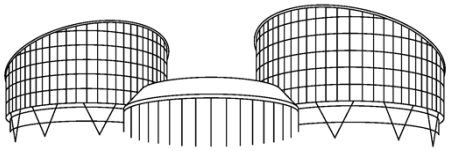

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIFTH SECTION

CASE OF BOUTON v. FRANCE

(Application no. 22636/19)

JUDGMENT

Art 10 • Freedom of expression • Suspended prison sentence for sexual exposure in respect of topless, militant Femen performance in a church to protest against Catholic Church's position on abortion • Narrow margin of appreciation • Weighing-up of competing interests inadequate and not in accordance with criteria established by Court • Disproportionate sanction

STRASBOURG

13 October 2022

FINAL

13/01/2023

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

In the case of Bouton v. France,

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

Síofra O'Leary*, President*,
Stéphanie Mourou-Vikström,
Lado Chanturia,
Ivana Jelić,
Arnfinn Bårdsen,
Mattias Guyomar,
Kateřina Šimáčková*, judges*,

and Victor Soloveytchik, *Section Registrar,*

Having regard to:

the application (no. 22636/19) against the French Republic lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a French national, Ms Eloise Bouton ("the applicant"), on 31 May 2019;

the decision to give notice to the French Government ("the Government") of the complaints concerning Articles 7 and 10 of the Convention and to declare inadmissible the remainder of the application;

the parties' observations;

Having deliberated in private on 13 September 2022,

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

INTRODUCTION

1. The application concerned, mainly under Article 10 of the Convention, the criminal conviction of the applicant, a feminist activist and member of Femen, for acts of sexual exposure (*exhibition sexuelle*) committed in a church.

THE FACTS

2. The applicant was born in 1983 and lives in Bagnolet. She was represented by Mr T. Bouzenoune, a lawyer.

3. The Government were represented by their Agent, Mr F. Alabrune, Director of Legal Affairs at the Ministry of European and Foreign Affairs.

4. The facts of the case, as submitted by the parties, may be summarised as follows.

I. THE APPLICANT'S PROTEST AND ITS COVERAGE IN THE MEDIA

5. At the relevant time, the applicant was – and had been since 2012 – a member of the Femen movement, an international women's rights

organisation founded in Ukraine in 2008 and known for its members' provocative, topless protest actions to combat the image of women as sexual objects. On 20 December 2013 she staged a protest in the church of La Madeleine in Paris, but not during any religious service, by standing topless in front of the high altar, with slogans daubed across her body, pretending to perform an abortion using raw beef liver as a prop. She was acting as part of an international protest action, organised by her movement, to condemn the Catholic Church's position on abortion. Her performance was brief and she left the church in silence when so requested by the choirmaster. As the applicant had contacted journalists in advance, about ten of whom were present, the protest received media coverage. The national press published articles on their websites containing photographs of the applicant in front of the altar wearing a veil, bare-breasted, with her arms outstretched in the form of a cross, or with her hands clasped together as if in prayer. In an interview with the magazine *Le Nouvel Observateur* on 23 December 2013, published on the internet in the form of a letter addressed to the parish priest, the applicant explained the meaning of her act: she had held "two pieces of beef liver in her hands, symbolising the aborted baby Jesus" and painted on her torso and back were "the slogans '344th slut' ... in reference to the *Manifesto of the 343* launched by pro-abortion feminists in 1971, and 'Christmas is canceled [sic]'".

II. COURT PROCEEDINGS

6. The parish priest lodged a criminal complaint, together with an application to join the proceedings as a civil party. On 7 January 2014 the applicant was taken into custody. She explained that she had been appointed by collective decision of the Femen movement to stage her protest in France as described above, with similar protests planned, at the same time, in other countries, by other Femen activists. She clarified that the church of La Madeleine had been chosen in France for its "international symbolism". The investigators entered into evidence a publication from the Femen France website containing the same photographs with the captions: "Christmas is cancelled from the Vatican to Paris; on the altar of the church of La Madeleine, Holy Mother Eloise has aborted Jesus". On the issue of her nudity, the applicant told the investigators that, for her, the point had been to raise awareness and not to commit the offence of sexual exposure. She added that this was standard practice for Femen, who went topless at all their public protests in order to subvert the image of women as sexual objects by reclaiming it and turning it into a political message.

7. The applicant was summoned before the criminal court by the public prosecutor for the offence of sexual exposure. She left the Femen movement in February 2014.

8. After a hearing on 15 October 2014, the Paris Criminal Court refused, as a preliminary point, to submit to the Court of Cassation a priority question of constitutionality (*question prioritaire de constitutionnalité – QPC*) raised by the applicant, finding that her complaint concerning the lack of precision of the concept of sexual exposure under Article 222-32 of the Criminal Code, with regard to the principle that only the law could define a crime and prescribe a penalty, had no serious merit, as the Court of Cassation had previously held in a judgment of 9 April 2014 (see paragraph 18 below). Ruling subsequently on the merits on 17 December 2014, the Criminal Court dismissed the applicant's pleas alleging a failure to establish the offence of sexual exposure and a violation of Article 10 of the Convention, respectively. In particular, it rejected the applicant's argument to the effect that her act had been exclusively political and fell within the scope of her freedom of expression, finding as follows:

> "Eloise Bouton alleges, in the alternative, citing Article 10 of the European Convention on Human Rights, that her action was exclusively political and that [her] acts fell within the bounds of her freedom of expression, which includes her freedom of opinion and the freedom to receive or impart information or ideas without interference by public authority, which is to say, in the present case, by the public prosecutor's office.
>
> It should be pointed out that the same provisions also provide that those rights may be restricted so long as they are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.
>
> In the present case, the defendant's rights were curtailed by the pressing social need to protect others from the sight of an action performed half naked in a place of worship, which some might consider shocking. The criminal proceedings brought by the public prosecutor's office were therefore proportionate to the legitimate aim pursued.
>
> This argument will accordingly be dismissed as without merit in the present case."

9. The Criminal Court convicted the applicant of sexual exposure and sentenced her to a suspended term of one month's imprisonment and, on the civil interests, ordered her to pay the parish representative 2,000 euros (EUR) in respect of non-pecuniary damage and to contribute EUR 1,500 to the other party's costs.

10. In the Paris Court of Appeal, the applicant did not reiterate her request for submission of a priority question of constitutionality. On 15 February 2017 that court upheld the judgment in its entirety, including the sentence. It found that the constituent elements of the offence of sexual exposure were made out, including "the material fact of exposure of a sexual body part or parts", and examined the facts in the light of those elements, reasoning as follows:

> "As to the material element, the defendant herself does not dispute that, after entering the church of La Madeleine, located in the 8th *arrondissement* of Paris, shortly before 10 a.m. on 20 December 2013, accompanied by journalists who had been invited the

day before to attend the protest, and approaching the altar, she removed her clothing, exposing her bare breasts, with the words '344th slut' written on her chest and 'Christmas is canceled [sic]' on her back, and in a state of undress pretended to 'abort the unborn Jesus', laying on the altar a bleeding piece of veal liver purportedly representing a foetus. ... The acts were committed during a rehearsal of the La Madeleine choir, leading the choirmaster, Mr [M.], to intervene by firmly requesting that Eloise Bouton and the journalists accompanying her leave. She justified her action on the grounds that she had wished to condemn the 'the anti-abortion campaigns' led by the Catholic Church throughout the world, particularly in Spain and certain Eastern European countries, as she clarified during the hearing before the court. The defendant cannot seriously dispute the fact that by exposing her breasts for others to see she thereby exposed sexual body parts, even if she denies the characterisation of her breasts as sexual body parts, when she nevertheless submitted at the hearing that the act of touching her breasts without her consent would still constitute sexual assault. ... Although Eloise Bouton exposed her breasts without obscene accompanying gestures, she committed that act in a religious edifice, a place of prayer and contemplation, at the entrance to which those going in – believers, atheists and agnostics alike – are reminded that they are required to be decently clothed. ... As an additional consideration, it will be noted that Eloise Bouton acted without any authorisation whatsoever from the parish priest appointed to that church. Lastly, the act committed and the poses struck in a religious edifice by Eloise Bouton, who claims to have used her breasts as a weapon, cannot be justified by appeals to changes in mores, conceptions of art or notions of decency. Moreover, the spectacle of the exposure [of her breasts] was imposed on others, in a place open to others' gazes, since the church of La Madeine was open to the public at the time and the act ... was committed during a rehearsal of the La Madeleine choir, near the altar and in the presence of the choirmaster, Mr [M.], who intervened firmly to put an immediate end to it. Thus, the sight of Eloise Bouton's exposure of her sexual body parts was also imposed on a non-consenting person. As to the mental element of the offence ... Eloise Bouton was aware of the presence of others and had even wished to be accompanied by some ten journalists in order to spread word of her actions effectively and efficiently. As she herself acknowledges, and as pointed out both in the pleadings and written submissions of the civil party's counsel and in the public prosecutor's submissions, she displayed her bare breasts as a weapon, with the intent, moreover, of offending others' sense of propriety, in particular that of Catholics, who are opposed to abortion and conduct anti-abortion campaigns in certain countries".

11. As to the question whether the applicant's freedom of expression had been interfered with during a feminist protest organised by the Femen movement to allow her to defend her political opinions, the Court of Appeal reasoned as follows:

"While the first paragraph of Article 10 of [the Convention] provides that 'everyone has the right to freedom of expression', it is observed that this right includes the freedom to hold opinions and to receive or impart information and ideas without interference by public authority and regardless of frontiers. Paragraph 2 of the aforementioned provision provides, in particular, that 'the exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions ... as ... 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'. ... In applying and ensuring respect for Article 10 of [the Convention], the courts are required to reconcile freedom of

> expression with other freedoms of equal value, such as freedom of religion. In the present case, the action in the church of La Madeleine, which had been specially chosen for the occasion, was carried out by Eloise Bouton with the stated aim of 'shocking' public opinion and Catholic church-goers by exposing her breasts and protesting violently and bluntly against the Catholic Church's anti-abortion positions, Ms Bouton having dared to defy individuals of the Catholic confession in a central area of one of their churches, namely, the altar, which encloses a stone containing the fragment of a Saint's relics. ... The criminal proceedings brought by the public prosecutor's office against Eloise Bouton were therefore not in any way aimed at depriving her of her freedom of expression or her right to impart her political opinions, but rather to punish an act of sexual exposure that was unacceptable in a place of worship and to protect the religious sentiments of the faithful who were the direct targets of that act. What she took to be within the bounds of her freedom of expression resulted in a serious interference with others' freedom of thought and with freedom of religion more generally. Consequently, this court cannot accept the justification put forward on the basis of Article 10 of [the Convention] and of an alleged infringement of Ms Bouton's freedom of expression. Consequently, as the lower court pointed out, 'the defendant's rights were curtailed by the pressing social need to protect others from the sight of an action performed naked in a place of worship, which some might consider shocking. The criminal proceedings brought by the public prosecutor's office were therefore proportionate to the legitimate aim pursued'. ... The Criminal Court, drawing the necessary legal conclusions, therefore correctly found Eloise Bouton to be guilty of the offence of sexual exposure."

12. As to the suspended sentence of one month's imprisonment, the Court of Appeal held that the applicant, a freelance journalist who was well-integrated socially and professionally, with a clean criminal record, had received a sanction that represented "a correct application of criminal law, taking into account both the circumstances surrounding the commission of the offence and the offender's character".

13. The applicant appealed against that judgment on points of law. On 9 January 2019 the Court of Cassation dismissed the appeal on the following grounds:

> "By ruling ... with reasoning in which the offence of sexual exposure was made out in all of its constituent elements, both material and mental, as committed by Ms Bouton – who had wilfully exposed her breasts in a church she knew to be accessible to public view – irrespective of the reasons she gave for her act, the Court of Appeal, which was not required to respond to the plea of a mistake of law allegedly caused by a ministerial response which lacked any normative force and did not excessively interfere with the appellant's freedom of expression, which must be reconciled with the right of others not to be disturbed in the practice of their religion, as recognised in Article 9 of [the Convention], duly justified its decision."

RELEVANT DOMESTIC LEGAL FRAMEWORK

I. THE CRIMINAL CODE

14. Article 222-32 of the Criminal Code is contained in the part of that Code which deals with "sexual assault". As worded at the relevant time – prior to the enactment of Law no. 21-478 of 21 April 2021, which extended

the offence of sexual exposure to cases where a sexual act is explicitly committed in full view of others even without exposure of a bared body part – it provided as follows:

> "Sexual exposure in full view of others, in a place in plain sight of the public, shall be punishable by one year's imprisonment and a fine of 15,000 euros."

II. CASE-LAW OF THE ORDINARY COURTS

A. Characterisation of the offence of sexual exposure

15. The concept of sexual exposure is not defined in Article 222-32 of the Criminal Code. The Court of Cassation's case-law has endeavoured to establish its constituent elements. With regard to bare breasts, the characterisation of the offence of sexual exposure has been the subject of some debate in the light of changing mores and claims of a right to nudity without sexual connotation in particular contexts (artistic nudes, nudism). Well-established case-law shows that, at the relevant time, the offence of sexual exposure criminalised acts which involved revealing a sexual body part and received a certain amount of publicity. Beyond the objective material element of the offence, the act had to be carried out "in full view of others" (*imposé à la vue d'autrui*) in a publicly accessible place. That such exposure was imposed on others unexpectedly, whether by surprise or by force, justified the fact that this conduct was regulated by the Criminal Code as a "sexual assault" and entailed that there be a connection between the characterisation of the offence of sexual exposure and the place where it was committed. Lastly, the mental element of the offence consisted solely in the knowledge that the relevant act of exposure was indecent, and did not depend on the offender's motives. In a judgment of 24 November 2021 (appeal no. 21-81.412), the Criminal Division of the Court of Cassation had thus held as follows in dismissing an appeal on points of law lodged against a judgment sentencing a man to the payment of a fine of EUR 600 for the offence (*délit*) of sexual exposure:

> "6. In finding the defendant guilty of sexual exposure, the judgment appealed against observes that it followed from the findings of the *gendarmes*, confirmed by photographs, that Mr [K] [B] had sat naked on the riverbank opposite the one where witnesses were present, in a position that allowed his genitals to be seen.
>
> 7. The lower court added that the distance between them had not been sufficient to allow the witnesses to avoid the sight of his naked genitals and that, moreover, he had refused to get dressed, in spite of being asked to do so.
>
> 8. The lower court stated that the defendant also exposed his nudity in full view of people on watercraft and passers-by.
>
> 9. The court concluded that the intent on the part of Mr [B] to have his nudity be seen, in the knowledge that it offended others' sense of propriety, established the mental element of the offence.

10. In so finding – to the extent that, in order to be made out, the offence of sexual exposure requires neither sexual or obscene conduct nor the deliberate intent to offend others' sense of propriety – the Court of Appeal justified its decision."

B. Femen members' freedom of expression

16. In a judgment of 23 January 2018 (appeal no. 17-80.524), the Court of Cassation ruled on obscene gestures and shocking statements directed towards the Catholic Church by Femen activists in the context of demonstrations that had been held in France against the draft bill authorising same-sex marriage. In that case, the Criminal Division dismissed the appeal on points of law lodged by the association General Alliance against Racism and for Respect for the French and Christian Identity (*Association alliance générale contre le racisme et pour le respect de l'identité française et chrétienne* – "AGRIF") to challenge – in particular on freedom-of-expression grounds – the dismissal of its claims for damages against those activists, whom the criminal court had acquitted of charges of public insults to individuals on account of their religion (section 33 of the Freedom of the Press Act of 29 July 1881). The Court of Cassation reasoned as follows:

"It can been seen from the judgment appealed against, the judgment it upholds and the evidence given in the proceedings that, during the demonstration held by several associations on 18 November 2012 against the draft bill to extend marriage to same-sex couples, young women who were members of the Femen movement barged onto the scene wearing nuns' headdresses, their backs and torsos bare, where the following slogans were written: 'in gay we trust', 'Holy (narrow-minded) Spirit' ('*saint esprit étroit*'), 'fuck church' and 'mind your own ass'. They chanted the slogan 'in gay we trust' and brandished aerosol canisters marked with the words 'Holy sperm' and 'Jesus sperm'. Since no charges had been brought following the complaint lodged by AGRIF, among others, the association lodged a criminal complaint, together with an application to join the proceedings as a civil party, for public insults against individuals on account of belonging to a given religion. That charge was laid against six members of the Femen movement, who were tried and acquitted by the Criminal Court. AGRIF appealed against that decision.

In holding that no civil liability was demonstrated on the basis and within the limits of the accusations in respect of which the prosecution was brought, the judgment notes that most of the slogans were parodic and that the harshest of them, 'fuck church', targeted an institution, rather than one or more specific individuals, and was provocative but not violent. The lower court added that the Femen activists had thereby expressed their opposition to a demonstration which they considered intolerant of the rights they sought to defend, such that what was at issue were competing claims to freedom of expression in forms that remained tolerable in a democratic society.

In the light of these considerations, the Court of Appeal did not disregard the legislation referred to in the ground of appeal given that, although the intrusion of the Femen activists had disturbed others in the exercise of their right to demonstrate, and although their outfits – which parodied a nun's outfit so as to deride it –, their slogans and their gestures, some of them obscene, explicitly took aim at the teachings of the Catholic Church, such that they had been likely to offend the religious convictions of

those in attendance, they had nevertheless not been insulting towards those individuals for belonging to that religion. ...”

17. The Court of Cassation was also called upon to examine whether the offence of sexual exposure had been made out in the case of a Femen activist who, on 5 June 2014, had vandalised the wax statue of Vladimir Putin on display at the Musée Grévin in Paris and who had been prosecuted on charges of vandalising another’s property. In an initial judgment of 10 January 2018 the Criminal Division held that the offence of sexual exposure resulting from bare breasts could be made out irrespective of “any sexual connotation”. Accordingly, it quashed the judgment of the Court of Appeal which, on that ground, had overturned the judgment of the Criminal Court sentencing the defendant to the payment of a fine of EUR 1,500 in respect of both offences. The Court of Cassation reasoned as follows:

“... in partly overturning the judgment referred to [the Court of Appeal] and acquitting Ms Z... of the offence of sexual exposure, the judgment holds that the act of exposing a bare female torso in for others to see, without any sexual intent, does not, having regard to the circumstances in which that act took place on 5 June 2014, constitute sexual exposure, the defendant having used her bare breasts displaying a written message for expressive purposes, outside of any sexual connotation.

But in so ruling, despite having noted – independently of the reasons given by the defendant, which had no bearing on the constituent elements of the offence – that the defendant had deliberately exposed her breasts in a museum, namely a place open to the public, the Court of Appeal misconstrued the meaning and scope of the aforementioned provision. ...”

In the same case, which returned to the Court of Cassation – after being referred back to the Court of Appeal, with a differently constituted bench – by way of a second judgment delivered on 26 February 2020 (appeal no. 19-81.827, *Bulletin criminel* 2020 no. 2), the Criminal Division, in dismissing the appeal on points of law lodged by the public prosecutor’s office against the judgment of the Court of Appeal having acquitted the defendant of the charge of sexual exposure, reasserted that the offence of sexual exposure had been made out, even absent any sexually-connotated intent on the part of the offender, and upheld the defendant’s acquittal of that offence on the grounds that she had been exercising her right to freedom of expression. The relevant reasons given in the judgment read as follows:

“10. In acquitting the defendant of the offence of sexual exposure, the Court of Appeal held that the mere exposure of a woman’s breasts did not fall under the provisions for the offence set out in Article 222-32 of the Criminal Code provided the intention expressed by the offender was devoid of any sexual connotation and was not aimed at offending others’ sense of propriety, but constituted the expression of a political opinion, as protected by Article 10 of [the Convention].

11. The lower court noted that the defendant had stated that she was a member of the movement known as ‘Femen’, which called for a ‘radical feminism’ and whose members exposed their bare breasts, on which political messages could be read. This

form of activism constituted a rejection of the female body's sexualisation and its reappropriation by the activists through its exposure in the nude.

12. The judgment adds that the way society looks at women's bodies has changed over time and that the frequent display of female nudity in the press or in advertising, even with strong sexual connotations, does not trigger any response in the name of public morality.

13. The second-instance court emphasised that, while certain actions mounted by members of the 'Femen' movement had been sanctioned as unacceptable attacks on freedom of thought and freedom of religion, the defendant's conduct at the Musée Grévin did not constitute such an action and did not appear to have infringed any right guaranteed by a statutory or regulatory prescription.

14. The Court of Appeal was wrong to state that the mere exposure of a woman's breasts did not fall under the provisions for the offence set out in Article 222-32 of the Criminal Code, provided the intention expressed by the offender was devoid of any sexual connotation.

15. However, the judgment should not be overturned since it can be seen from the lower court's findings that the defendant's conduct was part of a political protest and that her conviction, having regard to the nature of the act in question and the context surrounding it, would disproportionately interfere with her freedom of expression."

C. Priority questions of constitutionality

18. In a judgment of 9 April 2014 (appeal no. 14-80.867) the Court of Cassation held that there was no reason to refer the following question to the Constitutional Council, submitted by a man challenging his committal for trial in the Assize Court on charges of rape, aggravated sexual assault and sexual exposure: "Is Article 222-32 of the Criminal Code compatible with the principle that only the law can define a crime and prescribe a penalty, with Article 8 of the Declaration of the Rights of Man and of the Citizen of 1789 and with Article 34 of the Constitution, which entail that sexual exposure is not punishable under criminal law unless the constituent elements of the offence are not adequately defined by law ... ?" The Criminal Division gave the following reasons for its decision:

"The impugned provisions are applicable to the proceedings.

They have not previously been declared to be compatible with the Constitution in the reasoning and operative part of a decision by the Constitutional Council.

However, the question, which does not pertain to the interpretation of a constitutional provision that the Constitutional Council has not yet had occasion to apply, is not new.

Moreover, the question raised clearly lacks serious merit, since Article 222-32 of the Criminal Code is drafted in terms that are sufficiently clear and precise for it to be interpreted without risk of arbitrariness, a task which falls to the criminal courts."

19. In a judgment of 16 February 2022 (appeal no. 21-82.392) the Court of Cassation was once again called upon to rule on the same question following a priority question of constitutionality submitted by three Femen activists who had been prosecuted on charges of sexual exposure for

protesting topless in 2018 on the Champs Élysées during the commemoration of the armistice of 11 November 1918, two of whom had been sentenced by the Court of Appeal to suspended terms of one month's imprisonment and the third – also prosecuted for forgery and making use of forged documents with intent to defraud – to a suspended term of two months' imprisonment. In that case, the question had been broadened to include the discriminatory nature of the offence depending on whether the nudity involved female or male torsos. The Criminal Division gave the following reasons, which were in part identical to those set out in the above-mentioned judgment of 9 April 2014 (see paragraph 18 above), for refusing to refer the question to the Constitutional Council:

"1. The priority question of constitutionality is worded as follows:

'Are the provisions of Article 222-32 of the Criminal Code incompatible with the rights and freedoms guaranteed by the Constitution, and more precisely:

- with Articles 5, 8 and 16 of the Declaration of the Rights of Man and of the Citizen of 1789, 34 of the Constitution and with the principle that only the law can define a crime and prescribe a penalty, the principle that the law should be clearly defined, the principle of legal foreseeability and the principle of legal certainty, in that they fail to define the constituent elements of the offence, in particular the concept of 'sexual exposure'?

- with the principle of the necessity and proportionality of punishment guaranteed by Article 8 of the Declaration of the Rights of Man of 1789, in that they criminalise the mere nudity of female torsos in any place that is accessible for the public to see?

- with the principle of equality that derives from Articles 1, 6 and 13 of the Declaration of the Rights of Man and of the Citizen, from the principle of gender equality enshrined in the third paragraph of the Preamble of the Constitution of 4 October 1946 and from the principle of non-discrimination, in that they criminalise the nudity of female torsos but not that of male torsos?'

2. The impugned legislative provision is applicable to the proceedings and has not yet been declared compatible with the Constitution in the reasoning and operative part of a decision of the Constitutional Council.

3. The question, which does not pertain to the interpretation of a constitutional provision that the Constitutional Council has not yet had occasion to apply, is not new.

4. The question raised does not have serious merit, for the following reasons.

5. Firstly, Article 222-32 of the Criminal Code is worded in terms that are sufficiently clear and precise for it to be interpreted without risk of arbitrariness, a task which falls to the criminal courts, subject to the scrutiny of the Court of Cassation.

6. Secondly, the penalties provided for in the impugned provision, which the courts may adjust depending on the situation put before them, were regarded as necessary by the legislature for the purpose of maintaining public order and do not appear manifestly disproportionate to the aim thus pursued.

7. Thirdly, the principle of equality does not prevent the law from being applied differently in different situations, or from derogating from equality on general-interest grounds, and Article 222-32 of the Criminal Code applies to both men and women, even

if their anatomical differences and the representations associated therewith mean that the concept of exposure is given a different content in each case."

III. OTHER MATERIAL

20. The National Advisory Commission on Human Rights (*Commission nationale consultative des droits de l'Homme*) issued an opinion dated 20 November 2018 "on sexual abuse: a social and public health emergency, a fundamental rights issue" (*Official Gazette of the French Republic* of 25 November 2018) in which, under the heading "Clarifying the criminal statutes governing sexual offences", it questioned the wording of certain criminal statutes which, in its view, warranted revision so as to be sufficiently clear and legible to meet the requirements of the principle that offences must be defined in law. It specifically cited the case of the offence of sexual exposure set out in Article 222-32 of the Criminal Code and gave the prosecution of a Femen activist as an example (see paragraph 41 of the opinion).

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

21. The applicant complained of her criminal conviction for acts of sexual exposure committed in a church during a protest which she had conducted as a member of Femen. She alleged that this entailed a violation of 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 ... for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others ..."

A. Admissibility

22. The Court notes that this complaint is neither manifestly ill-founded nor inadmissible on any other grounds listed in Article 35 of the Convention. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

(a) The applicant

23. The applicant submitted, firstly, that, for want of the requisite clarity and foreseeability, the Government's acknowledged interference with her freedom of expression was not "prescribed by law" within the meaning of paragraph 2 of Article 10. Next, she submitted that, although such interference could be regarded as having pursued a "legitimate aim", namely, to combat any potential breaches of public order as might result from provocative sexual nudity, it could not be considered to have been "necessary in a democratic society" or proportionate to that aim. In this connection, she pointed out that the national authorities ought to have taken into account the political dimension at the heart of her protest, as they had done in dismissing the charge of sexual exposure in the case of the Femen activist who had exposed her breasts in the Musée Grévin (see paragraph 17 above).

24. The applicant argued that, far from being gratuitously offensive or seeking to disturb those present in the church in the practice of their faith, her action had been part of a public debate over women's place in society and had sought to convey a message about the Catholic Church's position on abortion. She pointed out that the protection afforded by Article 10 also extended to ideas that offended or shocked any section of the population. Moreover, she denied that there was any need, in the present case, to reconcile two fundamental freedoms guaranteed by Articles 9 and 10 of the Convention, since there had been no interference whatsoever with freedom of religion. She added that in view of the sentence imposed on her, especially as it had been a suspended prison sentence – a custodial sentence – the interference with her freedom of expression could not be regarded as proportionate.

(b) The Government

25. The Government did not deny that the applicant's conviction constituted interference with her right to freedom of expression. They submitted, however, that the three conditions for ensuring respect for that right had been met. First of all, as to such interference being "prescribed by law", they argued that the applicant's conviction for the offence of sexual exposure had been based on the law and on an accessible and foreseeable interpretation of the relevant case-law. In that connection, they argued that the wording of Article 222-32 of the Criminal Code involved the exposure of a sexual body part, which constituted the objective element of the impugned conduct, and that the offence had also been made out on the basis of the public nature of the act in question and its mental element, which was to be distinguished from the motive for the offence in accordance with a general

principle of French criminal law. As to the nudity of a woman's breasts, the Government noted that the case-law had consistently regarded this as the nudity of an intimate part of the body. They furthermore emphasised that the Court of Cassation had repeatedly ruled that the aforementioned Article 222-32 was sufficiently clear and precise and had refused to refer a priority question of constitutionality to the Constitutional Council concerning the compatibility of that provision with the principle that only the law could define a crime and prescribe a penalty (see paragraph 18 above). The Government concluded from this that the interpretation of that provision could be carried out by the domestic courts with no risk of arbitrariness and that it was indeed within their remit to do so.

26. As to the existence of a "legitimate aim" pursued by the interference with the applicant's freedom of expression, the Government submitted that such an aim was supplied by the need to protect morals, public order and the rights of others.

27. Lastly, as to the "necessity of the interference in a democratic society", the Government submitted that the applicant's conviction had by no means been connected to the nature of the ideas expressed about abortion or to any lack of respect for others' beliefs: only the form – and not the content – of the message expressed had been punished in the present case. With particular reference to the *Aydın Tatlav v. Turkey* judgment (no. 50692/99, 2 May 2006), they stressed that the right to freedom of expression also entailed duties and responsibilities, including the obligation, in the case of religious beliefs, to avoid expressions that were gratuitously offensive to others, or profane, and the duty to comply with the criminal statutes of ordinary law. The Government argued that, in this domain, States also enjoyed a margin of appreciation in punishing, in the event of a "pressing social need", certain types of conduct that were found to be incompatible with respect for the rights of others to freedom of conscience and religion. They argued that, in the present case, the applicant's conduct had been deliberately designed to offend the religious sensibilities of those present in the church and inferred from this that there had been a margin of appreciation as to the means of punishing such conduct.

28. In addition, the Government observed that the reasons given by the national courts had been relevant and sufficient, since they had found that the applicant's action had gone beyond merely contributing to the debate over women's rights and had also sought to offend others, in particular by means of an act of sexual exposure that was punishable under criminal law. They added that the courts had thereby justified the sanction imposed on the applicant, which had been reasonable in the light of the circumstances of the case and of the competing rights, both in terms of the sentence and the civil compensation awarded to the church representative. They concluded that, in the particular circumstances of the case, a fair balance had been struck

between the applicant's right to freedom of expression and the need to protect the rights of others.

2. The Court's assessment

29. As to whether there has been an interference with the applicant's right to freedom of expression, the Court notes that, without denying the existence of such interference, the Government argued that the applicant had not been punished for the ideas she had defended, but rather for the commission of a sexual offence (see paragraph 27 above).

30. As a preliminary consideration, the Court reiterates that a person's ideas or opinions can be expressed through conduct or behaviour (see, for example, *Mătăsaru v. the Republic of Moldova*, nos. 69714/16 and 71685/16, § 29, 15 January 2019; *Ibrahimov and Mammadov v. Azerbaijan*, nos. 63571/16 and 5 others, §§ 166-67, 13 February 2020; and *Handzhiyski v. Bulgaria*, no. 10783/14, § 45, 6 April 2021) and that it has previously held that Article 10 could apply to artistic forms of expression, since art and creation contribute to the exchange of ideas and opinions (see, in particular, *Müller and Others v. Switzerland*, 24 May 1988, §§ 27 and 33, Series A no. 133, and *Ulusoy and Others v. Turkey*, no. 34797/03, §§ 28-29, 3 May 2007). The Court has thus held that "performances" consisting of a mix of conduct and verbal expression amounting to a form of artistic and political expression fall within the scope of artistic expression protected by Article 10 (see, in particular, the judgment in *Mariya Alekhina and Others v. Russia*, no. 38004/12, §§ 202-06, 17 July 2018, concerning a musical performance in a cathedral by the Russian, feminist, punk-rock group "Pussy Riot"). In a different context, the Court also held that public nudity could be regarded as a form of freedom of expression (see *Gough v. the United Kingdom*, no. 49327/11, § 150, 28 October 2014). However, in the aforementioned *Mariya Alekhina and Others* judgment, the Court pointed out that notwithstanding the acknowledged importance of freedom of expression, Article 10 did not bestow any freedom of forum for the exercise of that right and clarified that holding an artistic performance or giving a political speech in a type of property to which the public enjoys free entry may, depending on the nature and function of the place, require respect for certain prescribed rules of conduct (see *Mariya Alekhina and Others*, cited above, § 213).

31. In the present case, the Court, like the parties, considers that the impugned conviction, which was the consequence of the applicant's activist "performance", constituted interference with her right to freedom of expression under Article 10 § 1 of the Convention. Such interference will be in breach of Article 10 unless, being "prescribed by law", it pursues one or more of the legitimate aims referred to in paragraph 2 of that provision and is "necessary in a democratic society" to achieve such aim or aims.

(a) Whether the interference was prescribed by law

(i) General principles

32. The Court would refer to the general principles with regard to the requirement of foreseeability under Article 10, as summarised in the *Perinçek v. Switzerland* ([GC], no. 27510/08, §§ 131-36, ECHR 2015 (extracts)) and *Selahattin Demirtaş v. Turkey (no. 2)* ([GC], no. 14305/17, §§ 249-54, 22 December 2020) judgments.

33. The Court emphasises, in particular, that a norm cannot be regarded as a "law" unless it is formulated with sufficient precision to enable a person to regulate his or her conduct. That person must be able – if need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which may result from a given action. However, the Court has clarified that these consequences need not be foreseeable with absolute certainty, as experience has shown this to be unattainable. Even in cases in which the interference with the applicants' right to freedom of expression had taken the form of a criminal "penalty", the Court has recognised the impossibility of attaining absolute precision in the framing of laws, especially in fields in which the situation changes according to the prevailing views of society, and has accepted that the need to avoid rigidity and keep pace with changing circumstances means that many laws are couched in terms which are to some extent vague and whose interpretation and application are questions of practice (see, among many other authorities, *Müller and Others v. Switzerland*, cited above, § 29; *Tammer v. Estonia*, no. 41205/98, § 37, ECHR 2001-I; and *Chauvy and Others v. France*, no. 64915/01, § 43, ECHR 2004-VI).

34. The Court further reiterates that when speaking of "law", Article 10 § 2 denotes the same concept to which the Convention refers elsewhere when using that term, for instance in Article 7 (see *Grigoriades v. Greece*, 25 November 1997, § 50, *Reports of Judgments and Decisions* 1997-VII; *Başkaya and Okçuoğlu v. Turkey* [GC], nos. 23536/94 and 24408/94, § 49, ECHR 1999-IV; and *Erdoğdu and İnce v. Turkey* [GC], nos. 25067/94 and 25068/94, § 59, ECHR 1999-IV). In the context of Article 7, the Court has consistently held that the requirement that offences be clearly defined in law is satisfied where a person can know from the framing of the relevant provision – if need be, with the assistance of the courts' interpretation of it – what acts and omissions will render him or her criminally liable (see, among other authorities, *Kononov v. Latvia* [GC], no. 36376/04, § 185, ECHR 2010; *Del Río Prada v. Spain* [GC], no. 42750/09, § 79, ECHR 2013; *Rohlena v. the Czech Republic* [GC], no. 59552/08, § 50, ECHR 2015; and, in a case concerning both Article 7 and Article 10 of the Convention, *Radio France and Others v. France*, no. 53984/00, § 20, ECHR 2004-II). Article 7 does not prohibit the gradual clarification of the rules of criminal liability through judicial interpretation from case to case, if the resultant development is

consistent with the essence of the offence and can reasonably be foreseen (see *Kononov*, § 185; *Del Río Prada*, § 93; and *Rohlena*, § 50, all cited above).

35. It is not for the Court to express a view on the appropriateness of the methods chosen by the legislature of a respondent State to regulate a given field (see *Selahattin Demirtaş*, cited above, § 251) or to review domestic law in the abstract (see *Magyar Kétfarkú Kutya Párt v. Hungary* [GC], no. 201/17, § 96, 20 January 2020). Its task is confined to determining whether the methods adopted and the effects they entail are in conformity with the Convention (see *Magyar Helsinki Bizottság v. Hungary* [GC], no. 18030/11, § 184, 8 November 2016).

(ii) Application of those principles to the present case

36. As a preliminary consideration, the Court would clarify that it follows from the principles reiterated above that the decisive question at this stage is whether, in conducting herself in the manner for which she was convicted, the applicant knew or ought to have known – if need be, after taking appropriate legal advice – that her actions could render her criminally liable under Article 222-32 of the Criminal Code (see, *mutatis mutandis*, *Perinçek*, cited above, § 137).

37. Firstly, the Court notes that the concept of sexual exposure was not defined in the aforementioned Article 222-32 and that a change in society's attitudes had given rise to some debate in the national courts on the sexual nature of a woman's bare breasts and on the existence of discrimination between men and women on that account (see paragraphs 15 and 19 above). In this connection, it observes that, since the Court of Cassation failed to refer priority questions of constitutionality as to whether the offence of sexual exposure was sufficiently clear, the Constitutional Council was not given the opportunity to decide the matter. The Court further notes that the National Advisory Commission on Human Rights recommended that the scope of the offence be defined in law (see paragraph 20 above). In the Court's view, although they may cast doubt on the quality of the law for the purposes of the Court's case-law, these considerations are not sufficiently weighty to call into question the foreseeability of the criminal proceedings against the applicant, which the public prosecutor's office had a discretionary power to bring, given that, in keeping with the established case-law at the material time, the offence in question, as clearly set out in the Criminal Code, was made out in its material element by the nudity of a woman's breasts (see paragraph 14 above). Nor did this interpretation change after the applicant was charged, the Court notes, in particular because the Court of Cassation declined to refer two priority questions of constitutionality to the Constitutional Council (see paragraphs 18 and 19 above). The consistent nature of this interpretation, as reiterated and confirmed in subsequent case-law, supports the argument that the applicant could reasonably have foreseen the scope of the offence in question and, in consequence, the criminal prosecution of her conduct.

38. Secondly, the Court observes that while the applicant acted alone on the day in question, her action was organised with support from the Femen movement, which was well-versed in confrontations with the national authorities because of its deliberately provocative brand of activism. By reason of her membership of that movement and of the manner in which her action was prepared (as related on the Femen France website) – as established during the criminal investigation (see paragraph 6 above) – the applicant, who could, if necessary, have sought and received specialised legal advice, must be deemed to have been aware of the law and of the consistent case-law applicable in such matters.

39. The Court concludes that the applicant could reasonably have expected that such conduct would entail consequences for her under the criminal law.

40. Accordingly, the interference with the applicant's right to freedom of expression may be regarded as sufficiently foreseeable and therefore as "prescribed by law" within the meaning of Article 10 § 2 of the Convention.

(b) Whether the interference pursued a legitimate aim

41. The Court finds, without this being disputed by the parties (see paragraphs 23 and 26 above), that the interference with the applicant's freedom of expression pursued a number of legitimate aims for the purposes of Article 10 § 2, namely the protection of morals and the rights of others and the prevention of disorder and crime. In the present case, the Court has acknowledged, in its examination of the foreseeability of the interference with the applicant's freedom of expression (see paragraphs 37-39 above), that the national courts could reasonably have considered punishing the conduct of a person who exposed a sexual body part, within the meaning of that term in domestic criminal law, in a public venue such as a church.

(c) Whether the interference was necessary in a democratic society

(i) General principles

42. The Court reiterates the fundamental principles developed in its case-law on Article 10 as set out in its *Handyside v. the United Kingdom* judgment (7 December 1976, Series A no. 24) and consistently reiterated ever since (see, among many other authorities, the judgments in *Morice v. France* [GC], no. 29369/10, § 124, ECHR 2015; *Delfi AS v. Estonia* [GC], no. 64569/09, §§ 131-39, ECHR 2015; and *Perinçek*, cited above, §§ 196-97, and the authorities cited therein): freedom of expression is 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.

43. In examining whether restrictions to the rights and freedoms guaranteed by the Convention can be considered "necessary in a democratic society", the Court will assess, in the circumstances of a particular case, *inter alia*, whether the interference corresponded to a "pressing social need" (see *Wingrove v. the United Kingdom,* 25 November 1996, § 57, *Reports of Judgments and Decisions* 1996-V, and *Murphy v. Ireland*, no. 44179/98, § 68, ECHR 2003-IX).

44. The Court's task is not to take the place of the competent national authorities but rather to review their decisions in the light of Article 10. This does not mean that the Court's supervision is limited to ascertaining whether these authorities exercised their discretion reasonably, carefully and in good faith. The Court must rather examine the interference complained of in the light of the case as a whole and determine whether it was proportionate to the legitimate aim pursued and whether the reasons adduced by the national authorities to justify it were "relevant and sufficient".

45. In assessing the relevance and sufficiency of the national courts' findings, the Court, in accordance with the principle of subsidiarity, thus takes into account the manner in which those courts weighed up the conflicting interests at stake in the light of its established case-law in this area (see *Erla Hlynsdottir v. Iceland (no. 2)*, no. 54125/10, § 54, 21 October 2014, and *Ergündoğan v. Turkey*, no. 48979/10, § 24, 17 April 2018). The Court reiterates that the quality of the judicial review of the necessity of the measure is of particular importance when assessing proportionality under Article 10 of the Convention (see *Animal Defenders International v. the United Kingdom* [GC], no. 48876/08, § 108, ECHR 2013 (extracts)). Thus, the absence of an effective judicial review of the impugned measure may justify the finding of a violation of Article 10 (see *Matúz v. Hungary*, no. 73571/10, § 35, 21 October 2014, and *Ergündoğan*, cited above, § 24).

46. Lastly, the Court would point out that the nature and severity of the penalties imposed are factors to be taken into account when assessing the proportionality of the interference. In this connection, it has frequently emphasised, in the context of cases concerning Article 10 of the Convention, that the imposition of a criminal penalty is one of the most serious forms of interference with the right to freedom of expression (see, among other authorities, *Reichman v. France*, no. 50147/11, § 73, 12 July 2016; *Lacroix v. France*, no. 41519/12, § 50, 7 September 2017; and *Tête v. France*, no. 59636/16, § 68, 26 March 2020). The Court reiterates that the national authorities must display restraint in resorting to criminal proceedings, especially with regard to the imposition of a prison sentence, which has a particularly powerful chilling effect on the exercise of freedom of expression (see *Cumpănă and Mazăre v. Romania* [GC], no. 33348/96, § 116, ECHR 2004-XI; *Morice*, cited above, §§ 127 and 176; and *Mariya Alekhina and Others v. Russia*, cited above, § 227).

(ii) Application of those principles to the present case

47. The Court notes that the applicant's conviction was based on the fact that the offence of sexual exposure had been made out. The Government submitted that it had not aimed to punish her ideas or views, which were critical of Catholic Church doctrine.

48. Nevertheless, the Court considers, as mentioned above (see paragraph 31), that, having regard to its activist nature, the applicant's action, which sought to express her political convictions, in line with the positions defended by the Femen movement in the name of which she was acting, must be regarded as a "performance" falling within the scope of Article 10. The purpose of the applicant's topless *mise en scene*, which was staged in a manner decided by the Femen movement, was thus to convey, in a symbolic place of worship, a message relating to a public and societal debate on the Catholic Church's position on a sensitive and controversial issue, namely women's right to bodily autonomy, including the right to abortion.

49. That being so, the Court takes the view that, even though the applicant's freedom of expression was used, in the present case, in a manner that was likely to offend intimate personal beliefs within the sphere of morals or, especially, religion, in view of the place chosen for the performance, where, by definition, many more believers could be found than in any other place (see *Otto-Preminger-Institut v. Austria*, 20 September 1994, § 50, Series A no. 295-A; *Wingrove*, cited above, § 58; and *Murphy*, cited above, § 67), that freedom had to be sufficiently protected and the national authorities' margin of appreciation was correspondingly narrower since the content of her message concerned a matter of public interest (see *Morice*, cited above, § 125, and the authorities cited therein, and *Mariya Alekhina and Others*, cited above, § 212).

50. The Court would point out that it does not have to express an opinion on the constituent elements of the offence of sexual exposure. In the present case, contrary to what the applicant would have it do, it is not for the Court to determine whether or not the prosecuted person's motives should be taken into account in establishing that the offence is made out. It is in the first place for the national authorities, notably the courts, to interpret and apply domestic law and – having examined the facts in question and their context, and having ascertained whether the constituent elements of the offence are established – to decide whether or not to find the defendant guilty (see, among many other authorities, *Lehideux and Isorni v. France*, 23 September 1998, § 50, *Reports of Judgments and Decisions* 1998-VII). Similarly, sentencing is in principle a matter for the national courts (see *Cumpănă and Mazăre*, cited above, § 115).

51. In the present case, the Court notes that the applicant's performance took place in a church and observes that it has previously acknowledged, in similar circumstances, that such conduct could be regarded as having flouted the rules of acceptable conduct in a place of worship and concluded that the

imposition of certain sanctions might in principle be justified by the demands of protecting the rights of others (see *Mariya Alekhina and Others*, cited above, § 214). However, as regards the sentence handed down in the present case, the Court is struck by the severity of the punishment that the domestic courts imposed on the applicant without any explanation as to why a custodial sentence was necessary to ensure the protection of public order, morals and the rights of others in the circumstances.

52. In this connection, it notes that the suspended term of one month's imprisonment to which the applicant was sentenced is a custodial sentence which would entail her actual imprisonment in the event of a fresh conviction and has been entered in her criminal record. Added to the severity of the criminal penalty imposed is the relatively high amount of the award of damages to be paid by the applicant (see paragraph 9 above).

53. The Court reiterates that the imposition of a prison sentence in the context of a political or public-interest debate will be compatible with freedom of expression as guaranteed by Article 10 of the Convention only in exceptional circumstances, notably where other fundamental rights have been seriously impaired, as, for example, in the case of hate speech or incitement to violence (see, among other authorities, *Otegi Mondragon v. Spain*, no. 2034/07, § 59, 15 March 2011, and *Stern Taulats and Roura Capellera v. Spain*, no. 51168/15, § 34, 13 March 2018). In the present case, the sole purpose of the action carried out by the applicant – who was not accused of any insulting or hateful conduct – however shocking it may have been for others in view of the nudity she imposed in a public place, which was punishable conduct under domestic criminal law, was to contribute, by way of a deliberately provocative performance, to the public debate on women's rights, more particularly on the right to abortion. The applicant had a clean criminal record. She was well-integrated socially and professionally, earning an income, such that the reference to "the offender's character" as a justification for the sentence did not correspond to any specific or unfavourable circumstance (see paragraph 12 above) or support the decision not to hand down a non-custodial sentence.

54. In the present case, the Court notes that the domestic courts opted for a prison sentence which, even when suspended, cannot be regarded as the "lightest possible" sanction, contrary to the requirement of its case-law where the freedom of expression of the sentenced person is at stake (see *Morice*, cited above, § 176, and *Reichman*, cited above, § 73), this being an area in which, as indicated above (see paragraph 46), criminal proceedings are to be used sparingly by the national authorities.

55. In view of the foregoing considerations, and in order to examine whether the nature and severity of the punishment imposed on the applicant were nevertheless justified in the circumstances of the case, the Court must now examine, as it has stated above (see paragraphs 44-45 above), whether the reasons adduced by the domestic courts were relevant and sufficient.

56. In this connection, the Court reiterates that, where they have carefully examined the facts, applied the relevant human rights standards consistently with the Convention and its case-law, and have adequately weighed up the individual interests against the public interest in a given case, the Court would require strong reasons to substitute its own view for that of the domestic courts (see recent case-law on Article 8: *I.M. v. Switzerland*, no. 23887/16, § 72, 9 April 2019; *M.A. v. Denmark* [GC], no. 6697/18, § 149, 9 July 2021; and, from the standpoint of Article 10, *Sellami v. France*, no. 61470/15, § 46, 17 December 2020).

57. The Court would point out that such a weighing-up of the interests at stake is separate from the review it is required to carry out – in other situations – of the reasons given by the national courts where the circumstances of the case call for two freedoms that are equally protected by the Convention to be weighed in the balance (concerning Articles 10 and 8 of the Convention, see *MGN Limited v. the United Kingdom*, no. 39401/04, § 142, 18 January 2011; *Couderc and Hachette Filipacchi Associés v. France* [GC], no. 40454/07, § 79, ECHR 2015 (extracts); *Ergündoğan v. Turkey*, cited above, § 30; or, concerning the freedoms protected by Articles 10 and 9 of the Convention, *Otto-Preminger-Institut v. Austria*, cited above, § 55, and *Aydın Tatlav v. Turkey*, no. 50692/99, § 26, 2 May 2006).

58. In the present case, in order to assess the necessity of the interference with the applicant's freedom of expression and to ascertain whether her conduct warranted punishment, the domestic courts referred, as can be seen from the reasoning of their decisions, to certain principles established by the Court in its case-law on Article 10 of the Convention. They thus relied, at first instance and on appeal, on the proportionality of the interference to "the pressing social need to protect others from the sight of an action performed half naked in a place of worship which some might [have] consider[ed] shocking" (see paragraphs 8 and 11 above). The Court of Appeal also found that "what the defendant [had taken] to be within the bounds of her freedom of expression [had] had the effect of seriously interfering with the freedom of thought of others and with freedom of religion more generally" (see paragraph 11 above). The Court of Cassation subsequently confirmed that analysis, basing its dismissal of the applicant's appeal on the need to reconcile two freedoms protected by the Convention, namely freedom of expression and the freedom of conscience and religion protected by Article 9, the latter being described in the present case as the right "not to be disturbed in the practice of [one's] religion" (see paragraph 13 above).

59. The Court notes, first of all, that this reasoning shows that both the Court of Appeal and the Court of Cassation weighed in the balance not only the competing interests at stake but also two freedoms protected by the Convention, namely, freedom of expression and freedom of conscience and religion.

60. The Court observes, as the applicant pointed out in her observations (see paragraph 24 above), that the criminal sanction imposed on her to punish the offence of sexual exposure, for having bared her breasts in a public place, was not intended to punish an attack on freedom of conscience and religion. Admittedly, through the choice of venue for her performance (a church) and the religious symbols used to stage it (her position in front of the altar, her arms in the form of a cross, her imitation of prayer, the veil covering her hair), the applicant's conduct was likely to offend not only the moral convictions of the ministers of the faith and of those present, but their religious beliefs as well. Accordingly, while account had to be taken – as contextual elements for the assessment of the competing interests at stake – of the circumstances relating to venue and to the symbols the applicant had used, the domestic courts were not required, having regard to the charge, to weigh in the balance her right to freedom of expression against the right to freedom of conscience and religion under Article 9 of the Convention.

61. Moreover, the Court notes that, while the domestic courts chose to examine the issue from the standpoint of freedom of religion, they did not examine whether the applicant's action was "gratuitously offensive" to religious beliefs (see *Otto-Preminger-Institut*, cited above, § 49), whether it was insulting, or whether it incited disrespect or hatred towards the Catholic Church (see, *mutatis mutandis*, *Giniewski v. France*, no. 64016/00, § 52, 31 January 2006, and *Mariya Alekhina and Others*, cited above, §§ 217-26, and the numerous authorities cited therein).

62. Similarly, it notes that, even though they found that she had disturbed others in the practice of their religion (see paragraphs 11 and 13), the domestic courts did not take into consideration the fact that the applicant had not staged her protest during a religious service (no mass had been in progress at the material time and the applicant had not been in direct view of the practising choir); that it was not disputed that her action had been brief, without the slogans on her body having been shouted out; and that she had left the church as soon as she had been asked to do so.

63. The Court must now examine whether, as part of the review they were required to carry out under paragraph 2 of Article 10, the domestic courts duly weighed up the competing interests: on the one hand, the applicant's right to convey to the public her ideas concerning the rights that women should be recognised as having, including the right to bodily autonomy, and on the other, the rights of others to respect for morals and public order. The Court would emphasise that such scrutiny could be exercised validly by the domestic courts only by way of an analysis encompassing all the elements in dispute bearing on the context in which the impugned action had taken place, together with the applicant's motives.

64. In this connection, the Court notes that, in the present case, the domestic courts, and more particularly the Court of Appeal, did not ignore the statements the applicant had given during the criminal investigation,

describing the political and feminist motives for her protest, which had formed part of a collective, international movement to contest the Catholic Church's position on the issue of women's rights in a manner that was deliberately bold and shocking from the standpoint of others' beliefs (see paragraphs 10-11 above). However, in weighing up the interests at stake, they confined themselves to examining the fact that she had bared her breasts in a place of worship, independently of the overall performance of which that act had been a part, without considering the intended meaning of the applicant's conduct. In particular, the domestic courts refused to take into account the meaning of the slogans on the applicant's torso and back, which conveyed a feminist message referring to the 1971 pro-abortion manifesto known as the "manifesto of the 343 sluts". They recounted the staging of an "abortion of Jesus" without putting it into perspective with reference to the ideas advocated by the applicant. Nor did they take into consideration the applicant's explanations concerning the use of topless protests as a "political banner" by the activists of Femen, of which she was a member, or concerning the venue for her action, a place of worship that was well known to the public, which had been chosen with the aim of encouraging media coverage of the protest.

65. The Court finds that, from the grounds given by the domestic courts, it is unable to conclude that, in the present case, they weighed up the competing interests adequately and in accordance with the criteria established in its case-law.

66. In the light of the above considerations as a whole, the reasons given by the domestic courts do not suffice for the Court to regard the sentence imposed on the applicant, having regard to its nature and to its severity and effects, as proportionate to the legitimate aims pursued.

67. Accordingly, the Court finds that the interference with the applicant's freedom of expression constituted by the suspended prison sentence imposed on her was not "necessary in a democratic society".

68. There has therefore been a violation of Article 10 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 7 OF THE CONVENTION

69. The applicant complained that the offence of sexual exposure was vague and construed extensively. She alleged there had been a violation of Article 7, which provides:

> "1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.
>
> 2. This article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations."

70. The Government contested that argument on the same grounds as those adduced with regard to Article 10 (see paragraph 25 above).

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

72. Having found a violation of Article 10 of the Convention in respect of the applicant, the Court considers that there is no need to give a separate ruling on the complaint under Article 7 in the present case (see, to similar effect, *Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania* [GC], no. 47848/08, § 156, ECHR 2014, and *M.D. and A.D. v. France*, no. 57035/18, § 106, 22 July 2021).

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

73. 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

74. The applicant claimed 10,000 euros (EUR) in respect of non-pecuniary damage sustained by reason of the custodial sentence imposed on her for a sexual offence that had stigmatised her throughout the entire course of the proceedings, namely since 2014.

75. The Government contested this claim, submitting that the finding of a violation would constitute sufficient redress, since the applicant would then have the possibility of requesting that her conviction be reviewed under Article 622-1 of the Code of Criminal Procedure.

76. Having regard to the circumstances of the case and the nature of the violation found, the Court considers it appropriate to award the applicant, on an equitable basis, the sum of EUR 2,000 in respect of non-pecuniary damage, plus any tax that may be chargeable.

B. Costs and expenses

77. The applicant claimed EUR 9,500 for the costs and expenses incurred before the Court, including EUR 500 in respect of the transportation and hotel expenses incurred by her counsel to travel to Strasbourg.

78. The Government argued that the document produced in support of that claim was not conclusive and that a total sum of EUR 4,000 would otherwise be sufficient to cover all the procedural steps before the Court.

79. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that

these were actually and necessarily incurred and are reasonable as to quantum. In the present case, regard being had to the documents in its possession and the above criteria, finding that there is no cause to question the invoice submitted to the Court by the applicant's counsel, with the exception of costs pertaining to a public hearing that was never held, the Court considers it reasonable to award the sum of EUR 7,800 for the proceedings before the Court, plus any tax that may be chargeable to the applicant.

C. Default interest

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

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the application admissible;

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

3. *Holds* that there is no need to examine the complaint under Article 7 of the Convention;

4. *Holds*
   (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts:
      (i) EUR 2,000 (two thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
      (ii) EUR 7,800 (seven thousand eight hundred euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

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

Done in French, and notified in writing on 13 October 2022, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Victor Soloveytchik Registrar	Georges Ravarani President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the separate opinion of Judge Kateřina Šimáčková is annexed to this judgment.

S.O.L.
V.S.

CONCURRING OPINION OF JUDGE ŠIMÁČKOVÁ

(*Translation*)

1. I fully concur with the Chamber's finding that there has been a violation of the applicant's right to freedom of expression in the present case.

2. The finding of a violation is based on the excessive nature of the sanction imposed on the applicant (especially the suspended prison sentence) for her performance in the church. With all due respect to my colleagues, I have reservations as to the finding that this sanction was prescribed by law. I am not convinced that the interference with the applicant's freedom of expression was prescribed by law or that it pursued a lawful and legitimate aim.

3. The purpose of criminalising sexual exposure under Article 222-32 of the Criminal Code – based on the Chapter in which that provision appears, in other words, in the light of the structure of that Code – is to provide protection against sexual assault. The criminalisation of sexual exposure is thus designed to protect the mental and physical integrity, and dignity, of assault victims, not freedom of conscience and religion.

4. The real reason the applicant was punished was to protect believers and their freedom of conscience and religion (see the content of the domestic decisions cited in paragraphs 9 to 12 of the judgment and the summary given in paragraph 59). And yet Article 222-32 of the Criminal Code pursues no such aim. Nor is there any prohibition of blasphemy in French law.

5. I therefore believe that the sanction imposed on the applicant for her conduct, on the basis of that provision of the Criminal Code, as cited by the national authorities, was unlawful. That criminal sanction was not based on the proper legal provisions.

6. The true purpose of the applicant's sanction for sexual assault was to punish her for having exposed her breasts in a church and for having thereby offended the congregation, which is to say for a different purpose from that provided for by the law. The charge of sexual assault brought by the prosecution to punish the applicant is simply inadmissible: the individuals in the church may have been offended, but none was exposed to a sexual threat. In a similar case cited in the judgment (*Mariya Alekhina and Others*), the women who had bared their breasts in Russia, even during mass, were convicted of hooliganism, i.e., a breach of public order, not of sexual assault. In matters of criminal charges, one should call things by their proper name and not hide the real goal behind another.

7. As I have pointed out above, the applicant was essentially punished, not for having exposed her breasts, but for having done so in a church. I understand that the aim of a legal rule can sometimes be to bring about religious reconciliation within a country (see *Leyla Sahin v. Turkey*, no. 44774/98, §§ 106-07, 10 November 2005) and to create a safe

environment for followers of different religions, especially where there is a clash of several religions, or where faith is ridiculed or insulted. Such a policy will be effective only if it treats all the relevant religious denominations within the country with the same sensitivity.

8. The essence of the rule of law, however, is that this aim – protecting believers' sense of propriety (which in my view was the real reason the applicant was punished in the present case) – must be based in law and cannot be tailored to fit the needs of the moment. To sum up, then, it is my contention that, in the present case, the interference with freedom of expression was unlawful because the applicant was punished for something that did not constitute an offence and because the national authorities sanctioned her using means which were intended for a very different purpose.

9. As to the aim pursued by the applicant's performance, it should be added that French culture is replete with well-known examples of naked female breasts as an expression of freedom – from Manet's *Déjeuner sur l'herbe* to the bared breast of Marianne. What is more, French civilisation is not puritanical. This is also why one cannot maintain that a purely political means of expression, which was not sexualised in any way whatsoever, constituted an interference with the right to protection from sexual assault (or even that it was contrary to good morals in general). This case, like the *S.A.S. v. France* case ([GC], no. 43835/11, 1 July 2014), illustrates the very issue that the applicant's performance was seeking, among other things, to highlight. Society accepts, or rather demands, that the legislator should discipline women in terms of what they may or may not display, and even uses the instruments of criminal law to that end. Women are not allowed to wear either too much or too little. Everyone is free, but women must be careful about what they reveal and what they keep hidden.