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

Case of Maestri v. Italy

(Application no. 39748/98)

Judgment

Strasbourg, 17 February 2004

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JUDGMENT

STRASBOURG

17 February 2004

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

In the case of Maestri v. Italy,

The European Court of Human Rights, sitting as a Grand Chamber composed of:

Mr L. WILDHABER, *President*,
Mr C.L. ROZAKIS,
Mr J.-P. COSTA,
Mr G. RESS,
Sir Nicolas BRATZA,
Mr G. BONELLO,
Mr L. LOUCAIDES,
Mrs V. STRÁŽNICKÁ,
Mr C. BÎRSAN,
Mr K. JUNGWIERT,
Mr V. BUTKEVYCH,
Mr B. ZUPANČIČ,
Mr J. HEDIGAN,
Mrs S. BOTOUCHAROVA,
Mrs E. STEINER,
Mr S. PAVLOVSCHI, *judges*,
Mrs M. DEL TUFO, ad hoc *judge*,

and Mr P.J. MAHONEY, *Registrar*,

Having deliberated in private on 25 June and 3 December 2003 and on 28 January 2004,

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

PROCEDURE

1. The case originated in an application (no. 39748/98) against the Italian Republic lodged with the European Commission of Human Rights ("the Commission") under former Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by an Italian national, Mr Angelo Massimo Maestri ("the applicant"), on 14 June 1997.

2. The applicant was represented before the Court by Mr A. Fusillo, of the Rome Bar. The Italian Government ("the Government") were represented successively by their Agents, Mr U. Leanza and Mr I.M. Braguglia, assisted by Mr V. Esposito and Mr F. Crisafulli, co-Agents.

3. The applicant, a judge, alleged that the imposition of a sanction on him for being a Freemason amounted to a violation of Articles 9, 10 and 11 of the Convention.

4. The application was transmitted to the Court on 1 November 1998, when Protocol No. 11 to the Convention came into force (Article 5 § 2 of Protocol No. 11).

5. The application was allocated to the Second Section of the Court (Rule 52 § 1 of the Rules of Court). Within that Section, the Chamber that would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1. On 30 March 1999 the Chamber decided to communicate the application to the respondent Government (Rule 54 § 2 (b)).

6. On 1 November 2001 the Court changed the composition of its Sections (Rule 25 § 1). This case was assigned to the newly composed First Section (Rule 52 § 1). On 4 July 2002 the application was declared admissible by a Chamber of that Section, composed of the following judges: Mr C.L. Rozakis, Mr G. Bonello, Mr P. Lorenzen, Mrs N. Vajić, Mrs S. Botoucharova, Mrs E. Steiner and Mrs M. del Tufo (*ad hoc* judge), and also of Mr E. Fribergh, Section Registrar.

7. On 10 October 2002 the Chamber relinquished jurisdiction in favour of the Grand Chamber, neither of the parties having objected to relinquishment (Article 30 of the Convention and Rule 72).

8. The composition of the Grand Chamber was determined according to the provisions of Article 27 §§ 2 and 3 of the Convention and Rule 24. Mrs del Tufo continued to sit as an *ad hoc* judge appointed by the respondent Government in place of the judge elected in respect of the respondent State (Rule 29 § 1).

9. The applicant and the Government each filed a memorial on the merits.

10. A hearing took place in public in the Human Rights Building, Strasbourg, on 25 June 2003 (Rule 59 § 3).

There appeared before the Court:

(a) *for the Government*
Mr F. CRISAFULLI, *co-Agent*,

(b) *for the applicant*
Mr A. FUSILLO, *avvocato*, *Counsel*.

The Court heard addresses by them and also their replies to questions from its members.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

11. The applicant was born in 1944 and lives in Viareggio (in the province of Lucca). He is a judge.

12. At the time when he lodged the application he was acting president of the La Spezia District Court. On 23 November 1993, following an inquiry by the General Inspectorate for the Ministry of Justice, the Minister of Justice instituted disciplinary proceedings against the applicant on account of his membership of a Masonic lodge affiliated to the Grande Oriente d'Italia di Palazzo Giustiniani. The Minister accused him of having been a Freemason from 1981 until March 1993 and of having thereby breached Article 18 of Royal Legislative Decree no. 511 of 31 May 1946 (see paragraph 18 below).

13. In a decision of 10 October 1995 the disciplinary section of the National Council of the Judiciary (*Consiglio Superiore della Magistratura*) found that the applicant had committed the offences of which he was accused and gave him a reprimand (*censura*). It stated that from 1982 onwards it should have been possible to "have a clear idea of the loss of integrity resulting from membership of the Freemasons ... because of the degeneration brought about when a number of people came together within the P2 lodge with plans to take control of the public authorities and subvert democratic institutions, and because of the collusion of certain Masonic lodges with the Mafia and organised crime". The disciplinary section added that the directives issued by the National Council of the Judiciary on 22 March 1990 and 14 July 1993 (see paragraphs 21 and 22 below), which emphasised – the second one in particular – the substantial conflict between membership of the Freemasons and membership of the judiciary, were to be seen in the context of such developments. The decision also stated that it was contrary to disciplinary rules for a judge to be a Freemason, for the following reasons: the incompatibility between the Masonic and judicial oaths, the hierarchical relationship between Freemasons, the "rejection" of State justice in favour of Masonic "justice" and, lastly, the indissoluble nature of the bond between Freemasons, even in the case of a member who wished to leave the organisation.

The disciplinary section of the National Council of the Judiciary stated, lastly, that the applicant's alleged ignorance of the institutional debate on Freemasonry merely served to confirm the existence of conduct punishable under Article 18 of the 1946 Legislative Decree. In its opinion, such conduct was characterised by a lack of diligence, caution and wisdom in dealing with a situation that posed a threat to the values protected by that Article.

14. On 5 January 1996 the applicant appealed on points of law to the Court of Cassation. In the three grounds of his appeal he alleged a breach of Article 18 of the Constitution, challenged the arguments used in support of the finding that judicial office was incompatible with membership of the Freemasons, and complained that no reasons had been given for the conclusion that a judge would be discredited by belonging to the Freemasons.

15. On 2 February 1996 the Ministry of Justice lodged a cross-appeal. The Court of Cassation, sitting as a full court, examined the case on 19 September 1996 and, in a judgment of 20 December 1996, dismissed the applicant's appeal.

It held, firstly, that the application of Article 18 of the Constitution was limited by the constitutional principles of the impartiality and independence of the judiciary, principles which should be taken to prevail over the right to freedom of association. The Court of Cassation further held that the disciplinary section of the National Council of the Judiciary had based its decision mainly on the directive of 14 July 1993 in which the Council had emphasised that judicial office was incompatible with membership of the Freemasons.

16. The applicant maintains that his career has been at a standstill since the disciplinary section's decision: he was declared unsuitable for a post as judge of the Court of Cassation; furthermore, the judicial council for his district stated that, because of the reprimand, it was unable to give an opinion on his suitability for a post as president of a district court.

Lastly, the applicant states that he has been transferred to Sicily; however, he has not produced any evidence that that decision was linked to the sanction imposed on him.

II. RELEVANT DOMESTIC LAW

A. The Italian Constitution

17. The relevant provisions of the Constitution are the following:

Article 18

"Citizens may form associations freely, without authorisation, for purposes not prohibited for individuals by the criminal law.

Secret associations and associations pursuing, even indirectly, a political aim through organisations of a military nature shall be prohibited."

Article 25

"No one shall be removed from the jurisdiction of a lawfully established court.

No one shall be punished save in accordance with a law in force at the time when the offence was committed.

No one shall be subjected to security measures except in cases provided for by law."

Article 54

"All citizens shall have the duty to be loyal to the Republic and to comply with the Constitution and the laws.

Citizens to whom public offices are entrusted shall perform them with discipline and honour, and take an oath where it is required by law."

Article 98

"Public officials shall be at the exclusive service of the nation.

If they are members of Parliament they shall be promoted only by seniority.

The right to become members of political parties may be limited by law in the case of members of the judiciary, professional members of the armed forces on active duty, police officials and officers, and diplomatic and consular representatives abroad."

Article 101

"Justice shall be administered in the name of the people. Judges shall be beholden only to the law."

Article 111

(version applicable in the instant case, before the entry into force of Constitutional Law no. 2 of 23 November 1999)

"Reasons shall be stated for all judicial decisions.

An appeal on points of law to the Court of Cassation for a breach of the law shall always be allowed against judgments and measures concerning personal freedom delivered by the ordinary or special courts. This provision may be waived only in the case of sentences pronounced by military courts in time of war.

Appeals to the Court of Cassation against decisions of the *Consiglio di Stato* and the Court of Audit shall be allowed only on grounds pertaining to jurisdiction."

B. Article 18 of Royal Legislative Decree no. 511 of 31 May 1946

18. Royal Legislative Decree no. 511 of 31 May 1946 ("the 1946 decree") concerns the safeguards afforded to members of the State legal service (*guarentigie della magistratura*).

Article 18 of the decree provides that any judge who "fails to fulfil his obligations or behaves, in the performance of his duties or otherwise, in a manner which makes him unworthy of the trust and consideration which he must enjoy or which undermines the prestige of the judiciary" will incur a disciplinary sanction.

19. The Constitutional Court, when asked to give a ruling as to whether Article 18 of the 1946 decree was compatible with Article 25 § 2 of the Constitution, held that, in disciplinary proceedings against judges, the principle of lawfulness applied as a fundamental requirement of the rule of law and was a necessary consequence of the role conferred on the judiciary by the Constitution (judgment no. 100 of 8 June 1981, § 4).

However, with regard to the fact that Article 18 did not specify the types of conduct which might be regarded as unlawful, the Constitutional Court pointed out that it was not possible to give examples of every type of conduct which might undermine the values guaranteed by that provision: the trust and consideration which a judge must enjoy and the prestige of the judiciary. It considered that those values amounted to principles of professional conduct which could not be included in "guidelines laid down in advance, because it [was] not possible to identify and classify every example of reprehensible conduct which might provoke a negative reaction in society" (ibid., § 5). The Constitutional Court subsequently reiterated that the earlier laws governing the same subject matter had included a provision of general scope alongside the provisions penalising specific conduct, that the proposals for reform in this field had always been worded in general terms and that the same was true for other professional categories. It concluded: "The provisions in this area cannot but be of general scope because specific guidelines would have the effect of legitimising types of conduct which were not expressly mentioned, but which nonetheless attracted society's opprobrium." It added that those considerations justified the broad scope of the rule and the wide margin of appreciation conferred on a body which, acting within the guarantees inherent in any judicial procedure, was – by virtue of its composition – particularly well qualified to assess whether the conduct considered in each case did or did not undermine the protected values (ibid., § 5).

The Constitutional Court considered, lastly, that such an interpretation was consistent with its case-law on the subject of lawfulness (ibid., § 6). It stated that, as it had previously held, "the principle of lawfulness [was] applicable not only by means of a rigorous and exhaustive description of individual cases, but sometimes also through the use of expressions that are

sufficient to determine the rule with certainty and to ascertain whether a particular type of conduct has breached the principle".

It further held: "'open-ended' provisions which penalise unlawful types of conduct by reference to concepts based on common experience or objectively understandable ethical and social values are fully compatible with the principle of lawfulness."

The Constitutional Court added that, with regard to the provisions in issue, such interpretation criteria appeared more valid in a disciplinary context because, in comparison with criminal offences, disciplinary offences aroused less of a reaction in society and had less of an impact on the personal situation of the individual concerned, and also because the possibility of conduct undermining the protected values was greater than in the case of criminal offences.

It further stated that the reference in Article 18 to the trust and consideration which a judge must enjoy and to the prestige of the judiciary was not objectionable as those concepts could be determined according to general opinion.

Accordingly, the Constitutional Court held that the constitutional provisions in issue had not been infringed, since there had been no breach of the principles of lawfulness and of the independence of the judiciary.

C. Law no. 17 of 25 January 1982

20. Law no. 17 of 25 January 1982 contains provisions on the implementation of Article 18 of the Constitution (right of association) in respect of secret associations and on the dissolution of the "P2" lodge. Section 2 provides that membership of a secret association is a criminal offence.

With regard to civil servants, section 4 provides that disciplinary proceedings must also be brought against them before a special committee constituted according to very precise rules. However, where judges of the ordinary, administrative and military courts are concerned, jurisdiction is vested in the relevant disciplinary bodies.

D. The directives of the National Council of the Judiciary

1. The directive of 22 March 1990

21. On 22 March 1990 the National Council of the Judiciary adopted a directive after holding a debate – further to a message from the Head of State, who acts as its president – on the incompatibility of judicial office with membership of the Freemasons. The proceedings of that meeting (the debate and the text of the directive) were published in the Official Bulletin

(*Verbali Consiliari,* pp. 89-129) under the heading "Report on the incompatibility of judicial office with membership of the Freemasons". An introductory note states that the report was compiled by the Committee on Reform of the Judicial System. A copy of the report was sent to the President of Italy and the speakers of the Senate and the Chamber of Deputies.

According to the directive, "judges' membership of associations imposing a particularly strong hierarchical and mutual bond through the establishment, by solemn oaths, of bonds such as those required by Masonic lodges raises delicate problems as regards observance of the values enshrined in the Italian Constitution".

The National Council of the Judiciary added that it was "undoubtedly [within its] powers to verify compliance with the fundamental principle of Article 101 of the Constitution, according to which 'judges are beholden only to the law'". It continued: "this scrutiny entails ... taking care to ensure that, in discharging their duties, all judges respect – and are seen to respect – the principle of being beholden to the law alone."

The National Council of the Judiciary then referred to the Constitutional Court's judgment no. 100 of 7 May 1981, in which judges' freedom of thought had been weighed against their obligation to be impartial and independent (see paragraph 19 above).

It added: "it has to be stressed that among the types of conduct of a judge to be taken into consideration for the requirements of the exercise of the administrative activity peculiar to the Council, there is also, beyond the limit laid down by Law no. 17 of 1982 (see paragraph 20 above), the acceptance of constraints which (a) are superimposed on the obligation of loyalty to the Constitution and of impartial and independent exercise of judicial activity and (b) undermine the confidence of citizens in the judiciary by causing it to lose its credibility."

Lastly, the National Council of the Judiciary considered it necessary "to suggest to the Minister of Justice that consideration be given to the advisability of proposing restrictions on judges' freedom of association, to include a reference to all associations which – on account of their organisation and ends – entail for their members particularly strong bonds of hierarchy and solidarity".

2. The directive of 14 July 1993

22. On 14 July 1993 the National Council of the Judiciary adopted a further directive.

It stated that the question whether membership of the Freemasons was compatible with judicial office had hitherto given rise solely to considerations concerning judges' career development and access to positions of leadership. Following criticism from certain political figures, including the Italian President, to the effect that such an approach was

unconstitutional, it had proved necessary to clarify the matter from a legal point of view.

Referring to judges' duties of loyalty and obedience, and having pointed out that the freedom of association for the purpose of professing Masonic ideas was not being called into question on a general level, the National Council of the Judiciary emphasised, however, that the performance of judicial duties was incompatible with membership of the Freemasons in Italy on account of the association's secret nature and the means of action and aims of the country's Masonic lodges.

THE LAW

I. THE APPLICANT'S COMPLAINTS

23. Relying on Articles 9, 10 and 11 of the Convention, the applicant alleged a violation of his right to freedom of thought, conscience and religion, his right to freedom of expression and his right to freedom of peaceful assembly and association.

24. The Court considers that the applicant's complaints fall most naturally within the scope of Article 11 of the Convention. Accordingly, it will consider them under that provision only.

II. ALLEGED VIOLATION OF ARTICLE 11 OF THE CONVENTION

25. The applicant complained that the decision by the National Council of the Judiciary, upheld by the Court of Cassation, to impose a disciplinary sanction on him in the form of a reprimand for being a Freemason had infringed his right to freedom of assembly and association. He relied on Article 11 of the Convention, which provides:

> "1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.
>
> 2. No restrictions shall be placed on the exercise of these rights other than such as 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. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State."

A. Whether there was interference

26. The Court considers that there was interference with the applicant's right to freedom of association as guaranteed by Article 11 of the Convention. The Government did not dispute this.

27. In order to be compatible with Article 11, such interference must satisfy three conditions. It must be "prescribed by law", pursue one or more legitimate aims under paragraph 2 and be "necessary in a democratic society" for the achievement of the aim or aims.

B. Whether the interference was "prescribed by law"

1. The parties' submissions

(a) The applicant

28. The applicant asserted that there were no laws in Italy prohibiting judges from being members of the Freemasons, a political party, a trade union or a church. He considered that Article 18 of Royal Legislative Decree no. 511 of 1946 was obsolete and served a purely formal purpose in that it did not specify the types of conduct and action that were prohibited for judges but merely conferred power on the National Council of the Judiciary to determine which types of conduct and action were concerned.

He further submitted that the only associations prohibited by the Italian Constitution were secret ones and those which pursued political aims by means of military organisations. He argued that Freemasonry was not a secret association, but rather a private association like other Italian associations such as political parties and trade unions; however, lists of such associations' members were not made public, contrary to the practice adopted by the Freemasons. Moreover, Freemasonry was not a paramilitary organisation and pursued purely cultural, humanitarian and philanthropic aims.

(b) The Government

29. Relying on the *N.F. v. Italy* judgment (no. 37119/97, §§ 14-19 and 27, ECHR 2001-IX), the Government observed that the Court had already found in a similar case that domestic law provided a "sufficient and accessible legal basis" for the interference complained of, namely Article 18 of the 1946 decree (ibid., § 27).

Turning to the quality of the law, the Government argued that, with regard to the condition of foreseeability, all the rules existing in Italian law, namely the relevant provisions of the Constitution, Article 18 of the 1946 decree and the two directives issued by the National Council of the

Judiciary, constituted a clear legislative framework with foreseeable effect, particularly on account of the "personal status" of those to whom they were addressed and the field they covered.

2. The Court's assessment

30. The Court notes that it has already had occasion to rule on whether the enforcement of a disciplinary sanction imposed on a judge, on the basis of Article 18 of the 1946 decree, for belonging to the Freemasons is compatible with Article 11 of the Convention (see the *N.F. v. Italy* judgment cited above). In that judgment the Court found that the disciplinary sanction had had a basis in Italian law (§ 27) and that the "law" on which it was based had been accessible (§ 28). However, it considered that the condition of foreseeability had not been satisfied (§§ 29-34).

The Court reiterates that the expressions "prescribed by law" and "in accordance with the law" in Articles 8 to 11 of the Convention not only require that the impugned measure should have some basis in domestic law, but also refer to the quality of the law in question. The law should be accessible to the persons concerned and formulated with sufficient precision to enable them – if need be, with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail (see Sunday Times *v. the United Kingdom (no. 1)*, judgment of 26 April 1979, Series A no. 30, p. 31, § 49; *Larissis and Others v. Greece*, judgment of 24 February 1998, *Reports of Judgments and Decisions* 1998-I, p. 378, § 40; *Hashman and Harrup v. the United Kingdom* [GC], no. 25594/94, § 31, ECHR 1999-VIII; and *Metropolitan Church of Bessarabia and Others v. Moldova*, no. 45701/99, ECHR 2001-XII).

For domestic law to meet these requirements, it must afford a measure of legal protection against arbitrary interferences by public authorities with the rights guaranteed by the Convention. In matters affecting fundamental rights it would be contrary to the rule of law, one of the basic principles of a democratic society enshrined in the Convention, for a legal discretion granted to the executive to be expressed in terms of an unfettered power. Consequently, the law must indicate with sufficient clarity the scope of any such discretion and the manner of its exercise (see *Hasan and Chaush v. Bulgaria* [GC], no. 30985/96, § 84, ECHR 2000-XI, and *N.F.*, cited above, § 29).

The level of precision required of domestic legislation – which cannot in any case provide for every eventuality – depends to a considerable degree on the content of the instrument in question, the field it is designed to cover and the number and status of those to whom it is addressed (see *Hashman and Harrup*, cited above, § 31).

31. In the instant case, the Court notes that Article 18 of the 1946 decree, construed in the light of Law no. 17 of 1982 and the 1990 directive,

was the legal provision used as the basis for the sanction imposed on the applicant. It therefore concludes that the disciplinary measure had a basis in domestic law.

32. The Court must next determine whether, in the light of the particular circumstances of the case, the condition relating to the quality of the law was also satisfied. It must therefore ascertain whether the law was accessible and foreseeable as to its effects.

33. As regards accessibility, the Court observes that Article 18 of the 1946 decree satisfied that condition because it was public and, moreover, readily accessible to the applicant on account of his profession. The fact that both the disciplinary section of the National Council of the Judiciary and the Court of Cassation also referred in their reasoning to the 1993 directive, which was issued after the material events, is irrelevant. Article 18 and the first directive adopted by the National Council of the Judiciary in themselves constituted provisions that satisfied the condition of accessibility (see, *mutatis mutandis*, *Autronic AG v. Switzerland*, judgment of 22 May 1990, Series A no. 178, p. 25, § 57).

34. As regards foreseeability, the Court must determine whether domestic legislation laid down with sufficient precision the conditions in which a judge should refrain from joining the Freemasons. In this connection, regard should also be had to the particular requirements of disciplinary regulations.

35. The Court notes, firstly, that Article 18 of the 1946 decree does not define whether and how a judge can exercise his or her freedom of association. Furthermore, while holding that Article 18 was compatible with the Italian Constitution, the Constitutional Court noted that that provision was of general scope (see paragraph 19 above).

36. The Court considers that, in the applicant's case, a distinction should be made between two periods: the period from 1981, when he joined the Freemasons, to 22 March 1990, when the National Council of the Judiciary adopted its first directive, and the period between that date and March 1993, when the applicant left the Freemasons. The directive adopted by the National Council of the Judiciary in 1990 stated that a judge's membership of lawful associations which, like the Freemasons, were governed by specific rules of conduct could be problematical for him or her (see paragraph 21 above).

37. With regard to the first period, the Court considers that Article 18 on its own did not contain sufficient information to satisfy the condition of foreseeability. The fact that Italy passed a law in 1982 on the right of association – which also ordered the dissolution of the secret P2 lodge (see paragraph 20 above) and prohibited membership of secret associations – could not have enabled the applicant to foresee that a judge's membership of a legal Masonic lodge could give rise to a disciplinary issue.

38. With regard to the second period, the Court must determine whether Article 18, combined with the 1990 directive (see paragraph 21 above), supports the proposition that the sanction in question was foreseeable.

39. It notes in that connection that the directive in question was issued in the context of an examination of the specific question of judges' membership of the Freemasons. Furthermore, the title of the report was clear: "Report on the incompatibility of judicial office with membership of the Freemasons."

However, although the title was unambiguous and the directive was primarily concerned with membership of the Freemasons, the debate held on 22 March 1990 before the National Council of the Judiciary sought to formulate, rather than solve, a problem.

That is demonstrated by the fact that the directive was adopted after the major debate in Italy on the unlawfulness of the secret P2 lodge. Furthermore, the directive merely stated: "Naturally, members of the judiciary are prohibited by law from joining the associations proscribed by Law no. 17 of 1982." With regard to other associations, the directive contained the following passage: "the [National] Council [of the Judiciary] considers it necessary to suggest to the Minister of Justice that consideration be given to the advisability of proposing restrictions on judges' freedom of association, to include a reference to all associations which – on account of their organisation and ends – entail for their members particularly strong bonds of hierarchy and solidarity" (see paragraph 21 above).

40. Lastly, the Court considers it important to emphasise that the debate of 22 March 1990 did not take place in the context of disciplinary supervision of judges, as was the case for the directive of 14 July 1993, but in the context of their career progression (see paragraph 22 above). It is therefore clear from an overall examination of the debate that the National Council of the Judiciary was questioning whether it was advisable for a judge to be a Freemason, but there was no indication in the debate that membership of the Freemasons could constitute a disciplinary offence in every case.

41. Accordingly, the wording of the directive of 22 March 1990 was not sufficiently clear to enable the applicant, who, being a judge, was nonetheless informed and well-versed in the law, to realise – even in the light of the preceding debate and of developments since 1982 – that his membership of a Masonic lodge could lead to sanctions being imposed on him.

The Court's assessment is confirmed by the fact that the National Council of the Judiciary itself felt the need to come back to the issue on 14 July 1993 (see paragraph 22 above) and state in clear terms that the exercise of judicial functions was incompatible with membership of the Freemasons.

42. That being so, the Court concludes that the condition of foreseeability was not satisfied in respect of the period after March 1990

either and that, accordingly, the interference was not prescribed by law. There has therefore been a violation of Article 11 of the Convention.

C. Compliance with the other requirements in paragraph 2

43. Having reached the conclusion that the interference was not prescribed by law, the Court does not consider it necessary to ascertain whether the other requirements of paragraph 2 of Article 11 were complied with in the instant case – namely, whether the interference pursued a legitimate aim and whether it was necessary in a democratic society.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

44. 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

45. In his claims submitted under Rule 60 of the Rules of Court the applicant asked the Court to order the respondent Government to put an end to the violations found by taking any measures available at national level. On the basis of Recommendation no. R (2000) 2 of the Committee of Ministers to the member States on the re-examination or reopening of certain cases at domestic level following judgments of the European Court of Human Rights (adopted by the Committee of Ministers on 19 January 2000 at the 694th meeting of the Ministers' Deputies), the applicant sought the reopening of the disciplinary proceedings. He argued that the Court's judgment was to be regarded as a "new fact" which, under Article 37 § 6 of the 1946 decree, entitled him to apply for those proceedings to be reopened.

During the oral proceedings the applicant also sought an award for non-pecuniary damage. He stated, however, that he was not seeking financial gain but, rather, a moral victory which would dispel any doubts as to whether his membership of the Freemasons had been lawful. He left it to the Court's discretion to determine the amount.

46. The Government observed that the applicant's claim for non-pecuniary damage had been submitted for the first time at the hearing on 25 June 2003. They considered, however, that a finding of a violation would constitute sufficient just satisfaction under that head.

They further submitted that the applicant had not proved that he had sustained any such damage.

47. The Court reiterates that, in the context of the execution of judgments in accordance with Article 46 of the Convention, a judgment in which it finds a breach imposes on the respondent State a legal obligation under that provision to put an end to the breach and make reparation for its consequences in such a way as to restore as far as possible the situation existing before the breach. If, on the other hand, national law does not allow – or allows only partial – reparation to be made for the consequences of the breach, Article 41 empowers the Court to afford the injured party such satisfaction as appears to it to be appropriate. It follows, *inter alia*, that a judgment in which the Court finds a violation of the Convention or its Protocols imposes on the respondent State a legal obligation not just to pay those concerned the sums awarded by way of just satisfaction, but also to choose, subject to supervision by the Committee of Ministers, the general and/or, if appropriate, individual measures to be adopted in its domestic legal order to put an end to the violation found by the Court and to redress so far as possible the effects (see *Scozzari and Giunta v. Italy* [GC], nos. 39221/98 and 41963/98, § 249, ECHR 2000-VIII, and *Pisano v. Italy* [GC] (striking out), no. 36732/97, § 43, 24 October 2002).

Furthermore, it follows from the Convention, and from Article 1 in particular, that in ratifying the Convention the Contracting States undertake to ensure that their domestic legislation is compatible with it. Consequently, it is for the respondent State to remove any obstacles in its domestic legal system that might prevent the applicant's situation from being adequately redressed.

In the instant case, it is for the Italian Government to take appropriate measures to redress the effects of any past or future damage to the applicant's career as a result of the disciplinary sanction against him which the Court has found to be in breach of the Convention.

48. The Court notes that the applicant did not submit a quantified claim for non-pecuniary damage. At the hearing on 25 June 2003, however, he left the matter to the Court's discretion. The Court considers that the applicant must have sustained damage on account of the psychological and mental suffering caused by the imposition and enforcement of the disciplinary sanction against him. Making its assessment on an equitable basis, as required by Article 41 of the Convention, the Court awards the applicant the sum of 10,000 euros (EUR) under this head.

B. Costs and expenses

49. The applicant sought reimbursement of the costs incurred in the disciplinary proceedings, namely EUR 8,500, and of the expenses incurred in the proceedings before the Court, which he put at EUR 12,000.

50. The Government left the matter to the Court's discretion.

51. As regards the proceedings before the domestic courts, the Court observes that they were instituted with a view to redressing the grievance that led to its finding of a violation.

Making its assessment on an equitable basis, as required by Article 41 of the Convention, the Court, having regard to the work incontestably performed by his lawyer during the written and oral stages of the proceedings, awards the applicant EUR 4,000, a similar amount to that awarded to the applicant in *N.F. v. Italy* (see paragraph 47 of that judgment).

As regards the costs incurred in the proceedings before it, the Court notes that the Chamber to which the case was initially allocated relinquished jurisdiction in favour of the Grand Chamber (Rule 72). It therefore considers it reasonable to award the applicant the sum of EUR 10,000.

C. Default interest

52. 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

1. *Holds* by eleven votes to six that there has been a violation of Article 11 of the Convention;

2. *Holds* by eleven votes to six
   (a) that the respondent State is to pay the applicant, within three months, the following amounts:
      (i) EUR 10,000 (ten thousand euros) in respect of non-pecuniary damage;
      (ii) EUR 14,000 (fourteen thousand euros) in respect of costs and expenses;
      (iii) any tax that may be chargeable on the above amounts;
   (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;

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

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 17 February 2004.

Luzius WILDHABER
President

Paul MAHONEY
Registrar

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

(a) joint dissenting opinion of Mr Bonello, Mrs Strážnická, Mr Bîrsan, Mr Jungwiert and Mrs del Tufo;

(b) dissenting opinion of Mr Loucaides joined by Mr Bîrsan.

L.W.
P.J.M.

JOINT DISSENTING OPINION OF JUDGES BONELLO, STRÁŽNICKÁ, BÎRSAN, JUNGWIERT AND DEL TUFO

1. We disagree with the majority's finding that the State's interference with the applicant's enjoyment of his rights under Article 11 was "not prescribed by law" in so far as that interference lacked the element of foreseeability [See paragraph 42 of the judgment].

2. It is our view that the applicant, a magistrate presumed to be versed in the law, knew, or reasonably ought to have known, that enrolling in an Italian Masonic lodge would have attracted disciplinary sanctions. There were compelling and inescapable pointers scattered throughout the Italian legal system that should have left no doubt in his mind as to the incompatibility of membership of the Italian Freemasons with the exercise of judicial functions.

3. The majority concluded that none of the measures current in Italy before 1993, including the directive approved by the National Council of the Judiciary on 22 March 1990, were "sufficiently clear" to forewarn the applicant of disciplinary sanctions in the event of his joining a Masonic lodge. To reach this inference the majority were repeatedly compelled to disregard the Court's (and the Commission's) long-standing case-law and the abundant harvest of factual findings on record.

The interference

4. It is important to emphasise at the outset that the applicant himself *never* claimed in his defence before the Italian courts that he could not have foreseen that membership of a Masonic lodge was incompatible, pursuant to Italian norms, with the exercise of his judicial functions. *It was only as a last resort before this Court that he discovered the non-foreseeability of the prohibition*. In the Italian courts he relied exclusively on a defence that, as a matter of fact, he was unaware of the prohibition on judges joining the Freemasons and, in law, that the ban was in breach of his freedom of association guaranteed by the Constitution, and also that insufficient reasons had been given for the penalty imposed on him [See paragraph 14].

5. In other words, the applicant always *accepted* that the Italian system contained norms prohibiting judges from joining the Freemasons, but claimed that these norms were in violation of his fundamental right of freedom of association and that insufficient reasons had been given for the sanction against him. He never asserted in the domestic fora that he could not have foreseen from the existing norms that membership of the Freemasons could lead to disciplinary sanctions.

Who is the best interpreter of domestic law?

6. The various national adjudicating authorities which were called upon to determine the issue, or to try the applicant, had absolutely no misgivings in finding in the 1990 directive to the judiciary on Freemasonry, and in the norms which preceded it, a sufficiently clear and foreseeable legal basis on which to establish that by enrolling in the Freemasons he had infringed his judicial duties.

Thus, relying on a 1981 judgment of the Constitutional Court [No. 100 of 8 June 1981], the National Council of the Judiciary (the highest body that regulates the conduct of the judiciary), in its decision of 10 October 1995 in the applicant's case, found that the Italian legal system contained a sufficient and clear legal basis for the ban on judges joining the Freemasons [See paragraph 13 of the judgment]. Similarly, on 20 December 1996 the Court of Cassation, on an appeal by the applicant, confirmed the existence of a clear legal basis for the ban [See paragraph 15].

7. According to the Court's case-law, the national adjudicating authorities are the natural interpreters of domestic law. "The Court would recall that it is primarily for the national authorities, notably the courts, to resolve problems of interpretation of domestic legislation, the Court's role being confined to deciding whether the effects of that interpretation are compatible with the Convention." [See *Waite and Kennedy v. Germany* [GC], no. 26083/94, § 54, ECHR 1999-I, and *Gorzelik and Others v. Poland* [GC], no. 44158/98, § 100, 17 February 2004 (same date as the present judgment)] On norms which could be deemed to have been drafted with insufficient precision, the Court has stressed that "it is primarily for the national authorities to interpret and apply domestic law" [See *Vogt v. Germany*, judgment of 26 September 1995, Series A no. 323, p. 24, § 48] when a question arises whether a particular norm is sufficiently clear and foreseeable.

The Court has also added that it regards the courts of first instance and appeal as being the most qualified for the task of construing and applying domestic law [See *Gitonas and Others v. Greece*, judgment of 1 July 1997, *Reports of Judgments and Decisions* 1997-IV, p. 1235, § 44].

It is thus clear that, at least to date, the Court has declined to interpret domestic law and has taken the domestic courts' interpretation to be correct and binding. The Court only exceptionally interferes, but not in reinterpreting domestic law; its intervention is limited to enquiring whether domestic law, *as established by the national authorities*, is compatible with the Convention.

8. In view of this well-established case-law, it is a matter of notable concern that the majority elected to disregard the unanimous interpretation of Italian law repeatedly made by the highest Italian adjudicating authorities about the sufficiency of the legal basis in this particular case, and found it expedient to second-guess the consistent and unanimous legal assessment made by the Italian courts.

9. In our view, the judgment of the majority has totally pushed aside the principle of subsidiarity (and also those of the "fourth-instance" doctrine and the margin of appreciation), so fundamental to the proper application of the Convention.

Specific historical and social context in Italy

10. In our view it is important from the outset to recall very briefly some facts that deeply affected Italian Freemasonry from the 1970s onwards: the detection of P2, a secret and deviant Masonic lodge; the Licio Gelli affair; the suspicion that some Masonic lodges were implicated in subversive plots to overthrow Italian democracy; the Gladio affair; and indications that part of Italian Freemasonry had close links with the Mafia, terrorism and organised crime. The report by the Parliamentary Commission of Inquiry on the P2 lodge, transmitted by President Tina Anselmi in 1984, should be kept in mind, too, as should, *inter alia,* the fact that a Grand Master of the Grande Oriente of Italy left the association and founded a new observance in consequence of the disreputable situation Italian Freemasonry was in, and the fact that, for the same reasons, British Freemasonry formally decided to withhold recognition of the Grande Oriente (the official Masonic association) of Italy and banned its affiliates from having connections with their Italian brothers.

It is against this social and historical background that the events at issue took place, and that the applicant remained affiliated to the Freemasons.

Legal basis of the interference

11. Concerning the legal context in the light of which the facts should be evaluated, we observe the following.

(a) The Italian Constitution

As the Court's judgment points out, the Constitution of the Italian Republic enshrines:

(i) the principle of free association for individuals, for purposes not prohibited by the criminal law (Article 18);

(ii) the principle of legality (Article 25);

(iii) the duty for all citizens to be loyal to the Republic and its laws (Article 54 § 1);

(iv) the duty for persons to whom public offices are entrusted to perform them with discipline and honour, taking an oath where this is required by law (Article 54 § 2);

(v) the duty for public officials to be at the exclusive service of the nation (Article 98 § 1);

(vi) the possibility of limiting by law the right to become members of political parties in the case of, *inter alia*, members of the judiciary (Article 98 § 3); and

(vii) the duty for judges to be beholden only to the law (Article 101 § 2).

Article 104 § 1, which asserts the autonomy of the judiciary and its independence from any other power, is also to be borne in mind.

(b) Article 18 of Royal Legislative Decree no. 511 of 31 May 1946

Article 18 of Royal Legislative Decree no. 511 of 31 May 1946 (*Guarentigie della magistratura*) provides that any judge who "fails to fulfil his obligations or behaves, in the performance of his duties or otherwise, in a manner which makes him unworthy of the trust and consideration which he must enjoy or which undermines the prestige of the judiciary" will incur disciplinary sanctions.

(c) Law no. 17 of 25 January 1982

Law no. 17 of 25 January 1982 laid down restrictions on the right of association (Article 18 of the Constitution) in respect of secret associations and provided for the dissolution of the P2 lodge.

This law is not relevant in this case. It merely implements the provisions of Article 18 § 2 of the Constitution (prohibition of secret associations and associations pursuing, even indirectly, political aims through organisations of a military nature) in the very particular context of Italian history during this period.

(d) Judgments of the Constitutional Court

Two judgments of the Constitutional Court (on penalising certain types of conduct by members of the judiciary) are relevant.

Judgments nos. 145/1976 and 100/1981 state that judges enjoy the rights granted to all citizens. Nevertheless, their function and the role they are called upon to play legitimise certain reductions in their enjoyment of such rights, on two conditions: the restrictions must be provided for by law and their legal basis must be of a constitutional nature.

The impartiality and independence of judges are enshrined in Article 101 § 2 and Article 104 § 1 of the Constitution. These principles are aimed both at protecting the trust and consideration which a judge must enjoy among public opinion and ensuring the dignity of the judiciary.

Impartiality and independence are constitutional principles which must have priority over the rights and liberties granted by the Constitution when judges exercise "atypically" such rights and such liberties.

As the Court noted, these judgments of the Constitutional Court also recognised the compatibility of Article 18 of the 1946 decree with Article 25 § 2 of the Constitution. The Constitutional Court pointed out that

an enumeration by Article 18 of all the types of conduct which might be regarded as unlawful would be impossible, while the use of a wider and more flexible wording allows a better balance between the two different interests: trust, consideration and prestige of the judiciary, on the one hand, and the rights of individuals on the other. In penal matters, too, where the rule of legality should receive stronger protection, the principle of legality is respected, even when the provision is not very detailed, where it is possible to identify the proscribed conduct by making reference to parameters which are objective or capable of being inferred.

In the present case, the applicant should reasonably have foreseen that his conduct could incur a disciplinary sanction in the light of Article 18 of the decree.

He had joined the judiciary in 1972 and should have known of the decisions of the Italian Constitutional Court, delivered some years before his affiliation to the Freemasons in 1982. He should have known, in particular, that the right of association can be restricted on the basis of the constitutional principles of impartiality and independence, where those principles require, respectively, the appearance of independence and the absence of any appearance of bias.

Also, in the light of the specific social, historical and legal context of the Italian system it was already inevitable that the applicant's conduct should be deemed to be in violation of Article 18 of Decree no. 511/1946.

(e) The directive of 22 March 1990 by the National Council of the Judiciary

Over and above this, on 22 March 1990, the National Council of the Judiciary adopted a directive to the effect that "judges' membership of associations imposing a particularly strong hierarchical and mutual bond through the establishment, by solemn oaths, of bonds such as those required by Masonic lodges raises delicate problems as regards observance of the values enshrined in the Italian Constitution".

12. That directive was adopted on the initiative of the President of the Italian Republic, the titular head of the National Council of the Judiciary. The Official Bulletin (*Verbali Consigliari*) formally published the directive under the following heading: "Extract of the minutes of the sitting held in the morning of 22 March 1990, concerning *the incompatibility of judicial office with membership of the Freemasons*" [Emphasis added].

13. The President of the Council opened the sitting by reminding members of the Italian President's message "*concerning the incompatibility of judicial office with membership of the Freemasons*" [Emphasis added].

14. The rapporteur on the directive (Dr Racheli), tabling the motion, resorted to language that could hardly have been more explicit and forceful. He referred repeatedly, and with approval, to the distressing findings of the report by the Parliamentary Commission of Inquiry (the Tina Anselmi

report) into the scandals rocking Italy at and prior to that time as a result of the infiltration of degenerate Freemasonry into all spheres of power, an infiltration which had resulted in a stranglehold of all democratic institutions, including the judiciary, and had compromised every sector of Italian public life and Italian Freemasonry as a whole.

The rapporteur left positively no room for equivocation that the directive was exclusively aimed at asserting the functional incompatibility between the holding of judicial office and membership of Italian Masonic lodges. "Applying the above standpoint of the Constitutional Court, it is to be excluded that judges can be members of associations that, through the bonds of hierarchy and professed and practised ideologies, may induce citizens to believe that the exercise of judicial power can be distorted to the advantage of the association or its individual members. As far as Freemasonry is concerned, there is no doubt that it is widely agreed that the image of the judiciary is greatly blackened." [*Verbali Consigliari*, p. 103]

15. The basis in Italian law on which the directive rested was explained in detail by the rapporteur and various other members of the Council who intervened in the debate. Very briefly, the incompatibility of the exercise of judicial power with Italian Freemasonry derives from the violation of the constitutional precept that judges are beholden only to obey the law, whereas a Freemason is bound solemnly to "swear to obey without hesitation or dissent such orders as are given to me by the Sovereign Tribunal of the 31st Degree and by the Council of the 33rd Degree of the Ancient and Accepted Scottish Rite" [Ibid]. Moreover, the bond of solidarity between Italian Freemasons – confirmed on oath – is incompatible with the independence and impartiality indispensable in the judiciary. The regulations of the Loggia Montecarlo, as one example, further impose on members a duty "to study and analyse power with the aim of gaining it, exercising it, retaining it and rendering it ever more solid".

16. The debate and the directive of the National Council of the Judiciary were not generated in a vacuum (see paragraph 10 of this opinion). The applicant knew, or manifestly had the duty to know (though he claims he did not), that the highly publicised official report of the Parliamentary Commission of Inquiry into Freemasonry in Italy had laid bare the colossal damage which the image, credibility and authority of official institutions, including the judiciary, had suffered through their infiltration by degenerate Italian Freemasonry. That report should have left absolutely no hesitation in the *bona fide* conscience of any Italian judge about the irreversible conflict arising between the exercise of judicial power and membership of Masonic lodges. The widely distributed report, as the rapporteur remarked, did not record the feelings of individuals, but "registered the beliefs of the Italian people" about the noxious infestation of degenerate Freemasonry throughout the vital organs of the State. The applicant showed scant regard

for the "beliefs of the Italian people", so publicly and alarmingly expressed by the legislature of the Republic which he had undertaken to serve.

The rapporteur's analysis, *published officially together with the directive*, stressed that "membership of the Freemasons – as of any association with a strong hierarchical structure and an iron bond of solidarity – brings about, as such, a falling-off, not only in appearances, but also and primarily, in substance ... Belonging to the Freemasons appears, then, as an obligation that objectively superimposes itself on the oath of loyalty required by Article 54 of the Constitution, and on the primary obligation that every judge must be beholden only to the law." [Ibid., p. 104]

17. The directive, put to the vote in the context of the aforementioned *travaux préparatoires*, was approved by the National Council of the Judiciary, with 24 votes in favour and five abstentions.

18. These extensively broadcast, precise and unequivocal forewarnings, disseminated officially alongside the directive itself, could have left the applicant with no residue of hesitation that membership of a Masonic lodge constituted an actionable disciplinary offence. It is frivolous, in our view, for him to hold (very belatedly, in an extreme line of defence) that he could have believed, in good faith, that an Italian judge could embrace Freemasonry with the blessing of the law – a claim so far-fetched that he never saw fit to raise it in the disciplinary proceedings against him in Italy.

The case-law of the Court and the Commission on accessibility and foreseeability

19. We cannot accept that the Italian norms on the compatibility between the exercise of judicial functions and Freemasonry in Italy can in any way be deemed vague, inaccessible or unforeseeable as to their consequences. On the contrary, they are as positive and forceful as can be. However, if, for the sake of argument, they could be deemed to suffer from a margin of ambiguity, we find it useful to recapitulate the Court's stand, at least to date, on this issue.

20. The Court has repeatedly held that any interference with the enjoyment of certain fundamental rights must be "prescribed by law" and that the restrictive law in question must be accessible and foreseeable. To that we subscribe without reservation. But the Court, in its case-law, has been attentive to the necessity of tempering this general recital with the inescapable exigencies of practical reason. It has acknowledged (*and this should be particularly obvious where disciplinary measures are concerned*) that (as in the present case) "it may be difficult to frame laws with absolute precision and that a certain degree of flexibility may even be desirable to enable the national courts to develop the law in the light of their assessment of what measures are necessary in the interests of justice" [See *Goodwin v.*

the United Kingdom, judgment of 27 March 1996, *Reports* 1996-II, p. 497, § 33].

21. Concerning the requirement of foreseeability, the Court has recognised the need for flexibility. Legal certainty can be established taking account not only of the wording of the relevant provisions, but also of the national courts' interpretation of them, and of other readily available forms of guidance as to their meaning and application.

22. The Commission has stressed that different criteria of foreseeability should apply in the case of disciplinary offences. In a case concerning the dismissal of a government employee, in which the issue of foreseeability was raised, it found that the disciplinary proceedings against him were "prescribed by law" (the regulations are not quoted), emphasising that "*disciplinary law is necessarily drafted in general terms*" [See *Haseldine v. the United Kingdom*, no. 18957/91, Commission decision of 13 May 1992, Decisions and Reports (DR) 73, p. 225 at p. 231 (emphasis added)].

23. The level of precision required of domestic legislation, the Court has found, "depends to a considerable degree on the content of the instrument considered, the field it is designed to cover, *and the number and status of those to whom it is addressed*" [See *Chorherr v. Austria*, judgment of 25 August 1993, Series A no. 266-B, pp. 35-36, § 25 (emphasis added)]. In other words, a law aimed at experts need not be as explicit as one addressed to laymen. In the specific field of (military) discipline the Court has observed that "it would scarcely be possible to draw up rules describing different types of conduct in detail" [See *Vereinigung demokratischer Soldaten Österreichs and Gubi v. Austria*, judgment of 19 December 1994, Series A no. 302, pp. 15-16, § 31].

24. On the requirement of clarity and foreseeability of the law, the Court has also found that "the mere fact that a legal provision is capable of more than one construction does not mean that it does not meet the requirement implied in the notion 'prescribed by law'" [See *Vogt*, cited above, p. 24, § 48].

25. In another leading judgment the Court analysed the element of foreseeability essential in any law relied on as the legal basis for limiting a fundamental right. It observed: "The Swedish legislation applied in the present case is admittedly rather general in terms and confers a wide measure of discretion... On the other hand, the circumstances ... in which a care decision may fall to be implemented *are so variable that it would scarcely be possible to formulate a law to cover every eventuality*... Moreover, in interpreting and applying the legislation, *the relevant preparatory work ... provides guidance as to the exercise of the discretion it confers* ... The Court thus concludes that the interferences in question were 'in accordance with the law.'" [See *Olsson v. Sweden (no. 1)*, judgment of 24 March 1988, Series A no. 130, pp. 30-31, §§ 62-63 (emphasis added)]

26. The latest pronouncement of the Court on the accessibility and foreseeability of norms restricting the enjoyment of fundamental rights was handed down today in the case of *Gorzelik and Others v. Poland*. The findings there, and in previous pronouncements, are in direct contradiction to what has been held by the majority in the present case: "It is a logical consequence of the principle that laws must be of general application that the wording of statutes is not always precise. The need to avoid excessive rigidity to keep pace with changing circumstances means that laws are inevitably couched in terms which, to a greater or lesser extent, are vague. The interpretation and application of such enactments depends on practice." [See *Gorzelik and Others*, cited above, § 64, and also the following judgments: *Kokkinakis v. Greece*, 25 May 1993, Series A no. 260-A, p. 19, § 40; Sunday Times *v. the United Kingdom (no. 1)*, 26 April 1979, Series A no. 30, p. 31, § 49; and *Rekvényi v. Hungary* [GC], no. 25390/94, § 34, ECHR 1999-III]

The Court added: "It must also be borne in mind that, however clearly drafted a legal provision may be, its application involves an inevitable element of judicial interpretation, since there will always be a need for clarification of doubtful points and for adaptation to particular circumstances. A margin of doubt in relation to borderline facts does not by itself make a legal provision unforeseeable in its application. Nor does the mere fact that a provision is capable of more than one construction mean that it fails to meet the requirement of 'foreseeability' for the purposes of the Convention. The role of adjudication vested in the [domestic] courts is precisely to dissipate such interpretational doubts as remain, taking into account the changes in everyday practice." [See *Gorzelik and Others*, cited above, § 65; see also *Cantoni v. France*, judgment of 15 November 1996, *Reports* 1996-V, p. 1628, § 32]

27. The restriction on the enjoyment of a fundamental right, that judgment insisted, must be formulated with sufficient precision to enable the citizen to regulate his conduct. The applicant must have been able "to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail". However, "*those consequences need not be foreseeable with absolute certainty: experience shows this to be unattainable*" [See *Rekvényi*, cited above, § 34 (emphasis added)].

28. The Commission was the organ charged by the Convention with deciding matters of admissibility, and had many occasions to evaluate the issue of foreseeability *in disciplinary law*. It held that a dismissal of an employee in the Netherlands on disciplinary grounds was "prescribed by law" in the light of Section 1639w of the Civil Code, which states only that "contracts [of employment] may be terminated when new circumstances make it necessary to do so" [See *Van der Heijden v. the Netherlands*, no. 11002/84, Commission decision of 8 March 1985, DR 41, p. 264 at p. 270].

29. Similarly, the Commission upheld the legality of a disciplinary sanction (compulsory relief of the applicant from her job duties) on the strength of staff regulations that stated that "members of staff must behave in all circumstances in a dignified and correct manner and perform no act likely to set a bad example". This norm was sufficient for the sanction applied to be foreseeable and "prescribed by law" [See *Morissens v. Belgium*, no. 11389/85, Commission decision of 3 May 1998, DR 56, p. 127 at p. 135].

30. In another case in 1995 the Commission approved as sufficiently foreseeable and thus "prescribed by law" a disciplinary regulation governing the legal profession, by which any "breach of integrity, honour or discretion ... shall render the *avocat* responsible liable to ... sanctions ..." [See *Zihlmann v. Switzerland*, no. 21861/93, Commission decision of 28 June 1995, DR 82-B, p. 12 at p. 18].

31. The Court has also found that judicial interpretation, taking account of social changes, is in conformity with Article 7 [See *S.W. v. the United Kingdom*, judgment of 22 November 1995, Series A no. 335-B].

32. The majority, in assessing the 1990 directive on the Italian judiciary and Freemasonry, and the other measures which preceded it, failed to take into consideration any of the many criteria required by the Court's and the Commission's case-law to determine whether the interference with the applicant's rights had a sufficient legal basis. They ignored the fact that general norms are sufficient (and indispensable) in disciplinary law, and did not give adequate weight to "the status of those to whom the norm is addressed" (in the present case a person presumed to be immersed in legal expertise). More lamentably, nor was due consideration given to the "relevant preparatory work" concomitant with the enactment of that norm. In the present instance, the relevant preparatory work, published in official form, leaves not the flimsiest penumbra of doubt that the norms in question prohibited Italian judges, in totally unequivocal terms, from being members of Italian Masonic lodges.

Different requirements of foreseeability between criminal laws and norms which interfere with the enjoyment of fundamental rights

33. The Convention stresses the requirement of "clarity" of the law in *two* circumstances: firstly, in defining proscribed criminal behaviour in penal statutes (the "void for vagueness" doctrine enshrined in Article 7) [See *Kokkinakis*, cited above, p. 22, §§ 51-53] and secondly, in the norms that interfere with the enjoyment of certain fundamental rights (such as those enshrined in Articles 8 to 11). The requirement of clarity obviously appears necessary to a higher degree in the "criminal" context of Article 7.

34. And yet the Court quite recently accepted as sufficiently precise, in an Article 7 case, a criminal statute which states: "Any person who is a

public officer and abuses his office in any manner other than that defined in this Code shall be sentenced to imprisonment of not less than six months but not more than three years, depending on the gravity of the offence" (Section 240 of the Turkish Criminal Code) [See *Ugur v. Turkey* (dec.), no 30006/96, 8 December 1998]. The applicant in that case was sentenced on the strength of *this provision* of the law to one year's imprisonment, a heavy fine and disqualification from holding public office. No violation of Article 7 was found by the Court; in fact the application was dismissed as inadmissible.

35. It is bewildering that this vague and equivocal criminal non-law passed the stringent test of clarity required under Article 7, while the emphatic, public and reiterated proscription of Freemasonry for Italian judges now fails the less stringent test of clarity required by Article 11.

36. This opinion is solely concerned with establishing whether there existed in Italian legislation a "sufficient legal basis" on which to discipline the applicant for being a member of a Masonic lodge. We have not analysed the necessity, in a democratic society, of the limitation in question.

DISSENTING OPINION OF JUDGE LOUCAIDES JOINED BY JUDGE BÎRSAN

I disagree with the majority. Although I could agree with the substance of the dissenting opinion of Judge Bonello, I prefer to base my dissent more specifically on the following reasoning:

As rightly observed by the Court in the *Chorherr v. Austria* judgment (25 August 1993, Series A no. 266-B, pp. 35-36, § 25) the level of precision required of domestic legislation "depends to a considerable degree on the contents of the instrument considered, the field it is designed to cover and the number and status of those to whom it is addressed" (emphasis added). Therefore, the requirement for law to be clear and foreseeable depends on the subject matter it is intended to cover and the degree to which it is possible to make such subject-matter clear and foreseeable.

The point I wish to stress in this respect is that achieving the requisite level of clarity and foreseeability may in some areas simply be impossible. And the law does not compel the impossible (*lex non cogit ad impossibilia*).

In the present case, we are in the field of disciplinary offences and it is an elementary rule of disciplinary law of universal recognition that it is impossible to cover exhaustively or specify all the different acts or omissions which may constitute disciplinary offences.

This in fact has been recognised to a certain extent by the Court in dealing with disciplinary law in the case of *Vereinigung demokratischer Soldaten Österreichs and Gubi v. Austria* (judgment of 19 December 1994, Series A no. 302, pp. 15-16, § 31), in which the Court stated:

> "As far as military discipline is concerned, it would scarcely be possible to draw up rules describing different types of conduct in detail. It may therefore be necessary for the authorities to formulate such rules more broadly. The relevant provisions must, however, afford sufficient protection against arbitrariness and make it possible to foresee the consequences of their application."

The requirement that "the relevant provisions must ... make it possible to foresee the consequences of their application" in the third sentence of that quotation is formulated in more absolute terms than the principle in the preceding sentence logically allows. For, if it is accepted that there are many types of conduct which cannot be described in detail, the possibility that it may not prove possible to foresee the consequences of such conduct in some cases cannot be excluded.

The fact remains that in disciplinary law there may be certain types of conduct which cannot be specified expressly and these are usually covered by a general prohibition formulated in broad terms, the interpretation and application of which depends on the social and moral attitudes of society as understood by the competent disciplinary body at the specific time the prohibition is applied. This point is aptly made by the Italian Constitutional Court (see paragraph 19 of the judgment). And it is not difficult to accept

because the disciplinary law does not seek to bar specific acts or omissions but rather to condemn general conduct or behaviour which in most disciplinary codes is referred to in broad terms such as "conduct incompatible with the duties or status" of the public officer or other person to whom the disciplinary code applies.

Take for example the "*obligation de réserve*" applicable in French law to members of the public service. It is impossible to enumerate the specific cases in which a breach of this obligation will occur.

We can even borrow an example from the Convention itself regarding the dismissal of a judge from office on the ground "that he has ceased to fulfil the required conditions" (Article 24), one of which is that "he shall be of high moral character" (Article 21 § 1). One cannot seriously deny the fact that it is impossible to define or describe in detail or exhaustively the different types of conduct that may be considered incompatible with "a high moral character".

Therefore, it is inevitable in the field of disciplinary law that only a general indication (accompanied perhaps by certain specific prohibitions) as to the kind of behaviour that may be considered as amounting to a disciplinary offence will be possible and that the degree of foreseeability will often be less than in other cases where a higher level of clarity and foreseeability of the law is in fact possible.

The result is that there may be disciplinary offences which cannot be foreseen with the requisite degree of certainty in all cases, though it is necessary, in my view, to afford the best possible protection against arbitrariness. This can be achieved first by ensuring that the description of the prohibited conduct, though broad, is capable of indicating the type of conduct for which there is a reasonable risk of its being considered to constitute prohibited conduct. And, secondly, by providing the possibility of independent judicial review of the relevant decision by the competent disciplinary body.

In the present case, Article 18 of the 1946 decree provides that: any judge who "fails to fulfil his obligations or behaves, in the performance of his duties or otherwise, in a manner which makes him unworthy of the trust and consideration which he must enjoy or which undermines the prestige of the judiciary" will incur a disciplinary sanction. This provision is in line with the general prohibition found in the disciplinary law as explained above. As in other legal systems, it is left to the competent disciplinary body to decide whether any particular conduct in an individual case amounts to behaviour that is incompatible with the general prohibition concerned. The question is whether, in the case under consideration, the conduct found to be incompatible with that prohibition (membership of a Masonic lodge) in the light of the disciplinary body's factual findings was behaviour which it was reasonably possible would be considered as falling within the scope of the prohibited conduct. In this connection, it should be recalled that the record

shows that the disciplinary body took the following elements into account in reaching the conclusion that the applicant had engaged in prohibited conduct.

(a) "Loss of integrity resulting from membership of the Freemasons ... because of the degeneration brought about when a number of people came together within the P2 lodge with plans to take control of the public authorities and subvert democratic institutions, and because of the collusion of certain Masonic lodges with the Mafia and organised crime" (see paragraph 13 of the judgment).

(b) Incompatibility between the Masonic and judicial oaths, the hierarchical relationship between Freemasons, the "rejection" of State justice in favour of Masonic "justice" and the indissoluble nature of the bond between Freemasons, even in the case of a member who wished to leave the organisation (ibid).

All these facts existed before 1982.

It is true that reference was also made to the directive of 14 July 1993, which was issued after the applicant had left the Freemasons and which, for this reason, the Court in this case rightly disregarded. However, this directive simply expressed formally what was already known to be the position in practice, for example the fact that the association was secretive. The fact that Masonic lodges kept their functions, ceremonies and procedures secret is a matter of public knowledge and should have been known to the applicant. The directive of 14 July 1993 did not make that fact known for the first time but simply confirmed it formally. The other facts also relied on by the disciplinary body, as mentioned above, should also have been known to any person in the applicant's position and by themselves justify the conclusion that it would not have been difficult for him in the circumstances to foresee at least that there was a risk that his membership of a Masonic lodge might reasonably be considered a disciplinary offence. That is so even if we act on the premiss that the directive of 22 March 1990 did not clearly state in so many words that membership of the Freemasons constituted a disciplinary offence for a judge.

Even if nothing was said on this subject in a directive, there was, in my opinion, sufficient indication in the circumstances of the case that a judge ran a reasonably foreseeable risk of committing a disciplinary offence by joining the Freemasons.

I do not agree with the Court's statement that the fact that the National Council of the Judiciary issued the directive of 14 July 1993 stating in clear terms that the exercise of judicial functions was incompatible with membership of the Freemasons confirms the view that until then such membership could not be considered a disciplinary offence. As I have already said, the directive in question simply expressed formally the existing position regarding conduct which any person in the applicants'

position would regard as being reasonably likely to constitute a disciplinary offence. The directive did not purport to introduce for the first time a new principle. It merely clarified an already existing principle; thus removing any doubts. In any event, the other facts on which the disciplinary decision was based did exist and were undisputed at the material time and could, as I have already explained, reasonably support a finding that a disciplinary offence had been committed.

For all the above reasons I find that there has been no violation of the Convention in this case.