

In the case of G. v. France (1),

The European Court of Human Rights, sitting, in accordance with Article 43 (art. 43) of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") and the relevant provisions of Rules of Court A (2), as a Chamber composed of the following judges:

Mr R. Ryssdal, President,
 Mr Thór Vilhjálmsson,
 Mr F. Matscher,
 Mr L.-E. Pettiti,
 Mr A. Spielmann,
 Mrs E. Palm,
 Mr A.N. Loizou,
 Mr B. Repik,
 Mr U. Lohmus,

and also of Mr H. Petzold, Registrar,

Having deliberated in private on 27 April and 31 August 1995,

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

Notes by the Registrar

1. The case is numbered 29/1994/476/557. The first number is the case's position on the list of cases referred to the Court in the relevant year (second number). The last two numbers indicate the case's position on the list of cases referred to the Court since its creation and on the list of the corresponding originating applications to the Commission.

2. Rules A apply to all cases referred to the Court before the entry into force of Protocol No. 9 (P9) and thereafter only to cases concerning States not bound by that Protocol (P9). They correspond to the Rules that came into force on 1 January 1983, as amended several times subsequently.

PROCEDURE

1. The case was referred to the Court by the European Commission of Human Rights ("the Commission") on 9 September 1994, within the three-month period laid down by Article 32 para. 1 and Article 47 (art. 32-1, art. 47) of the Convention. It originated in an application (no. 15312/89) against the French Republic lodged with the Commission under Article 25 (art. 25) by a French national, Mr G., on 19 July 1989.

The Commission's request referred to Articles 44 and 48 (art. 44, art. 48) and to the declaration whereby France recognised the compulsory jurisdiction of the Court (Article 46) (art. 46). The object of the request was to obtain a decision as to whether the facts of the case disclosed a breach by the respondent State of its obligations under Article 7 para. 1 (art. 7-1) of the Convention.

2. In response to the enquiry made in accordance with Rule 33 para. 3 (d) of Rules of Court A, the applicant stated that he wished to take part in the proceedings and designated the lawyer who would represent him (Rule 30).

3. The Chamber to be constituted included ex officio

Mr L.-E. Pettiti, the elected judge of French nationality (Article 43 of the Convention) (art. 43), and Mr R. Ryssdal, the President of the Court (Rule 21 para. 3 (b)). On 24 September 1994, in the presence of the Registrar, the President drew by lot the names of the other seven members, namely Mr Thór Vilhjálmsson, Mr F. Matscher, Mr A. Spielmann, Mrs E. Palm, Mr A.N. Loizou, Mr B. Repik and Mr U. Lohmus, (Article 43 in fine of the Convention and Rule 21 para. 4) (art. 43).

4. As President of the Chamber (Rule 21 para. 5), Mr Ryssdal, acting through the Registrar, consulted the Agent of the French Government ("the Government"), the applicant's lawyer and the Delegate of the Commission on the organisation of the proceedings (Rules 37 para. 1 and 38). Pursuant to the order made in consequence the Registrar received the Government's memorial on 30 January 1995 and the applicant's memorial on 3 February. On 8 February the applicant informed the Registrar that he would not be attending the hearing and that he would no longer be participating in the proceedings (see paragraph 2 above). On 28 February the President acceded to the applicant's request that his identity not be disclosed. On 8 March the Secretary to the Commission informed the Registrar that the Delegate would submit his observations at the hearing.

5. On 24 March 1995 the Commission produced the file on the proceedings before it, as requested by the Registrar on the President's instructions.

6. In accordance with the President's decision, the hearing took place in public in the Human Rights Building, Strasbourg, on 25 April 1995. The Court had held a preparatory meeting beforehand.

There appeared before the Court:

(a) for the Government

Ms M. Picard, magistrat, on secondment to the Legal Affairs Department, Ministry of Foreign Affairs,	Agent,
Mrs M. Dubrocard, magistrat, on secondment to the Legal Affairs Department, Ministry of Foreign Affairs,	
Mr G. Bitti, special adviser, European and International Affairs Department, Ministry of Justice,	Counsel;

(b) for the Commission

Mr B. Marxer,	Delegate.
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The Court heard addresses by Mr Marxer and Ms Picard.

AS TO THE FACTS

I. Circumstances of the case

7. Mr G., a driving test examiner, was charged on 14 December 1980 with accepting bribes. It was alleged that he had issued driving licences in exchange for payment of a sum of money (Article 177 of the Criminal Code, see paragraph 12 below).

In the course of the investigation and following additional submissions from the prosecuting authority, the investigating judge charged him with "corruption in the form of soliciting sexual favours" and indecent assault with violence or coercion (see paragraph 13 below) on the person of P., a driving test candidate. The investigating judge

based the second charge on Article 333 of the Criminal Code as amended by the Law of 23 December 1980 (see paragraph 14 below). It was specifically alleged that G. had, on 14 November 1980, constrained a young woman who suffered from a slight mental handicap to submit to acts of buggery. At the material time such acts were classified as indecent assault rather than rape.

8. On 18 November 1982 the Rennes Criminal Court sentenced him to five years' imprisonment, two of which were suspended, for accepting bribes as a citizen responsible for a public service and indecent assault with violence or coercion by a person in authority. In so doing, the court was applying the Law of 23 December 1980 (see paragraph 14 below).

The Rennes Court of Appeal upheld that decision in a judgment of 14 November 1983.

On 26 February 1985 the latter judgment was quashed by the Court of Cassation on the ground that no reply had been given to the pleas of nullity. The case was remitted to the Angers Court of Appeal.

9. In a judgment of 22 January 1987 that court rejected the pleas of nullity. It dismissed the charge of corruption in the form of soliciting sexual favours, but found the applicant guilty of accepting bribes and of indecent assault with coercion and abuse of authority. It reduced his sentence to three years' imprisonment by virtue of Law no. 80-1041 of 23 December 1980, whose entry into force postdated the commission of the offences in question (see paragraph 14 below).

10. The applicant lodged a further appeal on points of law with the Court of Cassation. The fourth and last ground of this appeal was formulated as follows:

"Violation of Article 7 of the Declaration of the Rights of Man and the Citizen, of Articles 4, 332 and 333 of the Criminal Code as applicable to the alleged offences and Article 593 of the Code of Criminal Procedure, failure to state reasons and lack of a legal basis;

In so far as the impugned judgment found the defendant guilty of indecent assault on the person of P. on 14 November 1980;

...

Before the entry into force of Law no. 80-1041 of 23 December 1980, under the Criminal Code the offence of indecent assault with coercion was not committed where no violence had been practised on the person who had been the object of that coercion; no one may be convicted in respect of acts which the law did not regard as an offence before they were carried out and the alleged indecent assault with coercion of which the appellant is accused did not, at the material time, constitute any criminal offence; nor did the mental deficiency of the 'victim' constitute an aggravating circumstance. The acts in question could not therefore be punished under this head. By ruling as it did, the Court of Appeal violated the principle that no act may be classified as a punishable offence unless the law makes prior provision to that effect."

11. On 25 January 1989 the Court of Cassation dismissed the appeal. It explained its rejection of the above-mentioned ground in the following terms:

"The finding of guilt on the count [of accepting bribes]

justified the sentence imposed; in accordance with Article 598 of the Code of Criminal Procedure [see paragraph 15 below] it is therefore unnecessary to rule on the fourth ground of appeal put forward by the appellant."

II. Relevant domestic law and practice

A. Corruption of public servants

12. Article 177 1° of the Criminal Code is worded as follows:

"Anyone who has solicited or accepted offers or promises, solicited or received gifts or presents shall be liable to a term of imprisonment of from two to ten years and a fine equal to double the value of the promises accepted or the articles received or requested, such fine not being less than FRF 1,500, where he has done so

1° as a person holding elected office, being a public servant in the administrative or judicial branch of the civil service, a member of the armed forces or having equivalent status, the agent or representative of a public administrative authority or of an administrative authority placed under the control of the public authorities or a citizen responsible for a public service, in return for performing or refraining from performing one of his duties or one of the tasks attaching to his post, whether fair or not, but not covered by his salary."

B. Indecent assault

1. Provisions applicable at the material time

13. The relevant provisions of the Criminal Code were as follows:

Article 331

"Any indecent assault committed or attempted without violence on the person of a child of either sex under the age of fifteen years shall be punished by between five and ten years' imprisonment.

The same penalty shall be imposed in respect of indecent assault by any relative in the ascending line carried out on the person of a minor, even if the victim is aged over fifteen years provided that he or she is unmarried.

Without prejudice to the more severe penalties laid down in the foregoing paragraphs or in Articles 332 and 333 of the present Code, whosoever shall commit an indecent or unnatural act with a person of the same sex aged less than twenty-one years shall be punished by between six months' and three years' imprisonment and a fine of between FRF 60 and FRF 15,000."

Article 332

"Whosoever shall commit the crime of rape shall be sentenced to between ten and twenty years' imprisonment.

If the offence has been committed on the person of a child not having fully attained fifteen years of age, the offender shall receive the maximum penalty available.

Whosoever shall commit or attempt to commit indecent assault with violence on individuals of either sex shall be sentenced to

between five and ten years' imprisonment.

If the crime has been committed on the person of a child not having fully attained fifteen years of age, the offender shall be sentenced to between ten and twenty years' imprisonment."

Article 333

"If the offenders are relatives in the ascending line of the person on whom the indecent assault was carried out, if they belong to the class of those who have authority over that person, if they are his or her schoolteachers or hired servants, or hired servants of the above-mentioned persons, if they are officials or ministers of a religion, or if the offender, whoever he may be, was assisted in his offence by one or more persons, the penalty shall be between ten and twenty years' imprisonment in the case provided for in the first paragraph of Article 331 and life imprisonment in the cases provided for in the preceding Article."

As there was no statutory definition of the notions of rape and indecent assault, the case-law delimited the scope of those terms. Thus coercion or non-physical violence has been treated as equivalent to physical violence. Consequently the offences were constituted where they had been committed without the victim's consent (see judgments of the Criminal Division of the Court of Cassation of 5 July 1838, Bulletin no. 191; of 27 September 1860, Bulletin no. 219; of 25 June 1857, Bulletin no. 240; of 27 December 1883, Bulletin no. 295; and of 17 November 1960, Bulletin no. 528).

2. The later provisions

14. Articles 332 and 333 of the Criminal Code were amended by Law no. 80-1041 of 23 December 1980, which entered into force on 24 December 1980. They now read as follows:

Article 332

"Any act of sexual penetration, of whatever nature, committed on the person of another by violence, coercion or by taking the victim unawares shall constitute rape.

Rape shall be punished by between five and ten years' imprisonment.

However, rape shall be punished by between ten and twenty years' imprisonment where it has been committed either on a person who was especially vulnerable owing to pregnancy, sickness, infirmity or physical or mental deficiency, or on a person under the age of fifteen years, or with the threatened use of a weapon, or by two or more assailants or accomplices, or by a legitimate, natural or adoptive ascendant of the victim or by a person in a position of authority over the victim or by a person who has abused the authority conferred by his duties."

Article 333

"Any other indecent assault committed or attempted with violence, coercion or by taking the victim unawares on a person other than a minor under the age of fifteen years shall be punished by between three and five years' imprisonment and a fine of between FRF 6,000 and FRF 60,000 or by one of these penalties alone.

However, indecent assault as defined in the first paragraph shall

be punished by between five years' and ten years' imprisonment and a fine of between FRF 12,000 and FRF 120,000 or one of these penalties alone where it was committed or attempted either against a person who was particularly vulnerable owing to sickness, infirmity or physical or mental deficiency or pregnancy, or with the threatened use of a weapon, or by a legitimate, natural or adoptive ascendant of the victim or by a person in a position of authority over the victim, or by two or more assailants or accomplices, or by a person who has abused the authority conferred on him by his duties."

The new law downgraded the offence of indecent assault from serious offence (crime) to less serious offence (délit).

C. The non-imposition of consecutive sentences

15. Article 5 of the Criminal Code provides that "in the event of conviction for several serious offences and less serious offences, only the heaviest penalty available for one of the individual offences shall be imposed". This principle that sentences are not to be imposed consecutively is part of the basis for the doctrine of justified penalty laid down in Article 598 of the Code of Criminal Procedure, according to which:

"Where the penalty imposed is the same as that which would be imposed under the law that applies to the offence, any application to have the judgment quashed on the basis that there has been an error in the citation of the relevant provision shall fail."

Thus the Court of Cassation will declare the operative part of a judgment imposing a sentence to be justified where the sentence imposed is identical to that which the trial court would have ordered if the error of classification had not been committed. Where the appellant has been convicted of several offences, the court will not examine the ground based on the error and directed against one of the offences if the penalty imposed is justified by the other offences (see judgments of the Criminal Division of the Court of Cassation of 25 September 1890, Bulletin no. 196; of 30 October 1925, Recueil Dalloz 1926, p. 6; of 25 March 1927, Recueil Dalloz 1927, p. 287; of 7 November 1931, Recueil Dalloz 1931, p. 559).

PROCEEDINGS BEFORE THE COMMISSION

16. Mr G. applied to the Commission on 19 July 1989 (application no. 15312/89). He complained that his conviction for an act which, at the time of its commission, did not constitute an offence under the law in force infringed Article 7 (art. 7) of the Convention. He further maintained that his right to a fair trial guaranteed under Article 6 para. 1 (art. 6-1) of the Convention had been infringed in that the Court of Cassation, relying on the doctrine of "justified penalty", had dismissed the submission based on the violation of the principle that no act may be classified as a punishable offence unless the law makes prior provision to that effect.

17. On 5 May 1993 the Commission declared the first complaint admissible and the second inadmissible. In its report of 29 June 1994 (Article 31) (art. 31), the Commission expressed the unanimous opinion that there had been no violation of Article 7 (art. 7). The full text of the Commission's opinion is reproduced as an annex to this judgment (1).

1. Note by the Registrar: for practical reasons this annex will appear only with the printed version of the judgment (volume 325-B of

Series A of the Publications of the Court), but a copy of the Commission's report is obtainable from the registry.

FINAL SUBMISSIONS TO THE COURT

18. In their memorial the Government requested the Court

"to hold, as did the Commission in its report of 29 June 1994, that the complaint based on a violation of Article 7 para. 1 (art. 7-1) of the Convention is unfounded since the sentence imposed on the applicant did not breach the principle that only the law can define a crime and prescribe a penalty".

AS TO THE LAW

I. SCOPE OF THE CASE

19. Mr G. requested the Court to reopen examination of the application from the point of view of the complaint based on Article 6 para. 1 (art. 6-1) of the Convention. The Government replied that the Commission had declared the complaint in question inadmissible (see paragraph 17 above).

20. Under the Convention the compass of a case brought before the Court is delimited by the Commission's decision on admissibility (see, among other authorities, the Powell and Rayner v. the United Kingdom judgment of 21 February 1990, Series A no. 172, pp. 13-14, para. 29, and the Helmers v. Sweden judgment of 29 October 1991, Series A no. 212-A, p. 13, para. 25). The Commission found the above-mentioned complaint inadmissible. The Court accordingly lacks jurisdiction to take cognisance of it. In any event a decision by the Commission finding a complaint inadmissible is final and is not open to appeal.

II. ALLEGED VIOLATION OF ARTICLE 7 PARA. 1 (art. 7-1) OF THE CONVENTION

21. The applicant complained that he had been convicted of an act that, when it was perpetrated, had not constituted an offence under the law in force. The prison sentence imposed on him pursuant to the Law of 23 December 1980, which postdated the act in question, had therefore violated Article 7 para. 1 (art. 7-1) of the Convention. That provision (art. 7-1) reads as follows:

"No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed."

Neither the Government nor the Commission accepted the applicant's contention.

22. In the Government's view, the criminal courts that dealt with the case had had recourse to the "in mitius" principle, namely that a criminal provision which is less severe than the previously applicable provision is to be applied retrospectively. This principle was not enshrined in Article 7 (art. 7) of the Convention, but it was to be found in Article 15 of the United Nations Covenant on Civil and Political Rights, according to which: "If subsequent to the commission of the offence, provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby." In a decision of 19 and 20 January 1981 (decision 80-127 DC, Rec. 15), the Conseil

constitutionnel clarified the basis for that principle, citing Article 8 of the Declaration of the Rights of Man and the Citizen of 1789, which states that "the law should impose only such penalties as are absolutely and evidently necessary". The Conseil constitutionnel considered that "not to apply to offences committed at a time when the earlier law was in force new, less severe provisions amounts to allowing the courts to impose penalties prescribed by the earlier provisions when such penalties are, according to the view of the legislature itself, no longer necessary".

Thus, as regards the definition of the offence, the acts of which the applicant had been accused had been classified as indecent assault with coercion in accordance with the definition laid down in the former law as consistently construed by the courts. Under the Law of 23 December 1980 the acts in question would have constituted rape. As far as imposition of sanctions was concerned, under the law applicable at the material time the applicant should have been committed for trial in the Assize Court as the offence of which he was accused was classified as serious (crime) and he would therefore have risked a life sentence, in view of the aggravating circumstance of abuse of a position of authority. Mr G. had benefited from the fact that the new law downgraded the offence to a less serious offence (délit) and prescribed lighter penalties. As the most lenient provisions of both the new law and the former law had been applied to him, he had no grounds for complaint.

23. The Commission took the view firstly that the provision setting out the criminal offence of which the applicant was accused satisfied the requirements of accessibility and foreseeability of the criminal law and, secondly, that the applicant's conviction and sentence was not in breach of the principle that no act may be classified as a punishable offence unless the law makes prior provision to that effect.

24. According to the Court's case-law, Article 7 para. 1 (art. 7-1) of the Convention embodies generally the principle that only the law can define a crime and prescribe a penalty and prohibits in particular the retrospective application of the criminal law where it is to an accused's disadvantage (see the *Kokkinakis v. Greece* judgment of 25 May 1993, Series A no. 260-A, p. 22, para. 52).

25. In the present case the Court, like the Commission, is of the opinion that the offences of which the applicant was accused fell within the scope of the former Articles 332 and 333 of the Criminal Code, which satisfied the requirements of foreseeability and accessibility (see, *mutatis mutandis*, the following judgments: *Müller and Others v. Switzerland* of 24 May 1988, Series A no. 133, p. 20, para. 29, and *Salabiaku v. France* of 7 October 1988, Series A no. 141-A, pp. 16-17, para. 29). There was consistent case-law from the Court of Cassation, which was published and therefore accessible, on the notions of violence and abuse of authority. As regards the notion of violence, the new provisions in the new Articles 332 and 333 of the Criminal Code merely confirmed this case-law.

26. The Court notes that the acts of which the applicant was accused also fell within the scope of the new legislation. On the basis of the principle that the more lenient law should apply both as regards the definition of the offence and the sanctions imposed, the national courts applied the new Article 333 of the Criminal Code for the imposition of sanctions as that provision downgraded the offence of which Mr G. was accused from serious offence (crime) to less serious offence (délit) (see paragraphs 13 and 14 above). Its application, admittedly retrospective, therefore operated in the applicant's favour.

27. In conclusion, there has been no violation of Article 7 para. 1

(art. 7-1) of the Convention.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. Holds that it lacks jurisdiction to examine the complaint based on Article 6 para. 1 (art. 6-1) of the Convention;
2. Holds that there has been no violation of Article 7 para. 1 (art. 7-1) of the Convention.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 27 September 1995.

Signed: Rolv RYSSDAL
President

Signed: Herbert PETZOLD
Registrar