

COURT (CHAMBER)

CASE OF CASTELLS v. SPAIN

(Application no. 11798/85)

JUDGMENT

STRASBOURG

23 April 1992

In the case of Castells v. Spain*,

The European Court of Human Rights, sitting, in accordance with Article 43 (art. 43) of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention")** and the relevant provisions of the Rules of Court, as a Chamber composed of the following judges:

Mr R. Ryssdal, President,

Mr Thór Vilhjálmsson,

Mr R. Macdonald,

Mr J. De Meyer,

Mr S.K. Martens,

Mrs E. Palm,

Mr R. Pekkanen,

Mr A.N. Loizou,

Mr J.A. Carrillo Salcedo, ad hoc Judge,

and also of Mr M.-A. Eissen, Registrar, and Mr H. Petzold, Deputy Registrar,

Having deliberated in private on 29 November 1991 and 26 March 1992,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case was referred to the Court by the European Commission of Human Rights ("the Commission") and by the Government of the Kingdom of **Spain** ("the Government") on 8 and 21 March 1991 respectively, within the three-month period laid down by Article 32 para. 1 and Article 47 (art. 32-1, art. 47) of the Convention. It originated in an application (no. 11798/85) against **Spain** lodged with the Commission under Article 25 (art. 25) by a Spanish national, Mr Miguel **Castells**, on 17 September 1985.

The Commission's request referred to Articles 44 and 48 (art. 44, art. 48) and to the declaration whereby **Spain** recognised the compulsory jurisdiction of the Court (Article 46) (art. 46); the Government's application referred to Article 48 (art. 48). The object of

the request and of the application was to obtain a decision as to whether the facts of the case disclosed a breach by the respondent State of its obligations under Article 10 (art. 10) of the Convention, taken alone or in conjunction with Article 14 (art. 14+10).

2. In response to the enquiry made in accordance with Rule 33 para. 3 (d) of the Rules of Court, the applicant stated that he wished to take part in the proceedings and sought leave, as a lawyer, to present his own case, assisted by two Spanish fellow lawyers (Rule 30 para. 1).

The President granted this request on 15 April 1991 and authorised the applicant to use the Spanish language (Rule 27 para. 3).

3. The Chamber to be constituted included ex officio Mr J.M. Morenilla, the elected judge of Spanish nationality (Article 43 of the Convention) (art. 43), and Mr R. Ryssdal, the President of the Court (Rule 21 para. 3 (b)). On 22 March 1991, Mr F. Matscher, having been duly delegated by the President, drew by lot, in the presence of the Registrar, the names of the other seven members, namely Mr Thór Vilhjálmsson, Mr R. Macdonald, Mr J. De Meyer, Mr S.K. Martens, Mrs E. Palm, Mr R. Pekkanen and Mr A.N. Loizou (Article 43 in fine of the Convention and Rule 21 para. 4) (art. 43).

By a letter to the President of 15 March, Mr Morenilla had declared his intention of withdrawing from the case pursuant to Rule 24 para. 2 because he had represented the Spanish Government before the Commission as Agent. On 26 April the Government notified the Registrar that Mr Juan Antonio Carrillo Salcedo, professor at Seville University, had been appointed ad hoc judge (Article 43 of the Convention and Rule 23) (art. 43).

4. Mr Ryssdal assumed the office of President of the Chamber (Rule 21 para. 5) and, through the Registrar, consulted the Agent of the Government, the Delegate of the Commission and the applicant on the organisation of the procedure (Rules 37 para. 1 and 38). Pursuant to the President's orders and instructions, the Registrar received the memorials of the Government and the applicant on 29 July and 29 August 1991 respectively. On 25 September the Secretary to the Commission produced various documents at the Registrar's request, then on 5 November submitted the Delegate's observations.

5. In accordance with the President's decision, the hearing took place in public in the Human Rights Building, Strasbourg, on 27 November 1991. The Court had held a preparatory meeting beforehand.

There appeared before the Court:

- for the Government

Mr J. Borrego Borrego, Head

of the Legal Department for Human Rights, Ministry of
Justice, *Agent*,

Mr J.M. Villar Uribarri, Ministry of Justice, *Counsel*;

- for the Commission

Mr L. Loucaides, *Delegate*;

- for the applicant

Mr M. **Castells**, abogado, applicant,

Mr J.M. Montero, abogado,

Mr E. Villa, abogado, *Counsel*,

Mr J. Vervaele, Professor,

Mr D. Korff, assistants.

The Court heard addresses by Mr Borrego Borrego for the Government, by Mr Loucaides for the Commission and, for the applicant, by Mr **Castells** himself, by Mr Montero, by Mr Villa and by Mr Vervaele, as well as their replies to its questions and to the question of a judge.

AS TO THE FACTS

6. Mr Miguel **Castells**, a Spanish national, resides at San Sebastián (Guipúzcoa), where he is a lawyer. At the material time he was a senator elected on the list of Herri Batasuna, a political grouping supporting independence for the Basque Country.

A. THE PARTICULAR CIRCUMSTANCES OF THE CASE

1. THE DISPUTED ARTICLE

7. In the week of 4 to 11 June 1979, the weekly magazine "Punto y Hora de Euskalherria" published an article entitled Insultante Impunidad (Outrageous Impunity) and signed by the applicant. The article read as follows:

"In a few days, at the San Fermín holiday, a year will have gone by since the murders of Germán Rodríguez at Pamplona (Iruna) and of Joseba Barandiarán at San Sebastián (Donosti). The authorities have not identified the perpetrators of these crimes. They have not even acknowledged to which organisations they belong. Nor have they identified the persons who killed, between 12 and 15 May 1977, Gregorio Marichalar Ayestarán, aged 63, and Rafael Gómez Jauregui, aged 78, at Rentería, José Luis Cano at Irun and Manuel Fuentes Mesa at Ortuella; on 14 May, again in 1977, José Luis

Aristizábal at San Sebastián, and, at around the same date, in the same town, Isidro Susperregui Aldekoa, over 70 years old; at the beginning of June, still in 1977, Javier Núñez Fernández at Bilbao; Francisco Aznar Clemente, Pedro María Martínez Ocio, Romualdo Barroso Chaparro, Juan José Castillo and Bienvenido Pereda Moral, on 3 March 1976 at Gasteiz, and, in the same year, on 7 March at Basauri, Vicente Antón Ferrero, on 9 May at Montejurra, Aniano Jiménez and Ricardo Pellejero, in June Alberto Romero Soliño at Eibar, in September Jesús María Zabala at Fuenterrabía, in November Santiago Navas and José Javier Nuin at Santesteban and on 10 July Normi Menchaka at Santurce; José Emilio Fernández Pérez, 16 years old, and Felipe Carro Flores, 15 years old, on 24 July and 25 July 1978, one at Apatomonasterio and the other at Sestao. I only mention the dead ones and the list is far from being exhaustive. These are only examples. Not one, I repeat, not one of the murders, of the interminable list of fascist murders carried out in the Basque Country (Euzkadi), has shown the slightest sign of being cleared up by the authorities. Will the individuals who assassinated Emilia Larrea, Roberto Aramburu, Josemar Iturriz, Agurtzane Arregui, Argala, José Ramon Ansa and Gladys del Estal, the most recent murders, be identified? And when I say most recent I should specify the date -9 June 1979 - because tomorrow there will be others.

And there remain the hundreds of cases, for there are hundreds of them, in which people burst in, pistols at the ready, to the bars of the villages and the suburbs (Amorebieta, Durango, Eguía, Loyola, etc.) or simply run through the streets wounding and beating up everyone they come across; the bombs left in popular meeting places (Punto y Hora, Bordatxo, Alay Bar, Santi Bar, Askatasuna etc.) or in cars, attacks whose survivors suffer the consequences for life etc.

The perpetrators of these crimes act, continue to work and remain in posts of responsibility, with total impunity. No warrant has been issued for their arrest. The description of the persons who carried out these acts has been neither drawn up or published; nor have there been any lists of suspects in the newspapers, or photokit pictures, and, far less, rewards offered to the public, or arrests, or inspections or searches of their homes. The public's help has not been sought through the media, as has happened in other cases. Indeed it is significant that such help is not even accepted in connection with these crimes. No link has been established, there have been no official communiqués full of explicit accusations and reprobation in the press, as in other cases.

The right-wing, who are in power, have all the means at their disposal (police, courts and prisons) to seek out and punish the perpetrators of so many crimes. But don't worry, the right will not seek itself out.

Extreme right-wing organisations? Before Franco's death no one in the Basque Country thought that it was possible to secure the arrest or conviction for "unlawful association" of a single member, and far less one of the leaders, of the "Triple A", of the "Batallón Vasco-Español", of the "Batallón Guezalaga", of the ATE, of the Adolf Hitler commando, of the Francisco Franco commando, of the Mussolini commando, of the New Order, of Omega, of the "Movimiento Social Español", of "Acción Nacional Española" or of the "Guerrilleros de Cristo Rey". No one can believe it now either.

"ETA" members held as prisoners? Hundreds of them have been to prison. Persons suspected of being members of "ETA"? Thousands of them have been detained in police stations. Sympathisers? One could go on with the list forever. Yet not a single leader or member of the Triple A has been bothered.

Those responsible for public order and criminal prosecutions are the same today as they were before. And here in the Basque Country nothing has changed as far as impunity and questions of liability are concerned.

The period when Ibanez Freire was Director General of the Civil Guard, and Fraga was Minister of the Interior, was also a time when there was a great increase in so-called extreme right-wing activities in the Basque Country. The same phenomenon, the same coincidences are recurring now.

The increase in the activities of groups free to act as they will is generally accompanied in the Basque Country by an increase in the strength of the security forces.

These commandos, because we have to call them something, seem totally at home in the Basque Country, in the middle of a community completely hostile to them. This is too inexplicable for there not to be an obvious explanation. They have precise information to carry out their attacks, often more detailed than that available to local people.

They have substantial files which are kept up to date. They have a considerable supply of weapons and of money. They have unlimited material and resources and operate with complete impunity. Considering the timing of their operations and the conditions in which they are carried out it can be said that they are guaranteed legal immunity in advance. Forbidding people to see this is futile.

This is important to the people. In the Basque Country it is more important than all the provisional schemes for self-government, democratic consensus and other meaningless or abstract nonsense, because it is a visible, tangible reality which confronts people on a daily basis.

Frankly, I do not believe that the fascist associations which I cited earlier have any independent existence, outside the State apparatus. In other words I do not believe that they actually exist. Despite all these different badges, it is always the same people.

Behind these acts there can only be the Government, the party of the Government and their personnel. We know that they are increasingly going to use as a political instrument the ruthless hunting down of Basque dissidents and their physical elimination. If they want to be so lacking in a sense of political vision that's their problem! But for the sake of the next victim from our people, those responsible must be identified right away with maximum publicity."

2. THE CRIMINAL PROCEEDINGS AGAINST THE APPLICANT

(A) THE JUDICIAL INVESTIGATION

8. On 3 July 1979 the prosecuting authorities instituted criminal proceedings against Mr **Castells** for insulting the Government (Article 161 of the Criminal Code; see paragraph 20 below). The court with competence for the investigation procedure, the Supreme Court, requested the Senate to withdraw the applicant's parliamentary immunity, which it did by a majority on 27 May 1981.

9. On 7 July 1981 the Supreme Court charged the applicant with having proffered serious insults against the Government and civil servants (Articles 161 para. 1 and 242 of the Criminal Code). It further ordered his detention on remand, taking into account the sentences laid down for the offences in question (six to twelve years' imprisonment; see paragraph 20 below), but allowed his release on bail in view of his status as a senator and the "lack of alarm" (*falta de alarma*) caused by the alleged offences.

On 28 September 1981 the court varied its previous decision. It allowed the applicant's provisional release subject solely to the obligation to report to the judge at regular intervals. In addition to the circumstances already cited, it stressed that, during his questioning, Mr **Castells** had shown a co-operative attitude and had declared that his article had been intended merely as a political denunciation and not to insult or threaten the Government or its members.

10. On 12 December 1981 the applicant's defence counsel challenged four of the five members of the relevant division of the Supreme Court. It was submitted that their political convictions and the posts which they had held under the previous political regime disqualified them from hearing a case concerning the freedom of opinion of an individual who, like the applicant, had been a notorious opponent of the regime in question. They relied on Article 54 para. 9 of the Code of Criminal Procedure.

After several interlocutory applications, including one which resulted in a decision of the Constitutional Court on 12 July 1982 enjoining the Supreme Court to find the challenge admissible, the latter court, sitting in plenary session, dismissed the challenge on its merits on 11 January 1983. The Supreme Court took the view that although the judges had indeed sat in the Criminal Division of the Supreme Court under the previous political regime and one of them had, from 1966 to 1968, been the presiding judge in the Public Order Court, they had at that time merely applied the legislation in force.

On 4 May 1983 the Constitutional Court dismissed an appeal (amparo) which Mr **Castells** had lodged alleging a violation of Article 24 para. 2 of the Constitution (right to an impartial tribunal). It found that the fact that the judges in question might have political convictions differing from those of the applicant could not be regarded as being of direct or indirect relevance (*interés directo o indirecto*) to the solution of the dispute within the meaning of Article 54 para. 9 of the Code of Criminal Procedure.

11. In the meantime the investigation of the case had progressed. On 3 February 1982 the public prosecutor had concluded that the facts constituted an offence of proffering serious insults against the Government and demanded a prison sentence of six years and a day.

In their memorial (*conclusiones provisionales*) of 2 April 1982, the defence lawyers contended that the disputed article contained accurate information and did not express the accused's personal opinion, but the views of the general public. They offered to adduce evidence to establish the truth of the information. In particular they suggested that the competent authorities should produce reports on any police inquiries, detentions, prosecutions or other measures undertaken against the members of the extreme right-wing groups responsible for the attacks denounced in the article; as the facts reported were common knowledge they could not be said to be insulting. In addition, the defence lawyers requested that evidence be taken from fifty-two witnesses, including members of the Belgian, Italian, French, English, Irish and Danish parliaments and of the European Parliament, on the matter of parliamentary practice regarding the freedom of political criticism; they argued that the accused had acted in his capacity as an elected representative and in conformity with the obligations attaching thereto.

12. By decision (*Auto*) of 19 May 1982, the Supreme Court refused to admit the majority of the evidence put forward by the defence, on the ground that it was intended to show the truth of the information disseminated.

There were divergences in academic opinion and even in its own case-law as to whether the defence of truth (*exceptio veritatis*) could be pleaded in respect of insults directed at the State institutions, but the reforms of the Criminal Code then under way clarified the question: those institutions fell outside the scope of that defence and Article 461 of the Criminal Code (see paragraph 21 below) authorised it only where civil servants were involved. The evidence which the defence proposed to adduce was not therefore admissible in the proceedings pending, without prejudice to the possibility available to the accused of instituting criminal proceedings as he considered fit.

Mr **Castells** filed an appeal (*recurso de súplica*), but on 16 June 1982 the Supreme Court confirmed its decision on the ground that the accuracy of the information was not decisive for a charge of insulting the Government.

The applicant then filed an appeal (*amparo*) in the Constitutional Court, alleging that the rights of the defence had been disregarded. That court dismissed it on 10 November 1982, holding that the question could be resolved only in the light of the proceedings in their entirety and after the decision of the trial court.

(B) THE TRIAL

13. The Criminal Division of the Supreme Court held a hearing on 27 October 1983 and gave judgment on 31 October. It sentenced the applicant to a term of imprisonment of one year and a day for proffering insults of a less serious kind (*menos graves*) against the Government; as an accessory penalty he was also disqualified for the same period from holding any public office and exercising a profession and ordered to pay costs.

It found in the first place, with regard to the objective element of the offence, that the expressions used in the article were sufficiently strong to damage the reputation of the injured parties and to reveal an attitude of contempt. As far as the subjective element was concerned, it considered that, as a senator, Mr **Castells** had available to him very obvious means of expression, provided for in the Assembly's rules of procedure, through which to carry out his duties of monitoring and criticising the Government's activities; as he had failed to use these means, he could not claim to have acted on behalf of his electorate. The defence's second argument, based on the aim of political criticism (*animus criticandi*), did not remove its defamatory purpose (*animus injuriandi*), but reduced the importance thereof. In the case under examination, the insults proffered with the aim of political criticism had exceeded the permissible limits of such criticism and attacked the Government's honour. It was therefore preferable to apply Article 162 of the Criminal Code, which provided for the offence of proffering less serious insults against the Government, rather than Article 161. On the question of the constitutional right to freedom of expression (Article 20 of the Constitution; see paragraph 19 below) there were limits to that right, in particular in relation to the right to honour and to a private life and the right to control use of one's likeness. Furthermore, the fact that the insult appeared in a press article suggested that it was the fruit of a more complicated intellectual process and a degree of reasoning which made it more clear and precise.

Finally, the Supreme Court confirmed its decision of 19 May 1982 regarding the admissibility of the defence of truth.

The applicant again indicated in the Supreme Court his intention of filing an appeal (amparo) against the judgment, relying inter alia on Articles 14, 20, 23 and 24 of the Constitution. He lodged his appeal on 22 November 1983.

14. On 6 December 1983 the Supreme Court, having regard to the circumstances of the case, stayed for two years the enforcement of the prison sentence (Article 93 of the Criminal Code), but left in place the accessory penalty. The enforcement of the latter measure was nevertheless stayed by the Constitutional Court on 22 February 1984.

3. THE APPEAL (AMPARO) TO THE CONSTITUTIONAL COURT

15. In his appeal (amparo) of 22 November 1983, Mr **Castells** complained that he had not been able to have the Supreme Court's judgment examined by a higher court and of the length of the proceedings.

He maintained further that the court had violated the principle of the presumption of innocence by refusing to allow him to adduce evidence. He considered it contrary to the most elementary rules of justice to convict someone - and in this case a senator - for making statements which were accurate and sufficiently important for it to be necessary to bring them to the attention of the community as a matter of urgency and in detail, without having allowed him to establish their truth.

He alleged, in addition, a breach of the principle of equality before the law (Article 14 of the Constitution), taken alone or in conjunction with the right to freedom of expression (Article 20), as other persons had published similar articles without encountering difficulties. Furthermore, he claimed that he had been the victim of a violation of his right to formulate political criticism, which he argued was inherent in Article 23 as it applied to him in his capacity as a senator. According to him, that provision, which guarantees the right to participate in public affairs, entitled him to carry out his parliamentary duties of scrutiny through any organ or means generally available.

The applicant made a further reference to Article 20 of the Constitution in the summary of his complaints (suplico).

16. In his observations of 22 March 1984, the public prosecutor noted that Article 14 guaranteed equality before the law and not equality outside the law. As regards the complaint based on Article 23, it overlapped with the preceding complaint or was based on a misunderstanding: clearly a member of parliament did not carry out his duties only in the assembly, but outside it he did not enjoy any immunity; although he could, like any citizen, criticise the action of the Government, he should not forget that the freedom of expression had its limits, fixed by the Constitution.

For his part, Mr **Castells**, by a letter of 21 May 1984, again offered to prove the truth of his statements, because that demonstrated "the violation by the contested judgment of the right to 'receive and communicate true information by any means of dissemination', referred to in Article 20 of the Constitution". He also mentioned this right in his appeal (recurso de súplica) against the rejection of this offer by the Constitutional Court (20 July 1984) and in his observations of 21 February 1985.

17. The Constitutional Court dismissed the appeal on 10 April 1985.

In summarising the applicant's complaints at point 2 of the "As to the Law" part of its judgment, it took together, like the public prosecutor, those relating to Articles 14 and 23, without referring to Article 20: alleged violation of the right to equality before the law, guaranteed under Article 14 taken alone or in conjunction with Article 23, inasmuch as the contested decision restricted the powers of monitoring, scrutiny and criticism of a senator.

At point 6 it stated that parliamentary privileges were to be interpreted strictly as otherwise they could become instruments for infringing the rights of others; they lapsed when their holder had acted as a mere citizen, even in his capacity as a politician.

At points 9 and 10 it considered the central issue: the right to rely on relevant evidence in presenting the defence case, and in particular to plead the defence of truth in respect of an offence of the type in question. The court noted in this connection:

"In order to assess whether evidence which it is sought to adduce is relevant, it is necessary to establish a link between that evidence and the *thema decidendi*, which must first be determined on the basis of the parties' allegations. Except in the case of facts which are manifest or common knowledge, the court must not intervene in this regard, otherwise it will prejudge the merits, if only in part It is preferable for the courts to avoid [such a preliminary assessment]; it does not however in itself infringe constitutional rights provided that the other defence rights are respected. Even though in the present case the court ought perhaps not to have anticipated its opinion on the defence of truth when assessing the relevance of the evidence, [that irregularity] therefore infringes the constitutional right to use relevant evidence - particularly where as here the decision is taken at a single level of jurisdiction - only if there has been a breach of a substantive right in issue.

... "

Article 161 of the Criminal Code had given rise to criticism among academic writers because it restricted the freedom of expression. In any event, it should be read in conjunction with Article 20 which guaranteed that freedom. In this connection it had to be accepted that criminal legislation could constitute an adequate means of regulating the exercise of fundamental rights provided that it respected the essential content of the right in question. The limits of the freedoms of information and of opinion were beyond question to be found in the area of State security, which could be jeopardised by attempts to discredit democratic institutions. In conclusion the question whether the defence of truth was or was not admissible in this field was purely one of statutory interpretation and the specific application of Article 161 in the case under review was a matter falling within the exclusive jurisdiction of the Supreme Court.

18. On 1 April 1986 the Supreme Court ruled that the term of imprisonment had been definitively served. Subsequently, the record of the conviction was annulled in accordance with Article 118 of the Criminal Code. It could therefore no longer be disclosed by investigation of the applicant's criminal record unless the request came from judges or courts in connection with a new criminal inquiry.

B. RELEVANT LEGISLATION

1. CONSTITUTION OF 1978

19. The relevant articles of the Constitution provide as follows:

ARTICLE 14

"All Spanish citizens are equal before the law. Any discrimination based on birth, race, sex, religion, opinion or any other condition or personal or social circumstances shall be prohibited."

ARTICLE 18

"1. The right to honour, to a private life and to a family life and the right to control use of one's likeness shall be protected.

..."

ARTICLE 20

1. The following rights shall be recognised and protected:

(a) the right freely to express and disseminate thoughts, ideas and opinions by word of mouth, in writing or by any other means of reproduction;

...

(d) the right to receive and communicate true information by any means of dissemination. The right to invoke the conscience clause and that of professional confidentiality shall be governed by statute.

2. The exercise of these rights may not be restricted by any prior censorship.

...

4. These freedoms shall be limited by respect for the rights secured in this Title, by the provisions of the implementing Acts and in particular by the right to honour and to a private life and the right to control use of one's likeness and to the protection of youth and children."

ARTICLE 23

"1. Citizens shall have the right to participate in public life directly or through their representatives freely elected at periodically held elections by universal suffrage.

..."

2. *THE CRIMINAL CODE*

20. The Institutional Act 8/1983 of 25 June 1983 reformed the Criminal Code. It provides that the offences of insulting the Government shall be punishable by the following penalties:

ARTICLE 161

"The following shall be liable to long-term prison sentences [from six years and a day to twelve years - Article 30 of the Criminal Code]:

1. Those who seriously insult, falsely accuse or threaten ... the Government ...;
2. ..."

ARTICLE 162

"When the insult or threat referred to in the preceding Article is not serious, it shall be punishable by a short-term prison sentence [from six months and a day to six years - Article 30 of the Criminal Code]."

These provisions appear in a separate chapter of the Criminal Code. The chapter in question is based on the principle of authority (decision of the Supreme Court of 19 May 1982; see paragraph 12 above) and provides for a strengthened protection for the life, freedom and honour of the senior officials of the State. The offence of falsely accusing the Government was not introduced until 1983.

21. Title X of Book II of the Criminal Code defines the offences of proffering insults and making false accusations. The latter consists of accusing a person wrongly of an offence coming within the category of those which have to be prosecuted even without a complaint (Article 453 of the Criminal Code). On the other hand, an insult is any expression or action which discredits a person or exposes him to contempt, in particular by accusing him of an offence of the kind which may be prosecuted only if a complaint is laid (Articles 457 and 458 of the Criminal Code). The practical importance of the distinction is that the defence of truth is admissible for the offence of false accusation (Article 456) but not for the offence of proffering insults, except where the insults are directed against civil servants in respect of acts relating to the performance of their duties (Article 461 of the Criminal Code).

By the judgment of 31 October 1983 the Supreme Court specified that the defence of truth could not be pleaded in connection with the offence of insulting one of the senior institutions of the State: in the first place no official as such was concerned and, secondly, the institutions in question enjoyed extra protection in this field under the criminal law (see paragraphs 12 and 13 above).

PROCEEDINGS BEFORE THE COMMISSION

22. In his application of 17 September 1985 to the Commission (no. 11798/85), Mr **Castells** relied on Articles 6, 7, 10 and 14 (art. 6, art. 7, art. 10, art. 14) of the Convention.

By a partial decision of 9 May 1989, the Commission dismissed the complaints based on Articles 6 and 7 (art. 6, art. 7) as inadmissible. On 7 November 1989 it found the remainder of the application admissible. In its report of 8 January 1991 (Article 31) (art. 31), it expressed the opinion that there had been a violation of Article 10 (art. 10) (nine votes to three) and that no separate question arose under Article 14 (art. 14) (unanimously). The full text of its opinion and of the two dissenting opinions contained in the report is reproduced as an annex to this judgment*.

AS TO THE LAW

I. ALLEGED VIOLATION OF ARTICLE 10 (ART. 10)

23. Mr **Castells** claimed to be a victim of a violation of his right to freedom of expression as guaranteed under Article 10 (art. 10) of the Convention, which is worded as follows:

"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 and regardless of frontiers. ...

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."

The Government contested this assertion, whereas the Commission agreed with it.

A. THE GOVERNMENT'S PRELIMINARY OBJECTION

24. The Government contended, as they had done before the Commission, that the applicant had failed to exhaust his domestic remedies (Article 26 of the Convention) (art. 26). Probably "for tactical reasons", he had not specifically raised in the Constitutional Court the complaint concerning the alleged breach of the right to freedom of expression protected under Article 20 of the Constitution. In his amparo appeal he had referred to this provision only indirectly, complaining of discrimination in the exercise of that freedom; in addition, he had made no mention of Article 10 (art. 10) of the Convention or of similar provisions in other international instruments. According to the Institutional Act governing the amparo appeal procedure (no. 2/1979), he ought to have indicated clearly both the facts and the provisions allegedly infringed. It followed that Mr **Castells** had not given the Constitutional Court the opportunity to rule on the question which was now before the Court.

25. In reply the applicant maintained that he had expressly invoked Article 20 of the Constitution in the Constitutional Court. In the first place the facts set out in his amparo application established that what was at stake was a typical example of the exercise of the right to freedom of expression and showed evidently that there had been an interference. Furthermore, in the *suplico* he had cited, among other provisions, the article in question and in the legal argument he had alleged a violation of Article 20, taken together with Article 14 (equality before the law). It was true that he had argued on the more limited basis of the right of an elected representative to formulate political criticism, under Article 23, but it was sufficient to read point 10 of the "As to the Law" part of the judgment of 10 April 1985 to see that the problem had indeed been raised. In that passage the Constitutional Court examined in detail the compatibility of Article 161 of the Criminal Code, the basis for the contested prosecution and conviction, with the freedom of expression (see paragraphs 15 and 17 above).

26. While expressing its agreement with the applicant, the Commission primarily invited the Court to find that it lacked jurisdiction to entertain the objection.

27. On this point the Court confines itself to referring to its consistent case-law, confirmed most recently in its *B. v. France* judgment of 25 March 1992 (Series A no. 232-C, p.45, paras. 35-36).

As regards the merits of the submission, it observes that Article 26 (art. 26) must be applied "with some degree of flexibility and without excessive formalism"; it is sufficient that "the complaints intended to be made subsequently before the Convention organs" should have been raised "at least in substance and in compliance with the formal requirements and time-limits laid down in domestic law" (see the *Guzzardi v. Italy* judgment of 6 November 1980, Series A no. 39, p. 26, para. 72, and the *Cardot v. France* judgment of 19 March 1991, Series A no. 200, p. 18, para. 34).

28. The applicant relied on Article 10 (art. 10) of the Convention in two respects: he had, he claimed, been prosecuted and convicted for making statements which were true, but whose accuracy he had been prevented from establishing; in addition, the contested article came within the sphere of the political criticism which it was the duty of any member of parliament to engage in.

29. It appears that Mr **Castells** had raised both of these points in the Supreme Court. The judgment of 31 October 1983 refused to admit the defence of truth in relation to the offence of insulting the Government and ruled that the applicant had overstepped the bounds of acceptable political criticism (see paragraph 13 above).

30. The submissions in support of the amparo appeal of 22 November 1983 made only an indirect and brief reference to Article 20 of the Constitution (see paragraph 15 above); they did however set out the complaints discussed above.

While basing his case on a narrower provision, Article 23 of the Constitution, the applicant claimed the right, in his capacity as a senator, to criticise the Government's

action, a right which is manifestly inherent in the freedom of expression in the specific case of elected representatives. Moreover the Constitutional Court recognised this in its summary of the complaints; it took together the complaint concerning Articles 14 and 20 and that relating to Article 23 (see paragraph 17 above).

The applicant also invoked both his right to be presumed innocent and his right to adduce evidence capable of establishing the accuracy of his statements. In so doing, he was formulating a complaint which was plainly linked to the alleged violation of Article 10 (art. 10) of the Convention. Indeed that was how the Constitutional Court construed the complaint; it joined the question of the relevance of the evidence to that of the merits of the case, namely the offence provided for in Article 161 of the Criminal Code, whose compatibility with the freedom of expression it examined (points 9 and 10 of the "As to the Law" part of the judgment of 10 April 1985; see paragraph 17 above).

31. The Court notes finally, like the Commission, that Mr **Castells** cited Article 20 of the Constitution both in his notice of the amparo appeal, filed in the Supreme Court, and in the *suplico* of his application of 22 November 1983 (see paragraphs 13 and 15 above). Subsequently, in a number of written communications to the Constitutional Court, he also referred, in connection with the defence of truth, to his right "to receive and communicate true information" (see paragraph 16 above).

No doubt the reason why the appeal failed in this respect is to be found in the limits which at the time the Constitutional Court set to its jurisdiction. In its view, the problem of the admissibility of the defence of truth in relation to the offence of insulting the Government raised a question of statutory interpretation rather than an issue of compliance with the Constitution, and the application of Article 161 of the Criminal Code in the case under review was exclusively a matter for the ordinary courts (see paragraph 17 above; and, *mutatis mutandis*, the *Guzzardi v. Italy* judgment, cited above, Series A no. 39, p. 27, para. 72).

32. Accordingly, the Court considers that the applicant did invoke before the Constitutional Court, "at least in substance", the complaints relating to Article 10 (art. 10) of the Convention. The objection that Mr **Castells** failed to exhaust domestic remedies must therefore be dismissed.

B. MERITS OF THE COMPLAINT

33. In Mr **Castells**'s submission, the criminal proceedings brought against him, and his subsequent conviction for insulting the Government, interfered with his freedom of expression, in particular because he was not allowed to establish the truth of the statements contained in his article.

34. The restrictions and penalties of which he complained are undeniably an "interference" with the exercise of the freedom in question. For such an interference to avoid infringing Article 10 (art. 10), it must be "prescribed by law", carried out in pursuit

of one or more of the legitimate aims set out in Article 10 para. 2 (art. 10-2) and "necessary in a democratic society" in order to attain such an aim or aims.

1. "PRESCRIBED BY LAW"

35. There can be no doubt that the contested prosecution had a legal basis, namely Articles 161 and 162 of the Criminal Code. The applicant did not dispute this, but he alleged that he could not have expected that his defence of truth would be held to be inadmissible, in particular following the adoption of the 1978 Constitution. He maintained that, until 19 May 1982, the Supreme Court had never ruled on the question in relation to the offence of insulting the Government and the admissibility of such a defence for offences of this nature (Article 240) was the subject of differing opinions both among academic writers and in the case-law.

36. In the Government's contention, on the other hand, it is clear from the Spanish legislation, and in particular from Article 461 of the Criminal Code, that in the field in question the defence of truth is admissible only where the insults are directed against civil servants in the performance of their duties; neither before nor after 1978 had the Supreme Court ever allowed the *exceptio veritatis* for insults which were not directed against individuals. Mr **Castells**, however, had accused the Government as a whole.

37. In the light of the wording of Article 461 of the Criminal Code, the Court considers this interpretation to be reasonable. There was apparently no precedent - hence the hesitation shown by the Supreme Court in its decision of 19 May 1982 (see paragraph 12 above) -, but that is immaterial here: it was a text which covered in a general fashion several possible types of insult and which had inevitably to be capable of being brought into play in new situations; the above-mentioned decision confined itself to applying it to different circumstances (see, *mutatis mutandis*, the *Observer and Guardian v. the United Kingdom* judgment of 26 November 1991, Series A no. 216, pp. 27-28, para. 53).

The Court therefore finds, like the Commission, that the rules governing the contested interference were sufficiently foreseeable for the purposes of Article 10 para. 2 (art. 10-2) of the Convention.

2. WAS THE AIM PURSUED LEGITIMATE?

38. According to the applicant, neither the charge laid against him nor his subsequent conviction pursued a legitimate aim under paragraph 2 of Article 10 (art. 10-2). The acts of which he was accused, as the Supreme Court itself admitted, had not engendered any alarm (see paragraph 9 above); in addition, it appeared from the judgment of 31 October 1983 that the object of the interference had been not to protect public order and national security, but in fact to preserve the respondent Government's honour.

39. However, in its decision of 10 April 1985 - on which the Government relied - the Constitutional Court stressed that the security of the State could be threatened by attempts to discredit democratic institutions (see paragraph 17 above). In his article Mr

Castells did not merely describe a very serious situation, involving numerous attacks and murders in the Basque Country; he also complained of the inactivity on the part of the authorities, in particular the police, and even their collusion with the guilty parties and inferred therefrom that the Government was responsible.

It may therefore be said, and this conforms to the view held by the Government and the Commission, that in the circumstances obtaining in **Spain** in 1979 the proceedings instituted against the applicant were brought for the "prevention of disorder", within the meaning of Article 10 para. 2 (art. 10-2), and not only for the "protection of the reputation ... of others";

3. NECESSITY OF THE INTERFERENCE

40. Mr **Castells** noted his agreement with the Commission and emphasised the crucial importance of freedom of expression for an elected representative, as the spokesman for the opinions and anxieties of his electorate. In addition, that freedom required extra guarantees when the discussion related to a matter of public interest. This had indeed been the case in this instance; the contested article was part of a wide debate on the climate of insecurity which had prevailed in the Basque Country since 1977. The applicant's conviction had been intended to protect the authorities against the attacks of the opposition rather than the Government against unjustified and defamatory accusations; although embarrassing for the Government, the revelation of the facts in question had served the public interest.

41. The Government stressed that freedom of expression was not absolute; it carried with it "duties" and "responsibilities" (Article 10 para. 2 of the Convention) (art. 10-2). Mr **Castells** had overstepped the normal limits of political debate; he had insulted a democratic government in order to destabilise it, and during a very sensitive, indeed critical, period for **Spain**, namely shortly after the adoption of the Constitution, at a time when groups of differing political persuasions were resorting to violence concurrently.

42. The Court recalls that the freedom of expression, enshrined in paragraph 1 of Article 10 (art. 10-1), constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress. Subject to paragraph 2 of Article 10 (art. 10-2), 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 that pluralism, tolerance and broadmindedness without which there is no "democratic society" (see, inter alia, the *Handyside v. the United Kingdom* judgment of 7 December 1976, Series A no. 24, p. 23, para. 49, and the *Observer and Guardian* judgment, cited above, Series A no. 216, p. 30, para. 59 (a)).

While freedom of expression is important for everybody, it is especially so for an elected representative of the people. He represents his electorate, draws attention to their preoccupations and defends their interests. Accordingly, interferences with the freedom of expression of an opposition member of parliament, like the applicant, call for the closest scrutiny on the part of the Court.

43. In the case under review Mr **Castells** did not express his opinion from the senate floor, as he might have done without fear of sanctions, but chose to do so in a periodical. That does not mean, however, that he lost his right to criticise the Government.

In this respect, the pre-eminent role of the press in a State governed by the rule of law must not be forgotten. Although it must not overstep various bounds set, *inter alia*, for the prevention of disorder and the protection of the reputation of others, it is nevertheless incumbent on it to impart information and ideas on political questions and on other matters of public interest (see, *mutatis mutandis*, the *Sunday Times v. the United Kingdom* judgment of 26 April 1979, Series A no. 30, p. 40, para. 65, and the *Observer and Guardian* judgment, cited above, Series A no. 216, p. 30, para. 59 (b)).

Freedom of the press affords the public one of the best means of discovering and forming an opinion of the ideas and attitudes of their political leaders. In particular, it gives politicians the opportunity to reflect and comment on the preoccupations of public opinion; it thus enables everyone to participate in the free political debate which is at the very core of the concept of a democratic society (see the *Lingens v. Austria* judgment of 8 July 1986, Series A no. 103, p. 26, para. 42).

44. In its judgment of 31 October 1983, the Supreme Court took the view that the contested article had crossed over the line between political criticism and insult, albeit only slightly, by its use of certain terms (see paragraph 13 above).

45. The Court observes, like the Commission, that Mr **Castells** began by denouncing the impunity enjoyed by the members of various extremist groups, the perpetrators of numerous attacks in the Basque Country since 1977. He thereby recounted facts of great interest to the public opinion of this region, where the majority of the copies of the periodical in question were sold. In his conclusion, however, he levelled serious accusations against the Government, which in his view was responsible for the situation which had arisen (see paragraph 7 above).

46. The freedom of political debate is undoubtedly not absolute in nature. A Contracting State may make it subject to certain "restrictions" or "penalties", but it is for the Court to give a final ruling on the compatibility of such measures with the freedom of expression enshrined in Article 10 (art. 10) (see, *mutatis mutandis*, the *Observer and Guardian* judgment, cited above, Series A no. 216, para. 59 (c)).

The limits of permissible criticism are wider with regard to the Government than in relation to a private citizen, or even a politician. In a democratic system the actions or omissions of the Government must be subject to the close scrutiny not only of the legislative and judicial authorities but also of the press and public opinion. Furthermore, the dominant position which the Government occupies makes it necessary for it to display restraint in resorting to criminal proceedings, particularly where other means are available for replying to the unjustified attacks and criticisms of its adversaries or the media. Nevertheless it remains open to the competent State authorities to adopt, in their capacity as guarantors of public order, measures, even of a criminal law nature, intended

to react appropriately and without excess to defamatory accusations devoid of foundation or formulated in bad faith.

47. In this instance, Mr **Castells** offered on several occasions, before the Supreme Court and subsequently in the Constitutional Court, to establish that the facts recounted by him were true and well known; in his view, this deprived his statements of any insulting effect (see paragraphs 11 and 16 above).

On 19 May 1982 the Supreme Court declared such evidence inadmissible on the ground that the defence of truth could not be pleaded in respect of insults directed at the institutions of the nation (see paragraphs 12 and 21 above); it confirmed this interpretation in its judgment of 31 October 1983 (see paragraph 13 above). The Constitutional Court took the view that it was a question of ordinary statutory interpretation and as such fell outside its jurisdiction (see paragraph 17 above).

The applicant could not therefore, in the criminal proceedings brought against him under Article 161 of the Criminal Code, plead the defences of truth and good faith.

48. In the Government's contention, because Mr **Castells's** allegations were not sufficiently precise, their truth could not be demonstrated; in addition, they were to be regarded as value judgments, in relation to which the defence of truth was irrelevant.

This argument is not convincing. The article which appeared in *Punto y Hora de Euskalherria* (see paragraph 7 above) must be considered as a whole. The applicant began by drawing up a long list of murders and attacks perpetrated in the Basque Country, then stressed that they had remained unpunished; he continued by alleging the involvement of various extremist organisations, which he named, and finally attributed to the Government the responsibility for the situation. In fact many of these assertions were susceptible to an attempt to establish their truth, just as Mr **Castells** could reasonably have tried to demonstrate his good faith.

It is impossible to state what the outcome of the proceedings would have been had the Supreme Court admitted the evidence which the applicant sought to adduce; but the Court attaches decisive importance to the fact that it declared such evidence inadmissible for the offence in question (see paragraph 12 above). It considers that such an interference in the exercise of the applicant's freedom of expression was not necessary in a democratic society.

49. The Government also relied on the relatively lenient nature of the sanction imposed, but in the light of the foregoing conclusion the Court does not have to examine this argument.

50. In sum, there has been a violation of Article 10 (art. 10).

II. ALLEGED VIOLATION OF ARTICLE 14 IN CONJUNCTION WITH ARTICLE 10 (ART. 14+10)

51. Mr **Castells** also claimed to be the victim of discrimination because other persons had expressed similar views without any criminal sanctions being imposed on them. He relied on Article 14 (art. 14), which is worded as follows:

"The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

The Government denied this assertion.

52. As this question is not a fundamental aspect of the case, the Court does not consider it necessary to deal with it separately (see, *inter alia*, the *Airey v. Ireland* judgment of 9 October 1979, Series A no. 32, p. 16, para. 30).

III. APPLICATION OF ARTICLE 50 (ART. 50)

53. According to Article 50 (art. 50):

"If the Court finds that a decision or a measure taken by a legal authority or any other authority of a High Contracting Party is completely or partially in conflict with the obligations arising from the ... Convention, and if the internal law of the said Party allows only partial reparation to be made for the consequences of this decision or measure, the decision of the Court shall, if necessary, afford just satisfaction to the injured party."

54. The applicant sought in the first place the publication of a summary of the Court's judgment in the newspapers of the Basque Country, of Madrid and the rest of the State, and the removal of any reference to his conviction in the central criminal records (Registro Central de Penados y Rebeldes).

The Court points out that it does not have jurisdiction to make such orders (see, *mutatis mutandis*, the *Manifattura FL v. Italy* judgment of 27 February 1992, Series A no. 230-B, p. 21, para. 22).

A. PECUNIARY DAMAGE

55. Mr **Castells** also claimed 375,000 pesetas in respect of loss of earnings. As an accused on bail, he had to appear fifty- two times before the court of his place of residence (San Sebastián) and three times before the Supreme Court of Madrid (see paragraphs 8-9 above), which resulted in a loss of time and opportunity in the exercise of his professional activity as a lawyer.

The Court takes the view that this constraint can have caused him hardly any loss since, as a lawyer, he frequently attended the courts in question. That he sustained pecuniary damage is therefore not established.

B. NON-PECUNIARY DAMAGE

56. The applicant also claimed, without giving any figures, compensation for non-pecuniary damage. The Court does not rule out the possibility that he may have sustained such damage, but in the circumstances of the case the finding of a violation set out in the present judgment constitutes in itself sufficient just satisfaction.

C. COSTS AND EXPENSES

57. In respect of his costs and expenses incurred in the Spanish courts, Mr **Castells** claimed 2,181,476 pesetas. The Court awards him only 1,000,000 of this amount, since some of the sums in question related to amparo appeals unconnected with the complaints found admissible by the Commission.

58. Finally the applicant sought 3,328,000 pesetas for his costs and expenses before the Convention organs, together with 20,000 DM for the fees of Mr Korff and Mr Vervaele.

Like the Government, the Court considers excessive the number of lawyers representing Mr **Castells**, who appeared before it with four lawyers; it should also be borne in mind that the Commission declared inadmissible some of the complaints raised initially.

Making an assessment on an equitable basis, the Court awards Mr **Castells** an overall amount of 2,000,000 pesetas.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. Holds that it has jurisdiction to consider the Government's preliminary objection, but dismisses it;
2. Holds that there has been a violation of Article 10 (art. 10);
3. Holds that it is not necessary to consider the case also under Article 14, taken together with Article 10 (art. 14+10);
4. Holds that, as regards the non-pecuniary damage alleged, the present judgment constitutes sufficient just satisfaction for the purposes of Article 50 (art. 50);
5. Holds that the Kingdom of **Spain** is to pay to the applicant, within three months, 3,000,000 (three million) pesetas for costs and expenses;
6. Dismisses the remainder of the applicant's claims.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 23 April 1992.

Rolv RYSSDAL

President

Marc-André EISSEN

Registrar

In accordance with Article 51 para. 2 (art. 51-2) of the Convention and Rule 53 para. 2 of the Rules of Court, the following separate opinions are annexed to this judgment:

- (a) concurring opinion of Mr De Meyer;
- (b) concurring opinion of Mr Pekkanen;
- (c) concurring opinion of Mr Carillo Salcedo, ad hoc judge.

R. R.

M.-A. E.

CONCURRING OPINION OF JUDGE DE MEYER

(TRANSLATION)

In the disputed article Mr **Castells** drew up a long list of murders and attacks carried out in the Basque Country⁴ and denounced the impunity, described by him as outrageous (insultante impunidad), enjoyed by their perpetrators⁵. He complained of the inaction of the authorities⁶, who, he alleged, had done nothing to identify them, although the same authorities had displayed great diligence "in other cases" (en otros supuestos)⁷. He saw this as evidence of collusion with the guilty parties⁸ and attributed responsibility for "these acts" (estas acciones) to the Government and its supporters⁹.

These were undoubtedly serious accusations¹⁰.

In levelling them, however, he was merely legitimately exercising his right to freedom of opinion and of expression. This right was infringed in the case before the Court because Mr **Castells** was prosecuted and convicted for having written and published his views on a question of general interest; in a "democratic society" it is not acceptable that a citizen be punished for doing this.

In this connection it makes no difference whether Mr **Castells** was right or wrong. The question of the defence of truth was not relevant in relation to his assessment of the situation¹¹; this is especially so because the murders and attacks referred to in the article really occurred and the impunity of their perpetrators does not even seem to have been denied.

It may be worth adding that as far as insults, false accusation and defamation are concerned there are no grounds for affording better protection to the institutions than to individuals, or to the Government than the opposition¹².

CONCURRING OPINION OF JUDGE PEKKANEN

In his article Mr **Castells** firstly enumerated a list of murders and attacks carried out in the Basque Country and stressed that they still remained unsolved and unpunished. He also evoked the involvement of various extreme right-wing organisations. From these facts he then drew the conclusion that: "Behind these acts there can only be the Government, the party of the Government and their personnel".

Mr **Castells** was sentenced by the Supreme Court for proffering insults of a less serious kind against the Government. The Supreme Court found inter alia that the insults proffered with the aim of political criticism had exceeded the permissible limits of such criticism and attacked the Government's honour. The Supreme Court was also of the opinion that the defence of truth (*exceptio veritatis*) was not admissible in such cases under Spanish law.

The Court attached decisive importance to the fact that the Supreme Court of **Spain** declared the defence of truth inadmissible for the offence in question. Unfortunately I am unable to accept this opinion. The decisive fact for a violation of Article 10 (art. 10) of the Convention is, in my view, that Mr **Castells** was punished for holding the opinion that the Government was responsible for the incidents in question and publishing it.

With regard to the question of *exceptio veritatis*, which is discussed at length in the judgment, I consider that it was not possible for Mr **Castells** to prove the truthfulness of his opinion, an opinion expressed as part of a political debate and affirming that the Government was behind the murders and attacks in question. *Exceptio veritatis* is therefore not relevant in the instant case. For a finding of a violation of Article 10 (art. 10) of the Convention it is sufficient that Mr **Castells** was punished for criticising the Government when he had done so in a way which should be allowed in a democratic society.

CONCURRING OPINION OF JUDGE CARRILLO SALCEDO

I fully share the views expressed by the Court at paragraph 46 of the judgment. I should like to stress that freedom of expression constitutes one of the essential foundations of a democratic society. But I must also emphasise that the exercise of that freedom "carries with it duties and responsibilities" (Article 10 para. 2 of the Convention) (art. 10-2), and that, in a situation where politically motivated violence poses a constant threat to the lives and security of the population, it is particularly difficult to strike a fair balance between the requirements of protecting freedom of expression and the imperatives of protecting the democratic State.

By providing, in Article 10 para. 2 (art. 10-2), that the exercise of the freedom of expression and the freedom to hold opinions and to receive and impart information and ideas "may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society", the Convention recognises that these freedoms are not absolute. Moreover, the Convention also recognises the principle that no group or person has the right to pursue activities which aim at the destruction of any of the rights and freedoms enshrined in it (Article 17) (art. 17); that implies in addition, in my view, positive obligations for the States parties.

Therefore, it remains open to the States to adopt measures, even of a criminal law nature, intended to react appropriately and without excess, that is, in conformity with the Convention requirements, to defamatory accusations devoid of factual foundation or formulated in bad faith.

* The case is numbered 2/1991/254/325. The first number is the case's position on the list of cases referred to the Court in the relevant year (second number). The last two numbers indicate the case's position on the list of cases referred to the Court since its creation and on the list of the corresponding originating applications to the Commission.

** As amended by Article 11 of Protocol No. 8 (P8-11), which came into force on 1 January 1990.

* Note by the Registrar: for practical reasons this annex will appear only with the printed version of the judgment (volume 236 of Series A of the Publications of the Court), but a copy of the Commission's report is obtainable from the registry.

⁴ Paragraph 48 of the judgment. See the first and second paragraphs of the article (paragraph 7 of the judgment).

⁵ Title of the article and paragraphs 45 and 48 of the judgment.

⁶ Paragraph 39 of the judgment.

⁷ See in particular the third and sixth paragraphs of the article.

⁸ Paragraph 39 of the judgment.

⁹ Last paragraph of the article and paragraphs 39 and 45 of the judgment.

¹⁰ Paragraph 45 of the judgment.

¹¹ See on this point the separate opinion of Mr Pekkanen, p. 29 below, and, mutatis mutandis, the *Lingens v. Austria* judgment of 8 July 1986, Series A no. 103, pp. 27-28, paras. 45 and 46.

¹² I cannot therefore approve the "strengthened protection" afforded the Government under Articles 161 and 162 of the Spanish Criminal Code (paragraph 20 of the judgment).

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CONCURRING OPINION OF JUDGE DE MEYER

CASTELLS v. **SPAIN** JUDGMENT

CONCURRING OPINION OF JUDGE CARRILLO SALCEDO