

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

GRAND CHAMBER

CASE OF MORICE v. FRANCE

(Application no. 29369/10)

JUDGMENT

STRASBOURG

23 April 2015

This judgment is final.

In the case of Morice v. France,

The European Court of Human Rights, sitting as a Grand Chamber composed of:

Dean Spielmann, *President*,
Josep Casadevall,
Guido Raimondi,
Isabelle Berro,
Ineta Ziemele,
George Nicolaou,
Luis López Guerra,
Mirjana Lazarova Trajkovska,
Ann Power-Forde,
Zdravka Kalaydjieva,
Julia Laffranque,
Erik Møse,
André Potocki,
Johannes Silvis,
Valeriu Griţco,
Ksenija Turković,
Egidijus Kūris, *judges*,

and Johan Callewaert, *Deputy Grand Chamber Registrar*,

Having deliberated in private on 21 May 2014 and 18 February 2015,

Delivers the following judgment, which was adopted on the last-mentioned 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, Director of Legal Affairs, Ministry of Foreign Affairs.

3. The applicant alleged that there had been a breach of the principle of impartiality under Article 6 § 1 of the Convention in proceedings before the Court of Cassation and that his freedom of expression, as guaranteed by Article 10, had been breached on account of his conviction.

4. The application was allocated to the Fifth Section of the Court (Rule 52 § 1 of the Rules of Court). On 11 June 2013 a Chamber of that

Section composed Mark Villiger, President, Angelika Nußberger, Boštjan M. Zupančič, Ganna Yudkivska, André Potocki, Paul Lemmens, Aleš Pejchal, judges, and Claudia Westerdiek, Section Registrar, declared the application admissible and delivered a judgment. It found, unanimously, that there had been a violation of Article 6 § 1, and, by a majority, that there had been no violation of Article 10. The partly dissenting opinions of Judges Yudkivska and Lemmens were appended to the judgment.

5. On 3 October 2013 the applicant requested, in accordance with Article 43 of the Convention, that the case be referred to the Grand Chamber. On 9 December 2013 a panel of the Grand Chamber granted the request.

6. The composition of the Grand Chamber was determined in accordance with the provisions of Article 26 §§ 4 and 5 of the Convention and Rule 24.

7. The applicant and the Government each filed observations on the merits. In addition, third-party comments were received from the Council of Bars and Law Societies of Europe and from the Paris Bar Association, the National Bar Council and the Conference of Chairmen of French Bars, which had been given leave by the President to intervene in the written procedure (Article 36 § 2 of the Convention and Rule 44 § 3).

8. A hearing took place in public in the Human Rights Building, Strasbourg, on 21 May 2014 (Rule 59 § 3).

There appeared before the Court:

(a) *for the Government*

Ms N. ANCEL, Head of the Human Rights Section, Ministry of Foreign Affairs and International Development, *Agent*,
Mr A. LETOCART, Ministry of Justice
Ms M.-A. RECHER, Ministry of Justice,
Ms P. ROUAULT-CHALIER, Ministry of Justice,
Ms E. TOPIN, Ministry of Foreign Affairs and International Development, *Advisers*;

(b) *for the applicant*

Ms C. AUDHOUI, member of the Paris Bar,
Mr L. PETTITI, member of the Paris Bar,
Mr N. HERVIEU, adviser to a firm of lawyers practising in the *Conseil d'État* and Court of Cassation, *Counsel*,
Mr J. TARDIF, member of the Paris Bar,
Ms C. CHAUFFRAY, member of the Paris Bar, *Advisers*.

The Court heard addresses by Mr Morice, Mr Pettiti, Mr Hervieu and Ms Ancel.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

9. The applicant, who was born in 1960 and lives in Paris, is a lawyer (*avocat*) and member of the Paris Bar.

A. Death of Judge Borrel and subsequent proceedings

10. On 19 October 1995 Mr Bernard Borrel, a judge who had been seconded by France for the year before as a technical adviser to the Djiboutian Minister of Justice, in the context of cooperation agreements between the two States, 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. The investigation by the Djibouti gendarmerie in the days that followed concluded that he had committed suicide by self-immolation.

11. On 7 December 1995 a judicial investigation was opened at the Toulouse *tribunal de grande instance* to determine the cause of death. Bernard Borrel's body, which was repatriated and interred in Toulouse, underwent an autopsy on 15 February 1996. The report concluded that the death was not suspicious, although the body's state of decomposition did not permit a precise cause to be established.

12. On 3 March 1997 Mrs Elisabeth Borrel, the widow of Bernard Borrel and also a judge, disputing the finding of suicide, filed a complaint as a civil party, in her own name and on behalf of her two minor children, against a person or persons unknown for premeditated murder. She appointed the applicant, Mr Morice, to represent her in the proceedings.

13. On 8 and 23 April 1997 two judicial investigations were opened in respect of premeditated murder committed by a person or persons unknown.

14. In a decision of 30 April 1997, the judicial investigation into the cause of death and the two investigations in respect of premeditated murder were joined.

15. On 29 October 1997 the Court of Cassation accepted a request by the applicant to withdraw the case from the Toulouse court and it was transferred to the *tribunal de grande instance* of Paris, where it was assigned on 12 October 1997 to Ms M., assisted from 7 January 1998 by Mr L.L., both investigating judges, who were to conduct the judicial investigation jointly.

16. On 19 November 1999 a lawyer at the Brussels Bar informed the police that A., a former senior officer and member of the Djiboutian Presidential Guard, who had found asylum in Belgium, had certain revelations to make concerning Judge Borrel. The information thus disclosed was transmitted to the French authorities via Interpol. A judgment

of the Versailles Court of Appeal of 28 May 2009 (see paragraph 18 below) records the following sequence of events: Judges M. and L.L. did not reply, owing to the fact that the witness wished to remain anonymous, and the information was not followed up; the witness's Belgian lawyer thus contacted the applicant, who arranged for the witness to be interviewed by journalists from the daily newspaper *Le Figaro* and the French TV channel TF1, at the end of December 1999; lastly, it was as a result of the publication and broadcasting of that interview in early January 2000 that Judges M. and L.L. decided to go to Belgium to assist the Belgian investigator in taking evidence from the witness.

17. On 31 January 2000 Judges M. and L.L. interviewed the witness in Brussels. It was subsequently alleged by A. that he had been pressurised and intimidated by Judge M. to withdraw his testimony, those complaints being expressly made in a letter of 2 February 2000 from his lawyer to the Crown Prosecutor. In addition, the witness accused the public prosecutor of Djibouti of having threatened him to make him recant his statement, and alleged that the head of the Djibouti secret services had ordered the head of the Presidential Guard, Captain I., to draft a statement discrediting him. Captain I. confirmed A's accusations concerning him.

18. Proceedings were brought in France against the public prosecutor of Djibouti and the head of the country's secret services for the procuring of false evidence, and Judge Borrel's widow and son, the witness A., Captain I., and a French lawyer, A.M., who was implicated, intervened as civil parties. Evidence was taken from Judge M. in her capacity as witness. The public prosecutor and the head of the secret services of Djibouti were sentenced, respectively, to eighteen and twelve months' imprisonment, and ordered to pay damages to the civil parties, in a judgment of the Versailles Criminal Court of 27 March 2008, before being acquitted by the Versailles Court of Appeal on 28 May 2009.

19. On 2 February 2000, in the context of the judicial investigation in respect of premeditated murder, three professional unions of judges and prosecutors, namely the *Syndicat de la magistrature*, the *Association professionnelle des magistrats* and the *Union syndicale des magistrats*, applied to be joined to the proceedings as civil parties.

20. On 16 March 2000 the applicant, acting on behalf of Mrs Borrel, requested, firstly, that evidence be taken from the witness, A., in Belgium, and, secondly, that a visit to the scene of the crime in Djibouti, in the presence of the civil parties, be organised.

21. In a decision of 17 March 2000, the investigating judges M. and L.L. accepted the request concerning A., finding that a new interview was absolutely necessary. They refused, however, to agree to a site visit, as such a visit had already been made twice, once in 1999 and again one week before the decision in question, as they did not see "how a visit to the site in the presence of the civil party would, at th[at] stage of the proceedings, be

helpful for the discovery of the truth". They added that during their visit to Djibouti a few days before, they had been accompanied by two experts, including the director of the Paris Institute of Forensic Medicine, adding that the scene had been filmed and photographed on that occasion.

22. The applicant and another lawyer appealed against that decision. They filed their pleadings with the Indictments Division, as did the lawyer acting for the *Syndicat de la magistrature*, arguing that the last site visit in the presence of an expert could be regarded as a reconstruction from which the civil parties had been excluded, and that the sole aim of the investigation was to demonstrate that the victim had committed suicide. They also requested that the Indictments Division take over the case from the investigating judges and continue the investigation itself.

23. In a judgment of 21 June 2000, the Indictments Division of the Paris Court of Appeal found that after two site visits in the absence of the civil parties, one of which closely resembled a reconstruction, the need to organise an on-site reconstruction in the presence of the civil parties so that they could exercise their rights was indispensable for the discovery of the truth. Accordingly, it set aside the decision of Judges M. and L.L. on that point. In addition, it withdrew the case from them and appointed a new investigating judge, Judge P., to continue the investigation.

24. On 19 June 2007 the Paris public prosecutor, further to the request of the investigating judge then handling the case, on the basis of Article 11, paragraph 3, of the Code of Criminal Procedure, issued a statement to clarify publicly that "whilst suicide had once been the preferred theory, the evidence gathered, especially since 2002, now point[ed] to a criminal act", adding that the experts' reports had determined that "Bernard Borrel was lying on the ground when liquids were poured over him in a random manner".

25. The proceedings are currently still pending.

B. Facts related to the "Scientology" case

26. The Minister of Justice, by acts of 29 June and 16 October 2000, referred to the National Legal Service Commission (*Conseil supérieur de la magistrature* – "the CSM"), in its capacity as a disciplinary board for judges, certain shortcomings attributable to Judge M. in the judicial investigation into the "Scientology" case for which she was responsible and in which the applicant also represented the civil parties. Judge M. was criticised for not devoting the necessary care and attention to the case file, leaving it practically untouched for five years; for having recourse to a friendly-settlement procedure which went beyond the jurisdiction of an investigating judge; and for not making copies of all the documents in the case file, thus making it impossible to reconstruct the file after its partial disappearance from her chambers. Judge M. requested that the referral to

the CSM be declared null and void, particularly on account of the fact that it had been made public by the director of the Minister's private office at a press conference, even before she had been personally notified of the decision. In parallel, on 18 October 2000, the Indictments Division of the Paris Court of Appeal upheld a request by the applicant for the withdrawal of the "Scientology" case from Judge M.

27. On 4 July 2000, at a general meeting of judges of the Paris *tribunal de grande instance*, the issue of the disciplinary proceedings against Judge M. was raised, in particular because they had been announced in the press whereas the judge concerned had not been officially informed and the president of that court had not yet been notified. During that meeting a judge, J.M., stated as follows:

> "We are not prohibited, as grassroots judges, from saying that we stand by Judge [M.]. It is not forbidden to say that Judge [M.] has our support and trust."

28. The general meeting drafted the following motion, which was adopted unanimously:

> "The general meeting of judges of the Paris *tribunal de grande instance* held on 4 July 2000, without disputing the authority conferred on the Minister of Justice to take disciplinary proceedings in the conditions prescribed by law, is surprised to learn from the press that such proceedings have been initiated against Judge [M.], investigating judge in Paris, whereas to date neither the judge herself nor her judicial hierarchy have been officially informed thereof."

29. In the context of a magazine interview published in July-August 2000, the chair of the *Syndicat de la magistrature*, a civil party in the Borrel case, criticised the "lack of impartiality on the part of Judge M. in the Borrel and [L.] cases", adding that the judges who had signed the motion "could not have been unaware that in two sensitive cases, the Borrel case and the [L.] case, her impartiality was seriously called into question".

30. In a judgment of 5 January 2000, the Paris *tribunal de grande instance*, in a case brought by the applicant as counsel acting for two civil parties, found the State liable for gross negligence on the part of the courts service on account of the disappearance of the so-called "Scientology" file from the office of Judge M. It awarded damages to the complainants.

31. On 13 December 2001 the CSM dismissed a plea of nullity from Judge M. and, on the merits, while reproaching her for a certain lack of rigour or a failure to keep track of the case sufficiently, did not impose any disciplinary penalty on her.

C. Criminal proceedings against the applicant

32. On 1 August 2000 Judge P., who had been appointed to replace Judges M. and L.L., drafted a report in which he noted the following chain of events. In response to the applicant's request concerning the

video-recording made in Djibouti in March 2000 and cited by Judges M. and L.L. in their decision of 17 March 2000, Judge P. replied that it was not in the judicial investigation file and was not registered as an exhibit; on the same day, Judge P. asked Judge M. whether she still had the video-cassette; Judge M. promptly gave him a closed and undated envelope with her name on, showing no sign of having been placed under seal, bearing the address of Judge M. as addressee and that of the public prosecutor of Djibouti as sender; the envelope contained a video-cassette and a handwritten card with the letter head of the public prosecutor of Djibouti, these items then being taken by Judge P. and placed under seal. The public prosecutor's card addressed to Judge M. read as follows (translated from French).

> "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 *Sans aucun doute* [Without any doubt] on TF1. I noticed once again how Mrs Borrel and her lawyers were determined to carry on orchestrating their manipulation.
>
> I'll call you soon.
>
> Say hello to Roger if he's back, and also to J.C. [D.].
>
> Speak to you soon.
>
> Best wishes,
>
> DJAMA."

33. On 6 September 2000 the applicant and another lawyer, Mr L. de Caunes, wrote a letter to the Minister of Justice to complain of the facts recorded in the report of the investigating judge P. dated 1 August 2000, on account of 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 stated that the form and substance of the card addressed by the public prosecutor of Djibouti to Judge M. revealed a complicit intimacy that was surprising and regrettable, as the public prosecutor was directly subordinate to the executive, of which the head was "suspected very openly and very seriously of being the instigator of Bernard Borrel's murder".

34. Furthermore, extracts from that letter were included, together with statements made by the applicant to the journalist, in an article in the newspaper *Le Monde* published on 7 September and dated Friday 8 September 2000. The article read as follows.

> "THE LAWYERS acting for the widow of Judge Bernard Borrel, who was found dead in Djibouti in 1995 in mysterious circumstances, vigorously criticised Judge [M.], from whom the case was withdrawn last spring, in a letter to the Minister

of Justice on Wednesday 6 September. The judge is accused by Olivier Morice and Laurent de Caunes of 'conduct which is completely at odds with the principles of impartiality and fairness', apparently having failed to register an item for the case file and to transmit it to her successor.

The two lawyers, who had not been authorised to go to Djibouti in March for a second site visit, asked on 1 August to consult the video-recording made on that occasion. Judge [P.], who has been handling the case since its withdrawal from [Judges M. and L.L.] on 21 June, told them that the cassette was not in the case file and was not 'registered in the file as an exhibit'. The judge immediately called his colleague, who gave him the cassette later that day. 'Judges [M.] and [L.L.] had been sitting on the cassette', protests Olivier Morice, 'and had forgotten 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 from Djama [S.], the public prosecutor of Djibouti. 'Hi Marie-Paule, as agreed I am sending you the video-cassette of the Goubet site visit' the note reads. 'I hope the picture will be clear enough. I watched the show *Sans aucun doute* (Without any doubt) on TF1. I noticed once again how Mrs Borrel and her lawyers were determined to carry on orchestrating their manipulation. I'll call you soon. Say hello to Roger [L.L.] if he's back, and also to J.-C. [D.] [deputy public prosecutor in Paris]. Speak to you soon. Best wishes, Djama.'

Mrs Borrel's lawyers are obviously furious. 'This letter shows the extent of the connivance between the Djibouti public prosecutor and the French judges', exclaims Mr Morice, 'and one cannot but find it outrageous'. They have asked Elisabeth Guigou for an investigation by the General Inspectorate of Judicial Services. The Minister of Justice had not received their letter on Thursday 7 September. Judge [M.] already has disciplinary proceedings pending against her before the National Legal Service Commission (CSM), in particular for the disappearance of documents from the investigation file in the Scientology case (see *Le Monde* of 3 July)."

35. Judges M. and L.L. filed a criminal complaint as civil parties against a person or persons unknown for false accusations. On 26 September 2000 the Paris public prosecutor's office opened a judicial investigation for false accusations. On 5 November 2000 the Court of Cassation appointed an investigating judge in Lille, who, on 15 May 2006, made a discontinuance order, which was upheld by the Investigation Division of the Douai Court of Appeal on 19 June 2007.

36. In addition, on 12 and 15 October 2000 Judges M. and L.L. filed a criminal complaint as civil parties against the publication director of *Le Monde*, the journalist who had written the article and the applicant, accusing them of public defamation of a civil servant.

37. In an order of 2 October 2001, an investigating judge at the Nanterre *tribunal de grande instance* committed the applicant and the two other defendants to stand trial before the Criminal Court on account of the following passages from the impugned article.

"The judge [M.] is accused by Olivier Morice and Laurent de Caunes of 'conduct which is completely at odds with the principles of impartiality and fairness', apparently having failed to register an item for the case file and to transmit it to her successor."

> "'Judges [M.] and [L.L.] had been sitting on the cassette', protests Olivier Morice, 'and had forgotten 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 between the Djibouti public prosecutor and the French judges', exclaims Mr Morice, 'and one cannot but find it outrageous'."

38. In a judgment of 4 June 2002, the Nanterre Criminal Court dismissed the pleas of nullity which had been raised by the defendants, in particular on the basis of the immunity provided for by section 41 of the Freedom of the Press Act of 29 July 1881 on judicial proceedings and pleadings filed in court, on account of the fact that the article had merely reiterated the content of the letter to the Minister of Justice. The court took the view, on that point, that the letter in question was not an act of referral to the CSM and that its content had to be regarded as purely informative, with the result that it was not covered by immunity.

39. The court then observed that the defamatory nature of the comments had not been "meaningfully disputed" and that the applicant stood by the content of his allegations, which he considered to be well founded. Turning then to each of the impugned comments, to ascertain whether the charge of defamation was made out, and to assess the significance and seriousness thereof, the court first noted 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". It further took the view that the comments on the failure to forward the video-cassette were also defamatory as they suggested that there had at least been some negligence or a form of obstruction. As to the term "connivance", the court found that the use of that word clearly and directly suggested that the judges had been collaborating with an official of a foreign country to act in a biased and unfair manner, this being exacerbated by the implication in the article that there was serious evidence of such conduct, because the Minister of Justice had been requested to initiate an investigation.

40. As to the applicant's guilt, the court found that it was, in any event, established that the journalist had become privy to the letter sent to the Minister of Justice through his own sources and that he had sought confirmation and comments from the applicant, with whom he had had a telephone conversation. As the applicant had been aware that his statements to the journalist would be made public, the court took the view that he was therefore guilty of complicity in public defamation, unless the court were to accept his offer to prove the veracity of the allegations or his defence of good faith. However, the court dismissed the applicant's various offers to

bring evidence, pointing out that in order to be accepted "the evidence to be adduced must be flawless and complete and relate directly to all the allegations found to be defamatory". As to the applicant's good faith, it found that "the highly virulent attacks on the professional and moral integrity of the investigating judges ... clearly overstepped the right of legitimately permissible free criticism" and that the profound disagreements between Mrs Borrel's lawyers and the investigating judges could not justify a total lack of prudence in their remarks.

41. As regards the sanction, the court expressly took into account the applicant's status as a lawyer and the fact that he could therefore not have been "unaware of the significance and seriousness of totally imprudent comments", finding it appropriate that "the sanction for such criminal misconduct had to be a fine of a sufficiently high amount". It sentenced him to a fine of 4,000 euros (EUR), and ordered him to pay, jointly with the other defendants, EUR 7,500 in damages to each of the two judges in question, together with EUR 3,000 in costs. It also ordered the insertion of a notice in the newspaper *Le Monde*, of which the cost was to be shared between the defendants. An appeal was lodged against the judgment by the applicant, his co-defendants, the two judges with civil-party status and the public prosecutor.

42. In a judgment of 28 May 2003, the Versailles Court of Appeal found that the summonses issued on the basis of L.L.'s complaint were null and void and that his action was time-barred, and it acquitted the three defendants under that head. It further upheld the convictions of the three defendants in respect of Judge M.'s complaint, together with the amount of the fine imposed on the applicant and the damages awarded to the judge, to whom it also awarded EUR 5,000 in court costs, in addition to the order to publish a notice in the daily newspaper *Le Monde*. Both the applicant and Judge L.L. appealed on points of law.

43. On 12 October 2004 the Court of Cassation quashed the judgment in its entirety and remitted the case to the Rouen Court of Appeal.

44. On 25 April 2005 the Rouen Court of Appeal took note of the fact that the three defendants waived any claim of nullity in respect of the summonses issued on the basis of Judge L.L.'s complaint and it adjourned the proceedings on the merits.

45. On 8 June 2005 the President of the Criminal Division of the Court of Cassation dismissed applications from the three defendants and the civil parties for the immediate examination of their appeals on points of law.

46. In a judgment of 16 July 2008, after a number of adjournments and the holding of a hearing on 30 April 2008, the Rouen Court of Appeal upheld the dismissal by the Nanterre *tribunal de grande instance* of the immunity objection, and also upheld the defendants' convictions for complicity in the public defamation of civil servants in the applicant's case. It ordered the applicant to pay a fine of EUR 4,000 and upheld the award of

EUR 7,500 in damages to each of the judges, to be paid by the defendants jointly, together with the order to publish a notice in the daily newspaper *Le Monde*. As regards costs, it ordered the three defendants to pay EUR 4,000 to Judge L.L. and the applicant alone to pay EUR 1,000 to Judge M.

47. In its reasoning, the Court of Appeal firstly took the view that to say that in handling a case an investigating judge 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 as 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. It further found that the applicant's comments concerning the delay in forwarding the video-cassette amounted to accusing the judges of negligence in the handling of the case, thereby discrediting the professional competence of the judges and implying that the latter had deliberately 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 Judge P., followed by that judge's request to Judge M., that the item of evidence had finally been obtained 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 card from the public prosecutor of Djibouti to Judge M., 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. The court noted, on that point, that the word "connivance" represented in itself a serious attack on the honour and reputation of Judge M. and the public prosecutor of Djibouti. 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.

48. The Court of Appeal thus concluded that the comments were defamatory and that the veracity of the defamatory allegations had not been established. It took the view, on that point, that there was no evidence that Judge L.L. had been in possession of the video-cassette or that he had even been informed of its arrival, so he was not concerned by the delay in forwarding it; that the judgment of the Indictments Division of 21 June 2000, withdrawing the case from the two judges, merely expressed disapproval of the judges' refusal to hold a reconstruction in the presence of the civil parties; that it had not been established that the video-cassette had reached Judge M. before the case was withdrawn from her or that it had

been in her possession when the investigation was transferred to Judge P.; that there was nothing to suggest that Judge M. had acted with obstructive intent or that she had been unfair in her handling of the cassette; that the handwritten card addressed to Judge M. from the public prosecutor of Djibouti did not prove that there was any connivance between them, as friendly greetings and the use of the familiar form "*tu*" in contacts between legal officials did not necessarily reflect a complicit intimacy, and the possibility that they shared the same opinion did not prove any complicity or connivance on the part of the French judges such as to undermine the judicial investigation procedure, regardless of the conduct of the Djibouti public prosecutor in this case; that the letter from the lawyer representing witness A. addressed to the Crown Prosecutor in Belgium, complaining that Judge M. had put pressure on his client, was not sufficiently conclusive in itself to show that Judge M. had accepted the theory of suicide or that she was hindering the establishment of the truth, even though Judge M. had acknowledged that she had told the Belgian police that A. was an unreliable witness; and, lastly, that the numerous press articles carried no evidential weight as regards the conduct and attitude of the judges in their handling of the case.

49. As regards the applicant's defence of good faith, the Court of Appeal to which the case had been remitted noted that he had referred to the duties that were inherent in his profession and the results obtained in the case since the withdrawal of the case from Judges M. and L.L., as shown by the public prosecutor's press statement of 19 June 2007; he had further relied on the judgment of the Douai Court of Appeal, also of 19 June 2007, upholding the decision to discontinue the proceedings started by the judges' complaint alleging false accusation and on the conviction of the Djibouti public prosecutor by the Criminal Court of Versailles on 27 March 2008 for procuring a person to give false evidence.

50. It observed that at the time the offence in question was committed, on 7 September 2000, the applicant had secured the withdrawal of the case from Judges M. and L.L. and that Judge P. had been in possession of the video-cassette since 1 August 2000. It took the view that the applicant had engaged in 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 and no longer being of any procedural relevance. The Court of Appeal further found: that the decision in the applicant's favour to discontinue the proceedings for false accusation initiated against him as a result of the judges' complaint was not incompatible with his bad faith; that the excessive nature of the comments made by the applicant revealed the intensity of the conflict between him and the two judges, in particular Judge M., and were tantamount to an *ex post facto* settling of scores, as shown by the publication of the article on 7 September 2000, after the

Indictments Division of the Paris Court of Appeal had received, on 5 September, the file in the "Scientology" case, in which Judge M. was suspected of being responsible for the disappearance of evidence; and 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 any good faith on his part.

51. The applicant, his two co-defendants and Judge M. all lodged an appeal on points of law against that judgment. In his pleadings, the applicant relied, as his first ground of appeal, on Article 10 of the Convention and the immunity provided for in section 41 of the Freedom of the Press Act, arguing that this provision sought to safeguard defence rights and protected lawyers in respect of any oral or written comments made in the context of any type of judicial proceedings, in particular of a disciplinary nature. As his second ground of appeal, he relied on Article 10 of the Convention, asserting that: the impugned comments concerned a case that had been receiving media coverage for some time, involving the suspicious circumstances in which a French judge seconded to Djibouti had been found dead "from suicide" and the questionable manner in which the judicial investigation had been conducted, with a clear bias against the civil party's theory of premeditated murder; 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; the Court of Appeal had not examined his good faith in the light of the comments that had been published in *Le Monde*, but in relation to the content of the letter to the Minister of Justice and it was not entitled to make any assessment concerning the judges' conduct criticised therein; unless all lawyers were to be banned from speaking about pending cases, no personal animosity could be inferred from the mere fact that he had had a disagreement with one of the judges in the context of another set of proceedings; good faith was not subject to the current situation or to the fact that the issue had been "made good" by the withdrawal of the case from the judges, the lack of necessity of the comments not being incompatible with good faith; lastly, opinions expressed regarding the functioning of a fundamental institution of the State, as was the case regarding the handling of a criminal investigation, were not subject to a duty of prudence or limited to theoretical and abstract criticism, but could be personal where they had a sufficient factual basis.

52. The appeals were initially supposed to be heard by a reduced bench of Section I of the Criminal Division of the Court of Cassation, as shown by the reporting judge's report of 21 July 2009, the Court of Cassation's online workflow for the case, and the three notices to parties issued on 15 September, and 14 and 27 October 2009, respectively, the last two of those documents having been sent after the date of the hearing.

Consequently, Mr J.M. (see paragraph 27 above), who had become a judge at the Court of Cassation, assigned to the Criminal Division, and who was neither the Division President, nor the senior judge (*doyen*), nor the reporting judge, was not supposed to sit in that case.

53. In a judgment of 10 November 2009, the Court of Cassation, in a formation eventually consisting of ten judges, including Mr J.M., dismissed the appeals on points of law. As regards the grounds raised by the applicant, it found that the objection of jurisdictional immunity had been validly rejected, as the fact of making public the letter to the Minister of Justice did not constitute an act of referral to the CSM and was not part of any proceedings involving the exercise of defence rights before a court of law. As to the various arguments expounded under the applicant's second ground of appeal, it took the view that the Court of Appeal had justified its decision, finding as follows:

> "[W]hile everyone has the right to freedom of expression and while the public has a legitimate interest in receiving information on criminal proceedings and on the functioning of the courts, the exercise of those freedoms carries with it duties and responsibilities and may be subject, as in the present case where the admissible limits of freedom of expression in criticising the action of judges have been overstepped, to such restrictions or penalties as are prescribed by law and are necessary in a democratic society for the protection of the reputation and rights of others."

II. RELEVANT DOMESTIC AND INTERNATIONAL LAW

A. Applicable domestic law on defamation

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

Section 23

> "Anyone who, by uttering speeches, cries or threats in a public place or assembly, or by means of a written or printed text, drawing, engraving, painting, emblem, image, or any other written, spoken or pictorial item sold or distributed, offered for sale or exhibited in a public place or assembly, or by means of a placard or notice exhibited in a place where it can be seen by the public, has directly and successfully incited the perpetrator or perpetrators to commit a serious crime or major offence [*crime ou délit*], and if the incitement has been acted upon, shall be punished as an accessory to the said offence.
>
> This provision shall also be applicable where the incitement has been followed only by an attempt to commit a serious crime [*crime*] under Article 2 of the Criminal Code."

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 [*diffamation*]. 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.

Courts examining the merits of the case may nevertheless order the exclusion of the insulting, contemptuous or defamatory statements, 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, where such actions have been left open to them by the courts, and, in any event, to civil action by third parties."

Section 55

"Where the defendant wishes to be allowed to prove the veracity of the defamatory allegations, in accordance with section 35 hereof, 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."

B. Code of Criminal Procedure

55. Article 11 of the Code of Criminal Procedure provides as follows:

Article 11

"Except where the law provides otherwise and without prejudice to the rights of the defence, proceedings in the course of the preliminary and judicial investigations shall be conducted in secret.

Any person contributing to such proceedings shall be bound by a duty of professional secrecy under the conditions and subject to the penalties set out in Articles 226-13 and 226-14 of the Criminal Code.

However, in order to prevent the dissemination of incomplete or inaccurate information, or to put an end to a breach of the peace, the public prosecutor may, of his own motion or at the request of the judicial authority responsible for pre-trial investigation or the parties, make public any objective elements from the proceedings that do not convey any judgment as to the merits of the charges brought against the individuals concerned."

C. Exercise of the legal profession

56. Recommendation Rec(2000)21 of the Council of Europe's Committee of Ministers to member States on the freedom of exercise of the profession of lawyer (adopted on 25 October 2000) states as follows.

" ... Desiring to promote the freedom of exercise of the profession of lawyer in order to strengthen the rule of law, in which lawyers take part, in particular in the role of defending individual freedoms;

Conscious of the need for a fair system of administration of justice which guarantees the independence of lawyers in the discharge of their professional duties without any improper restriction, influence, inducement, pressure, threats or interference, direct or indirect, from any quarter or for any reason;

...

Principle I – General Principles on the freedom of exercise of the profession of lawyer

1. All necessary measures should be taken to respect, protect and promote the freedom of exercise of the profession of lawyer without discrimination and without improper interference from the authorities or the public, in particular in the light of the relevant provisions of the European Convention on Human Rights. ..."

57. The Basic Principles on the Role of Lawyers (adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held in Havana, Cuba, from 27 August to 7 September 1990) state, in particular:

"16. Governments shall ensure that lawyers (a) are able to perform all of their professional functions without intimidation, hindrance, harassment or improper interference; (b) are able to travel and to consult with their clients freely both within their own country and abroad; and (c) shall not suffer, or be threatened with, prosecution or administrative, economic or other sanctions for any action taken in accordance with recognized professional duties, standards and ethics.

...

22. Governments shall recognize and respect that all communications and consultations between lawyers and their clients within their professional relationship are confidential."

58. The Council of Bars and Law Societies of Europe (CCBE) has adopted two founding texts: the Code of Conduct for European Lawyers, which dates back to 28 October 1988 and has undergone a number of amendments, and the Charter of Core Principles of the European Legal Profession, which was adopted on 24 November 2006. The Charter, which is not conceived as a code of conduct, contains a list of ten core principles common to the national and international rules regulating the legal profession.

"(a) the independence of the lawyer, and the freedom of the lawyer to pursue the client's case;

(b) the right and duty of the lawyer to keep clients' matters confidential and to respect professional secrecy;

(c) avoidance of conflicts of interest, whether between different clients or between the client and the lawyer;

(d) the dignity and honour of the legal profession, and the integrity and good repute of the individual lawyer;

(e) loyalty to the client;

(f) fair treatment of clients in relation to fees;

(g) the lawyer's professional competence;

(h) respect towards professional colleagues;

(i) respect for the rule of law and the fair administration of justice; and

(j) the self-regulation of the legal profession."

59. Lastly, there is a practical guide to the international principles concerning the independence and responsibility of judges, lawyers and prosecutors, produced by the International Commission of Jurists (initially in 2004, the most recent version being issued on 22 July 2009), which contains many significant and relevant international documents.

D. Relations between judges and lawyers

60. The relevant passages of Opinion no. (2013) 16 on the relations between judges and lawyers, adopted by the Consultative Council of European Judges (CCJE) on 13-15 November 2013, read as follows.

"6. Within the framework of their professional obligation to defend the rights and interests of their clients, lawyers must also play an essential role in the fair administration of justice. Paragraph 6 of the Commentary on the Charter of Core Principles of the European Legal Profession of the CCBE defines the lawyer's role as follows: *'The lawyer's role, whether retained by an individual, a corporation or the state, is as the client's trusted adviser and representative, as a professional respected*

by third parties, and as an indispensable participant in the fair administration of justice. By embodying all these elements, the lawyer, who faithfully serves his or her own client's interests and protects the client's rights, also fulfils the functions of the lawyer in Society – which are to forestall and prevent conflicts, to ensure that conflicts are resolved in accordance with recognised principles of civil, public or criminal law and with due account of rights and interests, to further the development of the law, and to defend liberty, justice and the rule of law'. As it is stated in paragraph 1.1 of the Code of Conduct for European Lawyers of the CCBE, respect for the lawyer's professional function is an essential condition for the rule of law and democracy in society. The UN Basic Principles on the Role of Lawyers state that adequate protection of the human rights and fundamental freedoms to which all persons are entitled, be they economic, social and cultural, or civil and political, requires that all persons have effective access to legal services provided by an independent legal profession. Principle 12 stipulates that lawyers shall at all times maintain the honour and dignity of their profession as essential agents of the administration of justice.

7. Judges and lawyers must be independent in the exercise of their duties, and must also be, and be seen to be, independent from each other. This independence is affirmed by the statute and ethical principles adopted by each profession. The CCJE considers such independence vital for the proper functioning of justice.

The CCJE refers to Recommendation CM/Rec (2010)12, paragraph 7, which states that the independence of judges should be guaranteed at the highest possible legal level. The independence of lawyers should be guaranteed in the same way.

...

9. Two areas of relations between judges and lawyers may be distinguished:

– on the one hand, the relations between judges and lawyers which stem from the procedural principles and rules of each state and which will have a direct impact on the efficiency and quality of judicial proceedings. In the conclusions and recommendations set out in its Opinion No. 11 (2008) on the quality of judicial decisions, the CCJE pointed out that the standard of quality of judicial decisions will clearly be the result of interactions between the numerous actors in the judicial system;

– on the other hand, the relations which result from the professional conduct of judges and lawyers and which require mutual respect for the roles played by each side and a constructive dialogue between judges and lawyers.

...

19. Judges and lawyers each have their own set of ethical principles. However, several ethical principles are common to both judges and lawyers, e.g. compliance with the law, professional secrecy, integrity and dignity, respect for litigants, competence, fairness and mutual respect.

20. The ethical principles of judges and lawyers should also concern themselves with the relations between the two professions.

...

With regard to lawyers, paragraphs 4.1, 4.2, 4.3 and 4.4 of the CCBE Code of Conduct for European Lawyers express the following principles: a lawyer who appears, or takes part in a case, before a court or tribunal must comply with the rules of conduct applied before that court or tribunal. A lawyer must always have due

regard for the fair conduct of the proceedings. A lawyer shall, while maintaining due respect and courtesy towards the court, defend the interests of the client honourably and fearlessly without regard to the lawyer's own interests or to any consequences to him- or herself or to any other person. A lawyer shall never knowingly give false or misleading information to the court.

21. The CCJE considers that the relations between judges and lawyers should be based on the mutual understanding of each other's role, on mutual respect and on independence vis-à-vis each other.

The CCJE accordingly considers it necessary to develop dialogues and exchanges between judges and lawyers at a national and European institutional level on the issue of their mutual relations. The ethical principles of both judges and lawyers should be taken into account. In this regard, the CCJE encourages the identification of common ethical principles, such as the duty of independence, the duty to sustain the rule of law at all times, co-operation to ensure a fair and swift conduct of the proceedings and permanent professional training. Professional associations and independent governing bodies of both judges and lawyers should be responsible for this process.

...

24. Relations between judges and lawyers should always preserve the court's impartiality and image of impartiality. Judges and lawyers should be fully conscious of this, and adequate procedural and ethical rules should safeguard this impartiality.

25. Both judges and lawyers enjoy freedom of expression under Article 10 of the Convention.

Judges are, however, required to preserve the confidentiality of the court's deliberations and their impartiality, which implies, inter alia, that they must refrain from commenting on proceedings and on the work of lawyers.

The freedom of expression of lawyers also has its limits, in order to maintain, as is provided for in Article 10, paragraph 2 of the Convention, the authority and impartiality of the judiciary. Respect towards professional colleagues, respect for the rule of law and the fair administration of justice – the principles (h) and (i) of the Charter of Core Principles of the European Legal Profession of the CCBE – require abstention from abusive criticism of colleagues, of individual judges and of court procedures and decisions."

E. The decriminalisation of defamation

61. Recommendation 1814 (2007) of the Parliamentary Assembly of the Council of Europe, "Towards decriminalisation of defamation", states, *inter alia*, as follows.

"1. The Parliamentary Assembly, referring to its Resolution 1577 (2007) entitled 'Towards decriminalisation of defamation', calls on the Committee of Ministers to urge all member states to review their defamation laws and, where necessary, make amendments in order to bring them into line with the case law of the European Court of Human Rights, with a view to removing any risk of abuse or unjustified prosecutions;

2. The Assembly urges the Committee of Ministers to instruct the competent intergovernmental committee, the Steering Committee on the Media and New Communication Services (CDMC) to prepare, following its considerable amount of

work on this question and in the light of the Court's case law, a draft recommendation to member states laying down detailed rules on defamation with a view to eradicating abusive recourse to criminal proceedings.

..."

62. The response of the Committee of Ministers, adopted at the 1,029th meeting of the Ministers' Deputies (11 June 2008), reads as follows.

"1. The Committee of Ministers has studied Parliamentary Assembly Recommendation 1814 (2007) entitled 'Towards decriminalisation of defamation' with great attention. It has communicated the recommendation to the governments of member states as well as to the Steering Committee on the Media and New Communication Services (CDMC), the European Committee on Crime Problems (CDPC), the Steering Committee for Human Rights (CDDH) and the Council of Europe Commissioner for Human Rights, for information and possible comments. The comments received are contained in the appendix.

2. By decision of 24 November 2004, the Committee of Ministers instructed the Steering Committee on Mass Media (CDMM), which subsequently became the Steering Committee on the Media and New Communication Services (CDMC), *inter alia*, to look into 'the alignment of laws on defamation with the relevant case law of the European Court of Human Rights, including the issue of decriminalisation of defamation'. It took note of the reply received in September 2006 and of the fact that the CDMC considered it desirable that member states should take a proactive approach in respect of defamation by examining, even in the absence of judgments of the European Court of Human Rights concerning them directly, domestic legislation against the standards developed by the Court and, where appropriate, aligning criminal, administrative and civil legislation with those standards. In the above-mentioned document, the CDMC also considered that steps should be taken to ensure that the application in practice of laws on defamation fully complies with those standards.

3. The Committee of Ministers endorses this view, as well as the Parliamentary Assembly's call on member states to take such measures, with a view to removing all risk of abuse or unjustified prosecutions.

4. Bearing in mind the role of the European Court of Human Rights in developing general principles on defamation through its case law and its power to adjudicate claims of violations of Article 10 in specific cases, the Committee of Ministers does not consider it advisable at this point in time to develop separate detailed rules on defamation for member states.

5. Finally, the Committee of Ministers considers that there is no need at present to revise its Recommendation No. R (97) 20 on hate speech or to prepare guidelines on this subject. More efforts could instead be made by member states to give the recommendation more visibility and to make better use of it."

F. Judgment of the International Court of Justice (ICJ) of 4 June 2008 in the case of *Djibouti v. France*

63. In its judgment of 4 June 2008 in the case concerning *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*, the ICJ noted that it was not its task to determine the facts and establish

responsibilities in the Borrel case and, in particular, the circumstances in which Bernard Borrel had met his death, but added that the dispute between the two States had originated in that case, as a result of the opening of a number of judicial proceedings, in France and in Djibouti, and the resort to bilateral treaty mechanisms for mutual assistance between the parties. The ICJ observed in particular that, although the subject of the dispute was described in Djibouti's application as the transmission by the French authorities of the Borrel case file to Djibouti, taken as a whole the application had a wider scope, which included the summonses sent to the Djiboutian President and those sent to two other Djiboutian officials, together with the arrest warrants subsequently issued against the latter.

64. The ICJ found, in particular, that the decision by the French investigating judge to refuse the request for mutual assistance had been justified by the fact that the transmission of the Borrel case file was considered to be "contrary to the essential interests of France", in that the file contained declassified "defence secret" documents, together with information and witness statements in respect of another case in progress. It took the view that those reasons fell within the scope of Article 2 (c) of the Convention on Mutual Assistance in Criminal Matters, which allowed a requested State to refuse to execute letters rogatory if it considered that such assistance would be likely to prejudice the sovereignty, the security, the *ordre public* or other essential interests of the nation. The ICJ further decided not to order the transmission of the Borrel file with certain pages removed, as Djibouti had requested in the alternative. It held, however, that France had failed in its obligation to give reasons for its refusal to execute the letter rogatory, while rejecting Djibouti's other submissions concerning the summonses addressed to the President and the two other senior Djiboutian officials.

THE LAW

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

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

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

A. The Chamber judgment

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

B. The parties' submissions before the Grand Chamber

1. The applicant

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

68. He argued that he had not been in a position to seek the withdrawal of Judge J.M., as he had not known, and could not reasonably have known, that this judge was going to sit in his case: the report of the reporting judge, the online workflow for the case and the notices to the lawyers had all given

the same information, namely that the Criminal Division was to sit as a reduced bench. The reduced bench comprised the President of the Division, the senior judge (*doyen*) and the reporting judge, and as Judge J.M. occupied none of those positions he could not have been expected to sit.

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

2. The Government

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

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

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

C. The Court's assessment

1. General principles

73. The Court reiterates that impartiality normally denotes the absence of prejudice or bias and its existence or otherwise can be tested in various ways. According to the Court's settled case-law, the existence of

impartiality for the purposes of Article 6 § 1 must be determined according to a subjective test where regard must be had to the personal conviction and behaviour of a particular judge, that is, whether the judge held any personal prejudice or bias in a given case; and also according to an objective test, that is to say by ascertaining whether the tribunal itself and, among other aspects, its composition, offered sufficient guarantees to exclude any legitimate doubt in respect of its impartiality (see, for example, *Kyprianou v. Cyprus* [GC], no. 73797/01, § 118, ECHR 2005-XIII, and *Micallef v. Malta* [GC], no. 17056/06, § 93, ECHR 2009).

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

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

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

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

78. In this connection even appearances may be of a certain importance or, in other words, "justice must not only be done, it must also be seen to be

done" (see *De Cubber*, cited above, § 26). What is at stake is the confidence which the courts in a democratic society must inspire in the public. Thus, any judge in respect of whom there is a legitimate reason to fear a lack of impartiality must withdraw (see *Castillo Algar v. Spain*, 28 October 1998, § 45, *Reports* 1998-VIII, and *Micallef*, cited above, § 98).

2. Application of those principles in the present case

79. In the present case, the fear of a lack of impartiality lay in the fact that Judge J.M., who sat on the Court of Cassation bench which adopted the judgment of 10 December 2009, had expressed his support for Judge M. nine years earlier, in the context of disciplinary proceedings that had been brought against her on account of her conduct in the "Scientology" case. Speaking as a judge and a colleague in the same court, in the course of a general meeting of judges of the Paris *tribunal de grande instance* on 4 July 2000, at which he had subsequently voted in favour of the motion of support for Judge M., J.M. had stated: "We are not prohibited, as grassroots judges, from saying that we stand by Judge [M.]. It is not forbidden to say that Judge [M.] has our support and trust" (see paragraphs 27-28 above).

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

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

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

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

84. The Court takes the view, however, that the very singular context of the case cannot be overlooked. It would firstly point out that the case concerned a lawyer and a judge, who had been serving in that capacity in

connection with two judicial investigations in particularly high-profile cases: the Borrel case, in the context of which the applicant's impugned remarks had been made, and the "Scientology" case, which had given rise to the remarks by J.M. It further notes, like the Chamber, that Judge M. was already conducting the investigation in the Borrel case, with its significant media coverage and political repercussions, when J.M. publicly expressed his support for her in the context of the "Scientology" case (see also paragraph 29 above). As emphasised by the Chamber, J.M. had then expressed his view in an official setting, at the general meeting of judges of the Paris *tribunal de grande instance*.

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

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

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

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

14 November 2006), and this unquestionably includes the requirement that the court must be impartial.

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

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

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

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

II. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

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

> "1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

A. The Chamber judgment

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

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

B. The parties' submissions before the Grand Chamber

1. The applicant

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

especially outside the courtroom. He hoped that his case would enable the Grand Chamber to clarify the interpretation of the Convention on that point and to secure the protection of lawyers' speech.

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

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

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

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

101. The argument that there was no pressing social need was mainly supported by the context in which the remarks were made, because the case had received significant media coverage, as the Court had previously noted in its judgment in *July and SARL Libération v. France* (no. 20893/03, ECHR 2008) and as confirmed by the Chamber in paragraph 76 of its

judgment. In addition, the status of the victim, the place and circumstances of his death, the diplomatic ramifications of the case, and the suspicions that the current President of the Republic of Djibouti might have been involved as the instigator, all showed that the case concerned a matter of general interest requiring strong protection of freedom of expression. Moreover, on 19 June 2007 the Paris public prosecutor had issued a press release stating that the theory of suicide had now been discounted in favour of a criminal explanation. That statement had been made at the request of the investigating judge under Article 11, paragraph 3, of the Code of Criminal Procedure (permitting the public disclosure of details of the case to avoid the dissemination of incomplete or inaccurate information, or to put an end to a breach of public order). The case was so sensitive that the investigation was now being handled by three investigating judges.

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

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

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

2. The Government

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

106. As to whether the interference was necessary in a democratic society, the Government were of the view that there was a fundamental difference between lawyers and journalists because of the former's position as officers of the court (*auxiliaires de justice*). They occupied a central position as intermediaries between the public and the courts and their activities helped to ensure that justice was administered effectively and dispassionately. A balance had to be struck between the legitimate aim of informing the public about matters of general interest, including issues relating to the functioning of the justice system, and the requirements stemming from the proper administration of justice, on the one hand, and the dignity of the legal profession and the reputation of the judiciary, on the other.

107. The Government noted two different situations in the Court's case-law on freedom of expression: the participation of lawyers in debates on matters of general interest unrelated to any pending proceedings, where freedom of expression was particularly broad; and statements made by lawyers in their role of defending clients, where they had a wide freedom of expression in the courtroom. That freedom of expression in defending a client in pending proceedings did have certain limits, however, in order to preserve judicial authority, such as, for example, where the lawyer made statements critical of the justice system before even using the legal remedies

available to him to rectify the shortcomings in question. The Government submitted that lawyers, as officers of the court, were thus obliged to use legal proceedings to correct any alleged errors; by contrast, harsh criticism in the press, where legal means could be used instead, was not justified by the requirements of the effective defence of the lawyer's client and cast doubt on the probity of the justice system.

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

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

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

111. The Government submitted that such attacks on judges did not contribute either to a clear public understanding of the issues, since the judicial authority had no right of reply, or to the proper conduct of the judicial proceedings in a context in which the investigating judge who was

the subject of the harsh criticism had already been removed from the case. In their view, neither was it a matter of zealous defence by a lawyer of his client, because there were judicial remedies that he could have used to submit his complaint. The Government referred to the Court's inadmissibility decision in *Floquet and Esménard v. France* ((dec.), nos. 29064/08 and 29979/08, 10 January 2012), which concerned comments made by journalists in the Borrel case, particularly as, in the present case, it was not a journalist but a lawyer who was the author of the impugned statements, and moreover in a case that was pending in the domestic courts.

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

C. Observations of the third-party interveners before the Grand Chamber

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

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

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

115. The limits to freedom of expression had firstly to be reasonably foreseeable, with a more restrictive and precise definition of the criteria relating to the restrictions that could be placed on lawyers' freedom of expression. The CCBE noted discrepancies in the assessment by the various Sections of the Court: in a related case (see *July and SARL Libération*, cited

above) the Court had found a violation of Article 10, whereas the Chamber in the present case had found no violation. In the CCBE's view such discrepancies in assessment appeared to be the result of different approaches to the remarks of a lawyer: a degree of immunity applied to any views, however harsh, on the justice system or a court, whilst criticism of a judge did not enjoy such immunity. Such a distinction was extremely difficult to apply and gave rise to almost insurmountable problems, on account of the interdependence between the general and the personal in the conduct of proceedings, together with the fact that, in an inquisitorial system, judicial office could not be separated from the institution itself.

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

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

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

118. These third-party interveners pointed out, firstly, that until recently the issue of a lawyer's freedom of speech had arisen only inside the courtroom, and that in the context of defending a client at a hearing, the lawyer was protected by immunity from legal proceedings, an immunity which covered pleadings and oral argument before a court, under section 41 of the Act of 29 July 1881. This immunity authorised remarks which could be considered offensive, defamatory or injurious.

119. In their view, the point of principle in the present case was the lawyer's freedom of expression to defend his client when he was addressing the press, where the case had attracted a certain level of public interest. The resulting issue was how to determine when comments became excessive,

however strong they might be, if they affected an opponent, a judge or a fellow lawyer.

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

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

122. The third-party interveners observed that, while the French courts had always strictly applied the immunity referred to in section 41 of the 1881 Act to judicial comments alone, they were not unaware that lawyers had to contend with certain developments when their cases attracted media attention. They cited a recent example from a high-profile case where a lawyer had been prosecuted for defaming a lawyer for the opposing party. The Paris *tribunal de grande instance* had accepted his plea of good faith, even though his comments had been particularly excessive and based only on his personal belief, as "they came from a passionate lawyer who dedicated all of his energy to defending his client and who could not restrict his freedom of expression on the sole ground that he was referring to his case in front of journalists rather than addressing judges" (final judgment of the Seventeenth Division of the Paris *tribunal de grande instance* of 20 October 2010). The distinction between judicial and extrajudicial expression had therefore become outdated. The word of a lawyer was in fact based on a duty to inform; like journalists, lawyers were also "watchdogs of democracy".

123. The third-party interveners submitted, lastly, that there was an obligation of proportionality in such matters both for lawyers and for the State. Lawyers had a very difficult role and this duty of proportionality reflected their duties of sensitivity and moderation, from which they could depart only where this was justified by the defence of their client and by the attacks or pressure they were under. As regards the State, the third-party interveners were of the view that lawyers should normally be granted immunity where their comments, however excessive, were linked to the

defence of their client's interests. Any restriction on their right to express their views should be exceptional, the test being whether or not the comments were detachable from the defence of the client. The margin of freedom of expression for lawyers, which had to remain as broad as that of journalists, should take account of the constraints faced by them and the increased media attention, with a press that was increasingly curious and probing.

D. The Court's assessment

1. General principles

(a) Freedom of expression

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

> "(i) Freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfilment. Subject to paragraph 2 of Article 10, it is applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Such are the demands of pluralism, tolerance and broadmindedness without which there is no 'democratic society'. As set forth in Article 10, this freedom is subject to exceptions, which ... must, however, be construed strictly, and the need for any restrictions must be established convincingly ...
>
> (ii) The adjective 'necessary', within the meaning of Article 10 § 2, implies the existence of a 'pressing social need'. The Contracting States have a certain margin of appreciation in assessing whether such a need exists, but it goes hand in hand with European supervision, embracing both the legislation and the decisions applying it, even those given by an independent court. The Court is therefore empowered to give the final ruling on whether a 'restriction' is reconcilable with freedom of expression as protected by Article 10.
>
> (iii) The Court's task, in exercising its supervisory jurisdiction, is not to take the place of the competent national authorities but rather to review under Article 10 the decisions they delivered pursuant to their power of appreciation. This does not mean that the supervision is limited to ascertaining whether the respondent State exercised its discretion reasonably, carefully and in good faith; what the Court has to do is to look at the interference complained of in the light of the case as a whole and determine whether it was 'proportionate to the legitimate aim pursued' and whether the reasons adduced by the national authorities to justify it are 'relevant and sufficient' ... In doing so, the Court has to satisfy itself that the national authorities applied standards which were in conformity with the principles embodied in

Article 10 and, moreover, that they relied on an acceptable assessment of the relevant facts ...”

125. Moreover, as regards the level of protection, there is little scope under Article 10 § 2 of the Convention for restrictions on political speech or on debate on matters of public interest (see *Sürek v. Turkey (no. 1)* [GC], no. 26682/95, § 61, ECHR 1999-IV; *Lindon, Otchakovsky-Laurens and July v. France* [GC], nos. 21279/02 and 36448/02, § 46, ECHR 2007-IV; and *Axel Springer AG v. Germany* [GC], no. 39954/08, § 90, 7 February 2012). Accordingly, a high level of protection of freedom of expression, with the authorities thus having a particularly narrow margin of appreciation, will normally be accorded where the remarks concern a matter of public interest, as is the case, in particular, for remarks on the functioning of the judiciary, even in the context of proceedings that are still pending in respect of the other defendants (see *Roland Dumas v. France*, no. 34875/07, § 43, 15 July 2010, and *Gouveia Gomes Fernandes and Freitas e Costa v. Portugal*, no. 1529/08, § 47, 29 March 2011). A degree of hostility (see *E.K. v. Turkey*, no. 28496/95, §§ 79-80, 7 February 2002) and the potential seriousness of certain remarks (see *Thoma v. Luxembourg*, no. 38432/97, § 57, ECHR 2001-III) do not obviate the right to a high level of protection, given the existence of a matter of public interest (see *Paturel v. France*, no. 54968/00, § 42, 22 December 2005).

126. Furthermore, in its judgments in *Lingens v. Austria* (8 July 1986, § 46, Series A no. 103) and *Oberschlick v. Austria (no. 1)* (23 May 1991, § 63, Series A no. 204), the Court drew a distinction between statements of fact and value judgments. The existence of facts can be demonstrated, whereas the truth of value judgments is not susceptible of proof. The requirement to prove the truth of a value judgment is impossible to fulfil and infringes freedom of opinion itself, which is a fundamental part of the right secured by Article 10 (see *De Haes and Gijsels v. Belgium*, 24 February 1997, § 42, *Reports* 1997-I). However, where a statement amounts to a value judgment, the proportionality of an interference may depend on whether there exists a sufficient “factual basis” for the impugned statement: if there is not, that value judgment may prove excessive (see *De Haes and Gijsels*, cited above, § 47; *Oberschlick v. Austria (no. 2)*, 1 July 1997, § 33, *Reports* 1997-IV; *Brasilier v. France*, no. 71343/01, § 36, 11 April 2006; and *Lindon, Otchakovsky-Laurens and July*, cited above, § 55). In order to distinguish between a factual allegation and a value judgment it is necessary to take account of the circumstances of the case and the general tone of the remarks (see *Brasilier*, cited above, § 37), bearing in mind that assertions about matters of public interest may, on that basis, constitute value judgments rather than statements of fact (see *Paturel*, cited above, § 37).

127. Lastly, the nature and severity of the sanctions imposed are also factors to be taken into account when assessing the proportionality of the

interference. As the Court has previously pointed out, interference with freedom of expression may have a chilling effect on the exercise of that freedom. The relatively moderate nature of the fines does not suffice to negate the risk of a chilling effect on the exercise of freedom of expression, this being all the more unacceptable in the case of a lawyer who is required to ensure the effective defence of his clients (see *Mor*, cited above, § 61). Generally speaking, while it is legitimate for the institutions of the State, as guarantors of the institutional public order, to be protected by the competent authorities, the dominant position occupied by those institutions requires the authorities to display restraint in resorting to criminal proceedings (see *Castells v. Spain*, 23 April 1992, § 46, Series A no. 236; *Incal v. Turkey*, 9 June 1998, § 54, *Reports* 1998-IV; *Lehideux and Isorni v. France*, 23 September 1998, § 57, *Reports* 1998-VII; *Öztürk v. Turkey* [GC], no. 22479/93, § 66, ECHR 1999-VI; and *Otegi Mondragon v. Spain*, no. 2034/07, § 58, ECHR 2011).

(b) Maintaining the authority of the judiciary

128. Questions concerning the functioning of the justice system, an institution that is essential for any democratic society, fall within the public interest. In this connection, regard must be had to the special role of the judiciary in society. As the guarantor of justice, a fundamental value in a State governed by the rule of law, 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 (ibid.).

(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 *Siałkowska 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 of 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 of 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, §§ 55-56).

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*, cited above). In the circumstances in *Gouveia Gomes Fernandes and Freitas e Costa* (cited above, § 48), 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. 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 have a sufficiently close connection with the facts of the case (see *Feldek v. Slovakia*, no. 29032/95, § 86, ECHR 2001-VIII, and *Gouveia Gomes Fernandes and Freitas e Costa*, cited above).

2. Application of those principles in the present case

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

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

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

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

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

whether it was proportionate to the legitimate aim pursued and whether the grounds given by the domestic courts were relevant and sufficient.

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

(a) The applicant's status as a lawyer

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

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

148. The Court would refer the parties to the principles set out in its case-law, particularly with regard to the status and freedom of expression of lawyers (see paragraphs 132-39 above), with emphasis on the need to distinguish between remarks made by lawyers inside and outside the courtroom. Moreover, in view of the specific status of lawyers and their position in the administration of justice (see paragraph 132 above), the Court takes the view, contrary to the argument of the CCBE (see paragraph 116 above), that lawyers cannot be equated with journalists. Their respective positions and roles in judicial proceedings are intrinsically different. Journalists have the task of imparting, in conformity with their duties and responsibilities, information and ideas on all matters of public interest, including those relating to the administration of justice. Lawyers, for their part, are protagonists in the justice system, directly involved in its functioning and in the defence of a party. They cannot therefore be equated with an external witness whose task it is to inform the public.

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

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

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

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

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

153. Accordingly, the Court takes the view that the applicant's impugned remarks, which also concerned, as in the said judgments in *Floquet and Esménard* and *July and SARL Libération*, the functioning of the judiciary and the handling of the Borrel case, fell within the context of a debate on a matter of public interest, thus calling for a high level of

protection of freedom of expression, with a particularly narrow margin of appreciation accordingly being afforded to the authorities.

(c) The nature of the impugned remarks

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

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

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

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

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

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

160. Lastly, it has been established that the applicant acted in his capacity as a lawyer in two high-profile cases in which Judge M. was an investigating judge. In both of them the applicant succeeded in obtaining findings by the appellate courts that there had been shortcomings in the proceedings, leading to the withdrawal of the cases from Judge M. (see paragraphs 22-23 and 26 above). In the context of the first case, known as the "Scientology" case, the applicant additionally secured a ruling that the French State was liable for the malfunctioning of the justice system (see paragraph 30 above).

161. It further considers that the expressions used by the applicant had a sufficiently close connection with the facts of the case, in addition to the fact that his remarks could not be regarded as misleading or as a gratuitous attack (see paragraph 139 above). It reiterates in this connection that freedom of expression "is applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of

indifference, but also to those that offend, shock or disturb". Similarly, the use of a "caustic tone" in comments aimed at a judge is not incompatible with the provisions of Article 10 of the Convention (see, for example, *Gouveia Gomes Fernandes and Freitas e Costa*, cited above, § 48).

(d) The specific circumstances of the case

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

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

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

164. For the same reasons, since the impugned remarks could not be assessed out of context, the Court cannot share the view of the Paris Court of Appeal that the use of the term "connivance" constituted "in itself" a

serious attack on the honour and reputation of Judge M. and the public prosecutor of Djibouti (see paragraph 47 above).

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

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

167. In addition, while the applicant's remarks certainly had a negative connotation, it should be pointed out that, notwithstanding their somewhat hostile nature (see *E.K. v. Turkey*, cited above, §§ 79-80) and seriousness (see *Thoma*, cited above), the key question in the statements concerned the functioning of a judicial investigation, which was a matter of public interest, thus leaving little room for restrictions on freedom of expression. In addition, a lawyer should be able to draw the public's attention to potential

shortcomings in the justice system; the judiciary may benefit from constructive criticism.

(ii) Maintaining the authority of the judiciary

168. The Government relied on the fact that the judicial authorities had no right of reply. It is true that the particular task of the judiciary in society requires judges to observe a duty of discretion (see paragraph 128 above). However, that duty pursues a specific aim, as noted by the third-party interveners: the speech of judges, unlike that of lawyers, is received as the expression of an objective assessment which commits not only the person expressing himself, but also, through him, the entire justice system. Lawyers, for their part, merely speak in their own name and on behalf of their clients, thus also distinguishing them from journalists, whose role in the judicial debate and purpose are intrinsically different. Nevertheless, while it may prove necessary to protect the judiciary against gravely damaging attacks that are essentially unfounded, bearing in mind that judges are prevented from reacting by their duty of discretion (see paragraph 128 above), this cannot have the effect of prohibiting individuals from expressing their views, through value judgments with a sufficient factual basis, on matters of public interest related to the functioning of the justice system, or of banning any criticism of the latter. In the present case, Judges M. and L.L. were members of the judiciary and were thus both part of a fundamental institution of the State: they were therefore subject to wider limits of acceptable criticism than ordinary citizens and the impugned comments could therefore be directed against them in that capacity (see paragraphs 128 and 131 above).

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

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

(iii) The use of available remedies

171. With regard to the Government's argument as to the possibility of using available remedies, the Court finds it pertinent but not sufficient in the

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

172. Moreover, the request for an investigation made to the Minister of Justice complaining of these new facts was not a judicial remedy – such as to justify possibly refraining from intervention in the press – but a mere request for an administrative investigation subject to the discretionary decision of the Minister of Justice. The Court notes in this connection that the domestic judges themselves, both at first instance and on appeal, took the view that the letter could not enjoy the immunity afforded to judicial acts, the Criminal Court having found that its content was purely informative (see paragraphs 38 and 46 above). The Court observes that it has not been argued that this request was acted upon and, in addition, it notes that Judges M. and L.L. clearly did not see it as the normal use of a remedy available under domestic law, but as an act justifying the filing of a complaint for false accusation (see paragraph 35 above).

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

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

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

(e) The sanctions imposed

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

176. The Court reiterates that even when the sanction is the lightest possible, such as a guilty verdict with a discharge in respect of the criminal sentence and an award of only a "token euro" in damages (see *Mor*, cited above, § 61), it nevertheless constitutes a criminal sanction and, in any event, that fact cannot suffice, in itself, to justify the interference with the applicant's freedom of expression (see *Brasilier*, cited above, § 43). The Court has emphasised on many occasions that interference with freedom of expression may have a chilling effect on the exercise of that freedom (see, *mutatis mutandis*, *Cumpănă and Mazăre v. Romania* [GC], no. 33348/96, § 114, ECHR 2004-XI, and *Mor*, cited above) – a risk that the relatively moderate nature of a fine would not suffice to negate (see *Dupuis and Others v. France*, no. 1914/02, § 48, 7 June 2007). It should also be noted that imposing a sanction on a lawyer may have repercussions that are direct (disciplinary proceedings) or indirect (in terms, for example, of their image or the confidence placed in them by the public and their clients). The Court would, moreover, reiterate that the dominant position of the State institutions requires the authorities to show restraint in resorting to criminal

proceedings (see paragraph 127 above). The Court observes, however, that in the present case the applicant's punishment was not confined to a criminal conviction: the sanction imposed on him was not the "lightest possible", but was, on the contrary, of some significance, and his status as a lawyer was even relied upon to justify greater severity.

3. Conclusion

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

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

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

179. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

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

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

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

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

B. Costs and expenses

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

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

186. The Court reiterates that costs and expenses will not be awarded under Article 41 unless it is established that they were actually incurred, were necessarily incurred and were also reasonable as to quantum (see, among many other authorities, *Iatridis v. Greece* (just satisfaction) [GC], no. 31107/96, § 54, ECHR 2000-XI; *Beyeler v. Italy* (just satisfaction) [GC], no. 33202/96, § 27, 28 May 2002; and *Kurić and Others v. Slovenia* (just satisfaction) [GC], no. 26828/06, ECHR 2014).

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

C. Default interest

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

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

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

2. *Holds* that there has been a violation of Article 10 of the Convention;

3. *Holds*

(a) that the respondent State is to pay the applicant, within three months, the following amounts:

(i) EUR 4,270 (four thousand two hundred and seventy euros), plus any tax that may be chargeable, in respect of pecuniary damage;

(ii) EUR 15,000 (fifteen thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;

(iii) EUR 14,400 (fourteen thousand four hundred 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 amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

4. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 23 April 2015.

Johan Callewaert	Dean Spielmann
Deputy Registrar	President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following separate opinions are annexed to this judgment :

(a) concurring opinion of Judge Nicolaou;

(b) concurring opinion of Judge Kūris.

D.S.
J.C.

CONCURRING OPINION OF JUDGE NICOLAOU

Judge M. of the Paris *tribunal de grand instance* had, for some time, already been seised as investigating judge of the so-called "Scientology" case when, in 1997, she was assigned, jointly with a colleague, the unrelated Borrel case, a particularly sensitive case which has given rise to the present proceedings before the Court. The applicant acted as lawyer for the civil parties in both cases and was dissatisfied with Judge M.'s conduct of the respective investigations, although not for exactly the same reasons.

In June 2000, at a time when important developments were taking place in the Borrel case, an unpleasant turn of events occurred in the "Scientology" case. Following a suit brought by the applicant, as counsel, in which the State had been found liable for gross negligence in respect of the handling of the "Scientology" file, disciplinary proceedings were brought against Judge M. in that connection. It was said that she had failed to show the requisite care and attention, leaving the case practically untouched for five years; that, in a friendly-settlement procedure to which she had had recourse, she had overstepped the bounds of her jurisdiction; and that she had not prepared copies of all the documents in the file, thus making its reconstruction impossible after parts of it had disappeared from her chambers. These matters were referred to the disciplinary board for judges by decision of the Minister of Justice.

Unfortunately, the Minister's decision was made public at a press conference given by the director of her private office before Judge M. herself and the court's president had been notified. This prior publicity sparked off a protest on the part of judges serving in the same court. They expressed sympathy for their colleagues who had been snubbed in this way and reasserted the right of judges to be treated with due respect; a right that can be no less than that which is owed to members of the public. At a general meeting held a few days later, the judges of that court unanimously adopted the following motion:

> "The general meeting of judges of the Paris *tribunal de grande instance* held on 4 July 2000, without disputing the authority conferred on the Minister of Justice to take disciplinary proceedings in the conditions prescribed by law, is surprised to learn from the press that such proceedings have been initiated against Judge [M.], investigating judge in Paris, whereas to date neither the judge herself nor her judicial hierarchy have been officially informed thereof."

The present Article 6 § 1 issue turns on what one of the judges said at that meeting. He expressed himself in this way:

> "We are not prohibited, as grassroots judges, from saying that we stand by Judge [M.]. It is not forbidden to say that Judge [M.] has our support and trust."

Nine years later the Court of Cassation, sitting in a formation of ten members, heard at final instance the applicant's appeal against conviction on a criminal charge brought against him for statements he had made about

Judge M. in connection with the present case, i.e., the Borrel case. The judge who had made the above-quoted statement about the way in which the Ministry of Justice had acted in the "Scientology" case and who, in the meantime, had risen to become a judge of the Court of Cassation, was a member of the formation which heard the appeal. The applicant has acknowledged that it has not been shown that there was any actual bias on the part of the judge. He submitted, however, that his very presence on the bench had been enough to create, in an objective sense, a legitimate fear or suspicion of a lack of impartiality.

The Grand Chamber agrees with that proposition. It takes the view that the language that had been used by the judge in question in support of Judge M. was capable of raising doubts in the applicant's mind regarding the impartiality of the Court of Cassation. It considers that this is supported by the "very singular context of the case" (see paragraph 84 of the present judgment), comprising as it does the interplay of various relations and factors, and particularly by the fact that the professional conflict between Judge M. and the applicant had taken on the appearance of a personal conflict, since it was the former who had filed the complaint against the latter. Further, the Grand Chamber observes that the Court of Appeal had itself seen a connection between the two cases to which an *"ex post facto* settling of scores" could be ascribed.

The essential question is whether one can have a reasonable doubt regarding the impartiality of the Court of Cassation by reason of the inclusion in its composition of the judge in question. It remains unknown whether that judge had any recollection of what he had actually said nine years earlier or whether it occurred to him, when seised of the case, that anything he had done or said in relation to Judge M. might be taken to reflect on his impartiality. If he had thought about it at all, one would have expected him to inform the other members of the bench. It is not known whether he did or did not remember or, if he did, whether he thought there was cause to reflect on the matter. It may be that he did not; or it may be that he did but that the bench thought nothing of it, for otherwise one would have expected the matter to be resolved quite simply by his withdrawal from the case, or otherwise by a decision of the court after giving the applicant an opportunity to be heard.

The Government have not suggested that in such cases the French system provides a means of redress of which the applicant should have availed himself. It must therefore be understood that the applicant had no way of bringing the matter before the Court of Cassation when, after judgment was handed down, he became aware of the participation of the judge in question (compare *In Re Pinochet* [1999] UKHL 52 (15 January 1999), where the House of Lords, faced with a similar situation, set aside its own judgment). The Court is, therefore, in the unhappy position of having to examine the matter at first instance.

The integrity of judicial proceedings must be demonstrated to all in no uncertain terms. In order to achieve this, it is necessary to adopt a concept of reasonableness that is as broad as possible, one that would encompass and accommodate even the most fastidious view of the appearance of things. It is "of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done" (per Lord Hewart in *Rex v. Sussex Justices, ex parte McCarthy* [1924] KB 256, at 259). At the same time it is necessary to firmly exclude fanciful interpretations or propositions that are wholly unrealistic.

In the present case there is no indication whatsoever that the judge in question had any connection with Judge M. other than that which all the other judges attending the meeting also had with her as a colleague. He used the first-person plural form, thus expressing collegial, not personal, support. He spoke in the context of a meeting of judges at which they collectively remonstrated about what was certainly a cavalier attitude on the part of the relevant ministry towards them. That attitude, having a more immediate and direct impact on Judge M., could be perceived as denoting contemptuous disregard for her. In this situation, language such as that used by the judge in question would merely be aimed at redressing the balance. He could certainly have made a better choice of words; but no one should have thought that his statement was intended to express a view on the merits of the pending disciplinary proceedings or, in other words, a value judgment on the manner in which Judge M. had acted. Moreover, what was said related exclusively to how Judge M. had, up until that point, dealt with the "Scientology" case. It had nothing at all to do with what was to happen later in the Borrel case. Nine years had passed since that statement had been made and, presumably, people had gone their separate ways. There is absolutely nothing to suggest that the Court of Cassation judge had any reason to hold, or that he might have held, any view as to how Judge M. had behaved or conducted her investigations in any of the cases assigned to her.

Are judges then to be so distrusted that one might, in such circumstances, legitimately think that a judge's impartiality could be doubted? To answer this question the Court must discern what view the public at large take of the integrity of judges. That is determinative of the respect in which they may be held and of the confidence that may or may not be reposed in them. Within limits, the greater the confidence the less one would be inclined to think that certain circumstances give rise to suspicion. Judges will themselves have contributed, over time, to the manner in which they are perceived. The concept of objective impartiality cannot, in my opinion, consist of a mere abstraction devised solely from principle, without regard to social realities which set practical standards. Judges may not be perfect – indeed, not all judges are perfect – but, even so, I have found it difficult to accept that one could seriously have thought that there was, in the present case, the possibility of an appearance of bias. One could, however, look at

the matter from another angle and say that even in a hypothetical world of perfect judges, enjoying unbounded confidence and respect, it would still be necessary to demonstrate that the justice system itself is in this regard immaculate and is a system from which the faintest hint of doubt is excluded – a rather absolutist approach for which I have little sympathy.

Whichever may be the best approach to the matter under consideration, I have finally decided that the view taken by all the other members of the Grand Chamber as to what the result should be might conceivably be shared by right-minded persons today and, therefore, on such a question of assessment, it was right to defer to that view.

CONCURRING OPINION OF JUDGE KŪRIS

1. My disagreement with the majority concerns two issues. Neither of them are to be considered so prominent as to cast doubt on the overall finding of a violation of Articles 6 § 1 and 10 of the Convention, to which I subscribe.

2. The reasoning, as laid out in paragraphs 89 to 91 of the judgment, includes two factual circumstances that are important for the finding of a violation of Article 6 § 1. The first is that Judge J.M. was a member of the bench which had decided the applicant's case, although it is explicitly acknowledged that "it is impossible to ascertain [his] actual influence on that occasion". The argument that Judge J.M. was merely one of ten judges in that formation "is not decisive for the objective-impartiality issue under Article 6 § 1", it being his "unascertained influence" which is regarded as tainting the impartiality of that court with "a genuine doubt" (see paragraph 89 of the judgment). In this context, the point about impartiality being "open to a genuine doubt" is meant to refer to the objective impartiality of Judge J.M. himself and, by extension, that of the whole bench. The Court is not willing to openly question Judge J.M.'s subjective impartiality; rather it is of the view that the fact that the applicant could have thought that he had some grounds on which to question Judge J.M.'s subjective impartiality had a bearing on the objective impartiality of that judge and of the formation as a whole. Although the Court does not question Judge J.M.'s subjective impartiality explicitly and directly, it does so implicitly and indirectly, because the very hint of that judge's influence on the outcome of the case suggests that it could also have been such as to determine a conclusion which was unfavourable to the applicant and that, but for that influence, the outcome might have been different.

The second circumstance is that the applicant had not been informed that Judge J.M. would be sitting on the bench in his case. On the contrary, the information available to him at the material time gave him no reason to expect that this particular judge would be in the composition of the judicial body which had to decide his case. Because of this concealment (whatever the reason), the applicant "had no opportunity to challenge [Judge] J.M.'s presence or to make any submissions on the issue of the judicial body's impartiality in that connection" (see paragraph 90 of the judgment and paragraph 52 referred to therein).

In my opinion, the first of these two circumstances is by itself of no legal importance. We do not and cannot know whether any opinion that Judge J.M. may have expressed in the deliberations in that case was at all unfavourable to the applicant. Thus, it is mere speculation that the judge could have had a greater or lesser influence on the outcome of the applicant's case. One could equally speculate on the lack of impartiality of – as they are routinely called – "national" judges of this Court, in cases

against the State in respect of which they were elected, because when a case which has been decided by the Chamber is referred to the Grand Chamber under Article 43 of the Convention, such judge finds himself or herself in the situation where he or she has already sat in that case as a member of the Chamber. However, such speculation is rebutted by reference to Article 26 § 4 of the Convention, which explicitly requires that the judge elected in respect of the High Contracting Party concerned be an *ex officio* member of the Grand Chamber. Accordingly, the inclusion of the "national" judge in the composition of the Grand Chamber is, in the most formal way, compelled by the Convention itself and is, in this respect, absolutely necessary.

In view of such situations pertaining to the continuous practice of this Court, the plausibility of any speculation regarding the objective "partiality" of Judge J.M. and the whole bench *vis-à-vis* the applicant is close to zero. That judge had expressed his support for Judge M. (whose relationship with the applicant appeared to be, so to say, problematic) many years before and in an entirely different context, and there are no indications that he had ever expressed an opinion on Mr Morice's case or personality, or on the whole politically sensitive context of that case, prior to its being decided by the bench of which he was part.

I am certainly not implying that in a French (or other national) court the "absolute necessity" of the inclusion of a particular judge in the composition of a judicial body which has to decide a particular case can be substantiated exhaustively by, say, mere reference to a statute which explicitly requires such inclusion, in the same way that the Convention requires inclusion of "national" judges in the Grand Chamber. Even had such a statute been in place, it probably would have been legally reproachable. However – and not merely in theory – there can be other reasons (not only of a formal legal but also of a factual nature) which would compel the inclusion of a particular judge in the composition of a bench or, to put it in a somewhat milder way, justify his or her non-exclusion therefrom. In the Court's case-law, one can find decisions and judgments where the previous involvement of a judge in the same case had not amounted to a violation of the right to a fair trial protected by the Convention. To give just a couple of examples, even the mere fact that a judge had already taken decisions regarding a particular person "cannot in itself be regarded as justifying doubts as to his or her impartiality" (see *Ökten v. Turkey* (dec.), no. 22347/07, § 41, 3 November 2011); in an even earlier case the Court had held that "no ground for legitimate suspicion [could] be discerned in the fact that three of the seven members of the disciplinary section had taken part in the first decision" (see *Diennet v. France*, 26 September 1995, § 38, Series A no. 325-A). Every case has to be decided on its own merits. In the present case, had the issue of Judge J.M.'s "partiality" been raised by the applicant in the proper course, such allegation would have been authoritatively dismissed as based

on an illegitimate suspicion. However, the applicant was denied any opportunity to raise this issue in the domestic proceedings.

Thus, much more important than the "bare" fact of Judge J.M.'s presence on the bench is that the Government failed (or did not even attempt) to show that there were compelling reasons making that presence absolutely necessary (see *Fazlı Aslaner v. Turkey*, no. 36073/04, § 40, 4 March 2014) or, put otherwise, making his non-exclusion from the composition justified. I personally believe that there were no such grounds whatsoever. On the other hand, there could also hardly have been any weighty grounds to exclude that judge from the composition solely on the basis that he had expressed his support for Judge M. many years before and in an entirely different context. The two situations were unrelated, save for the fact that they involved opposition between the same protagonists, but even this formal connection had been erased, or at least substantially alleviated, by the long time-span between the two events and by the fact that even the applicant himself admitted that Judge J.M. had not displayed any personal bias against him (see paragraph 67 of the present judgment). The presumption of judicial integrity should matter. And if it really does, given all the circumstances of the case, allegations as to Judge J.M.'s "partiality" should have been dismissed, had they been raised in the domestic proceedings. Moreover, it is not unlikely that the applicant, reasonably enough, would not have raised this issue at all, in view of its apparent groundlessness. What really could and did make him legitimately suspicious was the fact that the composition of the judicial body which decided his case had not been made known to him. The Government failed to give any explanation for this non-disclosure. Could the Government have succeeded in respect of this complaint had they provided such an explanation? I am sure that, in any event, they could not have found a plausible one, for even if there may be compelling reasons (however debatable) of a formal legal or factual nature for the inclusion of a given judge in a particular judicial composition, there simply cannot be any reason whatsoever for not making the names of those on the bench known to the person whose case that judicial body is to decide. In this respect, the Government's case was destined to fail from the outset.

Consequently, of the two circumstances discussed here, only the second one matters, whereas the first is merely ancillary in nature. In the combination of the two, it has no independent significance. But is that not what the majority meant when admitting that the mere presence of Judge J.M. was "not decisive for the objective-impartiality issue under Article 6 § 1"? In other words, am I simply repeating, in a more long-winded manner, essentially the same argument? I think I am not, or at least that is not my intention. The devil hides in the detail. In the majority's reasoning, it hides in one single detail, which is the consideration, in paragraph 89 of the judgment, of Judge J.M.'s "unascertained influence" on

the outcome of the applicant's case. I am sure that this unfortunate hint should have been omitted. Any speculation about that judge's "actual influence" on the outcome of the case casts an unnecessary and – even more importantly – unjustified shadow of doubt on that judge's integrity. This finding, last but not least, is not in line with the Court's case-law and mission.

3. My other disagreement with the majority relates to paragraph 132 of the judgment. Therein the Court repeats its *dictum*, incautiously employed, *inter alia*, in the Grand Chamber judgment in *Kyprianou v. Cyprus* (as well as in some Chamber cases), that the "special status" (or "specific status" here in paragraph 132) of lawyers gives them "a central position in the administration of justice" as "intermediaries between the public and the courts" (see *Kyprianou v. Cyprus* [GC], no. 73797/01, § 173, ECHR 2005-XIII).

I cannot agree with such a characteristic. This is a matter of principle. The adjectives "special" or "specific" do not mean "central". A lawyer always represents a party and by definition is not able to occupy "a central position in the administration of justice". A party is never "central", nor can its representative be. Those with a "central position in the administration of justice" are the judges (for good or, as is unfortunately sometimes the case, for ill). The "intermediaries between the public and the courts" are the courts' spokespersons, press representatives or – in their own right – journalists, but in no way lawyers, who represent parties. A lawyer acts in a party's interests, for the benefit of a client and, as a rule, is remunerated by the latter. A lawyer has to heed the represented party's interests even when they are in opposition to those of "the public", i.e., society and the State. This is not meant to deny or diminish the importance of the function of lawyers. It is true that they can and do contribute to seeking justice and help courts to exercise their mission, but lawyers may also aim at obstructing the pursuit of justice in the interests of their clients – and occasionally do so. It depends. A party represented by a lawyer may find himself or herself in the courtroom because he or she seeks justice, but it is probably no less frequent for the lawyer to represent a party against whom justice is sought.

Every *dictum* has the potential to be developed, in some future case, into a *ratio*. Regarding this particular *dictum*, I should probably say "danger" rather than "potential". Repetition, in yet another judgment of this Court's Grand Chamber, of the mantra about lawyers ostensibly occupying "a central position in the administration of justice" and of being "intermediaries between the public and the courts", especially when such a characteristic is not, in the Court's case-law, attributed anywhere to the other party, i.e., the prosecution, distorts the picture. As to the case at hand, it could have been decided, with no disadvantage to the Court's findings, without recourse to this uncritical repetition.