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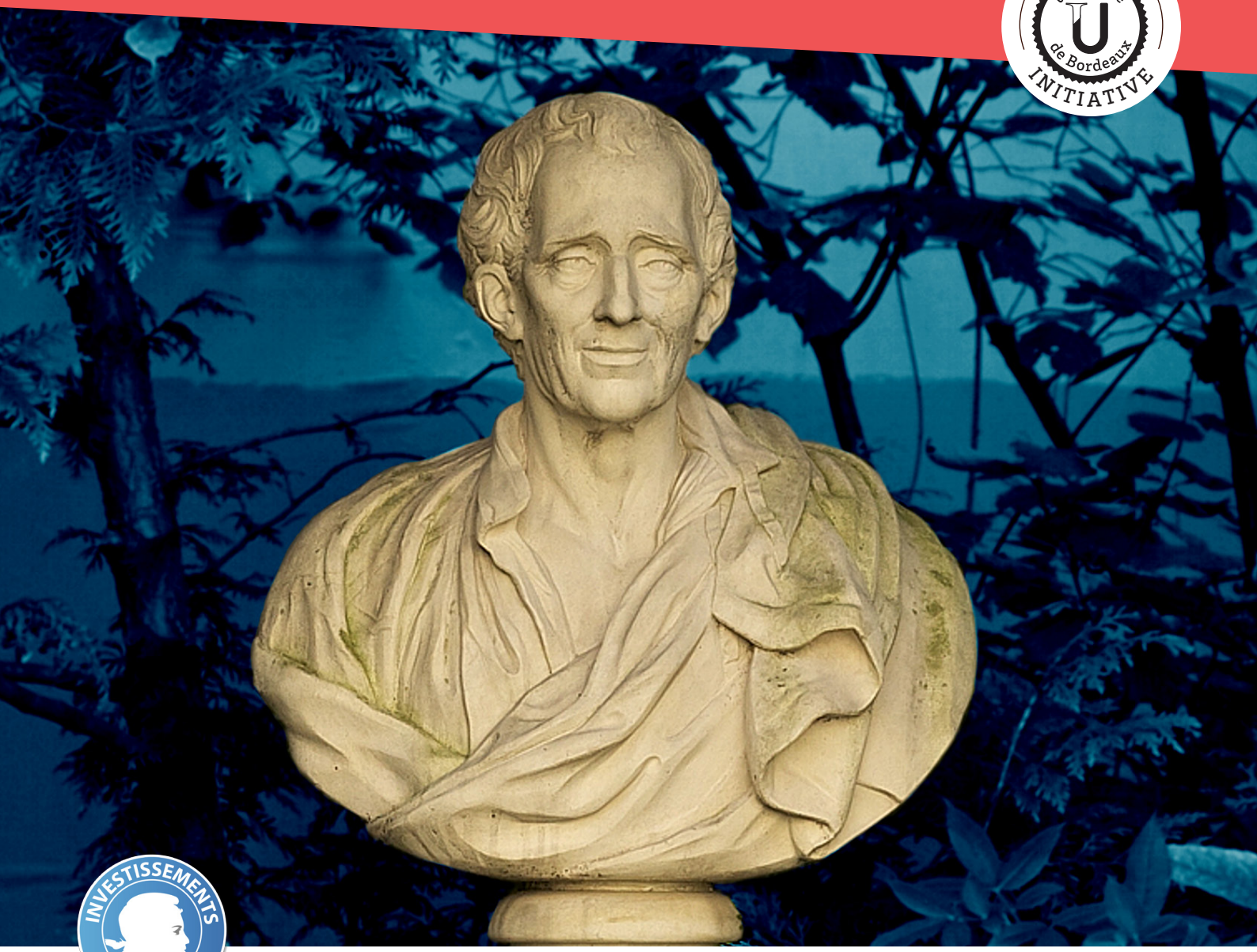
Prof. Charlotte Claverie-Rousset



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Counsel's right to criticise outside the courtroom

Charlotte Claverie-Rousset, Professor of Private Law and Criminal Sciences, University of Bordeaux (ISCJ)

Who today can claim not to read or listen to criticism of the functioning of the justice system made by lawyers on the courthouse steps after their hearing or being interviewed by the media? The coverage to which they are subject sometimes leads them to voice virulent criticism of the judge hearing their case, the court as a whole and the court ruling against their client. But do lawyers have the right to say anything in the name of freedom of expression enshrined under Article 11 of the 1789 Declaration of the Rights of Man and of the Citizen, which has constitutional status under French law, and Article 10 of the European Convention on Human Rights and Fundamental Freedoms? The question is regularly put to the French courts and the European Court of Human Rights, which have established a fundamental distinction between the statements made at the hearing, and those made outside, French and European law thereby demonstrating a greater flexibility regarding the former.

Firstly, **in a courtroom context** (be it a civil, criminal, or administrative court), lawyers enjoy immunity from prosecution, sometimes known as *l'immunité de la robe* (literally, "the immunity of the gown"). Article 41, paragraph 4 of the Law of 29 July 1881 provides that the speeches or written submissions made to a court will not give rise to proceedings for defamation, insult or contempt. This legislation therefore concerns lawyers (but also litigants in the context of a trial) who are granted an extensive freedom of speech enabling to exercise the rights of defence effectively (1). They may freely, verbally or in written submissions, criticise, defame or insult without risking criminal conviction. The sole restriction imposed by Article 41 itself concerns statements unrelated to the case, which are not covered by the abovementioned immunity. In other words, a lawyer who makes defamatory or disparaging statements unrelated to the matter before the court may be subject to criminal prosecution. This is particularly the case when a lawyer makes an *ad hominem* attack, exclusively demonstrating a personal grudge against a magistrate, not reflecting a desire to stimulate debate on the proper course of justice. This concept of unrelated statements gives rise to substantial litigation (2), the Court of Cassation taking a rather restrictive approach favouring the advocate (3).

However, the protection of counsel's freedom of expression applies only to criminal proceedings, not to disciplinary proceedings. Formerly, *délits d'audience* (literally, courtroom offences), i.e. failures on the part of a lawyer in fulfilling the duties imposed by his oath (4) were punished immediately at the hearing at which they were committed, and by the offended magistrates (5), which was obviously not without its problems under the principle of impartiality. Following the well-known *Choucq* case, the rule was changed by the Law of 15 June 1982: the lawyer is no longer judged on the spot but later, and by the *conseil régional de discipline* (regional disciplinary council) at first instance, then if necessary by a civil court of second instance and the Court of Cassation. Despite this important change, again favourable to the advocate's rights, it is established case law that the immunity afforded Article 41 is still not applicable to disciplinary matters (6). It often happens that a lawyer is subject to disciplinary proceedings for breach of oath,

for instance when he vehemently calls into question the professional competence and impartiality of the *juge des libertés et de la détention* (freedoms and custody judge), threatens to withdraw or expresses personal animosity towards the magistrate, bringing him or her into disrepute. The lawyer will then be subject to a disciplinary warning on the grounds that while he had the right to criticise the functioning of the justice system and the judge's conduct, he could not make vehement statements calling the judge's professional ethics into question (7).

The fact that a lawyer who exercises his right to freedom of expression on court premises may be punished under French law is not, according to the ECtHR, in itself contrary to Article 10, since this Article does not establish an absolute right. However, the Court considers that *"[i]t is therefore 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*" (8) because fairness implies a free, even robust, exchange of views between the parties.

Secondly, and conversely, **aside from the courtroom or submissions to the court,** lawyers do not enjoy the same indulgence. They no longer benefit from *l'immunité de la robe* (9) so that freedom of speech is not absolute: counsel cannot therefore be carried away by his convictions and disrupt the smooth administration of justice. In practice, however, when he makes statements in the context of press conferences, articles, blogs or any other means, it happens that the lawyer should hold and express views removed from the technical defence of the client, and that no longer fall within the scope of the exercise of the rights of defence. Sometimes interviews turn into a lynching of magistrates through personal attacks with no direct link to the facts of the case. Sometimes, on the contrary, the criticisms expressed are intended to highlight problems within the judicial system (10), especially in the event of a failure to comply with judicial independence or impartiality, the lawyer then invoking the public's right to information. However, the ECtHR has stated that, owing to their status as officers of the courts, lawyers have an obligation to contribute to the proper functioning of the judicial system (11). Thus, on the very principle of a lawyer's media appearances, the Court held that the defence of his clients could continue through an appearance on television news or in the press and, in this instance, through public information on the nature of dysfunctions likely to harm the smooth running of legal proceedings (12). French law therefore strives for balance between these various issues, inevitably restricting counsel's freedom of speech outside the courtroom. This lawyer's right to criticise is certainly limited (I) but these restrictions are acceptable in order to guarantee the smooth administration of justice (II).

I. An undeniably restricted right to criticise

A lawyer may freely exercise his right to criticise but he will often be torn between his desire publicly to express his complaints in order to inform the public and the risk of disciplinary (A) and criminal (B) proceedings.

A. The risk of disciplinary proceedings

Most disciplinary proceedings are conducted in the wake of critical comments made *in the context of the hearing* as counsel does not enjoy immunity. However, counsel is sometimes subject to disciplinary proceedings for statements made *out of court,* and potentially in tandem with criminal proceedings. Again, the lawyer is bound by his oath to a duty of moderation, discretion and courtesy, which is incompatible with overly vehement or accusatory statements. For example, a lawyer was cautioned for making remarks with racial connotations to a reporter from a radio station, casting aspersions on the jury and voicing suspicions as to on their honesty: he criticised

the acquittal by an *"exclusively white"* jury of a policeman who killed a minor from an ethnic minority (13).

A lawyer was also the subject of disciplinary proceedings for calling the Advocate General in charge of a criminal case a "*hereditary traitor*" in reference to the collaborationist past of the latter's father, convicted following the liberation of France. Rejecting the defence of provocation accepted by the Court of Appeal, the Court of Cassation held that "*while the lawyer has the right to criticise the administration of justice or the behaviour of a particular judge, his freedom of expression, which is not absolute as it is subject to restrictions which involve, in particular, protecting the reputation or rights of others and guaranteeing judicial authority and impartiality, does not extend to violent language which, in expressing personal animosity towards the magistrate concerned, calling his moral integrity into question, rather than challenging the latter's pronouncements which may indeed be criticised, constitute a breach of the basic principle of discretion which is incumbent on counsel in all circumstances* " (14).

Thus, the Court of Cassation considers that there is an abuse of freedom of expression when the statements in question exclusively demonstrate personal malice, without reflecting an idea, opinion or information likely to fuel a discussion or debate in the public interest (15).

A lawyer who abuses his right to criticise will therefore subject to disciplinary sanctions related to the exercise of his profession; but that is not all, as he also runs the risk of criminal prosecution like any other citizen.

B. The risk of criminal prosecution

When a lawyer voices criticisms outside the courtroom, he is likely to have committed a criminal offence, but the classification applicable depends on the target of the impugned statements (16): if it is the magistrate specifically, counsel is potentially guilty of contempt, defamation or insult (1.); if it is the judiciary more generally, counsel may be accused of attempting to discredit a judicial decision (2.).

1. Classifications applicable in cases pf criticism of a judge or magistrate

Where a judge is the subject of criticism, counsel can in theory be prosecuted for contempt, defamation or insult.

Turning first to contempt, counsel may be charged under two different provisions: on one hand, Article 433-5 of the Criminal Code; and, on the other hand, Article 434-24 of the same Code. In both cases, these are words, gestures, threats, written or images of any kind not made public, or of any objects tending to undermine the target's dignity or respect for the function with which he or she is vested. The difference between the two provisions lies in the target's capacity: while Article 433-5 broadly covers *"a person charged with a public service mission",* Article 434-24 specifically covers *"a magistrate, juror or any person sitting in a court".* Thus, with a special law applicable to magistrates (Article 434-24), this ought to prevail over the more general wording of Article 433-5. The penalties are also more severe for contempt of court, i.e. one year's imprisonment and a fine of €15,000 euros.

As regards the substantive element of contempt, the lawyer concerned must first have used one of the means criminalised by the relevant provision; i.e. undisclosed words, gestures, threats,

writings or images of any kind, or any other objects. In practice, the criticism will most often take the form of spoken words or writings. Contempt through images is also conceivable if we imagine a lawyer addressing to the magistrate a caricature or representation of a disgraceful scene in which he or she can be identified. Furthermore, by its wording, Article 434-24 seems to distinguish between the words, gestures, threats and the sending of objects on the one hand, and writings or images on the other. Indeed, the former would be criminalised regardless of whether they were made or expressed in public, while the latter would fall within the scope of the provision if they have not been disclosed. If the writings or offensive pictures are made public, they no longer fall within the remit of the Penal Code but rather that of the Law of 29 July 1881. Case law does not apply this distinction, favouring Article 434-24 even in matters involving writings made public (17).

Next, the means of expression used must insult the judge, i.e. undermine their moral authority and the respect due to their function, which is even more damaging to them in that their duty of reserve forbids them to respond. It is therefore the function that protects the person exercising it; this is why Article 434-24 covers contempt aimed at the magistrate in the exercise of their duties or in the course of this exercise. The criticism of the magistrate must relate to the way in which they exercise their profession. This is the case when a lawyer criticises a judge for not respecting a man's word when it is given, and thus failing in their duty of honour, virtue, or courtesy (18). This applies even when the lawyer deplores the hypocrisy of the public prosecutor, as well as his rejection of any adversarial argument, and blames them for a social dysfunction more serious than illegal work (19). An attack on a magistrate's moral authority is also made when the magistrate is accused of sullying the judiciary and making political decisions (20).

Lastly, the judge must be aware of the offensive statements or writings. However, it is not necessary that they be directly and immediately aware of the same. A physical confrontation between the two sides is not required as indirect contempt is admitted: the verbal or written contempt may have been expressed without the magistrate concerned being present, if the speaker or writer knew that witnesses would report the statement(s) to the magistrate. Thus, there will be contempt when the words actually come to the knowledge of the magistrate through a third party called a *rapporteur necessaire* ("necessary reporter"). This is, for instance, the scenario where a lawyer expresses his displeasure to the president of the local Bar association with regard to a particular magistrate, further to which the president addresses a letter to the presiding judge of the court concerned, who in turn forwards the letter or its content to the magistrate criticised (21). It may also be the case where a lawyer contacts a colleague of the intended target of the remarks (22).

As for the moral element, contempt is a deliberate offence. The requisite intent is for the author to want to undermine the addressee's dignity or function knowing that his words will be brought to their attention.

It is in relation to indirect contempt that the characterisation of intent presents the greatest difficulties. Indeed, in this case, there must be proof that the contemnor intended that the statements be reported to the person criticised. In practice, this proof may be deduced from the existing professional relationship between the *rapporteur nécessaire* and the magistrate concerned, including hierarchical subordination (23). For example, where the contempt expressed by the president of a Bar association is brought to the attention of the president of the court, case

law considers that, owing to their administrative duties related to their reporting function, the President should inform the magistrate concerned of the letter and its content since it casts opprobrium on the latter's professional honour (24). The Court of Cassation performs a strict review of this condition, recalling with force that *"may be described as* rapporteur necessaire *only the person who the accused knew would report the contempt to the person targeted thereby owing to their links with said person"* , which is not necessarily the case between a policeman and an examining magistrate leading an investigation, whatever the Court of Appeal may have said in upholding such a legal relationship on the basis of Article 40 of the Criminal Procedure Code (25). In this case, a lawyer had uttered, aloud and in the presence of a policeman, offensive comments about the magistrate, i.e. "*grosse connasse*" ("fat bitch"). However, when the insults are addressed to a clerk, case law considers that the author knew they would necessarily be reported to the magistrate concerned (26); the same applies where the statements are addressed to the Minister of Justice because they will inevitably be passed on to the magistrate concerned, even through the Attorney General (27).

As regards defamation, this is defined by Articles 29 and 30 of the Law of 29 July 1881 as any allegation or imputation of a fact that damages a person's honour or reputation. **Insult** is itself criminalised under Articles 29 and 33 of the same Law, defined as any offensive expression, term of contempt or invective not containing an allegation of fact. When offensive comments are made publicly against a magistrate, there is a conflict between the abovementioned provisions as this same act can constitute both contempt and insult or defamation. The Criminal Chamber of the Court of Cassation settled this conflict, considering that *"any abusive or defamatory phrase, when addressed to a judge of the administrative or judicial courts in the exercise of their functions or during this exercise, is classified as contempt by Article 434-24 of the Penal Code and, even where the phrase is uttered publicly, falls within the scope of this provision"* (28). Thus, the Court of Cassation gives precedence to the classifications contained in the Penal Code (29), rejecting all exceptional arrangements relative to the application of the 1881 Law.

2. Classifications applicable in the event of criticism of a decision

Where it is not the judge who is the subject of criticism by a lawyer, but rather a court decision, the latter is liable to be prosecuted on the basis of Article 434-25 of the Penal Code which criminalises acts seeking to discredit publicly, by actions, words, writings or images of any kind, any judicial act or decision, in circumstances that undermine judicial authority or independence; then he faces six months' imprisonment and a fine of €7,500.

Firstly, it should be noted that this is a formal offence where it is not necessary that the court decision be effectively discredited (it would also be difficult to prove such harm); simply attempting to discredit it will suffice in characterising the offence. Specifically it consists in seeking to undermine judicial authority or independence. Unlike contempt directed at a specific judge, this is an attack on the smooth administration of justice, which makes it a general interest offence: this explains why one of the judges who gave the impugned decision cannot join a civil suit to the criminal proceedings (30). In addition, reiterating previous case law established under Article 226 of the old Penal Code, Article 434-25 specifies that this classification does not apply to technical comments or acts, words, writings or images of any kind aimed at the reversal, cassation or revision of a decision. Again, it is all about moderation: a negative technical comment on the meaning or purpose of a judgment is accepted, while virulent criticism calling into question the

court's compliance with principles of the rule of law exceeds the right to criticise that is usually permitted.

This premeditated offence is constituted when a person calls a court's decision a *"masterpiece of inconsistency, extravagance and abuse of rights"* (31) or describes *"judges with no common sense who should think before making decisions every which way"* (32). This is also the case of the lawyer, commenting on the verdict given by an Assize Court, who clearly accused the jury of following racist considerations (33). Or that of the lawyer who, as a result of the examining magistrate's refusal to investigate, claimed to be faced with a denial of justice, quoting Voltaire to *"describe judges who admitted neither conflict nor criticism: the oxen-tigers, as stupid as oxen, as fierce as tigers".* In that case, the Criminal Chamber of the Court of Cassation, approving the sentence imposed by the Court of Appeal, considered that using abusive terms in calling to question the impartiality of the judges who handed down the decision criticised, and presenting their attitude as a manifestation of judicial injustice, their author, by exceeding the scope of admissible criticism, sought to undermine judicial authority, considered a fundamental state institution (34).

Lastly, as regards the criminal aspect, lawyers are treated like all other citizens: no specific offence applies, and case law does not seem to treat them any differently to any other citizen found to be in contempt. However, the risk of criminal and disciplinary sanctions is real, which correspondingly restricts counsel's right to criticise. Nevertheless, it must be acknowledged that such restrictions are acceptable in order to guarantee the smooth administration of justice.

II. Acceptable restrictions in order to guarantee the smooth administration of justice

Based on Article 10 of the European Convention on Human Rights, the Court of Cassation freely accepts that everyone has the right to freedom of expression and the public has a legitimate interest in receiving information on criminal proceedings and the functioning of the justice system (35). The Court does, however, state that, in accordance with the Convention, the exercise of these freedoms carries with it duties and responsibilities and may be subject, in a democratic society, to the protection of the dignity of the magistrate or the respect due to the function with which he is vested. It is these competing interests that the Court must juggle. In this respect, it has joined the ECtHR, which often has to deal with the question of restrictions on counsel's freedom of expression. In each case referred to it, in order to determine whether there is a violation of Article 10, the ECtHR refers to the criteria for the existence of state interference in the right to freedom of expression, its legal predictability, its necessity in a democratic society to meet a pressing social need and, finally, to the specific circumstances of the case. Thus, the restriction on counsel's right to criticise is acceptable because, on the one hand, it is necessary to ensure judicial authority (A) and, on the other hand, this restriction is proportionate to this purpose (B).

A. Restrictions justified by the need to protect judicial authority

Article 10 of the Convention stipulates that state interference in the right to freedom of expression can reasonably be regarded as necessary in a democratic society where its purpose is to protect the reputation or rights of others, to prevent the disclosure of confidential information or to guarantee judicial authority and impartiality. Different issues must therefore be reconciled: each state must punish criticisms voiced by lawyers that undermine the requirements of the proper administration of justice and the dignity of the judicial profession, whilst allowing them to exercise

their right to speak publicly on the administration of justice (36) and their mission to defend their client even outside the courtroom (37).

Therefore, certain restrictions on counsel's right to criticise under French law are not considered by the Court as being legitimate. It has for example ruled thus with regard to a lawyer, prosecuted for breaching the confidentiality of investigations and her professional duty of confidentiality, for leaking to the press information and comments on an expert report submitted to an examining magistrate as part of a criminal investigation for manslaughter involving illnesses caused by a vaccine, documents by which the lawyer sought to expose the pressure put on the expert. In light of the facts of the case, the Court considered that a fair balance had not been struck between the need to protect the counsel's right to respect for freedom of expression and preserve the confidentiality of the investigation, the rights of defendants and to guarantee judicial authority and impartiality (38).

Furthermore, state interference in counsel's freedom of speech is not justified when the statements relating to the functioning of the judicial system comes under the category of general interest, even if the trial is still ongoing (39). This question of general interest debate is illustrated in particular by *Morice v France*. Without going into details of the facts, as part of the *Borrel* case, the French judge killed in Djibouti, counsel for the widow denounced the complicity between the Djibouti prosecutor and two French examining magistrates, accusing the latter of behaviour contrary to the rules of natural justice. Maître Morice was convicted by the French courts of complicity in public defamation of a public official (40) and ordered to pay a fine of €4,000. In 2015, the Grand Chamber of the ECtHR, partly overturning the 2013 Chamber judgment in 2013, found that there had been a violation of counsel's right to freedom of expression. The European Court also found that the public had a legitimate interest in being informed and to inform themselves on proceedings in criminal matters and that the remarks on the functioning of the judicial system concerned a matter of general interest (41). The same court had twice previously heard complaints in connection with *Borrel* and the right to respect for freedom of expression with regard to comments on the conduct of the investigation, finding on each occasion that there was a public debate on a matter of general interest (42). Despite this, it is clear that the question of whether counsel's right to criticise was legitimately restricted is undoubtedly part of an assessment conducted on a case-by-case basis. Even while French law provides in abstract terms for disciplinary and criminal classifications, the effectiveness of the right to criticise will not be the same depending on the statements made and the way in which counsel has been judged. The restriction must be *de facto* proportionate to the aim pursued.

B. Restrictions proportionate to the aim pursued

The French system overall seems satisfactory since, ultimately, the restrictions remain within reason, i.e. they are proportionate to the objective pursued. This reasoning in terms of proportionality is also adopted by the ECtHR, which ensures that the penalty imposed is not disproportionate to the need to guarantee the smooth administration of justice. In other words, the European Court considers the severity of the penalty that can be imposed on the lawyer. Generally, it considers that to be convicted of an offence and sentenced to pay a criminal fine in itself confers a high level of severity to the measures (43). However, the States Parties have a margin of appreciation, and where the sentence imposed on counsel is nominal, the ECtHR generally makes no finding of a violation of the right to freedom of expression on the basis of

Article 10, considering that the national authorities did not exceed that margin of appreciation (44).

As regards French law, although a lawyer who abuses his right to criticise runs the risk of criminal prosecution and/or disciplinary proceedings, it must nevertheless be stressed that the associated penalties are relatively low. For criminal penalties, counsel faces up to one year in prison and a fine of €15,000 euros for contempt outside the hearing. In disciplinary matters, in theory counsel faces a warning, a reprimand, temporary suspension or disbarment (45); however, for breaches of the duty of moderation or discretion, it is extremely rare that counsel will receive any penalty more serious than a warning. These penalties are not very severe, so as not to impose too great a restriction on counsel's right to criticise.

The proportionality of these restrictions also means that statements are not regarded as abusive if they fall within the scope of "acceptable criticism", which must be assessed in terms of its author, content, and media context in which it arises. Thus, judges can be subject, as such, to personal criticism, which is much broader in scope than those aimed at private individuals (46). Furthermore, when counsel makes statements to the media criticising a judgment or a magistrate in acerbic, even sarcastic, terms, the intention is not abusive and should be considered as falling within the scope of "acceptable criticism"; in which case, if convicted by a national court, the ECtHR will find a violation of the right to freedom of expression (47), even if the penalty is merely nominal (48). The sole restriction concerns seriously damaging attacks against magistrates; it must be remembered that they belong to the fundamental institutions of the state.

Lastly, lawyers may not make serious statements exceeding the bounds of acceptable criticism without a solid basis in fact (49); on the contrary, it means that a lawyer who has factual evidence to substantiate his claims could make even more scathing comments. An examination of ECtHR case law reveals that the Court is more likely to find a violation of the right to freedom of expression where the allegations made against the judge or the judicial system are supported by undeniable facts, even if there is no evidence in the strict sense. Moreover, where a national criminal court or disciplinary tribunal finds against a lawyer for exercising his right to criticise when the criticism is based on established – or, at the very least, plausible – fact, the Court tends to find a violation of freedom of expression (50). This was the case for example in *Morice v France*, where the violation of Article 10 was upheld, among others, because there was a sufficient factual basis to establish the veracity of the allegations made by Maître Morice (51). Conversely, no violation of the right to freedom of expression was found in the matter of a Greek lawyer who accused a prosecutor and a judge in the media: the Court took the view that, in the absence of a sufficient factual basis, such a value judgment could be excessive (52). The ECtHR would thus appear to have established a kind of *exceptio veritatis,* which would allow counsel to criticise magistrates or the judicial system in general all the more vehemently when he can "prove" the allegations he has put forward. However, such a defence is not fully applicable in French law as it may only be invoked in cases of defamation (53), which is almost never found against a lawyer exercising his right to criticise outside the courtroom.

In conclusion, while lawyers, like all citizens, have the right to freedom of expression, the right to criticise outside the courtroom is also limited because as an officer of the court, they cannot undermine the authority thereof. They certainly have a duty to inform the public about possible malfunctions in the judicial system but must do so moderately at the risk of incurring criminal and

disciplinary sanctions. Those penalties, however, are in fact not severe, so that the restrictions on freedom of speech are minimal. It must be admitted that the expected deterrent effect is almost zero and almost never prevents a lawyer from express his displeasure outside the courtroom.

Notes:

(1) The rights of the defence resulting from the fundamental principles recognized by the laws of the Republic (Cons. Const. January 20, 1981, N° 80-127 DC, §52).

(2) E.g. Cass. crim. 8 September 2015, req. n° 14-84380

(3) E.g. Cass. crim. 8 June 1999, n° 96-82519; October 11 2005, n° 05-80545

(4) Under to Article 3 of the Law of 31 December 1971 "*Lawyers take an oath in these terms: "I swear, as a lawyer, to perform my duties with dignity, conscience, independence, integrity and humanity*". In addition, Article 3 of the Decree of 12 July 2005 states that lawyers must respect the principles of honour, loyalty, unselfishness, confraternity, discretion, moderation and courtesy.

(5) Former Article 25 of the Law of 31 December 1971.

(6) E.g. Cass. 1st Civ. 16 December 2003, N° 03-13353; 14 October 2010, N° 09-16495. 10 September 2015, n°14-24208

(7) Cass. 1st Civ. 10 September 2015, n°14-24208

(8) ECtHR, *Nikula v Finland,* Application N° 31611/96, 21 March 2002, para. 55; *Foglia v Switzerland,* Application N° 35865/04, 13 December 2007; *Alfantakis v Greece,* Application N° 49330/07, 11 February 2010

(9) E.g. Cass. 1st Civ. 5 April 2012, N° 11-11044

(10) See e.g. on the subject of the police, Cass. crim. 3 December 2002, N° 01-85466 and ECtHR, *Coutant v France,* Application N° 17155/03, 24 January 2008

(11) ECtHR, *Schöpfer v Switzerland* (56/1997/840/1046), 20 May 1998, paras. 29-30; *Amihalachioaie v Moldova,* Application N° 60115/00, 20 April 2004, § 27; *André and others v France,* Application N° 18603/03, 28 July 2008, para. 42

(12) ECtHR, *Mor v France,* Application N° 28198/09, 15 December 2011, para 59

(13) Cass. 1st Civ. 5 April 2012, N° 11-11044

(14) Cass. 1st Civ. 4 May 2012, N° 11-30193

(15) Cass. 1st Civ. 28 March 2008, N° 05-18598

(16) Regardless of the person to whom the statements are addressed, he may also be prosecuted for breach of professional confidentiality (Art. 226-13, Penal Code) and the confidentiality of investigations (Art. 11, Criminal Procedure Code)

(17) See below, footnote 28.

(18) Cass. crim. 22 June 1999, N° 97-84446

(19) Cass. crim. 10 June 1997, N° 96-81648 (the lawyer who was finally acquitted in criminal proceedings, there was a lack of civil contempt of court).

(20) Cass. crim. 3 January 2012, N° 11-81011

(21) Cass. crim. 22 June 1999, N° 97-84446

(22) Cass. crim. 10 June 1997, N° 96-81648

(23) On Article 433-5, see Cass. crim. 3 October 2001, N° 01-80157

(24) T. corr. Bordeaux, 14 October 1996. *Gaz.Pal*. 1996. 2. 626, note by A. Damien

(25) Cass. crim. 26 October 2010, N° 09-88460

(26) Cass. crim. 28 January 2014, N° 12-84425

(27) Cass. crim. 30 January 2001, N° 00-83890

(28) Cass. crim. 19 April 2000, N° 99-84886; 1 April 2009, N° 08-86338; 29 March 2011, N° 10-87 254 (see Cass. Crim. 25 November 2014, N° 13-88268 on Article 433-5). The solution was the same under the influence of the former Criminal Code, on the basis of Article 222: Cass. crim. 16 October 1956. Bull. crim. N° 638; 13 February 1975: Bull. crim. 54; 24 Jan 1991 N° 87-90214; 17 June 1991: N° 90-84144

(29) Except, as we know, in two isolated judgments concerning Article 433-5: Cass. crim. December 7 2004, N° 04-81162; and, much less explicitly, Cass. crim. 4 December 2001, N° 00-88094.

(30) Cass. crim. 13 September 2005, N° 04-87258; 21 November 2007, N° 07-82322; 24 September 2008, N° 08-82926

(31) Cass. crim. 27 February 1964, N° 62-93570

(32) Cass. crim. 11 February 1965, N° 64-91485

(33) CA Grenoble, 11 October 1995: Dr. Penal 1996. 79, obs. Véron.

(34) Cass. crim. 11 March 1997, N° 96-82283

(35) Cass. crim. 3 January 2012, N° 11-81011 regarding a contempt of court committed by a private individual

(36) E.g. ECtHR *Amihalachioaie v Moldova,* cited above, para. 28; *Alfantakis v Greece,* Application N° 49330/07, 11 February 2010, para. 27

(37) Thus, the ECtHR held that the pressing social need to restrict the lawyer's freedom of speech is not present when the ironic criticism highlights, not counsel's intention to impugn the prosecutor's character, but rather his intention publicly to defend his client's version of the facts in a case that had come to the public's attention (ECHR *Alfantakis v Greece,* cited above, para. 33).

(38) ECtHR *Mor v France,* Application N° 28198/09, 15 December 2011, para. 63

(39) ECtHR, *Roland Dumas v France,* Application N° 34875/07, 15 July 2010, para. 43

(40) The defamer being the newspaper editor who published the facts, in accordance with the 1881 Act

(41) ECtHR, *Morice v France* [GC], Application N° 29369/10, 23 April 2015, para.152

(42) ECtHR, *Floquet and Esménard v France,* Application N° 29064/08, 10 January 2002; *July and SARL Libération v France,* Application N° 20893/03, 14 February 2008

(43) ECtHR, *Radio France and others v / France,* Application N° 53984/00, 30 March 2004, para. 40

(44) E.g. ECtHR *Schöpfer v Switzerland,* cited above; *Peruzzi v Italy*, Application N° 39294/09, 30 June 2015, para. 66

(45) Art. 184 of the Decree of November 27, 1991

(46) ECtHR *Morice v France,* cited above, para. 131

(47) E.g. ECtHR *Alfantakis v Greece,* cited above; *Gouveia Gomes Fernandes and Freitas Costa E v Portugal,* Application N° 1529-1508, 29 March 2011;

(48) ECtHR *Amihalachioaie v Moldova*, cited above.

(49) ECtHR Karpetas V Greece Application N° 6086/10, 30 October 2012, para. 78

(50) ECtHR *July and SARL Libération v France,* cited above

(51) ECtHR *Morice v France,* cited above, para.158

(52) ECtHR *Karpetas v Greece,* Application N° 6086/10, 30 October 2012

(53) Art. 35 of the Law of 29 July 1881.