OVERVIEW OF EUROPEAN STANDARDS ON UNDUE INFLUENCE IN THE JUDICIARY

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OVERVIEW OF EUROPEAN STANDARDS ON UNDUE INFLUENCE IN THE JUDICIARY

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Pregled evropskih standarda o neprimerenom uticaju u okviru sudstva

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OVERVIEW OF EUROPEAN STANDARDS ON UNDUE INFLUENCE IN THE JUDICIARY

This document contains a summary of the key European standards on undue influence in the judiciary. While Council of Europe Recommendation No. R (2000) 10 "On codes of conduct for public officials" has identified a number of obligations to secure the respect of the judiciary[1], the European Court of Human Rights has developed an extensive case law under article 6 of the Convention concerning statements and other behavior of public officials which were considered as potentially undermining the right to an independent and impartial tribunal. Additionally, the Court has considered that statements violating the right to be presumed innocent of individuals in criminal proceedings were also prejudging the assessment of the fact by the competent judicial authorities, which also can be considered a form of interference in the functioning of the judiciary. Besides statements by public officials, the court has also considered the possibility that a virulent press campaign may undermine the fairness of proceedings, regardless of whether a judge could be considered as biased.

A second aspects under which the European Court has examined instances of undue influence and interference in the work of[2] judges and prosecutors is article 10 of the Convention which foresees balancing between freedom of expression with the reputation of judges and prosecutors and the authority and impartiality of the judiciary.

Although the focus of this overview is on the right to independent and impartial courts and the reputation and authority of the judiciary, due consideration should be given to the scope of media freedom within Serbia. In a number of judgments the European Court has assessed whether a virulent press campaign interfering with the independence and functioning of the judiciary was sparked by state officials. As such, European Standards on undue influence on the judiciary encompass, at least to some extent, issues such as media freedom and pluralism. Notably, the EU Rule of Law reports have incorporated in their overview, besides information on the existence of disinformation campaigns in the press and social media, also other specific standards such as the independence of media regulatory authorities, transparency of media ownership, existence of adequate public funding and public funding non being used to exert pressure on the media, transparency and fairness in the allocation of advertisement or subsidies, the existence of fair, transparent and non discriminatory procedures for granting operating licenses to media outlets as well as the safety of journalists and access to information. The Media Pluralism monitor, a research tool designed to identify potential risks to media pluralism in the Member States of the European Union also covers candidate countries such as Serbia.

1 Recommendation No. R (2000) 10 of the Council of Europe "On codes of conduct for public officials" states that public officials should act in a politically neutral manner and should not attempt to frustrate ...decisions or actions of the public authorities (art.4). In the performance of their duties, public officials should not act arbitrarily to the detriment of any person, group or body and should have due regards for the right, duties and proper interests of others (art 6). They should also behave in a way that the public's confidence in the integrity, impartiality and effectiveness of the public service are preserved and enhanced (Art. 9).

2 For example see MPM 2022 report states the following: " Within the Market Plurality area, Serbia scores a high risk of 68%. The major risks stem from the high concentration of news media, as well as from commercial and owner influence over editorial content. The major influence noted was that of state and party officials over private media, thanks to the political connections with certain media owners and marketing organisations. The influences were mostly conducted through direct contracting and public procurement. Many private outlets are owned by the ruling SNS supporters. State advertising was common in the Public Service Media as well. Media freedom and pluralism were particularly exposed by the lack of transparency in the process of project co-financing of media, as well as by persisting abuses of funds through project co-financing schemes".
Available at: https://cadmus.eui.eu/bitstream/handle/1814/74703/MPM2022-Serbia-EN.pdf?sequence=1&isAllowed=y

Interference on the right to an independent and impartial tribunal and prejudging assessment by competent judicial authority: general standards

Statement by public officials and a virulent press campaign may interfere with independence and impartiality of courts. Concerns on the impartiality of proceedings may be raised when an applicant has not complained of bias **on the part of the judge** deciding his case **but, quite apart from the judge's conduct**, that he had objectively justified fears based on ascertainable facts which may rise doubts as to their impartiality. Such fears may be due to the conduct of other state officials or a virulent press campaign. In this respect even appearances may be of a certain importance and what is at stake is the confidence which the courts in a democratic society must inspire in the public (Kinsky v Czech Republic).

Besides this, the presumption of innocence covers statements made by public officials about pending criminal investigations which encourage the public to believe the suspect guilty and **prejudge the assessment of the facts by the competent judicial authority** (Dovzhenko v Ukraine; Pesa v Croatia). However Article 6 § 2 cannot prevent the authorities from informing the public about criminal investigations in progress, but it requires that they do so with all the discretion and circumspection necessary if the presumption of innocence is to be respected (Allenet de Ribemont, § 38).

Interference due to public official being claimant in proceedings

Participation as claimant in proceedings of a public figure (the country's president) playing an institutional role in the career development of judges is **capable of casting a legitimate doubt on the independence and impartiality of the judges** hearing the case (Thiam v France).

In the circumstances of the case there were no elements supporting the allegation that the courts were not independent: the president had not initiated or sought the initiation of criminal proceedings, the case was not political and was not connected to the public function of the president, in convicting the applicant the national courts did not rely on any evidence provided by the president (who had been granted status as civil claimant in a case of wire fraud), no evidence was submitted that the president had sought to exert undue influence on the court or to hamper the accused's ability to defend himself effectively (Thiam v France)

The involvement to varying degrees of the Minister of Justice, who himself initiated the proceedings in question is of relevance for the assessment of the fairness of proceedings (Grosam v Czech Republic)

Interference due to Ministry of Justice imposing reporting obligations on pending proceedings on judges

The activities of the **Ministry of Justice imposing on the ordinary courts an obligation to provide information on the proceedings** regarding the applicant aimed at creating a negative atmosphere around the legal actions of the applicant or constituting direct attempts to interfere in these proceedings, [were] unacceptable in a system based on the rule of law. Under the domestic law the Ministry of Justice is **entitled to collect information necessary for the State administration of courts but** only in order to monitor and evaluate the conduct of proceedings in terms of the principles of the dignity of judicial conduct and ethics and whether the proceedings suffer from unnecessary delays. Yet, the Ministry itself reasoned that it required the information because of heightened interest of the media in these proceedings. The extent of the information requested went beyond these powers of the Ministry. As a consequence, the Ministry regularly received information on the development of the proceedings instituted by the applicant, including the names of the judges, for a period of over two years. In this context, it cannot be overlooked that the Minister of Justice had a right to institute disciplinary proceedings against judges. What was at stake here was **not actual proof of influence or pressure on judges but the importance of the appearance of impartiality**. These activities undoubtedly alerted the judges that their steps in the applicant's proceedings were being closely monitored. This is particularly worrying when considered in connection with some of the statements by politicians about the responsibilities of judges and their mental processes, and their assertions that they would do anything within their power to prevent the success of the applicant in the proceedings (Kinsky v Czech Republic).

Interference due to statements of the Ministry of Justice

The **Minister of Justice** declared that the national courts had "boldly and resolutely" convicted those involved in the case. This **statement was likely to give the impression that the Minister of Justice was satisfied with the verdict** reached in judgment no. 2444/2007 and wanted the Court of Appeal to uphold that judgment. Considered that, as Minister of Justice he embodied, par excellence, the political authority responsible for the organisation and the proper functioning of the courts, the Minister **should therefore have been particularly careful not to say anything that might give the impression that he wished to influence the outcome of proceedings pending before the Court of Appeal.** In the light of the foregoing the words used by the Minister of Justice appeared to prejudge the decision of the Court of Appeal (Konstas v Greece).

A statement in an interview with the press made by the Minister of Justice ("we have nine magistrates under investigation, many of them already sent to trial for corruption…I hope there will be no team spirit which unfortunately exists in many fields…") were **made in the context of general discussions about corruption among magistrates and did not concern** the guilt of involved magistrates. **The discourse remained neutral and the words used moderate** (Malaescu v Romania, app. No43943/07, decision 9 July 2013)

Head of police overstepping boundaries of duty to inform public on proceedings

The case was of great interest to the general public as it concerned a high officials accused of taking bribes in the privatization process. For this reason, State officials including the **head of the police were required to keep the public informed** of the proceedings. However, this duty cannot justify all possible choices of words, but has to be carried out with a view to respect the suspects' presumption of innocence. (Pesa v Croatia).

Circumstance that Members of Parliament openly questioned the validity and interfered in execution of judicial decisions and created a negative atmosphere around the legal actions of parties to proceedings constitutes evidence of politics involved in a case and violating fair trial

Series of **concerted official efforts in child abduction case to interfere with the execution of judgment** including several members of parliament openly questioning validity of judicial decisions (as "lacking elementary logic" and "not humane", expressing hope that "courts will have decency to reopen the case"), MOJ encouraging child's mother to believe that proceedings would be reopened, pressure exerted on bailiff not to execute court decision, amending law to favor child's mother, government providing mother with legal and financial support for proceedings before CJEU, mother running for election to the Seimas for party whose members had been supporting her. Members of Parliament had the right to challenge compliance of national legislation with Constitution but it was clear that request for such Constitutional review was tailored to specific situation. In their entirety, rather than as separate and distinct incidents, such events showed that there was prima facie **evidence of politics being involved in the case and was at odds with fairness of decision making process** in the enforcement of court order for child's return The efforts of politicians and other officials aimed at creating a negative atmosphere around the legal actions of the first applicant and constituting direct attempts to interfere in execution proceedings undoubtedly alerted judges and other officials that their steps were being closely monitored. (Rinau v Lithuania).

Politicians' wider scope of freedom of speech

Statements on suspect's guilt were made by the Romanian Minister of the Interior in official capacity and not by politicians. Consequently, they could not be considered part of a legitimate political debate, which might arguably allow a certain degree of exaggeration and liberal use of value judgments with reference to political rivals (G.C.P. v Romania app no 20899/03).

Impact on independent tribunal by parliamentary inquiry

No evidence that the court's deliberations had been influenced by the work of a parliamentary commission of inquiry which had been created to examine the case (allegations of corruption and trading in influence in the legislative procedure for the amendment of national legislation). (Rywin v Poland)

As to the possible impact of a parliamentary inquiry on the right to an independent and impartial tribunal, the Venice Commission has recognized the **right of Parliament to obtain information necessary to fulfill its lawful duties** and the importance of parliamentary oversight in a democratic society[3].

Purpose of the **parliamentary inquiry on alleged misconduct by prosecutors** was not to establish the liability of the applicant but to make an overall assessment as to whether general measures were necessary in order to improve the conduct of pre-trial investigations, accordingly its purpose was not the same of criminal proceedings. In concluding that the prosecution office "had obviously procrastinated in the pre-trial investigation, that it had failed to ensure that the essential investigative measures were taken and had thereby acted incompetently", the parliamentary report did not engage the individual liability of any specific officer. Similarly, it did not make any mention of the applicant (a prosecutor). These statements were of a general nature and unable to affect the fairness of the disciplinary proceedings concerning the prosecutor's individual liability.

As to statements concerning specific prosecutors, the parliamentary inquiry based its findings on the documents provided by other authorities, including the Prosecutor General's office and by the time of its publication the Prosecution General's office had already concluded its disciplinary proceedings in which it had identified various shortcomings in the work of prosecutors. The Parliament report did not endorsed or criticized the Prosecutor General's findings (Civinskaite v Lithuania).

3 Venice Commission, 98th plenary session, held on 21-22 March 2014, Amicus Curiae brief in the case of Rywin v. Poland

Statements of President requesting administration not to execute court rulings was not aimed at courts themselves and did not violate their independence

Critical statements of the President of Romania towards the courts and requesting the administration not to execute court rulings (which had declared the nationalization of real estate under the Communist Regime as null and void) could not considered as having effected the independence of the court in the applicant's case: the decision of the Supreme Court reversing existing case law and excluding that the court could order the restitution of nationalized assets could not be considered as the effect of the statements of the President since the latter's statements had been addressed to the administrative bodies in charge of executing court rulings and not to the court themselves (Mosteanu and others v Romania)

No need to speculate on effect of public officials' statements on course of proceedings for finding violation of right to independent and impartial tribunal

No reason to speculate on what effect multiple interventions of the Ukrainian authorities at the highest level on the course of proceedings , but the **applicant's concerns as to the independence and impartiality of the tribunals were not unreasonable**. Coming from the executive branch of the State, such interventions **nonetheless reveal a lack of respect for judicial office itself** (Sovtransavto v Ukraine)

Newly elected president and prime minister stated that privatization of a company had been unlawful (" had been stolen")and that company should be returned to the state and resold. Similar statements were repeated while the reopened proceedings were pending. Not possible to speculate on what effect statements of high officials may have had on course of proceedings. However, **taken together with unjustified decision of Supreme Court to reconsider privatization dispute, cumulatively and objectively** shed conspicuous light on the independence and impartiality of the commercial courts which had to deal with the case (Industrial Financial Consortium Investment Metallurgical Union v Ukraine).

Sufficient that statements by high officials had resulted in individual's disfavor to conclude right to conclude that there was an appearance that courts were not independent and impartial

While lustration proceedings affecting President of Constitutional Court were pending, Prime Minister published a letter in which he used initial findings of the Lustration Commission to denounce the applicant as a collaborator of the secret police of the former regime. In the circumstances of the case there was no reason to speculate on what effect the Prime Minister's statement might have had on the court of the proceedings. It was **sufficient to note that they had ended in the applicant's disfavor**. In view of the content and manner in which it was made, the statement was ipso facto incompatible with the notion of an independent and impartial tribunal. What was at stake was not actual proof of influence or pressure on judges but the importance of the **appearance of impartiality** (Ivanovski v Former Yugoslav Republic of Macedonia).

Virulent media campaign can impact impartiality of proceedings and presumption of innocence

A **virulent media campaign can impact on fairness of trial.** This may occur in terms of the **impartiality of the court** under article 6.1 ,as well as with regard to the **presumption of innocence embodied in article 6.**2 (Natsvlishivili and Togonidze v Georgia). A virulent media campaign can adversely affect the fairness of a trial **by influencing public opinion** and, consequently, **jurors called upon to decide the guilt of an accused.** At the same time, press coverage of current events is an exercise of freedom of expression, guaranteed by Article 10 of the Convention.

If there is a virulent press campaign surrounding a trial, what is **decisive is not the subjective apprehensions of the suspect** concerning the absence of prejudice required of the trial courts, however understandable, but whether, in the particular circumstances of the case, his **fears can be held to be objectively justified** (G.C.P. v Romania app no 20899/03; Krylov v Russia, app. No. 36697/03 , 14 March 2013)

A fair hearing can still be held after intensive adverse publicity. In a democracy, high-profile cases will inevitably attract comment by the media; however, that cannot mean that any media comment whatsoever will inevitably prejudice a defendant's right to a fair hearing. In such cases, the Court will examine whether there are sufficient safeguards to ensure that the proceedings as a whole are fair. It will **require cogent evidence that concerns about the impartiality of judges are objectively justified** before any breach of Article 6 § 1 can be found (Paulikas, § 58, and Civinskaite v Lithuania).

Factors relevant for assessing whether a virulent press campaign may affect the fairness of a trial, with particular regard to the presumption of innocence, include **the time elapsed between a press campaign and a trial, and in particular the composition of a trial court, whether the impugned publications were sparked off by the authorities and whether they influenced the judges and prejudiced the outcome of the proceedings** (Sutyagin v Russia).

Distinction between extensive press coverage and virulent press campaign

An extensive media coverage may not amount to a virulent press campaign as to sway the outcome of the court's deliberations and be instead **justified by the importance of the case.**

The importance of a case in the eyes of the public opinion can be explained by the **unprecedented nature and by the serious nature of the facts, whether the involved person is a well known figure.** In may be inevitable that the press would voice sharp criticism concerning such sensitive cases(Rywin v Poland).

Not only do the media have the task of imparting such information and ideas: the public also have a right to receive them. This is particularly true where, as in the present case, the proceedings concern a well-known figure. **Such a person inevitably and knowingly lays himself open to close scrutiny** of his every word and deed by

both journalists and the public at large Accordingly, the limits of acceptable criticism are wider as regards a public figure, in that capacity, than as regards a private individual (Rywin v Poland)

To the extent the applicant may have been faced with an extensive publicity and press coverage for his alleged maladministration while in office, this **must be seen against the background of the applicant's position as the Minister of Justice at the time** and the public interest in the matters concerned. There was no evidence that could lead to the conclusion that any of the judges in the Court of Impeachment were influenced by this publicity in reaching their decisions during the proceedings in the court or the final conviction and sentencing of the applicant, or that the applicant was in any other way prejudiced by this publicity.(Ninn Hansen v Denmark)

Media interest in a case may be justified by its background (suspicion that high-ranking public figures had been implicated in bribery, creating a major political scandal. Besides this the **matter was unusual and concerned serious acts**. It was inevitable that harsh comments should be expressed in the press on such a sensitive case (Rywin v Poland)

The **trial had its roots in events which were a matter of intense and divisive public** and political debate. It further notes that it is **inevitable** in a democratic society that on occasion the media make comments **which sometime are harsh on a sensitive case which, like the one concerning the applicants, raise doubt with regard to the morality of public servants** and the relationship between the political world and the business world (Bebis and Boboc v Romania)

Scope of virulent press campaign

A media coverage that does not go beyond what could be considered as **merely informing the public of the arrest of an important personality** within the country does not amount to a virulent press campaign capable of putting at risk the independence and fairness of the tribunal (Natsvlishvili v Togonidze v Georgia).

The role of the press which had **interviewed a large number of witnesses, published statements by them and disclosed information deriving directly from the file** of the investigation could not in itself cause a trial to breach the right to an independent and impartial tribunal (Taxquet v Belgium, para.77)

Geographical scope of press campaign

It is relevant that the articles allegedly amounting to a virulent **press campaign were published in regional newspapers** while the trial was being held in Moscow and it was **not apparent that the judges in the applicant's trial could have read them** (Sutyagin v Russia)

No evidence that media coverage was sparked by state officials

The filming of the first applicant's arrest by journalists from a private television station did not amount to a virulent media campaign aimed at hampering the fairness of the trial, **nor** is there any specific indication that the **interest of the media in the matter was sparked by the prosecutor, the Governor or any other State authority**. In the Court's opinion, the media coverage of the present case did not extend beyond what can be considered as merely informing the public about the arrest of the managing director of one of the largest factories in the country. (Natsvlishvili and Togonidze v. Georgia)

Impact of press campaign on judges

Domestic courts called upon to examine the case, were entirely made up of professional judges, who normally have sufficient professional experience and training to be able to dismiss any suggestion from an external source. Moreover , there was **no evidence that the press statements had influenced the judges' opinion and outcome of the deliberation (Rywin v Poland)**.

There is no evidence that the judges who examined the case were influenced by any of the publications in the press. The case was examined by domestic courts, made of professional judges, across three levels of jurisdiction

and issued **well reasoned judgments based on considerable amount of evidence available** in the case file, gave due consideration to the defendants' claims and upheld some of their arguments. (Bebis and Boboc v Romania)

The charges against the applicant **were determined by professional judges,** who would have been less likely than a jury to be influenced by the press campaign against the applicant on account of their professional training and experience, which allows them to disregard any external influence. Moreover, taking **account of the reasoned judgments** adopted by the domestic courts at three levels of jurisdiction, there is **no evidence** in the file to suggest **that the judges who assessed the arguments put forward by the applicant and who examined the charges brought against him and the merits of the case were influenced by any of the articles published by the press.** (G.C.P. v Romania app no 20899/03)

Importance of timing of statements: considerable period of time elapsed between press statements of public officials and trial

In general it will be **rare that prejudicial pre-trial publicity** will make a fair trial **at some future date impossible** (Abdulla Ali v Uniyed Kingdom, para 91)

Indeed, the case was commented upon extensively by the press and some of the articles did contain statements by public officials. However, the majority of the articles were published between1997 and 2000. The applicant was convicted in November 2002. Therefore, a **considerable period of time had already elapsed by the time the applicant was convicted since the press articles were published**. (G.C.P. v Romania app no 20899/03)

Statements by FSB officials were limited to asserting that the case against the applicant was well founded (which does not amount to a declaration of guilt). Besides this they were **made three years before the applicant's jury had been formed and the trial held**. A local governor's statements that "while whether the applicant was guilty from a legal standpoint would be decided by a court, he was guilty before society" while regrettable were made more than two years and three months before the trial and were made by a regional governor while the case was examined by a court in Moscow. Leaving the question open as to whether the press campaign against the applicant was sparked by the FSB, the European Court was not convinced that the publication could have prejudiced the outcome of the proceedings. No violation of applicant's presumption of innocence (Sutyagin v Russia, app. No 30024/02)

Importance of timing of statements: statements made in respect of pending proceedings and before they had reached judicial stage

There is general recognition of the fact that the courts cannot operate in a vacuum. Whilst they alone have jurisdiction to decide on guilt or innocence in determining a criminal charge, this **does not mean that there can be no prior or simultaneous discussion elsewhere of the issues involved**, be it in specialised journals, in the general press or among the public at large. Without overstepping the bounds imposed in the interests of the proper administration of justice, reports on judicial proceedings, including commentaries, contribute to a better knowledge of those proceedings and are thus compatible with the requirement of conducting them in public under Article 6 § 1 of the Convention (Rywin v Poland).

Pending criminal proceedings, limitations on freedom of expressions to protect the presumption of innocence **can neither prevent the authorities from informing the public about criminal investigations, nor prevent discussion of the subject in the media** or in the course of a parliamentary debate (Rywin v Poland). Nonetheless such reference should be made with all the discretion and restraint which respect for the presumption of innocence demands (Rywin v Poland)

The duty to inform the public of public officials cannot justify all possible choices of words. The statements by the Head of the Police were **made only four days after the applicant's arrest.** However, it **was particularly important at this initial stage, even before a criminal case had been brought against the applicant, not to make any public allegations** which could have been interpreted as confirming his guilt in the opinion of certain important public officials (Pesa v Croatia).

Statements by the Chairman of the Seimas ("on the basis of the material in my possession I entertain no doubt[that the applicant accepted bribes] and "One or two facts were and are convincing. [The applicant] took the money while promising criminal services.") made **just a few days after the applicant's arrest and it was particularly important at that initial stage not to make any public allegation** which could be interpreted as confirming his guilt in the opinion of important public officials. The remarks could therefore be interpreted as confirming the Chairman's view that the applicant had committed the offences. While the remarks were brief and made on separate occasions, they amounted to declarations by a public official of the applicant's guilt, which served to encourage the public to believe him guilty and prejudged the assessment of the facts by the competent judicial authority (Butkevicius v Lithuania).

Particular importance of timing of Prime Minister's open letter which was published while lustration proceedings, concerning a judge of the constitutional court, were **still pending and before they had reached the judicial stage** (Ivanovski v Former Yugoslav Republic of Macedonia). Applicant's doubt as to impartiality were not unreasonable, subjective or unjustified.

Statements by Minister of Interior made at a time **when the criminal investigation had just been started**. It was particularly important at this initial stage not to make any public allegations which **could have been interpreted as confirming the guilt of the applicant in the opinion of State authorities**. The relevant statements specifically mentioned, among other things, the applicant's name, and declared, without any qualification or reservation, that the applicant had committed the unlawful acts he was suspected of (G.C.P. v Romania app no 20899/03)

No evidence that single article published after the applicant's conviction at first instance, **while his appeal case was pending** had influenced the appeal judges (Sutyagin v Russia)

Following first instance court ruling, several politicians made strong negative statements regarding decisions in the type of cases brought by the applicant, including the applicant's own cases, and also about the judges deciding them. They **unequivocally expressed the opinion that the courts' decisions upholding the applicant's claims were wrong and undesirable**[4]. It was **worrying that a high-ranking politician attended the District Court's hearing** in the present case and made a public statement afterwards linking the applicant to Nazis and **stating that he would do "anything within [his] power" in order that the action of the applicant and those in a similar position should not succeed**. Notably, these statements were **directly aimed at the judges** (Kinsky v Czech Republic). There was no reason to speculate on what effect such interventions may have had on the course of the proceedings in issue: statements were made before the first-instance decision in the present case and also after the statements none of the applicant's actions was successful. It considers that in the circumstances of the present case the applicant's concerns as to the independence and impartiality of the tribunals were not unreasonable. Moreover, the activities of certain politicians referred to by the applicant, **be they verbal expressions to the media or other, aimed at creating a negative atmosphere around the legal actions** of the applicant or constituting direct attempts to interfere in these proceedings, [were] unacceptable in a system based on the rule of law. (Kinsky v Cezch Republic)

Spontaneous nature of declarations without goal of violating presumption of innocence

Minister's statement concerning accused in criminal proceedings **constituted a spontaneous reaction** to a question put to him during a Q&A session, which was broadcast live. While I may have created confusion as to which charges the applicant had already been convicted of by a court, **during a press conference held later on the same day, the prime Minister clarified his earlier remarks** that must have dispelled any possible confusion (Khodorkovsky and Lebedev v Russia No.2)

Comments made by the Prime Minister (**who was approached by the press the day after applicant's arrest**) that " he had derived profits by his closeness to recently arrested politicians and that it was the court that had made such statements in its decision to order the applicant's arrest" did not amount to a declaration of guilt. Such

4 "I do not know how we as legislators can do anything about the absolutely insane rulings of judges that suggest that they are independent, but in this instance independent of common sense. [the judgment] gives rise to misgivings about the train of thought of the judge involved."... "I cannot understand what mental processes members of our judicial system could have gone through to reach such conclusions."

declarations were **spontaneously made and did not have the goal or the effect of violating the suspect's right to be presumed innocent.** On the other hand, the declarations of the ministry of interior conveying information which had been collected in the framework of criminal proceedings concerning the modus operandi of the suspects in the criminal case went beyond the duty to inform the public on the case and could lead the public to believe that the applicant was the mastermind behind the criminal syndicate responsible for embezzling public funds. **Although such declarations were not "premeditated", the lack of an intention to undermine the presumption of innocence does not exclude a finding of violation** (Gutsanovi v Bulgaria, 34529/10).

Context of statements: statements against judges and prosecutors made by lawyers in context of criminal proceedings

Wider scope of freedom of expression should be acknowledged if critical statements are made in the framework of criminal proceedings by a suspect/accused or his lawyer. In the context of criminal proceedings **priority should be given to allowing the accused to speak freely without fear of being sued for defamation** whenever his or her speech concerned the statements and arguments **made in connection with his or her defence.**

A **defendant should have an opportunity to speak freely about his impression of a possible witness tampering and the improper motivation of the prosecution** case without the fear of being later sued for defamation. Such protected statements have been made in closing arguments to the trial court and **concerned defence arguments which had been sufficiently linked to the applicant's case and worked in favor of his defence**: if the defendant had succeeded in convincing the trial court of his argument, this would have seriously called into question the credibility and reliability of the witness evidence and the overall nature and background of the prosecution's case. Such arguments were not extraneous to the case and his defence, **did not include irrelevant or gratuitous attacks and did not amount to malicious accusations** against a participants in the proceedings or any third party. Besides this such accusations objectively caused limited consequences for the person who was attacked by the applicant as the national authorities never investigated that person for the criminal offense of witness tampering and the distressed caused did not result in profound or long lasting or other consequences (Shuvalov v Estonia)

Violation of article 10 ECHR due to conviction of a lawyer for **defamation following publication by the press of his letters to the Minister of Justice about the conduct of two judges** which "was completely at odds with the principle of impartiality and fairness" and asking for an investigation to be carried out by the Judicial Inspectorate in the "numerous shortcomings… brought into light in the course of the judicial investigation". As the statements were directed towards two judges who had already been removed from the case, they could not be considered as contributing to his task of defending his client. Nevertheless the statements fell within the context of the proceedings (Morice v France)

Violation of article 10 due to **opening of defamation proceedings against lawyer for reading out a memorial in court accusing prosecutor of abuse of process** by using procedural tactics that were preventing her client's defense. **The criticism had concerned two specific decisions and criticism was limited to performance as prosecutor** in the case against the applicant's client, as distinct as distinct from criticism focusing on the prosecutor's general professional or other qualities. In that procedural context the prosecutor had to tolerate very considerable criticism by the applicant in her capacity as defence counsel. The criticism did not amount to a personal insult and the Court could have limited itself to interrupt the applicant's plaadings and rebuked her even in the absence of a request to that end from the prosecutor (Nikula v Finland)

No connection between statements and criminal proceedings

Article 6 § 2, is aimed at preventing the undermining of a fair criminal trial by prejudicial statements made in close connection with those proceedings. **Where no such proceedings are, or have been in existence, statements attributing criminal or other reprehensible conduct** are relevant rather to considerations of protection against **defamation** and raising potential issues under Article 8(Khodorkovsky and Lebedev v Russia (No.2)

The statements made against the applicants by the Ministry of Justice speaking before the British parliament and naming them as having broken UN sanctions(forbidding the export of diamonds) were not related to any criminal proceedings which could render the right to be presumed innocent applicable. There was **no close link between the statements of the Minister and the criminal investigations against the applicants in Belgium**, which in any event did not result in charges being brought against them (Zollmann v United Kingdom, 62902/00, 27 November 2003)

Person directly or indirectly identifiable in statements violating presumption of innocence

Accused person was identifiable by statements of public officials. Explicit references by speakers to the name of the applicant was not necessary to attract guarantees of the presumption of innocence.

- Statements of high ranking police officers clearly concerned the applicant **even without mentioning applicant's name**: applicant's name and other personal information had been disclosed by the press and thus become known to the public. Given the gravity of the crime, there was a public interest in the case. (Dovzhenko v Ukraine)

- Event if the suspect's name had not been mentioned, the statement of the head of Police that "the suspects in the case were ravenously greedy and just for initiating any conversation about business they asked 50000 euro" clearly referred to the applicant who had been arrested on suspicion of having taken bribes at the time of the statements. Such statements were not limited to describing the status of pending proceedings or a state of suspicion but were presented as an established fact without any reservation as to whether the act of taking bribes had actually been committed by the suspects. As for the Prime Minister, while he conceded that each of the suspects may not have participated in each project, he also implied that they had been involved in the organized crime. As for the statements of the president, he had **used a metaphorical expression** (the three tenors) and it was **clear that he referred to the** accused and his statement implied that they had been part of corruption. Given that **all the authors of the statements held high positions, they should have exercised particular caution** in their choice of words for describing pending criminal proceedings against the suspects (Pesa v Croatia)

- The statements made by the Prime Minister while not referring to the applicant by name, **referred to a specific criminal case and the people involved in it and made the applicant easy to identify** as none other individuals fitted that description (Konstas v Greece)

Terms used in respect of suspect or accused violating presumption of innocence

Detained person referred to as "**criminal" without any reservation**. Such qualification coming from a high ranking. Police officer, came across as an established fact and amounted to a declaration of guilt. (Dovzhenko v Ukraine)

- Statement of Minister of Interior that suspect was a **"crook"** were not strictly and legally focused on the development of the criminal investigation against the applicant and considers that they were made without necessary qualifications or reservations and contained wording amounting to an express and unequivocal declaration that the applicant had committed criminal offences (Konstas v Greece).

Balancing freedom of expression and protecting the authority of the judiciary and reputation of judges and prosecutors

Although the press **must not overstep certain bounds, in particular in respect of the reputation and rights of others** and the need to prevent the disclosure of confidential information, its duty is nevertheless to impart – in a manner consistent with its obligations and responsibilities – information and ideas on all matters of public interest

Article 10.2 of the ECHR allows limitations of freedom of speech in order to protect the reputation or rights of others(legitimate aim).

Limitations however must meet proportionality requirement according to which interference correspond to a pressing social needs , whether it was proportionate to the legitimate aim pursued and whether the reasons given by the national authorities are relevant and sufficient.

In order for Article 8 of the Convention to come into play, **an attack on a person's reputation must attain a certain level of seriousnes**s, and its manner **must cause prejudice to personal enjoyment** of the right to respect for private life (see Novaya Gazeta and Milashina v Russia, see also A. v. Norway, no. 28070/06, § 64, 9 April 2009)

Criteria for balancing freedom of expression with right to private life (reputation) include the contribution to a debate of public interest, the degree of notoriety of the person affected, the subject of the news report, the prior conduct of the person concerned, the content, form and consequences of the publication, the way in which the information was obtained and its veracity, and the gravity of the penalty imposed on the journalists or publishers.

Maintaining the authority of the judiciary

Questions concerning the functioning of the justice system, an institution that is essential for any democratic society, fall within the public interest and that there is no doubt that in a democratic society individuals are entitled to comment on and criticise the administration of justice and the officials involved in it (see Lešník v. Slovakia, no. 35640/97, § 55). Nevertheless, regard must be had to the special role of the judiciary in society.

The phrase "**authority of the judiciary"** includes, in particular, the notion that the courts are, and are accepted by the public at large as being, the proper forum for the resolution of legal disputes and for the determination of a person's guilt or innocence on a criminal charge; further, that the public at large have respect for and confidence in the courts' capacity to fulfil that function. What is at stake is the confidence which the courts in a democratic society must inspire not only in the accused, as far as criminal proceedings are concerned, but also in the public at large(Stancu v Romania)

It may therefore prove necessary to **protect such confidence against gravely damaging attacks that are essentially unfounded, especially in view of the fact that judges who have been criticised are subject to a duty of discretion that precludes them from replying**

Scope of criticism on administration of justice

In a democratic society individuals are entitled to comment on and **criticise the administration of justice** and the officials involved in it. Limits of acceptable criticism in **respect of civil servants exercising their powers** may admittedly in some circumstances be **wider than in relation to private individuals.**

Save in the case of gravely damaging attacks that are essentially unfounded – bearing in mind that **judges form part of a fundamental institution of the State**, they may as such be subject to personal criticism within the permissible limits, and not only in a theoretical and general manner. When acting in their official capacity **they may thus be subject to wider limits of acceptable criticism than ordinary citizens** (Morice, § 131). **This is especially true when a judge is occupying a very visible public office** (Panioglu, § 113).

However, it cannot be said that civil servants knowingly lay themselves open to close scrutiny of their every word and deed to **the extent to which politicians** do and should therefore be treated on an equal footing with the latter when it comes to the criticism of their actions (Nikula v Finland and Stancu v Romania).

Moreover, civil servants must enjoy **public confidence in conditions free of undue perturbation if they are to be successful in performing their tasks** and it may therefore prove **necessary to protect them from offensive, abusive or defamatory** attacks **as well as unfounded accusations when on duty (Lesnik** § 53-54) **.** Prosecutors should also be protected by attacks on their personality (Perna, para 13)

The applicant's **critical remarks had not been capable of undermining the proper conduct of the judicial proceedings**, in view of the fact that the **higher court had withdrawn the case from the two investigating judges concerned by the criticisms**. For the same reasons the applicant's conviction could not serve to maintain the authority of the judiciary(Morice v France).

Prosecutors as members of the judiciary

The status and functions of the prosecution authorities differ from country to country and the question of whether they belong to the judiciary as such may accordingly have a different answer depending on the country concerned.

Public prosecutors are civil servants whose task it is to **contribute to the proper administration of justice**. In this respect they form **part of the judicial machinery in the broader sense of this term.** It is in the general interest that they, like judicial officers, should enjoy public confidence. It may therefore be necessary for the State to protect them from accusations that are unfounded. However, this does not give public prosecutors immunity from any media criticism of their actions performed in the official capacity. (Lešník v. Slovakia, , §§ 53-54).

Having regard to the role of prosecutors in Romania, to the absence of a fundamental distinction being made by the national judicial system between the status of judges and prosecutors , to the importance attached by the national authorities to the necessity of safeguarding the impartiality, the independence and the authority of prosecutors' decisions as a key element for preserving public confidence in the proper functioning of the justice system, as well as to the position held by (the concerned prosecutor) within the CSM and the functions attached thereto, the measure in question could be seen as also pursuing the legitimate aim of maintaining the authority of the judiciary (Stancu v Romania)

Expression clearly related to institutional responsibility

Protected criticism did **not concern private or family life but institutional responsibility** of prosecutor. The provocative comparisons did not concern Mr V.'s private or family life, but clearly related to his institutional responsibility as the head of the prosecutor's office of the entire region. The published material, in a satirical and parodic manner, denounced alleged corruption during the election campaign, criticised practices whereby certain candidates received more support from the authorities, which was to the detriment of other candidates, and whereby law-enforcement agencies, including the regional prosecutor's office headed by Mr V., turned a blind eye to such practices. (Grebneva and Alisimchik v Russia).

Prosecutor was a public figure who **appeared frequently on television** programs and in newspapers. Prosecutor **inevitably and knowingly exposed himself to public scrutiny and should therefore have displayed a greater degree of tolerance** to criticism than an ordinary civil servant.

Critical press article focused on the career of a judicial council member, who was also vicepresident of the organisation at the time when the article was published, and her work as prosecutor. The article did **not concern prosecutor's private life, but rather her professional activity and rise to a highranking position** within the CSM and ultimately the justice system. Prosecutor was a high-ranking publicly elected official who had received attention from the press even before the publication of the article in question. It was also public knowledge that the prosecutor was preparing to run in the elections for a position, namely that of CSM president, that was even more prominent than the one she already occupied. (Stancu v Romania)

State bodies should have no standing to sue in defamation in their own capacity

In the case concerning defamation claims brought by a courts' management department that there may be sound policy reasons to decide that **public bodies should not have standing to sue in defamation in their own capacity** (Romanenko and Others v. Russia, no. 11751/03, § 39, 8 October 2009) and State bodies acting in an official capacity are subject to wider limits of acceptable criticism than private individuals (ibid., § 47).

Similarly, the Prosecutor's Office, a public authority forming part of the judicial machinery in a broad sense, must enjoy public confidence if it is to be successful in carrying out its duties, **as an institution of a State it should display tolerance to criticism, particularly that emanating from the press.**

Social and political context of publication

In a democratic society is particularly important in the period preceding an election that opinions and information of all kinds are permitted to circulate freely . There is little scope under article 10.2 of the ECHR for restrictions on political speech or on debate on questions of public interest. (Grebneva and Alisimchik v Russia)

The case concerned applicants journalists publishing a number of satirical articles on the parliamentary election campaign which was underway in their region. The articles addressed in satirical and farcical way **various irregularities that, in their view, had taken place during the campaign and involved a prosecutor** who was depicted, in the article, as a prostitute. National courts failed to analyze the substance of the published material in the context of the ongoing election campaign and the satirical nature of the publication and the irony underlying it (Grebneva and Alisimchik v Russia)

Journalists not liable for reporting accusations against prosecutors made by third parties

The punishment of a journalist for assisting in the dissemination of statements made by another person ... would seriously hamper the contribution of the press to discussion of matters of public interest and should not be envisaged unless there are particularly strong reasons for doing so" (see Jersild v. Denmark, 23 September 1994, § 35, and Thoma, § 62). A general requirement for journalists systematically and formally to distance themselves from the content of a quotation that might insult or provoke others or damage their reputation is not reconcilable with the press's role of providing information on current events, opinions and ideas.

Journalists should not be held liable for having reported opinion of third parties "that prosecutor had committed abuse of office" expressed in court claims and in a book (Novaya Gazeta and Milashina v Russia). Statements had some factual basis.

Distinction between statements of facts and value judgments

In cases of freedom of expression, a distinction must be made between **statements of facts and value judgments.**

While the existence of facts can be demonstrated, **the truth of value judgments is not susceptible of proof.** The requirement to prove the truth of a value judgment is impossible to fulfil and infringes freedom of opinion itself, which is a fundamental part of the right secured by Article 10.

Sufficient factual basis for value judgments

Where a statement amounts to a value judgment, the proportionality of an interference may depend on whether there exists a **sufficient "factual basis"** for the impugned statement: if there is not, that value judgment may prove excessive. In order to distinguish between a factual allegation and a value judgment it is necessary to take account of the circumstances of the case and the general tone of the remarks, bearing in mind that **assertions about matters of public interest may, on that basis, constitute value judgments rather than statements of fact** (Stancu v Romania)

Journalist's serious accusations against senior prosecutor (member of the judicial council)**concerned alleged abuses that were noted by judges** in the relevant criminal case. Journalist raised questions about the reasons behind prosecutor's silence when faced with the story and about the possible undermining effect of her silence on the public's trust in the judicial council's ability to punish officers of the court responsible for breaking the law. Context of publication was larger public debate concerning the organisation and functioning of the CSM which generated special media attention. Journalist **publication relied on previous press articles** which had concerned the same events, on the judgment delivered by the national courts in respect of that case and on an ongoing criminal complaint brought by the accused against the prosecutor. The method used to obtain the information reported, could therefore not be questioned. There was a **sufficiently accurate and reliable factual basis proportionate to the nature** and degree of the article's statements and allegations. Additionally, the journalist had offered the prosecutor the opportunity to provide a public reply to the allegations, offer which was declined (Stancu v Romania)

Dissenting Opinion in Stancu v Romania

"In some States, including Romania, the judicial system, as well as individual judges and prosecutors, are sometimes subject to harsh criticism and attacks which tend to undermine public confidence in the integrity of the judiciary. Such attacks may further fuel demagogy and prepare grounds for structural reforms impairing the quality of that system….the Commission to the European Parliament and the Council, in its report of 2013 (see paragraph 80) drew attention to the role of the media and the circumstance that there had been numerous examples of the media exercising pressure on the judiciary, as well as particular doubts whether the National Audiovisual Council was proving an effective watchdog. The situation suggested the need for a review of existing rules, to ensure that freedom of the press is accompanied by a proper protection of institutions and of individuals' fundamental rights as well as to provide for effective redress.

Thus, protection to members of the judiciary should not be limited to gravely damaging attacks but should extend to other untrue factual statements or excessive value judgments damaging the reputation of judges and prosecutors, if such statements and value judgments are devoid of a sufficient factual basis".

Statements made in letters to the Minister of Justice by a lawyer and concerning the conduct of two judges (which " was completely at odds with the principle of impartiality and fairness" and asking for an investigation to be carried out by the Judicial Inspectorate in the "numerous shortcomings… brought into light in the course of the judicial investigation") **were value judgments. Their factual basis was sufficient** (the failure of a judge to forward to his successor in the case key evidence had been established and was sufficiently serious to be recorded by the successor judge in the case). Moreover, there had been a sufficiently **close connection between the expressions used and the facts of the case and the remarks were neither misleading nor gratuitous attacks**. The impugned remarks by the applicant had **not constituted gravely damaging and essentially unfounded attacks on the action of the courts, but criticisms levelled at two Judges** as part of a debate on a matter of public interest concerning the functioning of the justice system, and in the context of a case which had received wide media coverage from the outset. While those remarks could admittedly be regarded as harsh, they nevertheless constituted value judgments with a sufficient "factual basis".(Morice v France)

Sanctioning of editors and editing company of online publication for publishing defamatory article about the then vice-president of the High Council of the Judiciary and **alleging the commission of a miscarriage of justice in her earlier role as a superior prosecutor[5] violated freedom of speech** (Stancu v Romania).

Unfounded accusations of abuse of office by prosecutor in a private dispute: no violation of freedom of speech

5 "relevant statements in the press article "headline "The CSM vice-president, [O.S.H.], fails to provide explanations for the serious miscarriage of justice [committed] by her – [O.S.H.] and the prosecutor [V.P.] indicted a student for murder, who remained in detention for 13 months but was acquitted because he was not the perpetrator. Find out [about] the prosecution's abuses, noted by the judges in this case!"

Applicant's **held liable for defamations following letter accusing prosecutor in his case of misconduct did not violate freedom of speech**. In letter to Prosecutor General applicant had made statements in respect of the professional and personal qualities of the public prosecutor concerned. Such statements could be considered as value judgments which are not susceptible of proof, however the letters **also contained accusations of unlawful and abusive conduct by the latter.** Thus, the applicant alleged, in particular, that the public prosecutor had unlawfully refused to uphold his criminal complaint, had abused his powers and had in that context been involved in bribery and unlawful tapping of the applicant's telephone. **Those allegations are, statements of fact which the domestic courts rightly requested the applicant to support by relevant evidence. Su**ch statements of facts were unsubstantiated and **could not be justified by the conduct of the prosecutor in question**(Lesnik v Slovakia)

Chernysheva v Russia: no violation of freedom of speech due to imposition on applicant of civil liability for defamation of prosecutor:

The applicant was found civilly liable for defamation of a local prosecutor in connection with two articles . In both publications she maintained that a prosecutor had exercised – either directly or by the mediation of a fellow prosecutor– undue pressure on a district court that determined a civil action between the prosecutor's spouse and her neighbours. The applicant implied that the claims of the prosecutor's spouse were unfair, if not unlawful, and the action was only granted because the prosecutor had swayed the district court in favour of his spouse.

The journalist presented dispute in such a way that readers were inevitably given the impression that prosecutor had used connection and authority inherent in his position to tilt the judicial scale in favor of wife who was a plaintiff in a dispute. Allegations emanated by journalist herself, **did not quote from another sources or merely repeat statements made by others**. **At no stage** of the proceedings – either before the domestic authorities or before this Court – did the applicant **make an attempt to show the veracity of her allegations.**

The domestic courts found, after having examined all the available evidence, that the impugned statements were untrue. They established that the accused proseutor had not been a party to the civil dispute between his wife and neighbours. He had not taken part in the proceedings as the plaintiff, third-party, witness or as a State official. In any event, the prosecutor had served in the prosecutor's office of an administrative district other than that where the district court had been located. The domestic courts did not find any indications that the prosecutor had influenced the proceedings before the district court through his personal connections or otherwise.

The applicant's accusations were of a serious nature and were made repeatedly, in a series of publications. They were **capable of insulting the prosecutor, of affecting him in the performance of his duties and also of damaging his reputation**. There is **nothing to suggest that the applicant was prevented from carrying out adequate research in support** of her accusations or from presenting a more balanced account of the situation. Viewed against this background statements were not a fair comment on the administration of justice but rather a gratuitous personal attack on the professional reputation of a public prosecutor (a contrario, Unabhängige Initiative Informationsvielfalt v. Austria, no. 28525/95, § 43). Therefore that there was a pressing social need to prevent **the careless use of such grave allegations.**

Good faith requirement and compliance with duties and responsibilities for journalists making statements on judges and prosecutors

Journalists can claim protection of article 10 to divulge information **on issues of general interest** provided that they are acting in **good faith and on accurate factual basis** and **provide reliable and precise information** in accordance with the ethics of journalism[6] (Stancu v Romania).

Article 10 of the Convention does not guarantee a wholly unrestricted freedom of expression even with respect to press coverage of matters of serious public concern. By the terms of paragraph 2 of the Article the exercise of this freedom carries with it "**duties and responsibilities**", which also apply to the press. These "duties and

6 Fressoz and Roire v. France [GC], no. 29183/95, § 54, ECHR 1999I; Schwabe v. Austria, judgment of 28 August 1992, Series A no. 242B, p. 34, § 34; Prager and Oberschlick v. Austria, judgment of 26 April 1995, Series A no. 313, p. 18, § 37

responsibilities" are liable to assume significance when, as in the present case, there is a question of attacking the reputation of a named individual(Chernysheva v Russia).

Although the press must not overstep certain bounds, in particular in respect of the reputation and rights of others, its duty is nevertheless to impart, **in a manner consistent with its obligations and responsibilities**, information and ideas on all matters of public interest (Stancu v Romania)

Journalist **involved in a public debate on a matter of public interest (misconduct in the judiciary) is required to fulfil a no more demanding standard than that of due diligence,** as in such circumstances an obligation to prove the factual statements may deprive him or her of the protection afforded by Article 10 and that he or she is allowed to have recourse to a degree of exaggeration or even provocation, or in other words to make somewhat immoderate statements (Stancu v Romania)

Publication in the press not under the influence of state authorities

It is of relevance that the media interest and coverage of a case was not sparked by… the governor or any other state authority (Natsvlishvili and Togonidze v Georgia)

The **fact that the authorities were the source of the prejudicial information is relevant to the question of the impartiality of the tribunal only in so far as the material might be viewed by readers as more authoritative in light of its source**(Abdulla Ali v United Kingdom, 30971/12).

The opinion expressed in a national daily newspaper concerning corruption and criticizing high ranking public officials had not emanated from the state authorities and **had in no sense been inspired or led by representatives of the domestic authorities,** but had simply been the journalist's own opinions (Rywin v Poland, app. No 6091/06, judgment 18 February 2016).

No evidence that authorities had in any manner encouraged prejudicial reporting in the media. Indeed, the length of time taken by the jury to reach a verdict- seven and a half days-would strongly suggest that the jurors acted in accordance with their own conscience and he requirements of the oath which they had sworn (Pollicino v Malta, 45441/99)

At the same, time domestic authorities cannot be held responsible for the acts of the press(Rywin v Poland, para 232)

Limits to freedom of speech to protect reputation of judges and prosecutors

Articles/ publications should not be a **gratuitous personal attack on or insult** (Grebneva and Alisimchik v Russia).

Counsel **describing the opinion of a judge as "ridiculous"** (W.R. v Austria no. 26602/95). And counsel asserting that the **prosecutor had drafted the bill of indictment "in a state of complete intoxication" (**Mahler v. Germany, no. 29045/95, Commission decision of 14 January 1998 (unreported) amounted to personal insult.

In the context of reporting on criminal proceedings, the use of the words **"abuse of public office" directed at a prosecutor** does not, in itself, tarnish a prosecutor's honor, dignity and business reputation. To rule otherwise, in essence equating any allegation of wrongdoing on the part of the prosecutorial authorities with an insulting personal attack, would stifle media debate about matters of serious public concern and shield prosecutors' decisions from public scrutiny.(Novaya Gazeta and Milashina v Russia)

Background of the case consisted of **animosity between the newspaper and the prosecutor** and campaigns organised by the media in general which were critical of individuals working in key judicial institutions. However, none of the courts took the view that the articles concerning the prosecutor had been part of a media campaign amounting to harassment or that their publication had pursued any goal other than participating in a public debate. The courts considered that the ultimate aim of the articles published by the applicants, was to raise questions about the manner in which the justice system worked and the moral and professional probity of those called to protect it (Stancu v Romania).

Applicant's **statements could not be reduced to mere expressions of an antagonistic relationship with the judge** in which respect the applicant lawyer had made critical remarks in a letter to the Minister of Justice (and published by the press) . The remarks were in fact made by two lawyers on account of facts that were new, established and capable of revealing serious shortcomings in the justice system, involving the two judges who had formerly been conducting the investigation in a case in which the lawyers' clients were civil parties. While the applicant's remarks certainly had a negative connotation, it had to be pointed out that, notwithstanding their somewhat hostile nature and seriousness, the key question in the statements concerned the functioning of a judicial investigation, which was a matter of public interest, thus leaving little room for restrictions on freedom of expression. In addition, a lawyer should be able to draw the public's attention to potential shortcomings in the justice system and the judiciary might benefit from constructive criticism(Morice v France) .

Style of expression

Journalistic freedom also covers possible recourse to a degree of **exaggeration, or even provocation** (Prager and Oberschlick v. Austria, judgment of 26 April 1995, § 38) and the methods of objective and balanced reporting may vary considerably.

It is not for the national authorities to substitute their own views for those of the press as to what technique of reporting should be adopted (Stancu v Romania).

Provocative nature of text of a **satirical article** drew express parallels between the regional prosecutor and a prostitute[7] (Grebneva and Alimischik v Russia). Publication was one in a series of comic articles featuring a cartoon character, humorous nature of material was clear and could not be understood as being anything but a caricature and parody, that is, a satirical representation rather than a direct statement maliciously directed at the prosecutor.

Insulting nature of statement was established solely on the basis that it was perceived as such by the concerned prosecutor while journalists' intent to insult was proven by the use of the words "prostitute" and "werewolf". Such reasoning was terse and underdeveloped and did not take into account social and political context nor satirical nature and irony underlying publication.

Offensive language may fall outside the protection of freedom of expression if it amounts to wanton denigration , for example where the sole intent is to insult (Skalka v Poland), but the use of **vulgar phrases in itself is not decisive** in the assessment of an offensive expression as it may well serve merely stylistic purposes. Style constitutes part of the communication as the form of expression and is as such protected together with the content of the expression Grebneva and Alisimchik v Russia)

7 Para 57 of the judgment Grebneva and Alimschik v Russia "More specifically, as regards the impugned article, the Court observes that its headline "The candidates must be known from the inside!" was accompanied by a montage showing a female body dressed in a onedollar banknote with a photograph of the then regional prosecutor, Mr *V., for the face and a pretend interview with an imaginary female character, who "[was] a lawyer and [had] extensive working experience as a prosecutor" and who "sporadically, during elections, [ran] the escort agency Contact or Image". The first name of the character,* Vasilinka, was very similar to the regional prosecutor's surname. The character, referred to in the article as a "prostitute-werewolf", mentioned that her escort agency rendered services to candidates standing for election in their region, thereby earning extra income by carrying out a governmental order approved by the President. The so-called interview was accompanied by the character's comments on the candidates, with the use of slang words and expressions.

Publicity of statements

Defamatory statements contained in letter to hierarchical superior

No violation of freedom of expression where the applicant had been **criminally convicted** for having accused a public prosecutor of misconduct and breaches of law in **a letter sent to the General Prosecutor's Office**, regardless of the fact that the impugned statements were not made to the media or otherwise published by the applicant to the outside world (Lesnik v Slovakia)

Lesnik v Slovakia (dissenting opinion)

It may be necessary to protect public servants, including prosecutors, from offensive, abusive and defamatory attacks which are calculated to affect them in the performance of their duties and to damage public confidence in them and the office they hold. However, these cases have all concerned written or verbal attacks made in public and not, as in the present case, those made in private correspondence to the public servant concerned, where the same considerations do not appear to us to apply. Not only are the limits of acceptable criticism of a public servant wider than in relation to private individuals, but public servants must be prepared to tolerate such criticism, where it is personally addressed to them in private correspondence, even where such criticism is expressed in abusive, strong or intemperate terms and even where it consists of serious and unfounded allegations. Where as here the allegations are contained in a personal letter addressed to the public servant in question, it is only in the most exceptional circumstances that resort to criminal proceedings can be justified in terms of Article 10 of the Convention.

The same is true of the statements contained in the letter to the General Prosecutor. As the hierarchical superior of P., the General Prosecutor was in our view the appropriate authority to receive complaints about the manner in which P. had carried out his public functions and in particular to investigate, as the applicant had requested him to do, whether the offence of bribery had been committed. Private citizens must remain in principle free to make complaints against public officials to their hierarchical superiors without the risk of facing prosecution for defamation or insult, even where such complaints amount to allegations of a criminal offence and even where such allegations prove on examination to be groundless.

Circumstance that letters were published and applicant had provided the press article with the relevant document was of no significance since the criminal proceedings were initiated prior to the publication of the letters

Court of Appeal's view that the mere fact of asserting that an investigating judge's conduct was "completely at odds with the principles of impartiality and fairness" was a particularly defamatory allegation had not taken in consideration that such statement was not made by the applicant (a lawyer) to a journalist but was an extract taken from his letter to the **Minister of Justice** (to seek initiation of Judicial inspection into conduct of judges). In addition, at the time when the applicant answered his questions the journalist had already been informed of the letter to the Minister by his own sources. **Lawyers could not be held responsible for everything appearing in an "interview" published by the press or for actions by the press** (Morice v France)

Publication in newspaper

In Chernysheva v Russia the applicant, a professional journalist, deliberately made her allegations known to the general public by **repeatedly publishing them in a newspaper having circulation of 3,000 copie**s. The **harm caused to the public prosecutor** concerned by the applicant's statements must have been further **exacerbated because the newspaper in question was the official bulletin of the town administration** and the readership might have been given the **impression that the criticism of his professional conduct was backed up by the municipal authorities.**

Impact of defamatory statements on judges and prosecutors

It may be necessary to protect public servants, including prosecutors, from offensive, abusive and defamatory attacks which are calculated to affect them in the performance of their duties and to damage public confidence in them and the office they hold (Nikula v Finland 31611/96 and Janowski v. Poland [GC], no. 25716/94

Accusations were of a **serious nature and were made repeatedly**. They were **capable of insulting the public prosecutor, of affecting him in the performance of his duties and also,** in the case of the letter sent to the General Prosecutor's Office, of **damaging his reputation.** The harm caused to the public prosecutor concerned by the statements of fact, which the applicant could not prove to have been true, must have been aggravated to a certain extent by the publication of the letters in a newspaper, to which the applicant had after all contributed by providing the author with the relevant documents (Lesnik v Slovakia)

Type of penalty imposed in defamation proceedings

Civil or criminal nature and gravity of sanction imposed in defamation proceedings involving judges and prosecutors

It is not decisive that proceedings were civil rather than criminal and that the penalty imposed was lenient (an order to publish a retraction and a modest pecuniary award). What is important is that standards used by national authorities to review defamation claim by prosecutor were not in conformity with principles of article 10 ECHR

In assessing the proportionality of the interference, the nature and severity of the penalties imposed are factors to be taken into account (Skałka v. Poland, no. 43425/98, § 38, 27 May 2003).

The proceedings at issue **were civil rather than criminal in nature and the applicant was eventually ordered to pay the very small amount** of RUR 250 (9 euros).(Chernysheva- no violation). The applicant had been ordered to pay a fine of EUR 4,000 and, jointly with the other two defendants, EUR 7,500 in damages to each of the two judges who had filed the complaint as civil parties. Thus, the sanction imposed on him had not been the "lightest possible", but, on the contrary, one of some significance, and his status as a lawyer had even been relied upon to justify greater severity(Morice v France)

Civil sanctioning of editors and editing company of online publication for publishing defamatory article about the then vice-president of the High Council of the Judiciary and alleging the commission of a miscarriage of justice in her earlier role as a superior prosecutor was **capable of having dissuasive effect** on exercise of freedom of expression(Stancu v Romaia)

Applicant, a lawyer, had been **convicted merely of negligent defamation** and the court **waived the sentence but obligation to pay damages and costs remained.** Such penalty is difficult to reconcile with the defence counsel's duty to defend client's interests zealously. It follows that it should be primarily for counsel themselves, subject to supervision by the bench, to assess the relevance and usefulness of a defence argument without being influenced by the potential **"chilling effect" of even a relatively light criminal penalty or an obligation to pay compensation for harm suffered or costs incurred**. It 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** (Nikula v Finland)

Even in the case of the impostion of a fine in criminal proceedings, **what matters is not that the applicants were sentenced to a minor penalty but that they were convicted at all:** a recourse to criminal prosecution of journalists for purported insults, with the attendant risk of a criminal conviction and a criminal penalty , for criticizing a public figure in a manner which can be regarded as personally insulting, is likely to deter journalists from contributing to the public discussion of issues affecting the life of the community (Grebneva and Alimschik v Russia)

Effectiveness of remedies for alleged harassment by pro government media

The government submitted a number of decisions of the courts and the regulatory body for electronic media where these bodies had ruled in favor of various claimants, found violations of hate speech and ordered the respondent party to publish the judgments in question; ordered compensation in respect of non-pecuniary damage for a violation of their honour and reputation or their dignity and presumption of innocence caused by untrue and/or forbidden information being published about them; or issued warning and notices or banned further publishing of the particular content. As such they amounted to effective remedies that the applicant had failed to exhaust to seek redress for violation of his reputation (Gasi and others v Serbia (24738/19, 6 September 2022))

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