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

THIRD SECTION

CASE OF DU ROY AND MALAURIE v. FRANCE

(Application no. 34000/96)

JUDGMENT

STRASBOURG

3 October 2000

FINAL

03/01/2001

In the case of Du Roy and Malaurie v. France,

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

Mr W. FUHRMANN, *President*,
Mr J.-P. COSTA,
Mr L. LOUCAIDES,
Mr P. KŪRIS,
Mrs F. TULKENS,
Mr K. JUNGWIERT,
Sir Nicolas BRATZA, *judges*,
and Mrs S. DOLLÉ, *Section Registrar*,

Having deliberated in private on 15 June 1999 and 12 September 2000,

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

PROCEDURE

1. The case originated in an application (no. 34000/96) against the French Republic lodged with the European Commission of Human Rights ("the Commission") under former Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by two French nationals, Mr Albert Du Roy and Mr Guillaume Malaurie ("the applicants"), on 13 September 1996. The applicants were represented by Mr J.-Y. Dupeux and Mr C. Bigot, both of the Paris Bar. The French Government ("the Government") were represented by their Agent, Mr Y. Charpentier, Head of the Human Rights Section, Ministry of Foreign Affairs, and subsequently by his successor, Mrs M. Dubrocard.

2. Relying on Article 10 of the Convention, the applicants complained of an infringement of their right to freedom of expression.

3. On 22 October 1997 the Commission (Second Chamber) decided to give notice of the application to the Government, inviting them to submit written observations on its admissibility and merits. The Government submitted their observations on 10 February 1998 and the applicants submitted theirs on 2 April 1998.

4. Following the entry into force of Protocol No. 11 to the Convention on 1 November 1998, and in accordance with Article 5 § 2 thereof, the case was examined by the Court.

5. In accordance with Rule 52 § 1 of the Rules of Court, the President of the Court, Mr L. Wildhaber, assigned the case to the Third Section. The Chamber that would consider the case was then constituted within that Section (Article 27 § 1 of the Convention and Rule 26 § 1).

6. On 15 June 1999 the Chamber declared the application admissible [*Note by the Registry*. The Court's decision is obtainable from the Registry.].

7. On 25 June 1999 it requested the parties to submit further evidence and observations, together with any proposals for a friendly settlement, by 30 August 1999 and informed them that they were entitled to request a hearing; it also requested the applicants to submit their claims under Article 41 of the Convention by the same date.

8. In a letter of 2 July 1999 the applicants asked for a hearing on the merits of the case. In a letter of 27 August 1999 the Government stated that they did not consider a hearing necessary and that they were not prepared to reach a friendly settlement. The parties did not submit any further observations.

9. On 7 March 2000 the Chamber decided that it was not necessary to hold a hearing.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

10. At the material time the first applicant was the editor of the weekly magazine *L'Evénement du Jeudi* and the second applicant was a journalist on the magazine.

11. In its edition of 11 to 17 February 1993 *L'Evénement du Jeudi* published an article by the second applicant under the headline: “Sonacotra: the Left puts its house in order”.

12. The article was particularly critical of Michel Gagneux, the former head of Sonacotra (national company for the construction of workers' housing), and of his relations with Sonacotra's new management, who on 10 February 1993 had lodged a criminal complaint against Mr Gagneux alleging misuse of company property and had applied to join the proceedings as a civil party.

13. On 11 March 1993 Mr Gagneux summoned the applicants to appear in the Paris Criminal Court to answer a charge of publishing information concerning applications to join criminal proceedings as a civil party, an offence under section 2 of the Act of 2 July 1931. Mr Gagneux considered that he had been the victim of a breach of that provision on account of the following passages of the article published in *L'Evénement du Jeudi*:

> “Sonacotra: the Left puts its house in order”

> "Never before! The managers of a public company have condemned their predecessors' running of the company – and lodged a criminal complaint!"

> "*Raison d'Etat* foiled! In bringing a complaint against their predecessor Michel Gagneux for misappropriation and misuse of company property, Sonacotra's managers have shown courage. As they are well aware, there is a serious risk that it will be discovered that men with links to the PS [Socialist Party] have been able to make free with the 'immigrants' cash'."

14. In a judgment of 9 July 1993 the Paris Criminal Court found the applicants guilty and fined them 3,000 French francs (FRF) each. In addition to that sentence, damages were awarded to Mr Gagneux in his civil action and an order was made for the judgment to be published.

The court noted that the prohibition in section 2 of the Act of 2 July 1931 was general and absolute; the information had only to concern a criminal complaint that had been lodged together with an application to join the proceedings as a civil party.

The court further stated that the prohibition was intended to safeguard the presumption of innocence and to prevent any external influence on the course of justice. Accordingly, it was necessary in a democratic society 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" within the meaning of Article 10 of the Convention.

15. On 16 July 1993 the applicants appealed against that judgment.

16. In a judgment of 2 February 1994 the Paris Court of Appeal upheld the applicants' conviction and the amount of the fine but reduced to one franc the damages awarded to Mr Gagneux as the civil party. Its decision included the following passage:

> "The trial court rightly dismissed the defendants' submission that the Act of 2 July 1931 was incompatible with Article 10 [of the Convention], noting that the provisions of that Act, which were designed to protect persons against whom a complaint is lodged, to safeguard the presumption of innocence and to prevent any external influence on the course of justice, fell within the scope of the restrictions on freedom of expression permitted by the ... Convention ..., the restriction in question being proportionate to the aim pursued."

17. The applicants then appealed on points of law. In their grounds of appeal they submitted, as they had done in the courts below, that there had been a violation of Article 10 of the Convention. They referred to the general and absolute nature of the prohibition of publication, arguing that it was disproportionate to the aim pursued.

18. In a judgment of 19 March 1996 the Court of Cassation held that the criminal proceedings had become barred as a result of an intervening amnesty. It further held that it was still required to rule on the appeal on points of law in respect of the civil action and dismissed it, stating in particular:

"The Court of Appeal rightly dismissed the defendants' submission that the Act of 2 July 1931 was incompatible with Article 10 of the ... Convention ...

While the first paragraph of Article 10 of the said Convention states that everyone has the right to freedom of expression, the second paragraph provides that the exercise of that freedom, since it carries with it duties and responsibilities, may be subject to such formalities, restrictions or penalties as are prescribed by law and are necessary in a democratic society for, *inter alia*, the protection of the rights of others, and for maintaining the authority and impartiality of the judiciary; such is the purpose, which is proportionate to the aim pursued, of section 2 of the Act cited above."

II. RELEVANT DOMESTIC LAW

A. Act of 2 July 1931

19. Section 2 of the Act of 2 July 1931 provides:

"The publication, before a judicial decision has been given, of any information concerning applications to join criminal proceedings as a civil party under Article 63 of the [former] Code of Criminal Procedure [*Code d'instruction criminelle*] [Article 85 of the current Code of Criminal Procedure (*Code de procédure pénale*)] shall be prohibited, on pain of a fine of FRF 120,000 as laid down in the last paragraph of section 39 of the Act of 29 July 1881 ..."

B. Civil Code

20. Article 9-1 of the Civil Code provides:

"Everyone is entitled to be presumed innocent until proved guilty. Where a person ... the subject of ... a criminal complaint lodged together with a civil-party application is, before any judgment has been given against him, publicly portrayed as being guilty of an offence or offences in respect of which an inquiry or judicial investigation is being conducted, the court may direct, even on a summary application, that a notice be printed in the publication concerned in order to end the breach of the presumption of innocence ..."

C. Code of Criminal Procedure

21. The relevant provisions of the Code of Criminal Procedure read:

Article 11

"Except where the law provides otherwise and without prejudice to the rights of the defence, proceedings during the inquiry and the judicial investigation shall be confidential ..."

Article 91

"Where, after a judicial investigation begun on a criminal complaint and civil-party application, a decision has been taken that there is no case to answer, the public prosecutor may summon the civil party before the criminal court in which the case was investigated. If the complaint and civil-party application are held to have been an abuse of process or to have been intended purely to gain time, the court may impose a civil fine, the amount of which shall not exceed FRF 100,000. The proceedings must be brought within three months of the date on which the decision that there is no case to answer becomes final.

Within the same period and without prejudice to the institution of criminal proceedings for malicious prosecution, the person placed under investigation or any other person who was the subject of the complaint may, if he does not bring a civil action, seek damages from the complainant ..."

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

22. The applicants submitted that their conviction by the Paris Court of Appeal had infringed 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 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."

23. The applicants' conviction amounted to "interference" with the exercise of their right to freedom of expression. Such interference will infringe Article 10 unless it was "prescribed by law", pursued one or more of the legitimate aims referred to in paragraph 2 and was "necessary in a democratic society" in order to achieve the aim or aims in question.

A. "Prescribed by law"

24. It was common ground that the interference was "prescribed by law", namely section 2 of the Act of 2 July 1931. The Court shares that view.

B. Legitimate aim

25. According to the parties, the interference was intended to protect the reputation and rights of others and to maintain the authority and impartiality of the judiciary. The Court sees no reason to conclude otherwise.

C. "Necessary in a democratic society"

26. The Court must therefore consider whether the interference was "necessary in a democratic society" in order to achieve the above aims.

1. General principles

27. The Court reiterates the fundamental principles established by its case-law on Article 10.

(i) Freedom of expression constitutes one of the essential foundations of a democratic society. Subject to paragraph 2 of Article 10, it is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society" (see the Handyside v. the United Kingdom judgment of 7 December 1976, Series A no. 24, p. 23, § 49, and the Jersild v. Denmark judgment of 23 September 1994, Series A no. 298, p. 26, § 37).

(ii) The press plays an essential role in a democratic society. Although it must not overstep certain bounds, in particular in respect of the reputation and rights of others and the need to prevent the disclosure of confidential information, its duty is nevertheless to impart – in a manner consistent with its obligations and responsibilities – information and ideas on all matters of public interest (see the De Haes and Gijsels v. Belgium judgment of 24 February 1997, *Reports of Judgments and Decisions* 1997-I, pp. 233-34, § 37). Journalistic freedom also covers possible recourse to a degree of exaggeration, or even provocation (see the Prager and Oberschlick v. Austria judgment of 26 April 1995, Series A no. 313, p. 19, § 38).

(iii) As a matter of general principle, the "necessity" for any restriction on freedom of expression must be convincingly established. Admittedly, it is in the first place for the national authorities to assess whether there is a "pressing social need" for the restriction and, in making their assessment, they enjoy a certain margin of appreciation. In cases concerning the press, such as the present one, the national margin of appreciation is circumscribed by the interest of democratic society in ensuring and maintaining a free press. Similarly, that interest will weigh heavily in the balance in determining, as must be done under paragraph 2 of Article 10, whether the restriction was proportionate to the legitimate aim pursued (see, *mutatis mutandis*, the Goodwin v. the United Kingdom judgment of 27 March 1996,

Reports 1996-II, pp. 500-01, § 40, and the Worm v. Austria judgment of 29 August 1997, *Reports* 1997-V, pp. 1550-51, § 47).

(iv) The Court's task in exercising its supervisory function is not to take the place of the national authorities but rather to review under Article 10 the decisions they have taken pursuant to their power of appreciation. In so doing, the Court must look at the "interference" complained of in the light of the case as a whole and determine whether the reasons adduced by the national authorities to justify it are "relevant and sufficient" (see, among many other authorities, the Goodwin judgment cited above, ibid.).

2. Application of the above principles in the instant case

28. The applicants pointed out that the 1931 Act quite simply prohibited the publication of any information, whether damaging or not, about proceedings instituted on a civil-party application. They pointed out that the principle of the confidentiality of judicial investigations as provided in Article 11 of the Code of Criminal Procedure applied to all types of criminal proceedings; there was therefore no valid reason for making confidentiality stricter and treating it as absolute in certain types.

29. The applicants further maintained that the absolute confidentiality laid down by the Act in issue was not in any way intended to safeguard the presumption of innocence. To adopt such an interpretation would, they argued, be to do no less than attribute to the press intentions it did not have. When the press reported information or ideas about a matter of public interest, its aim was to establish the truth of the matter and not particularly to pillory guilty parties. The applicants submitted that there was no reason to strengthen the protection afforded by Article 9-1 of the Civil Code where proceedings instituted on a civil-party application were concerned. They concluded that subjecting the press to absolute confidentiality was manifestly incompatible with proper provision of information to the public in a democratic society.

30. The Government pointed out, as a preliminary, that the Court had held that the imposition of prior restraints or bans on publication could not be regarded as *ipso facto* incompatible with Article 10 of the Convention. In that connection, they relied on the *Observer* and *Guardian* v. the United Kingdom judgment of 26 November 1991 (Series A no. 216, p. 30, § 60). They further argued that the interference in issue had also been necessary to guarantee the impartiality and fairness of the proceedings while at the same time safeguarding the presumption of innocence. The 1931 Act had merely reflected the need to respect the principle of presumption of innocence, strengthening that presumption more particularly in the case of criminal complaints lodged together with civil-party applications, on account of the risks potentially attaching to unwarranted recourse to that procedure.

31. The Government added that no other means of protecting Mr Gagneux's rights existed that would have made the prohibition provided

for in the 1931 Act unnecessary. They pointed out that the other means of protecting persons against whom judicial proceedings were instituted did not pursue the same aim as the Act in issue. Article 9-1 of the Civil Code protected the right to presumption of innocence in civil matters; by definition, only a person placed under investigation could rely on that provision, which amounted only to a form of *right of reply*. As to an action brought under Article 91 of the Code of Criminal Procedure, that merely punished *ex post facto* persons who had abused their right to bring court proceedings by making a civil-party application that was an abuse of process or was intended purely to gain time.

32. Lastly, the Government maintained that, while the prohibition of publication in the 1931 Act was mandatory throughout the investigation, it was never anything but a temporary measure and ceased as soon as a judicial decision was given. Consequently, the right to inform was merely postponed and its effects delayed, so as to give the courts the opportunity to satisfy themselves that the complaint was not a frivolous one.

33. In the light of those arguments, the Court considers that it must examine whether there were relevant and sufficient reasons, for the purposes of paragraph 2 of Article 10, to justify the applicants' convictions.

34. Journalists reporting on criminal proceedings currently taking place must, admittedly, ensure that they do not overstep the bounds imposed in the interests of the proper administration of justice and that they respect the accused's right to be presumed innocent (see the Worm judgment cited above, p. 1552, § 50).

35. The Court observes, however, that the interference in issue took the form of a general and absolute prohibition of the publication of any type of information.

Although the domestic courts have, as in the instant case, held the prohibition to be justified as a means of protecting the reputation of others and maintaining the authority of the judiciary, that justification does not appear sufficient, seeing that the ban applies only to criminal proceedings instituted on a complaint accompanied by a civil-party application and not to those instituted on an application by the public prosecutor's office or on a complaint not so accompanied. Such a difference in the treatment of the right to inform does not seem to be based on any objective grounds, yet wholly impedes the right of the press to inform the public about matters which, although relating to criminal proceedings in which a civil-party application has been made, may be in the public interest, as was so in the instant case, concerning as it did French political figures and their allegedly fraudulent actions as directors of a public company managing housing for immigrants.

36. The Court notes in any event that other means of protecting the rights of the accused, such as Article 9-1 of the Civil Code and Articles 11

and 91 of the Code of Criminal Procedure, make the absolute prohibition in the 1931 Act unnecessary.

37. In conclusion, convicting the journalists was not a measure that was reasonably proportionate to the legitimate aims pursued, regard being had to the interest of a democratic society in ensuring and maintaining press freedom. There has therefore been a violation of Article 10 of the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

38. Article 41 of the Convention provides:

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

A. Damage

39. The applicants sought the sum of 100,000 French francs (FRF).

40. The Government noted that the applicants were seeking compensation for pecuniary damage of which no evidence had been adduced, and which had not been established as being directly linked to the applicants' complaint. They also considered that non-pecuniary damage would be sufficiently compensated by any finding of a violation of the Convention.

41. The Court considers that the finding of a violation in this judgment constitutes in itself sufficient just satisfaction.

B. Costs and expenses

42. The applicants claimed FRF 150,000 in respect of costs and expenses relating to their representation. They broke that sum down as follows: FRF 100,000 for the proceedings in the domestic courts and FRF 50,000 for the proceedings before the Convention institutions.

43. The Government stated that they would be prepared to reimburse the fees paid by the applicants, provided that the relevant vouchers were produced and that the claims were reasonable.

44. On the basis of the information before it, the Court, making its assessment on an equitable basis, awards the applicants FRF 50,000.

C. Default interest

45. According to the information available to the Court, the statutory rate of interest applicable in France at the date of adoption of the present judgment is 2.74% per annum.

FOR THESE REASONS, THE COURT

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

2. *Holds* unanimously that the finding of a violation constitutes in itself sufficient just satisfaction for the alleged pecuniary and non-pecuniary damage;

3. *Holds* by six votes to one that the respondent State is to pay the applicants, within three months from the date on which the judgment becomes final according to Article 44 § 2 of the Convention, the sum of FRF 50,000 (fifty thousand French francs) for costs and expenses, together with simple interest at an annual rate of 2.74% payable from the expiry of the above-mentioned three months until settlement;

4. *Dismisses* unanimously the remainder of the applicants' claim for just satisfaction.

Done in French, and notified in writing on 3 October 2000, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

S. DOLLÉ
Registrar

W. FUHRMANN
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) concurring opinion of Mr Loucaides;
(b) concurring opinion of Sir Nicolas Bratza;
(c) dissenting opinion of Mr Costa.

W.F.
S.D.

CONCURRING OPINION OF JUDGE LOUCAIDES

I agree with the majority in all respects, but I would like to add the following.

It is true that the provisions of the Act of 2 July 1931, which prohibit publication of any information regarding criminal proceedings in the form of *constitution de partie civile*, before a judicial decision is taken, are aimed at preventing abuse of such proceedings by the individuals at whose instance they are instituted. However, it should be pointed out that such proceedings constitute an important safeguard against possible abuses by prosecuting authorities. They are the only proceedings through which individuals may put the machinery of criminal prosecution in motion, the prosecuting authorities having, in such cases, no discretionary power to decide whether to proceed or not. The other possible procedures for instituting criminal proceedings are prosecution at the instance of the public prosecutor and prosecution following a complaint. The last two methods, however, depend on the discretion of the prosecuting authorities.

The beneficial effects of the process of the *constitution de partie civile* on the administration of the criminal law, especially in serious matters of public interest (like the present case), are evident. And they are so important that they counterbalance any possibility of abuse by the individuals who resort to such a process. In any event, as the Court also points out (see paragraph 36 of the judgment), the system provides sufficient protection for the rights of persons affected by the proceedings in question.

The importance of criminal proceedings in the form of *constitution de partie civile* as a safeguard for the proper enforcement of the criminal law is, in my opinion, by itself, a special reason necessitating the existence of a right of the press to inform the public about them. The existence of public scrutiny of the relevant process will also add to its effectiveness.

CONCURRING OPINION OF JUDGE Sir Nicolas BRATZA

I agree in all respects with the view and reasoning of the majority of the Court in finding a violation of Article 10 of the Convention in the present case and only wish to add a few supplementary remarks.

In an important passage in its judgment in the Worm v. Austria case (29 August 1997, *Reports of Judgments and Decisions* 1997-V) the Court observed:

> "There is general recognition of the fact that the courts cannot operate in a vacuum. Whilst the courts are the forum for the determination of a person's guilt or innocence on a criminal charge ..., this does not mean that there can be no prior or contemporaneous discussion of the subject matter of criminal trials elsewhere, be it in specialised journals, in the general press or amongst the public at large ...
>
> Provided that it does not overstep the bounds imposed in the interests of the proper administration of justice, reporting, including comment, on court proceedings contributes to their publicity and is thus perfectly consonant with the requirement under Article 6 § 1 of the Convention that hearings be public." (pp. 1551-52, § 50)

It is true that in the Worm case the Court was concerned with an article which commented on trial proceedings rather than, as here, on the fact that a criminal complaint had been introduced. But the principle stated by the Court appears to me to be equally applicable at this earlier stage of criminal proceedings, the important question at all stages being whether the impugned statements overstepped the proper boundaries set to protect the fair administration of justice.

It is true, too, that in the Worm case itself the Court held that the Austrian courts were entitled to conclude that the applicant had overstepped those boundaries and in consequence found that there had been no violation of Article 10. However, it is important to note that the impugned statements, the statutory provisions in question and the application of those provisions by the domestic courts in the Worm case were entirely different from those in the present case.

In that case, the applicant had published a lengthy article commenting on the trial of Mr A. in which, as the Vienna Court of Appeal found, he had clearly stated the opinion that Mr A. was guilty of the charges of tax evasion on which he was being tried. Further, this view had, as that court further found, been formulated in such absolute terms that the impression was conveyed to the reader that a criminal court could not possibly do otherwise than convict Mr A. The applicant had been prosecuted under a statutory provision which made it an offence to discuss the probable outcome of proceedings or the value of evidence "... in a way capable of influencing the outcome of proceedings ...". The Vienna Court of Appeal, after a careful and detailed examination of the terms of the article, concluded that it was capable of influencing the outcome of the proceedings against Mr A., noting

that it could not be excluded that the members of the trial court, more particularly the lay judges, might read the article.

The Court, in finding that the reasons given by the Vienna Court of Appeal were both "relevant" and "sufficient" and that there had accordingly been no violation of Article 10 of the Convention, emphasised that the judgment of the Vienna Court of Appeal had taken into account the incriminated article in its entirety and was entitled to conclude that the article was capable of influencing the outcome of Mr A.'s trial.

By contrast, in the present case the 1931 Act is cast in terms which, as the Paris Criminal Court observed, are both general and absolute: it prohibits the publication of any information concerning a civil-party complaint prior to a judicial decision, irrespective of the nature of the information published or its factual accuracy, and irrespective of whether its publication could have any influence or effect on the outcome of the proceedings or on the presumption of innocence of the persons subject to the proceedings. Moreover, it is clear that, in finding the applicants guilty of infringing the provision, the domestic courts did not subject the impugned article to any analysis in order to determine whether it was capable of breaching the presumption of innocence of Mr Gagneux or otherwise interfering with the fair administration of justice.

In my view, it has not been shown that the applicants' article posed any such threat to the proper administration of justice and the conviction and fine (albeit modest) imposed on the applicants constituted an unjustified restriction on their freedom of expression.

DISSENTING OPINION OF JUDGE COSTA

(Translation)

I. Though unsettled by the reasoning of the majority in the present case, I am not persuaded by it.

The reasoning in paragraphs 33 to 37 of the judgment is in substance the following: convicting the editor of the magazine and the journalist who wrote an article in it was disproportionate to the aims pursued, which were legitimate under paragraph 2 of Article 10 of the Convention. Why? Because the prohibition of the publication of any information concerning applications to join criminal proceedings as a civil party, laid down in section 2 of the Act of 2 July 1931, is general and absolute; because it does not apply to criminal complaints not accompanied by a civil-party application or to proceedings instituted on an application by the public prosecutor's office; and, lastly, because persons to whom such information relates have other means of protection available, such as Article 9-1 of the Civil Code and Articles 11 and 91 of the Code of Criminal Procedure.

Let us consider those three reasons.

Is the prohibition general and absolute? Yes and no. The prohibition on publication is wide, but it is limited in time ("before a judicial decision has been given"). The aim of the prohibition is not only "legitimate", but eminently praiseworthy: to protect the presumption of the innocence of a person who has not even been placed under investigation but in respect of whom an alleged victim has taken a procedural measure that might lead readers to believe – especially where, as in this case, the information is accompanied by comment – that the person against whom the complaint has been lodged is guilty (in the instant case, of misuse of company property). I would also observe that, according to paragraphs 11 and 12 of the judgment, hardly any time elapsed between the lodging of the complaint by Sonacotra (on 10 February 1993) and the publication of the article reporting on it in *L'Evénement du Jeudi* (in the issue of 11 to 17 February 1993). In any event, as soon as a judicial decision is given – for example, a decision to place under investigation the person in respect of whom the complaint and civil-party application have been lodged – the prohibition lapses; it is therefore not an absolute one.

Is the prohibition limited to criminal complaints accompanied by civil-party applications? Yes; but does that matter? In practical terms, it is precisely the publication of the fact that a civil-party application has been lodged that jeopardises the presumption of innocence. As the public is well aware, this special form of complaint generally triggers a prosecution; the conditions that have to be satisfied for an investigation to be refused, which are set out in Article 86 of the Code of Criminal Procedure and in the case-law of the Criminal Division of the Court of Cassation, are very stringent.

Ordinary complaints do not have the same effect at all. And although a prosecutor's application for a judicial investigation sets criminal proceedings in train, it is the act of a member of the national legal service (*magistrat*), who is bound by professional confidentiality and plainly cannot be suspected of wishing to breach the presumption of innocence. It is therefore quite natural that the 1931 Act should have sought to safeguard that principle solely in respect of information concerning civil-party applications.

From a logical standpoint, moreover, I find it odd that the majority should conclude that there has been an infringement of freedom of expression on the ground that the Act does not afford sufficient protection of the rights and reputation of others; I fail to see how a restriction on the principle of freedom can be considered excessive on the ground that it is insufficient!

Unnecessary protection of the presumption of innocence? I do not think so. Although the Act of 15 June 2000 legitimately increased that protection (indeed, that was one of its aims), the Act of 2 July 1931 – at the material time, in any event – was not unnecessary, in my opinion. Article 9-1 of the Civil Code, even as worded before the amendment of 24 August 1993 came into force, might perhaps have enabled Mr Gagneux to exercise a right of reply, or even to obtain compensation; but that is doubtful, and the damage would have been done ("if you throw enough mud, some of it will stick"). As regards the provisions of the Code of Criminal Procedure referred to in the judgment (paragraphs 21 and 36), they do not seem to me relevant: Article 11 makes it an offence to breach the confidentiality of judicial investigations, but civil parties are not bound to observe the confidentiality of them (Court of Cassation, Criminal Division, judgment of 9 October 1978, *Bulletin* no. 263). And Article 91 only applies if (and when) a judicial investigation begun on a criminal complaint accompanied by a civil-party application has resulted in a decision that there is no case to answer, so that, in any event, the possibility of redress is afforded only at a very late stage.

II. As I am very much in favour of press freedom and suspicious of laws affecting civil liberties that were passed in the period before the Second World War, I should have liked, as a matter of principle, to vote with my colleagues in the majority. But facts are facts. Like the Paris Criminal Court, the Court of Appeal and the Court of Cassation, I consider that in the instant case the small fine imposed on the applicants (which, moreover, was never paid) constituted a penalty that was proportionate to the legitimate aim pursued by the Act, namely protection of the presumption of innocence. That is why I did not vote in favour of finding that there had been a violation of Article 10.