Cause list number 6145
Judgment no. 72/2016 of 25 May 2016

J U D G M E N T

In the case of: the action for annulment of Articles 2 and 3 of the Act of 22 May 2014 "to combat sexism in the public space, amending the Act of 10 May 2007 to combat discrimination in order to punish the act of discrimination", instituted by the "Parti Libertarien" and others.

The Constitutional Court,

Composed of Presidents J. Spreutels and E. De Groot, and judges L. Lavrysen, A. Alen, J.P. Snappe, J.P. Moerman, E. Derycke, T. MerckxVan Goey, P. Nihoul, F. Daoût, T. Giet and R. Leysen, assisted by Registrar P.Y. Dutilleux, under the chairmanship of President J. Spreutels,

Delivers the following judgment after deliberation:

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I. *Purpose of the action and judicial procedure*

By an application addressed to the Court by registered letter sent on 20 January 2015 and received by the court registry on 21 January 2015, an action was instituted for the annulment of Articles 2 and 3 of the Act of 22 May 2014 "to combat sexism in the public space, amending the Act of 10 May 2007 to combat discrimination in order to punish the act of discrimination" (published in the *Belgisch Staatsblad* of 24 July 2014), by the "Parti Libertarien", Feyrouze Omrani and Patrick Smets, assisted and represented by Me R. Fonteyn, lawyer at the Bar of Brussels.

The Institute for the Equality of Men and Women, assisted and represented by Me E. Cloots, lawyer at the Bar of Antwerp, and the Council of Ministers, assisted and represented by Me E. Cloots and Me J. Roets, lawyer at the Bar of Antwerp, submitted statements of case, the applicants submitted a statement of reply, and the Institute for the Equality of Men and Women and the Council of Ministers also submitted statements of rejoinder.

By court order of 24 February 2016, the Court, after having heard judges-rapporteurs J.P. Moerman and A. Alen, decided that it can adjudicate on the case, that no hearing will take place, unless a particular party has asked to be heard within seven days after receiving notification of that court order, and that, barring such request, the proceedings will be closed on 16 March 2016 and the case will be taken under advisement.

Since no request for a hearing has been submitted, the case was taken under advisement on 16 March 2016.

The provisions of the Special Act of 6 January 1989 on the Constitutional Court with regard to the judicial procedure and the use of languages were applied.

II. *At law*

(…)

Regarding the contested provisions

B.1.1. The applicants request the annulment of Articles 2 and 3 of the Act of 22 May 2014 to combat sexism in the public space, amending the Act of 10 May 2007 to combat discrimination in order to punish the act of discrimination, which provide:

"Art. 2. For the purposes of this Act, sexism shall mean any gesture or act which, in the circumstances referred to in Article 444 of the Penal Code, is obviously intended to express contempt vis-à-vis a person because of his or her gender or, for the same reason, considers a

person as inferior or reduces the person to his or her sexual dimension and which results in a serious infringement of the dignity of that person.

Art. 3. Any person assuming the behaviour referred to in Article 2 shall be punished with a prison sentence of one month to one year and a fine of fifty euros to one thousand euros, or with one or the other of these penalties."

B.1.2. The contested Act is "intended to strengthen the existing legal arsenal by developing instruments to combat sexist phenomena" (*Parl. St.*, House of Representatives, 2013-2014, DOC 53-3297/001, p. 3).

As the Explanatory Memorandum indicates:

"It is to be observed that sexist issues are not yet recognized as a widespread phenomenon as such, that vigilance has diminished, and that the 'collective unconscious' still allows the perpetuation of male and female stereotypes.

Sexism is not just confined to deprived areas or a particular community; it is omnipresent. There are still too many instances of acquiescence to an all too widespread phenomenon. A democratic society that is governed by the rule of law cannot tolerate that a person's gender elicits acts that infringe human dignity.

We are indeed seeing a steadily growing awareness, and European and Belgian law are now combating discrimination between men and women in a number of specific areas. Nevertheless, freedom of movement can nowadays still be impeded by sexist behaviour, as is the right to respect for human dignity, although the Constitutional legislator expressly sets out in Article 11b of the Constitution: 'The law, federate law or rule referred to in Article 134 guarantees that women and men may equally exercise their rights and freedoms'" (*ibid.*).

"The authors of this bill wish […] to assert each person's right to human dignity insofar as it relates to gender" (*ibid.*, p. 4).

In the Parliamentary Committee, the Minister for Equal Opportunities pointed out:

"This bill has as its constitutional basis Article 11b of the Constitution, which expressly provides that gender equality must be guaranteed by law in the exercise of rights and freedoms." (*Parl. St.*, House of Representatives, 2013-2014, DOC 53-3297/003, p. 3).

Regarding the admissibility of the action

B.2.1. The first applicant is the "Parti Libertarien". The Council of Ministers considers that this party does not have the legal capacity to bring an action for annulment before the Court, since it is not disputed that it is an unincorporated association.

B.2.2. In accordance with Article 2(2°) of the Special Act of 6 January 1989, the applicant instituting an action for annulment before the Court must be a natural person or legal entity demonstrating an interest. Political parties that are unincorporated associations do not, in principle, have the requisite legal capacity to institute an action for annulment before the Court.

This does not apply only if they act in matters for which they are legally recognized as distinct entities and if, when their action is recognized by law, certain aspects thereof are at issue.

B.2.3. That is not the case in the present instance. The action is inadmissible insofar as it has been instituted by the "Parti Libertarien".

B.3.1. The second and third applicants are natural persons who explain that they, like any citizen, can be prosecuted on the basis of the contested provisions.

B.3.2. The Council of Ministers disputes the interest of those applicants in taking legal action. It considers that since their interest is not distinct from the interest that each person has in the observance of the Constitution, the action would resemble an *actio popularis*.

B.3.3. Article 142 of the Constitution and Article 2(2°) of the Special Act on the Constitutional Court require that each natural person instituting an action for annulment must demonstrate an interest. Only persons whose situation might be directly and adversely affected by the contested act can demonstrate the requisite interest. Consequently, the *actio popularis* is not admissible.

Provisions containing a penalty in the form of deprivation of liberty touch on such an essential aspect of the freedom of citizens that they concern not just the persons who are or have been involved in criminal proceedings.

B.3.4. The action for annulment is admissible with regard to the second and third applicants.

The merits

Regarding the legality principle in criminal matters (first ground)

B.4.1. The applicants allege in a first ground the infringement by Articles 2 and 3 of the Act of 22 May 2014 of Articles 10, 11, 12, second paragraph, and 14 of the Constitution, whether or not read in conjunction with Article 5 of the European Convention on Human Rights and with the general principles of legality, legal certainty and the requirement of predictability of criminal law. They reproach the legislator for not having defined in sufficiently accurate and clear terms the offence in the contested Article 2.

The legality principle in criminal matters is not stated in Article 5 of the European Convention on Human Rights, but in Article 7 of that Convention.

B.4.2. Article 12, second paragraph, of the Constitution provides:

"No one can be prosecuted except in the cases provided for by the law, and in the form prescribed by the law".

Article 7, paragraph 1, of the European Convention on Human Rights provides:

"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".

B.5.1. The legality principle in criminal matters is based on the idea that criminal law must be formulated in such a way that each person, when he or she assumes a particular

behaviour, knows whether or not that behaviour is punishable. This means that the legislator must specify in sufficiently precise and clear terms that offer legal certainty which acts are punishable so that, on the one hand, the person who assumes a particular behaviour can adequately judge in advance what the penal consequences of that behaviour will be and, on the other hand, not too much discretion is left to the courts of law.

The legality principle in criminal matters does not, however, prevent the law from giving the courts power of discretion. Account must be taken of the general character of the laws, the diversity of situations to which they apply, and the evolution in the kinds of behaviour they penalize.

B.5.2. The requirement that a criminal offence must be clearly defined in the law is fulfilled if the citizen, on the basis of the wording of the relevant provision and, if necessary, with the help of the interpretation thereof by the courts of law, is able to know which acts and omissions incur his criminal liability.

It is only by examining a specific penal provision that it is possible, taking into account the elements proper to the criminal offences it purports to penalize, to determine whether the general terms employed by the legislator are so vague as to infringe the principle of legality in criminal matters.

B.6. The European Court of Human Rights ruled on Article 7 of the Convention as follows:

"It follows that offences and the relevant penalties must be clearly defined by law. This requirement is satisfied where the individual can know from the wording of the relevant provision, if need be with the assistance of the courts' interpretation of it and after taking appropriate legal advice, what acts and omissions will make him criminally liable and what penalty he faces on that account […].

It is a logical consequence of the principle that laws must be of general application that the wording of statutes is not always precise. One of the standard techniques of regulation by rules is to use general categorisations as opposed to exhaustive lists. Accordingly, many laws are inevitably couched in terms which, to a greater or lesser extent, are vague and whose interpretation and application are questions of practice […]. However clearly drafted a legal provision may be, in any system of law, including criminal law, there is an inevitable element of judicial interpretation. There will always be a need for elucidation of doubtful points and for adaptation to changing circumstances. Again, whilst certainty is highly desirable, it may

bring in its train excessive rigidity and the law must be able to keep pace with changing circumstances […].

The role of adjudication vested in the courts is precisely to dissipate such interpretational doubts as remain […]" (ECHR, Grand Chamber, 21 October 2013, *del Rio Prada* against Spain, § 79 and §§ 92-93).

B.7. The contentions of the applicants concern several terms or expressions on which the definition of sexism in the contested Article 2 is based and which are said to be a source of unpredictability and therefore of legal uncertainty inasmuch as they leave the criminal courts too wide a margin of interpretation.

Editorial discrepancies between the French and Dutch versions of the Act

B.8.1. Article 3 of the contested Act punishes any person who assumes the kind of behaviour referred to in Article 2 of said Act. The purpose of that article is to penalize sexism and defines it as any "gesture or act" that meets the definition set out in that article. In the Dutch version, Article 3 uses the term "gedrag" ("behaviour"), and Article 2 the terms "gebaar of handeling" ("gesture or act").

B.8.2. Contrary to what the applicants argue, the French version does not exclude sexist gestures from the definition of reprehensible behaviour, since the term "behaviour" of an individual, in its generally understood sense, also comprises the gestures he makes. From the mere circumstance that in the French version of the contested Article 2 the expression "geste ou comportement" ("gesture or act") is used, and in Article 3 the term "comportement" ("behaviour"), it cannot be inferred that the legislator sought to depart from the conventional meaning of the word "comportement" and to exclude "gestes" ("gestures") therefrom. That interpretation is otherwise confirmed by the Explanatory Memorandum:

"The accepted definition requires a 'gesture, verbal behaviour' […].

This act can be expressed by verbal conduct or by a gesture. […] The term 'behaviour' can indeed cover very different realities" (*Parl. St.*, House of Representatives, 2013-2014, DOC 53-3297/001, p. 7).

B.9.1. Moreover, from the circumstance that the French version of Article 2 uses the expression “en raison de son appartenance sexuelle” (“because of his or her gender”) whereas the Dutch version uses the expression “wegens zijn geslacht”, it cannot be inferred that the two versions should be understood to give rise to different criminal offences.

B.9.2. It is clear from the Explanatory Memorandum that the legislator considered that it had the authority to “revive the right to respect for the human person, whether that person is of one or the other gender” (*ibid.*, p. 4). From this it should be inferred that the expression “en raison de son appartenance sexuelle” is synonymous with “en raison de son sexe” and equivalent to the Dutch expression “wegens zijn geslacht”. The offence criminalized under the contested Act relates to gestures or acts that are obviously intended to express contempt vis-à-vis a person because of his or her gender or, for the same reason, considers a person as inferior or reduces the person to his or her sexual dimension.

B.10.1. Finally, the applicants point out that the word “essentiellement” (“essentially”) used in the French version of the contested Article 2 has no equivalent in the Dutch version.

B.10.2. Inasmuch as such discrepancy between the French and Dutch versions of the provision might give rise to a problem of interpretation that is contrary to the legality principle in criminal matters, that word should be omitted from the French version of the contested Article 2.

Serious infringement of the dignity of the person concerned

B.11.1. The contested Article 2 clearly states that a criminal offence is only committed if the gesture or act results in a serious infringement of the dignity of the person concerned, irrespective of whether that gesture or act expresses contempt vis-à-vis a person, or that gesture or act expresses the intention of the perpetrator thereof to consider that person as inferior, or that gesture or act reduces that person to his or her sexual dimension. Contrary to what the applicants claim, the text is unequivocal on that subject. In order to be punishable under the contested Act, the criminalized gesture or act must in all cases have resulted in a serious infringement of the victim’s dignity.

B.11.2. The applicants reproach the legislator for not having specified whether the expression “and which results in a serious infringement of the dignity of that person” should be taken to refer only to acts of which the person in question is said to be the victim, or whether it should also extend to acts which the person permits vis-à-vis him or herself, or of which he himself or she herself is the perpetrator, which, in their opinion, constitutes a source of unpredictability that is contrary to the principle of legality in criminal matters.

B.11.3. Infringement of personal dignity or of human dignity is a concept that has already been used by the Constitutional legislator (Article 23 of the Constitution) and the legislator (Articles 136d, 433e and 433j of the Penal Code; Articles 1675/3(3), 1675/10(4)(1), 1675/12(2)(1), and 1675/13(6) of the Judicial Code; Article 2 of the Act of 2 June 1998 establishing an Information and Advisory Centre on harmful sectarian organizations and an Administrative Coordination Agency for the combat against harmful sectarian organizations; Article 5 of the Basic Act of 12 January 2005 concerning the prison system and the legal position of prisoners; Article 3 of the Act of 12 January 2007 on the reception of asylum seekers and of certain other categories of aliens) and by the courts of law (see Cass., 23 March 2004, *Arr. Cass.*, 2004, no. 165, and 8 November 2005, *Arr. Cass.*, 2005, no. 576).

B.11.4. Furthermore, the concept of “serious infringement of the human dignity of a person” cannot acquire a different meaning according to the personal and subjective assessment of the victim of the act. The absence of the victim’s consent is not a constituent element of the offence established under the contested provisions. It is up to the court seized of the case to determine, taking into account the actual circumstances in which the gesture or act was committed, whether all the constituent elements of the offence, including the consequences in terms of serious infringement of the dignity of the person concerned, are present.

It follows that the consent, if any, of the victim of the criminalized act or gesture, although that consent may be taken into consideration by the court that has to determine whether that act or gesture resulted in a serious infringement of the victim’s dignity and, where appropriate, to impose a penalty, cannot in itself rule out the criminal liability of the perpetrator of the act or gesture.

B.11.5. Finally, it can be inferred from the wording of the offence in the sense that it refers to "any gesture or act […] vis-à-vis a person" that it cannot refer to acts or gestures of a person vis-à-vis him or herself. Since the contested provision is unequivocal in that respect, the legislator cannot be reproached for not having expressly excluded cases in which a person has performed an act or gesture resulting in a serious infringement of his or her own dignity.

B.11.6. It can be inferred from the above that the condition under which, in order to be punishable, the gesture or act intended by the contested Article 2 must have resulted in a serious infringement of the human dignity of the person concerned must be sufficiently precise, clear and foreseeable.

"Considering" a person as inferior

B.12.1. The applicants reproach the legislator for not having specified in the contested Article 2 what is meant by the words "considers [a person] as inferior". They argue that a gesture or act cannot "consider" and add that the humiliation refers to an ideological construct under cover of which the opinion of those who advocate a traditional division of the sexes would be punished.

B.12.2. The text of the contested Article 2 can only be understood in the sense that it is intended to punish any gesture or act that expresses the intention of the perpetrator to consider a person as inferior because of his or her gender. The use of the word "consider" does not leave any ambiguity in that respect.

B.12.3. Moreover, the Explanatory Memorandum clearly suggests that it is the intention of the legislator to restrict penalization to "the most serious cases of sexism", in which the behaviour has "a humiliating effect" (*Parl. St.*, House of Representatives, 2013-2014, DOC 53-3297/001, p. 7). For that reason a criminal offence is only committed if the gesture or act results in a serious infringement of the dignity of the person concerned.

In addition, the criminalized gesture or act must be directed against one or more specific persons rather than indeterminate members of one gender or the other. From this it may be

inferred that the mere expression of opinions regarding the respective places or roles of the sexes in society cannot constitute an offence within the meaning of the contested Article 2.

Expressing "contempt" vis-à-vis a person

B.13. The term "contempt" in the sense of disdain ("mépris") has already been used by the criminal legislator. Articles 377b, 405d, 422d, 438b, 442c, 453b, 514b, 525b, 532b and 534d of the Penal Code provide for an aggravation of the penalties imposed on the offences and crimes covered by those articles if one of the motives for those offences or crimes is "hatred against, disdain for or hostility towards" the victim because of several criteria enumerated in those provisions.

Regarding the criminal offence established under the contested provision, there is nothing to suggest that the legislator wanted to depart from the ordinary meaning of the word "disdain". The Explanatory Memorandum mentions in that connection that the term refers to "scenarios where a person is considered unworthy of respect or morally reprehensible" (*Parl. St.*, House of Representatives, 2013-2014, DOC 53-3297/001, p. 7). The expression "is obviously intended to express contempt vis-à-vis a person" is sufficiently clear and precise in its normative content to define a criminal offence.

Reducing a person to his or her sexual dimension

B.14. Finally, the offence that consists in adopting a gesture or act that is evidently intended to reduce a person to his or her sexual dimension is also sufficiently precisely defined with regard to the legality principle in criminal matters, since it is required that the behaviour results in a serious infringement of the dignity of the person concerned.

B.15.1. For the rest, even assuming that the terms, each considered separately, that are criticized by the applicants are not sufficiently precise in scope or content, the requirement, which is a constituent element of the offence, that the criminalized acts and gestures must have resulted in a serious infringement of the dignity of the person, leaves the courts sufficient indications as to the scope of the contested Act. It is inherent in the mission of the

criminal court to decide on the seriousness of a particular behaviour and, consequently, to determine whether or not that behaviour falls within the scope of criminal law. By reserving penalization for gestures or acts that resulted in a serious infringement of the dignity of the person concerned, the legislator has satisfied the requirements of the legality principle in criminal matters.

B.15.2. Subject to what was said in B.10.2 regarding the word "essentiellement" that should be omitted from the French version of the contested Article 2, the first ground is unfounded.

Regarding the freedom of expression (second ground)

B.16.1. The applicants allege in a second ground the infringement of Article 19 of the Constitution, whether or not read in conjunction with Articles 9 and 10 of the European Convention on Human Rights and with Articles 18 and 19 of the International Covenant on Civil and Political Rights. They claim that Articles 2 and 3 of the contested Act infringe the right to freedom of expression guaranteed by those provisions.

B.16.2. Article 19 of the Constitution provides:

"Freedom of worship, its public practice and freedom to demonstrate one's opinions on all matters are guaranteed, but offences committed when this freedom is used may be punished".

B.16.3. Article 9 of the European Convention on Human Rights provides:

"1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.

2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others".

Article 10 of the same Convention provides:

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

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary".

B.16.4. Article 18 of the International Covenant on Civil and Political Rights provides:

"1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.

2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.

3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.

4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions".

Article 19 of the same Covenant provides:

"1. Everyone shall have the right to hold opinions without interference.

2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

(a) For respect of the rights or reputations of others;

(b) For the protection of national security or of public order (*ordre public*), or of public health or morals".

B.17.1. Inasmuch as they recognize the right to freedom of expression, Articles 9 and 10 of the European Convention on Human Rights and Articles 18 and 19 of the International Covenant on Civil and Political Rights are similar in scope to Article 19 of the Constitution, which recognizes the freedom to demonstrate one's opinions on all matters.

To that extent, the guarantees offered under those provisions form an inseparable whole.

B.17.2. The freedom of expression enshrined in those articles constitutes one of the foundations of a democratic society. 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. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society" (ECHR, 7 December 1976, *Handyside* v. United Kingdom, § 49; 23 September 1998, *Lehideux and Isorni* v. France, § 55; 28 September 1999, *Öztürk* v. Turkey, § 64; Grand Chamber, 13 July 2012, *Mouvement Raëlien suisse* v. Switzerland, § 48).

B.17.3. However, as is borne out by the wording of Article 10(2) of the European Convention on Human Rights, whoever exercises the right to freedom of expression undertakes duties and responsibilities (ECHR, 4 December 2003, *Gündüz* v. Turkey, § 37), such as the fundamental obligation not to overstep certain bounds, "in particular in respect of the reputation and rights of others" (ECHR, 24 February 1997, *De Haes and Gijsels* v. Belgium, § 37; 21 January 1999, *Fressoz and Roire* v. France, § 45; 15 July 2003, *Ernst and others* v. Belgium, § 92). Under Article 10(2) of the European Convention on Human Rights, the right to freedom of expression may, under certain conditions, be subject to formalities, conditions, restrictions or penalties with a view to, among other things, the protection of the reputation or rights of others. The exceptions to which this freedom is subject must, however, "be construed strictly, and the need for any restrictions must be established convincingly" (ECHR, Grand Chamber, 20 October 2015, *Pentikäinen* v. Finland, § 87).

Article 19 of the Constitution precludes the imposition of preventive restrictions on the freedom of expression, but not that offences committed when this freedom is used may be punished.

B.18.1. By designating the verbal or written expression of disdain for a person or the expression of the fact of considering that person as inferior or reducing that person to his or her sexual dimension as a criminal offence, Article 2 of the contested Act of 22 May 2014 constitutes an interference with the right to freedom of expression.

B.18.2. Consequently, it needs to be investigated whether that interference is defined in a sufficiently accessible and precisely formulated law, necessary in a democratic society, answers a pressing social need, and proportionate to the legitimate aim pursued by the legislator.

B.19. It is clear from what was said in reply to the first ground that the interference with the right to freedom of expression is defined in a sufficiently accessible and precisely formulated law.

B.20.1. The contested Act expresses the legislator's intention to guarantee equality between men and women. As the competent minister explained in the parliamentary proceedings:

"This bill has as its constitutional basis Article 11b of the Constitution, which expressly provides that gender equality must be guaranteed by law in the exercise of rights and freedoms." (*Parl. St.*, House of Representatives, 2013-2014, DOC 53-3297/003, p. 3).

The sexism marked as a criminal offence is understood to mean an overall conduct that "infringes personal human dignity" on account of "a person's gender", and involves "contempt vis-à-vis a gender, a fundamental belief in the essential inferiority of a gender" (*Parl. St.*, House of Representatives, 2013-2014, DOC 53-3297/001, pp. 34). The adoption of the contested Act was perceived as "a clear signal […] against the acquiescence of the victims and the impunity of the perpetrators" (*ibid.*, p. 4).

B.20.2. Equality between men and women is one of the fundamental values of a democratic society, and is enshrined in Article 11b of the Constitution, Article 14 of the European Convention on Human Rights, and in several international instruments such as, in particular, the United Nations Convention on the Elimination of all Forms of Discrimination Against Women. More specifically, the fight against gender-based violence is a current concern of the European Union (adoption of the Women's Charter on 5 March 2010 by the European Commission) and of the Council of Europe (Council of Europe Convention of 11 May 2011 on preventing and combating violence against women and domestic violence).

The aims pursued by the contested provisions, which express the intention of the legislator to guarantee that value, are legitimate and belong to the aims set out in Articles 9 and 10 of the European Convention on Human Rights, which may justify an interference with the fundamental rights enshrined in those articles, since they also fall under the protection of the rights of others, the protection of public order, and the confirmation of one of the fundamental principles of democracy.

B.21.1. It occurred to the legislator that it is essential to step up the fight against sexism, which it found to be "omnipresent", marking it as an "all too widespread phenomenon" (*Parl. St.*, House of Representatives, 2013-2014, DOC 53-3297/001, p. 3).

During the debate in the Parliamentary Committee, the Minister for Equal Opportunities found that "society does not yet treat sexism as reprehensible" (*Parl. St.*, House of Representatives, 2013-2014, DOC 53-3297/003, p. 5).

B.21.2. Given those considerations, the legislator could hold the view that the adoption of the contested provisions was necessary to achieve the aim of equality between men and women in the exercise of their rights and freedoms, which it must guarantee under Article 11b of the Constitution.

B.22.1. The applicants believe that the contested provisions are not effective to achieve the aforementioned aims, and more specifically the aim of combating the impunity of the perpetrators of sexist behaviour, inasmuch as they are unenforceable and therefore will not be applied by the criminal courts.

B.22.2. Apart from the fact that this argument is founded on conjecture that cannot possibly be verified, the effectiveness of a criminal law, measured in terms of its application by the courts of law and the sentences passed, does not as such constitute a condition for its compatibility with the constitutional and treaty provisions cited in the ground. The affirmation of the criminal nature of a conduct, because the legislator considers it incompatible with the fundamental values of democracy, may also have an educational and preventive effect. The pursuit of that effect, which by definition cannot be objectively measured, may in principle justify the adoption of criminal sanctions.

B.23.1. The Court has yet to investigate whether the contested provisions, adopted in order to guarantee observance of the prohibition of sexist behaviour, have no effects that are disproportionate to the aims pursued.

B.23.2. According to the contested Article 2, the gesture or act must be "obviously intended to express contempt vis-à-vis a person [...] or [...] considers a person as inferior [...]". Moreover, the gesture or act must result in a "serious infringement of the dignity" of that person.

It is clear from the wording of the contested provision and the relevant parliamentary proceedings that the offence in question is intentional and that the legislator sought to restrict prosecution to the most serious cases:

"In order not to broaden the scope too much and to avoid abusive recourse to sexism as a criminal concept, it is important to emphasize the combination of willingness (special intent) to cause harm and the humiliating effect of the sexist behaviour. Criminal procedure must be confined to the most serious cases of sexism, as opposed to civil procedure, which extends to cases where the penalized act has a humiliating effect without the assumption of an actual intention to cause harm" (*Parl. St.*, House of Representatives, 2013-2014, DOC 53-3297/001, p. 7).

"There must be an intention to cause harm (intent); this must be clear and indisputable, which requires that the case must be fairly serious, the assessment of which is left to the discretion of the criminal court" (*Parl. St.*, House of Representatives, 2013-2014, DOC 53-3297/003, p. 4).

The wording combination of that provision indicates that it requires the intention to express "disdain" for a person or to consider him or her as inferior, knowing that the gesture

or act can result in an infringement of the dignity of that person. Moreover, to be punishable, this gesture or act must have actually resulted in a serious infringement.

In other words, it must not be an offence which is assumed to exist from the moment that its material elements are present. It is up to the prosecuting party to prove the existence of the requirement of special intent.

B.23.3. The use of the wording "vis-à-vis a person" in the contested Article 2 indicates that an offence is only committed if the wording in question refers to one or more specific individuals. Therefore "the incrimination does not [concern] abstract groups of people, but conduct that for gender-related reasons is directed against specific individuals" (*Parl. St.*, House of Representatives, 2013-2014, DOC 53-3297/003, p. 5).

B.23.4. The requirement of special intent and the fact that the offence resulted in a serious infringement of the dignity of specific persons rule out that, in the absence of such intent or such an effect on specific persons, pamphlets, jokes, mocking statements, opinions and, in particular, opinions regarding the distinct place and role of persons in society according to their gender, advertising and any utterance which, in the absence of the requirement of special intent, belongs to the right to freedom of expression are punishable.

B.24. It follows from the above that the challenged provisions are reasonably proportional to the aim being pursued and that, consequently, interference with the right to freedom of expression, enshrined in Article 19 of the Constitution and in the treaty provisions cited in the ground, is justified.

Subject to the interpretation referred to in B.23.2, the second ground is unfounded.

Regarding equality and non-discrimination (third to fifth grounds)

B.25. The applicants allege in a third ground the infringement, by Articles 2 and 3 of the Act of 22 May 2014, of Articles 10, 11 and 19 of the Constitution, whether or not read in conjunction with Articles 9, 10, 14 and 17 of the European Convention on Human Rights and with Articles 18 and 19 of the International Covenant on Civil and Political Rights.

They reproach the contested provisions for treating in an identical manner, without objective and reasonable justification, those who adopt behaviour that incites hatred, segregation or discrimination on the one hand, and persons who express opinions on the differences between the sexes and their respective roles in society without inciting hatred, segregation or discrimination on the other. As an example of opinions expressed by persons belonging to the second category they cite the ideas set forth by adherents of certain religions with regard to the respective places of men and women in society.

B.26.1. As was specified in B.23.4, the criminal offence established under the contested provisions is only committed if the criminalized gesture or act vis-à-vis a specific individual results in a serious infringement of his or her dignity. It follows that the expression of opinions in general on the places and roles of men and women in society does not fall within the scope of Articles 2 and 3 of the contested Act.

B.26.2. The third ground is unfounded.

B.27.1. The applicants allege in a fourth ground the infringement, by Articles 2 and 3 of the Act of 22 May 2014, of Articles 10, 11, 19 and 25 of the Constitution, whether or not read in conjunction with Articles 9, 10 and 14 of the European Convention on Human Rights and with Articles 18 and 19 of the International Covenant on Civil and Political Rights.

They reproach the contested provisions for treating in an identical manner, without objective and reasonable justification, perpetrators or victims of behaviour that may constitute press offences and perpetrators and victims of other kinds of behaviour, and for treating in a different manner, without objective and reasonable justification, perpetrators of sexist press offences and perpetrators of other press offences.

B.27.2. Article 25 of the Constitution provides:

“The press is free; censorship can never be introduced; no security can be demanded from authors, publishers or printers.

When the author is known and resident in Belgium, neither the publisher, the printer nor the distributor can be prosecuted”.

B.28.1. The differences in treatment between perpetrators of offences according to whether those offences are committed by the press or by other means arise from a choice that was made by the Constitutional legislator. The Court is not competent to take cognizance of that.

B.28.2. For the rest, the legislator, when criminalizing behaviour which in some cases may constitute a press offence, cannot be reproached for not settling any controversies in the case law over the scope of the term ‘press’ and, more particularly, over the question whether the dissemination of written documents by electronic means falls under the protection of Article 25 of the Constitution.

B.29. The fourth ground is unfounded.

B.30. The applicants allege in a fifth ground the infringement, by Articles 2 and 3 of the Act of 22 May 2014, of Articles 10 and 11 of the Constitution.

They reproach the contested provisions for treating in an identical manner, without objective and reasonable justification, persons who show disdain for individuals of the opposite sex according to whether that disdain is expressed in an aggressive manner or through indifference or disregard.

B.31. It is up to the courts of law that are called upon to apply the law to determine, once all the constituent elements of the offence are present, the appropriate penalty, taking into account the seriousness of the offence, the context, and the personality of the perpetrator and the victim. The aggressive or violent behaviour of the perpetrator of the offence is an element which the court may take into consideration in that respect. Since the court can choose between the sentences it may pass, the legislator cannot be reproached for not having provided for a distinction in the wording of the law between cases in which the perpetrator is aggressive and cases in which he or she is not.

B.32. The fifth ground is unfounded.

Regarding the right to self-determination derived from the right to respect for private life, the right to work, and the right to free choice of occupation (sixth to ninth grounds)

B.33. The applicants allege in a sixth, seventh, eighth and ninth ground the infringement, by Articles 2 and 3 of the Act of 22 May 2014, of Articles 10, 11, 19, 22 and 23 of the Constitution, whether or not read in conjunction with Articles 8, 9, 10 and 14 of the European Convention on Human Rights and with Articles 18 and 19 of the International Covenant on Civil and Political Rights.

They reproach the contested provisions, construed as permitting the punishment of behaviour that is deemed to infringe the dignity of a person, whereas that person has permitted that behaviour or even is the perpetrator thereof, for unreasonably infringing the right to respect for private life, inasmuch as it encompasses a right to self-determination, the right to work and the right to free choice of occupation.

B.34.1. As was mentioned in B.11.5, it can be inferred from the wording of the offence in the sense that it refers to "any gesture or act […] vis-à-vis a person" that it cannot refer to acts or gestures of a person vis-à-vis him or herself.

Contrary to what the applicants argue, the contested provisions cannot be construed as permitting the punishment of the fact that a woman is wearing a religious garment such as a veil or headscarf.

B.34.2. For the same reason, the contested provisions cannot be construed as permitting the punishment of voluntary prostitution or pornography on the part of the person engaging in those activities.

B.35.1. On the other hand, sexism as an offence may be committed vis-à-vis a person, even though that person consented to the gesture or act carried out by a third party, if that gesture or act results in a serious infringement of that person's dignity. The absence of consent is not a constituent element of the offence. Moreover, the aim pursued by the legislator is not only to protect the rights of victims of sexist gestures or acts, but also to

guarantee equality between men and women, which is one of the fundamental values of society, the accomplishment of which is to the benefit of all its members and not just the potential victims of sexism.

B.35.2. Assuming that the criminalization of sexist gestures or acts under the contested Act might result in an infringement of the victim's right to respect for private life, the right to work or the right to free choice of occupation, that infringement would, for the reasons stated in B.19 to B.24, not be without reasonable justification.

B.36. The sixth, seventh, eighth and ninth grounds are unfounded.

For those reasons,

The Court,

- annuls the word “essentiellement” in the French version of Article 2 of the Act of 22 May 2014 “to combat sexism in the public space, amending the Act of 10 May 2007 to combat discrimination in order to punish the act of discrimination”;

- subject to the interpretation referred to in B.23.2, dismisses the action for the remainder.

Thus pronounced in French, Dutch and German, in accordance with Article 65 of the Special Act of 6 January 1989 on the Constitutional Court, on 25 May 2016.

The Registrar, The President,

P.-Y. Dutilleux J. Spreutels