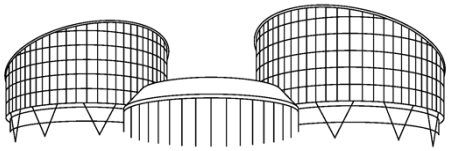

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

THIRD SECTION

CASE OF AYUSO TORRES v. SPAIN

(Application no. 74729/17)

JUDGMENT

Art 10 • Statement by an academic, member of the military, in televised scholarly debate found by disciplinary body to exceed freedom of expression limits, but not sanctioned due to time-bar • Public debate on an issue of general interest of political nature • Finding amounting to sufficient reprimand and a *de facto* warning to censure future behaviour • Chilling effect • Applicant's academic status not taken into account

STRASBOURG

8 November 2022

FINAL

03/04/2023

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

In the case of Ayuso Torres v. Spain,

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

Georges Ravarani, *President,*
Georgios A. Serghides,
María Elósegui,
Anja Seibert-Fohr,
Peeter Roosma,
Andreas Zünd,
Frédéric Krenc, *judges,*
and Milan Blaško, *Section Registrar,*

Having regard to:

the application (no. 74729/17) against the Kingdom of Spain lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Spanish national, Mr Miguel Ayuso Torres ("the applicant"), on 10 October 2017;

the decision to give notice to the Spanish Government ("the Government") of the complaints concerning Article 6 § 1 and Article 10;

the parties' observations;

Having deliberated in private on 11 October 2022,

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

INTRODUCTION

1. The applicant complained under Article 6 § 1 and Article 10 of the Convention that, while no sanction had been imposed on him in a set of disciplinary proceedings, it had been stated in the decision adopted in those proceedings that he had exceeded the limits of his right to freedom of expression. His administrative appeal against that decision had been dismissed on the ground that he had had no legitimate interest in having that statement deleted.

THE FACTS

2. The applicant was born in 1961 and lives in Madrid. He was represented by Mr F. Marqués Zornoza, a lawyer practising in Madrid.

3. The Government were represented by their Agent, Mr Alfonso Brezmes Martínez de Villareal, Government legal adviser (*abogado del Estado*).

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

5. The applicant is currently a reserve military officer of the Spanish armed forces and a professor of constitutional law at the Comillas Pontifical University in Madrid. When the events in issue took place, the applicant was

a member of the Military Legal Corps, with the rank of Lieutenant Colonel Auditor.

6. The applicant was a guest on a television programme called "Tears in the Rain" about the "Myths of the Transition" and broadcast by the Intereconomia channel on 26 May 2013. This television programme, which had a relatively small audience, included the projection of a film, followed by a debate with the participation of the applicant and other university professors. The applicant was introduced as a member of the Military Legal Corps, Professor of the Faculty of Law at the Comillas Pontifical University and as having received an honorary doctorate from the University of Udine. During the programme, details of the applicant's curriculum vitae not related to the military but to the academic world were quoted several times.

7. During his speech, the applicant spoke about the transition process from military dictatorship to democracy in Spain and why, in his opinion, the origins of the Spanish Constitution were flawed. He elaborated on these ideas using academic arguments and described the Spanish Constitution as a "pseudo-constitution" and also had said that the origins of the Constitution were "spurious and bastardised". The applicant had previously written academic articles on this topic, expressing the same ideas.

8. On 23 September 2013 one of the leading national newspapers (*El País*) published a front-page story under the headline "[The Ministry of] Defence promotes a military judge who questions the Constitution", which resulted in military disciplinary proceedings being brought against the applicant on 14 November 2013, whereby he was charged with the serious offence (see paragraph 16 below).

9. On 2 December 2013 the military general assigned to investigate the applicant's case proposed to the military authority in charge of adjudicating the applicant's case to terminate the proceedings. He stated in that proposal that the applicant had not intended to criticise the Constitution and that he had only made the comments in issue in an academic context, and that therefore his statement did not amount to a serious offence. In his view, the applicant's statement constituted a minor offence, since intent was not required for the commission of such an offence. However, he proposed not to prosecute the applicant on the ground that prosecution of the minor offence had become time-barred.

10. On 21 January 2014, senior counsel and the president of the Central Military Court adopted a decision terminating the disciplinary proceedings without deciding on the applicant's responsibility for the serious offence he had been charged with and also without deciding on the existence of any other disciplinary offence of a lesser nature, holding that such an offence would have, in any event, become time-barred. In their reasoning they established that the applicant had not intended to attack the Constitution but had rather made his statements in a cultural and scholarly context. Unlike in the proposal of the military general (see paragraph 9 above), there was no mention of

whether such acts amounted to a minor offence. However, the disciplinary decision stated that "it [was] evident from the material in the case file that the defendant [had] exceeded the regulatory framework applicable to the exercise of his right to express himself freely and, therefore, that the restriction of this right was legitimate, appropriate and proportionally justified, even though he [had] expressed himself in an academic context".

11. The applicant then requested to be transferred to the reserves, and his reserve status was declared on 5 February 2014.

12. The applicant appealed against the decision of 21 January 2014 to the Governing Body of the Central Military Court, requesting that the statement that he had exceeded the limits of the right to freedom of expression accorded to the military be deleted from the reasoning of the disciplinary decision. The Central Military Court rejected the appeal on 19 February 2014. It decided not to assess the facts of the case as no sanction had been imposed on the applicant. However, it noted that if a member of the military had said that the origins of the Constitution were "spurious and bastardised", he or she would not have been protected by the right to freedom of expression.

13. The applicant brought an action for judicial review of the decision of 19 February 2014, which was dismissed by the Chamber of Justice of the Central Military Court on 3 February 2016 on the ground that the applicant did not have standing, as no sanction had been imposed on him. The Chamber of Justice of the Central Military Court concluded that the lack of legitimate interest constituted a sufficient ground to declare the action inadmissible. In their opinion, it was not clear what advantage the applicant would gain by having the statements in question deleted from the disciplinary decision. They held that in order for the applicant to have legal standing, he should have proved that the contested decisions had had a clear and sufficient impact on his sphere of interests.

14. The applicant then lodged a cassation appeal with the Military Chamber of the Supreme Court, citing case-law which allowed an appeal against a decision in which, even though no penalty had been imposed, the reasoning contained a reproach of the defendant's conduct (see paragraph 21 below). The Supreme Court dismissed the appeal, holding that the applicant lacked standing because he had not been sanctioned.

15. The applicant lodged an *amparo* appeal with the Constitutional Court. He alleged the infringement of the right to freedom of expression and academic freedom, as well as a breach of the right of access to a court because his administrative appeal had been dismissed. The *amparo* appeal was declared inadmissible on 19 April 2017 on the ground that the applicant had failed to "specifically and sufficiently justify its constitutional relevance".

RELEVANT LEGAL FRAMEWORK AND PRACTICE

I. DOMESTIC LAW AND PRACTICE

16. The relevant provisions of Institutional Law no. 8/1998 of 2 December 1998 on the disciplinary regime of the armed forces, in force at the relevant time, provided as follows:

Section 7

"Minor offences include:

...

29. Expressing or tolerating expressions against, carrying out slightly disrespectful acts, or adopting an attitude of contempt towards the Constitution, the Crown and other bodies, institutions and powers or the persons and authorities that embody them, the flag, the coat of arms and the national anthem and other representative institutions, as well as towards representatives of other nations, the armed forces and the corps of which they are composed and other military institutions or bodies, as well as their commanders and military authorities when they do not constitute a more serious offence or crime."

Section 8

"Serious offences include:

...

32. Manifestly and publicly expressing or tolerating expressions against, carrying out disrespectful acts, or adopting an attitude of contempt towards the Constitution, the Crown and other bodies, institutions or powers or the persons and authorities that embody them, the flag, coat of arms and the national anthem and other representative institutions, as well as towards the representatives of other nations, the armed forces and the corps of which they are composed and other military institutions or bodies, as well as their commanders and military authorities when they do not constitute a more serious offence or crime."

Section 9

"1. The penalties that may be imposed for minor offences are:

– a reprimand;

– being deprived of the right to leave the unit for up to eight days;

– detention from one to thirty days at home or in the unit.

2. The penalties that may be imposed for serious misconduct are:

– detention from one month and one day to two months in a military disciplinary establishment;

– loss of posting;

– dismissal from the military training and other training centres.

3. The imposition of penalties is always without prejudice to the actions that may be taken by the injured party."

Section 80

"1. The authorities and commanders competent to rule on disciplinary appeals shall issue a decision within one month. The provisions of military procedural law shall apply as regards the effects of failure to reach a decision within the prescribed period.

2. In any case, the authority before which the appeal has been lodged shall check whether the established procedure has been followed, carry out the relevant enquiries and review or consider the facts, their classification and the penalty imposed, which it may annul, reduce or uphold.

3. The decision adopted shall be notified to the appellant, indicating the appeal that may be lodged against it, the time-limit within which the appeal may be lodged, and the authority or judicial body before which it must be lodged. Notice of the decision shall also be given to the authority which imposed the penalty."

17. The relevant provisions of Institutional Law no. 2/1989 of 13 April 1989 on military procedure, as in force at the relevant time, provided as follows:

Section 459

"Persons on whom a sanction as provided for in the [Law on the disciplinary regime of the armed forces] has been imposed shall be entitled to request a declaration of non-compliance with the law and, where appropriate, the annulment of acts in military disciplinary matters, as well as to request the recognition of an individualised legal situation and its restoration."

Section 493

"The judgment shall declare the military disciplinary proceedings appeal inadmissible when:

...

(b) it has been brought by a person who is incompetent, who does not have legal standing or who is not duly represented."

18. The relevant provisions of Institutional Law no. 8/2014 of 4 December 2014 on the disciplinary regime of the armed forces, currently in force, provides as follows:

Section 73

"Decisions taken in appeals and appeals for reconsideration shall terminate disciplinary proceedings and may be appealed against in military disciplinary proceedings under the terms provided for in military procedural regulations."

First additional provision

"In all matters not provided for in this Act, Law no. 30/1992 of 26 November 1992 on the legal regime of the public administrations and common administrative procedure and Institutional Law no. 2/1989 of 13 April 1989 on military procedure, or the laws that replace them at any given time, shall be applicable in a supplementary capacity."

19. The relevant provisions of Institutional Law no. 9/2011 of 27 July 2011 on the rights and duties of members of the armed forces, read as follows:

Section 12.1

"Military personnel have the right to freedom of expression and to freely communicate and receive information under the terms established in the Constitution, with no other limits than those deriving from the safeguarding of national security and defence, the duty of reserve and respect for the dignity of individuals and of public institutions and authorities.

...

3. In matters strictly related to service in the armed forces, military personnel in the exercise of their freedom of expression shall be subject to the limits deriving from [maintaining] discipline."

20. Spanish Constitutional Court decision no. 371/1993 of 13 December 1993 on the freedom of speech of members of the armed forces states as follows:

"It must be concluded, in the sense of the above-mentioned case-law, that the legislature may legitimately impose specific limits on the exercise of freedom of expression by members of the armed forces as long as those limits correspond to the primordial principles and essential organisational criteria of the military institution, which guarantee not only the necessary discipline and hierarchical subjection, but also the principle of internal unity, which excludes expressions of opinion that could introduce undesirable forms of partisan debate within the armed forces."

21. Spanish Constitutional Court decision no. 157/2002 of 15 September 2002 on effective judicial protection states as follows:

"7. In this regard, it should be pointed out at the outset that it does not appear to be arguable that for an appeal against a judicial decision to be admissible, it is necessary for the decision to cause harm to the appellant. Understood in this way, the configuration of the charge as a precondition for an appeal (regardless of the specific legal nature of that precondition and of its relationship with the standing to appeal) is constitutionally unobjectionable.

...

However, such a consideration does not resolve the question in issue in this case. The real core of the question lies in the determination of whether it is necessary, as a prerequisite for the appeal, that the harm suffered by the appellant derives precisely from the operative part of the judicial decision. And, as we have already mentioned, our procedural system does not allow such a solution to be maintained. In this sense, it should be borne in mind, firstly, that it is perfectly conceivable that there may be cases in which the declarations of the judicial decision, contained in its legal grounds, generate harm for the appellant, regardless of the content of the operative part. And, on this basis, there is no reason whatsoever to deny, in general terms, that appeals can be used to challenge those declarations, under the pretext of an alleged conception of appeals as being limited to those claims whose purpose is to alter the operative part of the contested judicial decision. This limited conception has no legal basis to support it, especially bearing in mind that it restricts the possibilities of effective judicial protection of the rights and legitimate interests of individuals and, consequently, affects a fundamental right of the same, that recognised in Article 24 § 1 of the Constitution.

8. However, a series of complementary considerations must be made. Firstly, the determination, in each specific case, of whether or not the contested judicial decision effectively causes harm to the appellant will depend on the specific circumstances present in the case, and it should be borne in mind that not every negative or unfavourable effect on the appellant will necessarily merit consideration as harm for the purposes in question, and it may be required that such an effect be of a certain intensity or nature.

For the resolution of the specific case submitted for our consideration in the present constitutional process, what is important to highlight now is that the rejection of an appeal on the sole basis that it can only be lodged in relation to the pronouncements contained in the operative part of the contested judicial decision, incorporates a reasoning that does not satisfy the requirements that derive from the fundamental right to effective judicial protection in Article 24 § 1 of the Constitution, as it implies the rejection of a legally established appeal without cause for it, in the terms that have been previously set out."

II. INTERNATIONAL LAW AND PRACTICE

22. On 3 February 1999 Institutional Law no. 8/1998, of 2 December, came into force, replacing Institutional Law no. 12/1985. Part III of the new Law was devoted to disciplinary breaches and punishments and Part IV to the procedure for imposing punishments, both for minor breaches (Chapter II) and for serious breaches (Chapter III) (see paragraph 16 above).

23. On 23 May 2007 the Ministry of Foreign Affairs of the Kingdom of Spain informed the Council of Europe that the reservation initially made on 4 October 1979in respect of Articles 5 and 6 of the Convention had been updated. The updated version, registered with the Secretariat of the Council of Europe, read as follows:

"Spain, in accordance with Article 64 of the Convention [Article 57 since the entry into force of Protocol No. 11], reserves itself the implementation of Articles 5 and 6 insofar as they could be incompatible with [Institutional] Law 8/1998, of 2 December, Chapters II and III of [Part] III and Chapters I, II, III, IV and V of [Part] IV of the Disciplinary Regime of the [Armed] Forces, which came into force on 3 February 1999."

24. This amendment to the reservation was published in the Official Gazette on 7 November 2007.

25. On 19 February 2015 a declaration updating the reservation entered by Spain in respect of Articles 5 and 6 of the Convention was set out in a *note verbale* from the Permanent Representation of Spain registered with the Secretariat of the Council of Europe on 20 February 2015 and published in the Official Gazette on 17 April 2015. The declaration was worded as follows:

"[Institutional] Law 8/1998 of 2 December, of the Disciplinary Regime of the [Armed] Forces has been substituted by [Institutional] Law 8/2014, of 4 December, of the Disciplinary Regime of the [Armed] Forces, enacted on 4 December 2014 and which will enter into force on 5 March 2015. This [Institutional] Law 8/2014 repeals [Institutional] Law 8/1998, reduces the maximum limit of the duration of the sanctions imposing deprivation of liberty for minor or serious offences, as well as the one of ...

preventive custody, and maintains the maximum limit of sixty days for the duration of the sanctions imposing deprivation of liberty for very serious offences, which can be imposed without judicial intervention. Regarding procedures, the new [Institutional] Law progresses in the recognition of personal [guarantees] and rights.

The Kingdom of Spain maintains and updates its reservation, which reads as follows:

'Spain, in accordance with Article 64 of the Convention [currently Article 57], reserves itself the implementation of Articles 5 and 6 insofar as they could be incompatible with [Institutional] Law 8/2014, of 4 December (Chapter II of [Part] I, [Part] II, [Part] III, Chapter I of [Part] IV and Additional Provisions fourth and fifth), of the Disciplinary Regime of the [Armed] Forces, enacted on 4 December 2014 and which will enter into force on 5 March 2015.'"

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

26. The applicant complained that the statement contained in the disciplinary decision in his case that the expressions he had used had surpassed the limits of his right to freedom of expression had amounted to a clear warning that if he were to make the same statement in the future he could be sanctioned on the ground of his military status, which constituted an interference with his right to freely express his opinions. He relied on Article 10 of the Convention, the relevant parts of which read as follows:

"1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority ...

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety ..."

A. Admissibility

1. Objection on the grounds of the lack of victim status and of no significant disadvantage

27. The Government alleged that the applicant, since the applicant had not been found guilty of the disciplinary charges against him, could not claim to be a victim of a violation of the rights and freedoms guaranteed under Article 10 of the Convention. Having been acquitted, he had not suffered unfair treatment by the domestic authorities. Delving into this question, they also submitted that the decision had not been made public and it had not curtailed the applicant's freedom of expression since he had not been sanctioned despite the disrespectful way in which he had referred to the Constitution. Accordingly, the Government concluded that the applicant not only lacked victim status but also had not suffered any significant disadvantage.

28. The applicant alleged that, according to the case-law of the Spanish Constitutional Court, the statements contained in the reasoning of administrative and judicial decisions could be harmful to the person concerned, even where the operative part of such decisions did not impose any liability (see paragraph 21 above). He stated that the disciplinary ruling had contained an express reprimand of his conduct that had caused him sufficient prejudice in relation to his freedom of expression; therefore, he could not be denied victim "status".

29. Furthermore, he submitted that he would not be able to comment on similar issues in the future, even though he was a professor of constitutional law, owing to the warning contained in the reasoning of the disciplinary decision, notwithstanding that no sanction had been imposed on him. Additionally, he argued that he had suffered severe consequences, as the reasoning contained in the disciplinary decision had been taken into account when he had been passed over for promotion to a higher post. Consequently, he alleged that he had suffered clear prejudice.

30. The Court considers that the Government's objection regarding the lack of victim status and the lack of significant disadvantage is closely linked to the merits of the complaint under Article 10. It therefore joins it to the merits.

2. Objection on grounds of "non-exhaustion"

31. The Government argued that the applicant was, in fact, alleging a violation of his right to honour, protected under Article 8 of the Convention, and not of his rights under Article 10 of the Convention. They stressed that, in Spain, there was a specific procedure for the protection of honour regulated by Institutional Law no. 1/1982 on civil protection of the right to honour, private and family life and one's own image, which the applicant could also use for the protection of his reputation. The Government also considered that he could have claimed State liability, but that he had not brought the action envisaged by Law no. 40/2015 of 1 October 2015 on the legal system of the public sector.

32. The applicant, disagreeing with the Government, alleged that the procedure established in Institutional Law no. 1/1982 expressly excluded from its scope actions authorised or agreed by the competent authorities in accordance with the law, which were not to be deemed to constitute unlawful interference with the right to one's honour, private and family life and one's own image. In any event, the applicant submitted that through such proceedings he could not have requested either the annulment of the disciplinary ruling or the withdrawal of the finding that he had exceeded the limits of his right to freedom of expression. The applicant also alleged that, contrary to the Government's allegations, he could not have claimed State liability either since it required the administrative sanctioning decision to

have previously been annulled, which in his case had not been possible since he had been denied standing in the proceedings for judicial review.

33. The Court notes that the applicant complained under Article 10, not under Article 8, as the Government have affirmed. The Court doubts that the alternative proceedings suggested by the Government could be deemed an effective remedy in order to properly redress an alleged violation of the right to freedom of expression. As a matter of fact, nor are those proceedings adequate either to quash the decision which stated that the applicant had exceeded the limits of his right to freedom of expression or to have that concrete statement deleted from the decision, which is what the applicant was seeking. In any event, the Court reiterates that, where more than one potentially effective remedy is available, the applicant is only required to have made use of one of them, it being for the applicant to select the one which is most appropriate in his or her case (see *Aquilina v. Malta* [GC], no. 25642/94, § 39, ECHR 1999-III; *O'Keeffe v. Ireland* [GC], no. 35810/09, §§ 110-11, ECHR 2014 (extracts); and *Karakó v. Hungary*, no. 39311/05, § 14, 28 April 2009). The applicant in this case opted for lodging an administrative appeal and a constitutional complaint, remedies that were available to him and not *prima facie* inadmissible. He has therefore properly exhausted domestic remedies. It follows that the Government's objection as to the exhaustion of domestic remedies has to be dismissed.

3. Conclusion

34. The Court notes that this part of the application is neither manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention, nor inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

(a) The applicant

35. The applicant pointed out that the Government themselves had apparently acknowledged that the disputed sentences had caused him harm even though he had not been sanctioned. However, they considered that his right to honour, and not to freedom of expression, could have been violated.

36. The fact that the judgment stated that his statements had exceeded the limits of his right to freedom of expression had clearly prejudiced his freedom of expression. Such a statement in the decision had been unnecessary, as he had been acquitted. It had been a clear warning because the meaning had been that if a military member exceeded the limits of the right to freedom of expression, he or she could be sanctioned. That meant that he could not express himself in similar terms in the future, which clearly limited his

freedom of expression as a professor of constitutional law. He considered that the risk of new disciplinary proceedings was not mere speculation. Therefore, to mitigate that risk as much as possible and to be able to continue pursuing his academic activities, he had requested his transfer to "reserve staff". He had been forced to forego his career in the military and devote himself exclusively to his academic work. Nevertheless, military personnel who move to reserve staff remained subject to the military regime. Therefore, he could still find himself subject to fresh disciplinary proceedings and a sanction on account of statements made outside the military realm.

(b) The Government

37. The Government argued that there was no violation of the Convention. The decisions declaring the appeals inadmissible had not been arbitrary or unreasonable. On the contrary, they had followed domestic legislation.

38. They stated that the applicant had not claimed any prejudice to his freedom of expression. They alleged that the statements in the decision might at most have harmed his honour, but not his right to freedom of expression. Since no sanction had been imposed on him, they stated that it could hardly be said that there had been an interference with the applicant's freedom of expression.

39. The Government considered that the applicant's complaint involved a contradiction since he was arguing that his right to freedom of expression, which allowed him to say whatever he wanted, had been limited, but on the other hand he was complaining about those who had exercised their own right to freedom of expression when criticising him.

40. Furthermore, the Government submitted that the statements made in the decision not to sanction the applicant and in the court decisions acquitting him of any disciplinary charge could be regarded as nothing more than criticism.

2. The Court's assessment

(a) Whether there has been an "interference" with the applicant's right under Article 10

41. The Court reiterates that certain circumstances which have a chilling effect on freedom of expression do in fact confer on those concerned - persons who have not been finally convicted – the status of victim of interference in the exercise of their right to that freedom (see *Dilipak v. Turkey*, no. 29680/05, § 44, 15 September 2015). It has also found that mere allegations that the contested measures had a chilling effect, without clarifying in which specific situation such an effect occurred, is not sufficient to constitute interference for the purposes of Article 10 of the Convention (see *Schweizerische Radio- und Fernsehgesellschaft and Others*

v. Switzerland (dec.), no. 68995/13, § 72, 12 November 2019). In this regard, the Court reiterates that where criminal prosecutions based on specific criminal legislation are discontinued for procedural reasons, but the risk remains that the party concerned will be found guilty and punished, that party may validly claim to be the victim of a violation of the Convention (see *Dilipak*, cited above, § 45).

42. In the instant case disciplinary proceedings were brought against the applicant on the ground of the opinions he had publicly expressed about the origins of the Spanish Constitution in a television programme. Even though the applicant was not sanctioned, the decisions delivered in those disciplinary proceedings stated that he had gone beyond the limits of the right to freedom of expression accorded to military personnel. Those decisions implied that the applicant would have been sanctioned were it not for the fact that the minor offence had become time-barred (contrast *M.D. and Others v. Spain*, no. 36584/17, § 86, 28 June 2022).

43. In the Court's view, that conclusion could be deemed a *de facto* warning or admonition addressed to the applicant, which could have a chilling effect, preventing him from expressing in the future similar opinions since fresh disciplinary proceedings might be brought.

44. Even though no criminal proceedings were brought against the applicant, the applicant could have faced a maximum penalty of one month's house arrest if the facts had been found to amount to a minor offence and two months' committal to a disciplinary unit if they had been found to amount to a serious offence.

45. In the light of above, the Court considers that those consequences could be relatively serious. They amounted to an interference with the applicant's right to freedom of expression protected under Article 10 of the Convention.

(b) Whether the interference was prescribed by law

46. In the instant case, the disciplinary proceedings were brought in accordance with the provisions contained in the Institutional Law on the disciplinary regime of the armed forces. Furthermore, the warning contained in the decisions delivered is a mere reflection of the content of those provisions; therefore, the interference was prescribed by law.

(c) Whether the interference pursued a legitimate aim

47. The Court reiterates that Article 10 applies to military personnel just as it does to other persons within the jurisdiction of the Contracting States and, accordingly, Article 10 does not stop at the gates of army barracks. However, it has also acknowledged that an effective military defence requires the maintenance of an appropriate measure of discipline in the armed forces (see *Jokšas v. Lithuania*, no. 25330/07, § 70, 12 November 2013; *Kazakov*

v. Russia, no. 1758/02, § 27, 18 December 2008; and *Grigoriades v. Greece*, 25 November 1997, § 41, *Reports of Judgments and Decisions* 1997-VII). It has also affirmed that the State can impose restrictions on the right to freedom of expression accorded to military personnel pursuing legitimate aims such as national security and the defence of public order (see *Yaşar Kaplan v. Turkey*, no. 56566/00, § 36, 24 January 2006).

(d) Whether the interference was "necessary in a democratic society"

(i) General principles

48. The general principles for assessing the necessity of an interference with the exercise of freedom of expression were summarised by the Court on a number of times (see *Axel Springer AG v. Germany* [GC], no. 39954/08, § 78, 7 February 2012; *Morice v. France* [GC], no. 29369/10, § 124, ECHR 2015; *Bédat v. Switzerland* [GC], no. 56925/08, § 48, 29 March 2016; and *Medžlis Islamske Zajednice Brčko and Others v. Bosnia and Herzegovina* [GC], no. 17224/11, § 75, 27 June 2017). The Court reiterates in particular that freedom of expression constitutes one of the essential foundations of a democratic society. Subject to paragraph 2 of Article 10, it is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population.

49. When it comes to military personnel, the Court has acknowledged that it must be open to the State to impose restrictions on freedom of expression where there is a real threat to military discipline, as the proper functioning of an army is hardly imaginable without legal rules designed to prevent servicemen from undermining it; however, it has highlighted that it is not open to the national authorities to rely on such rules for the purpose of frustrating the expression of opinions, even if these are directed against the army as an institution (see *Grigoriades*, cited above, § 45; and *Yaşar Kaplan*, cited above, § 37). Accordingly, not every restriction imposed on military personnel can automatically be deemed as proportionate with the aim pursed.

50. The Court further reiterates that in cases concerning the right to freedom of expression, it has to look at the interference complained of in the light of the case as a whole and determine whether it was 'proportionate to the legitimate aim pursued' and whether the reasons adduced by the national authorities to justify it are 'relevant and sufficient'.

(ii) Application of these principles to the present case

51. Turning to the circumstances of the present case, the Court notes at the outset that the applicant, who is, apart from being a member of the Spanish military, also a university professor, had been invited to participate in a televised debate. The Court finds that the subject of the television programme in which the applicant participated (see paragraphs 6 and 7 above) concerned

issues that have a long-standing controversial nature in the Spanish society, namely the transition process from military dictatorship to democracy in Spain. The applicant expressed his views on the Spanish Constitution. The Court considers that the applicant's statements contributed to a public debate concerning an issue of general interest.

52. The applicant's statements consisted of his personal opinions, the truthfulness of which is not susceptible of proof. The Court finds that the statements made by the applicant must be understood within the specific context in which they were made. Even the domestic decision noted that the applicant had not intended to attack the Constitution but had rather made his statements in a cultural and scholarly context. However, they held that the applicant by expressing his views, albeit in the academic context, also exceeded the limits of his freedom of expression (see paragraph 10 above).

53. The Court is not convinced that these reasons were sufficient to justify the necessity of the interference in a democratic society. The Court recalls that there is little scope under Article 10 § 2 of the Convention for restrictions on political speech or on debate on matters of public interest (see *Ceylan v. Turkey* [GC], no. 23556/94, § 34, ECHR 1999-IV). Despite the fact that the applicant was not an elected representative and has not given a political speech *stricto sensu*, he expressed his view on issues that may be deemed as having a political nature.

54. The applicant's statements did not call for any action, immediate or otherwise, and their potential impact did not entail any harm. They had no impact on his public office. As a matter of fact, no reference was made that the applicant's views, as expressed in the context of the debate in question, had a bearing on his performance as a member of the military. Furthermore, the Government did not refer to any instance where the applicant, in the pursuit of his duties or otherwise, had acted in an objectionable way (see, *mutatis mutandis*, *Wille v. Liechtenstein*, no. 28396/95, § 69, 28 October 1999, and *Albayrak v. Turkey*, no. 38406/97, § 45, 31 January 2008).

55. The Court notes that it is indisputable that owing to the applicant's military status his right to freedom of expression could be subject to certain limitations. Given the applicant's military status, the Court considers that the respondent State, in its assessment on whether to institute disciplinary proceedings, was entitled to have regard to the requirement that military personnel, such as the applicant, respected and ensured the special bond of trust and loyalty between him and the State in the performance of his functions (compare *Karapetyan and Others v. Armenia*, no. 59001/08, § 54, 17 November 2016).

56. However, in this particular case, the applicant was also a university professor, a circumstance which could lead to situations in which his right to freedom of expression in the field of teaching could collide with the restrictions in the military sphere. Apparently, there was no obstacle for the applicant to hold both statuses – those of a military officer and of a professor

of law outside the military. Additionally, the applicant had previously spoken in similar terms in the academic sphere, without consequences. Moreover, the context in which the applicant had made the remarks that were the subject of the disciplinary proceedings was that of an academic environment, in a discussion with other professors. Even though it was broadcasted in a television programme, the applicant's position as a scholar had repeatedly been pointed out (see paragraph 6 above). However, the national courts did not properly take into account the applicant's status of a constitutional law professor. Reiterating that Article 10 of the Convention also protects the form in which ideas are conveyed, the Court considers that the present application relates essentially to the exercise by the applicant of his right to freely express his views as an academic during a television programme. In the Court's view, this issue unquestionably concerns his academic freedom, which should guarantee freedom of expression and of action (compare *Kula v. Turkey*, no. 20233/06, § 38, 19 June 2018, with further references).

57. The Court further notes that it was not until six months later that the disciplinary proceedings were initiated, after a national newspaper had reprinted the applicant's statements. The disciplinary bodies found that the applicant had not committed a serious disciplinary offence since the opinions he had expressed, despite being disrespectful to the Constitution, had not been expressed with intent to manifestly show an attitude of contempt towards the Constitution (see paragraphs 10 and 12 above). Conversely, although they found that it was not necessary to assess whether the expressions the applicant had used could have constituted a minor offence since it was time-barred, the same absence of intent was not taken into account, and the decisions stated that the applicant had exceeded the limits of the right to freedom of expression. Accordingly, the applicant was implicitly warned that any opinion he may hold regarding the origins of the Constitution which could be deemed as disrespectful, regardless of his intent when expressing it, would be subject to a sanction, at least, as a minor disciplinary offence.

58. The Court is aware that that, even though no sanction was imposed on the applicant, the statements made by the disciplinary bodies that his opinions were not to be protected by the right to freedom of expression, constituted a sufficient reprimand for an opinion expressed in the course of an academic debate and on a matter of general interest. They effectively warned the applicant to censure his future behaviour and statements concerning the Constitution, irrespective of the context or the intent, and could lead to a sanction. The Court thus considers that, even the absence of actual sanction, the warning as regards his future behaviour was in itself liable to have an impact on the exercise of his freedom of expression and even to have a chilling effect in that regard. However, the national courts did not properly take into account the applicant's status of a university law professor (compare *Kula*, cited above, § 39).

59. Given the above considerations, the Court finds that there has been a violation of Article 10 of the Convention. Therefore, the Government's objections as to the applicant's victim status as well as to whether the applicant suffered insignificant disadvantage have to be dismissed.

II. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

60. The applicant submitted that the dismissal of his administrative appeal for lack of *locus standi* had deprived him of his right to effective judicial protection. He relied on Article 6 § 1 of the Convention, the relevant part of which reads as follows:

> "In the determination of his civil rights and obligations ... everyone is entitled to a fair ... hearing ... by [a] ... tribunal ..."

61. In view of its conclusion that there had been a violation of Article 10 of the Convention, the Court considers that the complaint under Article 6 § 1 does not give rise to any issues of fact or law requiring separate examination.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

62. 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

63. The applicant claimed just satisfaction in respect of pecuniary damage claiming that he had lost the opportunity to be promoted to the rank of colonel, as well as an economic loss of about 12,000 euros (EUR) per year in salary terms. He also claimed non-pecuniary damage in the amount the Court deemed prudent and proper. More specifically, he claimed that he had suffered great emotional distress.

64. The Government, disagreeing with the applicant's allegations, claimed that it had been the applicant who had voluntarily decided to request to be transferred to the reserves. Accordingly, they argued that such a decision had not been an immediate consequence of the alleged violation. Since he had not been sanctioned, he could have perfectly well continued his military career and preserved, at the same time, his post at the university.

65. The Court does not discern any causal link between the violation found and the pecuniary damage alleged; it therefore rejects this claim. On the other hand, as regards non-pecuniary damage, it is to be noted that it is in the nature of such damage that it does not lend itself to precise calculation, and that Rule 60 does not prevent the Court from examining claims for

non-pecuniary damage which applicants did not quantify, leaving the amount to the Court's discretion (see *Nagmetov v. Russia* [GC], no. 35589/08, § 72, 30 March 2017, and *Narodni List D.D. v. Croatia*, no. 2782/12, § 78, 8 November 2018). That being so, the Court further considers that in the present case the applicant must have sustained non-pecuniary damage as a result of the violation found which cannot be sufficiently compensated by mere finding of a violation. Therefore, ruling on an equitable basis, the Court awards the applicant EUR 4,000 in respect of non-pecuniary damage, plus any tax that may be chargeable on that amount.

B. Costs and expenses

66. The applicant also claimed EUR 6,153 in respect of the costs and expenses incurred before the Court. More specifically, he claimed: (a) EUR 5,000 for his lawyer's fees for the lodging of the application with the Court; and (b) EUR 1,153 for translation costs.

67. The Government made no observations in this regard.

68. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these were actually and necessarily incurred and are reasonable as to quantum. In the present case, regard being had to the documents in its possession and the above criteria, the Court considers it reasonable to award the sum of EUR 4,000 for the proceedings before the Court, plus any tax that may be chargeable to the applicant.

C. Default interest

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

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Decides* to join to the merits and to dismiss the Government's objections as to the applicant's victim status and absence of significant disadvantage;

2. *Declares* the complaint under Article 10 of the Convention concerning the applicant's freedom of expression admissible;

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

4. *Holds* that there is no need to examine separately the complaint under Article 6 § 1 of the Convention;

5. *Holds*

(a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts:

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

(ii) EUR 4,000 (four thousand euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses;

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

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

Done in English, and notified in writing on 8 November 2022, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Milan Blaško Registrar	Georges Ravarani President