JUDGE-LAWYER CONDUCT IN THE COURTROOM & THE FAIR TRIAL PRINCIPLE

Vilnius, 14- 15 May 2015

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A. Status and role of the lawyer - "watchdog of procedural regularity"

- ***Morice v. France, GC judgment of 24 April 2015, par. 132 – 133***

The specific status of lawyers gives them a central position in the administration of justice as intermediaries between the public and the courts. They therefore play a key role in ensuring that the courts, whose mission is fundamental in a State based on the rule of law, enjoy public confidence (see Schöpfer v. Switzerland, 20 May 1998, §§ 29-30, Reports 1998-III; Nikula v. Finland, no. 31611/96, § 45, ECHR 2002-II; Amihalachioaie v. Moldova, no. 60115/00, § 27, ECHR 2004-III; Kyprianou, cited above, § 173; André and Another v. France, no. 18603/03, § 42, 24 July 2008; and Mor, cited above, § 42). However, for members of the public to have confidence in the administration of justice they must have confidence in the ability of the legal profession to provide effective representation (see Kyprianou, cited above, § 175).
133. That special role of lawyers, as independent professionals, in the administration of justice entails a number of duties, particularly with regard to their conduct (see Van der Mussele v. Belgium, 23 November 1983, Series A no. 70; Casado Coca v. Spain, 24 February 1994, § 46, Series A no. 285-A; Steur v. the Netherlands, no. 39657/98, § 38, ECHR 2003-XI; Veraart v. the Netherlands, no. 10807/04, § 51, 30 November 2006; and Coutant v. France (dec.), no. 17155/03, 24 January 2008). Whilst they are subject to restrictions on their professional conduct, which must be discreet, honest and dignified, they also enjoy exclusive rights and privileges that may vary from one jurisdiction to another – among them, usually, a certain latitude regarding arguments used in court (see Steur, cited above).

- ***Elci and Others v. Turkey, judgment of 13 November 2003, appl. nos. 23145/93 and 25091/94, par. 669***

The Court would emphasise the central role of the legal profession in the administration of justice and the maintenance of the rule of law. The freedom of lawyers to practise their profession without undue hindrance is an essential component of a democratic society and a necessary prerequisite for the effective enforcement of the provisions of the

Convention, in particular the guarantees of fair trial and the right to personal security. Persecution or harassment of members of the legal profession thus strikes at the very heart of the Convention system. For this reason, allegations of such persecution in whatever form, but particularly large scale arrests and detention of lawyers and searching of lawyers' offices, will be subject to especially strict scrutiny by the Court.

B. In the courtroom

a. Impartiality of judges

- ***Morice v. France, GC judgment of 23 April 2015***

General principles

73. The Court reiterates that impartiality normally denotes the absence of prejudice or bias and its existence or otherwise can be tested in various ways. According to the Court's settled case-law, the existence of impartiality for the purposes of Article 6 § 1 must be determined according to a **subjective test** where regard must be had to the personal conviction and behaviour of a particular judge, that is, whether the judge held any personal prejudice or bias in a given case; and also according to an objective test, that is to say by ascertaining whether the tribunal itself and, among other aspects, its composition, offered sufficient guarantees to exclude any legitimate doubt in respect of its impartiality (see, for example, Kyprianou v. Cyprus [GC], no. 73797/01, § 118, ECHR 2005-XIII, and Micallef v. Malta [GC], no. 17056/06, § 93, ECHR 2009).
74. As to the subjective test, the principle that a tribunal must be presumed to be free of personal prejudice or partiality is long-established in the case-law of the Court (see Kyprianou, cited above, § 119, and Micallef, cited above, § 94). The personal impartiality of a judge must be presumed until there is proof to the contrary (see Hauschildt v. Denmark, 24 May 1989, § 47, Series A no. 154). As regards the type of proof required, the Court has, for example, sought to ascertain whether a judge has displayed hostility or ill will for personal reasons (see De Cubber v. Belgium, 26 October 1984, § 25, Series A no. 86).
75. In the vast majority of cases raising impartiality issues the Court has focused on the **objective test** (see Micallef, cited above, § 95). However, there is no watertight division between subjective and objective impartiality since the conduct of a judge may not only prompt objectively held misgivings as to impartiality from the point of view of the external observer (objective test) but may also go to the issue of his or her personal conviction (subjective test) (see Kyprianou, cited above, § 119). Thus, in some cases where it may be difficult to procure evidence with which to rebut the presumption of the judge's subjective impartiality, the requirement of objective impartiality provides a further important guarantee (see Pullar v. the United Kingdom, 10 June 1996, § 32, Reports of Judgments and Decisions 1996-III).
76. As to the **objective test**, it must be determined whether, quite apart from the judge's conduct, there are ascertainable facts which may raise doubts as to his or her impartiality. This implies that, in deciding whether in a given case there is a legitimate reason to fear that a particular judge or a body sitting as a bench lacks impartiality, the standpoint of the

person concerned is important but not decisive. What is decisive is whether this fear can be held to be objectively justified (see Micallef, cited above, § 96).
77. The objective test mostly concerns hierarchical or other links between the judge and other protagonists in the proceedings (ibid., § 97). It must therefore be decided in each individual case whether the relationship in question is of such a nature and degree as to indicate a lack of impartiality on the part of the tribunal (see Pullar, cited above, § 38).
78. In this connection even appearances may be of a certain importance or, in other words, "justice must not only be done, it must also be seen to be done" (see De Cubber, cited above, § 26). What is at stake is the confidence which the courts in a democratic society must inspire in the public. Thus, any judge in respect of whom there is a legitimate reason to fear a lack of impartiality must withdraw (see Castillo Algar v. Spain, 28 October 1998, § 45, Reports 1998-VIII, and Micallef, cited above, § 98).

- ***Kyprioanou v. Cyprus, GC of 15 December 2005, appl. no.73797/01,***

Impartiality - Objective test:
127. The present case relates to contempt in the face of the court, aimed at the judges personally. They had been the direct object of the applicant's criticisms as to the manner in which they had been conducting the proceedings. The same judges then took the decision to prosecute, tried the issues arising from the applicant's conduct, determined his guilt and imposed the sanction, in this case a term of imprisonment. In such a situation the confusion of roles between complainant, witness, prosecutor and judge could self-evidently prompt objectively justified fears as to the conformity of the proceedings with the time-honoured principle that no one should be a judge in his or her own cause and, consequently, as to the impartiality of the bench (see Demicoli v. Malta, judgment of 27 August 1991, Series A no. 210, pp. 18-19, §§ 41-42).

Subjective test:
The applicant further alleged that the judges concerned had acted with personal bias. Firstly, the judges, in their decision sentencing the applicant, acknowledged that they had been "deeply insulted" "as persons" by the applicant. Even though the judges proceeded to say that this had been the least of their concerns, in the Court's view this statement in itself shows that the judges had been personally offended by the applicant's words and conduct and indicates personal involvement on their part.

Secondly, the emphatic language used by the judges throughout their decision conveyed a sense of indignation and shock, which runs counter to the detached approach expected of judicial pronouncements. In particular, the judges stated that they could not "conceive of another occasion of such a manifest and unacceptable contempt of court by any person, let alone an advocate" and that "if the court's reaction is not immediate and drastic, we feel that justice will have suffered a disastrous blow".

Thirdly, they then proceeded to impose a sentence of five days' imprisonment, enforced immediately, which they deemed to be the "only adequate response". In the judges' opinion, "an inadequate reaction on the part of the lawful and civilised order, as

expressed by the courts would mean accepting that the authority of the courts be demeaned" .
Fourthly, the judges expressed the opinion early on in their discussion with the applicant that they considered him guilty of the criminal offence of contempt of court. After deciding that the applicant had committed the above offence they gave the applicant the choice either to maintain what he had said and to give reasons why a sentence should not be imposed on him, or to retract. He was, therefore, in fact asked to mitigate "the damage he had caused by his behaviour" rather than defend himself.

- ***PANOVITS v. Cyprus, appl. No. 4268/04, judgment of 11 December 2009***

98. (…) The Court considers that the personal conduct of the judges in the case undermined the applicant's confidence that his trial would be conducted in a fair manner. Although the contempt proceedings were separate from the applicant's main trial, the fact that the judges were offended by the applicant's lawyer when he complained about the manner in which his cross-examination was received by the bench undermined the conduct of the applicant's defence. (…)
100. The Court finds that the refusal of Mr Kyprianou's request for leave to withdraw from the proceedings due to the fact that he felt unable to continue defending the applicant in an effective manner exceeded, in the present circumstances, the limits of a proportionate response given the impact on the applicant's rights of defence. Further, in the view of the Court, the Assize Court's response to Mr Kyprianou's discourteous criticism of the manner in which they were trying the case, which was to convict him immediately of contempt of court and impose a sentence of imprisonment on him, was also disproportionate. It further considers that the "chilling effect" on Mr Kyprianou's performance of his duties as defence counsel was demonstrated by his insistence, upon the resumption of the proceedings, that another lawyer should address the court in respect of the request for the continuation of the proceedings before a different bench.
101. In these circumstances, the Court concludes that the Assize Court's handling of the confrontation with the applicant's defence counsel rendered the trial unfair. It follows that there has been a violation of Article 6 § 1 in this respect.

Objective impartiality

- ***Micallef v. Malta, GC judgment of 15 October 2009, par. 100***

The Grand Chamber, like the Chamber, cannot but observe that Maltese law as it stood at the time of the present case was deficient on two levels. Firstly, there was no automatic obligation for a judge to withdraw in cases where impartiality could be an issue, a matter which remains unchanged in the law in force at present. Secondly, at the time of the present case the law did not recognise as problematic – and therefore as a ground for challenge – a sibling relationship between judge and advocate, let alone that arising from relationships of a lesser degree such as those of uncles or aunts in respect of nephews or nieces. Thus, the Grand Chamber, like the Chamber, considers that the law in itself did not give adequate guarantees of subjective and objective impartiality.

101. The Court is not persuaded that there is sufficient evidence that the Chief Justice displayed personal bias. It therefore prefers to examine the case under the objective impartiality test which provides for a further guarantee.
102. As to the objective test, this part of the complaint is directed at a defect in the relevant law under which it was not possible to challenge judges on the basis of a relationship with a party's advocate unless it was a first-degree relationship of consanguinity or affinity (see paragraph 28 above). Consequently, in the present case, Mrs M. was faced with a panel of three judges, one of whom was the uncle of the opposing party's advocate and the brother of the advocate acting for the opposing party during the first-instance proceedings whose conduct was at issue in the appeal. The Grand Chamber is of the view that the close family ties between the opposing party's advocate and the Chief Justice sufficed to objectively justify fears that the presiding judge lacked impartiality. It cannot be overlooked that Malta is a small country and that entire families practising law are a common phenomenon. Indeed, the Government have also acknowledged that this had become a recurring issue which necessitated action resulting in an amendment to the relevant law, which now includes sibling relationships as a ground for withdrawal (see paragraph 29 above).
103. The foregoing considerations are sufficient to enable the Court to conclude that the composition of the court was not such as to guarantee its impartiality and that it failed to meet the Convention standard under the objective test.

- ***PÉTUR THÓR SIGURÐSSON v. ICELAND, Application no. 39731/98, judgment of 10 April 2003***

One of the three judges forming the majority was Mrs Justice Guðrún Erlendsdóttir. The applicant submitted that after the delivery of the Supreme Court's judgment, it came to light that Mrs Justice Guðrún Erlendsdóttir and her husband, a Supreme Court lawyer, had a financial relationship with the National Bank of such a nature as to disqualify her from sitting in the applicant's case.
The applicant lodged two petitions to the Supreme Court requesting the reopening of the proceedings in his case against the National Bank on the ground of Mrs Justice Guðrún Erlendsdóttir's alleged lack of impartiality.
The judge's involvement in the debt settlement, the favours received by her husband and his links to the National Bank were of such a nature and amplitude and were so close in time to the Supreme Court's examination of the case that the applicant could entertain reasonable fears that it lacked the requisite impartiality. Accordingly, the Court finds that there has been a violation of Article 6 § 1 of the Convention in the present case.

- ***STECK-RISCH AND OTHERS v. LIECHTENSTEIN Judgment of 19 May 2005, Application no.63151/00***

In the present case, judge H.H., as a member of the Constitutional Court, was called upon to decide on the applicants' appeal against the Administrative Court's judgment, in which G.W., who was his law-office colleague, had acted as presiding judge.
43. In the Wettstein case, the Court's finding that the applicant's fear that judge R. lacked the necessary impartiality was objectively justified was mainly based on the dual role of

R: there was an overlapping in time of two sets of proceedings in which R. had exercised the function of judge in one case and that of legal representative of the party opposing the applicant in the other. Whereas the fact that R. and one other judge were also office colleagues of another lawyer who had represented the party opposing the applicant in another set of proceedings was considered to be of minor importance .

44. The Court notes at the outset that neither judge H.H. nor judge G.W. exercised any dual functions in the present case. The applicants based their allegation that judge H.H. lacked impartiality on the simple fact that both judges were partners in their capacity as practicing lawyers.

45. In the Court's view, the nature of this partnership is of importance when determining whether the applicants' fears were objectively justified. It notes that, according to the Government, H.H. and G.W. merely shared their office premises but did not obtain a common income. The applicants who had initially claimed that H.H. and G.W. were living of common earnings, did not contest this. They rather argued that the mere fact that they were office colleagues created an appearance justifying their fear that H.H. lacked impartiality.

Although appearances are of importance where a judge's objective impartiality is at stake (Pétur Thor Sigurđsson, cited above, § 37), the Court has to subject the specific circumstances of the case to careful scrutiny. Given that H.H. and G.W. only shared office premises, the Court considers that their partnership did not involve any professional or financial dependence that may cast doubt on H.H.'s impartiality. This distinguishes the present case from a case in which the court found a violation of Article 6 § 1 as the judge in question had professional and financial ties with the party opposing the applicant: He performed duties as an appeal court judge and those of an associate professor in receipt of an income from the university which was the applicant's opponent in the proceedings at issue (Pescador Valero v. Spain,no. 62435/00, § 27, ECHR 2003-VII).

47. The Court further points out that doubts as to a judge's independence and objective impartiality may arise where that judge is, in a context outside the proceedings, a subordinate of one of the parties (see Sramek v. Austria, judgment of 22 October 1984, Series A no. 84, p. 20, § 42; Findlay v. the United Kingdom, judgment of 25 February 1997, Reports of Judgments and Decisions 1997-I, p. 282, §§ 75-76). No such relationship of subordination existed in the present case. G.W and H.H. were equal and independent partners in their lawoffice.

The Court is not convinced either by the applicants' argument that it might have had negative repercussions on their law-office, had the Constitutional Court quashed the Administrative Court's judgment. The quashing of a lower court's decision by a supreme jurisdiction is a normal feature in any legal system, which does not cast doubt on the competence of the judges who gave the decision.

48. Finally, there is nothing to indicate that the H.H. and G.W. were particularly close friends, in other words, that their relationship went beyond a professional relationship as office colleagues. Nor is there any indication that, despite their obligation to observe professional secrecy as judges, they had shared any substantial information concerning the applicants' case which would have led judge H.H. to reach a preconceived view on the merits of the case.

b. Defence rights in the context of State paid lawyers appointed ex officio

- ***Daud v. Portugal, 21 April 1998, appl. nos.11/1997 and 795/997***

38. The Court reiterates that the Convention is designed to "guarantee not rights that are theoretical or illusory but rights that are practical and effective, and that assigning counsel does not in itself ensure the effectiveness of the assistance he may afford an accused" (see the Imbrioscia v. Switzerland judgment of 24 November 1993, Series A no. 275, p. 13, § 38). "Nevertheless, a State cannot be held responsible for every shortcoming on the part of a lawyer appointed for legal aid purposes... It follows from the independence of the legal profession from the State that the conduct of the defence is essentially a matter between the defendant and his counsel, whether counsel be appointed under a legal aid scheme or be privately financed... [T]he competent national authorities are required under Article 6 § 3 (c) **to intervene only if a failure by legal aid counsel to provide effective representation is manifest or sufficiently brought to their attention in some other way"** (Kamasinski v. Austria judgment of 19 December 1989, Series A no. 168, p. 33, § 65).

39. In the instant case the starting-point must be that, regard being had to the preparation and conduct of the case by the officially assigned lawyers, the intended outcome of Article 6 § 3 was not achieved. The Court notes that the first officially assigned lawyer, before reporting sick, had not taken any steps as counsel for Mr Daud, who tried unsuccessfully to conduct his own defence. As to the second lawyer, whose appointment the applicant learned of only three days before the beginning of the trial at the Criminal Court, the Court considers that she did not have the time she needed to study the file, visit her client in prison if necessary and prepare his defence. The time between notification of the replacement of the lawyer (23 January 1993 – see paragraph 19 above) and the hearing (26 January 1993 – see paragraph 20 above) was too short for a serious, complex case in which there had been no judicial investigation and which led to a heavy sentence. The Supreme Court did not remedy the situation, since in its judgment of 30 June 1993 it declared the appeal inadmissible on account of an inadequate presentation of the grounds (see paragraph 23 above).

Mr Daud consequently did not have the benefit of a practical and effective defence as required by Article 6 § 3 (c).

- ***Sakhnovskiy v. Rusia, [GC] 2 November 2010***

102. The Court emphasises that the relationship between the lawyer and his client should be based on mutual trust and understanding. Of course, it is not always possible for the State to facilitate such a relationship: there are inherent time and place constraints for the meetings between the detained person and his lawyer. Moreover, in exceptional circumstances the State may restrict confidential contacts with defence counsel for a person in detention (see Kempers v. Austria (dec.), no. 21842/03, 27 February 1997, or Lanz v. Austria, no. 24430/94, § 52, 31 January 2002). Nevertheless, any limitation on relations between clients and lawyers, whether inherent or express, should not thwart the effective legal assistance to which a defendant is entitled. Notwithstanding possible

difficulties or restrictions, such is the importance attached to the rights of the defence that the right to effective legal assistance must be respected in all circumstances.
103. In the present case, the applicant was able to communicate with the newly-appointed lawyer for fifteen minutes, immediately before the start of the hearing. The Court considers that, given the complexity and seriousness of the case, the time allotted was clearly not sufficient for the applicant to discuss the case and make sure that Ms A.'s knowledge of the case and legal position were appropriate.
104. Moreover, it is questionable whether communication by video link offered sufficient privacy. The Court notes that in the Marcello Viola case (cited above, §§ 41 and 75) the applicant was able to speak to his lawyer via a telephone line secured against any attempt at interception. In the case at hand the applicant had to use the video-conferencing system installed and operated by the State. The Court considers that the applicant might legitimately have felt ill at ease when he discussed his case with Ms A.

C.Conduct outside the courtroom – Freedom of expression of lawyers

- ***Morice v. France, GC judgment of 23 April 2015,***

a) Freedom of expression

124. The general principles concerning the necessity of an interference with freedom of expression, reiterated many times by the Court since its judgment in Handyside v. the United Kingdom (7 December 1976, Series A no. 24), were summarised in Stoll v. Switzerland ([GC] no. 69698/01, § 101, ECHR 2007‑V) and restated more recently in Animal Defenders International v. the United Kingdom ([GC], no. 48876/08, § 100, ECHR 2013), as follows:
"(i) Freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfilment. Subject to paragraph 2 of Article 10, it is applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Such are the demands of pluralism, tolerance and broadmindedness without which there is no 'democratic society'. As set forth in Article 10, this freedom is subject to exceptions, which ... must, however, be construed strictly, and the need for any restrictions must be established convincingly ...

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

(iii) The Court's task, in exercising its supervisory jurisdiction, is not to take the place of the competent national authorities but rather to review under Article 10 the decisions they delivered pursuant to their power of appreciation. This does not mean that the supervision is limited to ascertaining whether the respondent State exercised its discretion reasonably, carefully and in good faith; what the Court has to do is to look at the interference complained of in the light of the case as a whole and determine whether it was 'proportionate to the legitimate aim pursued' and whether the reasons adduced by the national authorities to justify it are 'relevant and sufficient' ... In doing so, the Court has to satisfy itself that the national authorities applied standards which were in conformity with the principles embodied in Article 10 and, moreover, that they relied on an acceptable assessment of the relevant facts ..."

b) Maintaining the authority of the judiciary

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

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

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

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

c) The status and freedom of expression of lawyers

132. The specific status of lawyers gives them a central position in the administration of justice as intermediaries between the public and the courts. They therefore play a key role

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

133. That special role of lawyers, as independent professionals, in the administration of justice entails a number of duties, particularly with regard to their conduct (see Van der Mussele v. Belgium, 23 November 1983, Series A no. 70; Casado Coca v. Spain, 24 February 1994, § 46, Series A no. 285-A; Steur v. the Netherlands, no. 39657/98, § 38, ECHR 2003-XI; Veraart v. the Netherlands, no. 10807/04, § 51, 30 November 2006; and Coutant v. France (dec.), no. 17155/03, 24 January 2008). Whilst they are subject to restrictions on their professional conduct, which must be discreet, honest and dignified, they also enjoy exclusive rights and privileges that may vary from one jurisdiction to another – among them, usually, a certain latitude regarding arguments used in court (see Steur, cited above).

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

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

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

137. As regards, firstly, the issue of "conduct in the courtroom", since the lawyer's freedom of expression may raise a question as to his client's right to a fair trial, the principle of fairness thus also militates in favour of a free and even forceful exchange of argument between the parties (see Nikula, cited above, § 49, and Steur, cited above, § 37). Lawyers have the duty to "defend their clients' interests zealously" (see Nikula, cited

above, § 54), which means that they sometimes have to decide whether or not they should object to or complain about the conduct of the court (see Kyprianou, cited above, § 175). In addition, the Court takes into consideration the fact that the impugned remarks are not repeated outside the courtroom and it makes a distinction depending on the person concerned; thus, a prosecutor, who is a "party" to the proceedings, has to "tolerate very considerable criticism by ... defence counsel", even if some of the terms are inappropriate, provided they do not concern his general professional or other qualities (see Nikula, cited above, §§ 51-52; Foglia, cited above, § 95; and Roland Dumas, cited above, § 48).

138. Turning now to remarks made outside the courtroom, the Court reiterates that the defence of a client may be pursued by means of an appearance on the television news or a statement in the press, and through such channels the lawyer may inform the public about shortcomings that are likely to undermine pre-trial proceedings (see Mor, cited above, § 59). The Court takes the view, in this connection, that a lawyer cannot be held responsible for everything published in the form of an "interview", in particular where the press has edited the statements and he or she has denied making certain remarks (see Amihalachioaie, cited above, § 37). In the above-cited Foglia case, it also found that lawyers could not justifiably be held responsible for the actions of the press (see Foglia, cited above, § 97). Similarly, where a case is widely covered in the media on account of the seriousness of the facts and the individuals likely to be implicated, a lawyer cannot be penalised for breaching the secrecy of the judicial investigation where he or she has merely made personal comments on information which is already known to the journalists and which they intend to report, with or without those comments. Nevertheless, when making public statements, a lawyer is not exempted from his duty of prudence in relation to the secrecy of a pending judicial investigation (see Mor, cited above, §§ 55 and 56).

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

- ***AMIHALACHIOAIE v. MOLDOVA, Application no. 60115/00, judgment of 20 April 2004***

The Moldovan Constitutional Court held in a decision of 15 February 2000 that the provisions making membership of the Moldovan Bar Council compulsory were unconstitutional. The applicant- Chairman of Moldovan Bar Council-criticised the Constitutional Court's decision in a telephone interview he gave to A.M., a journalist of a newspaper. A.M. published an article on the debate which the Constitutional Court's

decision of 15 February 2000 had sparked off among lawyers. He gave the following account of his telephone interview with the applicant:
'The Constitutional Court's decision will produce total anarchy in the legal profession'…In view of this, the question is whether the Constitutional Court is constitutional. In 1990 the United Nations adopted its Basic Principles on the Role of the Bar, which are fully guaranteed by our law. The legal profession is independent the world over. In Moldova it is subordinate to the executive, that is to say the Ministry of Justice. This is a serious breach of fundamental democratic principles. The Constitutional Court did not take into account the judgments of the Strasbourg Court referred to by the Bar Council in its observations. The judges of the Constitutional Court probably do not regard the European Court of Human Rights as an authority. Am I to assume that they have acquired more experience in five years than the Strasbourg judges in fifty? We shall certainly be informing the Council of Europe that Moldova does not comply with the case-law or requirements of the European Court of Human Rights.'

On 6 March 2000 the Constitutional Court issued a final decision pursuant to Articles 81 and 82 of the Code of Constitutional Procedure in which it imposed an administrative fine on the applicant in the sum of 360 Moldovan lei (equivalent to 36 euros). It found that the applicant's comments showed a lack of respect on the applicant's part for the Constitutional Court and its decision.
The Court finds that even though the remarks may be regarded as showing a certain lack of regard for the Constitutional Court following its decision, they cannot be described as grave or as insulting to the judges of the Constitutional Court… In the light of these considerations, the Court finds that there was no "pressing social need" to restrict the applicant's freedom of expression and that the national authorities have not furnished "relevant and sufficient" reasons to justify such a restriction. Since the applicant has not gone beyond the bounds of acceptable criticism under Article 10 of the Convention, the interference in issue cannot be regarded as having been "necessary in a democratic society".