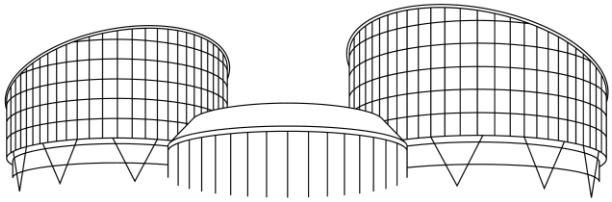

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FOURTH SECTION

CASE OF WIZERKANIUK v. POLAND

(Application no. 18990/05)

JUDGMENT

STRASBOURG

5 July 2011

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

In the case of Wizerkaniuk v. Poland,

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

Nicolas Bratza, *President*,
Lech Garlicki,
Ljiljana Mijović,
David Thór Björgvinsson,
Päivi Hirvelä,
Ledi Bianku,
Nebojša Vučinić, *judges*,
and Fatoş Aracı, *Deputy Section Registrar*,

Having deliberated in private on 21 September 2010, 12 April 2011 and on 14 June 2011,

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

PROCEDURE

1. The case originated in an application (no. 18990/05) against the Republic of Poland lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Polish national, Mr Jerzy Wizerkaniuk ("the applicant"), on 14 May 2005.

2. The applicant was represented by Mr A. Zielonacki, a lawyer practising in Poznań. The Polish Government ("the Government") were represented by their Agent, Mr J. Wołąsiewicz of the Ministry of Foreign Affairs.

3. The applicant alleged a breach of his right to freedom of expression guaranteed by Article 10 of the Convention.

4. On 24 January 2007 the President of the Fourth Section decided to communicate the application to the Government. Under the provisions of Article 29 § 1 of the Convention, it was decided to examine the merits of the application at the same time as its admissibility.

5. The applicant and the Government each filed further written observations (Rule 59 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

6. The applicant, Mr Jerzy Wizerkaniuk, is a Polish national who was born in 1952 and lives in Kościan. At the material time he was a chief editor and a co-owner of the local newspaper "*Gazeta Kościańska*", published in Kościan.

7. On 24 February 2003 two journalists working for the applicant's newspaper interviewed a local M.P., Mr T. M. The interview, arranged during a chance meeting between one of the journalists and the M.P. several days earlier, at a session of the Kościan Municipal Council, took place in the M.P.'s office in Kościan and lasted about two hours. All questions and answers were tape-recorded. It related to the M.P.'s public and business activities. After the meeting the M.P. requested that the text of the interview be submitted for his authorisation (*autoryzacja*) before its publication, as provided for by Section 14 of the 1984 Press Act (*Prawo Prasowe*) (see paragraph 29 below).

8. The verbatim transcript of the interview, subsequently prepared by the two journalists, ran to forty standard pages. The applicant requested P.S., the editing journalist of the newspaper, to prepare an edited version of the interview, fit for the publication purposes. That version ran to three standard pages. The latter version was subsequently presented to the interviewee, approximately a month after the conversation. He read it and informed an employee of his office, Mr K. P., that he would not give his consent to the publication of the text. He was of the view that the text did not correspond to the conversation he had had with the two journalists and that many important statements he had made were not included. He asked Mr K.P. to inform the applicant of his refusal. Shortly afterwards, the applicant called the M.P. who reiterated his refusal.

9. In an undated letter to the applicant, served on him on 5 May 2003, the M.P. stated:

> "It is true that in February I talked to two representatives of "Gazeta Kościańska". During that conversation, which was in any event very informal, I replied to a number of questions. However, the text submitted for my authorisation only after a month, failed to include many of my important statements and to reflect the character and contents of my statements, [a state of affairs] which I cannot accept."

10. On 29 April 2003 the newspaper published a short text asking the readers whether they would be interested in having an interview with Mr T.M., the local M.P., published.

11. On 7 May 2003 parts of the *verbatim* records of the interview, edited by P.S. and accompanied by photos made when the interview was conducted, were published by "Gazeta Kościańska". The text carried a lead

informing the reader that the M.P. had refused to grant his authorisation for the publication of the interview and that the newspaper was publishing parts of the interview as recorded on the tape, including in its original grammatical form.

12. On 19 May 2003 the M.P. informed the Kościan District Prosecutor that the applicant had committed a criminal offence by publishing parts of the interview without his authorisation and against his will.

13. On the same day criminal proceedings were instituted against the applicant on a charge of publishing an interview with the M.P. in spite of the latter's refusal to authorise its publication. During the investigation the M.P. submitted that he had talked to the two journalists from the applicant's newspaper. They had had a casual conversation rather than a formal interview. A month later he had been given the text to be published which, in his view, failed to reflect many of his important assertions. Moreover, he was of the view that the text failed to convey both the character and the substance of his statements.

14. By a judgment of 30 April 2004 the Poznań District Court found the applicant guilty as charged. The court established the facts of the case as summarised above (see paragraphs 7-11 above). It further found that the applicant had published the interview despite the M.P.'s refusal to authorise its publication. This in itself amounted to a criminal offence punishable under section 14 read together with section 49 of the 1984 Press Act (see paragraph 29 below). The court observed that it was possible for the interviewed person to renounce his or her right to grant authorisation for the text to be published, but such a declaration had to be unequivocal.

15. The court noted the submission made by P.S., who was heard as a witness. According to P.S., the newspaper had not published the three-page summary which had initially been submitted for the M.P.'s approval. It had published parts of the interview quoted *verbatim*. The court found his statement credible.

The court further noted that M.P.'s photographs taken during the interview had also been published together with the interview. The applicant had failed to indicate which photographs he intended to publish and to show them to M.P. before the publication.

16. The court further observed that the applicant had failed to comply with his obligation, under the Press Act, to obtain the authorisation of the interviewed person. It was of the view that the fact that the interview had been published without the required authorisation breached the interviewee's personal rights. The applicant had acted with intent to break the law, but he had been motivated by his wish to fulfil his journalistic duties by making the interview available to the public. Having regard to the latter factor, the court concluded that the offence concerned could not be regarded as serious.

Consequently, and having regard also to the fact that it was not open to any doubt that the applicant was a law-abiding citizen and that his conduct had always been irreproachable, the court conditionally discontinued the proceedings, obliged the applicant to pay 1,000 zlotys (PLN) to a charity and ordered him to bear the costs of the proceedings.

17. By a judgment of the Poznań Regional Court of 6 October 2004, served on the applicant on 15 November 2004, the first-instance judgment was upheld. The court noted, inter alia, that the photographs taken during the interview constituted its inherent part. The applicant, by publishing them without the interviewee's consent, had breached his personal rights within the meaning of Article 23 of the Civil Code.

18. The applicant subsequently lodged a constitutional complaint with the Constitutional Court, challenging the compatibility with the Constitution of section 14 in conjunction with section 49 of the Press Act 1984, in so far as they provided for a fine or for restriction of liberty to be imposed on a journalist or publisher for failing to ask an interviewee for his or her authorisation. He relied on Article 54, guaranteeing the right to freedom of expression, and Article 31 of the Constitution, providing for the principle of proportionality in respect of restrictions on constitutional rights.

19. In the ensuing constitutional proceedings the Constitutional Court sought the opinions of the Ombudsman (*Rzecznik Praw Obywatelskich*), the Prosecutor General (*Prokurator Generalny*) and the Speaker of the Parliament (*Marszałek Sejmu*). In their opinions submitted to that court they concluded that section 49, read together with section 14 of the Press Act, was incompatible with the constitutional guarantees of freedom of expression. They were of the view, in particular, that the restriction on the exercise of that right by imposition of a criminal penalty was incompatible with Article 31 of the Constitution, which enshrined the principle of proportionality in respect of restrictions imposed on the exercise of civil rights and freedoms (see paragraph 27 below). They further referred to the existing civil law instruments available for the purposes of effective protection of personal rights (see paragraphs 30-32 below).

20. The Constitutional Court gave a judgment on the merits of his constitutional complaint on 29 September 2008. It held that the contested provisions of the Press Act were compatible with Article 54 of the Constitution read together with its Article 31.

21. The court noted that it was proposed in a public debate to do away with the obligation to seek and obtain the authorisation provided for by the Press Act. However, the opinions pointing to the potential danger of such a legislative measure could not be overlooked. The Constitutional Court was of the view that abrogating the authorisation requirement would, on the one hand, expose persons interviewed by the press to the risk of having their personal rights breached by having their words distorted and, on the other, be dangerous for the exercise of the freedom of expression. The essence of

the authorisation was not only to ensure that statements made by interviewees were rendered literally, but also to protect the integrality of such statements. This, in turn, ensured that the intentions of the speaker were faithfully conveyed.

Therefore, the applicant's argument that the authorisation requirement gave the interviewee an opportunity to block the publication of a statement indefinitely was incorrect.

22. The judgment further read:

> "Freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfilment. 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. The press has a duty to impart – in a manner consistent with its obligations and responsibilities – information and ideas on all matters of public interest. This duty is closely intertwined with the right of the public to receive information. (...)
>
> Statements made public by the media could, as they have a great power of persuasion, lead to the infringement of the personal rights of the individuals concerned. In certain cases the *post factum* remedies available under law are insufficient to provide effective redress for such infringements, and in some cases the damage could indeed be irreparable. However, a publicly made statement not only could be an instrument of an infringement, but could also be unlawfully distorted. This was why the legislature decided to grant additional protection to statements made in the context of interviews by creating the authorisation requirement. Assuming that this requirement amounted to a restriction on freedom of expression as it obliged journalists to obtain authorisation from the author of literally quoted statements, its necessity in a democratic society has to be examined. [The] freedom of expression is not *ius infinitum* and could therefore be limited. However, it is necessary that restrictions on its exercise are compatible with the principle of proportionality set out in Article 31 of the Constitution. This provision allows for restrictions imposed on individual rights only when they have statutory legal basis and are necessary in a democratic state in the interests of national security or public safety, for the protection of environment, health or morals, for the protection of rights of others. These restrictions cannot not impair the essence of rights and freedoms. (...)
>
> Article 47 of the Constitution provides for everyone's right to the legal protection of one's private and family life, of one's honour and good reputation, and for the right to decide about one's personal life. No restrictions can be imposed on the exercise of these rights (...). On the contrary, the freedom of expression can be restricted. The obligation to obtain the interviewee's consent amounted to a restriction. However, such restriction cannot be seen as impairing the essence of the freedom of expression, because it concerns only statements quoted *verbatim* in press publications. It does not restrict or limit journalists' right to inform the public of the content of such a statement by summarising it. When a journalist chooses to summarise or otherwise convey the content of a statement made by the interviewee, he or she is not obliged to seek the interviewee's authorisation or to inform them of the intended publication. Nor, therefore, does it restrict the right of the public to obtain information.
>
> [...] that requirement is also necessary in a democratic society to protect the personal rights of journalists' sources. Hence, not only it is not in breach of any constitutional

right but, on the contrary, it had to be regarded as a guarantee of the effective exercise of constitutional rights.

Furthermore, this requirement is justified not only by the necessity to protect individual rights [...] but it derives its legal foundation from other elements which, taken together, formed the constitutional notion of the public interest. As the authorisation serves to establish with full clarity the authorship of a given statement made public, it contributes to the clarity and transparency of public debate. It makes it possible for the reader to be certain that the speaker identifies himself with the statement's content and would not try to change it or to distance himself from it. It is therefore in the reader's interest to maintain it. Without this requirement, readers could not be sure whether statements purportedly made in the context of interviews are really authentic.

In the Constitutional Court's opinion the authorisation requirement was therefore a means of guaranteeing the reader's right to obtain reliable, credible, truthful, honest, clear, not misleading and responsible information. This right has not been expressly guaranteed by the Constitution, but it was anchored in it. [...]"

23. In so far as the criminal sanction for failure to obtain the authorisation was concerned, the Constitutional Court observed that it aimed at ensuring that the citizen's right to reliable information was respected. Authorisation was the simplest way to ensure the veracity of the message, whereas statements published without authorisation could be distorted, which was clearly undesirable.

24. The Constitutional Court referred to the legal provisions penalising defamation. It was of the view that while the offence of defamation was directed against an individual's reputation, in the same way the offence penalised by section 14 read together with section 49 of the Press Act was aimed at obtaining compliance with the obligation to quote and report statements made by interviewees in a fair and accurate manner, in order to protect their personal rights. The penal sanction provided for by these provisions thus respected the principle of proportionality.

25. A dissenting opinion of Justice Rzepliński was attached to that judgment. He had regard, firstly, to considerations which could be said to have constituted the *ratio legis* of the Press Act when it had been adopted in 1984. He noted that the 1952 Constitution, in force at that time, guaranteed neither the right to freedom of expression nor the right to respect for family and private life in any form comparable to the current constitutional regulations. At that time all media had been subject to preventive censorship and it was ultimately the State which decided what could be published or broadcast. The opinion further read, *inter alia*:

"The provisions of the Press Act regarding the authorisation requirement were only, at that time, an additional safeguard against the press publishing any information given to journalists by the communist party or State agents if such information was capable of jeopardising the interests of then political power.

[Given that constitutional background, it is only natural that] the Press Act did not provide for any distinction in respect of the authorisation requirement between the persons exercising public functions and all other persons. Thus, that Act provided for identical protection, by way of the criminal law, of persons holding public offices who were, for that reason, obliged to provide information about their acts to journalists, playing the role of "watchdogs" of the public powers on behalf of public opinion, and all other, "private", persons. (...)

Moreover, the Press Act failed to indicate any time-limit within which a journalist could reasonably expect that authorisation would be granted or refused. (...)

While it is true that during the last years of the *ancien régime*, in 1998/89, State censorship became less strict, the origin of the examined provisions of the Press Act and the place they had in the legal order at that time cannot be ignored."

26. Justice Rzepliński further disagreed with the Constitutional Court in so far as it had held that the restrictions imposed by the impugned provisions satisfied the test of proportionality, enshrined in Article 31 of the Constitution. In this context, he stated that the freedom of speech standards developed by the European Court of Human Rights in its judgments could not be overlooked. The dissenting opinion further read:

"The impugned provisions [seen in this light] amounted to an unnecessary and excessive interference with the freedom of the press in the interest of the personal rights of persons providing information to the press. These provisions were not necessary for that purpose at the time they were adopted and are still less necessary in a democratic State governed by the rule of law.

Authorisation to publish information quoted verbatim is unknown to the legal systems of other States of the European Union. (...)

The authorisation requirement amounts to censorship which makes it impossible for the reader to know the original statement made by the interviewee. It may dissuade journalist who is wishing to obtain an interview for their newspaper with a politician important in a national or local context from asking uncomfortable, searching questions. (...)

In a democratic state a politician, a public person, has no right to manipulate his or her statements *post factum*. If he or she resorts to such manipulation, the public opinion is entitled to know this because it is an important element relevant for public image of a politician if he or she tampers with his or her public statements. The requirement of authorisation makes it impossible for the public to acquire such knowledge. Citizens expect politicians to have the courage to make wise decisions in difficult situations. If a politician is unsure of the choice of words to be used when speaking in a public situation it might be a signal to the public that he or she is unable to cope with stressful circumstances. It is something that public opinion is entitled to know. (...)

I do not share the view expressed by the Constitutional Court in the present case that a journalist, when refused authorisation to publish a *verbatim* quotation, can resort to paraphrasing the statements concerned; that the Press Act therefore does not in any way restrict the journalist's right to convey the interviewee's thoughts and the right to

inform the public thereof (...). I am of the view that public opinion always has a right to be informed of the interviewee's statements quoted *verbatim* always where a journalist deems it necessary to convey information which is interesting for readers. I am also of the opinion that that descriptive technique is manipulative and makes it possible for both a journalist and an interviewee to shirk responsibility for the words they use. Furthermore, the fact that the impugned provisions of the Press Act make it possible to use such "techniques" and "evasions" demonstrates that they do not meet the standards required of a fair-minded legislator. (...)

There is no right in the Constitution or in a democratic society to "true" or "right" information. A journalist is not obliged to provide such information; if only because he or she does not exercise public powers. His or her professional duty is to seek and disseminate information, views and judgments. Only persons receiving information, readers, listeners, TV watchers or internet users are to decide whether information is true or not. (...)

The authorisation requirement is not, as such, wrong. A journalist, when talking to experts, may have, at the editing stage, some doubts whether he or she has properly understood what they said, even where the interview was recorded. In practice, in such situations journalists themselves request the persons interviewed to read the text and to correct or supplement it. A journalist is well aware that errors he committed in gathering specialist information could jeopardise his position on the market. What then is a sword of a criminal sanction needed for? (...)

The mere fact that section 49 of the Press Act has practically never been applied recently by the courts (...) does not mean that it does not play in the Polish legal system a negative role, with a chilling effect on public debate. No one challenges the constitutionality of the provisions of civil law applied by the courts in the context of disagreements arising out of press publications."

II. RELEVANT DOMESTIC LAW AND PRACTICE

27. Article 54 of the Constitution provides:

"1. Freedom to express opinions, and to acquire and disseminate information shall be ensured to everyone.

2. Preventive censorship of means of social communication and licensing of the press shall be prohibited."

Article 31 of the Constitution reads:

"Freedom of the person shall receive legal protection.

Everyone shall respect the freedoms and rights of others. No one shall be compelled to do that which is not required by law.

Any limitation upon the exercise of constitutional freedoms and rights may be imposed only by statute, and only when necessary in a democratic state for the protection of its security or public order, or to protect the natural environment, health or public morals, or the freedoms and rights of other persons. Such limitations shall not violate the essence of freedoms and rights."

28. Article 61 of the Constitution provides that a citizen shall have the right to obtain information on the activities of organs of public authority as well as those of persons discharging public functions.

29. Section 14 of the Press Act 1984 reads:

> "1. Publication or dissemination in another manner of information that has been preserved by way of phonic or visual recording requires the consent of the persons providing the information.
>
> 2. It is obligatory for a journalist to submit the text of a statement cited *verbatim*, if it has not been published previously, for authorisation by the person providing the information."

Section 49 of the Press Act provides:

> "Anybody who infringes the provisions of Articles 3, 11 paragraph 2, Articles 14, 15 paragraph 2 and Article 27 – shall be subject to a fine or the penalty of limitation of liberty."

Under section 31 of that Act an editor-in-chief of a newspaper is obliged to publish a disclaimer to rectify false information, or a matter-of-fact reply to an article, if the requesting person considers that that article has breached his or her personal rights.

Various provisions of the Press Act adopted in 1984 were subsequently amended by Parliament (Sejm) on twelve occasions. Neither section 14 nor 49 have been amended.

30. Article 23 of the Civil Code contains a non-exhaustive list of the rights known as "personal rights" (*dobra osobiste*). This provision states:

> "The personal rights of an individual, such as, in particular, health, liberty, reputation (*cześć*), freedom of conscience, name or pseudonym, image, secrecy of correspondence, inviolability of the home, scientific or artistic work, [as well as] inventions and improvements shall be protected by the civil law regardless of the protection laid down in other legal provisions."

31. Article 24 of the Civil Code provides for ways of redressing infringements of personal rights. According to that provision, a person facing the danger of an infringement may demand that the prospective perpetrator refrain from the wrongful activity, unless it is not unlawful. Where an infringement has taken place, the person affected may, *inter alia*, request that the wrongdoer make a relevant statement in an appropriate form, or claim just satisfaction from him/her. If an infringement of a personal right causes financial loss, the person concerned may seek damages.

32. Under Article 448 of the Civil Code, a person whose personal rights have been infringed may seek compensation. That provision, in its relevant part, reads:

> "The court may grant an adequate sum as pecuniary compensation for non-material damage (*krzywda*) suffered to anyone whose personal rights have been infringed. Alternatively, the person concerned, regardless of seeking any other relief that may be

necessary for removing the consequences of the infringement sustained, may ask the court to award an adequate sum for the benefit of a specific public interest ..."

33. Under Article 66 §§ 1 and 2 of the Criminal Code of 1997, criminal proceedings may be conditionally discontinued if the seriousness of the offence, punishable by a prison sentence of less than three years, is not significant, the circumstances in which it was committed have been established beyond reasonable doubt, the perpetrator does not have a criminal record and his personal circumstances and qualities suggest that he will abide by the law during the probation period.

34. Under Article 68 §§ 2 and 3 of the Code, when deciding to discontinue the proceedings for the period of probation, lasting from one to two years from the date on which the judgment becomes final, the court can impose certain obligations on the accused: to pay appropriate compensation to the victim of the offence, to apologise to him/her, or to carry out certain work in the public interest.

35. Under Article 67 § 1 of the Code, the court can fix a probation period of between one and two years, running from the date on which the judgment became final. Criminal proceedings may be resumed if during the probation period the offender disregards the obligations imposed by the court, acts in flagrant breach of public order, or, in particular, commits a new criminal offence.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

36. The applicant complained that his criminal conviction for having published the interview amounted to a breach of Article 10 of the Convention. This provision reads as follows:

"1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

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."

II. THE GOVERNMENT'S PRELIMINARY OBJECTION

37. The Government argued that the applicant had failed to exhaust relevant domestic remedies. Before bringing his application to the Court, he should have awaited the outcome of the proceedings concerning the constitutional complaint which he had lodged with the Constitutional Court.

The applicant submitted that in the circumstances of the present case the judgment of the Constitutional Court should be regarded as a final decision determining the outcome of the case.

38. The Court has already dealt with the question of the effectiveness of the Polish constitutional complaint (see *Szott-Medyńska v. Poland* (dec.), no. 47414/99, 9 October 2003; *Pachla v. Poland* (dec.), no 8812/02, 8 November 2005; and *Wypych v. Poland* (dec.), no. 2428/05, 25 October 2005). It examined its characteristics and in particular found that the constitutional complaint was an effective remedy for the purposes of Article 35 § 1 of the Convention in situations where the alleged violation of the Convention resulted from the direct application of a legal provision considered by the complainant to be unconstitutional.

39. The assessment of whether domestic remedies have been exhausted is normally carried out with reference to the date on which the application was lodged with the Court. However, as the Court has held on many occasions, this rule is subject to exceptions, which may be justified by the particular circumstances of each case (see *Baumann v. France*, no. 33592/96, § 47, 22 May 2001; and *Brusco v. Italy* (dec.), no. 69789/01, ECHR 2001-IX). In this context, the Court must also take into consideration that the rationale for the exhaustion rule is to afford the national authorities, primarily the courts, the opportunity to prevent or put right the alleged violations of the Convention. It is based on the assumption, reflected in Article 13, that the domestic legal order will provide an effective remedy for violations of Convention rights. This is an important aspect of the subsidiary character of the Convention machinery: see, among many authorities, *Selmouni v. France*, [GC], no. 25803/94, ECHR 1999-V, § 74; and *Rogoziński v. Poland* (dec.), no. 13281/04, 3 November 2009).

In the present case the Court notes that the applicant availed himself of this remedy and lodged a constitutional complaint with the Constitutional Court, challenging the compatibility with the Constitution of the provisions of the Press Act 1984 on which his criminal conviction had been based. That court declared his constitutional complaint admissible and gave a judgment on its merits. The Court notes that the substance of the applicant's constitutional complaint was identical with the complaint under Article 10 of the Convention which the applicant had previously brought before the Court.

40. In the Court's opinion, in these circumstances and with due regard being had to the principle of subsidiarity operating in the context of

exhaustion of domestic remedies, referred to above, the fact that the substance of the applicant's complaint was examined by the Constitutional Court after he had lodged the present application is sufficient to justify the departure from the principle that the assessment of compliance with the requirement of exhaustion of domestic remedies is made by reference to the date when the application was brought to the Court.

It follows that the Government's preliminary objection must be dismissed.

41. The Court concludes therefore that the application is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. No other ground for declaring it inadmissible has been established. It must therefore be declared admissible.

III. MERITS

A. The parties' submissions

1. The Government

42. The Government argued that it was a fundamental principle of all democratic States that where a person provided information to be presented or quoted in the media, he or she had a right to review the final version of the final text to be published and to grant or refuse authorisation for the dissemination thereof. Without that right, editors of newspapers, or television producers, would be free to shape the final message in any way they pleased, thereby taking advantage of the co-operation of the person concerned.

43. In the case at hand the M.P. had given an interview of his own free will and provided information about his activities as a parliamentarian and entrepreneur. He had subsequently refused to consent to the publication of the text proposed by the applicant as he felt that it did not properly reflect the true nature of his statements. However, he had told the applicant that he was prepared to grant authorisation, provided that certain changes were introduced. The applicant had chosen to publish the unchanged text.

44. By publishing it the applicant had not only taken advantage of T.M.'s willingness to co-operate with the press, and possibly jeopardised his reputation, but had also misled the readers by presenting an untruthful picture. Hence, the penalty subsequently imposed on him had been necessary as it had reminded him, as well as other journalists and editors of newspapers, that the provisions of the Press Act were to be respected at all times since they served the purpose of protecting not only the person

providing information, but also the public. It was the State's duty to protect society from misinformation and infringement of individuals' rights.

45. The Government referred to the Court's case-law to the effect that there could be no doubt Article 10 § 2 imposed on individuals an obligation to protect the reputation of others. This protection extended to politicians too, even when they were not acting in their private capacity. In such cases the requirements of such protection had to be weighed in relation to the interests of open discussion of political issues (*Dąbrowski v. Poland*, no. 18235/02, § 28, 19 December 2006). It had therefore been necessary to counterbalance the interest of open discussion – although it was open to doubt whether well-informed debate could indeed be held if it was based on erroneous presuppositions – with the interest of protecting the M.P.'s reputation. Admittedly, freedom of expression constituted one of the essential foundations of a democratic society. However, it could not be perceived as the right of the public to receive information at all times and under any condition. The rights of the majority could not prevail unconditionally over the rights of an individual. In any case, even if the right of the public to receive information were to be construed as an absolute right, it could not also encompass a right to receive misleading or incorrect information.

46. The Government submitted that the purpose of section 49 in conjunction with section 14 of the Press Act was to protect persons providing information from being taken advantage of by having information they gave to the press presented in a manner distorting their message. Such protection was particularly important where the individuals concerned held public office, where the publications could portray them in a negative manner inconsistent with the truth. Such persons were particularly exposed to having their statements manipulated through, for instance, omission of parts of their statements. In the particular circumstances of the present case, the interest of protecting the reputation of an M.P. who had willingly participated in an interview should prevail over the interest of an open discussion.

47. The Government further argued that the nature and severity of the penalty imposed on an individual were factors to be taken into account when assessing the proportionality of the interference with the right to freedom of expression. In the present case the penalty imposed on the applicant had by no means been severe. The District Court had merely ordered the applicant to pay a pecuniary benefit (*świadczenie pieniężne*) in the amount of PLN 1,000 to a charity and conditionally discontinued the criminal proceedings. The court had not imposed a fine on him. The decision to conditionally discontinue the criminal proceedings had resulted in the applicant not being convicted. Admittedly, his name had been entered in the National Criminal Register (*Krajowy Rejestr Karny*), but not as a convicted person, rather as a person against whom proceedings had been

conditionally discontinued. Moreover, that situation had lasted for only one year. Afterwards, the entry had been deleted.

48. The Government further argued that the applicant had in no way been impeded from publishing. Moreover, he had not been prosecuted for publishing the text concerned, but for his failure to obtain authorisation. Accordingly the purpose of the penalties imposed on him had not been to discourage him from criticising public officials in the future, nor had they been likely to deter journalists from contributing to public discussion of important issues affecting the life of the community.

49. The Government concluded that the limitation on the applicant's freedom of expression had been proportionate to the legitimate aim pursued, bearing in mind the interest of the protection of the reputation of the interviewed person, as well as the need to prevent the spreading of misinformation. Untruthful messages, disseminated at the expense of an individual, did not constitute a contribution to the formation of public opinion worth safeguarding in a democratic society.

2. The applicant

50. The applicant disagreed with the argument that the requirement to obtain the authorisation, strengthened as it had been at the material time and remained afterwards, served only the purposes of good journalistic practice. He stressed that the legal requirement to ask for authorisation and obtain it, reinforced by a criminal sanction, did not exist in the legislation of any other Council of Europe countries. Such a requirement amounted in itself to a disproportionate interference with freedom of expression; all the more so when it was, in addition, protected by a criminal sanction. Such a sanction had been imposed on the applicant in the instant case.

51. The applicant was of the view that this requirement could not possibly be seen as being necessary in a democratic society. It gave too much leeway to the interviewed persons, allowing them to distort and change what they had actually said in interviews. Disclosing information to the press and giving interviews was a special form of public activity, particularly in the case of persons holding public office. The mere requirement to obtain the interviewee's authorisation threatened the essence of an interview as one of the fundamental tools of journalism. It was difficult to imagine an interview in any form other than the questions asked and the answers given. The public could legitimately be interested not only in the mere content of the interviews, but also in the personal style of public figures as reflected in the way they spoke.

52. The applicant further argued that the application of this legal requirement could result in censorship of free debate. It could also have negative consequences even prior to publication, in that it was capable of making journalists avoid putting searching questions for fear that their interlocutors might later block the publication of the entire interview.

53. He submitted that this requirement also resulted in slowing down the flow of information from the press to the public and burdened journalists with additional work and costs. Journalists could not simply report the statements made during an interview; they were obliged, in addition, to have the report accepted by the interviewee. The time devoted to obtaining this consent could be more usefully spent in verifying the facts.

54. There were other ways to protect individuals' reputations under domestic law, which could always be used when a person was of the view that a press publication breached his or her personal rights.

55. The applicant asserted that the courts which had examined the present case had not investigated whether the applicant had in any way manipulated or distorted his statements, because criminal responsibility under the contested provisions of the Press Act arose irrespective of the journalist's professional diligence or lack of it.

56. The applicant submitted that the fact that the criminal sanction imposed on him had not been particularly severe was of no particular relevance for the assessment of the circumstances of the case, given that free speech was of the utmost importance in a democratic society. Last but not least, as a result of the criminal conviction the applicant had been listed in the National Criminal Register as having been found guilty of a criminal offence.

57. Pursuant to the Court's case-law, while exercising their freedom of expression journalists should act in good faith, provide reliable information reflecting the factual situation and follow the rules of journalistic ethics. The applicant referred to the Court's judgments in the cases of *Fressoz and Roire v. France* [GC], no. 29183/95, ECHR 1999-I; *McVicar v. the United Kingdom*, no. 46311/99 ECHR 2002-III; and *Tønsbergs Blad A.S. and Haukom v. Norway*, no. 510/04, ECHR 2007-III. He concluded that the interference complained of in his case, namely imposing a punishment on a journalist who had reliably quoted a politician's statement, had grossly breached Article 10 of the Convention.

B. The Court's assessment

1. General principles

58. According to the Court's well-established case-law, freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfilment. 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". As set forth in Article 10 § 2, this freedom is subject to exceptions, which must, however, be construed strictly, and the need for any restrictions must be established convincingly (see, among many other authorities, *Janowski v. Poland* [GC], no. 25716/94, § 30, ECHR 1999-I; *Nilsen and Johnsen v. Norway* [GC], no. 23118/93, § 43, ECHR 1999-VIII; and *Lingens v. Austria*, 8 July 1986, § 41, Series A no. 103).

59. 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, 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, among many authorities, The Observer *and* Guardian *v. the United Kingdom*, judgment of 26 November 1991, Series A no. 216, pp. 29-30, § 59, and Bladet Tromsø and *Stensaas v. Norway* [GC], no. 21980/93, § 59, ECHR 1999-III).

60. In this context, the safeguards to be afforded to the press are of particular importance (*Janowski v. Poland* [GC], no. 25716/94, § 30, ECHR 1999-I). Not only does the press have the task of imparting information and ideas: the public also has a right to receive them. Were it otherwise, the press would be unable to play its vital role of "public watchdog" in imparting information of serious public concern (see, among other authorities, The Observer *and* Guardian *v. the United Kingdom*, cited above, § 59, and *Gawęda v. Poland*, no. 26229/95, § 34, ECHR 2002-II).

61. However, Article 10 of the Convention does not guarantee a wholly unrestricted freedom of expression even with respect to press coverage of matters of serious public concern. Under the terms of paragraph 2 of the Article the exercise of this freedom carries with it "duties and responsibilities", which also apply to the press. By reason of the "duties and responsibilities" inherent in the exercise of freedom of expression, the safeguard afforded by Article 10 to journalists in relation to reporting on issues of general interest is subject to the proviso that they are acting in good faith in order to provide accurate and reliable information in accordance with the ethics of journalism (see the *Goodwin v. the United Kingdom*, judgment of 27 March 1996, *Reports of Judgments and Decisions* 1996-II, p. 500, § 39; *Fressoz and Roire v. France* [GC], no. 29183/95, § 54, ECHR 1999-I; and *Wołek, Kasprów and Łęski v. Poland* (dec.), no. 20953/06, 21 October 2008).

2. Application of the principles to the circumstances of the present case

62. In the present case the domestic authorities instituted proceedings against the applicant for breach of his obligation to seek and obtain the consent of the interviewed person prior to publishing the interview. Ultimately, a criminal sanction provided for by section 14 read together with section 49 of the Press Act was imposed on him. It is not in dispute that this sanction amounted to an interference with his right to freedom of

expression. Nor has it been disputed that this interference was prescribed by the relevant provisions of that Act.

(a) Whether the interference served a legitimate purpose

63. The Court must now examine whether the interference served a legitimate purpose. It notes the Government's argument that it was aimed at protecting the reputation of the M.P. (see paragraphs 44-46 above) and that it had therefore served the purpose of the "protection of the reputation or rights of others"**.** The Court does not find this argument persuasive as it has never been argued, either in the domestic proceedings or before the Court, that the interview published by the newspaper contained any information or opinions capable of damaging the M.P.'s reputation. The domestic courts in their decisions did not criticise the applicant for tarnishing it. Indeed, they did not even refer to the substance of the interview. Nor was it argued that the M.P.'s words were distorted and quoted out of context or conveyed in the manner which could have misled readers or depicted the M. P. in a negative light. The applicant's criminal conviction was based exclusively on a breach of a technical character, namely on the fact that he had published the interview despite the M.P.'s refusal to give his authorisation.

However, the Court is prepared to assume for the purposes of the instant case that the interference complained of served a legitimate purpose.

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

64. The Court must now examine whether this interference was "necessary in a democratic society". The Court reiterates that this depends on whether the interference complained of corresponded to a pressing social need, whether it was proportionate to the legitimate aim pursued and whether the reasons given by the national authorities to justify it are relevant and sufficient (see Bladet Tromsø *and Stensaas*, cited above, § 58). The Court's task is not to take the place of the national courts but rather to review under Article 10, in the light of the case as a whole, the decisions they have taken pursuant to their power of appreciation (ibid., § 60, and see also *Fressoz and Roire v. France*, cited above, § 45). In doing so, the Court has to satisfy itself that the national authorities applied standards which were in conformity with the principles embodied in Article 10 and, moreover, that they based themselves on an acceptable assessment of the relevant facts (see *Jersild v. Denmark*, 23 September 1994, § 31, Series A no. 298, and *Veraart v. the Netherlands*, no. 10807/04, § 61, 30 November 2006).

The Contracting States have a certain margin of appreciation in assessing whether in the circumstances of a concrete case a pressing social need exists, but it goes hand in hand with European supervision, embracing both the legislation and the decisions applying it, even those delivered by an independent court. The Court is therefore empowered to give the final ruling

on whether a "restriction" is reconcilable with freedom of expression as protected by Article 10 (see, among many other authorities, *Perna v. Italy* [GC], no. 48898/99, § 39, ECHR 2003-V, and *Cumpănă and Mazăre v. Romania* [GC], no. 33348/96, § 88, ECHR 2004-XI).

65. In the present case the authorities applied the 1984 Press Act when examining the criminal case against the applicant. That Act imposed on the applicant, as an editor-in-chief, an unequivocal obligation to seek and to obtain the authorisation of the interviewed person before publishing an interview, regardless of the subject-matter of that interview and its content. That authorisation amounted to certifying that the text proposed for publication corresponded to what had actually been said during the interview.

In this connection, the Court reiterates that while it is true that Article 10 of the Convention does not in terms prohibit the imposition of prior restraints on publications, the dangers inherent in prior restraints call for the most careful scrutiny on the Court's part (see *Chauvy and Others v. France*, no. 64915/01, § 66, ECHR 2004-VI; and *Társaság a Szabadságjogokért v. Hungary*, no. 37374/05, § 36, ECHR 2009-...; *Gawęda v. Poland*, no. 26229/95, § 35, ECHR 2002-II; and The Observer *and* The Guardian, cited above, p. 30, § 60). Where freedom of the press is at stake, the national authorities have only a limited margin of appreciation to decide whether there is a "pressing social need" to take such measures (*Editions Plon v. France*, no. 58148/00, § 44, ECHR 2004-IV).

66. It is not in dispute that the applicant published the *verbatim* excerpts from the interview concerned without obtaining the authorisation of the interviewed person.

The Court is of the view that an obligation to verify, before publication, whether a text based on statements made in the context of an interview and quoted *verbatim* is accurate can be said to amount, for the printed media, to a normal obligation of professional diligence. It can be expected, in the interests of responsible reporting, that a journalist will make appropriate efforts to ensure that his or her rendering of the interview corresponded to what was actually said and that such efforts constitute a natural part of the journalist's work. The impugned provisions of the Polish Press Act were aimed at ensuring compliance with journalists' professional obligations. Their essential objective was to avoid the potential adverse effect of inaccurate reporting on the reputation of persons whose statements were reported by the press.

67. However, in the present case it is not only the obligation imposed under section 14 of the Press Act which constituted the legal background of the case, but the criminal sanction imposed for the applicant's failure to comply with that obligation, expressly provided for by section 49 of the same Act.

68. The Court reiterates that it must exercise caution when the measures taken or sanctions imposed by the national authorities are such as to dissuade the press from taking part in the discussion of matters of legitimate public concern (see *Standard Verlags GmbH v. Austria*, no. 13071/03, § 49, 2 November 2006; *Kuliś and Różycki v. Poland*, no. 27209/03, § 37, ECHR 2009-...). The chilling effect that the fear of criminal sanctions has on the exercise of journalistic freedom of expression is evident (see, *mutatis mutandis*, *Wille v. Liechtenstein* [GC], no. 28396/95, § 50, ECHR 1999-VII; *Nikula v. Finland*, no. 31611/96, § 54, ECHR 2002-II; *Goodwin*, cited above, p. 500, § 39; and *Elci and Others v. Turkey*, nos. 23145/93 and 25091/94, § 714, 13 November 2003). This effect, which works to the detriment of society as a whole, is likewise a factor which goes to the proportionality, and thus the justification, of the sanctions imposed on media professionals.

69. The Court has repeatedly stated that the nature and severity of the penalties imposed on media professionals are also factors to be taken into account when assessing whether the interference with their freedom of expression was necessary in a democratic society (see *Skałka v. Poland*, no. 43425/98, 27 May 2003, § 41-42; *Cumpana and Mazare v. Romania*, cited above, §§ 111-124; and *Sokołowski v. Poland*, no. 75955/01, § 51, 29 March 2005).

70. In the present case the first-instance court, when determining the sanction to be imposed on the applicant, observed that he had been motivated by his wish to fulfil his duty as a journalist by communicating to the public the interview given by the local M.P. The court accordingly concluded that the offence concerned could not be regarded as serious.

71. However, in the Court's view, the mere fact that the domestic courts' approach to the determination of the penalty to be imposed on the applicant was cautious cannot overshadow other considerations of a more fundamental character relating, in the first place, to the subject-matter of the publication concerned. In this connection, the Court reiterates that there is little scope under Article 10 § 2 of the Convention for restrictions on political speech or on debate on questions of public interest (see *Bączkowski and Others v. Poland*, no. 1543/06, § 98, ECHR 2007-VI; and *Wojtas-Kaleta v. Poland*, no. 20436/02, § 46, 16 July 2009).

72. The applicant interviewed the local M.P. about his political and business activities (see paragraph 7 above). His views and comments were indisputably a matter of general interest to the local community which the applicant was entitled to bring to the public's attention and the local population was entitled to receive information about such matters (see, *mutatis mutandis*, *Cumpănă and Mazăre v. Romania* [GC], cited above, §§ 94-95).

73. The Court notes the Government's argument that the interest of open discussion should be weighed against the interest of protecting the M.P.'s

reputation (see paragraph 46 above). However, even assuming that private life issues were raised in the interview, the Court reiterates that the limits of acceptable criticism are wider as regards a politician as such than as regards a private individual. Unlike the latter, the former inevitably and knowingly lays himself open to close scrutiny of his words and deeds by journalists and the public at large, and he must consequently display a greater degree of tolerance (see *Lingens*, cited above, § 42; *Incal v. Turkey*, judgment of 9 June 1998, *Reports* 1998-IV, p. 1567, § 54; and *Scharsach and News Verlagsgesellschaft v. Austria*, no. 39394/98, § 30, ECHR 2003-XI).

74. Moreover, the Court observes that the M.P. chose to request that criminal proceedings against the applicant be instituted and that the applicant was ultimately convicted. In the assessment of the case it should not be overlooked that the bill of indictment against the applicant was lodged by the public prosecutor, whereas the domestic law provided for the possibility of lodging private bills of indictment with the courts in cases concerning less serious offences. Hence, the national legislator was of the view that the offence defined by Section 14 read together with Article 49 of the Press Act was serious enough to warrant the involvement of the public prosecutor in the proceedings.

75. The Court further notes that the domestic courts imposed a criminal sanction on the applicant despite the fact that it was not in dispute that there had been no attempt at subterfuge on his part when he had tried to obtain the interview. The interviewee had expressed his consent to the interview and the applicant's newspaper had published it. In so far as the Government argued that the M.P. had given the interview although not obliged to do so, the Court fails to see how this factor should be construed as justifying a restriction on the applicant's right to freedom of expression. Indeed, a transparent and responsible exercise of a political mandate would normally necessitate that the local population be informed via the media by M.P.s about their public activities, if need be by way of interviews.

76. The Court further observes that in its case-law to date it has normally been called upon to examine whether interferences with freedom of expression were "necessary in a democratic society" with reference to the substance and content of statements of fact or value judgments for which the applicants had ultimately been penalised, by way of civil or criminal law. The essential difference between all such cases examined to date and the present one is that, here, the courts punished the applicant and imposed a criminal penalty on grounds which were completely unrelated to the substance of the impugned article.

77. At no stage of the proceedings was it shown that either the content of what had been said by the M.P. or the form of his remarks, published *verbatim* by the applicant's newspaper, had been distorted in any way. There is nothing to suggest that the rendering of the interviewee's words was not accurate. Nor was it ever disputed that the published article

contained his statements quoted *verbatim.* Despite this, the mere fact that the applicant had published the text without the authorisation required by section 14 of the Press Act automatically entailed the imposition of the criminal sanction provided for under section 49 of that Act.

78. Moreover, the impugned provisions applied across the board, regardless of the status of the interviewee. It was sufficient for the court to establish a failure on the applicant's part to seek and obtain authorisation. The content of the article was, in any event, establishing irrelevant for the criminal offence.

79. As a result, the domestic courts, when examining the criminal case against the applicant, were not required to give any thought to the relevance of the fact that the interviewed person was an M.P. with political responsibilities towards his constituents. Indeed, the courts did not have any regard either to the substance of the statements published by the applicant's newspaper or to whether they had corresponded to what had been said during the interview. This approach alone does not appear compatible with the established case-law of the Court, which consistently emphasises that protection granted to politicians against criticism is much narrower than that applicable to all other persons (see paragraph 73 above). Moreover, the Court notes that the refusal of authorisation for the publication of the interview was of a blanket character as under the impugned provisions the M.P. was not obliged to provide any grounds for his refusal.

80. The Court can accept that an interviewed person may be anxious that his or her actual comments are faithfully rendered and conveyed to the public. This also applies where the interviewed person is a politician. Exposure to the public eye of reckless or awkward utterances made by a politician in the context of an interview may have a negative impact on his or her further career and, indeed, their political existence.

81. However, the provisions applied in the present case give interviewees *carte blanche* to prevent a journalist from publishing any interview they regard as embarrassing or unflattering, regardless of how truthful or accurate it is. They can do so either by refusing authorisation or by unreasonably delaying the granting of authorisation. The relevant provisions do not fix any time-limit within which the authorisation is to be granted or refused. Furthermore, it cannot be excluded that their application may also result in slowing down the flow of information from the press to the public and burden journalists with additional work and costs. The Court reiterates in this context that news is a perishable commodity and to delay its publication, even for a short period, may well deprive it of all its value and interest (see, for example, Observer *and* Guardian, cited above, p. 30, § 60; Sunday Times *v. the United Kingdom (no. 2)*, judgment of 26 November 1991, Series A no. 217, pp. 29 et seq., § 51; and *Association Ekin v. France*, no. 39288/98, § 56, ECHR 2001-VIII). Consequently, a journalist cannot in principle be required to defer publishing information on

a subject of general interest without compelling reasons relating to the public interest or the protection of the rights of others (see, for example, *Editions Plon*, cited above, § 53, with further references).

82. Moreover, the legal provisions concerned in the present case could have other negative consequences prior to publication, in that they were capable of making journalists avoid putting probing questions for fear that their interlocutors might later block the publication of the entire interview by refusing to grant authorisation, or choose interlocutors known for being co-operative, to the detriment of the quality of the public debate. The Court shares the view expressed by Justice Rzepliński in his dissenting opinion (see paragraph 26 above) that these provisions were therefore capable of having a chilling effect on the exercise of the journalistic profession by going to the heart of decisions on the substance of press interviews and shares.

83. The Court has had regard to the Government's argument that the interference complained of was aimed at the protection of the reputation of the interviewed person. However, the Court notes that under domestic law there existed an array of available civil law instruments specifically intended for that purpose (see paragraphs 30-32 above). It also reiterates that in its examination to date of the measures in place at domestic level to protect Article 8 rights in the context of freedom of expression (and even assuming that such rights were at issue in the present case), the Court has so far accepted that *ex post facto* damages provide an adequate remedy for violations of Article 8 rights arising from the publication by a newspaper of private information (see *Von Hannover v. Germany*, no. 59320/00, §§ 72-74, ECHR 2004-VI; *Armonienė v. Lithuania*, no. 36919/02, §§ 45048, 25 November 2008). Moreover, the provisions of the Press Act itself afforded additional protection against inaccurate rendering of statements and judgments made in the context of an interview. Section 31 of that Act provided, at the material time, for the obligation for a newspaper to publish a disclaimer submitted by a person who wished to have inaccurate information published about him or her rectified, or a more elaborate reply if his or her personal rights had been breached by an article (paragraph 29 above). It has not been argued, let alone shown, that these instruments were generally ineffective or that in the specific circumstances of the present case recourse to them would not have offered a sufficient level of protection. In these circumstances, recourse to a criminal sanction was not, in the Court's opinion, justified.

84. The Court observes that the Press Act was adopted in 1984, twenty-seven years ago. It was adopted before the collapse of the communist system in Poland in 1989. Under that system, all media were subjected to preventive censorship. The Press Act 1984 was extensively amended on twelve occasions (see paragraph 29 above). However, the provisions of sections 14 and 49 of that Act, on which the applicant's

conviction was based, were never subject to any amendments, in spite of the profound political and legal changes occasioned by Poland's transition to democracy. It is not for the Court to speculate about the reasons why the Polish legislature has chosen not to repeal those provisions. However, the Court cannot but note that, as applied in the present case, the provisions cannot be said to be compatible with the tenets of a democratic society and with the significance that freedom of expression assumes in the context of such a society.

85. It is also relevant for the assessment of the case that, in the proceedings before the Constitutional Court, the compatibility of the impugned obligation with the freedom of expression enshrined in the Polish Constitution was negatively assessed by the Ombudsman, the Speaker of Parliament and the Prosecutor General, who were all of the view that the restrictions imposed by the Press Act breached the principle of proportionality enshrined in Article 31 of the Polish Constitution of 1997. What is more, they all referred to the availability of civil law instruments to secure effective protection of personal rights (see paragraph 19 above). This remarkable unanimity of leading national legal authorities in the assessment of the provisions which had served as a legal basis for the interference concerned in the present case cannot be overlooked by the Court.

86. In so far as the Constitutional Court stressed that journalists were not obliged to seek authorisation (and, consequently, did not run the risk of criminal proceedings) where they chose to summarise or otherwise convey the content of statements made in the context of interviews (see paragraph 22 above), the Court is of the view that this approach was, in fact, paradoxical. The more faithfully journalists rendered the statements of interviewed persons, the more they were exposed to the risk of criminal proceedings being brought against them for failure to seek authorisation. In the same vein, it is also paradoxical that section 14 of the Press Act obliges journalists to seek authorisation only in respect of interviews recorded in a phonic or visual form whereas no such obligation is imposed where a journalist only makes notes of an interview. In any event, the Court is of the view that the mere fact that the applicant was free to paraphrase words used by the interviewed person – but chose to publish his statements *verbatim* and was penalised for it - does not make the criminal penalty imposed on him proportionate.

87. The Court concludes that the criminal proceedings brought against the applicant and the criminal sanction imposed on him, without any regard being had to the accuracy and subject-matter of the published text and notwithstanding his unquestioned diligence in ensuring that the text of the published interview corresponded to the actual statements made by the M.P., was disproportionate in the circumstances.

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

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

89. 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

90. The applicant claimed 150,000 and 165,000 zlotys (PLN) in respect of pecuniary and non-pecuniary damage respectively. He referred to the stress and humiliation which he had suffered as a result of his criminal conviction, and to the income he had lost in connection with the judgments given in his case. He further claimed PLN 1,000, equivalent to EUR 256, in respect of pecuniary damage, representing the fine imposed on him by the domestic court.

91. The Government considered that the applicant's claims were excessive and bore no causal link with the circumstances of the case.

92. The Court finds that in the circumstances of the case there is a causal link between the violation found and the alleged pecuniary damage in respect of the EUR 256 fine he was ordered to pay by the domestic courts (see *Busuioc v. Moldova*, no. 61513/00, § 101, 21 December 2004). Although the applicant claimed this amount under costs and expenses (see paragraph 94 below), the Court considers that it should be granted under the head of pecuniary damage and awards the applicant the sum claimed in respect of the fine.

93. The Court also accepts that the applicant suffered non-pecuniary damage – such as distress and frustration resulting from the conviction and sentence – which is not sufficiently compensated by the finding of a violation of the Convention. Making its assessment on an equitable basis, the Court awards the applicant EUR 4,000 under this head.

B. Costs and expenses

94. The applicant also claimed PLN 15,000 for costs and expenses incurred before the domestic courts. This amount included PLN 1,000, equivalent to EUR 256, for the fine imposed on him in the proceedings; PLN 4,000, equivalent to EUR 1,124 for domestic court fees; PLN 5,200 in legal fees, equivalent to EUR 1,331 and PLN 1000, equivalent to EUR 256 for travel costs incurred in connection with the appellate proceedings.

He further claimed PLN 5,500, equivalent to EUR 1,408 in reimbursement of legal fees incurred in connection with the proceedings before the Court.

95. The Government reiterated that the claims were excessive.

96. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. As regards the fine paid by the applicant, this has been awarded under the head of pecuniary damage (see paragraph 92 above). As to the remaining claims concerning costs incurred in connection with the domestic proceedings, the Court awards the applicant the sum of EUR 4,119 covering costs under all heads.

C. Default interest

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

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the application admissible;

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

3. *Holds*

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

(i) EUR 256 (two hundred and fifty six euros) in respect of pecuniary damage, plus any tax that may be chargeable;

(ii) EUR 4,000 (four thousand euros) in respect of non-pecuniary damage, plus any tax that may be chargeable;

(iii) EUR 4,119 (four thousand one hundred and nineteen euros) in respect of costs and expenses, plus any tax that may be chargeable to the applicant;

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

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

Done in English, and notified in writing on 5 July 2011, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Fatoş Aracı	Nicolas Bratza
Deputy Registrar	President

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

(a) joint concurring opinion of Judges Bratza and Hirvelä;

(b) joint concurring opinion of Judges Garlicki and Vučinić.

N.B.
F.A.

JOINT CONCURRING OPINION OF JUDGES BRATZA AND HIRVELÄ

We fully concur with the view of the Chamber that Article 10 of the Convention was violated in the present case.

The central problem which gives rise to a violation lies, in our view, in the legislation in question which makes it a criminal offence to publish or disseminate any information provided by a person and recorded in audio or visual form, without the authorisation of the person concerned. As is demonstrated by the facts of the present case, the offence is committed by the mere fact of publication without authorisation, irrespective of the accuracy of the reproduction of the statements made by the individual concerned, irrespective of whether the words spoken are distorted or quoted out of context or conveyed in a misleading manner, irrespective of the identity or position of the individual concerned or the context in which his words were recorded and irrespective of the reasons, if any, given for refusing authorisation. In our view, such a provision cannot be reconciled with the right to freedom of expression guaranteed by Article 10 of the Convention.

Where we have hesitations about the reasoning in the judgment is in relation to paragraph 74 which implicitly, if not expressly, suggests that the outcome might have been different had the prosecution of the applicant been brought by the M.P. himself, rather than by the public prosecutor. It is the fact of the applicant's prosecution and conviction under the Press Act and not the identity of the prosecutor which is important in the present case and our view that Article 10 was violated would have been exactly the same even if the M.P. had himself brought the prosecution which resulted in the applicant's conviction.

JOINT CONCURRING OPINION OF JUDGES GARLICKI AND VUČINIĆ

1. We are ready to accept that there has been a violation of Article 10 of the Convention in this case. However, it seems that the judgment could have been drafted in more precise terms. In particular, it is not clear whether the violation results only or mostly from the severity of the sanction or whether the position of the majority should be interpreted as a total rejection of any form of the authorisation requirement.

In our opinion, the finding of a violation should have been based – clearly and exclusively – on three narrower grounds.

First, the authorisation requirement is overbroad in its scope since it applies not only to the text to be published but also to photographs taken in the course of the interview. It should not be forgotten that the applicant's conviction also referred to the publication of "unauthorised" photographs of the member of parliament who was the subject of the interview.

Second, the authorisation requirement is overbroad since it entails a blanket ban on the publication of any "unauthorised" verbatim quotations. Thus, criminal responsibility arises from the very fact of publication, independently of whether the published quotations were accurate and whether they truly reflected what was actually said by the person interviewed.

Third, while the use of criminal procedure is not fundamentally incompatible with the Court's understanding of the freedom of the press (see *Radio France and Others v. France*, no. 53984/00, § 40, ECHR 2004-II, and *Lindon, Otchakovsky-Laurens and July v. France* [GC], nos. 21279/02 and 36448/02, § 59, ECHR 2007-XI), this assessment is more difficult to apply in cases such as the present one, in which the procedure is initiated by a public prosecutor and not upon a private action brought by the person affected (see *Raichinov v. Bulgaria*, no. 47579/99, § 50, 20 April 2006; *Rumyana Ivanova v. Bulgaria*, no. 36207/03, § 68, 14 February 2008; and *Długołęcki v. Poland*, no. 23806/03, § 47, 24 February 2009).

2. The Court attached considerable weight to the severity of the sanction in the applicant's case. It is true that, according to our case-law, an overly severe sanction can tip the balance and lead to a violation of Article 10, even if the conduct of the journalist concerned fell short of the requirements of professional ethics (see, in particular, *Cumpănă and Mazăre v. Romania* [GC], no. 33348/96, § 116, ECHR 2004-XI).

In this instance, however, the applicant's case was conditionally discontinued and he was obliged to pay 1,000 zlotys (equivalent to approximately 250 euros) to a charity. In our opinion, it is difficult to describe this sanction as a severe one.

3. The fact that we have all agreed that there was a violation in the applicant's case should not be interpreted as a total rejection of any form of

the authorisation requirement. It is true that authorisation constitutes a prior restraint on publications and that the Court should apply the most careful scrutiny in assessing any restriction of such nature. But, as was also noted by the majority, Article 10 does not in terms prohibit the imposition of prior restraints and, therefore, a reasonably tailored restriction has a chance of surviving the Court's scrutiny.

In our opinion there are three considerations that may be used in defence of the authorisation requirement.

First, the requirement applies not to every publication or every interview, but only to texts in which a journalist chooses to include verbatim statements by the interviewed person. Therefore (as was also observed by the Polish Constitutional Court), the authorisation requirement can easily be avoided if a journalist decides to publish his or her own presentation of what was said by the interviewed person.

Second, even verbatim quotations are not always free from the danger of inaccuracy. In the present case, the original transcript ran to forty pages and the published text amounted to only three pages. This is usual practice: a journalist prepares a selection of what has been said and publishes only what he or she considers relevant. But selection may also mean manipulation and it is not difficult to recall situations in which several quotations have been merged into one statement with the content completely distorted. It seems that there is some force in the Constitutional Court's argument that once an interview is going to be edited, it may be reasonable to allow the interviewed person to have a look at the final version of his – purported – statements.

Finally, we should not ignore the dangers of journalistic abuse. In Poland, as in many other countries, journalists are not always angels. There have been numerous situations in which, particularly in the course of a political debate, a person's statements have been quoted in a malevolently inaccurate manner. It is, unfortunately, not uncommon for journalists to denigrate political opponents and we must be aware that political journalism sometimes degenerates into an instrument of annihilation rather than of information. The authorisation requirement attempts to address at least one aspect of that process by preventing inaccurate or manipulated – in short, false – quotations.

Thus, the authorisation requirement may serve such legitimate aims as providing the general public with accurate information and contributing to a practice of responsible journalism.

The above-mentioned considerations make us hesitant in accepting that the authorisation requirement, if correctly framed, cannot be regarded as a reasonable limitation of journalistic freedom. We no longer live in a world in which the press can always assume the position of a victim. More and more often, the press abuses its powerful position and, deliberately and

malevolently, undermines the good name and integrity of other persons. We have no alternative but to address this new situation.