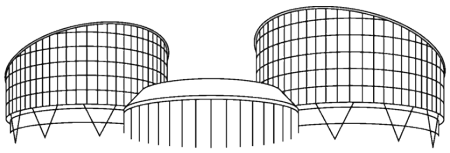

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIFTH SECTION

CASE OF EON v. FRANCE

(Application no. 26118/10)

JUDGMENT
(Extracts)

STRASBOURG

14 March 2013

FINAL

14/06/2013

This judgment is final but it may be subject to editorial revision.

In the case of Eon v. France,

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

Mark Villiger, *President*,
Ann Power-Forde,
Ganna Yudkivska,
André Potocki,
Paul Lemmens,
Helena Jäderblom,
Aleš Pejchal, *judges*,
and Claudia Westerdiek, *Section Registrar*,

Having deliberated in private on 12 February 2013,

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

PROCEDURE

1. The case originated in an application (no. 26118/10) against the French Republic lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a French national, Mr Hervé Eon ("the applicant"), on 12 April 2010.

2. The applicant was represented by Mr D. Nogueres, a lawyer practising in Paris. The French Government ("the Government") were represented by their Agent, Ms E. Belliard, Director of Legal Affairs, Ministry of Foreign Affairs.

3. The applicant alleged, in particular, a violation of Article 10 of the Convention.

4. On 15 April 2011 notice of the application was given to the Government.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1952 and lives in Laval.

6. On 28 August 2008, during a visit to Laval by the President of France, the applicant waved a small placard reading "*Casse toi pov'con*" ("Get lost, you sad prick") as the President's party was about to pass by.

7. The applicant was making an allusion to a much publicised phrase which the President himself had uttered on 23 February 2008 at the

International Agricultural Show in response to a farmer who had refused to shake his hand. The phrase had given rise to extensive comment and media coverage and had been widely circulated on the Internet and used as a slogan at demonstrations.

8. The applicant was immediately stopped by the police and taken to the police station. He was prosecuted by the public prosecutor for insulting the President, an offence under section 26 of the Act of 29 July 1881 (see paragraph 16 below). A summons to appear before the criminal court was handed to him later that day.

9. In a judgment of 6 November 2008 the Laval *tribunal de grande instance* found the applicant guilty of insulting the President and fined him 30 euros (EUR), a penalty which was suspended. The court held as follows:

> "... On the day of the President's visit ... the defendant ... saw fit to wave a small placard containing an exact copy, served cold, of a famous retort prompted by a direct affront.
>
> If the defendant had not intended to cause offence, but solely to give an incongruous lesson in manners, he would surely have preceded the phrase '*casse toi pov'con*' with words to the effect 'you shouldn't say'.
>
> Having adopted the phrase strictly as his own, he cannot reasonably maintain that he had no intention of causing offence. The apparently underlying issue of double standards does not even arise, since the purpose of the law is to protect the office of President, and Mr Eon, as an ordinary citizen, cannot claim the right to be treated on an equal footing.
>
> The offence of insulting the President of the French Republic has therefore been fully made out ..."

As to the sentence, the court noted that in view of the applicant's circumstances and modest income (EUR 450 per month), it was appropriate to give him a simple warning in the form of a fine described by the judges as "a matter of principle".

10. The applicant and the public prosecutor both appealed.

11. In a judgment of 24 March 2009 the Angers Court of Appeal upheld the lower court's judgment in its entirety. On the issue of the applicant's guilt, it set out its reasoning as follows:

> "As to the question of guilt:
>
> *Actus reus* of the offence
>
> The definition in the 1959, 2002 and 2006 editions of *Le Petit Larousse* is almost unchanged: 'insult [*offense*] is a concept defined as a remark or action which undermines a person's dignity or honour; in law, it specifically denotes an affront to a head of State (1959) or a public affront to the President of France ... constituting a criminal offence' (2006).
>
> It is accepted in the case-law that the *actus reus* of the offence is any insulting or disparaging expression or any defamatory insinuation that is liable to undermine the President's honour, dignity or reputation, either in the performance of his official

duties or in his private life. There is no need for lengthy discussion of the fact that describing the President as a 'sad prick' ['*pauvre con*'] amounts to insulting him.

The small placard containing the phrase in question is indisputably a form of publicly conveying a message, which can take place by means of placards or posters on public display (section 23 of the 1881 Act). Accordingly, the *actus reus* of the offence has been made out.

Mens rea of the offence

The expression '*casse toi pov'con*', which the first-instance judges described as a 'famous retort', does not obviate the need for an examination of the insulting nature of the phrase, which has not passed into the public domain and hence has not entered general usage or lost any insulting connotations it might have had. In other words, the accused cannot maintain that he was acting in good faith. In this connection, the court observes that Mr Hervé Eon is an activist and a former Socialist elected representative in the *département* of Mayenne, who had recently fought a long-running campaign actively supporting a Turkish family residing unlawfully in national territory; several days before the head of State's visit to Laval, this political battle had ended in a resounding failure for the support committee as the family had been deported. Mr Eon explained to the court that at the time of the events he had been feeling bitter, to say the least. Accordingly, his political involvement (as corroborated by the fact that the accused called a senator as a witness) and the very nature of the phrase used, which was wholly premeditated, conclusively rule out any notion of good faith. The court will therefore endorse the reasoning of the first-instance judges, who found that the accused could not reasonably maintain that he had no intention of causing offence.

The offence is therefore established in terms of both *actus reus* and *mens rea* as outlined above. The first-instance judges were thus correct in concluding from all these factors that the accused should be found guilty. ..."

The Court of Appeal further noted that the applicant had declined to apologise, which meant that he could not be given a discharge. It observed that the first-instance court had found that a simple warning was required and had given him a suspended fine of EUR 30 as a matter of principle. It noted that the applicant had a previous conviction for destroying genetically modified crops. Accordingly, it concluded that the penalty imposed was entirely appropriate in view of the nature of the offence and the applicant's character.

12. The applicant appealed on points of law to the Court of Cassation. He applied to the Court of Cassation's Legal Aid Board for legal aid. In a decision of 14 May 2009 the Legal Aid Board observed that the applicant's resources were below the statutory limit but refused his application, holding that no arguable ground of appeal could be made out. The applicant appealed to the judge delegated by the President of the Court of Cassation, challenging the decision to refuse legal aid in the absence of an arguable ground of appeal. He submitted as follows:

"In the case between myself and the public prosecutor's office, the reason for my appeal on points of law was obviously not the amount of the penalty but the question of the fundamental principle of freedom of expression and the concept of insulting the head of State. By not granting me legal aid, you are preventing me from lawfully exercising my rights in relation to a fundamental freedom."

13. In an order of 15 June 2009 the President of the Court of Cassation upheld the refusal to grant legal aid in the absence of any arguable grounds of appeal.

14. The applicant nevertheless pursued his appeal on points of law to its conclusion. The Government stated that on 15 September 2009 the law firm instructed to represent him had sent the Court of Cassation a letter indicating that it did not intend to file further pleadings in support of the appeal; nor had the applicant filed any pleadings himself. The applicant submitted that in view of his inability to pay the fees charged by the law firm, the firm had informed him that it would not file any pleadings.

15. In a judgment of 27 October 2009 the Court of Cassation declared the appeal inadmissible, finding that there were no grounds to warrant its examination.

II. RELEVANT DOMESTIC LAW AND PRACTICE

16. The offence of insulting the President of France (*offense*) is provided for in section 26 of the Freedom of the Press Act of 29 July 1881, which reads as follows:

> "Insulting the President of the Republic by one of the means set out in section 23 shall be punishable by a fine of 45,000 euros.
>
> The penalties provided for in the preceding subsection shall be applicable to insults to a person exercising all or part of the powers of the President."

As in the case of the offence of insulting the head of State, the penalties provided for in sections 30 and 31 of the 1881 Act, which respectively concern damage to the honour and reputation of public authorities (State institutions and administrative authorities) and persons vested with public authority (such as ministry officials), are more severe than those applicable to defamation of private individuals. However, the penalty for the ordinary offence of proffering insults (*injure*) is the same irrespective of whether the insult was directed at a private individual or a public authority: section 33 of the 1881 Act provides that "insults proffered in the same manner to private individuals, without prior provocation, shall be punishable by a fine of 12,000 euros". In a decision of 16 July 2010 the Court of Cassation (Criminal Division, no. 10-90.081), which had been asked for a preliminary ruling on constitutionality in the context of proceedings brought under section 31 of the Act of 29 July 1881, held as follows in response to the question whether section 31 infringed the principle of equality in that it entailed a more severe penalty for defamation of a civil servant than for defamation of a private individual:

> "... The question raised has no serious merit, seeing that firstly, the principle of equality does not prevent the law from being applied differently in different situations; secondly, although the fine applicable for public defamation of a civil servant is

> higher than that applicable for public defamation of a private individual, it serves as punishment, without being manifestly disproportionate, for the attack not only on the person at whom the offending remarks are directed but also on the function embodied by that person; and lastly, anyone prosecuted under section 31 of the Act of 29 July 1881 has the opportunity to prove that he or she acted in good faith.
>
> It follows that it is unnecessary to refer the question to the Constitutional Council ..."

17. The rationale behind making it a criminal offence to insult the head of State is to protect the latter from certain forms of attack on his or her honour or dignity. The power to bring a prosecution for the offence is vested solely in the public prosecutor's office, acting of its own motion (section 47 of the Act of 29 July 1881). According to the Government's explanations, the offence of insulting the head of State, unlike that of criminal defamation and the ordinary offence of proffering insults, is aimed more at protecting the function than the person. It is described in the Act as an "offence against the public good" and is thus set apart from offences against persons, which explains why a prosecution can be initiated only by the public prosecutor's office and not by the aggrieved party.

18. The notion of insulting the head of State is not defined in the 1881 Act. The following elements are required for the offence to be made out: an insult directed at the President personally, its commission by one of the means and in the public manner referred to in section 23 of the Act, and the intention to commit the offence.

19. As regards the public element, it is accepted that the insult may result from a piece of writing, and also from a photomontage, a caricature or a combination of a drawing and text (Court of Cassation, Criminal Division, 5 April 1965). Gestures are covered by the offence of abusing a person in authority (*outrage*) and may give rise to a prosecution under Article 433-5 of the Criminal Code.

20. The courts have defined insulting the head of State as "any insulting or disparaging expression or any defamatory insinuation which is liable to undermine the President's honour or dignity either in the performance of his presidential duties or in his private life, or in his public life prior to being elected" (Court of Cassation, Criminal Division, 21 December 1966, *Bull. crim.* no. 302). The insult must in principle be directed at the President personally and not his or her policies or the actions of his or her government. However, insults proffered at political events necessarily affect the person concerned. In a judgment of 12 April 1967 the Court of Cassation held as follows:

> "It appears from this examination that the passages in issue go beyond objective criticism of General de Gaulle's political activities before and during the Occupation, and during and after the Liberation, and do indeed constitute, as Court of Appeal found, a 'diatribe' which 'is not simply, as the accused maintain, a commentary on the events witnessed by the author of the book but a deliberate, violent and insulting personal attack on the President, to whom vile and base sentiments and motives are ascribed'.

> In particular, the head of State is described in these passages as an ambitious soul incapable of order, bent on domination to a dizzying, hallucinatory degree, having abandoned his post when faced with the enemy, sought to exploit the country's defeat and misfortune to his own advantage, stirred up discord among French citizens, practised a form of abusive despotism, trampled on the justice system, making it the instrument of his rage, rancour and hatred, and been the sole cause, through his own fault, of 'the infections gradually contaminating the nation's body and soul'.
>
> That being so, the judgment appealed against rightly held that the acts of which the appellant was accused fell within the scope of sections 26 and 61 of the Act of 29 July 1881, having been committed by one of the means listed in section 23 of the same Act.
>
> While all citizens have the right to open discussion by virtue of the general principles of law as enshrined in the Constitution of 4 October 1958, and while the Constitution allows the exercise of this fundamental freedom to extend to discussion of the President's political activities, the freedom to exercise this right ends where it becomes an insult to the head of State.
>
> Insults proffered at political events necessarily affect the person concerned.
>
> Where the acts to which the charge relates have been committed by one of the means set out in sections 23 and 28 of the Act of 29 July 1881, and the intention to cause offence is established, the *actus reus* of the offence punishable under section 26 of the Press Act is constituted by any insulting or disparaging expression or any defamatory insinuation which is liable to undermine the President's honour or dignity either in the performance of his presidential duties or in his private life, or in his public life prior to being elected.
>
> Criticism of, or purporting to be of, a historical nature is no more exempt from these rules than political controversy. ..."

21. Unlike in the case of criminal defamation and the ordinary offence of proffering insults, the *mens rea* of the offence of insulting the head of State is not presumed and must be established. The prosecution must prove that the person responsible for the insult acted in bad faith. The defence of justification (*exceptio veritatis*) cannot be pleaded on a charge of insulting the head of State. The 1881 Act did not extend to the offence of insulting the head of State the provisions of section 35, by which defamatory allegations against public officials are permissible if they can be proved true, because the offence defined in section 26 is separate from the offence of criminal defamation (Court of Cassation, Criminal Division, 21 December 1966, *Bull. crim.* no. 300).

22. The offence of insulting the President of France had become virtually obsolete. A significant number of prosecutions were brought while General de Gaulle was President. Under President Pompidou, only one prosecution was brought on this basis and none were brought under Presidents Giscard d'Estaing, Mitterrand and Chirac between 1974 and 2007. A number of private members' bills to abolish the offence were tabled by members of the Senate or the National Assembly after the events in issue in the present case (for instance, the Bill introduced by Senator Mélenchon in November 2008, or the Bill registered with the Presidency of the National

Assembly on 20 May 2010 and tabled by several of its members), the most recent one being registered with the Presidency of the Senate on 20 March 2012. In the explanatory memorandum the sponsor of the Bill (Mr Masson) stated: "... in so far as all citizens can use the provisions of ordinary law concerning the offences of proffering insults or defamation, the offence of insulting the President has no purpose. Moreover, the offence is abnormally extensive in that it may apply to a mere political slur or rather harsh criticism. For these reasons, nearly all modern democracies have removed the notion of insulting the head of State from their criminal codes. Luxembourg, for example, abolished the criminal offence of 'malicious attacks against the Grand Duke' in 2002, replacing it with the provisions of ordinary law."

23. The Government submitted that the legislation in France was not an isolated example in Europe. By way of example, they referred to Spain, Italy, the Netherlands, Poland and Turkey.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

24. The applicant complained that his conviction infringed his freedom of expression as enshrined in Article 10 of the Convention, which provides:

> "1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority ...
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

A. Admissibility

...

2. Lack of significant disadvantage

30. The Government submitted that the applicant had not suffered any significant disadvantage, particularly in financial terms, in view of the suspended fine of EUR 30 he had received, which he would not be required to pay unless he reoffended. They argued that the courts dealing with the

case had taken his financial position into account and that, even if he were required to pay the fine, the amount would not have a significant impact on his situation (they cited *Rinck v. France* (dec.), no. 18774/09, 19 October 2010).

31. The Government further argued that the safeguard clauses in Article 35 § 3 (b) were not applicable in the present case. Firstly, respect for human rights did not require the Court to pursue the examination of the application on the merits. They asserted that the Court had already held that a minor penalty to which an individual had been sentenced for abusive comments that made no contribution to political debate did not represent a disproportionate interference with freedom of expression (citing *Janowski v. Poland* [GC], no. 25716/94, ECHR 1999-I). Secondly, the case had been properly examined by domestic courts at two levels of jurisdiction and by the Court of Cassation. The fact that the latter court had declared the applicant's appeal inadmissible was not a denial of justice since he had had the opportunity to submit complaints against the Angers Court of Appeal's judgment and had never filed pleadings in support of his appeal to the Court of Cassation. Its decision not to consider his appeal was therefore the result of shortcomings on his own part and did not preclude the application of the admissibility criterion in Article 35 § 3 (b) (the Government cited *Korolev v. Russia* (dec.), no. 25551/05, ECHR 2010, and *Bratři Zátkove A.S. v. the Czech Republic* (dec.), no. 20862/06, 8 February 2011).

32. The applicant did not submit any observations on this issue.

33. The Court reiterates that an application may be rejected on the basis of the admissibility criterion laid down in Article 35 § 3 (b) of the Convention as amended by Protocol No. 14, which came into force on 1 June 2010. The relevant provisions of Article 35 read as follows:

> "3. The Court shall declare inadmissible any individual application submitted under Article 34 if it considers that:
>
> ...
>
> (b) the applicant has not suffered a significant disadvantage, unless respect for human rights as defined in the Convention and the Protocols thereto requires an examination of the application on the merits and provided that no case may be rejected on this ground which has not been duly considered by a domestic tribunal."

34. As to whether there was a "significant disadvantage", the Court observes, as the Government did, that the case concerns a modest sum of money and that its financial implications are therefore minimal. However, the seriousness of a violation should also be assessed by taking into account both the applicant's subjective perceptions and what is objectively at stake in a particular case. The issue at stake in this case was clearly of subjective importance to the applicant (contrast *Shefer v. Russia* (dec.), no. 45175/04, 13 March 2012). He pursued the proceedings to their conclusion, even after being refused legal aid because no arguable grounds of appeal could be

made out. As to what was objectively at stake, the Court observes that the case has received widespread media coverage and concerns the question whether insulting the head of State should remain a criminal offence, a matter that is regularly raised in Parliament (see paragraph 22 above).

35. As to whether respect for human rights as defined in the Convention and the Protocols thereto requires an examination of the application on the merits, the Court reiterates that the application raises an issue that is not insignificant, either at national level (see paragraph 34 above) or in Convention terms (see *Berladir and Others v. Russia*, no. 34202/06, § 34, 10 July 2012; see also the case-law cited in paragraph 55 below).

36. Having regard to the foregoing, the Court considers that the first requirement of Article 35 § 3 (b) of the Convention, namely the lack of any significant disadvantage for the applicant, has not been satisfied and that the Government's objection should therefore be dismissed.

3. Conclusion as to admissibility

37. The Court notes that no other ground for declaring the complaint inadmissible has been established. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

38. The applicant submitted that he had been the victim of a blatant infringement of his freedom of expression. By emphasising his activities as a militant socialist, the Court of Appeal had made a subjective assessment of the facts of the case, leading it to rule out any good faith on his part.

39. The applicant did not challenge the amount of the penalty, which was clearly modest, but rather the principle. He pointed out that the offence of insulting a foreign head of State as provided for in section 36 of the 1881 Act had been abolished following the *Colombani and Others v. France* judgment (no. 51279/99, ECHR 2002-V). In that judgment the Court had observed that "unlike the position under the ordinary law of defamation, the applicants were not able to rely on a defence of justification – that is to say proving the truth of the allegation – to escape criminal liability on the charge of insulting a foreign head of State. The inability to plead justification was a measure that went beyond what was required to protect a person's reputation and rights, even when that person was a head of State or government". In the light of that finding, the applicant urged the Court to conclude that the offence of insulting the President was in breach of the Convention as the relevant procedural rules were exactly the same as those in the repealed section 36: it was impossible to rely on the defence of justification. He suggested that the President should be added to the list of persons covered by special rules protecting them from abuses of freedom of

expression, which currently included ministers, members of parliament and civil servants; under these rules, set out in section 31 of the 1881 Act, the penalty was increased where defamatory allegations were made against any of the above but anyone making such allegations had the opportunity to defend himself or herself by proving that they were true.

40. The Government expressed doubts as to whether the phrase in issue in the present case – which did not contain any expression of opinion and had been displayed by a private individual, outside the context of any debate on a matter of public concern, while the President's party was passing by – could be covered by freedom of expression within the meaning of the first paragraph of Article 10.

41. In any event, they contended that the applicant's conviction had been prescribed by law, namely the Freedom of the Press Act of 29 July 1881, and had been necessary in a democratic society for the prevention of disorder, given the need to protect the institutional representative embodying one of the highest State authorities from verbal and physical attacks liable to undermine the State institutions themselves (they referred to *Janowski*, cited above, §§ 25 and 26; see also paragraph 17 above).

42. The Government submitted that the protection afforded to the President met a pressing social need. They argued that States enjoyed a broad margin of appreciation where the offending comment was not a contribution to a debate on matters of public concern (ibid.) or a form of political expression (referring, by contrast, to *Mamère v. France*, no. 12697/03, § 20, ECHR 2006-XIII) and where it did not form part of a journalist's activities (referring, by contrast, to *Colombani and Others*, cited above, §§ 57 and 64).

43. Turning to the present case, they observed that the applicant was not an elected representative and did not perform any function connected to the press; nor could the phrase in question be viewed as contributing to a debate on a matter of public concern. Moreover, the phrase had not been used in the context of a political event but on the public highway.

44. The Government added that the circumstances of the present case differed from those of *Colombani and Others* since it concerned an insulting verbal attack not based on any verifiable information, rather than facts reported by a journalist with the aim of informing the public about an issue of general concern.

45. Nor could the context of the incident justify the phrase displayed by the applicant. In the Government's submission, the same phrase had been uttered by the President in response to an affront by an individual who had behaved disparagingly towards him, and not in the course of a debate between politicians, which could be provocative and prompt vigorous reactions (they referred to *Pakdemirli v. Turkey*, no. 35839/97, § 47, 22 February 2005). Accordingly, while the Court tended to accept that the limits of permissible criticism were wider as regards politicians, that

principle had to be qualified where attacks were directed at the head of State and the "criticism" consisted of insulting comments.

46. Lastly, the Government submitted that the conviction had been proportionate in view of the amount of the fine, and contended that the domestic courts had displayed restraint in their handling of criminal proceedings, thus meeting the requirements of the Court's case-law (they cited *Castells v. Spain*, 23 April 1992, § 46, Series A no. 236).

2. The Court's assessment

47. The Court considers that the applicant's conviction amounted to "interference by public authority" with his right to freedom of expression and that the Government's arguments should be examined in relation to the restrictions on freedom of expression provided for in paragraph 2 of Article 10. Such interference will infringe the Convention if it does not meet the requirements of that paragraph. It must therefore be determined whether it was "prescribed by law", pursued one or more of the legitimate aims set out in paragraph 2 and was "necessary in a democratic society" to achieve them.

(a) Prescribed by law

48. The Court observes that the domestic courts based their decisions in particular on sections 23 and 26 of the Freedom of the Press Act of 29 July 1881. The interference was therefore "prescribed by law".

(b) Legitimate aim

49. In the Government's submission, the interference pursued the aim of preventing disorder. The Court considers, however, particularly in view of the reasons given by the domestic courts, that the purpose of the interference was "protection of the reputation ... of others".

(c) Necessary in a democratic society

50. It remains for the Court to determine whether the interference was "necessary" in a democratic society to achieve the legitimate aim pursued. In that connection it refers to the fundamental principles deriving from its case-law on the subject (see, among many other authorities, *Mamère*, cited above, and *Lindon, Otchakovsky-Laurens and July v. France* [GC], nos. 21279/02 and 36448/02, §§ 45 and 46, ECHR 2007-XI).

51. 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 (see *Fressoz and Roire v. France* [GC], no. 29183/95, § 45, ECHR 1999-I). This does not mean that the supervision is limited to ascertaining whether the respondent State exercised its discretion reasonably, carefully or in good

faith; what the Court has to do is to look at the interference complained of in the light of the case as a whole, including the content of the comments held against the applicants and the context in which they made them (see *News Verlags GmbH & Co. KG v. Austria*, no. 31457/96, § 52, ECHR 2000-I).

52. In particular, the Court must determine whether the reasons adduced by the national authorities to justify the interference were "relevant and sufficient" and whether the measure taken was "proportionate to the legitimate aims pursued" (see *Chauvy and Others v. France*, no. 64915/01, § 70, ECHR 2004-VI). In so doing, 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 their decisions on an acceptable assessment of the relevant facts (see, among many other authorities, *Zana v. Turkey*, 25 November 1997, § 51, *Reports of Judgments and Decisions* 1997-VII).

53. In the present case the Court notes that the phrase "*Casse toi pov'con*" on a placard waved by the applicant as the President's party was passing along the public highway was, in literal terms, insulting to the President. Nevertheless, the phrase should be examined in the light of the case as a whole, particularly with regard to the status of the person at whom it was directed, the applicant's own position, its form and the context of repetition of a previous statement.

54. After describing the phrase in question as an "exact copy, served cold, of a famous retort prompted by a direct affront", the national courts found, above all, that it had been repeated with the sole aim of causing offence. The first-instance court held that by "adopting the phrase strictly as his own", the applicant could not have had any other intention. The Court of Appeal considered that the applicant could not have acted in good faith – as the phrase had not passed into the public domain and entered general usage – having regard in particular to his political activism and the premeditated nature of his act.

55. The Court notes, first of all, that the restriction of the applicant's freedom of expression is unconnected with the interests of freedom of the press since the phrase in issue was not used in any such context. Accordingly, it does not consider it appropriate to examine the present case in the light of the *Colombani and Others* judgment (cited above). In that judgment the Court found that, unlike the position under the ordinary law of defamation, the applicants had been unable to rely on a defence of justification – that is to say, proving the truth of the allegation – to escape criminal liability on the charge of insulting a foreign head of State. It held that this peculiarity was a measure that went beyond what was required to protect a person's reputation and rights, even when that person was a head of State or government. In the present case the applicant, who was accused of using an insulting phrase, did not claim that the head of State had acted or spoken offensively towards him, and the phrase he used was an insult

rather than an allegation. That being so, he could not have relied on a defence of either provocation or justification. Furthermore, it should be noted that, as under the ordinary law, the domestic courts examined whether the applicant had acted in good faith, which might have served as justification for his acts, although they ruled out this possibility in view of his political activism and the premeditated nature of the phrase he had used. Lastly, the prosecution was initiated not by the President himself but by the public prosecutor's office, in accordance with the relevant domestic law.

In the light of these factors, the Court considers that it is not necessary in the present case to determine whether the criminal classification of the applicant's acts was compatible with the Convention – even if it is recognised that this was a special measure – since it did not have any particular effects or confer any privilege on the head of State concerned *vis-à-vis* the right to convey information and opinions concerning him (contrast *Artun and Güvener v. Turkey*, no. 75510/01, § 31, 26 June 2007, and *Pakdemirli*, cited above, §§ 51 and 52; see also the reference to these cases in *Otegi Mondragon v. Spain*, no. 2034/07, § 55, ECHR 2011).

56. The question nevertheless arises as to whether the restriction of the applicant's freedom of expression can be weighed against the interests of open discussion of matters of public concern in the context of the present case.

57. In this connection, the Court considers that the repetition of the phrase previously uttered by the President cannot be said to have targeted the latter's private life or honour, or to have amounted merely to a gratuitous personal attack against him.

58. The Court observes, firstly, that the factors taken into account by the Court of Appeal suggest that the applicant's intention was to level public criticism of a political nature at the head of State. Its judgment noted that he was an activist and former elected representative who had fought a long-running campaign actively supporting a Turkish family residing unlawfully in France. It pointed out that this political battle had ended in failure for the support committee several days prior to the President's visit to Laval, as the family had been deported, and added that the applicant had felt bitter as a result. Lastly, it established a link between his political involvement and the very nature of the phrase he had used.

59. The Court reiterates that there is little scope under Article 10 § 2 for restrictions on freedom of expression in the area of political speech or debate – where freedom of expression is of the utmost importance – or in matters of public interest. The limits of acceptable criticism are wider as regards a politician as such than as regards a private individual. Unlike the latter, the former inevitably and knowingly lays himself open to close scrutiny of his every word and deed by both journalists and the public at large, and he must consequently display a greater degree of tolerance (see *Lingens v. Austria*, 8 July 1986, § 42, Series A no. 103; *Vides Aizsardzības*

Klubs v. Latvia, no. 57829/00, § 40, 27 May 2004; and *Lopes Gomes da Silva v. Portugal*, no. 37698/97, § 30, ECHR 2000-X).

60. The Court further notes that by adopting an abrupt phrase that had been used by the President himself and had attracted extensive media coverage and widespread public comment, much of it humorous in tone, the applicant chose to express his criticism through the medium of irreverent satire. The Court has observed on several occasions that satire is a form of artistic expression and social commentary which, by its inherent features of exaggeration and distortion of reality, naturally aims to provoke and agitate. Accordingly, any interference with the right of an artist – or anyone else – to use this means of expression should be examined with particular care (see *Vereinigung Bildender Künstler v. Austria*, no. 8354/01, § 33, 25 January 2007; *Alves da Silva v. Portugal*, no. 41665/07, § 27, 20 October 2009; and, *mutatis mutandis*, *Tuşalp v. Turkey*, nos. 32131/08 and 41617/08, § 48, 21 February 2012).

61. The Court considers that criminal penalties for conduct such as that of the applicant in the present case are likely to have a chilling effect on satirical forms of expression relating to topical issues. Such forms of expression can themselves play a very important role in open discussion of matters of public concern, an indispensable feature of a democratic society (see, *mutatis mutandis*, *Alves da Silva*, cited above, § 29).

62. Having regard to the foregoing, and having assessed the purpose of a criminal conviction for insulting the head of State in the particular circumstances of the case and the effect of the conviction on the applicant, the Court considers that the competent authorities' recourse to a criminal penalty was disproportionate to the aim pursued and hence unnecessary in a democratic society.

...

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

65. 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."

66. The applicant claimed 5,000 euros in respect of the non-pecuniary damage he had sustained.

67. The Government expressed the view that the finding of a violation would constitute sufficient redress for the damage alleged.

68. The Court considers that in the circumstances of the case, the finding of a violation in this judgment constitutes sufficient just satisfaction in itself.

FOR THESE REASONS, THE COURT

1. *Declares*, by six votes to one, the complaint under Article 10 of the Convention admissible and, unanimously, the remainder of the application inadmissible;

2. *Holds*, by six votes to one, that there has been a violation of Article 10 of the Convention;

3. *Holds*, by five votes to two, that the finding of a violation constitutes sufficient just satisfaction for the non-pecuniary damage sustained by the applicant.

Done in French, and notified in writing on 14 March 2013, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Claudia Westerdiek	Mark Villiger
Registrar	President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following separate opinions are annexed to this judgment:

(a) partly dissenting opinion of Judge Power-Forde;
(b) declaration by Judge Yudkivska;
(c) partly dissenting opinion of Judge Pejchal.

M.V.
C.W.

PARTLY DISSENTING OPINION OF JUDGE POWER-FORDE

I agree with the majority's finding that there has been a violation of the applicant's right to freedom of expression. I disagree that this finding in itself constitutes just satisfaction. Notwithstanding the fact that the penalty imposed upon the applicant was light, he was nevertheless subjected to the ordeal of criminal proceedings and convicted of a criminal offence for exercising his right to freedom of expression. This, by any standards, must have caused anxiety, apprehension and distress. The majority, in my view, should not have departed from the Court's usual practice in Article 10 cases[1] and should have awarded the applicant the modest compensation which he sought. To my mind, he was entitled to something more than "*a mere moral victory or the satisfaction of having contributed to enriching the Court's case-law*".[2]

As to that case-law, I appreciate the distinction drawn by the majority between the position of the applicant and those in *Colombani and Others v. France*.[3] However, I would add that the rationale behind the criminal offences in issue was the same, namely, to confer upon heads of State a special legal status "*shielding them from criticism solely on account of their function or status, irrespective of whether the criticism is warranted*". In *Colombani and Others* (§ 68) the Court found that such a special privilege "*cannot be reconciled with modern practice and political conceptions*". Whatever the obvious interest which every State has in maintaining respect for its head or friendly relations with heads of other States, "*such a privilege exceeds what is necessary for that objective to be attained*". The Court in *Colombani and Others* took the view that the existence of such an offence was liable to inhibit and undermine freedom of expression without meeting any "pressing social need" that was capable of justifying such a restriction (ibid., § 69). To my mind, the majority should have affirmed the applicability of that principle in the context of the present case.

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[1] See, for example, *Oberschlick v. Austria (no. 2)*, 1 July 1997, *Reports of Judgments and Decisions* 1997-IV; *Jersild v. Denmark*, 23 September 1994, Series A no. 298; *Lingens v. Austria*, 8 July 1986, Series A no. 103; *Fressoz and Roire v. France* [GC], no. 29183/95, ECHR 1999-I; *Roemen and Schmit v. Luxembourg*, no. 51772/99, ECHR 2003-IV; and *Marchenko v. Ukraine*, no. 4063/04, 19 February 2009.

[2] A phrase used in paragraph 2 of the partly dissenting opinion of Judge Casadevall joined by Judges Bonello and Kovler in *Kingsley v. the United Kingdom* [GC], no. 35605/97, ECHR 2002-IV.

[3] *Colombani and Others v. France*, no. 51279/99, ECHR 2002-V.

DECLARATION BY JUDGE YUDKIVSKA

I voted against point 3 of the operative part of the judgment for the reasons expressed by Judge Power-Forde in her separate opinion.

PARTLY DISSENTING OPINION OF JUDGE PEJCHAL

The Explanatory Report to Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the control system of the Convention, sets out a new admissibility criterion, its paragraph 80 reading as follows:

> "The main element contained in the new criterion is the question whether the applicant has suffered a significant disadvantage. These terms are open to interpretation (this is the additional element of flexibility introduced); the same is true of many other terms used in the Convention, including some other admissibility criteria. Like those other terms, they are legal terms capable of, and requiring, interpretation establishing objective criteria through the gradual development of the case-law of the Court."

It follows from this paragraph that there are two important elements:

1. The main element – "a significant disadvantage suffered".
2. The additional element – "its openness to interpretation".

Why is the question whether a significant disadvantage has been suffered by the applicant laid down as the main element of the new admissibility criterion? Because this element has to form an integral part of all consideration by the Court of a violation of any Article of the Convention. And why is this element open to interpretation? It is a matter of fact that any consideration by the Court implies interpretation of the Convention.

Nonetheless, every international treaty must be interpreted within the limits of international law. Any consideration of the Court is also bound by international law. The general rule of interpretation of international treaties is provided for in the Vienna Convention on the Law of Treaties, in Article 31 § 1 thereof, which reads as follows: "*A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.*"

A judgment of the Court is not a philosophical disputation as to whether the Convention may have been violated. A judgment of the Court is an individual decision on an alleged violation of the Convention which incorporates an individual decision as to a significant disadvantage which the applicant has suffered. I agree with the majority that this case can be generally judged as a violation of Article 10 of the Convention. However, I do not see in the complaint under Article 10 any significant disadvantage suffered by the applicant. The suspended penalty of 30 euros cannot, in my opinion, be considered consonant with the "ordinary meaning" of a significant disadvantage. Moreover, the same majority (including myself) considered that the criminal trial was in compliance with Article 6 § 1 of the

Convention, or more precisely declared the complaints under Article 6 § 1 of the Convention inadmissible.

For the absence of a significant disadvantage I suggested that the complaint under Article 10 of the Convention be declared inadmissible.