CONSULTATIVE COUNCIL OF EUROPEAN JUDGES

(CCJE)

"HOW TO BETTER ORGANISE THE RELATIONS BETWEEN JUDGES AND LAWYERS

IN ORDER TO IMPROVE THE PROVISION OF JUSTICE"

PARIS, 7 NOVEMBER 2012

« Maison du Barreau », 2 rue de Harley, 75001 Paris: (Auditorium, 9h-18h)

European conference organised

by the Consultative Council of European Judges and the Paris Bar

9:30 – 11:00 **Theme No. I - Is there a common ethic to judges and lawyers?**

Moderator: Julia LAFFRANQUE (Estonia), Judge at the European Court of Human Rights

(What are the fundamental principles/values governing the ethical conducts of each profession? Opportunity of a common code or a guide on joint actions)

Chers Mesdames et messieurs, chers juges et avocats,

Le thème de notre conférence : Comment mieux organiser les relations entre juges et avocats est très important parce que les relations entre ces deux professions servent un objectif commun : une justice meilleure. Ce problématique est très pertinent en Europe et on ya voit aussi assez régulièrement dans la jurisprudence de la Cour Européenne des Droits de l'homme.

Il y a plusieurs aspects de ces relations, notre premier session a une tache important de traiter le sujet essentielle : éthique des juges et des avocats et de essayer répondre la question : existe-t-il une éthique commune aux juges et aux avocats ? Ces questions sont bien évidement lie avec la responsabilité et indépendance des juges et des avocats, avec la confidentialité tel quelle et avec l'impartialité des juges.

Bien sur il existe certaines caractéristiques communes quand on parle de l'éthique des juges et des avocats. Il est essentielles que il y a un respect mutuelles entres ces deux professions. Nous sommes ravis d'avoir aujourd'hui une possibilité d'apprendre les expériences de deux intervenants, deux experts, un juge et un avocat : M. Corboz

et M. Dal. Leurs présentations vont sûrement contribuer à élaborer l'avis du CCJE en 2013 sur les relations entre ces deux professions.

Mais d'abord, mesdames et messieurs, permettez-moi une très brève introduction au sujet.

Les documents essentiels

Selon **l'avis n° 3 du Conseil Consultatif des Juges Européens adopte an 2002** sur les principes et règles régissant les impératifs professionnels applicables aux juges et en particulier la déontologie, les comportements incompatibles et l'impartialité il apparaît qu'une réflexion d'ordre éthique est indispensable pour différentes raisons. Les méthodes utilisées pour régler les litiges devraient toujours inspirer confiance. Les pouvoirs du juge sont strictement liés aux valeurs de la Justice, la vérité et la liberté. Les normes de conduite des juges sont le corollaire de ces valeurs et la condition de la confiance en la justice. L'avis du CCJE élaboré une liste des règles de conduite de chaque juge.

En Europe, plusieurs pays se sont dotés de **codes de déontologie** dans le secteur public (police), dans les professions réglementées (notaires, médecins) et dans le secteur privé (presse). En ce qui concerne les juges, depuis peu l'on peut observer le développement des codes éthiques, inspirés des États-Unis. Le plus ancien est le " code éthique " **italien** adopté le 7 mai 1994 par l'Association des magistrats italiens. D'autres pays, surtout les pays d'Europe de l'Est, tels que **l'Estonie, la Lituanie, l'Ukraine, la Moldova, la Slovénie, la République tchèque et la Slovaquie** ont un « code d'éthique judiciaire » ou des « principes de conduite » adoptés par des assemblées représentatives de juges et distincts des règles disciplinaires. Inspire parmi autres documents aussi par l'avis du CCJE, dans plusieurs pays les juges ont adopté leur propre code éthique, par exemple **la Norvège** (*Ethical principles for Norwegian judges,* adopte an 1 Octobre 2010). **Le Recueil des obligations déontologiques des magistrats français** été rédige en profondeur, le Conseil supérieur de la magistrature, en charge de élaborer le Recueil a même fait effectuer par un institut de sondage, en mai 2008, une étude sur les Français, les magistrats et la déontologie.

Cependant, le CCJE souligne que la protection de l'indépendance et de l'impartialité ne peut être assurée par la seule déontologie et que de nombreux **textes statutaires et procéduraux y concourent.**

Récemment mon ancien collègue néerlandais en quittent notre Cour a fait un cadeau aux autres juges : un petit livre *« Matters of Principle, codes on the independence and impartiality of the judiciary compiled by the Dutch foundation Judges for Judges. »*

Among numerous important documents in this book, including Dutch own codes of conduct for judges, I would like to draw your attention to the **Bangalore Principles of Judicial Conduct, Magna Carta of Judges adopted by the CCJE, Recommendation of the Committee of Ministers of Council of Europe to their Member States on Judges independence, efficiency and responsibilities and the European Networks of Councils for the Judiciary judicial ethics report 2009-2010.**

According to the Bangalore principles (6.6) a judge shall maintain order and decorum in all proceedings before the court and be patient, dignified and courteous in relation to litigants, jurors, witnesses, lawyers and others with whom the judge deals in an official capacity. The judge shall require similar conduct of legal representatives, court staff and others subject to the judge's influence, direction or control. A judge shall not engage in conduct incompatible with the diligent discharge of judicial duties (6.7). It also states the self-evident that a judge shall not practice law whilst the holder of judicial office and neither him/herself or the judge's family ask nor accept any gift, bequest, loan or favour in relation to anything done or to be done or omitted to be done by the judge in connection with the performance of judicial duties (4.12, 4.14). A judge shall also not, in the performance of judicial duties, by words or conduct, manifest bias or prejudice towards any person or group on irrelevant grounds (5.2).

According to Magna Carta of European Judges (18) deontological principles, distinguished from disciplinary rules, shall guide the actions of judges. They shall be drafted by the judges themselves and be included in their training. As the Magna Carta underlines, all these principles apply mutatis mutandis to judges of European and international courts.

For example, the plenary of **the European Court of Human Rights** adopted on 23 June 2008 its **resolution on Judicial Ethics.**

The institute of international law *(Institute de Droit International*) adopted in September 2011 a resolution on the position of an international judge stating inter alia (art 3.6) that a former judge should not act as agent, counsel or advocate before the court or tribunal of which that judge has been a member during at least three years following the end of his/her term.

There exist also a **Practitioner's guide on international principles on the independence and accountability of judges, lawyers and prosecutors**, prepared by the international commission of jurists consisting of many relevant and important international documents.

As regards the lawyers, **The Council of Bars and Law Societies of Europe (Conseil des barreaux européens)** has adopted two foundation texts: The Code of Conduct for European lawyers dates back to 1998 and the more recent one is the Charter of Core Principles of the European Legal Profession. These documents draw attention to the similar important principles and guidelines as the ethical codes for judges.

Lawyers and judges relations as seen by the practice of the European Court of Human Rights

Please, allow me just a few words about the case law of the European Court of Human Rights (ECtHR) on the topic of relations between judges and lawyers and their ethics, a highly fascinating subject.

The relevant case law of the European Court of Human Rights can be summarised in following categories:

1) Lawyers offend courts and get fined for contempt of court, ECtHR needs to decide whether the rights of lawyers were violated;

2) This is linked with the cases where judges have been criticised in the public, mostly in journals by lawyers, but also by journalists, these cases might also reveal problems of judges ethics and the ECtHR has to decide where to draw a border between the freedom of press and defending the authority of the judiciary;

3) Problems with lawyers ethics, disciplinary matters against lawyers, disqualifications from the Bar and the outcome of these measures to the court proceedings, removals of lawyers from the court proceedings, lawyers who abuse their rights also in front of the ECtHR. Issues of lawyer client relationship and the duties of lawyers appointed under legal aid schemes…

4) Other legal professions and their relationship with lawyers;

5) Seizure of documents of lawyers, protection of confidentiality and client privilege;

6) Impartiality of judges and disciplinary proceedings, also against judges who have been critical towards the judicial system.

This list is definitely not exhaustive, but gives you selected indication of the problems faced by the ECtHR.

I would now like to give you some concrete examples and will concentrate above all to the first and second category of cases which are often interrelated to some extent with the third and fourth category listed above. As far as this topic is concerned (lawyers offend courts and get fined for contempt of court), the ECtHR judgments mostly

deal with Article 10 (freedom of expression) of the European Convention on Human Rights (ECHR) and to some extent also with Article 6 § 1 (right to a fair trial) ECHR. In these cases the ECtHR looks first what has been said by the lawyers, why they have said so (offended the court: judiciary), then where the court/judiciary was offended: in the courtroom and during the proceedings or outside, was this also done in the media. The ECtHR distinguishes between whether the lawyers offended the judges personally (personal insult) or the judiciary as such, whether impugned language was used, whether the accusations were based on facts or were value judgments. Then the ECtHR looks how the matter was solved on national level, it examines the legal bases and proportionality of the interference and looks whether the same judges who were offended by lawyers sanctioned the lawyers or other judge/judges who did not feel themselves subjectively and emotionally attached to the incident dealt with the matter and whether the sanctions/penalties posed were proportional, the nature and severity of the penalties imposed are also factors to be taken into account. In a majority of judgments the ECtHR has found a violation of Article 10 and/or Article 6 due to the fact that the sanctioning of the lawyers who offended the courts was too harsh and not ordered by another (impartial) judge. But there exist also few opposite examples where no violation has been found.

Sometimes indeed the lawyers/counsels have made rather insulting statements about judges and other persons whom the lawyers have regarded as having decided or acted incorrectly in the context of, or in relation to, court proceedings. For example in ***W.R. v. Austria*** the counsel had described the opinion of a judge as "ridiculous" (European Commission of Human Rights decision of 30 June 1997, unreported) and ***Mahler v. Germany***, the counsel had stated at the trial that the prosecutor had drafted the bill of indictment "in a state of complete intoxication" (European Commission of Human Rights decision of 14 January 1998, unreported). In the present case the impugned statements were not only a criticism of the reasoning in the judgment, but further, as found by the Disciplinary Board, amounted to an accusation of abuse of office by a particular judge framed in belittling and impertinent terms. There is nothing to suggest that the applicant could not have raised the substance of his criticism of the reasoning in the decision without

In the case ***Kyprianou v. Cyprus***, the Grand Chamber of the ECtHR found on 15 December 2005 violation of both Articles 6 and 10 of the ECHR. This is a case where a Cypriot lawyer who defended his client in a murder trial was interrupted by the court while cross-examining a prosecution witness. The lawyer accused the judges that they have exchanged *ravasakia* (short and secret letters notes messages, love letters, messages with unpleasant contents) during the cross-examination. The court found it deeply insulting and sentenced promptly the lawyer for five days in imprisonment, which later was shortened. The ECtHR found that this was in violation of Article 6: the judges did not succeed to detach themselves sufficiently from the situation, other judges should have decided upon the conduct of the lawyer not the judges who felt offended themselves. The ECtHR also found violation of Article 10. The ECtHR acknowledged that it is of course important to protect the authority of the judiciary, but on the other hand it is also crucial to protect the applicant's freedom of expression in his capacity as a lawyer. The harsh sentence of the national court could have a chilling effect to freedom of expression of lawyers.

Actually, much earlier than the *Kyprianou v. Cyprus* judgment the ECtHR had already dealt with part of the issues raised in that case, namely the freedom of expression of lawyers and found violations of Article 10 of ECHR. For example, in the judgment ***Nikula v. Finland*** of 21. March 2002 a violation of Article 10 ECHR was found. The applicant in this case, a Finnish lawyer, had prepared a memorandum in which she denounced the tactics of the public prosecutor as constituting "manipulation and unlawful presentation of evidence". The ECtHR noted, moreover, that the applicant's submissions were confined to the court room, as opposed to criticism against a judge or a prosecutor voiced in, for instance, the media. Nor could the ECtHR find that the applicant's criticism of the prosecutor, being of a procedural character, amounted to personal insult.

In its judgment in the case ***Steur v. the Netherlands*** of 28. October 2003 the ECtHR said that the defence lawyer has the liberty to speak, <u>however the lawyer has also a duty to be discreet, honest and behave with dignity.</u> In this concrete case the ECtHR found that the lawyer for the defence who had criticized the way in which the police had obtained evidence against his client had not abused his liberty, the lawyer's criticism of a police officer in court did not amount to a personal insult and was strictly limited to the officer's actions relevant to his client's case as distinct from criticism of his general professional or other qualities and therefore the Bar should not have sanctioned him.

In a case ***Amihalachioaie v. Moldova*** the ECtHR found on 20. April 2004 again a violation of lawyer's freedom of expression. In this case a Moldovan lawyer, president of the Lawyers Union, criticised the Moldovan Constitutional Court's decision declaring unconstitutional the provisions requiring lawyers to be members of Union of Lawyers in Moldova. The lawyer said in an interview to a journal that the decision of the Constitutional Court creates complete chaos and questioned whether the Constitutional Court was constitutional and inserted that its judges probably did not consider the ECtHR to be an authority. The Constitutional Court imposed an administrative fine of 36 Euros for

being disrespectful towards court. The ECtHR found that the interference into the lawyer's freedom of expression pursued legitimate aim which was authority and impartiality of judiciary. However the ECtHR found that the interference was not necessary in a democratic society, there had not been a pressing social need to restrict applicant's right to freedom of expression and there was a violation of Article 10 ECHR.

In a more recent case ***Pecnik v. Slovenia*** the ECtHR found on 27 September 2012 a violation of Article 6 § 1 ECHR and ordered just satisfaction amounting 4000 Euros. In this case the applicant Ms Pecnik was a lawyer who was fined for contempt of court for criticizing in an appeal statement the judge who had rejected her client's claim for injuries sustained during an attack. Relying on Article 6 § 1 she complained before the ECtHR that her right to impartial tribunal had been violated since the judge she had criticised also had convicted her of contempt of court. According to Ms Pecnik's appeal in Slovenian courts it would be reasonable to expect that the judge of a higher court would explain before the trial hearing why he is presiding over the case which is being considered at first instance, at least according to the lawyer this is what the judicial code of behaviour would expect the judge to do. However, according to lawyer Pecnik the judge was trampling on that code of behaviour by behaving arrogantly and chewing a gum during the hearing and by covering his mouth while talking. Thereafter the same judge issued a fine of 150 00 Slovenian Tolars (this happened in 2002). The lawyer lost also on appeal although the case was transferred to another court, the constitutional court also found that there had been no violation. The ECtHR however said as far as the subjective impartiality test of the judge is concerned that the judge himself described the action of the lawyer as having been gravely insulting towards him, but even without analysing the subjective aspect any deeper, the ECtHR found that the objective requirement of impartiality was violated as the same judge fined the lawyer.

However, in a more recent case: ***Karpetas v. Greece***, the ECtHR found in its judgment of 30. October 2012 no violation of lawyers freedom of expression and thus no violation of Article 10 ECHR. The case concerns the conviction of a Greek lawyer, Mr. Karpetas, for defamation of a prosecutor and an investigating judge who released on bail a person who had assaulted the applicant in his office. Mr Karpetas insinuated that the prosecutor and judge had taken bribes from his assailant. On account of the remarks he made about them in the office of the investigating judge, and subsequently in the context of the proceedings against them and through the press, he was ordered to pay 15,000 Euros to the prosecutor (the proceedings concerning the investigating judge are still pending). In front of the ECtHR Mr. Karpetas as the applicant alleged violation of Article 10 ECtHR. The ECtHR reasoned the non-violation as follows: « La Cour rappelle aussi que lorsque des informations concernant le fonctionnement de la justice, institution essentielle à toute société démocratique, sont rapportées dans la presse, il convient de tenir compte de la mission particulière du pouvoir judiciaire dans la société. Comme garant de la justice, valeur fondamentale dans un État de droit, son action a besoin de la confiance des citoyens pour prospérer. Aussi peut-il s'avérer nécessaire de protéger celui-ci contre des attaques destructrices dénuées de fondement sérieux, alors surtout que le devoir de réserve interdit aux magistrats visés de réagir. /…/ La Cour relève tout d'abord que le requérant, avocat expérimenté, a été condamné pour diffamation calomnieuse commise, entre autres, par voie de presse à l'égard d'un procureur /…/ L'incident et les procédures ont fait l'objet d'articles dans la presse, dans trois grands quotidiens nationaux. /…/ La Cour estime devoir distinguer la présente affaire de certains précédents invoqués par le requérant en sa faveur, notamment les arrêts *Nikula c. Finlande* (no 31611/96, 21 mars 2002), *Katrami c. Grèce* (no 19331/05, 6 décembre 2007) et *Kanellopoulou c. Grèce* (no 28504/05, 11 octobre 2007), où la Cour a conclu à une violation de l'article 10. /…/ En l'occurrence, la Cour estime qu'il y a lieu de distinguer selon que les déclarations litigieuses du requérant avaient comme destinataires les magistrats appelés ès-qualités à connaître de son affaire et intervenus dans l'enquête relative aux plaintes et à l'action de prise à partie, d'une part, et la presse d'autre part. /…/ Toutefois, la divulgation dans la presse des déclarations litigieuses du requérant était de nature à faire croire au public que la décision du procureur et de la juge d'instruction était fondée sur une possible corruption de ceux-ci alors que ces déclarations, bien que voilées, étaient d'une gravité dépassant la limite du commentaire admissible, sans solide base factuelle. Si la plus grande partie des déclarations du requérant étaient effectivement des jugements de valeur et pouvaient se justifier par son droit légitime à l'indignation face à une décision qui lui semblait injuste, la Cour rappelle que faute d'une base factuelle suffisante, un jugement de valeur peut lui aussi se révéler excessif. La Cour relève à cet égard qu'à aucun moment, le requérant n'a rapporté – ou même tenté de rapporter- la preuve de la véracité de ses allégations de corruption. /…/ Par ailleurs, l'action des tribunaux, qui sont garants de la justice et dont la mission est fondamentale dans un État de droit, a besoin de la confiance du public pour bien fonctionner. Aussi peut-il s'avérer nécessaire de protéger celle-ci contre des attaques destructrices dénuées de fondement sérieux. Le requérant n'a pas pris ses précautions pour éviter d'employer des expressions prêtant à confusion et son indignation ne saurait suffire à justifier une réaction si violente et méprisante pour la justice de sa part. »

Actually, some examples of similar reasoning can be also found earlier, such as on 8 January 2004 when the application ***A v. Finland*** was declared manifestly ill-founded. It concerned a lawyer who was accused for defamatory statements about the presiding district court judge. The ECtHR noted that in this case the impugned

statements were not only a criticism of the reasoning in the judgment, but further, as found also by the Disciplinary Board of lawyers, amounted to an accusation of abuse of office by a particular judge framed in belittling and impertinent terms. According the ECtHR there is nothing to suggest that the applicant could not have raised the substance of his criticism of the reasoning in the decision without using the impugned language. Furthermore, in respect of the proportionality of the interference and the nature of the penalties imposed, the ECtHR noted that the applicant was merely issued a warning, which was not made public nor had any consequences on his right to exercise his profession.

As far as the freedom of expression and ethics of the lawyers in general is concerned, the ECtHR has said e.g. in the judgment of 30 November 2006 in the case ***Veraart v. the Netherlands*** that although lawyers are entitled to freedom of expression, the special nature of their profession requires that they conduct themselves in a discreet, honest and dignified manner in public. The ECtHR observed in this concrete case that the lawyer was entitled to make public statements in his client's interest, even outside the courtroom, subject to the provision that he was acting in good faith and in accordance with the ethics of the legal profession.

On the other hand there exist unfortunate examples **of abuse of right of the lawyers**, also in front of the ECtHR. An extremely drastic example can be found in a recent decision (15 November 2011) of the ECtHR in the case ***Petrovic v. Serbia*** in which the ECtHR had to find an abuse of the right of individual application, something the ECtHR does not easily find. The matter concerned a Serbian lawyer, Mr. Petrovic, who was filing hundreds of dubious applications (all in all more than 500 applications!) with the ECtHR either as an applicant or as a legal representative against Serbia, but also Croatia, Slovenia, Bonsia and Herzegovina, Montenegro, FYRM. Whereas it became evident, that on at least three occasions Mr. Petrovic had submitted applications on behalf of people who had died, with the power of attorney signed at least in one case after the person's death. Mr. Popovic was banned from representing the applicants by the Section president of the ECtHR. Despite the ban the lawyer continued to file applications and requested reimbursement of his fees, even though he was well aware that the ECtHR would not take into consideration such requests. Thereafter the ECtHR addressed Belgrade Bar Association on this matter and the Bar answered that the disciplinary bodies are informed. Finally the ECtHR joined all the applications filed after the ban (altogether 11) and declared them inadmissible because of an abuse of the right of individual application (Art 35 § 3 ECHR).

Similarily, the ECtHR declared on 10 July 2012 inadmissible applications ***Simonetti v. Italy II and III*** brought before the ECtHR in length of proceedings case against Italy by an Italian lawyer with abusive behaviour. The ECtHR explained the situation and the requirements of an application to the ECtHR as follows: "En l'espèce, la Cour note, d'abord, que le requérant, par l'intermédiaire de Me A. Marra, a introduit à douze jours d'intervalle deux requêtes portant sur la même procédure « Pinto ». /…/ Les communications du représentant du requérant qui ont suivi l'introduction des deux requêtes se sont avérées imprécises et trompeuses. /…/ Loin d'être coopérative avec la Cour et sa mission, la conduite du requérant et de son avocat s'est révélée particulièrement incorrecte et a entraîné un gaspillage des ressources de la Cour. /../ La Cour note que, le 27 octobre 2011, le greffe a attiré l'attention de Me A. Marra sur la nécessité de signaler, lors de l'introduction de nouvelles requêtes, l'existence d'autres requêtes déjà introduites au nom des mêmes requérants et portant sur les mêmes procédures judiciaires, afin de pouvoir vérifier si les nouveaux griefs soulevés doivent être considérés partie intégrante des requêtes déjà pendantes. Dans les requêtes qu'ils présentent devant la Cour, les avocats doivent manifester un haut niveau de diligence professionnelle et de coopération active avec la Cour, qui est chargée de nombreuses requêtes qui soulèvent des problèmes sérieux de respect des droits de l'homme. Ils doivent non seulement éviter de soulever des griefs dépourvus de toute substance mais aussi, après avoir introduit la requête, se conformer à toute règle de déontologie et de procédure. A défaut, le recours abusif ou négligent à la Cour mine la crédibilité du travail des avocats et pourrait même, lorsqu'il s'agit d'une conduite systématique, aboutir à l'exclusion de ceux-ci des procédures devant la Cour.

The ECtHR has furthermore dealt with the disqualifications of the lawyers from the Bar (e.g. ***H. v. Belgium*** of 30 November 1997) and the applicability of Article 6 § 1 ECHR in these cases; the lawyer client relationship (e.g. ***McMullen v. Ireland*** of 4 July 2002); the advertisement of law firms in the press (e.g. ***Casado coca v. Spain*** of 24 February 1994); Code of conduct of lawyers (e.g***. D v. Ireland*** of 27 June 2006); cases where the lawyers have according to the applicants given bad advice and no other lawyer wants to defend the applicant in suing such a lawyer (e.g. ***Bertuzzi v. France*** 13 February 2003 where legal aid was not even compulsory in applicant's case, but the ECtHR however found a violation); lawyers access to bar in other Council of Europe countries (e.g***. Bigaeva v. Greece*** of 28 May 2009 where the ECtHR found a violation because a Russian lawyer living in Greece was refused pupillage in Greece law firms); lack of legal assistance (***Bogumil v. Portugal***, 2 October 2008) etc.

A quite peculiar example of how sometimes the lawyers have been found to breach their ethics on the level of ECHR contracting states and which (finding such a breach) in fact runs contrary to the essence of the ECHR can be found in the case ***Yaremenko v. Ukraine*** which gave rise to the judgment of 12 June 2008 of the ECtHR. In this case the applicant in front of the ECtHR had in national proceedings plead guilty in absence of his lawyer and not guilty when the lawyer was present and later signed a waiver that the lawyer prevented him of confessing the crime. The national authorities thereafter removed the lawyer. The lawyer was told that he had breached professional ethics by advising his client to assert his innocence! The applicant complained that he was forced to confess by the officers to the police department. The ECtHR was struck by the fact that as a result of the procedure adopted by the Ukrainian authorities, the applicant had been placed in a situation in which he had been coerced into waiving his right to counsel and incriminating himself. The ECtHR considered that the manner, reasoning and alleged lack of legal grounds for the removal of the lawyer had raised serious questions as to the fairness of the proceedings and found a violation of Art 6 § 3 (c) of ECHR.

Similarly, in another case the lawyer's ethics was used in a reversed manner in order to excuse an interference of the authorities with the lawyer's work (the prosecutors interfered with lawyers). Namely, in the case of ***Colibaba v. Moldova*** which led to a judgment of 23 October 2007 of ECtHR. The origins of this case are in 2006 when the Moldovan prosecutor general wrote a letter to the Moldovan Bar Association in which he referred to the "phenomenon" of Moldovan lawyers involving international organisations which specialise in the protection of human rights in the examination of criminal cases, he cited as an example the applicant's (applicant to the ECtHR) case and said that these organisations are used as an instrument for serving personal interests and for avoiding the criminal responsibility of suspected persons. He wrote that such practices were defamatory of the state and that prosecutor's office would examine whether it would bring criminal proceedings against lawyers. The Moldovan Bar qualified the letter as an attempt to intimidate lawyers. The Government claimed that it was merely a call to lawyers to observe professional ethics, but the ECtHR found a violation of Article 34 ECHR saying that the wording could have a chilling effect on the intention of the applicant to bring an application to Strasbourg.

Another specific problematic in front of the ECtHR has been the duties of lawyers appointed under legal aid schemes. In its judgment of 22 November 2011 in the case ***Andreyev v. Estonia*,** the applicant, Mr. Andreyev who is serving a six-year prison sentence for the repeated rape of his minor daughter alleged that he had been deprived of the right to appeal in the case against him, in breach of Article 6 § 1 (access to court) of the Convention, because his lawyer – appointed under the State legal aid scheme – had failed to lodge an appeal within the applicable time-limit. The ECtHR found a violation of Article 6 § 1 ECHR and ordered 1000 Euros as just satisfaction for non-pecuniary damage.

In the judgment of 26 April 2007 in the case of ***Kemal Kahraman and Ali Kahraman v. Turkey***, the ECtHR reiterated that the appointment of defence counsel in itself does not necessarily settle the issue of compliance with the requirements of Article 6 § 3 (c) ECHR. The Court noted that the ECHR is intended to guarantee not rights which are theoretical or illusory, but rights which are practical and effective. Thus, mere nomination does not ensure effective assistance since a lawyer appointed for legal aid purposes may be prevented from performing, or shirk his or her duties. If they are notified of the situation, the authorities must either replace or oblige the lawyer to fulfil those duties. Nevertheless, the ECtHR stressed also that a State cannot be held responsible for every shortcoming of a lawyer appointed for legal aid purposes. According to the ECtHR it follows from the independence of the legal profession that the conduct of the defence is essentially a matter between the defendant and his counsel, whether counsel be appointed under a legal aid scheme or be privately financed and that the competent national authorities are required under Article 6 § 3 (c) ECHR to intervene only if a failure by legal aid counsel to provide effective representation is manifest or sufficiently brought to their attention in some other way (***Kamasinski v. Austria***, judgment of 19 December 1989).

In its judgment of 22 March 2007 in the case ***Sialkowska v. Poland*** the ECtHR noted *inter alia* that the independence of the legal profession was crucial for the administration of justice to function effectively. The ECtHR continued saying that it was not the role of the State to oblige a lawyer, whether appointed under a legal aid scheme or not, to take any specific steps when representing their clients. Such State powers would be detrimental to the essential role of an independent legal profession in a democratic society founded on trust between lawyers and their clients. According to the ECtHR it was the responsibility of the State to ensure a proper balance between access to justice and the independence of the legal profession. However, the ECtHR was of the view that the refusal of a legal aid lawyer to lodge a cassation appeal should meet certain quality requirements. The applicant's complaint that the lawyers assigned to represent him under the legal aid scheme refused to lodge the cassation appeal with the Supreme Court was dealt with also in the judgment of 19 October 2000 in the case ***Rutkowski v. Poland***. In the judgment of 22 March 2007 in the case ***Staroszczyk v. Poland*** the ECtHR noted that, under the applicable domestic regulations, the legal aid lawyer was not obliged to prepare a written legal opinion on the prospects of the appeal, nor did the law set any standards as to the legal advice he had to give to justify his refusal

to lodge a cassation appeal. However, had such requirements existed, then according to the ECtHR it would have been possible, subsequently, to have had an objective assessment of whether the refusal had been arbitrary.

A separate problem has also been the seizure of documents of lawyers: either from lawyers or their clients which has followed most likely the search of law offices (also in cases where the lawyers themselves have not been accused, but only their clients). These issues are connected to the professional ethics of lawyers, above all to the protection of **confidentiality** and to the importance of client privilege. The ECtHR has held that the notion of home protected by Article 8 (right to respect for private life) ECHR also includes the business premises of an advocate in view of professional activities (see, e.g. ***Elci v. Turkey***, 13 November 2003).

In some of the cases where the law firms have been searched, a violation of Article 8 ECHR has been found by the ECtHR (e.g. ***André and other v. France*** of 24 July 2008, as opposed to ***Andres Tamm v. Estonia*** of 2. September 2008, in which the application against the search of a law firm during criminal investigation against the client of the firm was declared inadmissible, because the lawyer did not raise the complaint as early as possible in the beginning of the proceedings. In the judgment of 3 July 2012 in the case ***Robathin v. Austria*** the ECtHR found a violation of Article 8 ECHR even though the search warrant issued by an investigating judge in respect of the premises of the applicant, a practising lawyer was in connection with a series of theft and fraud related offences of the lawyer himself. The warrant was not confined to data likely to be related to the alleged offences, but extended to all data in the office of the law firm. Following the search a review chamber authorised the examination of all the materials after noting that the data had been seized in the context of preliminary investigations and that a lawyer could not rely on his duty of professional secrecy when he himself was the suspect. The applicant was ultimately acquitted of the offences. The ECtHR found that the search and seizure of the electronic data had constituted an interference with the applicant's right to respect for his "correspondence" and had pursued the legitimate aim of crime prevention. The issue whether, as the applicant had submitted, the search warrant was too vague to be in accordance with the law raised questions of proportionality and would be examined in that context. The ECtHR stated that the fact that the applicant was ultimately acquitted did not mean that there had not been reasonable grounds for suspicion when the warrant was issued. The warrant was, according to the ECtHR however, couched in very broad terms, as it authorised in a general and unlimited manner the search and seizure of documents, personal computers and discs, savings books, bank documents and deeds of gift and wills in favour of the applicant. In view of the specific circumstances prevailing in a law office, particular reasons should have been given to allow such an all-encompassing search. In the absence of such reasons, the seizure and examination of all the data had gone beyond what was necessary to achieve the legitimate aim.

In a recent French case pending currently before the ECtHR (***Michaud v. France***) a lawyer is complaining about his duty at law to report to the authorities any suspicions of money-laundering by clients. This duty originates from transposition in France of a relevant European Union Directive

As far as the judges ethics are concerned, most of the cases before the ECtHR deal with the impartiality of judges and sometimes also with the disciplinary proceedings initiated against judges. The most famous case if one could so say concerning the freedom of expression of judges and thus also linked to its limits and ethics is most likely the judgment of 26 February 2009 in the case ***Kudeshkina v Russia***. The case concerned a Russian judge, Ms. Kudeshkina's allegation that she was dismissed from the judiciary in 2004 because she had publicly accused higher judicial officials of putting pressure on her in connection with a high-profile criminal case. The ECtHR found a violation of Article 10 ECHR. Having noted that Ms Kudeshkina had publicly criticised the conduct of various officials, and had alleged that pressure on judges was common, the ECtHR found that she had undoubtedly raised a very important matter of public interest which had to be open to free debate in a democratic society. According to the ECtHR even if Ms Kudeshkina had allowed herself a certain degree of exaggeration and generalisation, the ECtHR found that her statements had to be regarded as a fair comment on a matter of great public importance.

With this case I would like to conclude my short overview of only a small part of the extensive materials and ECtHR case law on the fascinating subject of ethics of judges and lawyers, the similarities, the differences and the problems that have occured and hope that it has given you some inspiration for further elaboration of the possible common ethic of lawyers and judges.

Prof. Julia Laffranque, judge