



Conviction for defamation of lawyer acting for Judge Borrel's widow was disproportionate interference with his right to freedom of expression

In today's **Grand Chamber** judgment¹ in the case of [Morice v. France](#) (application no. 29369/10) the European Court of Human Rights held, unanimously, that there had been:

a violation of Article 6 § 1 (right to a fair trial) of the European Convention on Human Rights, and
a violation of Article 10 (freedom of expression) of the Convention.

The case concerned the conviction of a lawyer, on account of remarks reported in the press, for complicity in defamation of the investigating judges who had been removed from the judicial investigation into the death of Judge Bernard Borrel.

The Grand Chamber found in particular that Mr Morice had expressed value judgments with a sufficient factual basis. His remarks had not exceeded the limits of the right guaranteed by Article 10 and they concerned a matter of public interest, namely the functioning of the justice system and the handling of the Borrel case.

The Grand Chamber nevertheless emphasised that lawyers could not be equated with journalists, not being external witnesses with the task of informing the public, but being directly involved in the functioning of the justice system and the defence of a party.

The Grand Chamber further found that significant weight had to be attached to the context of the case, while pointing out that it was necessary to maintain the authority of the judiciary and to ensure mutual respect between judges and lawyers.

Principal facts

The applicant, Olivier Morice, is a French national who was born in 1960 and lives in Paris. He is the lawyer acting for Mrs Borrel, the widow of the French judge Bernard Borrel, whose dead body was found, on 19 October 1995, 80 kilometres from the city of Djibouti.

In 1997 the French judicial investigation into the death was assigned to Judges M. and L.L. On 21 June 2000, on an appeal lodged by Mr Morice and his colleague, the Paris Court of Appeal set aside a decision of the judges in which they refused to organise an on-site reconstruction in the presence of the civil parties, also removing those judges from the case and transferring it to a new investigating judge, Judge P. The new judge drew up a report of 1 August 2000 with the following observations: a video-recording made in Djibouti in March 2000 during an on-site visit by the judges and experts was not in the judicial investigation file forwarded to him and was not registered as an exhibit; the cassette had subsequently been given to him, at his request, by Judge M., in an envelope bearing that judge's name as addressee together with a handwritten card to her from the public prosecutor of Djibouti; that card, which used informal language (using the "tu" form), cast aspersions on Mrs Borrel and her lawyers, accusing them of "orchestrating their manipulation" and ending with "Best wishes, Djama".

On 6 September 2000 Mr Morice and his colleague wrote to the French Minister of Justice to complain about the shortcomings noted by Judge P. in his report and referring to the conduct of

1. Grand Chamber judgments are final (Article 44 of the Convention).

All final judgments are transmitted to the Committee of Ministers of the Council of Europe for supervision of their execution. Further information about the execution process can be found here: www.coe.int/t/dghl/monitoring/execution.

Judges M. and L.L. as being “completely at odds with the principles of impartiality and fairness”. The lawyers asked for an investigation to be carried out by the General Inspectorate of Judicial Services into the “numerous shortcomings ... brought to light in the course of the judicial investigation”. The following day, extracts from that letter were included, together with statements made by Mr Morice to the journalist, in an article in the newspaper *Le Monde*, which stated that Mrs Borrel’s lawyers had “vigorously criticised” Judge M. to the Minister of Justice, accusing her in particular of conduct which was “completely at odds with the principles of impartiality and fairness”. The article then quoted in full the “handwritten and rather friendly note” from the public prosecutor of Djibouti to Judge M., which for the lawyers showed “the extent of the connivance between the prosecutor and the French judges”. The article also referred to the disciplinary proceedings against Judge M. that were pending before the National Legal Service Commission, in particular for the disappearance of documents from the file in the “Scientology” case. Mr Morice, who represented the civil parties in that case as well, had obtained Judge M.’s removal from the investigation and, in 2000, a judgment against the State for gross negligence on the part of the courts service on account of the disappearance of the “Scientology” file from Judge M.’s office.

In October 2000 Judges M. and L.L. filed a criminal complaint against the publication director of *Le Monde*, the journalist who had written the article and Mr Morice, accusing them of the offence of public defamation of a civil servant. Mr Morice was ultimately found guilty of complicity in that offence by the Rouen Court of Appeal in 2008. He was ordered to pay a fine of 4,000 euros (EUR) and EUR 1,000 to Judge M. for her costs, in addition to an award of EUR 7,500 in damages to each of the judges, to be paid by him jointly with the two other defendants, and an order to publish a notice in *Le Monde*.

In a judgment of 10 November 2009 the Court of Cassation dismissed Mr Morice’s appeal on points of law, finding in particular that the admissible limits of freedom of expression in criticising the action of the judges had been overstepped. The composition of the bench was different from that previously announced to the parties. Judge J.M. was present, giving rise to a complaint by the applicant, because that judge had, on 4 July 2000, at the General Meeting of judges of the Paris *tribunal de grande instance*, expressed his support for Judge M. in the context of the disciplinary proceedings for her handling of the “Scientology” case.

Complaints, procedure and composition of the Court

Relying on Article 6 § 1 (right to a fair hearing) of the European Convention on Human Rights, Mr Morice alleged that his case had not been determined fairly and impartially by the Court of Cassation, on account of the presence of Judge J.M. on the bench. He further alleged that his conviction for complicity in defamation had breached his right to freedom of expression under Article 10 of the Convention.

The application was lodged with the European Court of Human Rights on 7 May 2010.

In a [judgment](#) of 11 July 2013, the Court 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.

On 3 October 2013 Mr Morice requested that the case be referred to the Grand Chamber under Article 43 of the Convention (referral to the Grand Chamber). On 9 December 2013 the panel of the Grand Chamber accepted that request. A [hearing](#) was held in Strasbourg on 21 May 2014.

The Council of Bars and Law Societies of Europe, the Paris Bar Association, the National Bar Council and the Conference of Chairmen of French Bars were given leave to intervene as third parties in the written procedure (Article 36 § 2 of the Convention).

Judgment was given by the Grand Chamber of 17 judges, composed as follows:

Dean **Spielmann** (Luxembourg), *President*,
 Josep **Casadevall** (Andorra),
 Guido **Raimondi** (Italy),
 Isabelle **Berro** (Monaco),
 Ineta **Ziemele** (Latvia),
 George **Nicolaou** (Cyprus),
 Luis **López Guerra** (Spain),
 Mirjana **Lazarova Trajkovska** (“The former Yugoslav Republic of Macedonia”),
 Ann **Power-Forde** (Ireland),
 Zdravka **Kalaydjieva** (),
 Julia **Laffranque** (Estonia),
 Erik **Møse** (Norway),
 André **Potocki** (France),
 Johannes **Silvis** (the Netherlands),
 Valeriu **Grițco** (the Republic of Moldova),
 Ksenija **Turković** (Croatia),
 Egidijus **Kūris** (Lithuania),

and also Johan **Callewaert**, *Deputy Grand Chamber Registrar*.

Decision of the Court

Article 6 § 1

The Court began by finding that Mr Morice had acknowledged that it was not established that Judge J.M. had displayed any personal bias against him. He had argued nevertheless that the very presence of J.M. on the bench had created a situation which justified his fears of a lack of impartiality. The Court thus examined the case from the perspective of the objective impartiality test, addressing the question whether Mr Morice’s doubts could be regarded as objectively justified in the circumstances.

First, the language used in 2000 by Judge J.M. in favour of a fellow judge, Judge M. – the very judge whose complaint had led to the criminal proceedings against Mr Morice – had been capable of raising doubts in the defendant’s mind as to the impartiality of the “tribunal” hearing his case.

The Court emphasised the very singular context of the case, which concerned a lawyer and a judge who had both been involved at the judicial investigation stage of two particularly high-profile cases: the Borrel case, in the context of which Mr Morice’s impugned remarks had been made, and the “Scientology” case, which had given rise to the public remarks by J.M. in support of Judge M.

The Court, after pointing out that Mr Morice had been convicted on the basis of a complaint by Judge M., observed that the judgment of the Court of Appeal had itself expressly established a connection between Mr Morice’s remarks in the Borrel case and the developments in the Scientology case, concluding that this suggested the existence of personal animosity on the part of Mr Morice towards Judge M. It was precisely that judgment which Mr Morice had appealed against on points of law and which had been examined by the bench of the Court of Cassation on which Judge J.M. was sitting.

In addition, as Mr Morice had not been informed that Judge J.M. would be sitting on the bench, and had had no reason to believe that he would, he had thus had no opportunity to challenge J.M.’s presence or to make any submissions on the issue of impartiality.

The Court held that Mr Morice's fears could have been considered objectively justified and that there had been a violation of Article 6 § 1.

Article 10

It was not in dispute that Mr Morice's conviction had constituted an interference with the exercise of his right to freedom of expression, as prescribed by the Freedom of the Press Act of 29 July 1881, and with the aim of protecting the reputation or rights of others.

Applicant's status as lawyer and debate on a matter of public interest

Mr Morice had relied on the right of lawyers to defend their clients through the press. The Court reiterated its case-law to the effect that a distinction had to be drawn depending on whether the lawyer was speaking inside or outside the courtroom. Remarks made in the courtroom remained there and thus warranted a high degree of tolerance to criticism. In other contexts lawyers had to avoid remarks amounting to a gratuitous personal attack without a direct connection to the facts of the case. That being said, in the present case the Court failed to see how Mr Morice's statements could have directly contributed to his task of defending his client, Mrs Borrel, since the judicial investigation had by that time been entrusted to another judge who was not criticised.

Mr Morice had also relied on his right to contribute to a debate on a matter of public interest. The Court took the view that his remarks, which concerned the functioning of the judiciary and the handling of the Borrel case², fell within the context of a debate on such a matter, as the public had a legitimate interest in being informed about criminal proceedings. In that context the authorities had a particularly narrow margin of appreciation when it came to restricting freedom of expression. The Court nevertheless emphasised that lawyers could not be equated with journalists. While lawyers had a special position in the administration of justice which made them first-hand witnesses of any shortcomings, they could not be equated with journalists, not being external witnesses with the task of informing the public, but being directly involved in the defence of a party.

Factual basis of impugned remarks and context of the case

The Court took the view that Mr Morice's remarks were value judgments and as such were not susceptible of proof, but nevertheless had to have a sufficient "factual basis". The Court found in the present case that such a basis existed. It had first been established that an important item of evidence, namely the video recording made in Djibouti, had not been forwarded with the case file to the new investigating judge, who had produced a report to register this fact. In addition, after the cassette had been given to him by Judge M., at his request, Judge P. had made a certain number of factual observations, concerning in particular the absence of exhibits under seal and the presence of the handwritten card showing a certain friendliness on the part of the public prosecutor of Djibouti towards Judge M. and accusing the civil parties' lawyers of "orchestrating their manipulation". The Court emphasised in this connection that, not only had the Djibouti authorities supported the theory of suicide from the outset, but also a number of representatives of that State had been personally implicated in the subsequent investigation. Lastly, Mr Morice had acted in his capacity as lawyer in two high-profile cases in which Judge M. was an investigating judge and in both of them shortcomings had been identified by the appellate courts, leading to the withdrawal of the cases from Judge M. at Mr Morice's request. Mr Morice had also secured a ruling that the French State was liable for the malfunctioning of the justice system in the Scientology case. As to Mr Morice's remarks, they had a close connection with the facts of the case and had been neither misleading nor gratuitous.

As regards the background to the case, which always had to be taken into account in Article 10 cases, it could be explained not only by the conduct of the investigating judges and by Mr Morice's

² As in the cases of *Floquet and Esménard v. France* (no. 29064/08, 10 January 2002) and *July and Sarl Libération v. France* (no. 20893/03, 14 February 2008).

relations with one of them, but also by the very specific history of the case, its inter-State dimension and the substantial media coverage. Although this specific context was of considerable importance, the Court of Appeal had attributed an extensive scope to some of the language used by Mr Morice. The Court took the view that Mr Morice's remarks could not be reduced to the mere expression of personal animosity on his part towards Judge M. or an antagonistic relationship between the two individuals, as they fell within a broader context, also involving another lawyer and another judge (L.L.). In addition, while Mr Morice's remarks reflected some hostility, they concerned alleged shortcomings in a judicial investigation – a matter to which a lawyer should be able to draw the public's attention.

Maintaining the authority of the judiciary and use of available remedies

The Government relied on the fact that judges could not reply, as they were bound by a duty of discretion. The Court took the view that, while it might prove necessary to protect them for that reason from gravely damaging and unfounded attacks, this could not 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. In the present case, the limits of acceptable criticism *vis-à-vis* members of the judiciary, part of a fundamental institution of the State, were wider than in the case of ordinary citizens and the impugned comments could therefore be directed against the judges. The Court nevertheless underlined the need to maintain the authority of the judiciary and to ensure relations based on mutual consideration and respect between the different protagonists of the justice system.

The Government further relied on the argument that Mr Morice should have used the available legal remedies and not the press in order to remedy the problems he had encountered. The Court noted that the referral of the matter to the Indictments Division of the Paris Court of Appeal showed that Mr Morice's initial intention had been to resolve the matter using the available remedies, but at that stage the Indictments Division was no longer in a position to examine such complaints, because it had already withdrawn the case from Judges M. and L.L. Moreover, the request for an investigation made to the Minister of Justice was not a judicial remedy but a mere request for an administrative investigation subject to the discretionary decision of the Minister.

The Court further noted that no disciplinary proceedings had been brought against Mr Morice.

Sanctions imposed

The Court took into account the nature and severity of the sanctions imposed. It reiterated that even a relatively small fine would still have a chilling effect on the exercise of freedom of expression. Imposing a sanction on a lawyer might also have certain repercussions, whether 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 noted that Mr Morice's punishment had not been confined to a criminal conviction: the sanction imposed on him had been of some significance, and his status as a lawyer had even been relied upon to justify greater severity.

In view of the foregoing, the Court found that the judgment against Mr Morice could be regarded as a disproportionate interference with his right to freedom of expression and it thus held that there had been a violation of Article 10.

[Article 41 \(just satisfaction\)](#)

The Court held that France was to pay Mr Morice 4,270 euros (EUR) in respect of pecuniary damage, EUR 15,000 in respect of non-pecuniary damage and EUR 14,400 in respect of costs and expenses.

Separate opinions

Judges Nicolaou and Kūris each expressed a concurring opinion. These opinions are annexed to the judgment.

The judgment is available in English and French.

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The European Court of Human Rights was set up in Strasbourg by the Council of Europe Member States in 1959 to deal with alleged violations of the 1950 European Convention on Human Rights.