



10 December

2015



**EUROPEAN
LAWYERS DAY**



ccbe.eu/lawyersday



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CONTACT:

Council of Bars and Law Societies of Europe
Rue Joseph II, 40/8
1000 Bruxelles (Belgique)
T +32 (0)2 234 65 10
F +32 (0)2 234 65 11

ccbe@ccbe.eu
www.ccbe.eu

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FOREWORD

1. Maria Ślęzak, President of the CCBE
2. Patrick Henry, Chair, CCBE Human Rights Committee



Maria Ślqzak,
2015 CCBE President

In a year that saw a murderous attack on a satirical newspaper, and where hundreds of thousands of refugees from violence in the Middle East flowed into Europe in search of a better life, freedom of expression, regardless of religion, background or race, and the right to claim and defend such a freedom has rarely seemed more important.

Lawyers are one of the guardians of freedom of speech, working to protect those who are not able defend themselves or who speak out against something they disagree with. However, even in 2015, citizens – including lawyers - all around the world are censured, imprisoned and attacked for simply claiming this freedom.

This is why on December 10 2015, for European Lawyers Day, lawyers in Europe will celebrate World Human Rights Day by focusing on freedom of speech.

This handbook is intended to assist you in your preparations for European Lawyers Day. You will find more materials on our website, www.ccbe.eu/lawyersday. Please do not hesitate to contact us with any questions or comments. We look forward to following your events and to celebrating a memorable European Lawyers Day 2015!

**Maria Ślqzak,
2015 CCBE President**



Patrick Henry
Chair,
CCBE Human Rights Committee

Freedom of expression is at the heart of the second European Lawyers Day

Everyone has the freedom to express their ideas, without permission or restriction, even when they are different, even if they shock. This freedom is one of the great legacies of the 20th Century.

To have neither your freedom, your life nor those close to you lives' endangered, when you express a contradiction or a disagreement. To have the right to express your criticisms, to denounce abuses, to protest against injustices, to claim a freedom provided by democracy, without fear of retaliation.

Freedom of the press, of art, of thought, of speech.

These freedoms, however, do have their limits, and events at the end of the 20th century and beginning of the 21st really brought these limits to light.

In 1994, in Rwanda, freedom of expression led to the death of hundreds of thousands.

In Europe too, special laws were implemented to limit these freedoms. For example, freedom of speech does not extend to Holocaust denial, racial hatred, or discrimination.

As always, when it comes to fixing the limits, we struggle. What are the boundaries of the right to offend or to blaspheme? How far does the freedom to contest or deny go? What are the restrictions on the right to incite revolution?

The violent attacks on Charlie Hebdo earlier this year brought these questions to the forefront of our minds.

And while media censorship has all but disappeared in the Western world, new dangers have emerged.

Under the pressure of individual thought, social media outlets delete photos or words that are troublesome. Frightened away by the looming thought of weapons, attacks and murders, many people no longer dare to speak, or if they do it's with placating words.

This backbone of our society, which is freedom of speech, is in danger, is being questioned.

It is with these fundamental questions in mind that the CCBE invites us to think, and to honour World Human Rights Day, on 10 December 2015, for the second European Lawyers Day.

Let us continue the struggle,

Patrick Henry
Chair,
CCBE Human Rights Committee

BASIC INFORMATION

1. Purpose
2. Date
3. Participants
4. Theme
5. Activities
6. World Human Rights Day
7. Resources
8. Contact





Purpose

To establish a national day throughout Europe to celebrate the rule of law and the legal profession's intrinsic role in its defence, as well as lawyers' common values and contribution to the justice system.

Date

The first **European Lawyers Day** took place on **10 December 2014**, in conjunction with **World Human Rights Day** (see below). The second European Lawyers Day will similarly take place on 10 December 2015.

Participants

It is intended that European Lawyers Day programmes and activities will be organised by national and local bars, or any person or group working with a national or local bar (lawyer members, courts, law schools and students, youth groups, and community organisations) that would like to educate the public on the crucial role of the rule of law and the legal process in protecting citizens' rights.

Theme

An annual theme is chosen to illustrate how a specific aspect of law affects citizens and their rights. This year's theme is Freedom of Speech, and refers to all forms of expression. It is particularly important at a time of clashing liberties – the most obvious in this year of the Charlie Hebdo murders in Paris being between freedom of speech and the right not to be insulted or discriminated against. The background material will also examine lawyers' own freedom of speech, for instance in speaking about cases in which they are involved, or in being involved generally in civil society.

Activities

Each member bar and law society is requested to encourage its members to organise events, publish educational material and/or conduct other programmes that promote citizens' awareness of the European Lawyers Day theme.

World Human Rights Day

In 1950, the United Nations (UN) General Assembly declared 10 December as 'Human Rights Day' to bring attention to the Universal Declaration of Human Rights (UDHR) as the common standard of achievement for all people and nations. In the aftermath of World War II, the General Assembly's adoption and proclamation of the UDHR on 10 December 1948 marked the first global enunciation of human rights.



Resources

An event poster, press releases, relevant position papers, and other related online research resources will be available on the CCBE's website: www.ccbe.eu/lawyersday

Contact

Madeleine Kelleher and Karine Metayer of the CCBE are available for any questions or comments that you may have regarding European Lawyers Day. They can be reached at kelleher@ccbe.eu and metayer@ccbe.eu.

SUGGESTED TALKING POINTS

1. Freedom of speech - all citizens
2. Freedom of speech - lawyers
3. Basic texts





Freedom of speech – all citizens

General

Most people feel that speech should be as free as possible – it is often protected in countries' constitutions – but the famous example of shouting 'Fire!' in a crowded theatre unites nearly everyone in calling for some limits. Lawyers are on the front-line of those who patrol it. If someone feels that they have a case where it should be limited – they have been defamed, say – that person goes to a lawyer for an opinion, and it is for the lawyer to look at the line between what is and what is not allowed, and to decide in the first instance whether it is worthwhile mounting a claim. The lawyer will then argue the case in court, and appeal it if instructed. Lawyers are therefore primary guardians of freedom of speech. The basic texts for this freedom are set out below.

Citizens and lawyers

There is a sub-category of the general freedom of speech of all citizens, which is that all citizens should be free to speak to their lawyers without fear or interference. This freedom exists in all EU Member States, and usually goes under the title of professional secrecy. Professional secrecy means not only that the lawyer has a duty not to disclose any aspect of communications with clients, but that others – in particular the state – should not interfere with or have access to those communications. Concerns about mass surveillance of lawyer-client communications constituted the theme of European Lawyers Day 2014, but there are many other aspects to this interference – reporting of suspicious transactions in money laundering, for instance.

Freedom of speech – lawyers

There are various kinds of speech by lawyers which needs to be protected.

First, there is a distinction between what a lawyer can say in general, and what he or she can say on behalf of a client or about a case.

General

In general, lawyers are persecuted in many countries for speaking out about human rights or the rule of law. The CCBE and many national bars write letters, observe trials and intervene in other ways to protect lawyers who are persecuted for speaking or writing about general justice issues. A few recent instances of this persecution include:

- **In Angola:** Mr Bula Tempo is a human rights lawyer that has been detained since 14 March 2015 on account of his human rights work and reportedly charged with sedition in relation to organising a peaceful demonstration to denounce corruption and bad governance. According to the information received, his health conditions are fragile and deteriorating and he suffers from chronic arterial hypertension and needs constant treatment.

Follow up: On 13 May 2015, Mr Bula Tempo was conditionally released pending trial. As a condition for his release, he must not leave the country without authorization.

- **In the Maldives:** On the 4th of September 2015, Mahfooz Saeed was attacked and stabbed in the head by two unknown men. Despite the recording of three CCTV cameras at the time, we understand that no suspects have been arrested so far. The attack happened a week after the lawyer made a public speech at a political rally, where he criticised the government.



Mahfooz Saeed is also known for holding a blog where he regularly criticises the Maldivian judicial system and judiciary, the escalating crime rate and deterioration of the socioeconomic situation in the country.

- **In Kazakhstan:** Ermek Narymbaev was arrested on 20 August 2015 by the police, and sentenced to 20 days imprisonment in total for convening an illegal demonstration and for contempt of court. However, no demonstration had taken place and his arrest was in fact due to a statement which he had published on a social network page where he stated that he was planning to protest against the economic policy of the government.

Follow up: 10/09/2015: Ermek Narymbaev was released from the detention centre, after spending 20 days in prison.

- **In Turkey:** 22 human rights lawyers who were members of the 'Association of Progressive Jurists' (Cagdas Hukukcular Dernegi, 'CDH'). These lawyers, well known for their professional activities in the field of human rights in the defence of individuals' rights to freedom of speech and of victims of police violence, were arrested as part of simultaneous raids carried out in several Turkish cities on 18 January 2013. The raids were conducted under Turkish anti-terrorism laws and targeted alleged members of the armed 'Revolutionary People's Liberation Party/Front', which is listed as a terrorist group in Turkey. The arrested lawyers were accused of 'transferring instructions from organization leaders in prison to militants'. After having spent 14 months in detention these lawyers were listed for trial on 11 and 12 November 2014 before the 18th Penal Court in Istanbul. However the hearing was postponed. We understand that the judge of this court said that *'a lawyer that defends a terrorist damages the goodwill of the State'*. Furthermore, he went further to say that *'being the lawyer of a terrorist was just like participating in the administration of the terrorist organisation as well as doing propaganda for them'*. The trial was postponed until the 13 and 14 May 2015.

Lawyers and clients

On behalf of a client, there is a difference between what lawyers can say inside or outside of a court. The recent case before the European Court of Human Rights of *Morice v France* (see below in basic texts) described this aspect fully.



Basic texts

Basic texts for all citizens

- **Article 19, UN Universal Declaration of Human Rights**

Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

The full text can be found here: <http://www.ohchr.org/EN/UDHR/Pages/Language.aspx?LangID=eng>

- **Article 10, European Convention of Human Rights**

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

The full text can be found here: http://www.echr.coe.int/Documents/Convention_ENG.pdf

- **Article 22, UN Basic Principles on the Role of Lawyers**

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

The full text can be found here: <http://www.ohchr.org/EN/ProfessionalInterest/Pages/RoleOfLawyers.aspx>

- **Principle III.2, Recommendation Rec(2000)21 of the Committee of Ministers to member states on the freedom of exercise of the profession of lawyer**

Professional secrecy should be respected by lawyers in accordance with internal laws, regulations and professional standards. Any violation of this secrecy, without the consent of the client, should be subject to appropriate sanctions.

The full text can be found here: <https://wcd.coe.int/ViewDoc.jsp?id=378645&Site=COE>

- **ECJ decision on the AM&S case (155/79)**

Here is an extract of the European Court of Justice's decision on the AM&S case regarding Community Law and the protection of confidentiality. This highlights the recognition at EU level of the importance of professional secrecy.

b.18 Community law, which derives from not only the economic but also the legal interpenetration of the Member States, must take into account the principles and concepts common to the laws of those States concerning the observance of confidentiality, in particular, as regards certain



communications between lawyer and client. That confidentiality serves the requirements, the importance of which is recognized in all of the Member States, that any person must be able, without constraint, to consult a lawyer whose profession entails the giving of independent legal advice to all those in need of it.

The full text can be found here: <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:61979CJ0155&from=EN>

- **CCBE Code of Conduct for European Lawyers and CCBE Charter of Core Principles of the European Legal Profession**

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

2.3. Confidentiality

2.3.1. It is of the essence of a lawyer's function that the lawyer should be told by his or her client things which the client would not tell to others, and that the lawyer should be the recipient of other information on a basis of confidence.

Without the certainty of confidentiality there cannot be trust. Confidentiality is therefore a primary and fundamental right and duty of the lawyer.

The lawyer's obligation of confidentiality serves the interest of the administration of justice as well as the interest of the client. It is therefore entitled to special protection by the State.

2.3.2. A lawyer shall respect the confidentiality of all information that becomes known to the lawyer in the course of his or her professional activity.

2.3.3. The obligation of confidentiality is not limited in time.

2.3.4. A lawyer shall require his or her associates and staff and anyone engaged by him or her in the course of providing professional services to observe the same obligation of confidentiality.

The full text can be found here: http://www.ccbe.eu/fileadmin/user_upload/NTCdocument/EN_CCBE_CoCpdf1_1382973057.pdf

Basic texts for lawyers

- **Article 23 of the UN Principles on the Role of Lawyers**

23. Lawyers like other citizens are entitled to freedom of expression, belief, association and assembly. In particular, they shall have the right to take part in public discussion of matters concerning the law, the administration of justice and the promotion and protection of human rights and to join or form local, national or international organizations and attend their meetings, without suffering professional restrictions by reason of their lawful action or their membership in a lawful organization. In exercising these rights, lawyers shall always conduct themselves in accordance with the law and the recognized standards and ethics of the legal profession.

- **Principle 1.3, Recommendation Rec(2000)21 of the Committee of Ministers to member states on the freedom of exercise of the profession of lawyer**

Lawyers should enjoy freedom of belief, expression, movement, association and assembly, and, in particular, should have the right to take part in public discussions on matters concerning the law and the administration of justice and to suggest legislative reforms.



- **European Court of Human Rights, Case of *Morice v France* (Application no. 29369/10)**

(c) The status and freedom of expression of lawyers

132. The specific status of lawyers gives them a central position in the administration of justice as intermediaries between the public and the courts. They therefore play a key role in ensuring that the courts, whose mission is fundamental in a State based on the rule of law, enjoy public confidence (see *Schöpfer v. Switzerland*, 20 May 1998, §§ 29-30, Reports 1998-III; *Nikula v. Finland*, no. 31611/96, § 45, ECHR 2002-II; *Amihalachioaie v. Moldova*, no. 60115/00, § 27, ECHR 2004-III; *Kyprianou*, cited above, § 173; *André and Another v. France*, no. 18603/03, § 42, 24 July 2008; and *Mor*, cited above, § 42). However, for members of the public to have confidence in the administration of justice they must have confidence in the ability of the legal profession to provide effective representation (see *Kyprianou*, cited above, § 175).

133. That special role of lawyers, as independent professionals, in the administration of justice entails a number of duties, particularly with regard to their conduct (see *Van der Musselle v. Belgium*, 23 November 1983, Series A no. 70; *Casado Coca v. Spain*, 24 February 1994, § 46, Series A no. 285-A; *Steur v. the Netherlands*, no. 39657/98, § 38, ECHR 2003-XI; *Veraart v. the Netherlands*, no. 10807/04, § 51, 30 November 2006; and *Coutant v. France* (Dec.), no. 17155/03, 24 January 2008). Whilst they are subject to restrictions on their professional conduct, which must be discreet, honest and dignified, they also enjoy exclusive rights and privileges that may vary from one jurisdiction to another – among them, usually, a certain latitude regarding arguments used in court (see *Steur*, cited above).

134. Consequently, freedom of expression is applicable also to lawyers. It encompasses not only the substance of the ideas and information expressed but also the form in which they are conveyed (see *Foglia v Switzerland*, no. 35865/04, § 85, 13 December 2007). Lawyers are thus entitled, in particular, to comment in public on the administration of justice, provided that their criticism does not overstep certain bounds (see *Amihalachioaie*, cited above, §§ 27-28; *Foglia*, cited above, § 86; and *Mor*, cited above, § 43). Those bounds lie in the usual restrictions on the conduct of members of the Bar (see *Kyprianou*, cited above, § 173), as reflected in the ten basic principles enumerated by the CCBE for European lawyers, with their particular reference to “dignity”, “honour” and “integrity” and to “respect for ... the fair administration of justice” (see paragraph 58 above). Such rules contribute to the protection of the judiciary from gratuitous and unfounded attacks, which may be driven solely by a wish or strategy to ensure that the judicial debate is pursued in the media or to settle a score with the judges handling the particular case.

135. The question of freedom of expression is related to the independence of the legal profession, which is crucial for the effective functioning of the fair administration of justice (see *Sialkowska v. Poland*, no. 8932/05, § 111, 22 March 2007). It is only in exceptional cases that restriction – even by way of a lenient criminal penalty – of defence counsel’s freedom of expression can be accepted as necessary in a democratic society (see *Nikula*, cited above, § 55; *Kyprianou*, cited above, § 174; and *Mor*, cited above, § 44).

136. A distinction should, however, be drawn depending on whether the lawyer expresses himself in the courtroom or elsewhere.

137. As regards, firstly, the issue of “conduct in the courtroom”, since the lawyer’s freedom of expression may raise a question as to his client’s right to a fair trial, the principle of fairness thus also militates in favour of a free and even forceful exchange of argument between the parties (see *Nikula*, cited above, § 49, and *Steur*, cited above, § 37). Lawyers have the duty to “defend their clients’ interests zealously” (see *Nikula*, cited above, § 54), which means that they sometimes have to decide whether or not they should object to or complain about the conduct of the court (see *Kyprianou*, cited above, § 175). In addition, the Court takes into consideration the fact that the impugned remarks are not repeated outside the courtroom and it makes a distinction depending on the person concerned; thus, a prosecutor, who is a “party” to the proceedings,



has to “tolerate very considerable criticism by ... defence counsel”, even if some of the terms are inappropriate, provided they do not concern his general professional or other qualities (see *Nikula*, cited above, §§ 51-52; *Foglia*, cited above, § 95; and *Roland Dumas*, cited above, § 48).

138. Turning now to remarks made outside the courtroom, the Court reiterates that the defence of a client may be pursued by means of an appearance on the television news or a statement in the press, and through such channels the lawyer may inform the public about shortcomings that are likely to undermine pre-trial proceedings (see *Mor*, cited above, § 59). The Court takes the view, in this connection, that a lawyer cannot be held responsible for everything published in the form of an “interview”, in particular where the press has edited the statements and he or she has denied making certain remarks (see *Amihalachioaie*, cited above, § 37). In the above-cited *Foglia* case, it also found that lawyers could not justifiably be held responsible for the actions of the press (see *Foglia*, cited above, § 97). Similarly, where a case is widely covered in the media on account of the seriousness of the facts and the individuals likely to be implicated, a lawyer cannot be penalised for breaching the secrecy of the judicial investigation where he or she has merely made personal comments on information which is already known to the journalists and which they intend to report, with or without those comments. Nevertheless, when making public statements, a lawyer is not exempted from his duty of prudence in relation to the secrecy of a pending judicial investigation (see *Morice*, cited above, §§ 55 and 56).

139. Lawyers cannot, moreover, make remarks that are so serious that they overstep the permissible expression of comments without a sound factual basis (see *Karpetas*, cited above, § 78; see also *A v. Finland* (dec.), no. 44998/98, 8 January 2004), nor can they proffer insults (see *Coutant* (dec.), cited above). In the circumstances of the *Gouveia Gomes Fernandes and Freitas e Costa* case, the use of a tone that was not insulting but caustic, or even sarcastic, in remarks about judges was regarded as compatible with Article 10 (see *Gouveia Gomes Fernandes and Freitas e Costa*, cited above, § 48). The Court assesses remarks in their general context, in particular to ascertain whether they can be regarded as misleading or as a gratuitous personal attack (see *Ormanni v. Italy*, no. 30278/04, § 73, 17 July 2007, and *Gouveia Gomes Fernandes and Freitas e Costa*, cited above, § 51) and to ensure that the expressions used had a sufficiently close connection with the facts of the case (see *Feldek v. Slovakia*, no. 29032/95, § 86, ECHR 2001-VIII, and *Gouveia Gomes Fernandes and Freitas e Costa*, cited above).

The full text can be found here: <http://hudoc.echr.coe.int/eng?i=001-154265>

CCBE RESOURCES





There are a number of articles (in English) on this year's European Lawyers Day theme, contributed by our members. These can be found in the [annex](#) to this handbook.

In addition, we will continue to provide additional resources in the run up to the day. Please check our website regularly so that you may benefit from these resources.

Here is a brief summary of a rather amusing case from the Czechoslovak Republic from 1922, involving a famous lawyer-writer called Jaroslav Maria (which was his pen-name - his lawyer's name was Jaroslav Mayer).

Jaroslav Maria was disciplined by his bar for publishing a short story in a magazine in which he caricatured certain members of the disciplinary council of the bar, the same members who then went on to sanction him. He also made the hero of his story break his duty of confidentiality by blurting out the defendant's guilt to the court. It was found by the bar that he had offended the legal profession. There was an appeal to the Supreme Court.

It was the lawyer's pseudonym which saved him. The court found that art and the law have to be separated, that the constitution guaranteed freedom of art and the writer had never been involved in cases such as the one described in the story - and even if a lawyer writes disparagingly in a story about lawyers and the law, he is protected provided that he uses a pseudonym and does not breach the criminal law.

PUBLICISING YOUR EVENT





Publicising your European Lawyers Day events and activities is a key component of making them successful.

Here are some ideas to call attention to European Lawyers Day events:

Send Out Press Releases

The CCBE will be providing an official [European Lawyers Day poster](#) all of our members for their use and distribution.

Write Letters to the Editor

A brief, concise letter to the editor or a topical article is an excellent way to reach newspaper readers. You can use this space to discuss the European Lawyers Day theme or the importance of European Lawyers Day.

Submit Articles for Publication

See [European Lawyers Day website](#) for resources that member bars may use in their press coverage or communication of the event.

Address Local Groups

Contact the organizers of upcoming meetings of community groups (e.g., school boards) and ask to be allotted time on the agenda to briefly discuss European Lawyers Day. If this is not feasible, ask the organizer if he/she would be willing to make an announcement about your event if you provide him/her with the copy.

Use Social Media

Get the word out: Facebook, Twitter, and LinkedIn all provide excellent opportunities to advertise an event. For your Tweets, use the hashtag #freedomofspeech to give visibility among others looking for European Lawyers Day-related communications. Link to a page with more detailed information about your event.

Don't forget to notify the CCBE so that your event or activity can be posted on the [European Lawyers Day website](#).

ANNEX - ADDITIONAL DOCUMENTS

1. From Dr. Stanislav Balík, the Head of the Czech Delegation to the CCBE
2. From Dr. Antigoni Alexandropoulou, Lawyer member of the Piraeus Bar Association
3. From Mr. J.A.W.M. Vogels, Head of the Netherlands delegation to the CCBE
4. From Jędrzej Klatka, Head of the Polish Delegation to the CCBE





1. From Dr. Stanislav Balík, the Head of the Czech Delegation to the CCBE

Black sheep

The second year of the European Lawyers Day will take place in 10 December 2015 and this year's main topic will be freedom of speech. It is an issue which is highly topical, actually—as I am going to show in this article—constantly topical. A not yet overcome 1922 decision of the Supreme Court of the Czechoslovak Republic, which will be further addressed, was an assessment of facts which are now, among other things, part of literary history. Another interesting aspect is the fact that the protagonist was a writer-lawyer.

Based on a decision of the Supreme court of 9 September 1922 ref. no. Ds II 1/22, which was anonymised for the purposes of publication in the *Hlídka rozhodnutí* (Decision Watch) column of the magazine *Česká advokacie* (Czech Legal Profession), “*Dr. J. M. was found guilty of misdemeanour of violation of credit and esteem of the legal profession under § 10 of the Lawyers Code by publishing, under a pseudonym, a short story, in which he offended the legal profession.*” The short story was *Prašivá ovce* (Black sheep) published in magazine *Cesta* (The Road). The short story was basically an excerpt from the author's novel *Kyvadla věčnosti* (Pendula of Eternity). The lawyer-writer filed an appeal against the decision of the Disciplinary Council of the Bar Association in Bohemia, which was decided on, in accordance with the then applicable 1872 Code of Disciplinary Procedure, by the Supreme Court.

First, the Supreme Court dealt with the use of the pseudonym.

“If an author of a work uses a literary pseudonym, he or she shows that his or her person should remain secret for the general public and that the readership of the work and critics should not link its content with the author's civil profession and social status... [I]n assessing the work in question, it is necessary to exclude the person of the author as a member of a certain profession and social status and ... it is not acceptable to assess the composition of the work, description of characteristics of its heroes and its tendency from a single-sided point of the author's civil status and in terms of a special legal code applicable to this status. This would be contrary to the prevalent opinion of that time and freedom of artistic creation—and there is no doubt that writing of novels, which are a special field of imaginative literature, is artistic creation—as well as determination of the work for wide readership; it would also be contrary to freedom of art guaranteed by our Constitution and it would mean a substantial limitation of writing activities,” reads the decision justification.

Years later it seems amusing that the decision was anonymised for the publication in the Czech Legal Profession journal since everyone nowadays knows, based on the name of the novel, that the lawyer-writer was Jaroslav Mayer, writing under the pseudonym of Jaroslav Maria. However, in early 1920s “*evidence of identity of the author of the article and the novel with the person of the complainant has to be produced*” before the Disciplinary Council of the Bar Association.

The first-instance ruling was based on arguments that the author of the short story and the novel “*unprecedentedly defames and dispraises, by describing the person of Dr. Jindřich Hort in places quoted in the ruling, members of his (legal) profession not in an effort to uplift the honour and esteem of the profession and its moral level, which is in his view low, but to show he is better than others, to take vengeance on those who had harmed him, in his opinion, as members of the Disciplinary Council or otherwise.*”

The short story described disciplinary proceedings against lawyer Jindřich Hort, who breached the obligation of secrecy in an *ex officio* defence. When defending his client Petr Sýkora, accused of rape, Hort stated before the court:



“I declare that he admitted he was the offender. I have long been struggling and cringing behind the wall of duties. But the wall has suddenly collapsed and I can see that law would die if I remained silent, and therefore I will sacrifice myself. Everyone can think about me what they want but I repeat that Sýkora admitted he had raped Mrs. Zárubová, I am convinced of his guilt and it would therefore be impertinent for me as the defending counsel to stay here even for a moment.”

The Supreme Court came to the conclusion in Maria’s case that *“[i]n impartial reading of the novel, no safe base can be found, under any circumstances, for judgment that the author intended, by describing the person of lawyer Dr. Jindřich Hort, to put himself in the robe of the hero. Such judgment would necessarily require—although it could perhaps be supposed that at least a certain part of readership is knowledgeable about the author’s civil occupation—knowledge of the manner he practices the profession, in particular when practice of this occupation is in contrast to statutory obligations, in the case he has been already punished for guilt against the obligations of his profession as well as knowledge of his life as such. It is obvious that such knowledge of situation is out of the question in the readership, including readers who are members of the appellant’s profession.”* Moreover, the Supreme Court did not find the case described in the novel to be similar to any case in the writer’s legal practice.

“However, the appealed ruling is also contrary to freedom of art guaranteed by the Constitution. According to § 118 of the Constitutional Charter of the Czechoslovak Republic of 29 October, No. 121 of the Collection of Laws and Ordinances, art is free unless it violates criminal law. It has already been noted above that writing of novels, which are a supreme type of fiction writing, belongs to artistic creation and it must be at least on par with works of art. In choosing the matter for their work of poetry and description of persons, writers are therefore limited in their sovereignty and freedom only by the fact they must not be in conflict with criminal law. The appealed ruling does not state that the appellant has violated criminal law in this case, and the ruling is therefore, also from this point of view, erroneous,” concluded the Supreme Court, which fully accommodated the appeal. The recital of law in the statement of the decision reads:

“It is not a misdemeanour against the credit and esteem of the profession, although the lawyer dispraises, in his literary work, the legal profession and its members, if the author has done so under a pseudonym and has not violated criminal law.”

Whereas the novel hero Jindřich Hort was found guilty and sentenced to a monetary fine of CZK 1,000, the writer escaped without punishment.

It would seem that a case which assumed a constitutional-law importance and made not only the protagonists read Maria’s novel, is closed by the quoted decision. But not quite, because it can be inferred from reading the novel why the proceedings were initiated in the first place and for what reason they ended before the Disciplinary Council with a non-definitive conviction of the lawyer-writer.

Jaroslav Maria knew the environment in which the proceedings took place very well. *“The hall in which the Bar Disciplinary Court meets in session is a large airy room in an ancient Prague palace on the corner of a main street. A long, oval table in the middle of a smoothly polished room, surrounded by tall, Gothic seats; bookcases by the walls.”* It should be noted that the bookcases by the walls are still there and the seats were replaced only recently.

However, the writer also knew in person the members of the Disciplinary Council. His opinion on some was undoubtedly rather positive, on others highly contemptuous.

“The President of Court, lawyer Motýl. An elderly short man, stocky, with black thick massive moustache, red in the face, glasses with a thick twine on his eyes, with white, thick hair divided into halves by a parting in the middle.” Lawyer Motýl was in fact Karel Motejl, grandfather of the first Czech ombudsman Otakar Motejl. *“Motýl was an avid musician but what he liked most was*



singing in a choir. He also enjoyed singing a song in a pub among his friends,” Maria writes and adds, in another place, that in Hort’s case Motýl interceded for a lighter sentence and told the convicted lawyer that his act *“at least had an idea”*.

“[R]apporteur, lawyer Pavel Valentin Kusý, skinny, pale, lank, beardless man, fair haired, ugly, starkly looking in front of him. This person, suffering from a lung disease, coughing and sweating, married a daughter of an outstanding statesman, an blossom-losing spinster, who only out of emergency married an unpleasant, empty, obstinate lawyer whose only aim in life was to acquire profitable bank clientele and heap up riches. These efforts were successful under the father-in-law’s patronage and the office was among those most profitable in Prague,” the writer presented another member of the Disciplinary Council, in whom the contemporary lawyers easily recognized a lawyer with real name Petr Celestýn Nesý.

Does anyone wonder that the Maria’s case had to go as far as to the Supreme Court?

As often also in other cases related to freedom of speech, the trigger in this one was a lack of sense of humour...

JUDr. PhD. Stanislav Balík



2. From Dr. Antigoni Alexandropoulou, Lawyer member of the Piraeus Bar Association

Lawyers' Freedom Of Speech: Greece

Lawyers in Greece enjoy the freedom of speech and local Bar Associations are very active in their role to protect the core values and rights of the legal profession. There are only a few known cases where a lawyer alleged violation of his/her freedom of speech and only in one known case the court has decided in favour of the plaintiff. The majority of these cases related to criticism of the judiciary by lawyers during judicial proceedings (inside and outside of the courtroom) and only one case related to a disciplinary decision by the Bar Association. There are no known cases of any attempt either by the government or by any other public authority to interfere with the lawyers' freedom of speech.

In this article we will present the general national legislation on the freedom of speech and the special legal provisions regulating the legal profession. We will then present the case law of the European Court of Human Rights and the national Courts related to Greek lawyers; we will refer to some cases of lawyers' prosecution by the judiciary that have been made public in the press because they provoked the reaction of the Bar Associations and we will conclude with a discussion that was raised on the occasion of the recent referendum in Greece.

A. NATIONAL LEGISLATION

I. Greek Constitution

Freedom of speech is protected under art. 14 of the Greek Constitution on "freedom of expression". According to par. 1 *"Every person may express and propagate his thoughts verbally, in writing and through the press in compliance with the laws of the State"*. This right is subject to the general restrictions that the law imposes to all citizens for the protection of the personality or the general public interest as well as to other special restrictions that could be justified by the nature of one's profession¹. The justification behind the constitutional protection of freedom of speech is that such a freedom is beneficial to the development of a democratic society and that it is essential to effectively establish equal treatment of all citizens. Restrictions of the freedom of speech are likely to result to a situation where it will be possible to address and support some ideas, while it will not be possible to support some other ideas. This will effectively result to unequal treatment of citizens, since some citizens will be able to promote their beliefs, while others will not. Moreover, it is generally believed that exchange and promotion of ideas usually makes more benefit than harm to social welfare and is a necessary step towards progress. From this point of view, in dubious cases freedom of speech should prevail. In applying freedom of speech to particular cases, usually two fundamental distinctions are made depending on: (a) whether the issue in question is one of strong public interest or not and (b) whether the type of speech in question is one expressing an evaluation or an ideal, or one referring to facts (in this latter case, speech may be defamatory, if the facts are misstated). In cases where there is an evident public interest, freedom of speech is broader. In addition, freedom of speech is again broader, in cases where the type of speech is one that does not address particular facts, but instead expounds a personal evaluation or an ideal. In cases with a genuine public interest, there will be an abuse of freedom of speech, only if defamatory intent (bad faith) or gross negligence can be established; in the absence of such intent or gross negligence, freedom of speech should prevail, as it is such freedom of speech that better promotes public exchange of ideas and social control by public opinion.

The Greek law does not provide a special provision for the protection of the lawyers' freedom of speech and therefore art. 14 par. 1 applies as a general rule. However the Code of Conduct

¹ Administrative Court of Appeal of Athens, decision no. 2006/2012.



of Lawyers and the Code of Ethics of Lawyers praise the special nature of the legal profession and dictate additional rights to lawyers as well as duties, obligations and restrictions that do not necessarily apply to other professions or categories of people.

II. Special national provisions regulating the legal profession

Law 4194/2013 known as the Lawyers' Code ("LC") is the main legal text that regulates the legal profession². Art. 41 LC expressly provides that supplementary to LC the Greek Code of Ethics of the Legal Profession ("CELP")³ and the Charter of Core Principles of the European Legal Profession and the Code of Conduct for European Lawyers issued by the CCBE also apply. The Lawyers' Code entails several provisions that could be considered as restrictions to the lawyers' freedom of speech while other provisions of the same legal text reinforce the lawyer's role as a public officer

1. The lawyer as a public officer

According to the Lawyers' Code and the Greek Code of Ethics of the Legal Profession, the legal profession constitutes a keystone to the rule of law (art. 1 par. 1 LC). The lawyer is considered to be an unsalaried officer of the court (art. 1 par. 1 LC) and one of the three main agents in the operation and administration of justice (judges, lawyers, judicial clerks) (preamble and art. 1 par. 1 CELP; see also art. 2 LC). Therefore the lawyer in his/her dual capacity as a representative of his/her client and as a public officer (s)he not only enjoys the right to freedom of speech but in certain occasions provided by law this right could amount to a duty of the lawyer to express his/her opinion and to protect the rule of law.

This importance of the lawyer's free speech and his/her role in the judicial system is underlined in the CELP which expressly recognizes that the proper administration of justice requires the proper administration of the rule of law; the lawyer should therefore fight to protect the rule of law and in particular fight for freedom, democracy, peace and social justice; (s)he must defend with courage and self-sacrifice the constitution and the democratic institutions, the individual, political and social rights of the citizens; fight against any kind of violation of constitutional freedoms and against illegality; defend the independence of Justice (art. 2 CELP). The lawyer should not only be deduced to his/her legal profession but (s)he should show interest for the problems of the country, offer his/her knowledge and services for the promotion of the country and exercise his/her profession in a way valuable to the individuals and to the community (art. 3 par. 1 CELP). Therefore lawyers, as public officers, are obliged to actively promote public interest, and freedom of speech is an integral part thereof. The obligation to promote public interest and, hence, freedom of speech is stronger in cases where there is a genuine interest for public opinion. In promoting public interest and freedom of speech lawyers are both exercising a civil liberty and discharge a legal obligation. Therefore it could be argued that Greek Lawyers are not merely intermediaries between the public and the courts as stated in the case law of ECtHR⁴ but moreover have the duty to serve a higher purpose in the judicial system and society at large.

Further lawyers enjoy complete freedom during the exercise of his/her duties, and the Courts and the Authorities must show him/her respect (art. 4 par. 2 CELP; art. 34 par. 1 LC). In applying freedom of speech to lawyers, another special characteristic is the adversarial type of the judicial proceedings to which lawyers are part. Judicial proceedings are of a forensic and adversarial nature. This means that there is a process of argument and counterargument, where each lawyer is obliged to actively promote the best interests of his/her client. The forensic and adversarial nature of the proceedings would be invalidated without a broad freedom of speech. Moreover, lawyers are not deemed to be independent in this process; instead, they are obliged

² According to Greek Law it is compulsory in order to become a lawyer ("dikigoros") to register to a Greek Bar Association. Therefore all Greek Lawyers are subject to the LC.

³ As voted by the Athens Bar Association on 04.01.1980 and published in the Legal Journal Nomiko Vima, issue of 1986.

⁴ Indicatively: *Morice v. France*, decision of 24.04.15 (appl. no. 28198/09), par. 132 – 133; *Schöpfer v. Switzerland*, decision of 20.05.98, par. 29-30.



to represent clients to whom they owe loyalty and fiduciary duties. Hence, to make this forensic nature efficient, lawyers should enjoy a broader freedom of speech to be able to effectively support clients' interests. From this point of view, lawyers deserve a more favourable treatment than ordinary citizens with respect to freedom of speech, due to their special duties and role. The lawyer's right to the freedom of speech as a defence lawyer during criminal proceedings is further reinforced by several articles of the Greek Code of Criminal Procedure which provide that a lawyer cannot be arrested during a court hearing before (s) he completes his/her duties as a counsellor while in case of a felony, lawyers are judged before a higher court than other citizens. It is essential for a fair trial that the lawyer defend the rights of his/her client freely, undisturbed and in an effective manner and not be undermined by the bench or any other authority⁵.

2. Limitations of the Lawyer's freedom of speech

The lawyer's freedom of speech is restricted by certain provisions of the Lawyers' Code and the Greek Code of Ethics of the Legal Profession.

a) According to the LC and the CELP the lawyer must act with "dignity" inside and outside the courtroom, according to the "traditions of the legal profession" and with "respect" towards the judiciary. Therefore his/her freedom of expression must stay within these boundaries and is more restrained than the freedom of speech of ordinary citizens. In particular:

Although the lawyer has the obligation to act according to his/her conscience and the law like any other lay-man, (s)he must moreover act with dignity and according to the traditions of the legal profession both when (s)he acts in his/her professional capacity and in his/her private life (art. 5 CELP). The lawyers' obligation to respect the judges, the public prosecutors, the officials of the court and the representatives of the public authorities and to act towards them with dignity is repeated in several other provisions (s. art. 35 par. 1 LC; art. 28 and 31 CELP). Any undignified behaviour is prohibited including flattery towards judges and judicial officers with the purpose to achieve favourable treatment (art. 31 CELP).

Vice versa the judiciary officials and the judicial clerks have the same obligation of respect towards the lawyers (art. 35 par. 1 LC; art. 28 CELP). The Bar Association examines any violation of this obligation. In the event that a lawyer has violated this obligation the Bar Association may decide to impose sanctions on the lawyer. In the event that the violation occurred by a judge, public prosecutor or judicial officer, the Bar Association requests from their superiors to impose on them sanctions. In the event that their superiors do not impose any sanctions against them, the Bar Association may publicly criticize the offense or the fact that no sanctions were imposed (art. 28 CELP).

Greek courts have not yet ruled as to the definitions of the notions of "dignity", "respect" and "traditions of the legal profession". It is however understood that the purpose for these boundaries to the lawyer's freedom of expression, is to prevent unfounded attacks and excessive behaviour by lawyers towards judges and prosecutors for example as part of their defence strategy or retaliation for a prior case that the same judge has handled.

b) Restrictions to the lawyers' freedom of speech can also be found in procedural provisions. Art. 29 CELP provides that lawyers acting in court proceedings enjoy absolute freedom of opinion however within the framework of the relevant procedural rules. In case the lawyer's rights are in any way restricted during a trial, the lawyer has the duty to defend the authority of the legal profession, to exercise the rights that the law provides him/her and to report the case to the Bar Association (art. 29 CELP).

c) Speech limitations may also be found in the provisions of LC and CELP regarding lawyers' speech to the press, lawyers' advertising and lawyers' solicitation. The lawyer is not allowed to

⁵ ECtHR Decision of 21.03.2002, *Nikula v. Finland* (appl. no. 31611/96) par. 49 and 53. See also: ECtHR *Kyprianou v. Cyprus*, decision of 15.12.2005 (appl. no. 7379/01); *Panovits v. Cyprus*, decision of 11.12.2009 (appl. no. 4268/04).



advertise him-/herself in the papers or other mass media, or with letters or any other kind of documents (art. 9 par. 1 CELP). (S)he is not allowed to try to acquire clients with actions that are not compatible with the dignity of the legal profession (art. 10 (a) CELP).

d) The lawyers' freedom of speech is also restricted by his duty to professional secrecy towards his client (art. 38 LC). This duty is reinforced by his/her obligation to refuse to testify against the client regarding any knowledge (s)he acquired acting on his behalf (art. 39 art. 5 LC).

B. CASE LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS ON ART. 10 ECHR RELATED TO GREEK LAWYERS

The European Court of Human Rights ("ECtHR") had the opportunity to try three cases where a Greek Lawyer's right to the freedom of expression was allegedly violated pursuant art. 10 of the European Convention on Human Rights ("ECHR"). In the case *Alfantakis v. Greece*⁶ ECtHR found a violation of the freedom of expression while in the cases *Sagropoulos v. Greece*⁷ and *Karpetas v. Greece*⁸ ECtHR rejected the applications. In particular:

I. *Alfantakis vs. Greece*

The case concerned a Greek lawyer who during a live television interview stated that when he read the public prosecutor's report about his client's case he "*laughed*" and argued that the report did not constitute an actual proposal by the prosecutor but rather a "*literary opinion*" which did not take under consideration the facts but rather showed contempt for his client. Following this statement the public prosecutor filed a civil lawsuit against the lawyer on the legal ground of defamation and requested an award for moral damages. The national court awarded the prosecutor an amount of 11.738,81 euros. The lawyer filed an application to the ECtHR on the ground that the national court's decision violated his freedom of expression as guaranteed by art. 10 ECHR. The ECtHR ruled in favour of the applicant with the following arguments: The Greek court had based its judgment solely on the applicant's public statement on television "*I laughed when I read the report*" and "*literary opinion*". In that way the Court interpreted the phrase subjectively and attributed to it a meaning that might have never been the intention of the applicant. Further it did not distinguish between statements of fact and value judgments. It only evaluated the impact of the phrases "*I laughed when I read it*" and "*literary opinion*" and whether they could constitute an insult to the dignity and honour of the public prosecutor. In that way the court deprived the applicant from the opportunity to demonstrate that these phrases by nature were not susceptible of proof⁹. In addition the Greek Court saw the critical nature of these phrases completely out of context and did not take under consideration that the case had already been made public in the media due to the popularity of the applicant's client who was a famous actor and due to the fact that the actor's wife (and opponent in the proceedings) had previously participated in TV shows and made comments publicly regarding the case. Therefore the participation of the applicant in the TV newscast resulted from the applicant's desire to defend his client rather than the intention to insult the public prosecutor. Further the court did not take into consideration that the statement had been made during a live broadcast and not in a videotaped interview, so the applicant did not have the opportunity to request from the TV-station to delete his statement or to rephrase it. Therefore ECtHR ruled that the national authorities did not give sufficient and adequate reasoning to justify their interference with the applicant's free speech and thus their decision was not justified by a pressing social need as requested by art. 10 par. 2¹⁰.

II.

6 Application no. 49330/07, date of court decision: 11.02.2010.

7 Application no. 61894/08, date of court decision 03.05.2012.

8 Application no. 6086/10, date of court decision 30.10.2012.

9 See also ECtHR, *Feldek v. Slovakia*, decision of 12.07.2001, (application no. 29032/95) par. 75-76.

10 For a commentary on this decision see Sotiropoulos, Journal on Mass Media and Information Law (Dikaio Meson Enimerosi kai Epikinonias) 2010, 438.



III. Sagropoulos vs. Greece

The applicant was a lawyer and a member of the Bar Association of Athens. D.F. had filed a criminal suit against the applicant on 21.07.2000 for defamation against him. The applicant was the lawyer of A.P. who was in litigation with D.F. In his capacity as A.P.'s lawyer the applicant drafted and signed a letter addressed to D.P., who was assigned by the court with the task to conduct a graphological report on a document related to the litigation between A.P. and D.F. In the letter the applicant wrote *“These invalid and unsustainable court decisions (...) that ruled in favour of D.F. under highly ambiguous procedures, D.F. is showing them off with a justified arrogance since he succeeded for a thousand time to deceive the courts, and refers to them in every occasion (...). Since D.F. has methodically looted the Greek and foreign market by taking in possession illegal gains in the amount of 1.000.000 drachmas (1989), he did not foresee in his plan which was to drain [out of their money] his creditors, to falsify the signature so that when the time would come he could deny the originality of the signature, when his naïve victims would try to succeed the recognition of their claims with litigation proceedings (...) With this kind of craziness without precedence, D.F. managed to deceive the court (...).”*

The Greek Supreme Court upheld the decision of the Court of Appeal and rejected the argument of the applicant that his freedom of expression had been violated. The court argued that the applicant had offended the honour and the reputation of D.F. by repeating facts he knew did not correspond to reality. The applicant acting in his professional capacity should have restricted his letter to the object of the graphological report, which referred to the question of whether or not the signature of D.F. on the checks and invoices at issue had been falsified. He should have further fulfilled his duty towards his client and show dignity and moderation in the expressions he had used. His letter to D.P. was not aimed at informing him about the case but to defame D.F. instead and was not justified by any need to defend his client. The court found the applicant guilty of defamation and gave him a sentence of seven months with probation.

ECtHR taking under consideration the content of the letter, the fact that the applicant was a lawyer and the moderate penalty, ruled that the Greek Court's decision was proportionate and adequately justified.

IV. Karpetas v. Greece

The applicant was a lawyer and defended a client in civil proceedings. Two relatives of his client's opponent entered his office, beat him and shot his leg. The prosecutor pressed charges against them for blackmail, premeditated injury, carrying and using of arms. When one of them was arrested and brought before the investigating judge, the latter agreed with the prosecutor's proposal and decided to release him from custody ordering him to pay a bail in the amount of 587 euros, although there were already eight known pending arrest warrants against him for other felonies. The applicant who was present in the judge's office reacted by saying: *“How is it possible? Are you serious?”* and then insinuated that the investigating judge and the prosecutor had been bribed by the accused. The applicant made the same insinuation during the court proceedings he initiated against the prosecutor and the judge as well as through the press. Additionally he filed a penal lawsuit against each one of them; he also filed a lawsuit for mistrial against their decision to release the accused. All lawsuits however were rejected by the Greek Courts. On the other hand both the prosecutor and the judge also filed a lawsuit against the applicant. The court ordered the applicant to pay the prosecutor the amount of 15.000 euros as moral damages due to defamation against him¹¹. The lawyer filed an application with the ECtHR and argued inter alia a violation of Article 10 ECHR. The ECtHR rejected his application. In its decision the court distinguished between the insinuations the applicant made in the judge's office which were only heard by the judge, the prosecutor and the applicant himself, and the insinuations he made through the press which were made public to a lot of other people. According to the court these statements were excessive and constituted defamation against the judge and the public prosecutor. Although the court noted his frustration due to the fact

11 The judge's lawsuit against the applicant was at the time still pending.



he had been assaulted and that the accused had been released by paying a very low amount of money as a guarantee, however this was not evidence enough to substantiate the applicant's insinuations for which he failed to produce any evidence at all. Therefore the restriction of the applicant's freedom of speech was justified by art. 10 par. 2 ECHR. The amount of 15.000 euros that the Greek court had adjudicated to the applicant was according to ECtHR very high but not unreasonable.

C. CASES OF NATIONAL COURTS

I. Freedom of speech and the Lawyers' Code of Conduct

A lawyer of the Athens Bar Association had been condemned by the Disciplinary Committee of the Bar to a two-month suspension of his right to exercise his profession due to a prior behaviour that was considered to be against the Code of the Legal Profession and the Code of Ethics of Lawyers. The lawyer had appeared on a TV show in the presence of his client's opponents but without his client, presented and argued the pending case during the show. The lawyer had according to the Disciplinary Committee appeared and participated to the TV show and turned a pending court case into a TV-hearing. He did that with the intention to promote himself and to acquire in that way new clients. The above actions were against art. 9 and 10 CELP that prohibited the lawyers' solicitation of clients and lawyers' advertising and constituted undignified behaviour that degraded the legal profession (former art. 45 par. 1 LC now art. 34 par. 1). The Committee ordered as a disciplinary punishment a two-month suspension of his professional license. The lawyer filed an appeal with the Supreme Disciplinary Committee which reduced his sentence to a one-month suspension.

The lawyer applied for the annulment of this decision before the Council of State with the argument that his appearance on the TV show was the exercise of his right to the freedom of expression guaranteed by art. 14 of the Greek Constitution and art. 10 of the ECHR, and that none of the public goods protected under art. 10 par. 2 of the ECHR and art. 10 CELP had been violated. The Council of State rejected this argument¹². One judge however argued in favour of the annulment of the Supreme Disciplinary Committee's decision because he considered that the Committee should have examined first whether or not the appearance of the lawyer was an exercise of his right of freedom of expression and if it constituted a behaviour that justified disciplinary action against him in order to protect a public purpose¹³. Also it should have justified in its decision why –in view of the lawyer's legitimate interest to defend his client's rights- his appearance in the TV show was in the particular case excessive and justified disciplinary action against him.

II. Freedom of speech in national courts and criticism of the judiciary

There have been several cases reported where lawyers were prosecuted for criticizing the judiciary during a court hearing. The Bar Associations have made public statements in the defence of these lawyers which have been reproduced through the press¹⁴. In all cases that we mention below the lawyers involved did not file a complaint based on a violation of their freedom to speech. However, they have been threatened with a punishment for reacting to a decision of the judiciary while they were acting in their capacity as counsels to their client in a courtroom.

¹² Decision no. 2577/2014 of the Council of State.

¹³ According to ECtHR case law in *Mor v. France* decision of 15.12.11 (appl. no. [28198/09](#)), par. 59 and *Alfantakis v. Greece*, decision of 11.02.10 (appl. no. [49330/07](#)), par. 33 a lawyer may make comments to the press about a case (s)he is handling when it serves the defense of the client.

¹⁴ Unfortunately it has not been possible to locate all these decisions due to the fact that they have not been published in a legal database or a legal journal and there has not been any follow up statement by the Bar Associations or the Press. Therefore the information is largely based on the relevant statements made publicly by the Bar Associations and articles in the Press.



1. Criminal charges against four lawyers in Thessaloniki during court proceedings

In 20 March 2008 the plenary of the Bar Associations had announced a Pan-Hellenic abstention of lawyers from their duties. Four lawyers who had a court hearing on that day, requested from the court to postpone the hearing on the ground that they had to respect the Bar's decision and abstain from their duties. The President of the court rejected their request. When the lawyers complained about the rejection of their request the court pressed charges against them on the ground of alleged disturbance of the court hearing. The case caused the reaction of the Bar Associations¹⁵.

2. Criminal charges against two lawyers in Ioannina during court proceedings¹⁶

During a criminal hearing on 07.11.2013 the deputy public prosecutor in the court of Ioannina took action against two lawyers because one of them expressed his value judgment with respect to an intervention made by the deputy state's attorney during the plea of the accused and the other one expressed his value judgment on the deputy state's attorney proposal on the punishment of the accused. The deputy state's attorney requested the detention of one of the lawyers and pressed charges against the other which caused the reactions of the Bar Associations who condemned this decision¹⁷.

3. Official complaint by the Athens bar Association against two judges

In July 2014 during criminal proceedings before the Three-member Appellate Court for Felonies the defence lawyer requested the postponement of the hearing because the Plenary of the Bar Associations had decided prior to the hearing that lawyers abstain from their duties. The court rejected the lawyer's request and ordered that he leaves the court room escorted by policemen. Further it ordered the appointment of a new lawyer from the list of public defendants. The latter also refused to participate to the hearing due to the prior decision of the Bar for abstention. The court pressed charges against these lawyers because they refused to conform to the court's decision about their appointment and undertake the case¹⁸.

On another occasion in 26.09.2014 before the One-member First Instance Court of Athens the lawyers participating at the hearing requested from the president of the court that she postpones the hearing due to the fact that the previous lawyer who was handling the case had suddenly passed away. The judge refused the request and asked the assistance of the police in order to proceed with the hearing. The lawyers finally decided not to participate in the hearing and the hearing was cancelled¹⁹.

It must be noted that the above mentioned cases are some rare examples of excessive conflict between the judiciary and lawyers who otherwise enjoy mutual respect in and outside of the courtroom.

15 Statement of the Bar Association of Zakynthos of No. 35/12-3-2013, http://legalnews24.blogspot.co.at/2013/03/blog-post_6836.html#more. We have been orally informed by members of the local Bar Association that the trial took place on 14.03.2013 before the Court of Appeal for Misdemeanours and the lawyers were acquitted because the constituent elements (objective and subjective) of the court hearing's disturbance were not proven.

16 Press release of the Athens Bar Association of 07.11.2013, <http://www.dsa.gr>. Press release of the Bar Association of Kos of 07.11.2013, <http://www.dsko.gr/dskoportal/nea-kai-anakoinoseis/olta-ta-arthra/236-anakoinosi-gia-apoxi-tou-d-s-zakynthou>.

17 We have been orally informed by a member of the local Bar Association that the cases did not finally go to court.

18 Statements of the Athens Bar Association of 15.07.2014 and 24.07.2015, <http://www.lawnet.gr/news/dsa-anakoinosi-diamarturia-1572014-33070.html>. Response to the Bar Association's statement by the Association of Judges and Prosecutors no. 100/25.07.2014, http://dikastis.blogspot.co.at/2014/07/blog-post_25.html. Counter-response of the Athens Bar Association dated 30.07.2014, www.dsa.gr. We have no information about the outcome of these prosecutions.

19 Statement of the Athens Bar Association of 13.11.2014: www.dsa.gr.



D. FREEDOM OF SPEECH AND THE OBLIGATION TO PROTECT THE RULE OF LAW V. PROFESSIONAL DUTY OF IMPARTIALITY DURING A REFERENDUM

The recent referendum that took place in Greece on the 5th of July 2015 gave rise to a new discussion on the freedom of speech for lawyers. In particular some Bar Associations²⁰ issued statements pursuant to which they publicly questioned the legality of the particular referendum and requested the government to send them the official documents to which the question of the referendum was referring, in order to assess the actual meaning of the question put to the vote of the Greek Public. On the other hand another Bar Association²¹ stated that they would not make any statement regarding the referendum because they considered that the task of the lawyers at that point was to assure the integrity of the voting procedure and to refrain from any political statements that could influence the voters. It should be noted that according to Greek Law, Greek lawyers are among those professionals who are responsible to conduct the voting procedure and the counting of the votes during elections. They are considered during the elections as judicial officers and they even enjoy powers of an investigating judge. These enhanced judicial powers are exceptional and begin with the lawyer's appointment two days prior to the elections. The same applies during a referendum. As judicial officers the lawyers have therefore the obligation to ensure the integrity and the transparency of the voting procedure and to remain impartial.

Therefore the main issue of the discussion was whether or not in view of the upcoming referendum Bar Associations who according to the LC have the duty to protect the rule of law, had the right to publicly express their professional opinion about the legality of the referendum or furthermore even their own beliefs about what they thought the choice of the voters should be or whether this would undermine their role and the confidence of the public towards them as guarantors of the integrity of the voting procedure during this referendum. Was their right to the freedom of speech reinforced by their duty to act as protectors of the rule of law or was it in fact restricted by their obligation to act objectively as guarantors of the voting procedure?

Before answering this question we should first present the special role that the Law awards to the Bar Associations. According to art. 90 LC the Greek Bar Associations have the following duties and obligations: To protect the principles and regulations of the rule of law in a democratic society; to ensure the proper administration and the independence of justice; to make sure that lawyers act with dignity and that they are treated with respect and honour by the judiciary and any other authority when they act in their professional capacity; to express opinions and proposals for the improvement of the legislation, its interpretation and its application. In this context the Bar Associations are considered to be counsels of the state and their participation in legislative preparatory committees is compulsory. They also have the duty and the obligation to express opinions and proposals for the improvement of the function and the administration of justice; they can submit any legal instrument before any court and any authority for the defence of any issue of national, social, cultural, financial interest, irrespective of whether it is of the interest of the legal profession or not. They also cooperate with other scientific and professional bodies for subjects of mutual or of general interest.

From all the above it can be concluded that the Bar Associations play a crucial role in the protection of the rule of law and it is not only their right but moreover their duty and obligation to express their opinion as professional organizations when they consider it necessary within this context. Therefore Bar Associations and individual lawyers as well have not only the right to free speech but also an obligation to express their professional opinion publicly when they consider that the legality of the referendum procedure is questionable. Their freedom of speech however should be restricted to the necessary actions that will enable them to fulfil their duties and obligations as described in the law. Therefore any statement should be addressed in a professional manner, aim to present the legal aspects of the issue at stake and should not reflect personal political beliefs and ambitions –especially in a time immediate before any elections or referendum-

20 Statement of the Athens Bar Association of 30.06.2015: www.dsa.gr. Statement of the Lamia Bar Association of 01.07.2015: <http://www.lawnet.gr/news/cifisma-ds-lamias-gia-to-dimocifisma-tis-5is-iouliou-2015-34981.html>.

21 Statement of the Piraeus Bar Association of 01.07.2015: www.dspeir.gr.



that could be perceived as an attempt to influence the voters' decision and therefore could undermine the authority of the legal profession. This obligation however results from art. 90 as described above and not from any obligations from the Law on the Elections. The role of the Bar Associations and the lawyers in general before the elections should be distinguished from the role of these lawyers who are appointed as electioneering officers. From the time of their appointment and for the purposes of the elections or of a referendum these lawyers' freedom of speech is restricted and should only be limited to their tasks during the voting procedure as prescribed by the law and not extend to comments beyond this procedure i.e. the legality of a referendum notice prior to their appointment as electioneering officers.

E. CONCLUSION

The Greek lawyer plays a core role in the legal system and the society. (S)he is not only the legal representative of his/her client but also a public officer with the duty to defend the rule of law. The particularity of the Greek Law is that it attributes moreover to lawyers and Bar Associations a public duty towards society. It has elevated the lawyer from his/her role as the defender of his/her client and the Bar Association from its role as a professional body to protectors of the rule of law and society at large. It can only be concluded that such responsibility can be exercised only when lawyers and Bar Associations enjoy a broader freedom of speech. This freedom should not be limited to cases when lawyers act in or outside the courtroom as counsels of their client but should moreover extend to those instances where lawyers express their opinion even outside any judicial proceedings.



3. From Mr. J.A.W.M. Vogels, Head of the Netherlands delegation to the CCBE

There is no such thing as Freedom

'Now you think you have freedom? You will find that there is no such thing as freedom without personal responsibility and the rule of law'

(Margaret Thatcher visiting Middle-/East-Europe just after the 1989 velvet revolutions)

This quote reflects quite essentially the cornerstones of the right to freedom of speech in the current Dutch perspective. Freedom of speech is a fundamental right incorporated in the Dutch constitution. Would this freedom however exist at all if not defined by any limits? And, given the reality of, or even the need for limitations, which authority should judge the application of the responsibility by individuals, personal or more abstract, and according to which criteria?

It is evident that an unlimited or absolute freedom of speech is utopic, or even unthinkable, but one anecdote about the celebrated revolutionary dimension of the freedom of speech in modern Dutch history, should not be held back here.

At the 2011 'bicentenaire' in Brussels - the Brussels' lawyers celebrating 200 years of regulated legal profession in Belgium – the French-speaking Brussels' Bar President gave an eloquent speech, explaining that until today, the Belgian lawyers actively celebrate freedom of speech which they conquered through the Brussels revolution in 1830 against the Dutch regime which was trying to oppress criticism towards the government and to impose Dutch language onto the southern provinces including the predominantly French speaking Belgian lawyers, who could not or at best with sore throats, plead in Dutch. Conquering southern independence, with a heroic role of the Brussels' bar, thus gave way to the freedom to erupt criticism on the Dutch government, in the French language, in Brussels. As a consequence, Dutch lawyers had to wait and struggle much longer to obtain a similar freedom of speech in the northern part of the country.

Indeed, the limitations on freedom of speech are older than the freedom of speech itself as we know it today in western societies. It is from limitations that this freedom emerged, and yet it is to be recognized that limitations permanently give shape and meaning to the freedom of speech.

The Netherlands' constitution says that no one shall need prior permission to publish thoughts or feelings through the press, *without prejudice to the responsibility of every person under the law.*

This means that while everyone is free to express her- or himself, it cannot be ruled out that a person exercising his or her right to freedom of speech breaches the law and can be held accountable. It also implies that the law can be, and in reality is, a source of limitations of the freedom of speech.

An example of statutory limitations of the freedom of speech can be found in the Dutch criminal law (Wetboek van Strafrecht, Article 137c): it is a criminal offence to deliberately offend groups of people because of their race, religion or belief, sexual orientation, or physical, psychical or mental handicap. Another, currently relevant, example is Article 137d Wetboek van Strafrecht: it is a criminal offence to incite to hatred against, or discriminate people, or violently offend persons or goods of persons because of their race, religion or belief, gender, sexual orientation, or physical, psychical or mental handicap.

These examples show that freedom of speech is not shaped as a limited list of quotations, but



that freedom of speech is paramount, with only the responsibility according to the law giving certain restraints.

In the sphere of the legal profession, article 46 of the Dutch *Advocatenwet* (Law on lawyers), determines that a lawyer shall refrain from any conduct that does not suit a proper lawyer. Speech is not excluded from this rule.

Article 46 is an open rule in the sense that it does not specify from which speech or writing the lawyer exactly should refrain. Would such a provision be imaginable? The authors of the law have explicitly thought not. The rule should be open as to not inhibit judgments on particular situations. Thereby, it is widely accepted, and seen as a cornerstone in disciplinary case law, that a lawyer has in principle a far reaching freedom in the way he defends his client's interests, according to his own judgement, and in agreement with his client, including the expressions used by that lawyer in his professional performance.

This being said, we do see judgments emerging from particular disciplinary cases concerning lawyers. One recent example is the case of a Dutch lawyer against the Bar President of The Hague, before the Disciplinary Court of the Netherlands.²²

The lawyer involved wrote a letter, in his own name, to a Regional Court's President, which gave the Court's President cause to inform the local Bar President, with the complaint that the lawyer had not shown sufficient respect for the judiciary. Subsequently, the Bar President sent, in vain, three invitations to the lawyer to discuss the complaint, each of which invitation was responded to in writing by the lawyer that the Bar President had no competence in the field of the lawyer's expressions, implying an unlimited freedom to express his opinions. As a result the Bar President brought a case before the regional Disciplinary Council against the lawyer, followed by an appeal by the lawyer to the Disciplinary Court, which is the appeal institution for the disciplinary judgment on lawyers.

The Disciplinary Court thoroughly assessed the arguments of the lawyer, and could not find any justification for the lawyer to express, in his own name, his displeasure about the decisions of three judges – in a case in which the lawyer was involved– in the way he had done, that is, qualifying the judges as 'acting maliciously', 'incompetent', 'shameless', 'corrupt', 'unscrupulous', 'unfathomably lying', and 'morally, legally and intellectually corrupt' (this being a summary). The Disciplinary Court found that there was no need for the lawyer to express himself in such a way, that these expressions were unnecessarily abusive, unworthy of a lawyer, and that the lawyer, by using these expressions, had shown a reprehensible and for a lawyer very unfit lack of reverence towards the judicial authorities. As a consequence, the Disciplinary Court upheld the primary judgment of the Disciplinary Council that the lawyer's expressions do not befit a proper lawyer. The Court adds that this does imply a limitation of the lawyer's freedom of speech; however, it considered that this limitation has been provided by the law, and is necessary in a democratic society to maintain confidence in the judiciary. The penalty was four weeks suspension from the profession.

This example leads to two observations.

The first observation is connected to the Thatcher statement at the beginning of this essay, referring to personal responsibility as deciding what to do with one's freedom. The Dutch case law on freedom of speech shows it cannot be left to individual persons to define the limits of the right to his or her freedom of speech. Indeed, judging someone on a personal view on the limitation of the freedom to express something, is very difficult or even meaningless. This implies the application of the rule of law, as, again, Thatcher said.

The second observation emerges from, and contradicts in a way the first observation. Concerning lawyers, we see that the law has, inevitably, created an open rule as to what is fit or what is unfit

²² Decision of 19 January 2015, ECLI:NL:TAHVD:2015:13



for a proper lawyer. This means that the responsibility is primarily one of the individual lawyer himself. One might consider this a 'personal' responsibility, like the Iron Lady said, however in this perspective it would be more accurate to describe it as a 'professional' responsibility. This brings us to the identity of the individual lawyer as an independent agent in the judicial system.

The independent position of the lawyer in the judicial system, requires a far reaching freedom for the individual lawyer to judge what is right to express or not express in his professional performance. This judgment, and the responsibility to do so, is part of the independence of the lawyer.

And, since it is widely accepted as a cornerstone in disciplinary case law that a lawyer has in principle a far reaching freedom in the way he defends his clients' interests, according to his own judgement, and in agreement with his client, including the expressions used by that lawyer in his professional performance, this complies with the principle of independence.

Yet the need for an authority which can hold a lawyer accountable is obvious. It is because of the principle of the independence of both the legal profession and the individual lawyer that this authority should be separate from the judiciary and, broader, from the spheres in which the lawyer performs his daily work, prominently including the state. This means that for the legal profession it is clear that right to freedom of speech of lawyers can only be limited by a disciplinary authority which is equipped with the utmost guarantees of deontological expertise and independence.



4. From Jędrzej Klatka, Head of the Polish Delegation to the CCBE

Polish legal advisers' freedom of speech

According to art. 11 of Polish Act on Legal Advisers, **in the course of professional acts, legal advisers shall enjoy freedom of speech and writing within the limits set by the provisions of law and by needs of the case. Abuse of this freedom which constitutes insult or defamation, is prosecuted upon private action of a party or its attorney, a witness, expert or translator/interpreter and shall be subject exclusively to disciplinary liability.**

In practice the above provision means that even when legal adviser insults or libels the opposite party or its attorney, a witness, expert or translator/interpreter – legal adviser shall not be subject to criminal liability, but only to disciplinary liability. However, it must be noted, that this rule does not apply if legal adviser insults or libels the judge.

At the same time, **legal adviser must be moderate and tactful in his or her words** (article 12 sec. 3 of the Code of Ethics of Legal Advisers') and **while making use of the freedom of speech and writing while practising the profession, cannot exceed limits set by law and material need** (art. 38 sec. 1 of the Code of Ethics of Legal Advisers').

On 24th of May, 2012, Polish Supreme Court has stressed in its verdict that as a rule when legal adviser acts as an attorney in a trial, his or her knowledge about facts usually is limited only to what he or she has learned from his or her principal. Therefore, such facts are presented in trial. Legal adviser is not obliged to examine whether the facts are true. Therefore legal adviser may not be held responsible for the accuracy of the facts which he or she has presented, unless the opposite party proves that legal adviser has been aware that the facts were not true. The facts of the case were the following: legal adviser has represented an employer in Labour Court. Legal adviser had to prove that termination of employment was justified. In the answer to the lawsuit legal adviser has written that the plaintiff as employee has disregarded his bosses. After an employee has lost his case in Labour Court he has sued legal adviser for illegal infringement of his personal rights (i.e. good name). Legal adviser has lost in first and in second instance, but has won in the Supreme Court.

In other case Higher Disciplinary Tribunal of Legal Advisers, acting as disciplinary court in second instance, has struck a legal adviser trainee off the roll of trainees because he has send an email to all trainees in which, without any grounds to do so, he has accused one of legal advisers – his former principal – for committing a crime and during disciplinary proceedings have not understood why his behaviour had been inappropriate.

