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

FIFTH SECTION

CASE OF MORICE v. FRANCE

(Application no. 29369/10)

COUNCIL OF EUROPE
CONSEIL DE L'EUROPE

JUDGMENT

STRASBOURG

11 July 2013

THIS CASE WAS REFERRED TO THE GRAND CHAMBER
WHICH DELIVERED JUDGMENT IN THE CASE ON 23/04/2015

This judgment may be subject to editorial revision.

In the case of Morice v. France,

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

Mark Villiger, *President,*
Angelika Nußberger,
Boštjan M. Zupančič,
Ganna Yudkivska,
André Potocki,
Paul Lemmens,
Aleš Pejchal, *judges,*

and Claudia Westerdiek, *Section Registrar,*

Having deliberated in private on 11 June 2013,

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

PROCEDURE

1. The case originated in an application (no. 29369/10) against the French Republic lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a French national, Mr Olivier Morice ("the applicant"), on 7 May 2010.

2. The applicant was represented by Ms C. Audhoui and Mr J. Tardif, lawyers practising in Paris. The French Government ("the Government") were represented by their

Agent, Ms E. Belliard, Head of Legal Affairs, Ministry of Foreign Affairs.

3. The applicant alleged that he had not had a fair hearing within the meaning of Article 6 § 1 of the Convention and that his freedom of expression, as guaranteed by Article 10, had been breached.

4. On 6 September 2010 notice of the application was given to the Government.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1960 and lives in Paris.

A. Background to the case

6. On 19 October 1995 Mr Bernard Borrel, a judge who at the time had been seconded as technical adviser to the Djiboutian Minister of Justice, was found dead 80 kilometres from the city of Djibouti. His half-naked and partially burnt body was lying some 20 metres below a remote road. In early November 1995 the investigation by the local gendarmerie concluded that he had committed suicide by self-immolation.

7. In November 1995 a judicial investigation was opened in Toulouse to establish the cause of the judge's death. His body, on its repatriation to France, was interred in

Toulouse. In February 1996 an autopsy was carried out on the judge's remains and its conclusion, notified to his widow, was that he had committed suicide after dowsing himself in petrol.

8. In February 1997 Mrs Elisabeth Borrel, the widow of Bernard Borrel, disputing that finding, filed a complaint as a civil party against a person or persons unknown for premeditated murder. In April 1997 a judicial investigation was opened. In July 1997 a private forensic report, commissioned by the civil party, concluded that in view of the total absence of burn residue in the judge's lungs, he must already have been dead when his body caught fire. The judicial investigation was subsequently transferred to Paris, where the case was assigned in late October 1997 to Ms M., assisted by Mr L.L., both investigating judges at the Paris *tribunal de grande instance*.

9. In March 1999 the investigating judges visited Djibouti without the civil parties.

10. While Mrs Borrel was challenging the suicide conclusion, a witness – a former member of the Djiboutian Presidential Guard who had found asylum in Belgium – came forward in December 1999 and lent support to the theory of premeditated murder, implicating the former chief of staff of the President of Djibouti. His testimony proved highly controversial and was widely reported in the press and other media. In January 2000 the investigating

judge, Ms M., interviewed the witness in Brussels, after which he challenged her impartiality, alleging that she had put pressure on him to withdraw his testimony.

11. In the context of the judicial investigation in respect of the premeditated murder charge, three professional unions, including the *Union syndicale des magistrats* ("the USM"), applied on 2 February 2000 to be joined to the case as civil parties. Lastly, in early March 2000, the investigating judges, accompanied by the director of the Paris Institute of Forensic Medicine and the Deputy Public Prosecutor of Paris, paid another visit to Djibouti in order to stage a re-enactment at the scene, without the civil parties being present. They had asked to participate but their visa applications had been turned down.

12. On 21 June 2000 the case was withdrawn from the two investigating judges by the Paris Court of Appeal, as it regarded as unjustified their refusal to order a new visit to Djibouti with the participation of the civil parties. The case was transferred to another investigating judge, Mr P.

B. Criminal proceedings against the applicant

13. The applicant is Mrs Borrel's lawyer.

14. On 4 July 2000 a general meeting of the judges of the Paris *tribunal de grande instance*, held in Paris, examined among other things the situation of the judge Ms M. It had been announced in the press that the Minister of

Justice had referred to the *Conseil supérieur de la magistrature* (National Legal Service Council) a dossier concerning the Church of Scientology which she had been working on as investigating judge and in which certain shortcomings had been noted. During that meeting a judge, Mr J.M., stated as follows:

> "We are not prohibited, as grassroots judges, from saying that we are friends of Ms M. It is not forbidden to say that Ms M. has our support and trust."

15. On 6 September 2000 the applicant and a fellow lawyer wrote a letter to the Minister of Justice in connection with the judicial investigation into judge Borrel's death. They stated that they were complaining again to the Minister of Justice about the "conduct of judges M. and L.L., [which was] completely at odds with the principles of impartiality and fairness". They asked for an investigation to be carried out by the General Inspectorate of Judicial Services into "the numerous shortcomings which [had] been brought to light in the course of the judicial investigation".

They added that, after the case had been withdrawn from investigating judges M. and L.L. by a judgment of the Indictments Division of the Paris Court of Appeal dated 21 June 2000, all of the evidence had been transmitted to the new judge, on 23 June 2000. Noting that a video recording

made during an on-site visit by the investigating judges, unaccompanied by the civil parties, was not in the file thus transmitted, the lawyers protested about this to the new judge on 1 August 2000.

They pointed out that the new judge had received that evidence on the same day, and in their view this showed that judges M. and L.L. "had been sitting on this video-cassette, also forgetting to place it under seal, for over a month after the case was withdrawn from them".

They further stated that the judge, on opening the cassette's cover, had discovered an envelope containing a letter addressed to judge M. about which they commented that "its content [was] revealing and the literary quality of this letter [was] such that it oblige[d] [them] to reproduce it for [the Minister of Justice] in full, especially as it came from the public prosecutor of the Republic of Djibouti, Mr D.S.". The letter read as follows:

"*Salut Marie-Paule,*

Je t'envoie comme convenu la cassette vidéo du transport au Goubet. J'espère que l'image sera satisfaisante.

J'ai regardé l'émission « Sans aucun doute » sur TF1.

J'ai pu constater à nouveau combien Madame Borrel et ses avocats sont décidés à continuer leur entreprise de manipulation.

Je t'appellerai bientôt.

Passe le bonjour à Roger s'il est rentré, de même qu'à J.C.D.

Je t'embrasse. Djama."

(Hi Marie-Paule,

As agreed, I am sending you the video-cassette of the Goubet site visit. I hope the picture will be clear enough.

I watched the show 'Without any doubt' on TF1.

I noticed once again how Mrs Borrel and her lawyers were determined to carry on their manipulation.

I'll call you soon.

Say hello to Roger if he's back, and also to J.C.D.

Best wishes, Djama.)

The lawyers continued their letter as follows:

"The form and substance of the letter reveal, moreover, a surprising and regrettable complicit intimacy between the French judges and the Djibouti Public Prosecutor, a judicial authority placed directly under the Government, of which the head ... is very openly and very seriously suspected of being the instigator of Bernard Borrel's murder.

This type of information is clearly capable of explaining the firm and constant determination of the investigating judges to stop the civil parties and their lawyers from attending the re-enactments held in Djibouti.

As you are aware, this particularly delicate case concerns the death of a French judge and his widow, herself a judge, cannot accept such conduct on the part of other judges, in disregard of the most basic rules, not only those of the procedure but also those requiring respect for the victims.

In those circumstances we are obliged to bring this matter to your attention, to seek your assurance that all the shortcomings will be fully scrutinised ..."

16. The newspaper *Le Monde* published an article dated 7 September 2000 entitled "Borrel case: Judge M.'s impartiality called into question".

The journalist reported in the article that Mrs Borrel's lawyers had "vigorously" criticised judge M. to the Minister of Justice. It was stated that the applicant and his colleague had accused the judge of "conduct which [was] completely at odds with the principles of impartiality and fairness" and that the judge seemed "to have omitted to register an item from the case file and to transmit it to her successor". The article further stated: "judges M. and L.L. had been sitting

on this video-cassette, protests the lawyer Olivier Morice, and also forgot to place it under seal, for over a month after the case was withdrawn from them".

The article continued as follows: "To make matters worse, in the envelope judge P. found a handwritten and rather friendly note by D.S., the public prosecutor of Djibouti". The wording of the note found inside the cassette's cover was then reproduced in the article, which added: "Mrs Borrel's lawyers are obviously furious. This letter shows the extent of the connivance which exists between the Djibouti public prosecutor and the French judges, exclaims Mr Morice, and one cannot but find it outrageous". It was then stated that the lawyers had asked the Minister of Justice to initiate an investigation by the General Inspectorate of Judicial Services.

17. On 12 and 15 October 2001 the two judges in question lodged a criminal complaint for public defamation of a civil servant against the editor-in-chief of *Le Monde*, the journalist who had written the article and the applicant, applying to join the proceedings as civil parties. The defendants were committed to stand trial before the Nanterre *tribunal de grande instance* by an order of the investigating judge dated 2 October 2001. The complaint concerned the following passages of the article published on 7 September 2000:

"She [judge M.] is accused by lawyers Olivier Morice and L.D. of *'conduct which is completely at odds with the principles of impartiality and fairness'* and seems to have omitted to register an item from the case file and to transmit it to her successor."

"Judges M. and L.L. had been sitting on this cassette, protests Olivier Morice, and also forgot to place it under seal, for over a month after the case was withdrawn from them."

"To make matters worse, in the envelope judge P. found a handwritten and rather friendly note."

"Mrs Borrel's lawyers are obviously furious. '*This letter shows the extent of the connivance which exists between the Djibouti public prosecutor and the French judges*', exclaims Mr Morice, '*and one cannot but find it outrageous*'."

18. The court hearing took place on 2 April 2002 and the judgment was delivered on 4 June 2002.

19. The applicant first invoked the immunity provided for under section 41 of the Freedom of the Press Act of 29 July 1881. The court rejected that argument, finding that the action taken by the applicant and his colleague in writing to the Minister of Justice could not be regarded as connected to judicial proceedings or documents adduced

before a court of law, within the meaning of section 41 of that Act.

20. The court then examined whether the comments at issue were defamatory. It noted at the outset that this had not "been meaningfully disputed" and that the applicant "[stood] by the content of his allegations, that he consider[ed] well founded".

Concerning the first passage, the court noted that the quotation was correct, the letter to the minister having been included in the case file. It added that "the accusation of impartiality [*sic*] and unfairness proffered against a judge clearly constitute[d] a particularly defamatory allegation, because it [was] tantamount to calling into question her qualities, her moral and professional rigour, and ultimately her capacity to discharge her duties as a judge".

21. As regards the cassette, it noted that the comments reflected "at least some negligence in the handling of the judicial investigation and also [cast] doubt on the professional integrity of the two investigating judges". It added that, read as a whole, the comments suggested that the cassette had only been included in the proceedings because it had been demanded by the lawyers, then by the judge himself, and that it had been "necessary, as it were, to thwart and denounce a sort of obstruction on the part of judges M. and L.L.". It took the view that such assertions

had to be classified as defamatory as they necessarily impugned a person's honour and reputation within the meaning of section 29 of the Freedom of the Press Act.

22. As regards the last of the impugned passages, the court noted that the defamatory weight of the term "connivance" was the only aspect to have given rise to debate. It noted that this term followed a number of other defamatory passages of which the highly negative wording ("and one cannot but find it outrageous") proved the deliberately strong connotation of the word "connivance". According to the court, the use of that word clearly and directly suggested that, on account of their good relations with the Djibouti public prosecutor, judges M. and L.L had been collaborating with that official of a foreign country in investigating the case in a partial and unfair manner, in breach of the basic principles of law and of judicial office. The court found that the defamatory nature of those views was exacerbated by the subsequent indication in the article that the lawyers had asked the Minister of Justice to initiate an investigation by the General Inspectorate of Judicial Services, thus implying that they had a serious basis on which to substantiate such an accusation.

23. As to the applicant's guilt, the court noted that the Law of 29 July 1881 provided that a person supplying defamatory information to a journalist, in the knowledge that it would be published, could be convicted for

instigation of public defamation. The court noted that in the present case, the applicant had confirmed at the hearing that he had spoken on the telephone with the journalist who had drafted the article and had made the comments as reported. The court concluded that it was established that the applicant had supplied information to a journalist of the daily newspaper *Le Monde*, for the purposes of publication, making comments of which the defamatory nature was "patent".

24. As to the applicant's offer to bring evidence, the court pointed out that, in order to be admitted, the evidence had to be perfect and complete and to relate directly to all the accusations found to be defamatory. As regards the shortcomings in the judicial investigation, the court noted that it was still in progress and that the judgment of 21 June 2000 had expressed disapproval with the refusal by the judges concerned to proceed with the re-enactment requested by the civil party and had acted thereon by ordering the case to be withdrawn from them. It took the view, however, that it could not be inferred that all the criticisms made in open court about the handling of the judicial investigation should be regarded as founded. As regards the retention of the cassette, the court noted that no offer of evidence had been seriously made in order to establish any professional misconduct or dishonest conduct on the part of the investigating judges. Lastly, as to the

term “connivance”, the court stressed that a possible convergence of opinion between participants in the judicial process, without its precise extent having been determined, did not in any way prove the existence of a culpable complicity with the aim of distorting the investigation procedure. It concluded that the applicant had failed in all his offers to bring evidence.

25. In support of his good faith, the applicant referred to the duties that were inherent in his mission of defending clients and the results obtained in response to the requests of the civil party since the withdrawal of the case from judges M. and L.L. The court refused, however, to admit his defence of good faith, finding that the highly virulent attacks on the professional and moral integrity of the investigating judges clearly overstepped the right of legitimately admissible free criticism.

26. The court thus found Mr Morice guilty of instigating the public defamation of judges M. and L.L. It sentenced him to a fine of 4,000 euros (EUR) and ordered him to pay, jointly with the journalist and publication director of *Le Monde*, EUR 7,500 to each of the two judges. The court further ordered that an announcement be published in the newspaper Le *Monde* at their shared expense.

27. All the parties to the proceedings appealed against that judgment.

28. The Versailles Court of Appeal delivered its judgment on 28 May 2003. It held that judge L.L.'s appeal was time-barred and upheld the three convictions for defamation against judge M. It increased the amount of the fines imposed on the applicant's co-defendants, from 500 to 3,000 euros and 800 to 1,500 euros, respectively. However, it confirmed the amount of the fine imposed on the applicant and that of the damages awarded, and also the order to have an announcement published in *Le Monde*.

29. In a judgment of 12 October 2004, on appeals by the applicant and judge L.L., the Court of Cassation, finding that the reasoning was inconsistent and that judge L.L.'s appeal was not time-barred, quashed the Court of Appeal's judgment in its entirety. It remitted the case to the Rouen Court of Appeal, which thus had to rule on the criminal and civil-party actions against the three defendants in relation to judge L.L., and on the criminal and civil actions against the applicant alone in relation to judge M.

30. After a number of adjournments, the hearing before the Rouen Court of Appeal was held on 30 April 2008.

31. In its judgment of 16 July 2008 that court looked again at the defamatory nature of the impugned comments.

32. As regards the conduct of judge M., the court found that to say about an investigating judge that in the handling of a case she had shown "conduct which [was] completely

at odds with the principles of impartiality and fairness", or in other words conduct incompatible with professional ethics and her judicial oath, was a particularly defamatory accusation because it was tantamount to accusing her of lacking integrity and of deliberately failing in her duties as a judge, thus questioning her capacity to discharge those duties.

33. As to the delay in the transmission of the cassette, the court noted that the applicant's comments not only accused the judges of negligence in the handling of the case, thereby discrediting the professional competence of the judges, but above all implied that the latter had kept hold of the cassette after the case was withdrawn from them, with the intention, at least, of causing obstruction. Allegedly, it was only because the lawyers had raised the matter with P., followed by that judge's request to judge M., that the item of evidence had been obtained and finally transmitted on 1 August 2000.

The Court of Appeal added that such assertions, attributing to those judges a deliberate failure to perform the duties inherent in their office and a lack of integrity in the fulfilment of their obligations, constituted factual accusations which impugned their honour and reputation. It found this to be all the more true as the applicant, referring to the handwritten note from the public prosecutor of Djibouti, had emphasised this atmosphere of

suspicion and the negligent conduct of the judges by stating that this document proved the extent of the "connivance" between them and the prosecutor.

The court noted, on that point, that the word thus used implied that, on account of those good relations, judge M. had been able to conceal the truth and conduct her investigation in a partial and unfair manner, in breach of professional ethics and the fundamental principles governing the office of judge. The court added that such an allegation, accusing the two judges of a total breach of the duties inherent in their office, represented in itself a serious attack on their honour and reputation. It merely served to confirm the defamatory nature of the previous comments, especially as the article added that the applicant had asked the Minister of Justice for an inspection by the General Inspectorate of Judicial Services.

34. The Court of Appeal concluded that the offending passages characterised the offence of public defamation against civil servants.

35. As to the applicant's offer to bring evidence, the Court of Appeal, referring in part to the arguments of the court below, took the view that none of the items produced showed, on the part of the judges, any unfair or partial conduct, any failure to perform the duties inherent in their office or any lack of integrity in the handling of the case concerning the death of judge Borrel. It concluded that the

veracity of the defamatory allegations had not been established.

36. As regards the applicant's defence of good faith, the court noted that he had referred to the duties that were inherent in his mission of defending clients, the results obtained in the case since the change of investigating judge and the judicial decisions taken thereafter. It found, however, that at the time of the article's publication, the highly virulent attacks on the professional and moral integrity of the two judges, in comments that seriously questioned their impartiality and intellectual honesty, clearly overstepping the right to free criticism, was no longer of any procedural interest because the case had already been withdrawn from them.

37. The court found that the particularly defamatory comments made by the applicant in the press against the two judges revealed, by their excessive nature, the intensity of the conflict between him and, in particular, judge M. It considered the comments to amount to an "*ex post facto* settling of scores", as shown by their inclusion, as the applicant had wished, in an article published in *Le Monde* on 7 September 2000. According to the court, on that date, the applicant could not have been unaware that the Investigation Division of the Paris Court of Appeal had just begun to examine, at his request as lawyer acting for the civil parties, the case of the Church of Scientology in which

M., as investigating judge in the case, was suspected of being responsible for the disappearance of documents. It concluded that this showed, on the part of the applicant, personal animosity and an intention to discredit those judges, in particular judge M., with whom he had been in conflict in various cases, thus ruling out his good faith.

38. Consequently, the Court of Appeal upheld the judgment of the court below, found the applicant guilty of instigating the offence of defamation against a civil servant, sentenced him to a fine of EUR 4,000 and, jointly with his two co-defendants, awarded EUR 7,500 in damages to each of the civil parties. It also ordered the publication of an announcement in *Le Monde*.

39. The defendants and judge M. lodged an appeal on points of law against that judgment.

The applicant relied, in particular, on Article 10 of the Convention, arguing that the immunity provided for in section 41 of the Freedom of the Press Act protected the lawyer in respect of any oral or written comments made in the context of any type of judicial proceedings, in particular of a disciplinary nature. It followed, in his submission, that the letter of 6 September 2000 to the Minister of Justice, for the purpose of asking the National Legal Service Council (*Conseil supérieur de la magistrature*) to take action against two judges who had been responsible for investigating the case in question, fell within the context of

the defence of the civil party's interests. Accordingly, in his view, the Court of Appeal had not been entitled to refuse to grant immunity from suit in respect of the allegedly defamatory comments contained in that letter on the ground that it did not constitute an act of referral that could be covered by the term "pleadings" in section 41 of the above-mentioned Act.

40. On that point, the Court of Cassation found that the Court of Appeal had justified its decision by taking the view that the fact of making public the letter to the Minister of Justice seeking an investigation by the General Inspectorate of Judicial Services into the shortcomings attributed to the two investigating judges did not constitute an act of referral to the National Legal Service Council and was not part of any proceedings involving the exercise of defence rights before a court of law.

41. The applicant further relied on Article 10 of the Convention, asserting that the impugned comments concerned a court case that had for a long time received media coverage and the questionable manner in which the investigation had been conducted. Having regard to the importance of the subject of general interest in the context of which the comments had been made, the Court of Appeal was not entitled to find that he had overstepped the bounds of his freedom of expression.

42. He contended that good faith was to be assessed in the light of the impugned comments that had been published. He added that the mere fact that he had had a disagreement with one of the judges in the context of another set of proceedings did not prove that he was driven by any personal animosity.

Lastly, he argued that opinions expressed about the functioning of a basic institution of the State, like the handling of a criminal investigation, were not subject to a duty of prudence in the expression of thought.

43. The Court of Cassation took the view that the Court of Appeal had justified its decision. While everyone had the right to freedom of expression and while the public had a legitimate interest in receiving information on criminal proceedings and the functioning of the courts, the exercise of those freedoms entailed duties and responsibilities and could be subject, as in the present case where the admissible limits of freedom of expression in criticising the action of judges had been overstepped, to restrictions or sanctions prescribed by law which constituted measures that were necessary in a democratic society for the protection of the reputation and rights of others.

It dismissed the appeals by a judgment of 10 November 2009. The bench which gave that judgment included, in particular, Mr J.M. (see paragraph 14 above).

II. RELEVANT DOMESTIC LAW

44. The relevant provisions of the Freedom of the Press Act of 29 July 1881 read as follows.

Section 29

"The making of any factual allegation or imputation that damages the honour or reputation of the person or body to whom the fact in question is attributed shall constitute defamation. The direct publication or reproduction of such an allegation or imputation shall be punishable, even where it is expressed in sceptical terms or made about a person or body that is not expressly named but is identifiable by the terms of the offending speeches, shouts, threats, written or printed matter, placards or posters.

The use of abusive or contemptuous language or invective not containing an allegation of any fact shall constitute an insult (*injure*)."

Section 31

"Where defamation is committed by the same means by reference to the functions or capacity of one or more ministers or ministry officials, one or more members of one of the two legislative chambers, a civil servant, ..., the offence shall be punishable by the same penalty. ..."

Section 41

"... No proceedings for defamation, insult or abuse shall arise from any faithful record of judicial proceedings drawn up in good faith, or from any statements made or pleadings filed in a court of law.

Judges to whom the matter has been referred, ruling on the merits, may nevertheless order the suppression of the insulting, contemptuous or defamatory speech, and award damages against the person concerned.

Defamatory allegations that are unrelated to the case may, however, give rise to criminal prosecution or civil actions by the parties, when such actions have been reserved for them by the courts, and, in any event, to civil action by third parties."

Section 42

"The following persons shall be liable, as principals and in the following order, to sanctions for serious crimes (*crimes*) or other major offences (*délits*) committed through the press:

(1) publication directors or publishers, whatever their profession or title and, in the circumstances defined in section 6(2), joint publication directors;

(2) in the absence of any of the foregoing, the actual offenders;

(3) in the absence of the authors, the printers;

(4) in the absence of the printers, the vendors, distributors and billstickers.

In the cases provided for in the second paragraph of section 6, the joint and several liability of the persons referred to in paragraphs 2, 3 and 4 of the present section shall be engaged as if there were no publication director, when, contrary to the provisions of the present Act, a joint publication director has not been appointed."

Section 55

"Where the defendant wishes to be allowed to prove the veracity of the defamatory allegations, in accordance with section 35 of the present Act, he shall, within ten days from the service of the summons, notify the public prosecutor or the complainant, at the address for service designated thereby, depending on whether the proceedings have been initiated by the former or the latter, of:

1° The allegations as given and described in the summons of which he seeks to prove the veracity;

2° Copies of the documents;

3° The names, occupations and addresses of the witnesses he intends to call for the said purpose.

The said notice shall contain the choice of the address for service in the proceedings before the criminal court, and all requirements shall be met on pain of forfeiting the right to bring evidence."

45. The Code of Criminal Procedure provides *inter alia* as follows, concerning applications for the withdrawal of judges:

Article 668

"An application for a judge's withdrawal from a case may be based on any of the following grounds::

...

9° where there has been, between the judge ... and one of the parties, any manifestation serious enough to cast doubt on his/her impartiality."

Article 674-1

"An application for the withdrawal of a member of the Court of Cassation hearing a criminal case must give reasons; it shall be deposited in the registry. The assistance of a lawyer is not compulsory."

Article 674-2

"The competent Section shall rule within one month from the filing of the application with the registry, after

receiving the observations of the judge whose withdrawal is sought.

The procedure shall otherwise be governed by the provisions of Book II, Title XX, of the Code of Civil Procedure."

46. The Code of Civil Procedure provides as follows:

Article 346

"The judge, as soon as he or she receives the copy of the application, must stand down until the ruling on the requested withdrawal.

In case of urgency, another judge may be appointed, even *ex parte*, to perform the necessary acts."

Article 1027

"A request for the withdrawal of a member of the Court of Cassation shall be examined by a Section, other than that to which the case has been allocated, designated by the President of the Court."

THE LAW

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

47. The applicant alleged that there had been a violation of Article 6 § 1 of the Convention and submitted that his case had not been heard fairly in an impartial tribunal, as regards the proceedings before the Court of Cassation. He complained that Mr J.M., who was on the bench which ruled on his appeal, had previously expressed his support publicly for judge M. at the general meeting of judges of the Paris *tribunal de grande instance* on 4 July 2000.

The relevant part of Article 6 § 1 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. Admissibility

48. The Government argued that the applicant had not exhausted internal remedies within the meaning of Article 35 of the Convention.

49. They submitted that the applicant could have requested the withdrawal of Mr J.M. on the grounds of his lack of impartiality. They referred to Articles 668, 674-1 and 674-2 of the Code of Criminal Procedure and explained

that the procedure for requesting a judge's withdrawal was straightforward as the relevant application, giving reasons, had to be filed in the registry of the Court of Cassation by the requesting party or lawyer.

50. The Government added that it was an appropriate remedy since, in accordance with the Code of Civil Procedure, the application for withdrawal had suspensive effect. As soon as he became aware of the request the judge had to stand down, until the ruling on his withdrawal.

51. They denied that the applicant had not discovered until reading the judgment that Mr J.M. had been sitting in the case.

52. They explained that the proceedings were held before a bench of which the members had been designated by the President of the court, and that the applicant must have – or could have – known who they were. They appended to their observations the order of the President of the Court of Cassation dated 28 January 2009 stipulating, *inter alia*, that Mr J.M. would sit in the Criminal Division from 2 February 2009 onwards.

53. They added that, since September 2009, lawyers at the *Conseil d'État* and Court of Cassation were immediately informed in writing, when a case was referred to a full Section rather than a reduced bench, of the development in the proceedings. Moreover, a few weeks before the hearing the lawyers were informed by a notice from the

prosecutor's officer of the date when their case was to be heard and they were entitled to present oral argument should they deem it necessary.

They produced a copy of the "on-line workflow" for the applicant's appeal, summarising the various stages of the Court of Cassation proceedings, together with the report by the reporting judge, both referring to examination by a "reduced bench".

They submitted that the applicant had thus had the necessary time to file a request for withdrawal.

54. The Government lastly pointed out that the lawyer at the *Conseil d'État* and Court of Cassation could not have failed to notice the presence of Mr J.M. at the hearing when he had made his oral submissions. It would still have been possible at that stage to lodge an application for the judge's withdrawal, but he had not done so.

Accordingly, in the Government's submission, a party which had not sought a judge's withdrawal before the close of the proceedings, when it could have done so, was presumed to have unequivocally waived that right.

55. The Government referred on this point to the Court's case-law and emphasised that the Court had already found the application for withdrawal to be an effective remedy.

56. The applicant submitted that in the present case neither he nor his lawyer had been able to know that Mr J.M. would be sitting.

He pointed out that the documents adduced by the Government showed, on the contrary, that Mr J.M. was not supposed to sit in that hearing.

First, the judge's report filed on 21 July 2009 stated that "a draft [had] been drawn up and examination by a reduced bench proposed".

Secondly, the "on-line workflow" for the applicant's case indicated, next to the date of 13 October 2009: "Hearing (Section 1 Reduced bench procedure)".

57. The applicant explained that the reduced bench was a bench of three judges from the Section concerned: the President of the Division, the *Doyen* (senior member) and the reporting judge. As Mr J.M. was none of those, the applicant could not have expected him to sit in his case.

Ultimately it was a larger "full Section" bench, made up of ten judges, including Mr J.M., which heard the applicant's appeal, without his lawyer having been informed. He argued that he had thus been misled about the real composition of the Court of Cassation and had thus been deprived of the right to seek the withdrawal of a judge.

58. The applicant also produced three notices to lawyers from the registry of the Criminal Division of the Court of Cassation, dated 15 September, and 14 and 27 October 2009, respectively, in which it was indicated that the case

would be, or had been, examined by a reduced bench on 13 October 2009.

59. He observed that the proceedings before the Court of Cassation were written and that his lawyer had not been obliged to attend the hearing of 13 October 2009.

60. He concluded that he had not had any reason to call for the withdrawal of a judge who was not supposed to be a member of the bench hearing his appeal. He added that it was the final judgment of 10 November 2009 which had revealed to him the precise composition of the Division at the time of its deliberation.

61. The Court reiterates that the purpose of Article 35 is to afford the Contracting States the opportunity of preventing or putting right the violations alleged against them before those allegations are submitted to the Convention institutions (see, for example, *Remli v. France*, 23 April 1996, § 33, *Reports of judgments and decisions* 1996-II, and *Selmouni v. France* [GC], no. 25803/94, § 74, ECHR 1999-V).

62. As regards an allegation to the effect that a court has not satisfied the conditions of independence or impartiality required by Article 6 § 1 of the Convention, the possibility of lodging an application for withdrawal under French law can be regarded as an effective remedy for the purposes of Article 35 § 1 of the Convention, and where the impartiality of a given member of a court is in issue, the withdrawal

procedure must be implemented (see *Huglo Lepage et Associés SCP v. France* (dec.), no. 59477/00, 30 March 2004, and *Roussin v. France* (dec.), no. 44674/08, 19 October 2010).

63. The Court notes that, in the present case, it can be seen from the documents submitted both by the applicant and by the Government that the case was supposed to be examined by a reduced bench of Section I of the Criminal Division of the Court of Cassation.

The report of the reporting judge dated 21 July 2009, the Court of Cassation's "on-line workflow" for the case, and the three notices issued on 15 September, and 14 and 27 October 2009, respectively, thus all mention that the case was being heard by a reduced bench, even in the last two of those documents which were sent after the date of the hearing.

Consequently, Mr J.M., who was neither the Division President, nor the *Doyen*, nor the reporting judge, was not supposed to sit in this case and the applicant had no reason to believe that he would.

64. As regards, moreover, the possibility of raising this point at the hearing, the Court notes that the proceedings before the Court of Cassation are mainly written and that there is no evidence in the file to show that the applicant's lawyer had been present at the hearing.

65. In those circumstances, the Court takes the view that the applicant had no reason to request the withdrawal of Mr J.M. and had thus been unable to use the remedy advocated by the Government.

66. The objection raised by the Government must thus be rejected.

67. Moreover, the Court finds that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

68. On the merits, the applicant took the view that the Government had sought in vain to minimise the position taken by Mr J.M. at the general meeting of the Paris *tribunal de grande instance* of 4 July 2000.

He indicated that those comments, although they had been made in the context of disciplinary proceedings against judge M. in the case concerning the Church of Scientology, revealed that Mr J.M.'s relations with her were close and supportive, as expressed in a broad manner and not being confined to the Scientology case (see paragraph

14 above). He added that the Rouen Court of Appeal had used that case against him.

69. The applicant further observed that he had also been the lawyer acting for certain civil parties in the Scientology case and had triggered the disciplinary proceedings against judge M., because he had referred to the Minister of Justice the difficulties he had encountered with her in that case (see paragraph 37 above).

70. The Government, for their part, emphasised that Mr J.M. had made the comments at issue almost ten years earlier, when he had been a judge at the Paris *tribunal de grande instance*. They added that those comments had been made in a different court and context, that of a case concerning the Church of Scientology, and could not be regarded as a general and unconditional expression of support for judge M.

2. The Court's assessment

(a) General principles

71. The principles emanating from the case-law on such matters were summarised by the Court as follows in the case of *Micallef v. Malta* ([GC], no. 17056/06, ECHR 2009).

> "93. 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 constant 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, *inter alia*, *Fey v. Austria*, 24 February 1993, §§ 27, 28 and 30, Series A no. 255-A, and *Wettstein v. Switzerland*, no. 33958/96, § 42, ECHR 2000-XII).

94. As to the subjective test, the principle that a tribunal shall be presumed to be free of personal prejudice or partiality is long-established in the case-law of the Court (see, for example, *Kyprianou v. Cyprus* [GC], no. 73797/01, § 119, ECHR 2005-XIII). The Court has held that the personal impartiality of a judge must be presumed until there is proof to the contrary (see *Wettstein*, cited above, § 43). 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).

95. In the vast majority of cases raising impartiality issues the Court has focused on the objective test. 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* 1996-III).

96. 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 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 *Wettstein*, cited above, § 44, and *Ferrantelli and Santangelo v. Italy*, 7 August 1996, § 58, *Reports* 1996-III).

97. The objective test mostly concerns hierarchical or other links between the judge and other actors in the proceedings (see court martial cases, for example, *Miller and Others v. the United Kingdom*, nos. 45825/99, 45826/99 and 45827/99, 26 October 2004; see also cases regarding the dual role of a judge, for example, *Mežnarić v. Croatia*, no. 71615/01, 15 July 2005, § 36, and *Wettstein*, cited above, § 47, where the lawyer representing the applicant's opponents subsequently judged the applicant in a single set of proceedings and overlapping proceedings respectively) which objectively justify misgivings as to the impartiality of the tribunal, and thus fail to meet the Convention standard under the objective test (see *Kyprianou*, cited above, § 121). 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).

98. In this respect 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)."

(b) Application of those principles to the present case

72. The Court notes that, in the present case, the applicant called into question the impartiality of judge J.M. It is established that, at the general meeting of the judges of the Paris *tribunal de grande instance* on 4 July 2000, J.M. made the following statement about judge M. after shortcomings had been observed in her handling of the investigation into a case concerning the Church of Scientology:

> "We are not prohibited, as grassroots judges, from saying that we are friends of Ms M. It is not forbidden to say that Ms M. has our support and trust."

73. It further notes that the applicant was precisely the lawyer acting for certain civil parties in the Scientology case and that he himself, at the time, had complained to the Minister of Justice about the difficulties he had

encountered with judge M. in the course of the judicial investigation.

74. In the proceedings at issue in the present case, judge M. had filed a complaint as a civil party in particular against the applicant, who had made statements about how the investigation was being handled in the case concerning judge Borrel.

75. The Court does not find any evidence in the file to show that, in the present case, judge J.M. displayed any personal bias. It will thus examine the case in terms of objective impartiality.

76. It observes that judge J.M. sat on the bench of the Criminal Division of the Court of Cassation which ruled on appeals by judge M. and the applicant stemming from a dispute between them, and which dismissed those appeals, thereby upholding the applicant's conviction. Nine years earlier J.M. had 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.

Even though J.M.'s expressed position dated back several years, it is nevertheless true that judge M. was already investigating the Borrel case at the time when J.M. made his statement, that this case had major media and political repercussions and that it has since undergone numerous developments. Moreover, the Rouen Court of

Appeal, in its judgment of 16 July 2008, itself pointed out that the Church of Scientology case, in which judge M. was suspected of being responsible for the disappearance of evidence, had been referred to the Investigation Division of the Paris Court of Appeal, upon an application by the applicant, two days before the publication of the offending article in which that fact had been mentioned. The Court thus finds that 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 that where J. M. was sitting as a judge of the Court of Cassation. It is also noteworthy that J.M.'s support had been expressed in an official context, at the general meeting of the judges of the Paris *tribunal de grande instance*, and that it was quite general in nature.

77. This is sufficient for the Court to come to the conclusion that, in the circumstances of the case, 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.

78. There has accordingly been a violation of Article 6 § 1 of the Convention in the present case.

II. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

79. The applicant complained of a violation of his right to freedom of expression. He relied on 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. Admissibility

80. The Court finds that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

81. Without disputing the fact that the interference constituted by his conviction was prescribed by law and pursued a legitimate aim, the applicant submitted that the restriction imposed on him was unnecessary and disproportionate.

Referring to the Court's case-law in such matters, the applicant indicated that as regards criminal proceedings it was essential for journalists to be able to obtain information from legally-assisted civil parties – parties who were not in fact bound by the secrecy of the judicial investigation.

He added that it was thus important for the civil party's lawyer to be able to express criticisms, even harsh ones, as otherwise the information accessible to the public would be unreasonably restricted.

82. The applicant submitted that the investigation into judge Borrel's death was part of a sensitive criminal case which had received significant media coverage, as the Court had already had occasion to observe, and the circumstances were such that it raised political and diplomatic issues which warranted a greater degree of information, in particular on the subject of how the judicial investigation was proceeding (he referred to *July and Sarl Libération v. France*, no. 20893/03, § 67, ECHR 2008).

83. In his view, when reasons of State were at stake in a given case, the lawyer's freedom of speech had to be at least equal to that of the journalist and the press because, faced with the obstruction of the State authorities, the lawyer was the crucial "goad" in making sure that the truth was not stifled.

He considered it important, even *ex post facto*, to inform the public about the reasons underlying any shortcomings in the judicial investigation, like those in the case relating to the death of judge Borrel. He added that it was therefore as a lawyer and solely for the defence of his client's interests that he had explained to the journalist why he and his colleague had called upon the Minister of Justice seeking an investigation by the General Inspectorate of Judicial Services, this being the only possible course of action.

84. In those circumstances, the applicant was of the opinion that the comments he had made to the journalist were reasonable and that, while he had harshly criticised the judges' action, he had not insulted them or impugned their honour, but had shown the dignity and moderation required of a lawyer.

85. He added that he had been wrongly accused of being driven by personal animosity and of seeking to discredit the judges. He stated that the action he had taken in the Scientology case had been successful because the Indictments Division had withdrawn the case from judge M. and the French State had been ordered to pay compensation to the victims' families for gross negligence on the part of the courts.

86. As to the proportionality of the sanction, the applicant emphasised that the harshness of the penalties imposed on him, both civil and criminal, was such as to deter him from speaking in the media to denounce any shortcomings in the judicial system.

87. He concluded that the restriction on his freedom of expression was not necessary in a democratic society or proportionate to the aim pursued.

88. The Government, for their part, also took the view that the interference was prescribed by law and pursued a legitimate aim.

89. As to the necessity of the interference, they referred to the Court's case-law and observed that, in the present case, the need to limit freedom of expression stemmed not only from the particularly harsh comments but also from the context in which they had been made.

They further emphasised the sensitive nature of the investigation into judge Borrel's death and the significant media interest in the case.

They did not deny that the questions of general interest covered by the press included those concerning the functioning of the judicial system or that the press constituted a means whereby public opinion could ensure that judges assumed their responsibilities in accordance with their mission.

90. The Government observed, however, that a lawyer's freedom of expression could not be equal to that of a journalist and that it could be subject to restrictions.

Lawyers, as holders of legal office, were required to contribute to the proper functioning of the justice system and to the confidence that it was supposed to inspire. They thus had to show a degree of restraint in the exercise of their duties. The State therefore had to be able to impose sanctions where such confidence and the proper functioning of the courts were undermined.

91. They emphasised that it could be seen from the offending passages that they were directed, in an

unequivocal manner, at two judges in terms that impugned their honour. In the Government's submission, the applicant had not merely expressed a general criticism of the courts but had deliberately made biased comments without the slightest prudence. His remarks had not contributed in any way to an exchange of ideas and had gone further than mere participation in a debate on the functioning of the justice system.

92. The Government further observed that the domestic courts had carefully scrutinised the offending comments and had found them unquestionably to cause harm to the reputation of the two judges by suggesting that they had failed in their professional duties and obligations. They had thus overstepped the bounds of admissible criticism.

93. They added that the accusations suggesting that there might have been some concealment of evidence from the case file on the part of judge M. were particularly serious in that they were capable of engaging the judge's criminal liability. They should thus have been supported by particularly well-substantiated and precise information.

94. The Government indicated that the domestic courts assessed the defence of good faith in the light of the provisions 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 the prudence shown in expressing them. In the present case the Court of Appeal had held that those conditions were not satisfied and that the attacks had amounted to a "settling of scores".

95. In the Government's submission, the applicant could not argue that the offending comments, made outside the courtroom, constituted a defence strategy, as there were other means by which he could have expressed his views. The applicant had in fact used those means and had obtained, in a judgment of 21 June 2000, the withdrawal of the case from the two judges.

They added that the applicant had not been at fault for expressing himself outside the courtroom, but for using excessive comments, whereas he could have criticised the handling of the case in harsh terms without impugning the honour of State officials.

The Government therefore took the view that the grounds given by the domestic courts in rejecting the defence of good faith had been pertinent and sufficient and that the absence of moderation and prudence had rendered the interference necessary.

96. As to the proportionality of the sanction, the Government argued that it could not be regarded as excessive or capable of having a chilling effect on the exercise of freedom of expression.

The Government concluded that the interference had been necessary in a democratic society in order to ensure the protection of rights set out in paragraph 2 of Article 10 of the Convention.

2. The Court's assessment

97. 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 the reasons adduced by the national authorities to justify it are "relevant and sufficient" and whether it was "proportionate to the legitimate aim pursued". 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 (see, among other authorities, *Lindon, Otchakovsky-Laurens and July v. France* [GC], nos. 21279/02 and 36448/02, § 45, ECHR 2007-XI).

98. It reiterates in this connection that in order to assess the justification of an impugned statement, a distinction needs to be made between statements of fact and value judgments. While the existence of facts can be demonstrated, 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. The classification of a statement as a fact or as a value judgment is a matter which in the first place falls within the margin of appreciation of the national authorities, in particular the domestic courts. However, even where a statement amounts to a value judgment, there must exist a sufficient factual basis to support it, failing which it will be excessive (see, for example, *Lindon, Otchakovsky-Laurens and July*, cited above, § 55).

99. Moreover, as regards the impugned comments, the Court reiterates that it always has regard to the special role of the judiciary in society. As the guarantors of justice, judges and prosecutors must enjoy public confidence if they are to be successful in carrying out their duties. It may therefore prove necessary to protect them against destructive attacks that are essentially unfounded, especially as they are subject to a duty of discretion that

precludes them from replying (see *Rizos and Daskas v. Greece*, no. 65545/01, § 43, 27 May 2004).

100. In addition, the Court observes that the special status of lawyers gives them a key position in the administration of justice as intermediaries between the public and the courts. Such a position explains the usual restrictions on the conduct of members of the Bar (see *Casado Coca v. Spain*, 24 February 1994, § 54, Series A no. 285-A). However, as the Court has previously had occasion to state, lawyers are entitled to freedom of expression too and to comment in public on the administration of justice, provided that their criticism does not overstep certain bounds (see *Amihalachioaie v. Moldova*, no. 60115/00, §§ 27-28, ECHR 2004-III). In that connection, account must be taken of the need to strike the right balance between the various interests involved, which include the public's right to receive information about matters of general interest or the functioning of the judicial system, the requirements of the proper administration of justice, the dignity of the legal profession and the reputation of the judiciary (see *Schöpfer v. Switzerland*, 20 May 1998, § 33, *Reports* 1998-III).

101. In the present case the Court notes that the applicant made statements to a journalist from the daily newspaper *Le Monde* and they were reported in an article published on 7 September 2000 under the headline "Borrel case: Judge M.'s impartiality called into question".

In that article Mrs Borrel's lawyers, including the applicant, accused the investigating judge of displaying "conduct which [was] completely at odds with the principles of impartiality and fairness" and of having, with her colleague, "omitted to register an item from the case file and to transmit it to her successor". After referring to a note from the Djibouti public prosecutor, addressed to judge M. in "rather friendly" terms, the article stated that the lawyers, including the applicant, were "obviously furious" and that, according to the latter, "that document demonstrate[d] the extent of the connivance" which existed "between the Djibouti prosecutor and the French judges" and which was quite simply "outrageous".

102. The Court notes that the applicant did not confine himself in the article to factual statements about the failure to transmit the cassette and the presence of a letter from the Djibouti prosecutor inside the cassette cover. He had accompanied those factual observations with value judgments which cast doubt on the impartiality and fairness of judge M. and alleged that there was some connivance between the investigating judges and the Djibouti prosecutor.

103. The Court further notes that it was found by the *tribunal de grande instance* that the applicant had not disputed the defamatory nature of his comments and that

he stood by the substance of his accusations, which he regarded as well founded (see paragraph 21 above).

104. Furthermore, the applicant and a fellow lawyer had, on the previous day, 6 September 2000, sent a letter to the Minister of Justice containing the same claims and calling for an investigation by the General Inspectorate of Judicial Services into the "numerous shortcomings" that had been "brought to light in the course of the judicial investigation" into judge Borrel's death (see paragraph 15 above).

105. The Court notes, lastly, that the investigation file had already been removed from judge M. by a decision of the Investigation Division of the Paris Court of Appeal dated 21 June 2000. Judge M. was thus no longer handling the case when the applicant made his statements about her working methods in the case.

106. In those circumstances, the Court finds that the applicant publicly attacked, in a mainstream daily newspaper, the investigating judge and the functioning of the judicial system just one day after contacting the Minister of Justice, without waiting for a response to his request.

Even if his aim had been to alert the public with regard to possible problems in the functioning of the justice system, which the Court has acknowledged to be a matter of public interest (see *Kudeshkina v. Russia*, no. 29492/05, § 94, 26 February 2009), the applicant did so in

particularly virulent terms with the risk of influencing not only the Minister of Justice but also the Investigation Division which was examining his complaint in the Scientology case (see paragraph 37 above).

It goes without saying that freedom of expression is not denied to lawyers, who are certainly entitled to comment in public on the administration of justice, but their criticism must not overstep certain bounds (see *Schöpfer*, cited above, § 33). Having regard to the key role played by lawyers in this area, it is legitimate to expect them to contribute to the smooth functioning of the justice system and thus to the maintaining of public confidence in that system (ibid., § 31).

The Court reiterates that the press is one of the means by which politicians and public opinion can verify that judges are discharging their heavy responsibilities in a manner that is in conformity with the aim which is the basis of the task entrusted to them (see *Prager and Oberschlick v. Austria*, 26 April 1995, § 34, Series A no. 313, and *July and Sarl Libération*, cited above, § 66). The primary task of lawyers is to defend their clients and they have available to them judicial remedies by which to seek redress for possible shortcomings in the justice system. In the present case the applicant had already used such remedies and had thus far been successful.

Having regard to the foregoing, the Court finds that in expressing himself as he did, the applicant behaved in a manner which overstepped the limits that lawyers have to observe in publicly criticising the justice system.

107. This conclusion is reinforced by the seriousness of the accusations made in the article and in particular those alleging that the judge's "conduct [was] completely at odds with the principles of impartiality and fairness" and that there had been some "connivance" between her and the Djibouti prosecutor.

The Court takes the view that, in the circumstances of the case, the domestic courts were justified in finding that the comments in question, made by a lawyer, were serious and insulting *vis-à-vis* judge M., that they were capable of undermining public confidence in the judicial system unnecessarily – given that the judicial investigation in the case had been assigned to another judge several months previously – and that there were sufficient grounds to find the applicant guilty (contrast *Foglia v. Switzerland*, no. 35865/04, § 95, 13 December 2007).

Moreover, having regard to the chronology of the events, it could be inferred from the applicant's comments, as the Court of Appeal noted, that they were driven by some personal animosity towards judge M. (see paragraph 37 above).

108. The Court reiterates that the nature and severity of the penalties imposed are factors to be taken into account when assessing the proportionality of an interference with the freedom of expression guaranteed by Article 10 (see *Cumpănă and Mazăre v. Romania* [GC], no. 33348/96, § 111, ECHR 2004-XI, and *Brunet-Lecomte and Others v. France*, no. 42117/04, 5 February 2009, § 51).

As regards the "proportionality" of the sanction, the Court notes that the applicant was found guilty of an offence and ordered to pay a fine. However, in view of the margin of appreciation left to Contracting States by Article 10 of the Convention, a criminal measure as a response to defamation cannot, as such, be considered disproportionate to the aim pursued (see *Radio France and Others v. France*, no. 53984/00, § 40, ECHR 2004-II). Secondly, the amount of the fine imposed on the applicant, 4,000 euros, does not appear excessive; the same is true of the 7,500 euros in damages that he was ordered to pay to the civil parties, jointly with his two co-defendants. In those circumstances, and having regard to the content of the impugned comments, the Court considers that the measures imposed on the applicant were not disproportionate to the legitimate aim pursued.

109. In the light of the foregoing, the Court finds that the authorities did not overstep their margin of appreciation in

sentencing the applicant. Accordingly there has been no violation of Article 10 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

110. 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

111. The applicant claimed 33,000 euros (EUR) in respect of the pecuniary damage that he alleged to have sustained. He included therein the fines and the damages that he had been ordered to pay, together with the court costs that he had had to reimburse to the civil parties. In respect of non-pecuniary damage, he requested EUR 50,000.

112. The Government observed that the applicant had only furnished proof of payment for the sum of EUR 4,270 in May 2011 and that it was jointly with the newspaper's publication director and the journalist that he had been ordered to pay damages and court costs to the civil parties.

As to non-pecuniary damage, the Government argued that the finding of a violation would be sufficient.

113. The Court does not discern any causal link between the violation found and the pecuniary damage alleged; it therefore rejects this claim. However, it finds it appropriate to award the applicant EUR 6,000 in respect of non-pecuniary damage.

B. Costs and expenses

114. The applicant also claimed EUR 12,318.80 for the costs and expenses incurred before the Court. He produced invoices from two lawyers and copies of the cheques used to pay those sums.

115. The Government observed that the invoices thus furnished had not contained any details as to the nature of the services rendered and did not enable a connection to be established with the present case. They argued that, in any event, the sum should be reduced to fairer proportions, proposing EUR 5,000.

116. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. In the present case, regard being had to the documents in its possession and the above criteria, the Court considers it

reasonable to award the applicant the sum of EUR 6,000 for the proceedings before it.

C. Default interest

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

FOR THESE REASONS, THE COURT,

1. *Declares*, unanimously, the application admissible;

2. *Holds*, unanimously, that there has been a violation of Article 6 § 1 of the Convention;

3. *Holds*, by six votes to one, that there has been no violation of Article 10 of the Convention;

4. *Holds*, by six votes to one,

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

EUR 6,000 (six thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;

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

5. *Holds*, unanimously,

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

EUR 6,000 (six thousand euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses;

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

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

Done in French, and notified in writing on 11 July 2013, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Claudia Westerdiek — Registrar

Mark Villiger. — President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the separate opinions of judges Yudkivska and Lemmens are annexed to this judgment.

M.V.

C.W.

PARTLY DISSENTING OPINION OF JUDGE YUDKIVSKA

The present case concerns the balance between a lawyer's freedom of speech and the need to uphold the authority of the judiciary; the importance of such balance cannot be over-estimated. Assessing the competing interests in this case, I am unable to share the opinion of my colleagues who have found the interference with the applicant's freedom of expression to be proportionate.

In my opinion, the majority in the Chamber did not take full account of a certain number of important facts.

The first issue is that of the specific role of lawyers. In addition to the need to uphold the authority of the judiciary, lawyers have an obligation to "defend their clients' interests zealously"[1].

The applicant was furious to learn that the judge had not deemed it necessary "to register ... and transmit ... to her successor" an item of evidence that he regarded as important. He referred the matter to the Minister of Justice and gave an interview to a newspaper. The majority in the Chamber shared the opinion of the domestic judicial authorities, namely that the expressions used by the applicant reflected his "animosity" and that there had been no reason to criticise the judge so harshly, especially as the case had already been withdrawn from her.

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1. *Nikula v. Finland*, no. 31611/96, § 54, ECHR 2002-II.

Responsibility for drawing attention to the shortcomings of judicial investigations and proceedings, in the interest of the courts themselves, lies precisely with the lawyers. There is no doubt that the expressions used by a lawyer must be acceptable, without seeking to humiliate or offend those involved in judicial proceedings, including the judge. As the aim of such comments by a lawyer is not to offend but to *shed light on any shortcomings* – an aim that, in my opinion, was pursued in the present case – it is then very difficult for me to find sufficient grounds on which to limit such expression.

The comments made by the lawyer were not directed at the judge in person but were critical of her conduct during the proceedings in question. Thus, the applicant's remarks to the effect that she had displayed "conduct which [was] completely at odds with the principles of impartiality and fairness" and that there had been some "connivance" between her and the public prosecutor of Djibouti, as recognised by the majority, were value judgments based on an undeniable fact: the failure to transmit the cassette and the presence of a letter from the Djibouti prosecutor inside its cover (see paragraph 102 of the judgment).

Accordingly, the comments in question, even though they contain a certain degree of exaggeration, should not be

regarded as an unwarranted personal attack but rather as an interpretation of a matter of great public importance[1].

The interview with the applicant was part of the public debate concerning this high-profile case. The matter of public interest – the proper administration of justice – concerned him above all in his capacity as lawyer for the victims, who, as indicated in the *Mor v. France* case, "had a clear interest, both for their defence and for the dispassionate and independent judicial investigation in respect of their complaint [; and] giving an interview to the press was a legitimate part of [their] defence, given that the case had aroused interest in the media and among the general public"[2].

For that reason I am unable to accept the majority's arguments to the effect that the applicant's criticism was exaggerated because judge M. was "no longer handling the case when the applicant made his statements about her working methods in the case" (paragraph 105).

The applicant's criticism precisely concerned judge M.'s conduct *after* the transmission of the case to another judge, and in particular the fact that part of the evidence had not been passed on. According to the applicant, that omission could have undermined the ongoing judicial investigation

1. See, *mutatis mutandis*, *Kudeshkina v. Russia*, no. 29492/05, § 95, 26 February 2009.
2. *Mor v. France*, no. 28198/09, § 59, 15 December 2011.

and he considered it necessary to alert the Minister of Justice and public opinion.

The majority also found fault with the applicant for having given the impugned interview "just one day after contacting the Minister of Justice, without waiting for a response to his request" (see paragraph 106). However, the referral of the matter to the Minister of Justice and the interview in the newspaper clearly had different aims. The aim of the first was to trigger disciplinary proceedings against the judge, that being a procedural remedy available to a lawyer in respect of shortcomings on the part of the judiciary. The aim of the second action was to draw the attention of the general public to failings in the judicial investigation concerning this well-known case. I do not believe that one can find fault with a lawyer who has procedural remedies by which to make good any shortcomings in judicial proceedings, whether he uses them (as in the present case) or not, for having prompted a public debate, as those two paths lead in different directions. In addition, any disciplinary sanctions imposed on a judge will not necessarily be known to the public, even though clear failings could be seen in the judge's work in the present case. In any event, a lawyer's mission is, in the very interest of the judicial system, to use his best endeavours to ensure that the judicial investigation is conducted objectively and impartially. As the Court pointed

out in *Kyprianou*[1]: "For 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".

The principle of fair justice encompasses the right to be assisted by an independent lawyer who discharges his professional duties without excessive restriction or interference. The possibility of freely expressing his opinion is an indispensable condition for a lawyer to be able to fulfil his principal professional duty, the defence of his client's interests. Indeed, the lawyer's speech – arguments and persuasions, whether oral or written – is his main resource. As my honourable colleague, Judge Casadevall, has written on this subject: "Speech! The sole weapon (together with the pen or the keyboard) – and a very simple but nevertheless formidable one – at the lawyer's disposal when ... he is defending a party to proceedings"[2].

The possibility of filing a complaint with a disciplinary body is not really an appropriate means of expression when it comes to a lawyer's freedom of speech. Moreover, public debate as to a problem arising in judicial proceedings is necessary in a democratic society.

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1. *Kyprianou v. Cyprus* [GC], no. 73797/01, § 175, ECHR 2005-XIII.
2. Casadevall J. "L'avocat et la liberté de l'expression", in: *Freedom of expression: essays in honour of Nicolas Bratza, President of the European Court of Human Rights*, Josep Casadevall ... [et al.] (eds.), Strasbourg: Council of Europe/European Court of Human Rights; Oisterwijk: Wolf Legal Publishers (WLP), 2012 - pp. 235-244.

It is clear that any criticism by a lawyer must be assessed in a very stringent manner, for the public has more confidence in the comments of a lawyer who has inside knowledge of the case than, for example, those of journalists reporting on a trial in the media. But it would not be rational to leave the possibility of criticism only to "outside" observers, for a wall of silence imposed on professionals in relation to a trial that is important for public opinion would discredit the court in the public eye more than the criticisms emanating from those professionals. It is precisely the lawyers who appear in the case before the court, and who have the requisite qualification to see the faults and defects in the proceedings, that the public count upon to receive information. To turn court proceedings into a closed forum where one should not "air one's dirty washing" would, in my opinion, affect the image of the judicial system more than explicit criticism, provided, of course, that it does not become offensive or purely speculative. With that in mind, I do not think that the expressions used by the applicant can be regarded as "unfounded attacks"[1].

Lastly, the lawyer's conviction for making value judgments appears disproportionate. The very existence of criminal proceedings has a chilling effect; lawyers

[1]. *De Haes and Gijsels v. Belgium*, 24 February 1997, § 37, *Reports of judgments and decisions* 1997-I.

defending their clients' rights should not have to fear prosecution on that account.

Having regard to the foregoing, I have reached the conclusion that, in the present case, the applicant's rights under Article 10 of the Convention were not duly upheld.

PARTLY DISSENTING OPINION OF JUDGE LEMMENS

I voted with the majority in finding a violation of Article 6 § 1 of the Convention and no violation of Article 10. However, I disagreed with my colleagues as regards the application of Article 41 of the Convention.

In the present case, the only violation found by the Court concerned the composition of the bench of the Criminal Division of the Court of Cassation which dismissed the applicant's appeal on points of law. The violation related, more specifically, to only one of the ten judges on the bench.

The Court did not take the view that the Court of Cassation's decision was open to criticism in terms of its content, having regard to the Convention. On the contrary, it dismissed the Article 10 complaint.

In those circumstances, I am of the view that the finding of a violation of Article 6 § 1 of the Convention would in itself have constituted sufficient redress for the non-pecuniary damage sustained by the applicant.