D. VOORHOOF & I. HØEDT-RASMUSSEN

"Advocaten in de media. Het EHRM op de bres voor het recht op expressievrijheid van advocaten"

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Europees Hof voor de Rechten van de Mens (Grote Kamer), nr. 29369/10, 23 april 2015[1]

Vrijheid van meningsuiting – Strafrechtelijke veroordeling van een advocaat wegens medeplichtigheid aan eerroof van onderzoeksrechters omwille van uitlatingen in de pers – Schending artikel 10 EVRM

De zaak heeft betrekking op de strafrechtelijke veroordeling van een advocaat omwille van uitlatingen in de pers. Meer bepaald was de advocaat medeplichtig aan de eerroof van de onderzoeksrechters die ontlast werden van het opsporingsonderzoek betreffende het overlijden van de rechter Bernard Borrel.
Volgens de Grote Kamer van het EHRM heeft de advocaat evenwel waardeoordelen geuit die steunden op een voldoende feitelijke basis. Zijn uitlatingen hebben de grenzen van het recht dat wordt gewaarborgd door artikel 10 EVRM niet overschreden en betroffen een onderwerp van algemeen belang, namelijk de werking van het gerecht en het verloop van de zaak Borrel. De Grote Kamer benadrukt weliswaar dat advocaten niet kunnen worden gelijkgesteld met journalisten vermits zij geen externe getuigen zijn die tot taak hebben het publiek te informeren, maar rechtstreeks betrokken zijn bij de werking van het gerecht en bij het verweer van een partij. Advocaten hebben wel het recht om gegronde twijfels te uiten over de integriteit en onpartijdigheid van magistraten in een concrete zaak en om die kritiek ook via de media openbaar te maken. De Grote Kamer stelt vast dat art. 10 EVRM werd geschonden omdat de strafrechtelijke veroordeling van de advocaat als niet noodzakelijk werd beoordeeld in een democratische samenleving.
Er moet een groot belang worden gehecht aan de context van deze zaak, waarbij dient te worden benadrukt dat het gezag van de rechterlijke macht moet worden bewaard en er dient te worden toegezien op het wederzijdse respect tussen magistraten en advocaten.

Voorzitter: D. Spielmann
Rechters: J. Casadevall, G. Raimondi, I. Berro, I. Ziemele, G. Nicolaou, L. L. Guerra, M. L. Trajkovska, A. Power-Forde, Z. Kalaydjieva, J. Laffranque, E. Møse, A. Potocki, J. Silvis, V. Griţco, K. Turković en E. Kūris
Advocaten: C. Audhoui, J. Tardif, L. Pettiti en C. Chauffray
Griffier: J. Callewaert

Morice/ Frankrijk

[1] Zie ook D. VOORHOOF en I. HØEDT-RASMUSSEN, "Advocaat mag via media kritiek uiten op rechters", *De Juristenkrant* 2015/310, 1 en 4. Het EHRM stelt in *Morice t. Frankrijk* ook een schending vast van artikel 6 EVRM (onvoldoende waarborg (objectieve) onpartijdigheid van de rechtbank): op dit aspect van de zaak wordt in deze annotatie niet ingegaan.

(…)

THE LAW

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

65. The applicant claimed that, before the Court of Cassation, his case had not been examined fairly by an impartial tribunal, having regard to the presence on the bench of a judge who had previously and publicly expressed his support for one of the civil parties, Judge M. He relied on Article 6 § 1 of the Convention, of which the relevant part reads as follows:

"In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ... by an independent and impartial tribunal established by law."

A. The Chamber judgment

66. After noting that the applicant had not been in a position to request the judge's withdrawal, as he had not been informed before the hearing of the change in the composition of the bench that was to examine his appeal on points of law and that the procedure was mainly written, the Chamber examined the complaint in terms of objective impartiality. It noted that Judge J.M., one of the judges who had sat on the bench of the Criminal Division of the Court of Cassation ruling on an appeal from Judge M. and from the applicant stemming from a dispute between them, had, nine years earlier, publicly expressed his support for and trust in Judge M. in connection with another case in which she had been the investigating judge and the applicant had been acting for a civil party. Having regard to the facts, there was clear opposition between the applicant and Judge M., both in the case for which she had received the support of Judge J.M. and in the case in which J.M. was sitting as a judge of the Court of Cassation. Moreover, J.M.'s support had been expressed in an official and quite general context, at the general meeting of the judges of the Paris *tribunal de grande instance*. The Chamber found that there had been a violation of Article 6 § 1, as serious doubts could be raised as to the impartiality of the Court of Cassation and the applicant's fears in that connection could be regarded as objectively justified.

B. The parties' arguments before the Grand Chamber

1. The applicant

67. The applicant recognised that it was not established that Judge J.M. had displayed any personal bias against him, but argued that regardless of his personal conduct, his very presence on the bench created a situation which rendered his fears objectively justified and legitimate. In his submission, the fact that J.M. had sat on the bench of the Criminal Division of the Court of Cassation sufficed in itself to show that there had been a violation of Article 6 § 1 of the Convention. Judge J.M. had in the past expressed his support for Judge M., when the latter was conducting the judicial investigation in the Church of Scientology case, in response to criticisms of her professional conduct from the civil parties, whose representatives included the applicant, and by the public prosecutor. The applicant pointed out that Judge M. had ultimately been taken off the case at his request and that on 5 January 2000 the French State had been found liable for failings in the public justice system.

68. He argued that he had not been in a position to seek the withdrawal of Judge J.M., as he had not known, and could not reasonably have known, that this judge was going to sit in his case: the report of the reporting judge, the case "workflow" and the notices to the lawyers had all given the same information, namely that the Criminal Division was to sit as a reduced bench. The reduced bench comprised the President of the Division, the senior judge (*Doyen*) and the reporting judge, and as Judge J.M. occupied none of those positions he could not have been expected to sit.

69. On the merits, the applicant did not claim that Judge J.M. had displayed any personal bias against him and was not calling into question that judge's right to freedom of expression. He complained merely of Judge J.M.'s presence on the bench, which in his view rendered his fears of a lack of impartiality objectively justified and legitimate. In view of the support expressed by J.M. in favour of Judge M. in the context of another high-profile case with the same protagonists, there was serious doubt as to the impartiality of the Criminal Division and his fears in that connection could be regarded as objectively justified.

2. The Government

70. The Government observed that there was no question of any lack of subjective impartiality on the part of Judge J.M. and that it was therefore necessary to determine whether the circumstances of the case were such as to raise serious doubts about the Court of Cassation's objective impartiality. Referring to the effect of the statement made in July 2000 by Judge J.M., who at the time had been serving on the Paris *tribunal de grande instance*, they pointed out that the statement, made many years before the hearing of the Criminal Division, concerned a different case from the present one and that the terms used reflected a personal position which related only to the conditions in which disciplinary proceedings against a fellow judge had become known. The Government concluded that those remarks, which were limited in scope and had been made a long time before, were not sufficient to establish that, in his capacity as judge of the Court of Cassation, J.M. lacked objective impartiality.

71. The Government further stated that appeals on points of law were extraordinary remedies and that the Court of Cassation's oversight was restricted to compliance with the law. Moreover, it was an enlarged bench of the Criminal Division, comprising ten judges, that had considered the case.

72. The respondent Government accordingly argued that Article 6 § 1 of the Convention had not been breached.

C. The Court's assessment

1. General principles

73. The Court reiterates that impartiality normally denotes the absence of prejudice or bias and its existence or otherwise can be tested in various ways. According to the Court's settled case-law, the existence of impartiality for the purposes of Article 6 § 1 must be determined according to a subjective test where regard must be had to the personal conviction and behaviour of a particular judge, that is, whether the judge held any personal prejudice or bias in a given case; and also according to an objective test, that is to say by ascertaining whether the tribunal itself and, among other aspects, its composition, offered sufficient guarantees to exclude any legitimate doubt in respect of its impartiality (see, for example, *Kyprianou v.*

Cyprus [GC], no. 73797/01, § 118, ECHR 2005-XIII, and *Micallef v. Malta* [GC], no. 17056/06, § 93, ECHR 2009).

74. As to the subjective test, the principle that a tribunal must be presumed to be free of personal prejudice or partiality is long-established in the case-law of the Court (see *Kyprianou*, cited above, § 119, and *Micallef*, cited above, § 94). The personal impartiality of a judge must be presumed until there is proof to the contrary (see *Hauschildt v. Denmark*, 24 May 1989, § 47, Series A no. 154). As regards the type of proof required, the Court has, for example, sought to ascertain whether a judge has displayed hostility or ill will for personal reasons (see *De Cubber v. Belgium*, 26 October 1984, § 25, Series A no. 86).

75. In the vast majority of cases raising impartiality issues the Court has focused on the objective test (see *Micallef*, cited above, § 95). However, there is no watertight division between subjective and objective impartiality since the conduct of a judge may not only prompt objectively held misgivings as to impartiality from the point of view of the external observer (objective test) but may also go to the issue of his or her personal conviction (subjective test) (see *Kyprianou*, cited above, § 119). Thus, in some cases where it may be difficult to procure evidence with which to rebut the presumption of the judge's subjective impartiality, the requirement of objective impartiality provides a further important guarantee (see *Pullar v. the United Kingdom*, 10 June 1996, § 32, *Reports of Judgments and Decisions* 1996-III).

76. As to the objective test, it must be determined whether, quite apart from the judge's conduct, there are ascertainable facts which may raise doubts as to his or her impartiality. This implies that, in deciding whether in a given case there is a legitimate reason to fear that a particular judge or a body sitting as a bench lacks impartiality, the standpoint of the person concerned is important but not decisive. What is decisive is whether this fear can be held to be objectively justified (see *Micallef*, cited above, § 96).

77. The objective test mostly concerns hierarchical or other links between the judge and other protagonists in the proceedings (ibid., § 97). It must therefore be decided in each individual case whether the relationship in question is of such a nature and degree as to indicate a lack of impartiality on the part of the tribunal (see *Pullar*, cited above, § 38).

78. In this connection even appearances may be of a certain importance or, in other words, "justice must not only be done, it must also be seen to be done" (see *De Cubber*, cited above, § 26). What is at stake is the confidence which the courts in a democratic society must inspire in the public. Thus, any judge in respect of whom there is a legitimate reason to fear a lack of impartiality must withdraw (see *Castillo Algar v. Spain*, 28 October 1998, § 45, *Reports* 1998-VIII, and *Micallef*, cited above, § 98).

2. Application of those principles in the present case

79. In the present case, the fear of a lack of impartiality lay in the fact that Judge J.M., who sat on the Court of Cassation bench which adopted the judgment of 10 December 2009, had expressed his support for Judge M. nine years earlier, in the context of disciplinary proceedings that had been brought against her on account of her conduct in the "Scientology" case. Speaking as a judge and a colleague in the same court, in the course of a general meeting of judges of the Paris *tribunal de grande instance* on 4 July 2000, at which he had subsequently voted in favour of the motion of support for Judge M., J.M. had stated: "We are

not prohibited, as grassroots judges, from saying that we stand by Judge [M.] It is not forbidden to say that Judge [M.] has our support and trust." (see paragraphs 27-28 above).

80. The Grand Chamber notes at the outset that the applicant acknowledged in his observations that it was not established that Judge J.M. had displayed any personal bias against him. He argued merely that regardless of his personal conduct, the very presence of J.M. on the bench created a situation which rendered his fears objectively justified and legitimate (see paragraph 67 above).

81. In the Court's view, the case must therefore be examined from the perspective of the objective impartiality test, and more specifically it must address the question whether the applicant's doubts, stemming from the specific situation, may be regarded as objectively justified in the circumstances of the case.

82. Accordingly, the Court firstly takes the view that the language used by Judge J.M. in support of a fellow judge, Judge M., who was precisely responsible for the bringing of criminal proceedings against the applicant in the case now at issue, was capable of raising doubts in the defendant's mind as to the impartiality of the "tribunal" hearing his case.

83. Admittedly, the Government argued in their observations, among other things, that the remarks by J.M. were not sufficient to establish a lack of objective impartiality on his part, as they had been made a long time before and the words used reflected a personal position which concerned only the conditions in which the information about the bringing of disciplinary proceedings against a colleague of the same court had been forthcoming.

84. The Court takes the view, however, that the very singular context of the case cannot be overlooked. It would first point out that the case concerned a lawyer and a judge, who had been serving in that capacity in connection with two judicial investigations in particularly high-profile cases: the Borrel case, in the context of which the applicant's impugned remarks had been made, and the "Scientology" case, which had given rise to the remarks by J.M. It further notes, like the Chamber, that Judge M. was already conducting the investigation in the Borrel case, with its significant media coverage and political repercussions, when J.M. publicly expressed his support for her in the context of the "Scientology" case (see also paragraph 29 above). As emphasised by the Chamber, J.M. had then expressed his view in an official setting, at the general meeting of judges of the Paris *tribunal de grande instance*.

85. The Court further observes that the applicant, who in both cases was the lawyer acting for civil parties who criticised the work of Judge M., was subsequently convicted on the basis of a complaint by the latter: accordingly, the professional conflict took on the appearance of a personal conflict, as Judge M. had applied to the domestic courts seeking redress for damage stemming from an offence that she accused the applicant of having committed.

86. The Court would further emphasise, on that point, that the judgment of the Court of Appeal to which the case had been remitted itself expressly established a connection between the applicant's remarks in the proceedings in question and the Scientology case, concluding that this suggested, on the part of the applicant, an "*ex post facto* settling of scores" and personal animosity towards Judge M., "with whom he had been in conflict in various cases" (see paragraph 50 above).

87. It was precisely that judgment of the Court of Appeal which the applicant appealed against on points of law and which was examined by the bench of the Criminal Division of the Court of Cassation on which Judge J.M. sat. The Court does not agree with the Government's argument to the effect that this situation does not raise any difficulty, since an appeal on points of law is an extraordinary remedy and the review by the Court of Cassation is limited solely to the observance of the law.

88. In its case-law the Court has emphasised the crucial role of cassation proceedings, which form a special stage of the criminal proceedings with potentially decisive consequences for the accused, as in the present case, because if the case had been quashed it could have been remitted to a different court of appeal for a fresh examination of both the facts and the law. As the Court has stated on many occasions, Article 6 § 1 of the Convention does not compel the Contracting States to set up courts of appeal or of cassation, but a State which does institute such courts is required to ensure that persons having access to the law enjoy before such courts the fundamental guarantees in Article 6 (see, among other authorities, *Delcourt v. Belgium*, 17 January 1970, § 25, Series A no. 11; *Omar v. France* and *Guérin v. France*, 29 July 1998, §§ 41 and 44 respectively, *Reports* 1998-V; and *Louis v. France*, no. 44301/02, § 27, 14 November 2006), and this unquestionably includes the requirement that the court must be impartial.

89**.** Lastly, the Court takes the view that the Government's argument to the effect that J.M. was sitting on an enlarged bench comprising ten judges is not decisive for the objective impartiality issue under Article 6 § 1 of the Convention. In view of the secrecy of the deliberations, it is impossible to ascertain J.M.'s actual influence on that occasion. Therefore, in the context thus described (see paragraphs 84-86 above), the impartiality of that court could have been open to genuine doubt.

90. Furthermore, the applicant had not been informed that Judge J.M. would be sitting on the bench and had no reason to believe that he would do so. The Court notes that the applicant had, by contrast, been notified that the case would be examined by a reduced bench of the Criminal Division of the Court of Cassation, as is confirmed by the reporting judge's report, the Court of Cassation's on-line workflow for the case and three notices to parties, including two that were served after the date of the hearing (see paragraph 52 above). The applicant thus had no opportunity to challenge J.M.'s presence or to make any submissions on the issue of impartiality in that connection.

91. Having regard to the foregoing, the Court finds that in the present case the applicant's fears could have been considered objectively justified.

92. The Court therefore concludes that there has been a violation of Article 6 § 1 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

93. The applicant alleged that his criminal conviction had entailed a violation of his right to freedom of expression as provided for by Article 10 of the Convention, which reads as follows:

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

This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

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

A. The Chamber judgment

94. The Chamber found that there had been no violation of Article 10 of the Convention. It noted that the applicant had not confined himself to factual statements about the ongoing proceedings, but had accompanied them with value judgments which cast doubt on the impartiality and fairness of a judge.

95. The Chamber, after noting that the investigating judge in question was no longer handling the case, took the view, firstly, that the applicant should have waited for the outcome of his request addressed the previous day to the Minister of Justice seeking an investigation by the General Inspectorate of Judicial Services into the alleged numerous shortcomings in the judicial investigation and, secondly, that the applicant had already successfully used a legal remedy to seek to cure any defects in the proceedings and the judge concerned by his remarks had been taken off the case. In view of the foregoing and the use of terms that the Chamber found particularly harsh, it took the view that the applicant had overstepped the limits that lawyers had to observe in publicly criticising the justice system. It added that its conclusion was reinforced by the seriousness of the accusations made in the article, and that, also having regard to the chronology of the events, it could be inferred that the applicant's remarks were driven by a degree of personal animosity towards the judge. As to the "proportionality" of the sanction, the Chamber found that a fine of EUR 4,000 euros, together with an award of EUR 7,500 in damages to each of the judges, did not appear excessive.

B. The parties' arguments before the Grand Chamber

1. The applicant

96. The applicant argued that the Court's case-law guaranteed strong protection to the freedom of expression of lawyers, who played a key role in the administration of justice and the upholding of the rule of law, with any restriction having to remain exceptional. Such protection could be explained by two reasons: firstly, no particular circumstances could justify affording a wide margin of appreciation to States, bearing in mind that European and international texts, on the contrary, protected lawyers in their activity of defending their clients; secondly, their freedom of expression was linked to their clients' right to a fair trial under Article 6 of the Convention. He further observed that the right of lawyers to make press statements as part of their clients' defence was expressly acknowledged and that, in principle, there was, at European level, significant tolerance of lawyers' criticism of judges, even when made in a public and media setting. He submitted, however, that the Chamber judgment highlighted some major uncertainties and vagaries in the case-law that affected the exercise of such freedom, especially outside the courtroom. He hoped that his case would enable the Grand Chamber to clarify the interpretation of the Convention on that point and to secure the protection of the lawyer's speech.

97. He proposed in this connection a formal approach to lawyers' freedom of expression, based on the defence and interests of their clients, to ensure special protection in this context for the purposes of Article 10 of the Convention. Such an approach would also have the effect of dispelling the ambiguity surrounding the status of lawyers, who participated in the smooth running of the justice system but, on the other hand, did not have to adopt a conciliatory posture *vis-à-vis* that system and its members, as their primary role was to defend their clients. Being a key witness to the proceedings, lawyers should be afforded a functional protection that was not limited to the courtroom and was as broad as possible, in order to contribute effectively to defending their clients and informing the public. Such a functional approach would also make it possible to take effective action in response to any excesses and abuses committed by lawyers in breach of professional ethics and to preserve the necessary protection of judges from frivolous accusations. Any abuse of the primary purpose of the strengthened protection of the lawyer's freedom of expression, namely to uphold the rights of the defence, could thus entail sanctions.

98. In the present case, the applicant observed that his conviction could be regarded as an interference with the exercise of his right to freedom of expression. He did not dispute the fact that it was prescribed by law, namely by sections 23, 29 and 31 of the Law of 29 July 1881.

99. Whilst he did not deny, either, that it pursued the legitimate aim of the protection of the reputation or rights of others, in his view the idea that the criminal proceedings against him sought to "maintain the authority and impartiality of the judiciary" should be seriously called into question, as the impugned remarks were, on the contrary, intended to strengthen, rather than undermine, such authority. The applicant further submitted that the Chamber had wrongly placed on the same footing, on the one hand, the freedom of expression of lawyers and the public's right to be informed about matters of general interest, and on the other, the dignity of the legal profession and the good reputation of judges; while the former were rights guaranteed by Article 10 of the Convention, the latter were merely interests that might warrant a restriction, which had to remain exceptional.

100. As to the interference and whether it was necessary in a democratic society, the applicant took the view that it did not correspond to any pressing social need and that it was not proportionate to the aims pursued.

101. The argument that there was no pressing social need was mainly supported by the context in which the remarks were made, because the case had received significant media coverage, as the Court had previously noted in its *July and SARL Libération* judgment (no. 20893/03, ECHR 2008) and as confirmed by the Chamber in paragraph 76 of its judgment. In addition, the status of the victim, the place and circumstances of his death, the diplomatic ramifications of the case, and the suspicions that the current President of the Republic of Djibouti might have been involved as the instigator, all showed that the case concerned a matter of general interest requiring strong protection of freedom of expression. Moreover, on 19 June 2007 the Paris public prosecutor had issued a press release stating that the theory of suicide had now been discounted in favour of a criminal explanation. That statement had been made at the request of the investigating judge under Article 11, paragraph 3, of the Code of Criminal Procedure (permitting the public disclosure of details about the case to avoid the dissemination of incomplete or inaccurate information, or to put an end to a breach of public order). The case was so sensitive that the investigation was now being handled by three investigating judges.

102. The applicant argued that the remarks about the shortcomings in the justice system, in the context of the lawyer's duty to defend a client, could be deemed to merit even stronger protection. He denied going beyond the limits of permissible criticism: his comments concerned only the professional conduct of Judges M. and L.L., which was so crucial for the civil parties; the remarks had a sufficient factual basis which lay in two proven facts, firstly, the fact that the video-cassette at issue had not been transmitted to the new investigating judge with the rest of the case file and, secondly, the existence of the handwritten card from the prosecutor of Djibouti to Judge M.; moreover, the proceedings brought against the applicant and his colleague Mr de Caunes by Judges M. and L.L. for false accusation, following the letter sent by the lawyers to the Minister of Justice, had resulted in a discontinuance order, which had been upheld on appeal.

103. As to the accusation that he had shown personal animosity, the applicant rejected this, pointing out that only the content and subject of the impugned remarks should be taken into account, not any intentions that might be wrongly attributed to him. The applicant added that he was not responsible for the reference to the disciplinary proceedings pending against Judge M. and he noted that, in any event, Judge L.L. had also lodged a criminal complaint, without there being any suggestion of personal animosity towards that judge as well. The applicant also denied that any insults or abuse could be detected in the remarks published in *Le Monde*. Lastly, he submitted that he was merely defending his client's position in public, keeping her interests in mind without going beyond the scope of his duty of defence. He was of the view, in that connection, that this could not have influenced the ministerial or judicial authorities and he moreover challenged the idea that legal action by a lawyer on behalf of his client should preclude any comments in the press where the case aroused public interest. He asserted that, on the contrary, a lawyer was entitled to decide freely on his defence strategy for the benefit of his client.

104. Lastly, the applicant submitted that the sanction imposed had been particularly disproportionate. The criminal sanction had consisted of a fine of EUR 4,000, which was higher than the fine imposed on the journalist and director of *Le Monde* (respectively EUR 3,000 and EUR 1,500). In the civil part of the judgment, in addition to the sums awarded to cover the costs of Judges M. and L.L., he had been ordered to pay, jointly with his co-defendants, EUR 7,500 in damages to each of the two judges. Lastly, the publication of a notice in *Le Monde*, with a fine of EUR 500 per day in the event of delay, had been ordered. He submitted that such sanctions were unjustified and disproportionate and that they would inevitably have a significant and regrettable chilling effect on all lawyers.

2. The Government

105. The Government did not deny that the applicant's conviction constituted an interference with the exercise of his right to freedom of expression. They took the view, however, that this interference was prescribed by law, since its legal basis lay in section 23 and section 29 et seq. of the Law of 29 July 1881, and that it pursued a legitimate aim. On that latter point they argued that it sought to maintain the authority and impartiality of the judiciary, and to ensure the protection of the reputation or rights of others, since the statements had been directed at judges in the exercise of their duties and also undermined the confidence of citizens in the judiciary.

106. As to whether the interference was necessary in a democratic society, the Government were of the view that there was a fundamental difference between lawyers and journalists because of the former's position as officers of the court (*auxiliaires de justice*). They occupied

a central position as intermediaries between the public and the courts and their activities helped to ensure that justice was administered effectively and dispassionately. A balance had to be struck between the legitimate aim of informing the public about matters of general interest, including issues relating to the functioning of the justice system, and the requirements stemming from the proper administration of justice, on the one hand, and the dignity of the legal profession and the reputation of the judiciary, on the other.

107. The Government noted two different situations in the Court's case-law on freedom of expression: the participation of lawyers in debates on matters of general interest unrelated to any pending proceedings, where freedom of expression was particularly broad; and statements made by lawyers in their role of defending clients, where they had a wide freedom of expression in the courtroom. That freedom of expression in defending a client in pending proceedings did have certain limits, however, in order to preserve judicial authority, such as, for example, where the lawyer made statements critical of the justice system before even using the legal remedies available to him to rectify the shortcomings in question. The Government submitted that lawyers, as officers of the court, were thus obliged to use legal proceedings to correct any alleged errors; by contrast, harsh criticism in the press, where legal means could be used instead, was not justified by the requirements of the effective defence of the lawyer's client and cast doubt on the probity of the justice system.

108. In the present case the Government took the view that there had been numerous possible judicial remedies open to the applicant for the effective defence of his client and that he had in fact made use of them. His statements in the media could therefore only have been for the purpose of informing the public about a subject of general interest, but, as they concerned an ongoing case, he should have spoken with moderation.

109. In examining the impugned remarks, the Government referred to the margin of appreciation afforded to States in such matters. The article in question concerned a particularly sensitive case which, from the outset, had received significant media coverage. In their view, it could be seen from the article in *Le Monde* that the offending remarks were aimed, unequivocally, at the two judges and were phrased in terms that impugned their honour. The applicant had not confined himself to a general criticism of the institutions but had expressed biased views, without the slightest prudence. In the Government's submission, he had not made factual statements about the functioning of the judicial system, but rather value judgments that cast serious doubt on the investigating judges' integrity. The Government stated that the domestic courts had carefully examined each of the statements in question to establish whether they went beyond the limits of acceptable criticism. They further submitted that the evidence produced by the applicant was devoid of probative value.

110. Concerning the applicant's unsuccessful defence of good faith, based on the duties inherent in his responsibility to defend his client's interests, the Government observed that the French courts had assessed good faith in the light of Article 10 of the Convention and the four criteria that had to be fulfilled concurrently: the legitimacy of the aim pursued, the absence of personal animosity, the seriousness of the investigation carried out or of the evidence obtained by the author of the comments, and lastly, the prudence shown in expressing them. The domestic courts had taken the view that those conditions had not been fulfilled in the present case and had regarded the applicant's remarks as a settling of scores with a judge. The applicant was at fault not for expressing himself outside the courtroom, but for using excessive comments, whereas he could have expressed himself without impugning the honour of State officials.

111. The Government submitted that such attacks on judges did not contribute either to a clear public understanding of the issues, since the judicial authority had no right of reply, or to the proper conduct of the judicial proceedings in a context in which the investigating judge who was the subject of the harsh criticism had already been removed from the case. In their view, neither was it a matter of zealous defence by a lawyer of his client, because there were judicial remedies that he could have used to submit his complaint. The Government referred to the Court's inadmissibility decision in the case of *Floquet and Esménard v. France* (no. 29064/08, 10 January 2002), which concerned comments made by journalists in the Borrel case, particularly as, in the present case, it was not a journalist but a lawyer who was the author of the impugned statements, and moreover in a case that was pending in the domestic courts.

112. As to the sanction imposed on the applicant, the Government were of the view that it could not be regarded as excessive or such as to have a chilling effect on the exercise of freedom of expression. They thus submitted that there had been no violation of Article 10 of the Convention.

C. Observations of third parties intervening before the Grand Chamber

1. Observations of the Council of Bars and Law Societies of Europe (CCBE)

113. The CCBE observed that the Court's judgment in the present case would most certainly have a considerable impact on the conditions of interpretation and application of the standards of conduct imposed on European lawyers and more particularly with regard to their freedom of speech and expression in the context of the exercise of defence rights. Lawyers held a key position in the administration of justice and it was necessary to protect their specific status. Being the cornerstone of a democratic society, freedom of expression had a particular characteristic as regards lawyers, who had to be able to carry on their profession without hindrance; if the use of their speech were to be censored or restricted, the real and effective defence of the citizen would not be guaranteed.

114. The CCBE referred to the Court's case-law to the effect that a restriction of freedom of expression would entail a violation of Article 10 unless it fell within the exceptions mentioned in paragraph 2 of that Article. The examination criteria related to the existence of an interference, its legal foreseeability, whether it was necessary in a democratic society to meet a "pressing social need" and the specific circumstances of the case. In the CCBE's view, these criteria were all the more valid where a lawyer defending Convention rights was concerned.

115. The limits to freedom of expression firstly had to be reasonably foreseeable, with a more restrictive and precise definition of the criteria relating to the restrictions that could be placed on lawyers' freedom of expression. The CCBE noted discrepancies in the assessment by the various Sections of the Court: in a related case (*July and SARL Libération*, cited above) the Court had found a violation of Article 10, whereas the Chamber in the present case had found no violation. In the CCBE's view such discrepancies in assessment appeared to be the result of different approaches to the remarks of a lawyer: a degree of immunity applied to any views, however harsh, about the justice system or a court, whilst criticism of a judge did not enjoy such immunity. Such a distinction was extremely difficult to apply and gave rise to almost insurmountable problems, on account of the interdependence between the general and the personal in the conduct of proceedings, together with the fact that, in an inquisitorial system, judicial office could not be separated from the institution itself.

116. As the present case concerned freedom of expression outside the courtroom, the limits also had to take account of the fact that in sensitive and high-profile cases, and especially in those where reasons of State were at stake, lawyers often had no choice but to speak publicly to voice concerns about a hindrance to the proper conduct of the proceedings. In such cases, lawyers should have the same freedom of speech and expression as journalists. To restrict their freedom of expression, particularly when the proceedings were part of an inquisitorial system as in France, would prevent them from contributing to the proper administration of justice and ensuring public confidence therein.

117. The CCBE observed that as soon as a case attracted media attention, and, more particularly, where reasons of State were at stake, the rights of the defence, in certain cases, could only be meaningfully safeguarded by means of a public statement, even one that was somewhat vocal. Referring to the Court's findings in *Mor v. France* (no. 28198/09, § 42, 15 December 2011), it took the view that the fact that neither the competent judicial authority nor the professional disciplinary body had initiated proceedings would provide a foreseeable test in relation to the uncertainties surrounding any inappropriate action by a judge, whose office could not be distinguished from the judicial authority itself.

2. Joint observations of the Paris Bar Association, the National Bar Council and the Conference of Chairmen of French Bars

118. These third parties pointed out, first, that until recently the issue of a lawyer's freedom of speech had arisen only inside the courtroom, and that in the context of defending a client at a hearing, the lawyer was protected by immunity from legal proceedings, an immunity which covered judicial writing and speech, under section 41 of the Law of 29 July 1881. This immunity authorised remarks which could be considered offensive, defamatory or injurious.

119. In their view, the point of principle in the present case was the lawyer's freedom of expression to defend his client when he was addressing the press, where the case had attracted a certain level of public interest. The resulting issue was how to determine when comments became excessive, however strong they might be, if they affected an opponent, a judge or a fellow lawyer.

120. Every lawyer, however well known, was the custodian of the client's word. When a case came to public attention, it was the lawyer's responsibility to continue to defend that client, whether by taking any necessary *ad hoc* proceedings or by adding his own voice to the media storm, as had become the norm. This was no longer a lawyer's right but a duty attached to his position, whether the story of the case broke some time before any public hearing, as was often the case, or later.

121. Lawyers were entitled to criticise the court's ruling and to relay any criticism their clients might wish to make. The lawyer's comments were then necessarily interpreted and received by the public as partial and subjective. The parallel between the judge's duty of discretion and the lawyer's freedom of speech was not convincing. Whilst the word of the judge would be received as objective, the words of the lawyer were taken as the expression of a protest by a party. It was not unusual, therefore, for a judge to be obliged to remain silent, whilst comments by a lawyer, for a party to the proceedings, would in no way disrupt the independence and authority of the justice system.

122. The third parties observed that, while the French courts had always strictly applied the immunity referred to in section 41 of the 1881 Law to judicial comments alone, they were not

unaware that lawyers had to contend with certain developments when their cases attracted media attention. They cited a recent example from a high-profile case where a lawyer had been prosecuted for defaming a lawyer for the opposing party. The Paris *tribunal de grande instance* had accepted his plea of good faith, even though his comments had been particularly excessive and based only on his personal belief, as "they came from a passionate lawyer who dedicated all his energies to defending his client and who could not restrict his freedom of expression on the sole ground that he was referring to his case in front of journalists rather than addressing judges" (final judgment of the Seventeenth Division of the Paris *tribunal de grande instance* of 20 October 2010). The distinction between judicial and extrajudicial expression had therefore become outdated. The word of a lawyer was in fact based on a duty to inform; like journalists, lawyers were also "watchdogs of democracy".

123. The third parties submitted, lastly, that there was an obligation of proportionality in such matters both for lawyers and for the State. Lawyers had a very difficult role and this duty of proportionality reflected their duties of sensitivity and moderation, from which they could depart only where this was justified by the defence of his client and by the attacks or pressure they were under. As regards the State, the third parties were of the view that lawyers should normally be granted immunity where their comments, however excessive, were linked to the defence of their client's interests. Any restriction on their right to express their views should be exceptional, the test being whether or not the comments were detachable from the defence of the client. The margin of freedom of expression for lawyers, which had to remain as broad as that of journalists, should take account of the constraints faced by them and the increased media attention, with a press that was increasingly curious and probing.

D. The Court's assessment

1. General principles

(a) Freedom of expression

124. The general principles concerning the necessity of an interference with freedom of expression, reiterated many times by the Court since its judgment in *Handyside v. the United Kingdom* (7 December 1976, Series A no. 24), were summarised in *Stoll v. Switzerland* ([GC] no. 69698/01, § 101, ECHR 2007-V) and restated more recently in *Animal Defenders International v. the United Kingdom* ([GC], no. 48876/08, § 100, ECHR 2013), as follows:

"(i) Freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfilment. Subject to paragraph 2 of Article 10, it is applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Such are the demands of pluralism, tolerance and broadmindedness without which there is no 'democratic society'. As set forth in Article 10, this freedom is subject to exceptions, which ... must, however, be construed strictly, and the need for any restrictions must be established convincingly ...

(ii) The adjective 'necessary', within the meaning of Article 10 § 2, implies the existence of a 'pressing social need'. The Contracting States have a certain margin of appreciation in assessing whether such a need exists, but it goes hand in hand with European supervision, embracing both the legislation and the decisions applying it, even those given by an independent court. The Court is therefore empowered to give the final ruling on whether a 'restriction' is reconcilable with freedom of expression as protected by Article 10.

(iii) The Court's task, in exercising its supervisory jurisdiction, is not to take the place of the competent national authorities but rather to review under Article 10 the decisions they delivered pursuant to their power of appreciation. This does not mean that the supervision is limited to ascertaining whether the respondent State exercised its discretion reasonably, carefully and in good faith; what the Court has to do is 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' ... In doing so, the Court has to satisfy itself that the national authorities applied standards which were in conformity with the principles embodied in Article 10 and, moreover, that they relied on an acceptable assessment of the relevant facts ..."

125. Moreover, as regards the level of protection, 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 *Sürek v. Turkey (no. 1)* [GC], no. 26682/95, § 61, ECHR 1999-IV; *Lindon, Otchakovsky-Laurens and July v. France* [GC], nos. 21279/02 and 36448/02, § 46, ECHR 2007-IV; and *Axel Springer AG v. Germany* [GC], no. 39954/08, § 90, ECHR 2012). Accordingly, a high level of protection of freedom of expression, with the authorities thus having a particularly narrow margin of appreciation, will normally be accorded where the remarks concern a matter of public interest, as is the case, in particular, for remarks on the functioning of the judiciary, even in the context of proceedings that are still pending in respect of the other defendants (see *Roland Dumas v. France*, no. 34875/07, § 43, 15 July 2010, and *Gouveia Gomes Fernandes and Freitas e Costa v. Portugal*, no. 1529/08, § 47, 29 March 2011). A degree of hostility (see *E.K. v. Turkey*, no. 28496/95, §§ 79-80, 7 February 2002) and the potential seriousness of certain remarks (see *Thoma v. Luxembourg*, no. 38432/97, § 57, ECHR 2001-III) do not obviate the right to a high level of protection, given the existence of a matter of public interest (see *Paturel v. France*, no. 54968/00, § 42, 22 December 2005).

126. Furthermore, in its judgments in *Lingens* (*Lingens v. Austria*, 8 July 1986, § 46, Series A no. 10) and *Oberschlick* (*Oberschlick v. Austria (no. 1)*, 23 May 1991, § 63, Series A no. 204), the Court drew a distinction between statements of fact and value judgments. The existence of facts can be demonstrated, whereas the truth of value judgments is not susceptible of proof. The requirement to prove the truth of a value judgment is impossible to fulfil and infringes freedom of opinion itself, which is a fundamental part of the right secured by Article 10 (see *De Haes and Gijsels v. Belgium*, 24 February 1997, § 42, *Reports* 1997-I). However, where a statement amounts to a value judgment, the proportionality of an interference may depend on whether there exists a sufficient "factual basis" for the impugned statement: if there is not, that value judgment may prove excessive (see *De Haes and Gijsels*, cited above, § 47; *Oberschlick v. Austria (no. 2)*, 1 July 1997, § 33, *Reports* 1997-IV; *Brasilier v. France*, no. 71343/01, § 36, 11 April 2006; and *Lindon, Otchakovsky-Laurens and July*, cited above, § 55). In order to distinguish between a factual allegation and a value judgment it is necessary to take account of the circumstances of the case and the general tone of the remarks (see *Brasilier*, cited above, § 37), bearing in mind that assertions about matters of public interest may**,** on that basis, constitute value judgments rather than statements of fact (see *Paturel*, cited above, § 37).

127. Lastly, the nature and severity of the sanctions imposed are also factors to be taken into account when assessing the proportionality of the interference. As the Court has previously pointed out, interference with freedom of expression may have a chilling effect on the exercise of that freedom. The relatively moderate nature of the fines does not suffice to negate the risk of a chilling effect on the exercise of freedom of expression, this being all the more unacceptable in the case of a lawyer who is required to ensure the effective defence of his clients (see *Mor*, cited above, § 61). Generally speaking, while it is legitimate for the institutions of the State, as guarantors of the institutional public order, to be protected by the competent authorities, the dominant position occupied by those institutions requires the authorities to display restraint in resorting to criminal proceedings (see *Castells v. Spain*, 23 April 1992, § 46, Series A no. 236; *Incal v. Turkey* [GC], 9 June 1998, § 54, *Reports* 1998-IV; *Lehideux and Isorni v. France*, 23 September 1998, § 57, *Reports* 1998-VII; *Öztürk v. Turkey*

[GC], 28 September 1999, § 66, ECHR 1999-VI; and *Otegi Mondragon v. Spain*, no. 2034/07, § 58, ECHR 2011).

(b) Maintaining the authority of the judiciary

128. Questions concerning the functioning of the justice system, an institution that is essential for any democratic society, fall within the public interest. In this connection, regard must be had to the special role of the judiciary in society. As the guarantor of justice, a fundamental value in a law-governed State, it must enjoy public confidence if it is to be successful in carrying out its duties. It may therefore prove necessary to protect such confidence against gravely damaging attacks that are essentially unfounded, especially in view of the fact that judges who have been criticised are subject to a duty of discretion that precludes them from replying (see *Prager and Oberschlick v. Austria*, 26 April 1995, § 34, Series A no. 313; *Karpetas v. Greece*, no. 6086/10, § 68, 30 October 2012; and *Di Giovanni v. Italy*, no. 51160/06, § 71, 9 July 2013).

129. The phrase "authority of the judiciary" includes, in particular, the notion that the courts are, and are accepted by the public at large as being, the proper forum for the resolution of legal disputes and for the determination of a person's guilt or innocence on a criminal charge; further, that the public at large have respect for and confidence in the courts' capacity to fulfil that function (see *Worm v. Austria*, 29 August 1997, § 40, *Reports* 1997-V, and *Prager and Oberschlick*, cited above).

130. What is at stake is the confidence which the courts in a democratic society must inspire not only in the accused, as far as criminal proceedings are concerned (see *Kyprianou*, cited above, § 172), but also in the public at large (see *Kudeshkina v. Russia*, no. 29492/05, § 86, 26 February 2009, and *Di Giovanni*, cited above).

131. Nevertheless – save in the case of gravely damaging attacks that are essentially unfounded – bearing in mind that judges form part of a fundamental institution of the State, they may as such be subject to personal criticism within the permissible limits, and not only in a theoretical and general manner (see *July and SARL Libération*, cited above, § 74). When acting in their official capacity they may thus be subject to wider limits of acceptable criticism than ordinary citizens (see, in particular, *July and SARL Libération*, cited above).

(c) The status and freedom of expression of lawyers

132. The specific status of lawyers gives them a central position in the administration of justice as intermediaries between the public and the courts. They therefore play a key role in ensuring that the courts, whose mission is fundamental in a State based on the rule of law, enjoy public confidence (see *Schöpfer v. Switzerland*, 20 May 1998, §§ 29-30, *Reports* 1998-III; *Nikula v. Finland*, no. 31611/96, § 45, ECHR 2002-II; *Amihalachioaie v. Moldova*, no. 60115/00, § 27, ECHR 2004-III; *Kyprianou*, cited above, § 173; *André and Another v. France*, no. 18603/03, § 42, 24 July 2008; and *Mor*, cited above, § 42). However, for members of the public to have confidence in the administration of justice they must have confidence in the ability of the legal profession to provide effective representation (see *Kyprianou*, cited above, § 175).

133. That special role of lawyers, as independent professionals, in the administration of justice entails a number of duties, particularly with regard to their conduct (see *Van der Mussele v. Belgium*, 23 November 1983, Series A no. 70; *Casado Coca v. Spain*, 24 February 1994, § 46, Series A no. 285-A; *Steur v. the Netherlands*, no. 39657/98, § 38, ECHR 2003-XI;

Veraart v. the Netherlands, no. 10807/04, § 51, 30 November 2006; and *Coutant v. France* (dec.), no. 17155/03, 24 January 2008). Whilst they are subject to restrictions on their professional conduct, which must be discreet, honest and dignified, they also enjoy exclusive rights and privileges that may vary from one jurisdiction to another – among them, usually, a certain latitude regarding arguments used in court (see *Steur*, cited above).

134. Consequently, freedom of expression is applicable also to lawyers. It encompasses not only the substance of the ideas and information expressed but also the form in which they are conveyed (see *Foglia v Switzerland*, no. 35865/04, § 85, 13 December 2007). Lawyers are thus entitled, in particular, to comment in public on the administration of justice, provided that their criticism does not overstep certain bounds (see *Amihalachioaie*, cited above, §§ 27-28; *Foglia*, cited above, § 86; and *Mor*, cited above, § 43). Those bounds lie in the usual restrictions on the conduct of members of the Bar (see *Kyprianou*, cited above, § 173), as reflected in the ten basic principles enumerated by the CCBE for European lawyers, with their particular reference to "dignity", "honour" and "integrity" and to "respect for ... the fair administration of justice" (see paragraph 58 above). Such rules contribute to the protection of the judiciary from gratuitous and unfounded attacks, which may be driven solely by a wish or strategy to ensure that the judicial debate is pursued in the media or to settle a score with the judges handling the particular case.

135. The question of freedom of expression is related to the independence of the legal profession, which is crucial for the effective functioning of the fair administration of justice (see *Sialkowska v. Poland*, no. 8932/05, § 111, 22 March 2007). It is only in exceptional cases that restriction – even by way of a lenient criminal penalty – of defence counsel's freedom of expression can be accepted as necessary in a democratic society (see *Nikula*, cited above, § 55; *Kyprianou*, cited above, § 174; and *Mor*, cited above, § 44).

136. A distinction should, however, be drawn depending on whether the lawyer expresses himself in the courtroom or elsewhere.

137. As regards, firstly, the issue of "conduct in the courtroom", since the lawyer's freedom of expression may raise a question as to his client's right to a fair trial, the principle of fairness thus also militates in favour of a free and even forceful exchange of argument between the parties (see *Nikula*, cited above, § 49, and *Steur*, cited above, § 37). Lawyers have the duty to "defend their clients' interests zealously" (see *Nikula*, cited above, § 54), which means that they sometimes have to decide whether or not they should object to or complain about the conduct of the court (see *Kyprianou*, cited above, § 175). In addition, the Court takes into consideration the fact that the impugned remarks are not repeated outside the courtroom and it makes a distinction depending on the person concerned; thus, a prosecutor, who is a "party" to the proceedings, has to "tolerate very considerable criticism by ... defence counsel", even if some of the terms are inappropriate, provided they do not concern his general professional or other qualities (see *Nikula*, cited above, §§ 51-52; *Foglia*, cited above, § 95; and *Roland Dumas*, cited above, § 48).

138. Turning now to remarks made outside the courtroom, the Court reiterates that the defence of a client may be pursued by means of an appearance on the television news or a statement in the press, and through such channels the lawyer may inform the public about shortcomings that are likely to undermine pre-trial proceedings (see *Mor*, cited above, § 59). The Court takes the view, in this connection, that a lawyer cannot be held responsible for everything published in the form of an "interview", in particular where the press has edited

the statements and he or she has denied making certain remarks (see *Amihalachioaie*, cited above, § 37). In the above-cited *Foglia* case, it also found that lawyers could not justifiably be held responsible for the actions of the press (see *Foglia*, cited above, § 97). Similarly, where a case is widely covered in the media on account of the seriousness of the facts and the individuals likely to be implicated, a lawyer cannot be penalised for breaching the secrecy of the judicial investigation where he or she has merely made personal comments on information which is already known to the journalists and which they intend to report, with or without those comments. Nevertheless, when making public statements, a lawyer is not exempted from his duty of prudence in relation to the secrecy of a pending judicial investigation (see *Mor*, cited above, §§ 55 and 56).

139. Lawyers cannot, moreover, make remarks that are so serious that they overstep the permissible expression of comments without a sound factual basis (see *Karpetas*, cited above, § 78; see also *A v. Finland* (dec.), no. 44998/98, 8 January 2004), nor can they proffer insults (see *Coutant* (dec.), cited above). In the circumstances of the *Gouveia Gomes Fernandes and Freitas e Costa* case, the use of a tone that was not insulting but caustic, or even sarcastic, in remarks about judges was regarded as compatible with Article 10 (see *Gouveia Gomes Fernandes and Freitas e Costa*, cited above, § 48). The Court assesses remarks in their general context, in particular to ascertain whether they can be regarded as misleading or as a gratuitous personal attack (see *Ormanni v. Italy*, no. 30278/04, § 73, 17 July 2007, and *Gouveia Gomes Fernandes and Freitas e Costa*, cited above, § 51) and to ensure that the expressions used had a sufficiently close connection with the facts of the case (see *Feldek v. Slovakia*, no. 29032/95, § 86, ECHR 2001-VIII, and *Gouveia Gomes Fernandes and Freitas e Costa*, cited above).

2. Application of those principles in the present case

140. Turning to the present case, the Court observes that the applicant received a criminal conviction, with an order to pay damages and costs, on account of his remarks concerning the proceedings in the Borrel case, as reproduced in an article in the daily newspaper *Le Monde*, which contained the text of a letter sent by the applicant and his colleague to the Minister of Justice seeking an administrative investigation, together with statements that he had made to the journalist who wrote the impugned article.

141. The Court notes at the outset that it is not in dispute between the parties that the applicant's criminal conviction constituted an interference with the exercise of his right to freedom of expression, as guaranteed by Article 10 of the Convention. That is also the Court's opinion.

142. It further observes that the interference was prescribed by law, namely by sections 23, 29 and 31 of the Law of 29 July 1881, as the applicant acknowledged.

143. The parties also agreed that the aim of the interference was the protection of the reputation or rights of others. The Court does not see any reason to adopt a different view. While the applicant wished to qualify the point that the proceedings against him also sought to "maintain the authority and impartiality of the judiciary" (see paragraph 99 above), this question relates to the "necessity" of the interference and cannot affect the fact that it pursued at least one of the "legitimate aims" covered by paragraph 2 of Article 10.

144. It remains therefore to be examined whether the interference was "necessary in a democratic society" and this requires the Court to ascertain whether it was proportionate to

the legitimate aim pursued and whether the grounds given by the domestic courts were relevant and sufficient.

145. The Court notes that, in convicting the applicant, the Court of Appeal took the view that to say that an investigating judge had shown "conduct which [was] completely at odds with the principles of impartiality and fairness" was in itself a particularly defamatory accusation (see paragraph 47 above). That court added that the applicant's comments concerning the delay in forwarding the video-cassette and his reference to the handwritten card from the public prosecutor of Djibouti to Judge M., in respect of which the applicant had used the term "connivance", merely confirmed the defamatory nature of the accusation (ibid.), the "veracity" of the allegations not having been established (see paragraph 48 above) and the applicant's defence of good faith being rejected (see paragraph 49 above).

(a) The applicant's status as a lawyer

146. The Court first observes that the remarks in question stemmed both from statements made at the request of the journalist who wrote the article and from the letter to the Minister of Justice. The remarks were made by the applicant in his capacity as lawyer acting for the civil party and concerned matters relating to the proceedings in the Borrel case.

147. In this connection the Court notes at the outset that the applicant has invited it to clarify its case-law concerning the exercise of freedom of expression by a lawyer, particularly outside the courtroom, and to afford the greatest possible protection to comments by lawyers (see paragraphs 96, 97 and 102 above). The Government, for their part, while taking the view that their status as officers of the court fundamentally distinguished lawyers from journalists (see paragraph 106 above), identified various situations in which freedom of expression would be "particularly broad", "wide", or, on the contrary, subject to "certain limits" (see paragraph 107 above).

148. The Court would refer the parties to the principles set out in its case-law, particularly with regard to the status and freedom of expression of lawyers (see paragraphs 132-139 above), with emphasis on the need to distinguish between remarks made by lawyers inside and outside the courtroom. Moreover, in view of the specific status of lawyers and their position in the administration of justice (see paragraph 132 above), the Court takes the view, contrary to the argument of the CCBE (see paragraph 116 above), that lawyers cannot be equated with journalists. Their respective positions and roles in judicial proceedings are intrinsically different. Journalists have the task of imparting, in conformity with their duties and responsibilities, information and ideas on all matters of public interest, including those relating to the administration of justice. Lawyers, for their part, are protagonists in the justice system, directly involved in its functioning and in the defence of a party. They cannot therefore be equated with an external witnesses whose task it is to inform the public.

149. The applicant argued that his statements, as published in the newspaper *Le Monde*, served precisely to fulfil his task of defending his client – a task that was for him to determine. However, while it is not in dispute that the impugned remarks fell within the context of the proceedings, they were aimed at investigating judges who had been removed from the proceedings with final effect at the time they were made. The Court therefore fails to see how his statements could have directly contributed to his task of defending his client, since the judicial investigation had by that time been entrusted to another judge who was not the subject of the criticism.

(b) Contribution to a debate on a matter of public interest

150. The applicant further relied on his right to inform the public about shortcomings in the handling of ongoing proceedings and to contribute to a debate on a matter of public interest.

151. On that point, the Court notes firstly that the applicant's remarks were made in the context of the judicial investigation opened following the death of a French judge, Bernard Borrel, who had been seconded to the Djibouti Ministry of Justice as a technical adviser. The Court has already had occasion to note the significant media interest shown in this case from the outset (see *July and SARL Libération*, cited above, § 67), thus reflecting its prominence in public opinion. Like the applicant, the Court notes, moreover, that the justice system also contributed to informing the public about this case, as the investigating judge handling the case in 2007 asked the public prosecutor to issue a press release, under Article 11, paragraph 3, of the Code of Criminal Procedure, to announce that the suicide theory had been dismissed in favour of one of premeditated murder (see paragraphs 24 and 55 above).

152. In addition, as the Court has previously found, the public have a legitimate interest in the provision and availability of information about criminal proceedings (see *July and SARL Libération*, cited above, § 66) and remarks concerning the functioning of the judiciary relate to a matter of public interest (see paragraph 125 above). The Court has in fact already been called upon on two occasions, in *Floquet and Esménard* and *July and SARL Libération* (both cited above), to examine complaints relating to the Borrel case and to the right to freedom of expression in respect of comments on the handling of the judicial investigation, finding in each of those cases that there was a debate on a matter of public interest.

153. Accordingly, the Court takes the view that the applicant's impugned remarks, which also concerned, as in the said cases of *Floquet and Esménard* and *July and SARL Libération*, the functioning of the judiciary and the handling of the Borrel case, fell within the context of a debate on a matter of public interest, thus calling for a high level of protection of freedom of expression, with a particularly narrow margin of appreciation accordingly being afforded to the authorities.

(c) The nature of the impugned remarks

154. The Court notes that after the applicant's remarks had been found "particularly defamatory", he had been unable to establish their veracity on the basis of evidence that, according to the Criminal Court, had to "be flawless and complete and relate directly to all the allegations found to be defamatory" (see paragraph 40 above). His defence of good faith was also rejected. On that point, the Criminal Court and the Court of Appeal took the view, in particular, that the attacks on the professional and moral integrity of Judges M. and L.L. clearly overstepped the right of permissible criticism (see paragraphs 40 and 50 above). In addition, while the Criminal Court took the view that the profound disagreements between Mrs Borrel's lawyers and the investigating judges could not justify a total lack of prudence in their expression, the Court of Appeal concluded that the decision in the applicant's favour to discontinue the proceedings brought against him by the two judges did not rule out bad faith on his part. It held that the applicant's personal animosity and the wish to discredit the judges, in particular Judge M., stemmed from the excessive nature of his comments and from the fact that the article on the Borrel case had been published at the same time as the bringing of proceedings against Judge M. before the Indictment Division in connection with the Scientology case (ibid.).

155. As the Court has already observed, it is necessary to distinguish between statements of fact and value judgments (see paragraph 126 above). The existence of facts can be demonstrated, whereas the truth of value judgments is not susceptible of proof; a requirement to prove the truth of a value judgment is impossible to fulfil and infringes freedom of opinion itself, which is a fundamental part of the right secured by Article 10 (ibid.). In addition, the existence of procedural safeguards for the benefit of a defendant in defamation proceedings is among the factors to be taken into account in assessing the proportionality of an interference under Article 10. In particular, it is important for the defendant to be afforded a realistic chance to prove that there was a sufficient factual basis for his allegations (see, among other authorities, *Steel and Morris v. the United Kingdom*, no. 68416/01, § 95, ECHR 2005-II; *Andrushko v. Russia*, no. 4260/04, § 53, 14 October 2010; *Dilipak and Karakaya v. Turkey*, nos. 7942/05 and 24838/05, § 141, 4 March 2012; and *Hasan Yazıcı v. Turkey*, no. 40877/07, § 54, 15 April 2014). No such chance was afforded in the present case.

156. The Court takes the view that, in the circumstances of the case, the impugned statements were more value judgments than pure statements of fact, in view of the general tone of the remarks and the context in which they were made, as they reflected mainly an overall assessment of the conduct of the investigating judges in the course of the investigation.

157. It thus remains to be examined whether the "factual basis" for those value judgments was sufficient.

158. The Court is of the opinion that this condition was fulfilled in the present case. After the case had been withdrawn from Judges M. and L.L. by the Indictments Division of the Paris Court of Appeal (see paragraph 23 above), it became apparent that an important item of evidence in the file, namely a video-cassette recorded during a visit by the judges, accompanied by experts, to the scene of the death, even though it had been referred to in the last decision given by those judges, had not been forwarded with the investigation file to the judge appointed to replace them. That fact was not only established but it was also sufficiently serious to justify the drafting by Judge P. of a report in which he recorded the following: first, the video-cassette did not appear in the investigation file and was not registered as an exhibit; and second, it had been given to him in an envelope, which showed no sign of having been placed under seal, bearing the name of Judge M. as addressee and also containing a handwritten card with the letter head of the public prosecutor of Djibouti, written by him and addressed to Judge M. (see paragraph 32 above).

159. Moreover, in addition to the fact that the card showed a certain friendliness on the part of the public prosecutor of Djibouti towards Judge M. (see paragraph 32 above), it accused the civil parties' lawyers of "orchestrating their manipulation". The Court would emphasise in this connection that, not only have the Djibouti authorities supported the theory of suicide from the outset, but also a number of representatives of that State have been personally implicated in the context of the judicial investigation conducted in France, as can be seen in particular from the judgment of the International Court of Justice (see paragraphs 63-64 above) and from the proceedings brought on a charge of procuring of false evidence (see paragraph 18 above).

160. Lastly, it has been established that the applicant acted in his capacity as lawyer in two high-profile cases in which Judge M. was an investigating judge. In both of them the applicant succeeded in obtaining findings by the appellate courts that there had been shortcomings in the proceedings, leading to the withdrawal of the cases from Judge M. (see paragraphs 22-23

and 26 above). In the context of the first case, known as the "Scientology" case, the applicant additionally secured a ruling that the French State was liable for the malfunctioning of the justice system (see paragraph 30 above).

161. It further considers that the expressions used by the applicant had a sufficiently close connection with the facts of the case, in addition to the fact that his remarks could not be regarded as misleading or as a gratuitous attack (see paragraph 139 above). It reiterates in this connection that freedom of expression "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". Similarly, the use of a "caustic tone" in comments aimed at a judge is not incompatible with the provisions of Article 10 of the Convention (see, for example, *Gouveia Gomes Fernandes and Freitas e Costa*, cited above, § 48).

(d) The specific circumstances of the case

(i) The need to take account of the overall background

162. The Court reiterates that, in the context of Article 10 of the Convention, it must take account of the circumstances and overall background against which the statements in question were made (see, among many other authorities, *Lingens*, cited above, § 40, and Bladet Tromsø *and Stensaas v. Norway* [GC], no. 21980/93, § 62, ECHR 1999-III). In the present case, the background can be explained not only by the conduct of the investigating judges and by the applicant's relations with one of them, but also by the very specific history of the case, its inter-State dimension and its substantial media coverage. The Court would observe, however, that the Court of Appeal attributed an extensive scope to the impugned remark of the applicant criticising an investigating judge for "conduct which [was] completely at odds with the principles of impartiality and fairness", finding that this was in itself a particularly defamatory accusation, tantamount to saying that there had been a breach of professional ethics and of the judicial oath on the part of that judge (see paragraph 47 above). That quotation should, however, have been assessed in the light of the specific circumstances of the case, especially as it was in reality not a statement made to the author of the article, but an extract from the letter sent by the applicant and his colleague Mr L. de Caunes to the Minister of Justice on 6 September 2000. In addition, at the time when the applicant answered his questions the journalist had already been informed of the letter to the Minister of Justice, not by the applicant himself, but by his own sources, as the Criminal Court acknowledged (see paragraph 40 above). The applicant further argued, without this being in dispute, that the article's author was solely responsible for the reference to the disciplinary proceedings against Judge M. in the context of the "Scientology" case. In that connection, the Court reiterates that lawyers cannot be held responsible for everything appearing in an "interview" published by the press or for actions by the press.

163. The Court of Appeal was thus required to examine the impugned remarks with full consideration of both the background to the case and the content of the letter, taken as a whole.

164. For the same reasons, since the impugned remarks could not be assessed out of context, the Court cannot share the view of the Paris Court of Appeal that the use of the term "connivance" constituted "in itself" a serious attack on the honour and reputation of Judge M. and the public prosecutor of Djibouti (see paragraph 47 above).

165. As to the question of personal animosity on the part of the applicant towards Judge M., on account of conflicts in the context of the Borrel and "Scientology" cases, the Court takes the view that this aspect was insufficiently relevant and serious to warrant the applicant's conviction. In any event, since the courts acknowledged the existence of conflicts between the two protagonists, and in view of the particular circumstances of the present case, such a reproach of personal animosity could have been made as much to Judge M. as to the applicant (see, *mutatis mutandis*, *Paturel*, cited above, § 45), especially as before filing a complaint against the applicant for complicity in defamation Judge M. had already unsuccessfully filed a complaint against him for false accusation (see paragraph 35 above). The Court of Appeal's reliance on the applicant's personal animosity is also at least undermined, if not contradicted, by other factors. Firstly, the remark concerning "conduct which [was] completely at odds with the principles of impartiality and fairness" was directed not only at Judge M., but also at Judge L.L., in respect of whom the applicant was not accused of showing any personal animosity. Furthermore, while the proceedings against the applicant concerned the above-cited extract from the letter to the Minister of Justice, that letter had in reality been signed and sent by two lawyers, the applicant and his colleague Mr de Caunes. In the case of the latter, however, not only has he not been prosecuted for remarks that were attributable as much to him as to the applicant, he has not been accused of showing any animosity towards Judge M. or Judge L.L.

166. In conclusion, the Court considers that the applicant's statements could not be reduced to the mere expression of personal animosity, that is to say an antagonistic relationship between two individuals, the applicant and Judge M. The impugned remarks fell, in reality, within a broader context, also involving another lawyer and another judge. In the Court's opinion, that fact is capable of supporting the idea that the remarks were not part of any personal action on the part of the applicant, out of a desire for vengeance, but rather formed part of a joint professional initiative by two lawyers, on account of facts that were new, established and capable of revealing serious shortcomings in the justice system, involving the two judges who had formerly been conducting the investigation in a case in which the two lawyers' clients were civil parties.

167. In addition, while the applicant's remarks certainly had a negative connotation, it should be pointed out that, notwithstanding their somewhat hostile nature (see *E.K. v. Turkey*, no. 28496/95, §§ 79-80, 7 February 2002) and seriousness (see *Thoma*, cited above), the key question in the statements concerned the functioning of a judicial investigation, which was a matter of public interest, thus leaving little room for restrictions on freedom of expression. In addition, a lawyer should be able to draw the public's attention to potential shortcomings in the justice system; the judiciary may benefit from constructive criticism.

(ii) Maintaining the authority of the judiciary

168. The Government relied on the fact that the judicial authorities had no right of reply. It is true that the particular task of the judiciary in society requires judges to observe a duty of discretion (see paragraph 128 above). However, that duty pursues a specific aim, as noted by the third-party interveners: the speech of judges, unlike that of lawyers, is received as the expression of an objective assessment which commits not only the person expressing himself, but also, through him, the entire justice system. Lawyers, for their part, merely speak in their own name and on behalf of their clients, thus also distinguishing them from journalists, whose role in the judicial debate and purpose are intrinsically different. Nevertheless, while it may prove necessary to protect the judiciary against gravely damaging attacks that are essentially unfounded, bearing in mind that judges are prevented from reacting by their duty of discretion

(see paragraph 128 above), this cannot have the effect of prohibiting individuals from expressing their views, through value judgments with a sufficient factual basis, on matters of public interest related to the functioning of the justice system, or of banning any criticism of the latter. In the present case, Judges M. and L.L. were members of the judiciary and were thus both part of a fundamental institution of the State: they were therefore subject to wider limits of acceptable criticism than ordinary citizens and the impugned comments could therefore be directed against them in that capacity (see paragraphs 128 and 131 above).

169. The Court further finds, contrary to what has been argued by the Government, that the applicant's remarks were not capable of undermining the proper conduct of the judicial proceedings, in view of the fact that the higher court had withdrawn the case from the two investigating judges concerned by the criticisms. Neither the new investigating judge nor the higher courts were targeted in any way by the impugned remarks.

170. Nor can it be considered, for the same reasons, and taking account of the foregoing, that the applicant's conviction could serve to maintain the authority of the judiciary. The Court would nevertheless emphasise the importance, in a State governed by the rule of law and in a democratic society, of maintaining the authority of the judiciary. In any event, the proper functioning of the courts would not be possible without relations based on consideration and mutual respect between the various protagonists in the justice system, at the forefront of which are judges and lawyers.

(iii) The use of available remedies

171. With regard to the Government's argument as to the possibility of using available remedies, the Court finds it pertinent but not sufficient in the present case to justify the applicant's conviction. It first notes that the use of available remedies, on the one hand, and the right to freedom of expression, on the other, do not pursue the same aim and are not interchangeable. That being said, the Court takes the view that the defence of a client by his lawyer must be conducted not in the media, save in very specific circumstances (see paragraph 138 above), but in the courts of competent jurisdiction, and this involves using any available remedies. It notes that in the present case the referral to the Indictments Division of the Paris Court of Appeal patently showed that the initial intention of the applicant and his colleague was to resolve the matter using the available remedies. It was, in reality, only after that remedy had been used that the problem complained of occurred, as recorded by the investigating judge P. in his official report of 1 August 2000 (see paragraph 32 above). At that stage the Indictments Division was no longer in a position to examine such complaints, precisely because it had withdrawn the case from Judges M. and L.L. The Court further notes that, in any event, four and a half years had already elapsed since the opening of the judicial investigation, which has still not been closed to date. It also observes that the civil parties and their lawyers took an active part in the proceedings and, in particular, that they succeeded, according to the judgment of the Versailles Court of Appeal of 28 May 2009, in having a material witness examined in Belgium in spite of a lack of interest in him on the part of the investigating judges M. and L.L. (see paragraph 16 above).

172. Moreover, the request for an investigation made to the Minister of Justice complaining about these new facts was not a judicial remedy – such as to justify possibly refraining from intervention in the press – but a mere request for an administrative investigation subject to the discretionary decision of the Minister of Justice. The Court notes in this connection that the domestic judges themselves, both at first instance and on appeal, took the view that the letter could not enjoy the immunity afforded to judicial acts, the Criminal Court having found that

its content was purely informative (see paragraphs 38 and 46 above). The Court observes that it has not been argued that this request was acted upon and, in addition, it notes that Judges M. and L.L. clearly did not see it as the normal use of a remedy available under domestic law, but as an act justifying the filing of a complaint for false accusation (see paragraph 35 above).

173. Lastly, the Court finds that neither the Principal Public Prosecutor nor the relevant Bar Council or chairman of the Bar found it necessary to bring disciplinary proceedings against the applicant on account of his statements in the press, although such a possibility was open to them (see *Mor*, cited above, § 60).

(iv) Conclusion as to the circumstances of the present case

174. The Court is of the view that the impugned remarks by the applicant did not constitute gravely damaging and essentially unfounded attacks on the action of the courts, but criticisms levelled at Judges M. and L.L. as part of a debate on a matter of public interest concerning the functioning of the justice system, and in the context of a case which had received wide media coverage from the outset. While those remarks could admittedly be regarded as harsh, they nevertheless constituted value judgments with a sufficient "factual basis".

(e) The sanctions imposed

175. As to the sentences imposed, the Court reiterates that, in assessing the proportionality of the interference, the nature and severity of the penalties imposed are also factors to be taken into account (see, for example, *Sürek*, cited above, § 64; *Chauvy and Others v. France*, no. 64915/01, § 78, ECHR 2004-VI; and *Mor*, cited above, § 61). In the present case, the Court of Appeal sentenced the applicant to pay a fine of EUR 4,000. This amount corresponds precisely to that fixed by the first-instance court, where the judges had expressly taken into account the applicant's status as a lawyer to justify their severity and to impose on him "a fine of a sufficiently high amount" (see paragraph 41 above). In addition to ordering the insertion of a notice in the newspaper *Le Monde*, the court ordered him to pay, jointly with the journalist and the publication director, EUR 7,500 in damages to each of the two judges, together with EUR 4,000 to Judge L.L. in costs. The Court notes, moreover, that the applicant alone was ordered to pay a sum to Judge M. in respect of costs, amounting to EUR 1,000.

176. The Court reiterates that even when the sanction is the lightest possible, such as a guilty verdict with a discharge in respect of the criminal sentence and an award of only a "token euro" in damages (see *Mor*, cited above, § 61), it nevertheless constitutes a criminal sanction and, in any event, that fact cannot suffice, in itself, to justify the interference with the applicant's freedom of expression (see *Brasilier*, cited above, § 43). The Court has emphasised on many occasions that interference with freedom of expression may have a chilling effect on the exercise of that freedom (see, *mutatis mutandis*, *Cumpănă and Mazăre v. Romania* [GC], no. 33348/96, § 114, ECHR 2004-XI, and *Mor*, cited above) – a risk that the relatively moderate nature of a fine would not suffice to negate (see *Dupuis and Others*, cited above, § 48). It should also be noted that imposing a sanction on a lawyer may have repercussions that are direct (disciplinary proceedings) or indirect (in terms, for example, of their image or the confidence placed in them by the public and their clients). The Court would, moreover, reiterate that the dominant position of the State institutions requires the authorities to show restraint in resorting to criminal proceedings (see paragraph 127 above). The Court observes, however, that in the present case the applicant's punishment was not confined to a criminal conviction: the sanction imposed on him was not the "lightest possible", but was, on the contrary, of some significance, and his status as a lawyer was even relied upon to justify greater severity.

3. Conclusion

177. In view of the foregoing, the Court finds that the judgment against the applicant for complicity in defamation can be regarded as a disproportionate interference with his right to freedom of expression, and was not therefore "necessary in a democratic society" within the meaning of Article 10 of the Convention.

178. Accordingly, there has been a violation of Article 10 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

179. 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

180. The applicant claimed 4,270 euros (EUR) in respect of pecuniary damage, corresponding to the amounts he was ordered to pay on account of the judgment against him, and EUR 20,000 in respect of non-pecuniary damage on account of the violation of Articles 6 and 10 of the Convention.

181. The Government did not comment on those claims before the Grand Chamber.

182. The Court observes that the applicant was ordered to pay a fine of EUR 4,000, together with the sum of EUR 1,000 in respect of Judge M.'s costs and expenses, in addition to an award of EUR 7,500 in damages to each of the judges to be paid jointly with the other two co-defendants, and EUR 4,000 in respect of Judge L.L.'s costs (see paragraph 46 above). It thus takes the view that there is a sufficient causal link between the alleged pecuniary damage and the violation found under Article 6 and, especially, under Article 10 of the Convention. It is thus appropriate to order, under the head of pecuniary damage, the reimbursement of the sums that the applicant was required to pay, within the limit indicated in his claim, namely EUR 4,270, which corresponds to the amount of the fine, plus taxes and court courts, that was paid to the Treasury.

183. The Court further finds that the applicant clearly sustained non-pecuniary damage on account of his criminal conviction and, ruling on an equitable basis, it awards him EUR 15,000 on that basis.

B. Costs and expenses

184. The applicant claimed EUR 26,718.80 in respect of costs and expenses for the proceedings before the Court.

185. The Government made no comment on this claim before the Grand Chamber.

186. The Court reiterates that costs and expenses will not be awarded under Article 41 unless it is established that they were actually incurred, were necessarily incurred and were also reasonable as to quantum (see, among many other authorities, *Iatridis v. Greece* [GC] (just

satisfaction), no. 31107/96, § 54, ECHR 2000-XI; *Beyeler v. Italy* (just satisfaction) [GC], no. 33202/96, § 27, 28 May 2002; and *Kurić and Others v. Slovenia* (just satisfaction) [GC], no. 26828/06, ECHR 2014).

187. In the present case, taking account of the documents in its possession and the above-mentioned criteria, the Grand Chamber finds it reasonable to award EUR 14,400 on that basis to the applicant.

C. Default interest

188. 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.

(…)

Advocaten in de media. Het EHRM op de bres voor het recht op expressievrijheid van advocaten.

Het uiten van felle kritiek in de media op (individuele) rechters is een heikel thema in de relatie tussen media en justitie. Het ligt nog gevoeliger als die kritiek komt van advocaten, in verband met een rechtszaak waarin ze zelf betrokken zijn. Vooral in strafzaken komen advocaten zelf in de picture, soms met felle aanklachten tegen de onderzoeksrechters of magistraten die het onderzoek of de terechtzittingen leiden. Vanuit justitie en de advocatuur wordt hierop vaak negatief of zelfs misprijzend gereageerd. Onlangs nog beklemtoonde oud-stafhouder en voormalig OVB-voorzitter Jo Stevens dat het proces "uiteraard in de rechtbank moet gevoerd worden en niet in de media"[2]*. Een forumbijdrage van Hugo Lamon kreeg in een recent nummer in* De Juristenkrant *de titel mee: "Waarom advocaten soms beter zwijgen"*[3] *en ook de huidige voorzitter van de Orde van Vlaamse Balies liet onlangs in een opiniestuk in* De Morgen *zijn ongenoegen blijken omtrent de wijze waarop sommige advocaten al te forse stellingen verkondigen en interviews geven in de media*[4]*.*

Met een arrest van 23 april 2015 heeft de Grote Kamer van het Europees Mensenrechtenhof de expressievrijheid van advocaten via de media nochtans duidelijk opgetild: hoewel de rol van advocaten niet dezelfde is als die van journalisten, erkent het Hof dat ook advocaten het recht hebben om openlijk flinke kritiek te uiten op justitie, als onderdeel van het maatschappelijk debat. In de zaak Morice t. Frankrijk *erkent het Hof het recht van advocaten*

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[2] R. BOONE, "Stafhouders hebben aan soortgelijk gewicht ingeboet bij gerechtelijke hervorming", *De Juristenkrant* 2015/311 (interview met Jo Stevens, naar aanleiding van nieuwe editie van J. STEVENS, *Advocatuur. Regels & Deontologie*, Wolters Kluwer, 2015, 1102 p.). In de nieuwe editie van zijn boek schrijft Stevens (p. 579) : "Advocaten worden in tv-journaals vaak gebruikt als plaatje bij een nieuwsitem; zoals brandweermannen bij een brand en ziekenwagens bij een ongeluk. Zonder inhoudelijke meerwaarde voor de cliënt, maar met een voor hun kleinburgerlijk publicitair genoegen "op TV geweest te zijn". Hun mediatieke tussenkomsten zijn vaak van een ontluisterende onbenulligheid, indien al niet ronduit juridisch fout".

[3] H. LAMON, "Waarom advocaten soms beter zwijgen", *De Juristenkrant* 2015/310, 13. Deze bijdrage van Lamon was een reactie op L. NEELS, "Het woord te voeren past de advocaat. Toch?", *De Juristenkrant* 2015/309, 11.

[4] D. MATTHYS, "Waar halen sommige advocaten het" en R. WOUTERS, "Orde van Vlaamse Balies fluit media-advocaten. 'Rechtspraak is geen spektakel'", *De Morgen* 12 augustus 2015, 1-2.

om gegronde twijfels over de integriteit en onpartijdigheid van (onderzoeks)rechters in een concrete zaak (ook) via de media onder de aandacht te brengen. De strafrechtelijke veroordeling van Morice wegens laster en eerroof beoordeelt het EHRM strijdig met artikel 10 EVRM dat het recht op expressievrijheid waarborgt[5].

Het arrest van de Grote Kamer zal ongetwijfeld bij justitie en binnen de advocatuur voorwerp zijn van grondige analyse en discussie. Hoewel het arrest duidelijk maakt dat advocaten in dit soort zaken maar moeilijk het zwijgen kunnen worden opgelegd via strafrechtelijke weg, laat de Grote Kamer van het EHRM nog wel voldoende opening om bepaalde beperkingen op te leggen aan media-optredens door advocaten. Pertinente en proportionele vormen van inmenging of beperkingen inzake media-optredens door advocaten blijven mogelijk, maar dan eerder in toepassing van concrete deontologische voorschriften. Het Hof maakt duidelijk dat correctionele vervolging van en strafsancties voor advocaten maar moeilijk kunnen verantwoord worden in een democratische samenleving. Uit het arrest volgt ook dat een algemeen verbod van commentaar en kritiek door advocaten in de media, de toets aan artikel 10 EVRM niet kan doorstaan.

Situering

In 2000 werkte de Franse advocaat Olivier Morice mee aan een artikel in de krant *Le Monde*. Daarin werd gerapporteerd over de controverses in een gerechtelijk onderzoek naar het verdacht overlijden (zelfdoding of moord?) van een Franse rechter in Djibouti (Bernard Borrel). Er was sprake van manipulaties door de twee onderzoeksrechters die het gerechtelijk onderzoek hadden geleid. De journalist die het artikel schreef, de directeur van *Le Monde* en Morice werden veroordeeld voor laster en eerroof, in toepassing van de Franse perswet van 1881. Het Hof van Cassatie bevestigde de veroordelingen. De Franse rechtscolleges waren van oordeel dat het om zeer ernstige beschuldigingen ging waarvoor geen voldoende feitelijk bewijs geleverd kon worden. Morice kon zich evenmin beroepen op de immuniteit als advocaat, omdat de lasterlijke uitingen niet waren uitgesproken tijdens een terechtzitting.

Het EHRM werd gevraagd om de veroordeling van Morice tegen het licht te houden van artikel 10 EVRM (recht op vrijheid van meningsuiting). Het Hof was van oordeel dat Morice "*a adopté un comportement dépassant les limites que les avocats doivent respecter dans la critique publique de la justice"*. De geldboete van 4.000 euro en de aanvullende schadevergoeding van 7.500 euro die Morice moest betalen, achtte het Hof, gelet op de appreciatiemarge van de veroordelende staat, niet excessief. De vijfde sectie van het Hof kwam in een arrest van 11 juli 2013 tot de conclusie dat van schending van artikel 10 EVRM geen sprake was. Dit arrest werd evenwel niet definitief, want op 9 december 2013 verwees het panel van vijf rechters, op verzoek van Morice, de zaak naar de Grote Kamer van Hof, in toepassing van artikel 43 EVRM.

Op 23 april 2015 kwam de Grote Kamer, unaniem, tot een heel andere conclusie. De Grote Kamer concludeert dat de veroordeling van Morice neerkomt op een overheidsinmenging in de expressievrijheid die niet nodig is in een democratische samenleving en daarom een inbreuk is op artikel 10 EVRM.

[5] Voor een situering, zie D. VOORHOOF, " Vrijheid van meningsuiting en drukpersvrijheid", in J. VANDE LANOTTE, G. GOEDERTIER, Y. HAECK, J. GOOSSENS en T. DE PELSEMAEKER, *Belgisch Publiek Recht, Deel I,* Brugge, Die Keure, 2015, 577-613.

Dat journalisten soms flink mogen uithalen naar rechters heeft het Hof eerder al aanvaard, onder andere in de zaak *De Haes en Gijsels t. België*[6]. De 17 rechters van de Grote Kamer van het EHRM, die zelf ook regelmatig een flinke portie kritiek in de media en rechtsleer te verwerken krijgen, hebben nu duidelijk gemaakt dat ook hun collega-rechters in de 47 lidstaten van het EVRM bestand moeten zijn tegen soms ernstige aantijgingen in de media[7], ook wanneer die geuit worden door advocaten[8].

Basisvoorwaarde is wel dat die kritiek verband houdt met een zaak van maatschappelijk belang en de aantijgingen of kritiek een voldoende feitelijke basis hebben. De Grote Kamer gaat met dit arrest diametraal in tegen de bevindingen van het kamerarrest van de vijfde sectie, dat duidelijk meer de klemtoon legde op het bewaren van het vertrouwen van het publiek in justitie, de te felle persoonlijke uitval door Morice tegen de twee onderzoeksrechters en het speculatief karakter van de zeer ernstige aantijgingen.

Met het arrest van 23 april 2015 kiest het EHRM duidelijk voor een ruimer draagvlak voor de expressievrijheid van advocaten, met oog voor hun professionele rol in de samenleving en het belang van hun stem in het publieke debat, zeker over aangelegenheden die verband houden met justitie(beleid) en belangrijke rechtszaken. Ook al worden dan soms, onvermijdelijk, individuele rechters in het vizier genomen.

Het arrest

Het Hof neemt andermaal een aanloop met verwijzing naar de basisprincipes uit eerdere rechtspraak betreffende expressievrijheid van advocaten. In algemene termen laat het Hof noteren dat het uitgangspunt is en blijft dat ook advocaten kritiek moeten kunnen uiten op leden van rechterlijke macht . Daarom moeten de overheden er zich zoveel mogelijk van onthouden om via strafvervolging beperkingen op de leggen aan het recht op expressievrijheid van advocaten:

"Generally speaking, while it is legitimate for the institutions of the State, as guarantors of the institutional public order, to be protected by the competent authorities, the dominant position occupied by those institutions requires the authorities to display restraint in resorting to criminal proceedings" (§ 127).

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[6] EHRM 24 februari 1997, *De Haes en Gijsels t. België*; D. VOORHOOF, "De grenzen aan de kritiek op (leden van) de rechterlijke macht. Enkele beschouwingen bij de vonnissen inzake de magistraten W., X., Y. en Z. tegen De Morgen en Humo", *Recht en Kritiek*, 1989/3, 280-304; D. VOORHOOF, "Media en gerechtsverslaggeving. De bescherming van de eer en goede naam van magistraten en het waarborgen van het gezag en de onpartijdigheid van de rechterlijke macht als beperking op de vrijheid van expressie en informatie", *Panopticon*, 1989/3, 217-237; D. VOORHOOF, "België veroordeeld wegens inbreuk op artikel 10 van het EVRM. Situering EHRM 24 februari 1997", *Auteurs & Media* 1997/2, 196-197 en D. VOORHOOF, "Het Humo-arrest, scherpe kritiek op rechters geoorloofd", *Mediaforum* 1997/4, 68-69. Zie ook D. VOORHOOF, "Criticising Judges in Belgium", in M. ADDO (ed.), *Freedom of Expression and the Criticism of Judges. A comparative study of European legal standards*, Aldershot, Ashgate Publishing Limited, 2000, 89-111.

[7] Zie eerder ook de arresten van het EHRM in *Amihalachioaie t. Moldavië, Kyprianou t. Cyprus* (Grote Kamer); *Foglia t. Zwitserland*; *Kabanov t. Rusland; Gouveia Gomes Fernandes en Freitas e Costa t. Portugal; Mor t. Frankrijk; Ümit Bilgiç t. Turkije* en *Mustafa Erdoğan t. Turkije*. Vgl. *Barfod t. Denmarken, Prager en Oberschlick t. Oostenrijk; Schöpfer t. Zwitserland; Hrico t. Slovakije; Perna t. Italië (Grote Kamer); Cumpănă en Mazăre t. Roemenië (Grote Kamer)* en *Karpetas t. Griekenland.*

[8] Voor een overzicht van de EHRM-rechtspraak betreffende het recht op expressievrijheid van advocaten, zie I. HØEDT-RASMUSSEN, *Developing Identity for Lawyers – Towards Sustainable Lawyering*, CBS, Copenhagen 2014, 80-91, http://openarchive.cbs.dk/handle/10398/8908.

Limieten tegen ongefundeerde uitvallen tegen rechters zijn er zeker wel:

"Questions concerning the functioning of the justice system, an institution that is essential for any democratic society, fall within the public interest. In this connection, regard must be had to the special role of the judiciary in society. As the guarantor of justice, a fundamental value in a law-governed State, it must enjoy public confidence if it is to be successful in carrying out its duties. It may therefore prove necessary to protect such confidence against gravely damaging attacks that are essentially unfounded, especially in view of the fact that judges who have been criticised are subject to a duty of discretion that precludes them from replying" (§ 128).

Die beperkingen mogen evenwel niet van aard zijn het basisrecht op expressievrijheid in de praktijk te ondergraven. Ook rechters maken immers zelf deel uit van de staatsinstellingen die voorwerp van kritiek moeten kunnen zijn:

"Nevertheless – save in the case of gravely damaging attacks that are essentially unfounded – bearing in mind that judges form part of a fundamental institution of the State, they may as such be subject to personal criticism within the permissible limits, and not only in a theoretical and general manner" (§§ 130-131).

Het Hof verduidelijkt dat de limieten van kritiek op magistraten, geuit door advocaten in de media, vertolkt zijn in een reeks deontologische voorschriften:

"Consequently, freedom of expression is applicable also to lawyers. It encompasses not only the substance of the ideas and information expressed but also the form in which they are conveyed (..). Lawyers are thus entitled, in particular, to comment in public on the administration of justice, provided that their criticism does not overstep certain bounds (..). Those bounds lie in the usual restrictions on the conduct of members of the Bar (..), as reflected in the ten basic principles enumerated by the CCBE for European lawyers, with their particular reference to "dignity", "honour" and "integrity" and to "respect for ... the fair administration of justice"[9] (§ 134).

Om alle aspecten van de zaak te kunnen overzien beoordeelt het Hof vervolgens de zaak vanuit vijf verschillende criteria. Het analyseert (a) de rol van Morice als advocaat, (b) de bijdrage van zijn interview in *Le Monde* aan een debat van publiek belang, (c) de aard van de aantijgingen en commentaar in het gewraakte artikel, (d) de overige specifieke kenmerken van de zaak en (e) de aard en impact van de opgelegde sancties.

Het Hof wijst er op dat een onderscheid gemaakt moet worden tussen kritiek in de rechtszaal en kritiek op rechters via de media. Scherpe kritiek op rechters in de rechtszaal is acceptabel, zeker als zo'n tussenkomst van de advocaat de rechten van de cliënt beoogt te vrijwaren. In de zaak Morice gaat het evenwel om een heel andere context, buiten de rechtszaal en zijn commentaar in *Le Monde* draagt niet bij tot de bescherming van de belangen van zijn cliënt. Het Hof gaat ook niet akkoord met de stelling als zou een advocaat, net zoals een journalist, de taak hebben om het publiek te informeren over het reilen en zeilen bij justitie. Door zijn relatie met zowel justitie als met zijn cliënt heeft de advocaat een heel andere rol en positie:

[9] In § 58 van het arrest verwijst het Hof naar de CCBE Code of Conduct en het CCBE-Charter, beide opgesteld door de Council of Bars and Law Societies.

"Journalists have the task of imparting, in conformity with their duties and responsibilities, information and ideas on all matters of public interest, including those relating to the administration of justice. Lawyers, for their part, are protagonists in the justice system, directly involved in its functioning and in the defence of a party. They cannot therefore be equated with an external witnesses whose task it is to inform the public" (§ 148).

Dat Morice met zijn commentaar in *Le Monde* heeft bijgedragen tot een fel debat in een zeer belangrijke rechtszaak staat voor de Grote Kamer evenwel buiten kijf. Dat heeft tot gevolg dat het EHRM geen te brede appreciatiemarge moet laten aan de nationale rechtscolleges bij de beoordeling van de feiten en het Hof dus tot een strikte monitoring kan overgaan om te oordelen of de inmenging in de expressievrijheid gerechtvaardigd was. Cruciaal is de vaststelling door het Hof dat de opmerkingen van Morice eerder als waardeoordelen te beschouwen zijn en neerkomen op een algemene kritiek op het optreden door de twee onderzoeksrechters.

Het Hof verwerpt de vaststellingen door de Franse rechtscolleges als zouden de commentaren van Morice een onvoldoende feitelijke basis hebben en een onbetamelijke aanval zijn op de eer en integriteit van de twee rechters. Overigens kan een advocaat niet aansprakelijk worden gesteld voor bepaalde beweringen of stellingnames van de journalist die het artikel schreef.

Het Hof vindt ook niet dat de verklaringen van Morice louter ingegeven waren door een persoonlijke vete met één van de twee onderzoeksrechters. Het doel van Morice was om ernstige gebreken bij justitie in deze zaak bloot te leggen en zijn publieke verklaringen waren niet van aard het vertrouwen of het gezag van justitie aan te tasten.

Het Hof wijst er wel op dat een advocaat zijn gelijk moet proberen halen via procedures en rechtsmiddelen, en zijn proces niet in de media moet voeren. Expliciet erkent het Hof dat er wel heel specifieke omstandigheden kunnen zijn die de advocaat het recht geven zich via de media te uiten. Het beklemtoont dat een advocaat de aandacht van het publiek moet kunnen vestigen op eventuele disfuncties bij justitie, constructieve kritiek waarmee justitie dan haar voordeel kan doen:

"The key question in the statements concerned the functioning of a judicial investigation, which was a matter of public interest, thus leaving little room for restrictions on freedom of expression. In addition, a lawyer should be able to draw the public's attention to potential shortcomings in the justice system; the judiciary may benefit from constructive criticism" (§ 167).

Het waarborgen van het gezag van de rechterlijke macht kan evenwel geen argument zijn om de expressievrijheid van advocaten te verregaand in te perken. Daardoor is er dus ruimte voor commentaar en kritiek door advocaten op het functioneren van justitie, al moet dit wel zelf blijk geven van het nodige respect voor het justitiesysteem waarin rechters en advocaten een cruciale rol spelen:

"In any event, the proper functioning of the courts would not be possible without relations based on consideration and mutual respect between the various protagonists in the justice system, at the forefront of which are judges and lawyers" (§ 170).

Het Hof laat noteren dat de kritiek die Morice formuleerde in *Le Monde* aan de voorwaarde van "*mutual respect*" tegemoet komt, voldoende gefundeerd is en zich duidelijk situeerde in

een ruimer publiek debat over het functioneren van justitie in een heel belangrijke zaak:

"The Court is of the view that the impugned remarks by the applicant did not constitute gravely damaging and essentially unfounded attacks on the action of the courts, but criticisms levelled at Judges M. and L.L. as part of a debate on a matter of public interest concerning the functioning of the justice system, and in the context of a case which had received wide media coverage from the outset. While those remarks could admittedly be regarded as harsh, they nevertheless constituted value judgments with a sufficient "factual basis"" (§ 174).

De strafrechtelijke veroordeling van Morice en de schadevergoeding die hem werd opgelegd acht de Grote Kamer een onbetamelijke inmenging in de expressievrijheid van de advocaat, met een verkillend effect :

"The Court reiterates that even when the sanction is the lightest possible, such as a guilty verdict with a discharge in respect of the criminal sentence and an award of only a "token euro" in damages (..), it nevertheless constitutes a criminal sanction and, in any event, that fact cannot suffice, in itself, to justify the interference with the applicant's freedom of expression (..). The Court has emphasised on many occasions that interference with freedom of expression may have a chilling effect on the exercise of that freedom (..) - a risk that the relatively moderate nature of a fine would not suffice to negate (..). It should also be noted that imposing a sanction on a lawyer may have repercussions that are direct (disciplinary proceedings) or indirect (in terms, for example, of their image or the confidence placed in them by the public and their clients). The Court would, moreover, reiterate that the dominant position of the State institutions requires the authorities to show restraint in resorting to criminal proceedings (..). The Court observes, however, that in the present case the applicant's punishment was not confined to a criminal conviction: the sanction imposed on him was not the "lightest possible", but was, on the contrary, of some significance, and his status as a lawyer was even relied upon to justify greater severity" (§ 176).

Het Hof concludeert dat de veroordeling van Morice neerkomt op een ontoelaatbare overheidsinmenging die niet nodig is in een democratische samenleving en daarom in strijd is met artikel 10 EVRM.

Het EHRM-arrest en de OVB-codex in verband met advocaat en media

De Grote Kamer van het Hof laat er geen twijfel over bestaan dat in het algemeen aan advocaten niet het recht kan ontzegd worden om commentaar te geven in de media over rechtszaken waarin ze zelf als raadsman betrokken zijn. Met verwijzing naar eerdere rechtspraak (*Mor t. Frankrijk,* § 59) brengt het Hof in herinnering:

"*that the defence of a client may be pursued by means of an appearance on the television news or a statement in the press, and through such channels the lawyer may inform the public about shortcomings that are likely to undermine pre-trial proceedings*" (§ 138).

In *Morice t. Frankrijk* gaat het Hof nog een stap verder. Het erkent dat zelfs wanneer de commentaar niet de concrete rechtsbelangen van de cliënt op het oog heeft, maar een thematiek betreft van algemeen belang, ook dan de advocaat, onder bepaalde voorwaarden (zie CCBE-code, cfr. *supra),* scherpe kritiek mag uiten, zelfs op een manier die een aantasting kan inhouden van de eer en goede naam van de behandelende magistraten in een concrete zaak. Het Grote Kamer-arrest benadrukt ook dat

"while it may prove necessary to protect the judiciary against gravely damaging attacks that are essentially unfounded, bearing in mind that judges are prevented from reacting by their duty of discretion (..), this cannot have the effect of prohibiting individuals from expressing their views, through value judgments with a sufficient factual basis, on matters of public interest related to the functioning of the justice system, or of banning any criticism of the latter" (§ 168).

Hoewel het arrest in de zaak *Morice t. Frankrijk* de strafrechtelijke veroordeling betreft van een advocaat wegens lasterlijke uitingen in de media, in Frankrijk, heeft het arrest ook repercussies voor de relatie tussen media, advocaten en justitie in België, en meer bepaald in Vlaanderen. De Codex Deontologie voor Advocaten van de OVB (Orde van Vlaamse Balies)[10] bevat immers een bepaling die best grondig tegen het licht van dit Grote Kamer-arrest wordt gehouden. Meer bepaald stipuleert de OVB-codex over advocaat en media in Afdeling III.5.2. (Media),[11] in artikel 3.1. het volgende:

"*De advocaat voert het proces niet in de media en onthoudt zich van alle commentaren, behalve indien, als gevolg van mededelingen in de media van het openbaar ministerie, de persrechter of derden in de media, de wapengelijkheid een reactie noodzakelijk maakt*".

De tuchtrechtelijk gesanctioneerde verplichting voor de advocaat om zich "*van alle commentaren*" in de media te onthouden is in strijd met de basisprincipes die het EHRM vooropstelt in toepassing van artikel 10 EVRM. Dat er enkel een recht op commentaar voor de advocaat is als reactie op eerdere mededelingen via de media door het openbaar ministerie, een persrechter of derden teneinde de wapengelijkheid (in de media?) te waarborgen, is een te verregaande vernauwing en uitholling van het aan de advocaat gewaarborgde recht op expressievrijheid in toepassing van artikel 10 EVRM[12]. Uit niets blijkt immers dat dit recht pas in subsidiaire orde zou gelden, nl. enkel als reactie op eerdere mededelingen in de media die het recht op eerlijk proces van de cliënt bedreigen. Het arrest in de zaak *Morice t. Frankrijk* maakt duidelijk dat er ook daarbuiten omstandigheden kunnen zijn die het spreekrecht van de advocaten in toepassing van artikel 10 EVRM waarborgen.

Dat de advocaat er zich in principe moet van onthouden het proces in de media te voeren, is overigens ook een overweging van het EHRM: *"the Court takes the view that the defence of a client by his lawyer must be conducted not in the media, save in very specific circumstances"* (§ 171). Het Hof laat evenwel expliciet een opening ("*in very specific circumstances*"), terwijl de formulering van artikel 3.1. in de OVB-codex een absolute strekking heeft en commentaar in de media vanwege een advocaat reduceert tot een reactiemogelijkheid naar aanleiding van

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[10] De Codex integreert het OVB-Reglement over advocaat en media van 18 december 2013, *B.S.* 16 januari 2014: OVB, *Codex Deontologie voor Advocaten*, *B.S.* 30 september 2014. Merk op dat ook (milde) tuchtsancties opgelegd door de tuchtoverheden binnen de advocatuur, als een ongeoorloofde inmenging in de expressievrijheid van de advocaat, een schending van artikel 10 (of 11) EVRM kunnen opleveren: zie *Ezelin t. Frankrijk, Steur t. Nederland, Veraart t. Nederland* en *Kabanov t. Rusland.* Zie ook D. VOORHOOF, De vrijheid van meningsuiting van de advocaat. Noot onder Cass. 4 juni 1987, *T.G.R. (Tijdschrift voor Gentse Rechtspraak)* 1987/3, 65-67.

[11] Zie ook J. STEVENS, *Advocatuur. Regels & Deontologie*, Wolters Kluwer, 2015, 573-579.

[12] Zie ook art. 28 *quinquies*, § 4 en art. 57 § 4 Sv. dat de advocaat het recht heeft om het onderzoeksgeheim ondergeschikt te maken aan de persvoorlichting in het openbaar belang: de advocaat kan "*indien het belang van zijn cliënt het vereist*" aan de media gegevens verstrekken in verband met een opsporingsonderzoek of een gerechtelijk onderzoek waarin zijn cliënt betrokken is. De advocaat moet hierbij waken over het vermoeden van onschuld, de rechten van de verdediging van de verdachte, het slachtoffer en derden, het privéleven en de waardigheid van personen en hoe dan ook "*de regels van het beroep"* respecteren.

mediaverklaringen door OM, persrechters of derden, en daardoor in zijn toepassing in strijd komt met artikel 10 EVRM. Het artikel 3.1. van de OVB-codex lijkt overigens ook in te gaan tegen het in artikel 1.1. geponeerde algemene beginsel dat de advocaat "*in alle omstandigheden (..) in de media, publiek gebruik (mag) maken van zijn titel en van zijn recht op vrije meningsuiting*". Ook artikel III.5.2.4 van de Codex dat ongeclausuleerd bepaalt dat nadat de advocaat is opgevolgd, hij zich "*van elke commentaar in de media*" dient te onthouden, kan in bepaalde "*very specific circumstances*" op gespannen voet komen te staan met artikel 10 EVRM. Het is inderdaad "*niet omdat hij behoort tot een gereglementeerd beroep met eigen tuchtorganen, dat licht mag worden omgesprongen met een fundamenteel recht als de vrijheid van meningsuiting van de advocaat*" . Advocaten moeten juist door de functie die ze in de maatschappij vervullen "*in de uitoefening van hun beroep genieten van een extra ruime vrijheid van meningsuiting binnen en buiten de rechtbank"*[13].

Artikel III.5.2.2 en III.5.2.3 van de OVB-codex kunnen in het licht van het EHRM-arrest in de zaak *Morice t. Frankrijk* best niet te restrictief worden geïnterpreteerd. Artikel III.5.2.2. viseert de mogelijkheid tot het geven van commentaar in de media door de advocaat "*over zaken waarin hijzelf niet betrokken was of is*", maar laat toch de mogelijkheid open om daarnaast via de media inlichtingen, toelichtingen en uiteenzettingen te verschaffen "*over maatschappelijke evenementen en vraagstukken in het openbaar*", zonder dat daaraan de voorwaarde van niet-betrokkenheid is verbonden. Op basis van het arrest van 23 april 2015 moet de (uitzonderlijke) mogelijkheid van commentaar in de media inderdaad mogelijk blijven, ook over een zaak waarin de advocaat zelf betrokken is[14]. Het is ook zoals Jo Stevens schrijft in de nieuwe editie van *Advocatuur. Regels & Deontologie* : hoe zouden advocaten er in slagen vertrouwen te wekken, "*wanneer ze zelf niet van een minimale transparantie blijk zouden mogen geven*"[15].

De eis, "*zo mogelijk*", om vooraf de stafhouder te raadplegen, zijn standpunt in te winnen en zijn richtlijnen te volgen (art. 3.5 OVB-codex) kan eveneens strijd opleveren met artikel 10 EVRM, aangezien een gerechtvaardigde commentaar door een advocaat in de media maar moeilijk preventief afhankelijk kan worden gemaakt van een consultatieplicht bij de stafhouder, laat staan dat het aan de stafhouder zou toekomen invulling te geven aan de inhoud van de commentaar van de advocaat in kwestie. Cruciaal blijft ook de overweging van het Hof in *Morice t. Frankrijk*: "(..) *a lawyer should be able to draw the public's attention to potential shortcomings in the justice system; the judiciary may benefit from constructive criticism"*. Dit recht van de advocaat kan niet afhankelijk worden gemaakt van een voorafgaande melding aan de stafhouder of diens inhoudelijke directieven[16]. Een stafhouder kan ook geen "*mediastilte"*, of een "*spreekverbod"* opleggen[17].

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[13] Zie ook J. STEVENS, *Advocatuur. Regels & Deontologie, o.c*. 640 (nr. 890).

[14] De tuchtrechtspraak betreffende advocaten blijkt de lat hoger te leggen, namelijk door de advocaten enkel toe te laten "zich in het algemeen uit te spreken over de eventuele slechte werking van de rechterlijke macht, disfuncties aan de kaak te stellen en/of de inhoud van gerechtelijke beslissingen gemotiveerd te bekritiseren" en "wetenschappelijk/juridische kritiek (te) leveren op gerechtelijke uitspraken". De "plicht tot kiesheid" verzet er zich er evenwel tegen dat de advocaat dit zou doen "met betrekking tot een uitspraak waarin hijzelf of zijzelf als raadsman van een betrokken partij is opgetreden" : Tuchtraad voor advocaten van de ordes van het rechtsgebied van het Hof van Beroep te Antwerpen van 27 juni 2013, TAA/SH/0139/2013, bevestigd door Nederlandstalige Tuchtraad van Beroep voor Advocaten, Eerste Kamer, 10 December 2013, dossier nr. TB-0084-2013.

[15] J. STEVENS, *Advocatuur. Regels & Deontologie, o.c*., 640 (nr. 890).

[16] In de beslissing van de Nederlandstalige Tuchtraad van Beroep voor Advocaten, Eerste Kamer, 10 December 2013, dossier nr. TB-0084-2013, is de stelling bevestigd dat wanneer een incident ontstaat met een magistraat, de advocaat zich tot zijn Stafhouder dient te wenden. In toepassing van art. 429 Ger.W. heeft de eerbied die een advocaat aan het gerecht en de openbare overheid verschuldigd is, tot gevolg dat de advocaat "geen blijken van afkeuring van een magistraat of van diens beslissing kenbaar maakt". De beslissing van de Tuchtraad van Beroep

Voor het overige valt overigens wel op dat de andere bepalingen van de OVB-codex inzake "Media"[18] goed aansluiten bij een reeks principiële overwegingen en concrete richtlijnen die de Grote Kamer meegaf in het arrest van 23 april 2015, zoals de verwijzingen in artikel III.5.2.1. naar de principes van waardigheid, rechtschapenheid en kiesheid, de centrale rol van de advocaat in de rechtsbedeling (art. 1.2 en 1.3.), het respect voor loyaliteit (art. 1.5.), de plicht correcte informatie te verschaffen, op een serene manier (art. 1.6.), en het waken over de waardigheid en de regels van het beroep (art. 1.7). Ook benadrukt het OVB-reglement terecht dat de advocaat verantwoordelijk is voor zijn mededelingen in de media en in die context niet beschikt over de immuniteit van het pleidooi[19] (art. 1.10).

Het arrest van de Grote Kamer in de zaak *Morice t. Frankrijk* zal ongetwijfeld onder magistraten en binnen de advocatuur nog voorwerp zijn van grondige analyse en discussie. Hoewel het arrest van 23 april 2015 enkele duidelijke principes vooropzet, moet rekening worden gehouden met de heel specifieke context, de aard van de kritiek of de commentaar in de media, en de concrete omstandigheden waarin deze zaak zich situeerde. In andere omstandigheden, tegen de achtergrond van een andere feitelijke context zal de toepassing van artikel 10 EVRM minder verregaande garanties bieden voor de expressievrijheid van de advocaat bij het uiten van kritiek op leden van de magistratuur, zoals o.a. ook onlangs bleek in het arrest in de zaak *Peruzzi t. Italië*[20]. Het Hof vindt aansluiting bij de benadering in de zaak Morice voor wat één concrete aantijging betreft, maar is van oordeel dat een andere lasterlijke aantijging die publiek was geuit door een advocaat aan het adres van een magistraat niet ten volle aanspraak kan maken op de bescherming van artikel 10 EVRM. Het Hof concludeert, met een 5/2 stemverhouding:

" Eu égard à ce qui précède, la Cour estime que la condamnation du requérant pour les propos diffamatoires contenus dans sa lettre circulaire et la peine qui lui a été infligée, n'étaient pas disproportionnées aux buts légitimes visés et que les motifs avancés par les juridictions nationales étaient suffisants et pertinents pour justifier pareilles mesures. L'ingérence dans le droit du requérant à la liberté d'expression pouvait raisonnablement passer pour « nécessaire dans une société démocratique » afin de protéger la réputation d'autrui et pour garantir l'autorité et l'impartialité du pouvoir judiciaire au sens de l'article 10 § 2. (..). Il s'ensuit qu'il n'y a pas eu violation de cette disposition" (§§ 66-67).

Opmerkelijk is dat het Hof in *Peruzzi t. Italië* de diverse criteria voor de grondige analyse in de zaak *Morice t. Frankrijk* niet herneemt, minder gewicht lijkt te geven aan het ernstig karakter van de zaak en de "*potential shortcomings in the justice system*" en voorts ook aan de strafrechtelijke veroordeling van de advocaat in kwestie minder negatieve consequenties

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bevestigt ook de overweging van de Tuchtraad van de ordes van het rechtsgebied van het Hof van Beroep te Antwerpen van 27 juni 2013, volgens dewelke de advocaat "als actor van de rechtspleging (..) wel publiek kan verklaren dat hij het met een beslissing waarin hijzelf als advocaat betrokken was, oneens is maar (hij) dient in dat geval zijn concrete bezwaren te laten gelden via de daartoe geëigende (beroeps)procedures of andere kanalen en het juridisch debat niet in de openbaarheid te voeren" (Tuchtraad voor advocaten van de ordes van het rechtsgebied van het Hof van Beroep te Antwerpen van 27 juni 2013, TAA/SH/0139/2013). Merk op dat ook (milde) tuchtsancties opgelegd door de tuchtoverheden binnen de advocatuur, als een ongeoorloofde inmenging in de expressievrijheid van de advocaat, een schending van artikel 10 (of 11) EVRM kunnen opleveren: zie *Ezelin t. Frankrijk, Steur t. Nederland, Veraart t. Nederland* en *Kabanov t. Rusland.*

[17] J. STEVENS, *Advocatuur. Regels & Deontologie*, *o.c.*, 579 (nr. 794).

[18] Zie ook J. STEVENS, *Advocatuur. Regels & Deontologie*, *o.c.*, 573-579.

[19] Zie ook art. 452 Sw. en art. 444-445 Ger. W. Zie hierover ook J. STEVENS, *Advocatuur. Regels & Deontologie*, *o.c.*, 575 (nr. 789).

[20] EHRM 30 juni 2015, *Peruzzi t. Italië.*

verbindt. Een eerste commentaar beoordeelde dit arrest als "*a surprising and retrograde one in the light of the recent Grand Chamber decision in Morice v France*"[21]. Opmerkelijk is ook de afsluitende overweging van de *dissenting opinion* bij het arrest *Peruzzi t. Italië.* De *dissenting judges* Wojtyczek en Grosev betwijfelen terecht of de strafvervolging en het opleggen van een forse schadevergoeding naar aanleiding van de geuitte kritiek door een advocaat op een rechter, daadwerkelijk een bijdrage kunnen leveren aan het vertrouwen van het publiek in justitie en het gezag van de rechterlijke macht: "*La majorité justifie l'ingérence dans la liberté d'expression du requérant non seulement par le besoin de protéger la réputation d'une personne, mais aussi par la nécessité de garantir l'autorité de la justice. Dans cette optique, l'ingérence en considération devait contribuer à la protection de l'autorité de la justice en Italie. À notre avis, sur ce terrain, étant donné les spécificités de l'affaire exposées ci-dessus, l'ingérence dans la liberté d'expression du requérant risque de produire l'effet opposé à celui escompté* ".

Het arrest van 30 juni 2015 in de zaak *Peruzzi t. Italië* is op het ogenblik van het afsluiten van de eindredactie van deze noot evenwel nog niet definitief. Het is nog even afwachten dus of een mogelijke verwijzing naar de Grote Kamer, zoals in *Morice t. Frankrijk*, een andere kijk geeft op de toepassing van artikel 10 EVRM en de expressievrijheid van de advocaat bij het uiten van kritiek op een lid van de rechterlijke macht.

Dirk VOORHOOF
Hoogleraar mediarecht en auteursrecht Universiteit Gent en Universiteit van Kopenhagen

Inger HØEDT-RASMUSSEN
Docent Europees recht en administratief recht Universiteit van Kopenhagen.

De auteurs publiceerden samen *De jurist in actie, identiteit, retoriek en overtuigingskracht*, Brugge, Die Keure, 2013.

[21] J. WILLIAMS, "Case Law. Strasbourg: *Peruzzi v. Italy*. Criminal defamation is OK as long as it concerns judges", *Inforrm's Blog* 18 juli 2015, *https://inforrm.wordpress.com/2015/07/18/case-law-strasbourg-peruzzi-v-italy-criminal-defamation-is-ok-as-long-as-it-concerns-judges-joseph-williams/*