wording. According to the Government, the impugned measures had a sufficient legal basis in Swiss law.

46. The Court accepts that the interference in the present case was based on Article 28 of the Swiss Civil Code (see paragraph 14 above) and that that provision was accessible. The parties' views, however, diverge on its foreseeability. The Court must thus examine whether the provisions in question fulfill the foreseeability requirements.

47. A norm cannot be regarded as a "law" unless it is formulated with sufficient precision to enable individuals to regulate their conduct: they must be able – if need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. Those consequences need not be foreseeable with absolute certainty: experience shows this to be unattainable. Again, whilst certainty is highly desirable, it may entail excessive rigidity and the law must be able to keep pace with changing circumstances. Accordingly, many laws are inevitably couched in terms which, to a greater or lesser extent, are vague and whose interpretation and application are a question of practice (see *Karácsony and Others v. Hungary* [GC], no. 42461/13, § 124, ECHR 2016 (extracts), and *Delfi AS v. Estonia* [GC], no. 64569/09, § 121, ECHR 2015).

48. Turning to the present case, the Court finds no ambiguity in the content of the provisions of domestic law relied on by the national courts. As the Government submitted, the said provision has been in force since 1985 and the Federal Supreme Court has developed ample jurisprudence in relation to it. What is more, Article 28a of the Civil Code enumerates the possible measures that a court can take if it finds that there has been an unlawful infringement of an individual's personality rights. While it is primarily for the national authorities, notably the courts, to interpret and apply domestic law (see, among other authorities, *Centro Europa 7 S.r.l.*

*and Di Stefano v. Italy* [GC], no. 38433/09, § 140, ECHR 2012; *Korbely v. Hungary* [GC], no. 9174/02, §§ 72-73, ECHR 2008; and *Waite and Kennedy v. Germany* [GC], no. 26083/94, § 54, ECHR 1999-I), the Court finds nothing to suggest that the applicant organisation was not in a position to foresee, to a reasonable degree, the national appellate court's interpretation and application of Article 28 of the Civil Code to its case.

49. The Court therefore concludes that the impugned interference was "prescribed by law".

**(c) Whether there was a legitimate aim**

50. The Court finds that the interference pursued one of the legitimate aims set out in paragraph 2 of Article 10, namely the protection of the reputation and rights of others.

**(d) Whether it was necessary in a democratic society**

*(i) General principles*

51. Freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfillment. Subject to paragraph 2 of Article 10, it is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Such are the demands of pluralism, tolerance and broadmindedness without which there is no "democratic society" (see *Handyside v. the United Kingdom*, 7 December 1976, § 49, Series A no. 24; *Lindon, Otchakovsky-Laurens and July v. France* [GC], nos. 21279/02 and 36448/02, § 45, ECHR 2007-IV; and *Perinçek v. Switzerland* [GC], no. 27510/08, § 196, 15 October 2015).

52. The adjective "necessary", within the meaning of Article 10 § 2, implies the existence of a "pressing social need". The Contracting States have a certain margin of appreciation in assessing whether such a need exists, but it goes hand in hand with European supervision, embracing both the legislation and the decisions applying it, even those given by an independent court. The Court is therefore empowered to give the final ruling on whether a "restriction" or "penalty" is reconcilable with freedom of expression as protected by Article 10.

53. The Court's task in exercising its supervisory function is not to take the place of the national authorities but rather to review under Article 10 the decisions they have taken pursuant to their power of appreciation. In so doing, the Court must look at the "interference" complained of in the light of the case as a whole and determine whether the reasons adduced by the national authorities to justify it are "relevant and sufficient". In doing so, the Court has to satisfy itself that the national authorities applied standards which were in conformity with the principles embodied in Article 10 and,

moreover, that they based themselves on an acceptable assessment of the relevant facts (see, among others, *Mamère v. France*, no. 12697/03, § 19, ECHR 2006-XIII, and *Lindon, Otchakovsky-Laurens and July*, cited above, § 45).

54. The Court further recalls that the right to protection of reputation is protected by Article 8 of the Convention as part of the right to respect for private life. In order for Article 8 to come into play, however, an attack on a person's reputation must attain a certain level of seriousness and in a manner causing prejudice to personal enjoyment of the right to respect for private life (see *Medžlis Islamske Zajednice Brčko and Others v. Bosnia and Herzegovina* [GC], no. 17224/11, § 76, ECHR 2017). When examining the necessity of an interference in a democratic society in cases where the interests of the "protection of the reputation or rights of others" bring Article 8 into play, the Court may be required to verify whether the domestic authorities struck a fair balance when protecting two values guaranteed by the Convention which may come into conflict with each other in certain cases, namely, on the one hand, freedom of expression protected by Article 10 and, on the other, the right to respect for private life enshrined in Article 8 (see *Hachette Filipacchi Associés v. France*, no. 71111/01, § 43, 14 June 2007; *MGN Limited v. the United Kingdom*, no. 39401/04, § 142, 18 January 2011; and *Axel Springer AG v. Germany* [GC], no. 39954/08, § 84, 7 February 2012).

55. The Court has found that, as a matter of principle, the rights guaranteed under Articles 8 and 10 deserve equal respect, and the outcome of an application should not, in principle, vary according to whether it has been lodged with the Court under Article 10 of the Convention by the publisher of an offending article or under Article 8 of the Convention by the person who has been the subject of that article. Accordingly, the margin of appreciation should in principle be the same in both cases (see *Axel Springer AG*, cited above, § 87; *Von Hannover v. Germany (no. 2)* [GC], nos. 40660/08 and 60641/08, § 106, ECHR 2012; and *Couderc and Hachette Filipacchi Associés v. France* [GC], no. 40454/07, § 91, 10 November 2015). Where the balancing exercise between those two rights has been undertaken by the national authorities in conformity with the criteria laid down in the Court's case-law, the Court would require strong reasons to substitute its view for that of the domestic courts (see *Axel Springer AG*, cited above, § 88, and *Von Hannover (no. 2)*, cited above, § 107, with further references to *MGN Limited*, cited above, §§ 150 and 155, and *Palomo Sánchez and Others v. Spain* [GC], nos. 28955/06, 28957/06, 28959/06 and 28964/06, § 57, 12 September 2011).

56. The Court has already had occasion to lay down the relevant principles which must guide its assessment in this area. It has thus identified a number of criteria which may come into play in the context of balancing the competing rights (see *Couderc and Hachette Filipacchi Associés*,

cited above, § 93). The relevant criteria thus defined include: contribution to a debate of public interest, the degree of notoriety of the person affected, the subject of the news report, the prior conduct of the person concerned, and the content, form and consequences of the publication.

57. Lastly, the Court has previously accepted that when an NGO draws attention to matters of public interest, it is exercising a "public watchdog" role of similar importance to that of the press (see *Animal Defenders International v. the United Kingdom* [GC], no. 48876/08, § 103, ECHR 2013 (extracts)) and may be characterised as a social "watchdog" warranting similar protection under the Convention as that afforded to the press (ibid., and *Magyar Helsinki Bizottság v. Hungary* [GC], no. 18030/11, § 166, 8 November 2016).

*(ii) Application of the general principles in the present case*

58. The Court notes that the present case concerns a conflict of concurring rights, namely, on the one hand, respect for B.K.'s right to respect for his private life and freedom of expression and, on the other, the applicant organisation's right to freedom of expression.

59. Where national jurisdictions have carried out a balancing exercise in relation to those rights, the Court has to examine whether, during their assessment, they applied the criteria established in its jurisprudence on the subject (see *Axel Springer AG*, cited above, § 88) and whether the reasons that led them to take the impugned decisions were sufficient and relevant to justify the interference with the right to freedom of expression (see *Cicad v. Switzerland*, no. 17676/09, § 52, 7 June 2016). It will do so by examining the criteria established in it case-law (see paragraph 56 above) which are of relevance to the present case.

(*α) Contribution to a debate of public interest*

60. When assessing the impugned statements in the present case, it is first of all important to bear in mind the general background of the ongoing political debate in which both statements were made.

61. Both B.K.'s speech and the applicant organisation's article concerned a topic of intense public debate in Switzerland at the material time, which was the popular initiative against the construction of minarets, which was widely reported on in national and international media. The initiative, calling for a ban on the construction of minarets, was ultimately accepted by a referendum on 29 November 2009 and such a ban was included in the Swiss Constitution.

(β) How well-known is the person concerned and the subject of the report

62. The Court reiterates that a distinction has to be made between private individuals and persons acting in a public context, as political or public figures. Accordingly, whilst a private individual unknown to the

public may claim particular protection of his or her right to private life, the same is not true of public figures (see *Minelli v. Switzerland* (dec.), no. 14991/02, 14 June 2005, and *Petrenco v. Moldova*, no. 20928/05, § 55, 30 March 2010). For them, the limits of critical comment are wider as they are inevitably and knowingly exposed to public scrutiny and must therefore display a particularly high degree of tolerance (see *Ayhan Erdoğan v. Turkey*, no. 39656/03, § 25, 13 January 2009, and *Kuliś v. Poland*, no. 15601/02, § 47, 18 March 2008).

63. The Government argued that that principle had to be applied in a different way in the present case because B.K. was only 21 at the time he gave the critical speech. He was at the beginning of his political career and was unknown at national level. Those circumstances justified a proper level of protection for his personality rights and reputation.

64. The Court does not share the Government's view in this respect. B.K. had been elected president of a local branch of the youth wing of a major political party in Switzerland. The speech cited by the applicant organisation was clearly political and was made in the framework of support for his party's political goals, which at that time were to promote the popular initiative against the construction of minarets.

65. Consequently, B.K. had willingly exposed himself to public scrutiny by stating his political views and therefore had to show a higher degree of tolerance towards potential criticism of his statements by persons or organisations which did not share his views.

(γ) Content, form and consequences of the publication

66. In the present case the applicant reproduced B.K.'s speech, which had already been published on the political party's own website, but called it "verbal racism".

67. The Federal Supreme Court held that classifying B.K.'s speech as "verbal racism" had been a mixed value judgment which had had no factual basis because the speech had not been racist. In particular, the Federal Supreme Court held that for the average reader B.K.'s statements did not come across as belittling Muslims, but were merely defending Christianity as the Swiss guiding culture ("*schweizerische Leitkultur*"; see paragraph 13 above).

68. At this point the Court reiterates that a distinction needs to be made between statements of fact and value judgments in that, while the existence of facts can be demonstrated, the truth of value judgments is not susceptible of proof. The requirement to prove the truth of a value judgment is impossible to fulfil and infringes freedom of opinion itself, which is a fundamental part of the right secured by Article 10 (see, for example, *Lingens v. Austria*, 8 July 1986, § 46, Series A no. 103, and *Prager and Oberschlick v. Austria (no. 1)*, 23 May 1991, § 63, Series A no. 204). The classification of a statement as a fact or as a value judgment is a matter

which in the first place falls within the margin of appreciation of the national authorities, in particular the domestic courts (see *Prager and Oberschlick*, cited above, § 36). However, where a statement amounts to a value judgment, the proportionality of an interference may depend on whether there existed a sufficient "factual basis" for the impugned statement: if there was not, that value judgment may prove excessive (see *Morice v. France* [GC], no. 29369/10, § 126, 23 April 2015). In order to distinguish between a factual allegation and a value judgment it is necessary to take account of the circumstances of the case and the general tone of the remarks, bearing in mind that assertions about matters of public interest may, on that basis, constitute value judgments rather than statements of fact (see *Paturel v. France*, no. 54968/00, § 37, 22 December 2005).

69. Turning to the present case, the Court considers that the applicant's classification of B.K.'s speech as "verbal racism" constituted a value judgment as it contained the applicant's organisation's own comment on B.K.'s statements. What the Court has to establish is whether such a comment could be said to have had a sufficient factual basis, bearing in mind the general background of the ongoing political debate in which the statement was made (see paragraph 61 above).

70. In the present case, it is not the Court's task to settle the question of the definition of racism, which seems to have been in dispute between the applicant and the respondent in the domestic proceedings. The Court takes note of the Federal Supreme Court's conclusion, which was that merely pointing out a difference between two individuals or groups could not be interpreted as racism (see paragraph 13 above). At the same time, it is mindful of the definitions of racism by ECRI and the Swiss Federal Commission against Racism (see paragraphs 18 and 17 above).

71. The Court also attaches importance to the documents from various specialised national and international bodies on the matter. The tone taken in the political discourse of the supporters of the initiative in question was described in ECRI's 2009 report on Switzerland as one that "largely contributes to the stigmatisation [of Muslims] and to the reinforcement of racist prejudice and discrimination against them by members of the majority community" (see paragraph 19 above). Likewise, the Swiss Federal Commission Against Racism noted in its recommendations that the initiative defamed and discriminated against Muslim men and women (see paragraph 16 above). Furthermore, in 2014 the UN Committee on the Elimination of Racial Discrimination reported on the initiative in its concluding observations under the title "Racism and xenophobia in politics and the media" (see paragraph 20 above).

72. Moreover, as observed by the Federal Supreme Court, B.K's speech implied that the "Swiss guiding culture" was "worthy of protection and defence" against the expansion of Islam (see paragraph 13 above). In the

Court's view, this in itself would suggest that the latter was something negative from which the former needed protection and that B.K.'s speech was thus not merely limited to the "demonstration of a difference".

73. For the foregoing reasons, the Court considers that it cannot be said that classifying B.K.'s speech as "verbal racism" when it supported an initiative which had already been described by various organisations as discriminatory, xenophobic or racist, could be regarded as devoid of any factual basis.

74. The Court further observes that the applicant never suggested that B.K.'s statements fell within the scope of the criminal offence of racial discrimination under Article 261$^{bis}$ of the Swiss Criminal Code. In fact, in its arguments before the national authorities and the Court (see paragraph 32 above), the applicant organisation stressed the need to be able to describe an individual's statement as racist without necessarily implying criminal liability.

75. What is more, in the Court's view, the impugned description cannot be understood as a gratuitous personal attack on or insult to B.K. The applicant organisation did not refer to his private or family life, but to the manner in which his political speech had been perceived. As already stated, B.K., as a young politician expressing his view publicly on a very sensitive topic, must have known that his speech might cause a critical reaction among his political opponents.

76. In view of the foregoing, the impugned categorisation of B.K.'s statement as "verbal racism" on the applicant organisation's website could hardly be said to have had harmful consequences for his private or professional life (see, *a contrario*, *Cicad*, cited above, § 56).

(δ) Severity of the sanction

77. Finally, the nature and severity of the sanction imposed on an applicant are also factors to be taken into account when assessing the proportionality of an interference. The domestic courts ordered the applicant organisation to remove the impugned article from its website and to publish the conclusion of the second-instance court. It also had to pay CHF 3,335 plus tax in court fees and reimburse B.K.'s legal costs of CHF 3,830 plus tax.

78. In the Court's view, the above sanction, however mild, may have had a "chilling effect" on the exercise of the applicant organisation's freedom of expression as it may have discouraged it from pursuing its statutory aims and criticising political statements and policies in the future (see, *mutatis mutandis*, *Lewandowska-Malec v. Poland*, no. 39660/07, § 70, 18 September 2012).

(ε) Conclusion

79. In the light of all of the above-mentioned considerations, the Court considers that the arguments advanced by the Government with regard to the protection of B.K.'s personality rights, although relevant, cannot be regarded as sufficient to justify the interference at issue. In reviewing the circumstances submitted for their assessment, the domestic courts did not give due consideration to the principles and criteria laid down by the Court's case-law for balancing the right to respect for private life and the right to freedom of expression (see paragraphs 55 and 56 above). They thus exceeded the margin of appreciation afforded to them and failed to strike a reasonable balance of proportionality between the measures restricting the applicant organisation's right to freedom of expression and the legitimate aim pursued.

80. There has accordingly been a violation of Article 10 of the Convention.

## III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

81. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

### A. Damage

82. The applicant organisation claimed 5,000 euros (EUR) in respect of non-pecuniary damage.

83. The Government considered this claim excessive and submitted that the mere finding of a violation would suffice to cover any non-pecuniary damage suffered by the applicant.

84. In view of the violation found, the Court awards the applicant the amount requested in full.

### B. Costs and expenses

85. The applicant organisation also claimed CHF 29,943.60 (approximately EUR 26,174.85) for costs and expenses, including legal representation, incurred before the domestic courts, and CHF 15,261.70 (approximately EUR 13,340.84) for costs and expenses incurred before the Court. The latter sum corresponds to approximately 47 hours of legal work billable by its lawyer at an hourly rate of CHF 300 plus postal and copying costs and tax.

86. The Government did not contest CHF 11,810.90 (approximately EUR 10,324.36) of the claim, which included the applicant's costs for the domestic courts and the amount it was ordered to pay in respect of B.K.'s legal costs at the domestic level. However, they contested the applicant's claims for its own legal representation in both the domestic and Court proceedings and proposed CHF 8,000 (approximately EUR 7,000) as appropriate compensation in that regard.

87. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. In the present case, regard being had to the documents in its possession and the above criteria, the Court considers it reasonable to award the sum of EUR 30,000 covering costs under all heads.

### C. Default interest

88. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

## FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the application admissible;

2. *Holds* that there has been a violation of Article 10 of the Convention;

3. *Holds*

(a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts, to be converted into the currency of the respondent State at the rate applicable at the date of settlement:

(i) EUR 5,000 (five thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;

(iii) EUR 30,000 (thirty thousand euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses;

(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

4. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 9 January 2018, pursuant to Rule 77§§ 2 and 3 of the Rules of Court.

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| Fatoş Aracı | Helena Jäderblom |
| Deputy Registrar | President |