Chapter Four: Legal Services and Lawyers' Private Interests

As has been shown in Chapter Two and Chapter Three, there is thus extensive case law protecting the client's private interests[929] in legal services. In addition, however, there is also case law on lawyers' private interests in being able to provide legal services.

Since, where lawyers are acting in a particular case, the Court typically argues by reference to the client's interests, the case law on lawyers' private interests consists largely of judgments on the position of individual lawyers prior to their taking any specific case. Here, lawyers are being protected in their own right, perhaps modified by reference to the general importance of the profession of lawyer, but not as a means of protecting a specific other individual.

The chapter is split into two parts. A first section discusses the Court's case law on lawyers' private interest in providing legal services (I.); a second section discusses the Court's case law on lawyers as 'watchdogs' (II.), ie commenting publicly on cases in which they are not involved in a professional capacity. This latter section also provides a transition to Chapter Five, which discusses the way the Court reflects the public interest in legal services.

I. The Court's case law protecting the provision of legal services

Legal services require someone to provide them. As regards individuals' right to engage in the provision of legal services, the Court has set out a number of pointers. However, similar to the preceding sections, it has not typically related these cases to each other as concerning the provision of legal services. Instead, it has generally contextualised cases by reference to similar situations under the same article – frequently concerning similar claims by other professions – rather than to other situations concerning lawyers. To the extent that the Court has effectively set out vital preconditions for the existence of a legal services sector, the Court seems to have done so largely unwittingly, without paying specific attention to the fact that

929 On the terms 'private interest' and 'public interest' see Chapter One, 65ff.

lawyers are important not only in their own interests, but also as part of the public interest in the rule of law, and without greater reference to the specific role of lawyers. Conversely, the present study will attempt to group these cases more specifically according to the role of lawyers, focusing on the way the Court protects their private interests.

1. Protection of access to the legal profession

Art. 8 ECHR protects the right of access to the profession of lawyer.[930] As the Court put it in *De Moor v Belgium* (1994): 'Where legislation lays down conditions for the admission to a profession and a candidate for admission satisfies those conditions, he has a right to be admitted to that profession'.[931] Indeed, even the status as a legal trainee will be protected by Art. 8.[932] The point forms part of the bedrock of the protection of individual lawyers and is so clearly established that, by now, Governments typically do not even contest it.[933]

2. Protection of exercise of the legal profession

In addition to Art. 8 ECHR protecting the right of access to the profession of lawyer, the established exercise of eg a law firm can fall under Art. 1 of Protocol 1.[934] To quote the Court's translation of *Döring v Ger-*

930 *Bigaeva v Greece* App no 26713/05 (ECtHR, 28 May 2009), para 31; *Mateescu v Romania* App no 1944/10 (ECtHR, 14 January 2014), para 20; *Biagioli and Biagioli v San Marino (dec)* App no 8162/13 (ECtHR, 08 July 2014), para 100; *Lekavičienė v Lithuania* App no 48427/09 (ECtHR, 27 June 2017), para 38. For examples where the Court used Art. 8 as the standard against which to measure disbarment see *Namazov v Azerbaijan* App no 74354/13 (ECtHR, 30 January 2020), para 34ff, and *Bagirov v Azerbaijan* App no 81024/12; 28198/15 (ECtHR, 25 June 2020), para 86ff. Where non-admission to the Bar due to specific statements has been concerned, the Court has even used Art. 10, cf *Hajibeyli and Aliyev v Azerbaijan* App no 6477/08; 10414/08 (ECtHR, 19 April 2018), para 53.

931 *De Moor v Belgium* App no 16997/90 (ECtHR, 23 June 1994), para 43.

932 *Jankauskas v Lithuania (No 2)* App no 50446/09 (ECtHR, 27 June 2017), para 58.

933 eg *Bagirov v Azerbaijan* (n 930), para 90.

934 *Döring v Germany (dec)* App no 37595/97 (ECtHR, 09 November 1999); *Olbertz v Germany (dec)* App no 37592/97 (ECtHR, 25 May 1999) 7; *Wendenburg and others v Germany (dec)* App no 71630/01 (ECtHR, 06 February 2003) 23; *Lederer v Germany (dec)* App no 6213/03 (ECtHR, 22 May 2006) 6.

many (dec) (1999), 'by setting up his law practice and running it successfully, the applicant had built up a clientele; this had in many respects the nature of a private right and constituted an asset, and hence a possession within the meaning of the first sentence of Article 1'.[935] Later, the Court changed this wording slightly, but kept the conclusion the same, finding in *Buzescu v Romania* (2005) that '[t]he applicability of Article 1 of Protocol No. 1 … extends to law practices and their goodwill, as these are entities of a certain worth that have in many respects the nature of private rights, and thus constitute assets, being possessions within the meaning of the first sentence of this provision'.[936] Elsewhere, the Court has highlighted that 'the practicing lawyer's … practice depends on long-standing ties to his or her clients'.[937] As a result, in *Angerjärv and Greinoman v Estonia* (2022) the Court 'acknowledge[d] that the right of the applicants – members of the Bar Association – to practise as lawyers is a "civil right" within the meaning of Article 6 § 1 of the Convention' and further observed that lawyers' 'right to practise their profession' 'entails advising and representing or defending clients both within and outside court proceedings'.[938]

3. Protection of lawyers' professional reputation

In line with this emphasis on the (general) relationship between lawyers and their clientele, a lawyer's professional reputation will be protected under Art. 8,[939] although this has not generated very much case law.[940] Given this protection, interference with the Art. 10 rights of those who criticise

935 *Döring v Germany (dec)* (n 934), unpaginated translation available via HUDOC, http://hudoc.echr.coe.int/eng?i=001-5642, accessed 08 August 2024.

936 *Buzescu v Romania* App no 61302/00 (ECtHR, 24 May 2005), para 81.

937 *Helmut Blum v Austria* App no 33060/10 (ECtHR, 05 April 2016), para 65.

938 *Angerjärv and Greinoman v Estonia* App no 16358/18; 34964/18 (ECtHR, 04 October 2022), para 97.

939 *Kucharczyk v Poland (dec)* App no 72966/13 (ECtHR, 24 November 2015), para 31ff. The Committee ignored entirely the fact that legal services are a credence good.

940 Perhaps the closest recent case, although from the point of view of a person making an accusation against an (in-house) lawyer, is *Matalas v Greece* App no 1864/18 (ECtHR, 25 March 2021), where the Court at para 45 'found that accusing L.P. of being unprofessional and of engaging in behaviour contrary to ethics in a document made known to a restricted number of persons was not only capable of tarnishing her reputation, but also of causing her harm in both her professional and social environment. Accordingly, the accusations attained a level of seriousness sufficient to harm L.P'.s rights under Article 8 of the Convention'.

lawyers can be justified by reference to Art. 10 § 2 and the 'protection of the reputation or rights of others'.[941] However, the Court has also held 'that a lawyer's behaviour in the exercise of his profession, particularly during court proceedings held in public, is a matter of public interest',[942] and so restrictions on freedom to comment on lawyers' behaviour will be harder to justify. Nonetheless, lawyers will not generally be classed as 'public figures' for Art. 8 purposes, as the First Section in its admissibility decision in *Spirovska and Spirovski v North Macedonia* (2020) held that even a practising lawyer who had previously been a judge of the Constitutional Court would be classed as a private person.[943]

While lawyers' professional reputation is therefore protected under the Convention, notwithstanding the frequent references to lawyers as 'officers of the court'[944] it does not appear that Art. 10 § 2's 'authority of the judiciary' limb will protect them. In *Semik-Orzech v Poland* (2011), a case in which a journalist applied to the Court after having lost civil defamation proceedings regarding a lawyer's professional reputation, the Government explicitly argued that '[t]he restrictions imposed on the applicant had been necessary as they had met a pressing social need, namely the protection of the legal profession'[945] and that '[t]his profession played a special role in the system of administration of justice'.[946] Nonetheless, the Court merely referred to the legitimate aim of protecting 'the reputation or rights of others',[947] and otherwise did not engage with the Government's argument regarding the public-interest dimension of the legal profession. Similarly, in *Aquilina and others v Malta* (2011) the Court also referred only to 'the reputation or rights of others',[948] and did not interact with the structural role of lawyers, and in the 2022 case of *Mesić v Croatia*, which concerned criticism of a lawyer for having carried out his professional activities, the Court equally identified only the 'reputation or rights' of the lawyer

941 cf *Aquilina and others v Malta* App no 28040/08 (ECtHR, 14 June 2011), para 39; *Semik-Orzech v Poland* App no 39900/06 (ECtHR, 15 November 2011), para 47.
942 *Aquilina and others v Malta* (n 941), para 46; *Semik-Orzech v Poland* (n 941), para 51.
943 *Spirovska and Spirovski v North Macedonia (dec)* App no 52370/14 (ECtHR, 15 September 2020), para 23.
944 cf Chapter Five, 227ff.
945 NB not just the protection of the individual lawyer.
946 *Semik-Orzech v Poland* (n 941), para 38.
947 Ibid, para 47.
948 *Aquilina and others v Malta* (n 941), para 39.

concerned as the legitimate aim of the interference.[949] This is somewhat surprising, as there is also an argument to be made that even de lege lata, the protection of legal services can be part of 'maintaining … the authority of the judiciary' in the sense of Art. 10 § 2,[950] which would have tended towards including the protection of legal professionals 'against gravely damaging attacks that are essentially unfounded'[951] in the protection of the 'authority of the judiciary'. Nonetheless, the Court did not follow this reasoning, a point that is particularly noticeable since in two of these cases the Court did make extensive reference to the public-interest role of the press,[952] arguably rendering its balancing a little one-sided. Given that the Court takes a rather restrictive position as regards lawyers' own freedom of expression outside a courtroom context,[953] there is also a potential issue regarding equality of arms between lawyers and the press here.

4. Occasional reinforcement by reference to the public interest

Protection of access, exercise and reputation are arguably common to many professions.[954] However, for lawyers the Court has also at times[955] reinforced the level of protection they will enjoy by drawing on their general role in acting in favour of clients, an argument closely related to the public interest in legal services as a requirement of the rule of law, which separates the provision of legal services from many other professional activities where there is no comparable public interest. A particularly good example of this reliance on the services lawyers provide to their clients is *Smirnov v Russia* (2007). In that case, 'the applicant claimed that the real purpose of

949 *Mesić v Croatia* App no 19362/18 (ECtHR, 05 May 2022), para 78.

950 See Chapter Nine, 474.

951 cf *Morice v France [GC]* App no 29369/10 (ECtHR, 23 April 2015), para 128, as regards the protection of the judiciary.

952 *Aquilina and others v Malta* (n 941), para 43; *Semik-Orzech v Poland* (n 941), para 41ff.

953 cf Chapter Five, 227ff.

954 cf eg *Van Marle and others v Netherlands [Plenary]* App no 8543/79 and others (ECtHR, 26 June 1986), para 41 regarding accountants, a foundational judgment which the Court has drawn on fairly extensively in many of the cases regarding lawyers.

955 Note however eg *Bljakaj and others v Croatia* App no 74448/12 (ECtHR, 18 September 2014) (discussed in Chapter Three at 188), where the Court did not elevate the level of Art. 2 protection lawyers enjoy.

the seizure [of a computer central unit containing more than two hundred clients' files] had been to hinder his legal professional activities'.[956] The Court, while expressing doubts as to whether Russian criminal procedural law[957] complied with Art. 1 Protocol 1's 'quality of the law' requirement,[958] noted that given the possibility of copying the files, it '[could] not discern any apparent reason for continued retention of the central unit', but that 'nevertheless, the computer had been retained by the domestic authorities … for more than six years'.[959] After noting 'that the computer was the applicant's professional instrument', the Court went on to highlight that 'the retention of the computer not only caused the applicant personal inconvenience but also handicapped his professional activities; this, as noted above, might have had repercussions on the administration of justice'.[960] 'Having regard to [these] considerations', the Court went on to find 'that the Russian authorities failed to strike a "fair balance" between the demands of the general interest and the requirement of the protection of the applicant's right to peaceful enjoyment of his possessions', and that therefore there had been a violation of Art. 1 Protocol 1.[961]

The reasoning in *Smirnov*, which has also been applied in later cases,[962] is notable because the Court's main line of argument related closely to the public interest in the applicant's work as a lawyer. In effect, it focused not only on his rights, but also on his role in securing the rights of his clients, and the detrimental effect on their rights potentially engendered by a measure which significantly impeded their lawyer's ability to represent their interests. The Court therefore seems to have elevated the level of

956 *Smirnov v Russia* App no 71362/01 (ECtHR, 07 June 2007), para 51.

957 Which provided for 'broad [prosecutorial] discretion not accompanied by efficient judicial supervision', cf ibid, para 56.

958 Ibid, para 56.

959 Ibid, para 58. One wonders how relevant the argument regarding the clients' files was after this much time, since it appears to assume that the clients were happy to wait until their representative had gone all the way to Strasbourg. This lapse of time is a general problem in much of the Court's case law, cf eg *Namazov v Azerbaijan* (n 930), para 27, where almost seven years elapsed between the final domestic judgment and the European Court of Human Rights' finding of a violation.

960 *Smirnov v Russia* (n 956), para 58.

961 Ibid, para 59. The Court also went on to find a violation of Art. 1 Protocol 1 taken in conjunction with Art. 13 because the applicant had no effective remedy against the failure to return the computer, since the domestic courts declared an application to this effect inadmissible and advised the applicant to apply to a higher prosecutor.

962 *Kruglov and others v Russia* App no 11264/04 and others (ECtHR, 04 February 2020), para 144.

protection afforded to the applicant precisely *because* of the fact that he provided legal services, something it does not seem to do in relation to other professional activities.

5. Protection against disbarment

If these groups of cases have concerned admission to, and exercise of, the profession, a third point of significance for the position of individual lawyers is exit from the profession. Where removal by disbarment is concerned, the Court has also applied enhanced scrutiny under Art. 8, 'keeping in mind that the disbarment sanction constitute[s] the harshest disciplinary sanction in the legal profession, having irreversible consequences on the professional life of a lawyer'.[963] The Court has therefore required domestic authorities to explain why a violation of professional obligations was 'such a serious misconduct that it justified the harshest disciplinary sanction'.[964] The Court also noted that where

> in a series of cases it has noted a pattern of arbitrary arrest, detention or other measures taken in respect of government critics, civil society activists and human rights defenders … against this background … the alleged need in a democratic society for a sanction of disbarment of a lawyer in circumstances such as this would need to be supported by particularly weighty reasons.[965]

The Court is therefore clearly aware of the potential for abuse of disbarment proceedings, and consequently accords higher protection in this area.

Finally, the Court has also applied a more exacting standard as regards the 'quality of law' governing lawyers,[966] at least as regards laws providing for the incompatibility of certain professions with the profession of lawyer.[967] The Court has paid particularly close attention to Convention

963 *Bagirov v Azerbaijan* (n 930), para 101. As discussed in Chapter Five, 277ff, this is a reductionist view given the different impact that disbarment will have in different systems, but one can certainly agree that disbarment has consequences on the professional life of a lawyer.

964 Ibid, para 101.

965 Ibid, para 103.

966 Note that these stricter principles regarding quality of law for laws regarding lawyers stand in contrast to the laxer approach the Court takes to foreseeability where lawyers challenge laws more generally, cf Chapter Two, 144.

967 *Mateescu v Romania* (n 930), para 32, which can therefore have a similar effect to disbarment in the sense that they prevent a prima facie suitable candidate from exercising law professionally.

compliance of norms governing the status of lawyers,[968] and has also highlighted doubts where disciplinary norms were drafted excessively broadly.[969]

II. A 'watchdog' function for lawyers?

While, to the extent that the legal position of an identifiable lawyer is concerned, the foregoing is still primarily concerned with private interests, there is a further subset of cases that sits at the intersection between these private interests and the public-interest role of legal services in society more generally: Do lawyers, in a way similar to journalists,[970] enjoy elevated protection of freedom of expression in a role as 'watchdogs', tasked with bringing instances of unlawful behaviour to public attention with the aim of enabling the public to demand lawful behaviour?[971] These cases are different to those in which lawyers act in the defence of an identifiable client because they concern public rather than private interests,[972] which inter alia means that the 'unity of proceedings' argument[973] which the Court has emphasised elsewhere will not apply in the same way. Lawyers' contributions here will usually be less focused on a particular case and more on a certain general topic of public interest to which the additional qualifications lawyers bring are relevant. Unlike the cases discussed above where lawyers were acting on behalf of a client, these cases do not require

968 Note eg the in-depth assessment of a German legislative reform abolishing exclusive rights of audience in most of the higher courts in *Wendenburg and others v Germany (dec)* (n 934).

969 *Bagirov v Azerbaijan* (n 930), para 74. In this area much will hinge on context and case law, since a number of jurisdictions have rather broad norms on which to base disciplinary proceedings, but those have often been clarified through decades of case law – the question is discussed in greater detail in the section on disciplinary law in Chapter Five, 275ff.

970 For the press, the Court explicitly uses the term 'public watchdog', cf *Barthold v Germany* App no 8734/79 (ECtHR, 25 March 1985), para 58 and recently *Mammadov and Abbasov v Azerbaijan* App no 1172/12 (ECtHR, 08 July 2021), para 61. The Court's case law on the media is discussed in greater detail in Chapter Six, 309ff.

971 For the CCBE's argument in *Morice v France [GC]* (n 951) see Chapter Three, 178ff.

972 Although, as eg the applicant argued in *Schöpfer v Switzerland* App no 56/1997/840/1046 (ECtHR, 20 May 1998), para 24, these questions may at times be linked.

973 Chapter Three, 169.

the lawyer speaking out be personally involved with the case at all. A function as a public 'watchdog' is also possible where the lawyer has no connection to a specific case raising the problem;[974] in these cases, lawyers are pursuing a public, not a private, interest.

1. The public interest in lawyers' expertise

In this sense, lawyers are concerned here in their public-interest role of upholding the rule of law beyond private interests, which can require them to call attention to potential threats. Both Recommendation R(2000)21[975] and the UN Basic Principles,[976] which have been referred to in these cases in the Court's case law,[977] stress lawyers' right to take part in public discussions on matters concerning the law, and at the domestic level there is frequently even an obligation on lawyers to defend the constitutional order.[978] The view taken in those documents is that lawyers, beyond their duties furthering the private interests of their clients, have a general public-interest responsibility by virtue of their specific qualifications to call public attention to dangers to the rule of law. To the extent that such public debate is triggered as a result of a specific case,[979] there can be tension here between the Court's desire to keep all matters related to legal disputes within the courts[980] and the need for a public debate on questions of general importance. As highlighted above, this is particularly relevant for those contexts where there are more widespread problems with the legal system, since the *Morice* separation between freedom of expression

974 To this extent, the Grand Chamber's argument in *Morice v France [GC]* (n 951), para 148, holds good only where lawyers actually are 'directly involved in [the functioning of the administration of justice] and in the defence of a party'.

975 Committee of Ministers of the Council of Europe, *Recommendation R(2000)21 on the Freedom of Exercise of the Profession of Lawyer* (2000), Principle I.3. Recommendation R(2000)21 is discussed in Chapter One, 38ff.

976 United Nations, *Basic Principles on the Role of Lawyers* (1990), para 23, discussed in Chapter One, 34ff.

977 The provisions are cited in *Hajibeyli and Aliyev v Azerbaijan* (n 930), paras 39, 40.

978 cf eg for German *Rechtsanwälte* s 12a Federal Code for Lawyers (BRAO), under which they swear an oath including reference to upholding the constitutional order.

979 Take eg *Bagirov v Azerbaijan* (n 930), where the applicant, against the backdrop of his client's death in custody, had highlighted general problems with police violence in Azerbaijan.

980 cf Chapter Three, 171ff.

in proceedings and outside them assumes a justice system that functions well enough to provide effective protection in legal proceedings.[981] Acting as public 'watchdogs' may therefore bring lawyers into conflict with their discretion obligations[982] and their obligation to 'maintain public confidence' in the judiciary,[983] necessitating further clarification as to how this tension is to be resolved.

For matters relevant to the rule of law, lawyers' contributions will often be essential to allow a debate to even take place. For many legal matters, the information gap between lawyers and the general public means that a public discussion will only truly be possible with the facilitation of lawyers to explain the situation at hand and reduce complexity to the point where non-lawyers can form an opinion.[984] In this sense, the press, for example, will not always be able to fulfil its functions without the help of legal experts who can explain the case at hand and who inter alia possess the skills to unpick and critique legal reasoning. Among many other examples, this is particularly clear from those cases which concern lawyers 'whistle-blowing' on alleged judicial impropriety, such as *Pais Pires de Lima v Portugal* (2019)[985] or *LP and Carvalho v Portugal* (2019)[986]. Especially in borderline cases, lawyers are much more likely to be able to identify and call out problematic judicial conduct than the public at large, which typically lacks

981 An underlying assumption which the Court has not to date engaged with, focusing instead on apodictic statements such as that 'the courts must enjoy public confidence', *Gumenyuk and others v Ukraine* App no 11423/19 (ECtHR, 22 July 2021), para 52.

982 eg *Ottan v France* App no 41841/12 (ECtHR, 19 April 2018), discussed in Chapter Three, 176ff, or, as regards litigation secret, *Mor v France* App no 28198/09 (ECtHR, 15 December 2011).

983 *Nikula v Finland* App no 31611/96 (ECtHR, 21 March 2002), para 45, discussed in detail in Chapter Five, 227ff.

984 For example, it seems unlikely that the fact that so many of the cases concerning lawyers also clarify points related to Art. 6 § 1 and an 'independent and impartial' tribunal is just a coincidence – instead, it seems rather more likely that lawyers' additional expertise means that they are able to see potential problems more clearly. For a recent example from a different context note that eg the *Reczkowicz v Poland* App no 43447/19 (ECtHR, 22 July 2021) case was brought by a practising lawyer.

985 *Pais Pires de Lima v Portugal* App no 70465/12 (ECtHR, 12 February 2019), where at para 43 the applicant explicitly argued that all citizens had the moral duty to denounce situations they considered to be illegal and that this duty was all the more important for lawyers, bearing in mind the role lawyers played in the administration of justice.

986 *LP and Carvalho v Portugal* App no 24845/13; 49103/15 (ECtHR, 08 October 2019).

both experience and skills in this regard. For these cases, the intervention of legal experts effectively becomes a precondition for a public debate.

2. *Reznik v Russia*

The 2013 case of *Reznik v Russia,*[987] which dealt inter alia with a debate focused on the legality of certain criminal procedural measures, provides an illustrative example. That case concerned statements made by high-profile Russian lawyer Henri Markovich Reznik, then-President of the Moscow City Bar,[988] in relation to the way Mikhail Khodorkovskiy's counsel had been treated.[989] Among a number of other procedural irregularities, it had been alleged that, following a visit by one of Mr Khodorkovskiy's lawyers, the prison officers at *Matrosskaya Tishina* prison had examined documents subject to professional secrecy and searched the lawyer in violation of the obligation that such a search be performed by a member of the same sex.[990] At a later stage, the Ministry of Justice asked the Moscow City Bar to disbar said lawyer, which Mr Reznik, in his function as president of the local Bar association, publicly criticised.[991] When, in a later debate on a television talk show, the presenter 'asked the applicant about the relationship between the Moscow City Bar and the Ministry of Justice',[992] the applicant highlighted in relation to the case of Khodorkovskiy's counsel that '[t]here were no grounds for carrying out a search (*обыск*) which, by the way, was performed by men who rummaged (*шарили*) about the body of the woman lawyer. … There is nothing, absolutely nothing, in Ms. A'.s records that could warrant her disbarment'.[993] In response, the *Matrosskaya*

987 *Reznik v Russia* App no 4977/05 (ECtHR, 04 April 2013).

988 Ibid, para 5.

989 As attentive readers will have noticed, the criminal proceedings surrounding the YUKOS case form the backdrop to a number of cases relevant to the provision of legal services, including *Aleksanyan v Russia* App no 46468/06 (ECtHR, 22 December 2008); *Khodorkovskiy v Russia (No 1)* App no 5829/04 (ECtHR, 31 May 2011); *Khodorkovskiy and Lebedev v Russia* App no 11082/06; 13772/05 (ECtHR, 25 July 2013); *Khodorkovskiy and Lebedev v Russia (No 2)* App no 51111/07; 42757/07 (ECtHR, 14 January 2020).

990 *Reznik v Russia* (n 987), para 9. The incident in question itself is discussed by the Court in *Khodorkovskiy v Russia (No 1)* (n 989), para 199.

991 *Reznik v Russia* (n 987), para 10.

992 Ibid, para 13.

993 Ibid, para 13 (emphasis and untransliterated Cyrillic in original).

Tishina prison and two of its warders lodged defamation claims against the applicant,[994] alleging inter alia that he had used the legal term 'search'[995] incorrectly, since what had taken place had merely been an 'inspection'.[996] Their action was upheld by the Moscow City Court,[997] which ordered the applicant to pay a symbolic sum in a decision against which the applicant complained to the European Court of Human Rights.

Before the Court, the Government advanced, in particular, that the applicant's statement had been an (incorrect) factual allegation rather than a value judgment, and that

> taking into account that 'the Russian public traditionally regarded the authorities and their representatives with mistrust', the audience would have been more inclined to believe the words of a well-known lawyer than those of the acting head of a department of the Ministry of Justice. The applicant could not be held accountable for his statements to the standard of a journalist because he was seen as an official disseminating verifying information.[998]

The Government also submitted that the applicant was 'an experienced lawyer who should know the difference between a "search" and an "inspection"' and that 'his statements had amounted to a negative assessment of [the prison warder's] performance of their professional duties and had groundlessly tarnished the professional reputation of the remand prison'.[999] The applicant, on the other hand, highlighted that '[t]he presenter had not introduced him in his official capacity as the President of the Moscow Bar and his part in the discussion had been that of a lawyer and human rights defender, and a long-standing member of the Moscow Helsinki Group',[1000] effectively invoking his role in public debate, and that '[f]or lay people the

994 Ibid, para 15. On the former, see now *OOO Memo v Russia* App no 2840/10 (ECtHR, 15 March 2022), referring inter alia to *Reznik* and holding, at para 47, that 'civil defamation proceedings brought, in its own name, by a legal entity that exercises public power may not, as a general rule, be regarded to be in pursuance of the legitimate aim of "the protection of the reputation … of others" under Article 10 § 2 of the Convention'. A quantification of this problem can be found in Veronika Fikfak and Lora Izvorova, 'Language and Persuasion: Human Dignity at the European Court of Human Rights' (2022) 22 Human Rights Law Review 1, 15.

995 'Obysk'.

996 'Osmotr'.

997 *Reznik v Russia* (n 987), para 21.

998 Ibid, para 29.

999 Ibid, para 33.

1000 Ibid, para 33.

nuances of the legal meaning of the terms "search" and "inspection" were indistinguishable and could as well be used as synonyms'.[1001]

The Court, in its assessment of whether the interference with the applicant's right to freedom of expression under Art. 10 had been 'necessary in a democratic society', began by highlighting that '[t]he criminal proceedings against [Mikhail Khodorkovskiy] and the strategy of his defence were matters of intense public and media attention', and that '[t]he request to have a member of his defence team disbarred must have sparked a further wave of public interest'.[1002] Given that the debate thus concerned questions of public interest, where restriction would generally require 'very strong reasons', the Court criticised that the Moscow City Court had not engaged in any balancing exercise whatsoever.[1003]

The Court then referred once again to the 'special status of lawyers', but rejected the Government's insistence on technical usage of the terms 'search' and 'inspection',[1004] since the applicant had been 'speaking for the benefit of a lay audience of television viewers, rather than to a legal forum'.[1005] It then focused in particular on the spontaneous situation of a debate televised live,[1006] and the fact that neither the prison warders nor the remand centre itself had been mentioned by name.[1007] The Court further noted that it had already 'examined the incident involving Ms A. in the application lodged by her client',[1008] and that these findings together with the decision by the Moscow Bar Council not to disbar the lawyer 'constituted a sufficient factual basis for the applicant's statement'.[1009] Highlighting 'chilling effect' and referring to *Nikula v Finland* (2002),[1010] the First Section then held that '[i]n sum, … the applicant was entitled to state his opinion in a public forum on a matter of public interest and that his

1001 Ibid, para 38.
1002 Ibid, para 43.
1003 Ibid, para 43.
1004 Ibid, para 44.
1005 Ibid, para 44.
1006 Ibid, para 44.
1007 Ibid, para 45. As regards the latter, one wonders how significant this point was given the highly publicised nature of the case and the notoriety of *Matrosskaya Tishina* prison.
1008 Ibid, para 47, with reference to *Khodorkovskiy v Russia (No 1)* (n 989), paras 199–201.
1009 *Reznik v Russia* (n 987), para 47.
1010 Ibid, para 50. The Court's use of the term 'chilling effect' to denote that a certain minimum activity level is desirable is discussed in Chapter Six, 335ff.

statements had a factual foundation'.[1011] Together with the complete lack of engagement with the applicant's right to freedom of expression on the part of the Moscow City Court, this led the Court to find a violation of Art. 10 of the Convention.

Reznik, in this regard, indicates several things as regards lawyers' role as public watchdogs. First, the Court appeared to attach comparatively robust protection to the applicant's freedom of expression, noting particularly the highly publicised nature of the case.[1012] Furthermore, it did not make substantial reference to its case law distinguishing between lawyers' speech in the courtroom or elsewhere,[1013] under which lawyers' freedom of expression outside of acting in the courtroom will generally be protected to a lesser extent than in proceedings themselves.[1014] One reason for this may be that the applicant in *Reznik* was not formally representing anyone, even though he does seem to have seen himself as obliged to defend the rights of other lawyers. Despite a passing reference to 'the usual restrictions on the conduct of members of the Bar',[1015] the Court in *Reznik* appeared not to limit the applicant's rights at all as a result of his position as a lawyer, even though at the time of the statements the domestic proceedings to which they related were still ongoing. In this sense, it is not clear how consistent this is with the tendency the Court has shown elsewhere to try to keep legal matters closely confined to the courts. If *Reznik* appears to imply that freedom of expression for lawyers commenting on widely-publicised cases in which they are not formally involved will be particularly protected, that does seem to recognise a certain 'watchdog' function on the part of lawyers which may give additional protection to their freedom of expression.

3. Lawyers' freedom to comment

In keeping with this, the Court has held specifically on freedom of expression for lawyers that lawyers 'are certainly entitled to comment in public on

1011 Ibid, para 51.
1012 Ibid, para 43 – although to the extent that this seems to indicate that protection will be less strong where it is the lawyer who brings a problem to public attention, this rationale is not necessarily convincing.
1013 cf Chapter Three, 158ff.
1014 cf Chapter Three, 170ff.
1015 *Reznik v Russia* (n 987), para 44.

the administration of justice',[1016] as long as their criticism does not overstep 'certain bounds', one of which is 'insult'.[1017] It has also highlighted 'the public's right to receive information about questions arising from judicial decisions'.[1018] In substance, if not in name, these arguments underpin a similar 'watchdog' role to that which journalists exercise. For example, in *Amihalachioaie v Moldova* (2004), when assessing the Convention compliance of a contempt-of-court offence for a lawyer's vocal criticism of a decision by the Moldovan Constitutional Court, the Court

> note[d] that the applicant's comments were made on an issue of general interest in the context of a fierce debate among lawyers that had been sparked off by a Constitutional Court decision on the status of the profession that had brought to an end the system whereby lawyers were organised within a single structure, the Moldovan Bar Council, which was an association chaired by the applicant.[1019]

In *Foglia v Switzerland* (2007) it similarly highlighted that the information in issue had concerned a case already present in the media and that therefore the statements made could be seen to respond to the public's right to receive information on the activities of the judicial authorities.[1020] In *Gouveia Gomes Fernandes and Freitas e Costa v Portugal* (2011), the Court also separated between private and public interests, rejecting the Government's argument that the applicants had only defended their own personal interests and instead emphasising that the critical article in question had been made in the course of a debate on the functioning of the judiciary, which was 'manifestly' a question of public interest.[1021] Moreover, in *Ottan v France* (2018),[1022] the Court highlighted that the applicant's statement

1016 *Schöpfer v Switzerland* (n 972), para 33; *Nikula v Finland* (n 983), para 46; *Amihalachioaie v Moldova* App no 60115/00 (ECtHR, 20 April 2004), para 28; *Kyprianou v Cyprus [GC]* App no 73797/01 (ECtHR, 15 December 2005), para 174; *Schmidt v Austria* App no 513/05 (ECtHR, 17 July 2008), para 36; *Reznik v Russia* (n 987), para 44; *Kincses v Hungary* App no 66232/10 (ECtHR, 27 January 2015), para 38; *Morice v France [GC]* (n 951), para 134; *Peruzzi v Italy* App no 39294/09 (ECtHR, 30 June 2015), para 51; *Bono v France* App no 29024/11 (ECtHR, 15 December 2015), para 45.

1017 *Bagirov v Azerbaijan* (n 930), para 78.

1018 *Schöpfer v Switzerland* (n 972), para 33; *Nikula v Finland* (n 983), para 46; *Amihalachioaie v Moldova* (n 1016), para 28; *Schmidt v Austria* (n 1016), para 36; *Kincses v Hungary* (n 1016), para 38.

1019 *Amihalachioaie v Moldova* (n 1016), para 35.

1020 *Foglia v Switzerland* App no 35865/04 (ECtHR, 13 December 2007), para 97.

1021 *Gouveia Gomes Fernandes and Freitas e Costa v Portugal* App no 1529/08 (ECtHR, 29 March 2011), para 47.

1022 Discussed in Chapter Three, 176ff.

'[could] be regarded as a general assertion concerning the organisation of the criminal-justice system by a lawyer "echoing more general debates within society"'.[1023] While the Court has not used the term 'watchdog' explicitly, which is in itself noticeable given the expansive tendency in the Court's case law in this regard,[1024] a contribution to a public debate on a matter of general interest therefore appears to tend to increase the protection that statements by lawyers will enjoy under Art. 10.

4. Limits to lawyers' freedom to comment

Conversely, where no public debate has been concerned, the Court has also highlighted this as a central part of its reasoning. For example, in *Ţuluş v Romania (dec)* the Court highlighted that the statements in issue had not been made with the goal of criticising the functioning of the judiciary or of attracting public attention to the professional conduct of a judge, and had therefore neither contained a political message nor concerned potential irregularities in the judge's exercise of his office.[1025] It also appears that the Court will apply a more restrictive position where only an individual case, rather than a matter of wider public significance, is concerned. Of course, individual cases may also raise questions of public interest. However, despite the blanket holding eg 'that the public has a legitimate interest in the provision and availability of information about criminal proceedings',[1026] the Court appears to exercise a more restrictive position as regards problems confined to an individual case, emphasising lawyers' professional obligation to remain taciturn over the importance

1023 *Ottan v France* (n 982), para 66.

1024 cf eg the categories of individuals listed in European Court of Human Rights, *Guide on Article 10 of the European Convention on Human Rights - Freedom of expression* (2021), para 283ff, as well as *Magyar Helsinki Bizottság v Hungary [GC]* App no 18030/11 (ECtHR, 08 November 2016), para 166, discussed in Chapter Six at 331.

1025 *Ţuluş v Romania (dec)* App no 23562/13 (ECtHR, 17 December 2019), para 26.

1026 *July and SARL Libération v France* App no 20893/03 (ECtHR, 14 February 2008), para 66, drawing on Recommendation R(2003)13 of the Committee of Ministers on the provision of information through the media in relation to criminal proceedings. Similar references appear in eg *Giesbert and others v France* App no 68974/11 and others (ECtHR, 01 June 2017), para 92; *Novaya Gazeta and Milashina v Russia* App no 45083/06 (ECtHR, 03 October 2017), para 64; *Ottan v France* (n 982), para 61.

of their contributions to public debate. This would seem to explain why, in *Schöpfer v Switzerland* (1998), the Court did not follow the applicant's arguments based on his function as a public watchdog to elevate the level of Convention protection the applicant enjoyed. In *Schöpfer*, the applicant claimed that 'the reason why he had chosen to make his criticisms through the press was that it was not only his client's case which gave him cause for concern but an intolerable situation that had persisted for years at the Hochdorf district authority'.[1027] He argued that '[h]is criticisms had been justified, since they had been aimed not at an isolated case but at a longstanding practice contrary to the Convention', and 'a lawyer who noted that such a practice had been followed to the detriment of a number of his clients had the right to begin a public debate on the subject'.[1028] The Court, however, did not interact with these arguments. While it did not refute the claims directly, its silence on these matters is itself revealing: Given that the applicant did not use all remedies available[1029] and the remedy exercised did 'prov[e] effective with regard to the complaint in question',[1030] it seems the Court simply did not think that there was any wider, systemic issue at stake,[1031] and that therefore this was not a case of a lawyer acting as a 'watchdog' at all.[1032] Rather than seeing this case as a question of the public interest in the sense of revealing a wider problem, the Court seems to have seen it as largely specific to its own facts and therefore best dealt with in the courts of law rather than those of public opinion. Similarly,

1027 *Schöpfer v Switzerland* (n 972), para 25. The case is discussed in greater detail in Chapter Three, 171ff.

1028 Ibid, para 25. Presumably, it did not help the applicant's case that he argued that 'he had expressed his opinion not only as a lawyer but also as a politician', cf ibid.

1029 Ibid, para 34.

1030 Ibid, para 31.

1031 Note that the Commission also found that 'the applicant had exaggerated his grievances, by asserting for instance that for years the Hochdorf district authority had been flagrantly violating the laws of the Canton of Lucerne and human rights', ibid, para 27.

1032 See similarly *Hempfing v Germany (dec)* App no 14622/89 (Commission Decision, 07 March 1991) 8, where the Commission noted that 'les restrictions à la liberté d'expression ne doivent pas décourager les membres [des professions liberales] de contribuer à la discussion publique des questions concernant la vie de la collectivité', 'restrictions on freedom of expression should not discourage members [of the liberal professions] from contributing to public discussion of issues affecting the life of the community' (author's translation), and then highlighted that the applicant's circular letter had not been connected to any public debate or been aimed at informing the public or its addressees of any general problem.

in *Karpetas v Greece* (2012), where the applicant had made accusations of corruption against the Greek judiciary for what he considered excessively lenient bail conditions,[1033] the Court noted that there had been no sufficient factual basis for these statements, particularly since the applicant had not even attempted to establish evidence of the truth of his allegations.[1034] The lack of evidence of a wider problem therefore meant that the restrictions on lawyers' freedom of speech prevailed over any potential 'watchdog' function.

5. The public interest in comment by lawyers

Of course, whether or not a statement contributes to a public debate is a general criterion in determining the level of protection which Art. 10 will afford.[1035] What is specific to lawyers is the explicit link to public interests related to a well-functioning legal system. One such point has been the general right to 'comment in public on the administration of justice'[1036] discussed above, arguably a rather specific sub-manifestation of freedom of expression.[1037] Moreover, in other cases the Court has explicitly drawn a link to the public-interest role lawyers fulfil. In *Hajibeyli and Aliyev v Azerbaijan* (2018), the Court 'reiterate[d] that the freedom of expression of lawyers is related to the independence of the legal profession, which is crucial for the effective functioning of the fair administration of justice',[1038] and explicitly 'dr[e]w the Government's attention to Recommendation R(2000)21 of the Council of Europe's Committee of Ministers to member States on the freedom of exercise of the profession of lawyer, which clearly

1033 A sum of roughly 600 EUR compared to charges of extortion, assault occasioning actual bodily harm and carrying and using a weapon, *Karpetas v Greece* App no 6086/10 (ECtHR, 30 October 2012), para 9, 11.

1034 Ibid, para 78.

1035 On the Court's interpretation of Art. 10 more generally see Chapter Six, 310ff.

1036 cf n 1016.

1037 Discussing difficulties in treating such rights to speak on specific issues as deriving from the human right to freedom of expression Chapter Eight, particularly at n 2076.

1038 *Hajibeyli and Aliyev v Azerbaijan* (n 930), para 60. See for similar renditions of this statement *Morice v France [GC]* (n 951), para 135; *Bono v France* (n 1016), para 45; *Radobuljac v Croatia* App no 51000/11 (ECtHR, 28 June 2016), para 61.

stated that lawyers should enjoy freedom of expression'.[1039] Finally, lawyers are unique in being subject to particular restrictions on their conduct,[1040] by which the media, which lacks a public-law status as 'officer of the court', is not bound.

There is therefore a certain amount of tension between the restrictions on lawyers' freedom of expression and their (potential) role as public watchdogs. Given that the Court has generally permitted lawyers' freedom of expression to be subjected to greater limitations than that of other individuals,[1041] lawyers will have to take particular care when speaking out on matters they regard as being of public interest, since they remain subject to their discretion obligations and may find their rights restricted by a later finding that the case at hand was not one of 'public interest'.[1042] To some extent, this tension is already apparent from the Court's dictum that lawyers 'are certainly entitled to comment in public on the administration of justice'[1043] itself – the Court clearly thinks there is enough reason to doubt[1044] this that it is worth stressing lawyers' freedom of expression, at least for the specific sub-set of cases concerning 'the administration of justice'.

While there are therefore significant differences between the situations of lawyers and of journalists, where the Court has explicitly interacted with this 'watchdog' function,[1045] lawyers and journalists may be less far apart than the lack of reference in cases regarding lawyers might make it appear.[1046] While the Court has not made positive reference to its case law on journalists applying to lawyers as well, it *has* made reference to its case law on the public-interest function of lawyers – particularly the need to guard against 'chilling effect'[1047] – in the case law on journalists. Some of the cases on journalists make reference to the *Elçi and others v Turkey* (2003) and *Nikula v Finland* (2002) dicta, which will be examined in greater detail

1039 *Hajibeyli and Aliyev v Azerbaijan* (n 930), para 60. Recommendation R(2000)21 is discussed in Chapter One, 38ff.
1040 cf Chapter Five, 227ff.
1041 Chapter Three, 170ff.
1042 cf eg *Coutant v France (dec)* App no 17155/03 (ECtHR, 24 January 2008).
1043 See n 1016.
1044 And there is, see Chapter Eight.
1045 cf n 970, as well as the discussion in Chapter Six, 309ff.
1046 See, for a comparison in greater detail, Chapter Six.
1047 On this concept see Chapter Six, 335ff.

in Chapter Five[1048] and which concern the general position of lawyers in society and their role in serving public interests. For example, when dealing with the question whether penalties imposed on two journalists for defamation in the course of their reporting on a murder case were 'excessive in the circumstances or … of such a kind as to have a "chilling effect" on the exercise of media freedom', the Grand Chamber, in *Pedersen and Baadsgaard v Denmark [GC]* (2004), cited three cases 'mutatis mutandis'[1049]: *Wille v Liechtenstein [GC]* (1999), which concerned disagreement on a point of constitutional law between Hans-Adam II, Prince of Liechtenstein, and the President of the Liechtenstein Administrative Court,[1050] *Nikula* and *Elçi*. Moreover, *Pedersen and Baadsgaard* is not the only case to make such a citation. In *Kaperzynski v Poland* (2012) and *Wizerkaniuk v Poland* (2011), the Court, to support its statement that '[t]he chilling effect that the fear of criminal sanctions has on the exercise of journalistic freedom of expression is evident',[1051] equally cited (once again 'mutatis mutandis') the combination of *Nikula* and *Elçi*, although this time it also included several other cases with no connection to legal matters. The Court, it appears, seems to have seen the situation as regards journalists as similar enough to that concerning lawyers to merit this cross-citation, making it all the more surprising that there is no such transfer of the 'watchdog' function in the other direction, particularly in light of the Court's expansion of that category beyond its traditional application to journalists in a narrow sense.[1052]

This complex jurisprudence on lawyers' potential function as 'watchdogs' shows the close relationship between lawyers' functions in protecting their own private interests and their defence of the wider public interest in the rule of law. While lawyers' actions on behalf of specific clients aim to further those clients' private interests (as well as, perhaps, the lawyer's interest in exercising their profession), their statements on cases in which they are not involved mix the lawyer's own private interests and the public interest in the rule of law, which is closely inter-related with the question

1048 225ff.

1049 *Pedersen and Baadsgaard v Denmark [GC]* App no 49017/99 (ECtHR, 17 December 2004), para 93. The Court's use of the term 'chilling effect' to denote that a certain minimum activity level is desirable is discussed in Chapter Six, 335ff.

1050 *Wille v Liechtenstein [GC]* App no 28396/95 (ECtHR, 28 October 1999), para 9ff.

1051 *Wizerkaniuk v Poland* App no 18990/05 (ECtHR, 05 July 2011), para 68; *Kaperzyński v Poland* App no 43206/07 (ECtHR, 03 April 2012), para 70.

1052 cf n 1024 and accompanying text.

of what place lawyers properly occupy in a society based on the rule of law. This question of the relationship between legal services and the public interest forms the topic of the next chapter, Chapter Five.

III. Conclusion: Legal services and lawyers' private interests

In keeping with the classic idea that human rights further the interests of the rights holder,[1053] the Court has also developed case law which protects lawyers' private interests, though this is not necessarily particularly expansive. Even where they are not acting for an identifiable client (and furthering that person's private interests), lawyers' access to and continued membership of the profession will be protected, as will certain elements of their exercise of the profession as well as their professional reputation. However, it is noticeable that much of this case law does not highlight that the profession of lawyer, unlike the other professions which the Court frequently draws on for inspiration, also furthers the important public interest in the rule of law. This public interest becomes more visible in the Court's case law concerning lawyers commenting on cases they are not involved in professionally, where they fulfil something of a 'watchdog' function. However, due to the Court's restrictive case law on lawyers speaking outside of judicial proceedings, there may be a certain need for lawyers to exercise caution here.

1053 Chapter Eight, 399ff.