

## “A great victory for the overall profession of lawyers”

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The Grand Chamber in its judgment of 23 April 2015 in the case of *Morice v. France* has overruled an earlier finding of non-violation of the right to freedom of expression of a lawyer (Chamber judgment Fifth Section, 11 July 2013). The Grand Chamber found that the applicant lawyer in the newspaper *Le Monde* had expressed value judgments with a sufficient factual basis and that his remarks concerning a matter of public interest had not exceeded the limits of the right to freedom of expression. Therefore it considered the lawyer's conviction for defamation of two investigative judges as a breach of Article 10 of the Convention. The Grand Chamber's judgment defines in an interesting way the role and responsibilities of lawyers in relation to society and in relation to their clients and to the administration of justice. It emphasises that lawyers, although being in a role that differs from the role of journalists, should be able to draw the public's attention to potential shortcomings in the justice system. In a first reaction in *Le Monde*, Morice (the applicant) called the judgment “une grande victoire pour l'ensemble de la profession des avocats”.

### The criminal conviction of Morice and the Chamber's judgment

The case deals with the criminal conviction, with an order to pay damages and costs, on account of the defamatory remarks concerning the proceedings in a high-profile case in which Morice was acting as a lawyer. The remarks had been published in an article in the daily newspaper *Le Monde*, which contained the text of a letter sent by Morice to the Minister of Justice seeking an administrative investigation against two investigative judges. According to the French courts the statements made by Morice were to be considered defamatory, tarnishing the good name and reputation and casting doubts on the integrity of the two judges at issue. In its judgment of 11 July 2013 the Court's Chamber found the criticism expressed by Morice particularly harsh and the accusations very serious, and it considered that Morice had overstepped the limits that lawyers had to observe in publicly criticising the justice system.

On request of Morice, the case was referred to the Grand Chamber. The Council of Bars and Law Societies of Europe (CCBE), the Paris Bar Association, the French National Bar Council and the Conference of Chairmen of French Bars were given leave to intervene as third parties in the written procedure before the Grand Chamber. They argued in favour of the recognition of a robust right of freedom of expression when criticising failures in the administration of justice. They also argued that like journalists, lawyers are “watchdogs of democracy”.

### The Grand Chamber's judgment

After reiterating some of the general principles developed in the Court's jurisprudence, the judgment notices that the specific status of lawyers gives them a central position in the administration of justice as intermediaries between the public and the courts. Therefore lawyers 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. This however does not exclude lawyers from the right to freedom of expression, 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, with their particular reference to "dignity", "honour" and "integrity" and to "respect for ... the fair administration of justice" (*Charter of Core Principles of the European Legal Profession*, CCBE, 24 November 2006).

The Court also states that 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. Therefore, it is only in exceptional cases that a restriction – even by way of a lenient criminal penalty – of a defence counsel's freedom of expression can be accepted as necessary in a democratic society. In other cases, the use of a tone that was not insulting but caustic, or even sarcastic, in critical remarks about judges was regarded as compatible with Article 10 of the Convention. It must be ensured however that the criticism in such a context is not misleading or a gratuitous personal attack on members of the judiciary.

The judgment analyses more concretely

- (a) the applicant's status as a lawyer,
- (b) the contribution to a debate on a matter of public interest,
- (c) the nature of the impugned remarks,
- (d) the specific circumstances of the case and
- (e) the sanctions imposed.

As regards *(a) the applicant's status as a lawyer*, the Court reiterates its case-law to the effect that a distinction had to be drawn depending on whether the lawyer was speaking inside or outside the courtroom. Remarks made in the courtroom remained there and thus warranted a high degree of tolerance to criticism, especially 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. In the present case however the Court fails to see how Morice's statements could have directly contributed to his task of defending his client.

The Court also takes the view, contrary to the argument of the CCBE, that lawyers cannot be equated with journalists. It states that 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" (§ 148).*

Regarding *(b) the contribution to a debate on a matter of public interest*, the Court takes the view that the impugned remarks published in *Le Monde* concerned a high-profile case that created discussion about the functioning of the judiciary. As such a context of a debate on a matter of public interest calls for a high level of protection of freedom of expression, only a

particularly narrow margin of appreciation is left to the domestic authorities. This finding at the same time legitimates a strict scrutiny by the European Court whether the interference at issue can be justified as being necessary in a democratic society.

As regard **(c) *the nature of the impugned remarks*** the Court is of the opinion that the remarks were more value judgments than pure statements of fact, as they reflected mainly an overall assessment of the conduct of the investigating judges in the course of the investigation. Furthermore the remarks had a sufficient factual basis and could not be regarded as misleading or as a gratuitous attack on the reputation or the integrity of the two investigative judges.

With regard **(d) *the specific circumstances of the case*** the Grand Chamber finds that significant weight is to be attached to the whole context and the “overall background” of the 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. Furthermore the Grand Chamber, in contrast with the findings by the French courts, considers that Morice’s statements could not be reduced to the mere expression of personal animosity, as their aim was to reveal “serious shortcomings in the justice system” (§ 166).

The Court went on emphasising that:

*“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).

With regard to the interest of maintaining the authority of the judiciary, the Grand Chamber considers that this cannot justify an unlimited restriction on the right to freedom of expression:

*“(..) 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).

Although the defence of a client by his lawyer must be conducted not in the media, but in the courts of competent jurisdiction, involving the use of any available remedies, the Grand Chamber accepts that there might be “very specific circumstances” justifying a lawyer making public statements in the media, such as in the case at issue. The Court finds that Morice’s statements were not capable of undermining the proper conduct of the judicial proceedings, and that his conviction could not serve to maintain the authority of the judiciary.

Finally with regard to **(e) *the imposed sanction***, the Court refers to its findings on many occasions that interference with freedom of expression may have a chilling effect on the exercise of that freedom, especially in cases of criminal defamation.

In view of the foregoing, the Court finds that the judgment against Morice for 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. The Grand Chamber reaches the conclusion, unanimously, that there has been a violation of Article 10 of the Convention.

### *Comments*

In several cases the European Court has dealt with interferences in the right to freedom of expression because of defamation of members of the judiciary. In some cases which concerned defamatory criticism of judges (*Barfod v. Denmark, Prager and Oberschlick v. Austria, Schöpfer v. Switzerland, Hrico v. Slovakia, Perna v. Italy* (Grand Chamber) and *Karpetas v. Greece*), the European Court has shown reluctance in finding a violation of Article 10 of the Convention, especially considering the maintenance of the public's confidence in the authority of the judiciary (see also M. Addo, *Freedom of Expression and the Criticism of Judges. A comparative study of European legal standards*, Aldershot, Ashgate Publishing Limited, 2000). The chamber judgment's message in the case of *Morice v. France* (11 July 2013) confirmed this approach.

In other cases however the European Court gave priority to the right to freedom of expression of lawyers (*Kyprianou v. Cyprus* (Grand Chamber); *Foglia v. Switzerland, Kabanov v. Russia; Gouveia Gomes Fernandes and Freitas e Costa v. Portugal; Mor v. France* and *Ümit Bilgiç v. Turkey*). By emphasizing the importance of the contribution to a debate on a matter of public interest related to issues of the administration of justice, the Grand Chamber has now amplified the right of lawyers to be able to draw the public's attention to certain problems related to the functioning of the justice system. According to the Grand Chamber the judiciary may even benefit from "constructive criticism", and therefore critical statements and value judgments about the judiciary, with a sufficient factual basis, are to be protected under Article 10 of the Convention. This also applies when harsh criticism and allegations cast doubts on the integrity of judges.

It is remarkable that the Grand Chamber does not situate this case in the framework of a balancing test between the lawyer's freedom of expression (Art. 10) and the right of reputation of the two judges as guaranteed by Article 8 ECHR. The Grand Chamber explicitly refers to the fact that the parties agreed "that the aim of the interference was the protection of the reputation or rights of others", while the Court saw no reason "to adopt a different view" (§ 143). In such circumstances one would expect that the Court considers the case as one of balancing of conflicting rights, as in *Axel Springer AG v. Germany, Print Zeitungsverlag GmbH v. Austria, Belpietro v. Italy*, and also in *Anselmo Augusto Lopes v. Portugal* (dec.). It seems however that in cases in which the defamatory allegations clearly concern the professional functioning of public persons (*Karakó v. Hungary; Polanco Torres and Movilla Polanco v. Spain, Pipi v. Turkey* (dec.) and *Ümit Bilgiç v. Turkey*) the Court, like in *Morice v. France*, is less inclined to use the framework of the balancing test of Article 8 and 10 rights. It remains unclear however why the European Court, after its Grand Chamber's judgments of 7 February 2012 in *Von Hannover v. Germany (no. 2)* and *Axel Springer AG v. Germany*, in some cases opts for the balancing test with its predefined five or six criteria, while in other cases the Court analyses the interference at issue solely from the perspective of Article 10 of the Convention, applying other criteria and further narrowing the margin of appreciation of the national authorities of the defendant state.

The strong emphasis on the freedom of expression of lawyers and their participation in public debates is specifically relevant for developing the lawyer's identity and role in society, as this right can only be exercised actively by a personal decision, based on a person's will, voluntarism, identity and choice of how to perform a lawyer's identity (Inger Høedt-Rasmussen, [De-](#)

[veloping Identity for Lawyers – Towards Sustainable Lawyering](#), CBS, Copenhagen 2014, pp. 80-91). The expression of one's ideas and opinions is linked to personal performance and perception of identity and to the professional environment, including the administration of justice. It is relational and covers expressions in court, in writing, in participation in professional and public discussion or interviews in the media. This approach has now been clearly confirmed in the Grand Chamber's judgment in the case of *Morice v. France*, fully recognising the lawyers' right to take part in or to initiate debate of public interest related to (potential) shortcomings in the functioning of the judicial system.