Freedom of Expression and Association of Judges

Thematic booklet

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Authors: Mohor Fajdiga, Faculty of Law, University of Ljubljana, mohor.fajdiga@pf.uni-lj.si in collaboration with the TRIIAL 2 Consortium partners

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# About TRIIAL 2 project

The TRIIAL 2 project provides training activities and tools for judges, attorneys, and prosecutors on the European rule of law, mutual trust, judicial independence, impartiality and accountability (see the dedicated website [here](https://cjc.eui.eu/projects/triial-2/)). TRIIAL 2 project is co-funded by the European Commission Directorate General for Justice and Consumers (Project no. 101089737). The TRIIAL 2 project is aimed to continue and expand the research on rule of law issues beyond the temporal and substantive scope of TRIIAL project, its predecessor.

TRIIAL 2 consortium:

* Centre for Judicial Cooperation (European University Institute) (Coordinating partner) – Gabor Halmai, Marta Achler, Federica Casarosa, Madalina Moraru
* [Eötvös Loránd University (ELTE)](https://www.elte.hu/en/) – [Zoltan Fleck](https://www.ajk.elte.hu/en/staff/dr-zoltan-fleck), Agnes Kovacs
* [Institute for Law and Society (INPRIS)](http://www.inpris.pl/en/) – [Jaroslaw Gwizdak](http://www.inpris.pl/en/people/zarzad/jaroslaw-gwizdak/)
* [Italian School for the Magistracy (SSM)](http://www.scuolamagistratura.it/documentazione/archivio/91-presentazione/131-a-short-introduction-the-italian-school-for-the-judiciary.html) – [Gianluca Grasso](https://www.scuolamagistratura.it/web/portalessm/comitato-direttivo)
* [Lisbon Centre for Research in Public Law (CIDP)](https://www.icjp.pt/cidp) – Tiago de Freitas
* [National Association of the Romanian Bars (UNBR)](https://www.unbr.ro/category/proiecte-unbr/TRIIAL/) – [Raluca Bercea](https://drept.uvt.ro/departamente/drept-public/bercea-raluca.html)
* [University of Florence (UNIFI)](https://www.unifi.it/changelang-eng.html) – Martina Coli, Marcella Feri, [Nicole Lazzerini](https://www.unifi.it/p-doc2-2019-0-A-2c31342d352b-1.html)
* [University of Gdansk (UG)](https://en.ug.edu.pl/) – [Tomasz Koncewicz](https://ug.edu.pl/pracownik/1435/tomasz_koncewicz), Marcin Michalak
* [University of Ljubljana (UL)](https://www.uni-lj.si/university/) – [Mohor Fajdiga](http://www.pf.uni-lj.si/en/faculty/teachers-and-researchers/mohor-fajdiga-master-of-law/), [Saša Zagorc](http://www.pf.uni-lj.si/en/faculty/teachers-and-researchers/sasa-zagorc-phd-professor/)
* [University of Pompeu Fabra (UPF)](https://www.upf.edu/en/home) – [Aida Torres Perez](https://www.upf.edu/web/gritim/entry/-/-/1413/adscripcion/aida-torres)
* University of Masaryk (MUNI) – Šimon Chvojka, Ondrej Kadlec, David Kosar

# Introduction

This booklet is part of the preparatory materials designed for the workshop for the hybrid cross-border training workshop for judges, prosecutors, attorneys and other legal professionals on **Freedom of Expression and Association of Judges,** organised on 13–14 March 2024 by the University of Ljubljana as part of the TRIIAL 2 project.

The booklet aims to enable legal practitioners:

* to understand and explain the main legal issues relating to the European rule of law;
* to acquire the knowledge and the ability to assess the European legal pathways for defending freedom of expression and association of judges;
* to understand the threats to the rule of law from outside and from within the judiciary, and your role in upholding this fundamental EU value;
* to become familiar with the ECtHR standards concerning freedom of expression and association of judges and with the recent CJEU case-law, providing a new avenue for protection of this right;
* to understand the different underlying premises that govern the freedom of expression and association of different groups of professionals within the judicial system;
* to become familiar with the national case law concerning freedom of expression and association of judges
* to determine, whether the Charter of Fundamental Rights of the EU is applicable in a certain case or not;
* to be able to establish whether the solution of the pending case requires the involvement of the Court of Justice through the reference for preliminary ruling;

The booklet is not meant to be an exhaustive analysis of freedom of expression and association of judges or the CJEU and ECtHR caselaw on the topic. Instead, the booklet:

* focuses on selected aspects of the topic, seeking to fill the gaps in the current professional and academic discussions and
* raises questions not yet covered by the case law of the CJEU and ECtHR.

An important part of the booklet is the analysis of selected national jurisprudence from 8 jurisdictions (**the Czech Republic, Italy, Hungary, Poland, Portugal, Romania, Slovenia, and Spain**) on key aspects of freedom of expression and association of judges, focusing also on the added value of judicial interaction techniques. Each of the partner institutions has submitted approximately three cases dealing with freedom of expression and association of judges. These cases were selected with the aim to reflect how national courts are using the CJEU and ECtHR caselaw, to decide on national rule of law issues. The issues raised by the selected caselaw are not only of national relevance but address systemic pan-European questions and problems related to the freedom of expression and association of judges. For additional national case law, you are invited to consult the TRIIAL Database: <https://cjc.eui.eu/data/>.

The present booklet is part of a series of 12 booklets to be drafted within the framework of the TRIIAL 2 project by each of the partner institutions on the following topical rule of law issues:

1. Enforcing the Rule of Law through Judicial Interaction Techniques (EUI)
2. **Freedom of Expression and Association of Judges (UL)**
3. Mutual Trust, Judicial Independence of Prosecutors in the EAW framework (UPF)
4. Freedom of Expression and Association of Prosecutors – a Cross-Border Judicial Dialogue (INPRIS)
5. Are National Higher Courts Securing Fundamental Rights? Litigation Techniques towards Implementation of EU Acquis on RoL and Fundamental Rights (CIDP)
6. Disciplinary Proceedings and Judicial Ethics (SSM)
7. The Role of Lawyers in the Promotion of Judicial Independence, Mutual Trust and Rule of Law – Litigation Strategies before Judicial and Quasi-Judicial Bodies (UoG) hybrid– September 2024
8. Fundamental Rights and the Use of the Preliminary Reference Procedure (ELTE)
9. Judicial Dialogue and Freedom of Expression of Lawyers (UNBR)
10. The Rule of Law Requirements of Judicial Self-Government: the Role of Judicial Councils and Court Presidents (MUNI)
11. Mutual Trust, Judicial Independence and Judicial Cooperation in Asylum (UNIFI) online
12. Rule of Law and Predictive Justice (EUI)

# Why is Freedom of Expression and Association of Judges an Increasingly Relevant Topic?

Judges enjoy freedom of expression and association as any other citizen.[[1]](#footnote-1) However, when exercising these fundamental rights, they must be mindful of the limitations the legal system has traditionally imposed to safeguard important competing interests: judicial independence, impartiality and public trust in the judiciary. Striking a proper balance is an extremely demanding task. In the last decade, two major societal developments – the rise of social networks and the rule of law crisis – have even further increased the complexity of the topic of this booklet.

Social networks have fundamentally changed our daily lives. Judges are no exception. Their use of social media can be regarded as a welcomed novelty for the democratic society, yet it poses a series of challenges: the appropriate content of communication, especially from the perspective of the requirement of impartiality, the blurred lines between private and public communication, the consequences of liking, retweeting and other means of limited communication, etc. As a result, guidelines and standards on the use of social media by judges are growing and evolving at an accelerated pace.[[2]](#footnote-2)

The second development is that several Member States are witnessing an unprecedented decline in the rule of law. Polish and Hungarian judicial “reforms” led to a structural breakdown, which no longer makes it possible to talk about independence and impartiality of their judiciaries (e.g. C-791/19, § 64). While other Member States endure for the moment, they are not immune to the constitutional backsliding. Judges’ expression and association have proved to be an important antidote against attempts to undermine the rule of law.

These developments have triggered a response from the CJEU and the ECtHR. Firstly, both courts have extensively dealt with questions regarding the compatibility of domestic accountability systems with EU law and ECHR (e.g. *Juszczyszyn v Poland*, *Grzęda* v *Poland*, C-487/19, C-791/19, C-585/18, C-624/18, and C-625/18, C‑83/19, C‑127/19 and C‑195/19, C‑35*5/19; C-791/19; C-817/21).* Secondly, they have developed the standards concerning freedom of expression and association of judges (and prosecutors) to shield judges who raised their voices and protested against deleterious judicial reforms or to prevent creating conditions favourable to those seeking to discredit the judiciary (see e. g. C-204/21, Commission v Poland). Judges now have a (moral) duty to speak out in the face of affronts to the rule of law (see ECtHR, Żurek v Poland, No. 39650/19, para. 222). Nevertheless, fulfilment of such a duty could expose them to disciplinary and other sanctions, as it happened in numerous recently decided cases (e.g. Miroslava Todorova v Bulgaria; Kozan v Turkey; Tuleya v Poland). As a result, thirdly, some judges have sought to channel their opposition to judicial reforms through Article 267 of the TFEU and in fact did find refuge from the national pressures before the CJEU (C-558/18 and C‑563/18, *Miasto Łowicz;* C-564/19, *IS;* C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19, *Euro Box Promotion and Others*).

Standards stemming from the jurisprudence of both European supranational courts are currently under accelerated development. Only last year, the ECtHR has issued three new decisions concerning the topic (Tuleya v Poland, Manole v Moldova, Sarısu Pehlivan v Turkey). Numerous pending cases (e.g. *Morawiec* v *Poland* *Gąciarek* v *Poland; Wrobel* v *Poland, Chinita Rodriges v Portugal, Ferek v Poland etc.)* guarantee that the topic will be relevant for the years to come. Moreover, various soft law instruments are currently sprouting at the national and supranational level (e.g. the CCJE Opinion 25 on freedom of expression of judges from December 2022). The booklet therefore addresses a topic, which is currently extremely important and will remain highly relevant in the future. It strives to equip the judges, prosecutor, lawyers and other legal professionals as well as policy-makers with legal knowledge on the scope and content freedom of expression and association of judges as well as on procedural guarantees and avenues for its protection, ultimately empowering them to address adequately the manifold challenges of their daily work and their professional vocation.

# Freedom of Expression and Association of Judges and Judicial Independence: Interconnected and Mutually Reinforcing concepts

Freedom of expression and freedom of assembly and association are individual fundamental rights, guaranteed by Articles 10 and 11 of the Convention and Articles 11 and 12 of the Charter. When judges’ freedom of expression and association is at stake, their independence is often also affected. As this section will show, these two rights are intrinsically connected with judicial independence and the rule of law.

## Safeguarding judicial independence through the right to freedom of expression before the ECtHR

Before the ECtHR, judges cannot claim a violation of judicial independence as a self-standing principle.[[3]](#footnote-3) They must present any violation of judicial independence as a violation of one of the rights guaranteed by the Convention.[[4]](#footnote-4) Article 10 of the Convention is probably the most commonly invoked provision to safeguard judicial independence. This is what happened in the seminal case of *Baka v Hungary*.

The ECtHR affords judges a high level of protection, compared to other civil servants.[[5]](#footnote-5) According to the Court’s settled case law “any interference with freedom of expression of a judge calls for close scrutiny,” the underlying rationale being judicial independence. [[6]](#footnote-6) When freedom of expression of judges is at stake, judicial independence is normally also affected.[[7]](#footnote-7) In *Baka v Hungary* for example, concurring judges Pinto de Albuquerque and Dedov underlined that the “removal from the position of President of the Supreme Court had a chilling effect on the expression of professional opinions by other judges, the independence of the judiciary and the rule of law in Hungary.”[[8]](#footnote-8) National authorities can also (ab)use a publicly expressed opinion of a judge as a pretext for sanctioning a judge for his or her decision-making in individual cases. Venice Commission for example expressed concern over provisions of Turkish legislation, defining disciplinary offences for judges: “While some of them are vague, others are too broad. […] These can be abused even just to indirectly sanction judicial activities. […] This leads to the risk that the disciplinary power could be used to sanction a judge whose judicial decisions are disliked, without explicitly referring to such a motive.”[[9]](#footnote-9)

The Court grants a particularly high level of protection in the context of the rule of law crisis when judges express their opinion to defend their independence. Such approach is necessary, since experience has taught us, that legal institutions (including courts) can at best work as speed bumps but cannot stop determined autocrats from consolidating their power and ultimately creating a *de facto* autocracy.[[10]](#footnote-10) In such a context, judges – guardians of the rule of law and fundamental rights – cannot successfully perform their duty in their usual way, namely by impartially adjudicating cases brought before them. Publicly expressing their opinion can be a more valuable alternative in such circumstances. In such situations, the fact that the expression is aimed at defending judicial independence therefore heightens the level of protection, even though the national authorities normally invoke the very same reason (enhancing judicial independence and impartiality) to justify the interference with freedom of expression. As observed by Halmai and Kovácz, judicial independence can thus serve as a ground for interfering with freedom of expression of judges as well as a reason for increasing the level of protection of judicial free speech.[[11]](#footnote-11)

In what ways the Court increased the level of protection in the context of rule of law crisis? The Court was willing to recognise expressions given in a formal capacity in the exercise of an official duty (official speech) to be covered by the right to freedom of expression.[[12]](#footnote-12) This is far from being self-evident.[[13]](#footnote-13) The Court is also prepared to shift the burden of proof for establishing the causality link so that the state has to prove the applicant was not punished for expressing his or her opinion, but for another unrelated reason.[[14]](#footnote-14) This shift increases the potential for judges to defend their independence by relying on freedom of expression. They can argue that their freedom of expression was violated even in cases with an attenuate connection between their expression and the sanction, as the burden regarding the causality link is on the state.

Despite some inherent limitations of defending judicial independence through the right to freedom of expression before the ECtHR, national judges are afforded high protection in Strasbourg. The ECtHR therefore represents an important avenue for defending judicial independence.

## EU law: An Indirect Way of Protecting Freedom of Expression and Association of Judges

The rule of law crisis has been a catalysator of a more robust EU legal framework for guaranteeing independence of national judges. Among the EU institutions, the CJEU has played a paramount role in bolstering judicial independence standards. However, the CJEU jurisprudence has had a limited impact on freedom of expression and association of judges. The EU Charter of Fundamental Rights guarantees freedom of expression and association in Articles 11 and 12. Yet, the organisation of justice systems falls within the scope of Member States’ competence. As a result, Member States are in principle not implementing EU law in the sense of Article 51(1) of the Charter, which means that the Charter generally does not apply. The lack of competence in this field is also the reason why the Directive (EU) 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the protection of persons who report breaches of Union law (the Whistleblower Directive) does not cover the judiciary.[[15]](#footnote-15) Nevertheless, the EU law is a valuable source of protection for national judges’ freedom of expression and association, albeit in an indirect way.

The most important development in the relevant EU legal standards came with the famous ASJP judgment[[16]](#footnote-16) from February 2018, in which the CJEU recognised that Article 19 (1)(2) of the Treaty on European Union (TEU) requires Member States to ensure effective judicial protection. It ruled that that independence of national courts, the guarantors of such effective judicial protection, is an essential element of Article 19 (1)(2) TEU. This enabled the European Commission to launch infringement procedures against Member States that departed from the principle of judicial independence. In addition, it has allowed national courts to defend their independence though the preliminary ruling mechanism from Article 267 of the TFEU. Based on these two provisions of primary law, the CJEU was able to heighten the standards of judicial independence. For instance, it has increased the fair trial requirements for disciplinary proceedings, which enhanced the protection of judges, who have been subjected to disciplinary proceedings for exercising their freedom of expression. It has also prohibited any interference with the right of national judges to engage in dialogue with the CJEU through the preliminary ruling mechanism from Article 267 and thus strengthened another avenue for national judges under pressure.[[17]](#footnote-17) Instead of expressing their opposition to developments undermining judicial independence directly through the exercise of freedom of expression, judges can alternatively express their protest indirectly though the preliminary ruling procedure.[[18]](#footnote-18)

Since freedom of expression (and association) of judges and judicial independence are interconnected concepts, Article 19 (1)(2) TFEU can be invoked not only to safeguard judicial independence but also for protecting freedom of expression of judges.[[19]](#footnote-19) Freedom of expression is thus protected through Article 19 TEU, which guarantees judicial independence. It seems that we are witnessing a reverse situation, from the one occurring before the ECtHR, where judicial independence is safeguarded through freedom of expression of judges from Article 10 ECHR. The main limitation of such an indirect way of protecting freedom of expression of judges is that the case must be presented as a violation of judicial independence which might not always be easy.

# Political expression and association of judges

Political expression and association generally enjoy special protection under Articles 10 and 11 of the Convention.[[20]](#footnote-20) However, judges must enjoy public confidence, meaning that the Courts must be regarded as capable of resolving the legal controversies in an impartial manner.[[21]](#footnote-21) Whenever a judge publicly expresses his or her opinion, the public confidence in the judiciary may be at stake. This is particularly so when judges engage in political expression. This imposes on judges a duty of restraint and discretion whenever their expression or association falls within the political sphere.

## Political neutrality of the judiciary: a legitimate aim or an excuse for undermining judicial independence?

The Court has recognised that political neutrality of civil servants can be a legitimate aim under the Convention, especially in countries having a recent experience with an authoritarian regime.[[22]](#footnote-22) Political neutrality of the judiciary helps to build public trust in its independence and impartiality in any given society. However, recently, governments with authoritarian tendencies have started to exploit the ideal of political neutrality to punish and silence judges, who openly opposed to the judicial reforms that undermine judicial independence. This created a chilling effect on their colleagues and stifled a large part of the judicial branch. In response, the ECtHR heightened the protection of judges whose expression defended the rule of law and even imposed a (moral) “duty to speak out in defence of the rule of law and judicial independence when those fundamental values come under threat.”[[23]](#footnote-23) Nevertheless, the controversy surrounding the issue of political neutrality is far from settled and has been afforded limited attention so far. This section therefore seeks to shed some light on this complex issue.

At the outset, it must be recognised that countries have approached the question of political neutrality of the judiciary differently. The different approaches do not necessarily follow the “East-West” divide. For example, in Slovenia, judges cannot be functionaries of political parties. However, no law prohibits them from being members of political parties.[[24]](#footnote-24) Moreover, they can be elected to various political offices, if they agree to temporarily put their judicial function on hold.[[25]](#footnote-25) After their political mandate expires, they can return to the bench.[[26]](#footnote-26) In contrast, Poland and Hungary have made political neutrality of the judiciary *materia constitutionis*.[[27]](#footnote-27) These particularities of national context should can also play an important role in determining the correct balance of the duty of discretion and restraint and judicial free speech.

However, having a political neutrality of the judiciary enshrined in the Constitution, does not give the national authorities a *carte balance* to sanction judges for any involvement in activities of an allegedly political nature or with political implications. When provisions designed to implement political neutrality are invoked against judges or other civil servants who have been exercising their freedom of expression, the central legal question is what constitutes “political activities” and whether laws prohibiting political activities are sufficiently clear and foreseeable. The Court has been willing to tolerate unclear and unforeseeable laws, shifting the focus from the legislation itself to the assessment of proportionality of its application in a given case.[[28]](#footnote-28) This is understandable since a stricter approach would turn the Court into a European quasi-constitutional court with the authority to implicitly strike-down national legislation. However, these provisions have a great chilling potential for judges, who may choose to remain silent to avoid being sanctioned for engaging in political activities. The described situation works to the benefit of authoritarian governments that stretch the notion of political activities as far as possible to silence the dissenting voices. The Court therefore must come up with an approach that would enable it to properly address this challenge in a systemic way.[[29]](#footnote-29) Nevertheless, as will be shown in a turn, the rich jurisprudence of the Court offers judges, who have been sanctioned for their allegedly political expressions, aimed at defending the rule of law, a high standard of protection.

## Political activities of judges and the right to an impartial trial

Applicants before the ECtHR may argue that current or previous political activities of a judge cast doubt on his or her impartiality, guaranteed by Article 6 EHCR. In *Otegi Mondragon and Others v Spain* the Court found that previous membership in a political party of a Spanish constitutional court judge could not be regarded as raising an objectively justified doubt in the impartiality of the trial. The judge in question was a member of *Partido Popular* until 2011, roughly three years before the Constitutional court heard the case. The Court noted that under the Spanish legislation, being a judge of a constitutional court was not incompatible with membership in a political party, that the judge in question was not a member of any political party at the time when the appeal was submitted to the constitutional court and that he did not assume any particular function within the party but was merely a member. Consequently, the Court declared the application inadmissible.[[30]](#footnote-30) In *M.D.U. v Italy,* the applicant, member of Parliament elected as member of a right-wing party Forza Italia, complained about the lack of impartiality of the Court of Cassation due to allegedly political statements of two judges, which showed their opposite political views. One of them used to be a member of Parliament elected as member of the *Communist Party*, whereas the other was a member of *Magistratura democratica*, a left-leaning association of magistrates. The Court recognised personal fears of the applicant but held that they cannot be regarded as objectively justified. According to the Court, political convictions of judges in this case could not have impacted their impartiality in the absence of any connection between the case and the opinions, and any other elements that could question their impartiality.[[31]](#footnote-31)

The case law of the CJEU seems to confirm a reserved approach towards recognising previous involvement of judges in political activities or membership in political parties or politically engaged associations as casting sufficient doubt on the impartiality of a trial. In C-132/20, *Getin Noble Bank*,[[32]](#footnote-32) the CJEU explained that the mere fact that a judge was appointed at a time when that judge’s Member State was not a democratic regime does not affect the independence and impartiality of that judge. Another example is the most recent case of *Commission v Poland* (C-204/21, 5 June 2023). Polish law *inter alia* required judges to report to the authorities any prior and current membership in associations and political parties. This information would then be made freely available to everybody on an official website. The Court found such provisions, which aimed to ensure political neutrality and impartiality of courts, to be contrary to Article 7 (right to respect for private life) and Article 8 (the right to protection of personal data) of the Charter of Fundamental Rights of the EU (the Charter). The Court recognised a particularly serious interference with these rights, since the data, freely available to everybody, could reveal judges’ religious, political and philosophical beliefs.[[33]](#footnote-33) It also found very limited added value of such disclosure for the value of impartiality and seemed to regard it as a threat to judicial independence.[[34]](#footnote-34)

## Distinguishing different types of “political” expression: standards from the ECtHR

Whenever judges are accused of engaging in political activities or expressing political opinions, the Court is normally before one of the most challenging tasks in the field of freedom of expression and association of judges. Distinguishing between different types of “political” expression of judges is crucial for the level of protection accorded in each particular case. Of course, this is only one of the elements that the Court takes into account when determining the level of protection, yet it is a strong factor. Normally, a particular “political” expression cannot be neatly categorised into one of the subcategories designed for the purposes of this section. The lines between the different types are often blurred. The Court’s constantly developing jurisprudence can nevertheless be a valuable guidance for national judges, when contemplating to express their opinion or defending their fundamental right in court, and when adjudicating a case concerning freedom of expression of their colleagues.

Before turning to the case law of the Strasbourg court, an important caveat is in place: for the purposes of this section, “political” expression is a wide term, covering a full spectrum of expressions from purely political to those that are not political at all, but only arguably have political implications. To indicate that some expression covered by “political”, is in fact not political, but only has political implications, the word “political” is written in double quotation marks.

### a) Purely political expression of judges

The Court has had some opportunity to rule on cases, which seem to concern purely political expression. Note a few examples that arguably fall into this category. In *E v Switzerland*, a district court judge was reprimanded for distributing leaflets of a political party calling on the authorities for specific actions concerning a public controversy.[[35]](#footnote-35) In *Altin v Turkey* a public prosecutor publicly disapproved the actions of the ruling party, especially in relation to the terrorist campaign. The Turkish authorities imposed two disciplinary demotions before finally dismissing the applicant. The Court followed the characterisation of his activities by the national courts, namely that he was behaving like a “professional politician”.[[36]](#footnote-36) *Jhangiryan Gagik v Armenia* concerned the Deputy General Prosecutor of Armenia, who had a speech at a public rally in support of a candidate for President of Armenia, who lost the elections. The applicant argued that the election was rigged and called on the crowds to continue to protest even in the face of force. The Court ruled that the dismissal of the applicant was proportionate, after having characterised his speech as clearly political.[[37]](#footnote-37) *Karapetyan and Others v Armenia*, concerned diplomats who also believed the elections were stolen. They made a public statement, expressing their “outrage against the fraud of the election process […] demand[ing] urgent steps be undertaken to call into life the recommendations contained in the reports of the international observation mission.” The Court followed the Armenian Administrative Court, which had found that “the applicants’ impugned statement concerned ‘political processes as it contained a political assessment of election and post-election events.’”[[38]](#footnote-38) In all the cases outlined above, the Court found the expression to be political and upheld the sanctions imposed by the national authorities. The low level of protection that purely political expression enjoys largely contributed to such an outcome.

### b) Public interest expression with political implications

According to the settled case law of the Court, the fact that the statement has political implications could not *per se* prevent the judge from making such statement.[[39]](#footnote-39) Judges are therefore in principle entitled to make such statements. Most of the cases of freedom of expression of judges that reached the Court, concern these situations. However, not every expression with political implications enjoys the same level of protection.

#### Opinions on the functioning or reform of the justice system

Whenever judges express themselves regarding the justice system, judicial reforms and other related issues, the protection is heightened. The first reason is that judges possess a priceless understanding of the judiciary. Their insider’s point of view gives their opinions on the functioning and reform of the justice system significant weight. As the Court has ruled, “their experience and expertise may be conducive to an informed debate on issues of public interest and importance”.[[40]](#footnote-40) The democratic society has a special interest in being informed about the (proper) functioning of the judiciary, the third branch of power. Accordingly, judges whose expressions seek to contribute to that aim enjoy higher level of protection, since they are at the same time ensuring that the public is sufficiently informed, which is important from the perspective of the right to information, the other side of the coin of freedom of expression. The second reason the Court accords such expressions a higher protection is that judges are the ones who first bear the consequences of judicial reforms, especially those implemented to undermine judicial independence. Developments in the judiciary can directly impact their careers or affect their work. The third reason is that the Court has changed its position on whether the judges, as civil servants must show loyalty to their employer. In *Bilgen v Turkey*, and subsequent cases, the Court treated judges as a special category of civil servants and declared that judges should be loyal to the rule of law and not the holders of state power.[[41]](#footnote-41)

Not only the ECtHR case law, but also the Opinion no. 25 of the CCJE explicitly recognises the higher level of protection for expressions falling withing this subcategory.[[42]](#footnote-42) A particularly high level of protection is afforded, when judges speak in defence of the rule of law and judicial independence, if those fundamental values come under threat. In such circumstances, the Court recognised a duty to speak out.[[43]](#footnote-43)

#### Opinions on the law and its application

Similarly to the opinions on the functioning or reform of the justice system, the protection of freedom of expression is high in cases concerning the law, its application, ways to improve it, the role of courts in protection of human rights and various other aspects of administration of justice.[[44]](#footnote-44) The underlying rationale is again that it would be a loss for the society to prevent judges from expressing such opinions, as they have valuable knowledge and expertise that can contribute to enhancing the law and the way it is applied in practice. Judges often express these types of opinions in academic settings. Note for example the case of *Wille v Liechtenstein*.[[45]](#footnote-45) In this case, the Court recognised that the opinion of the President of the Administrative Court of Liechtenstein had political implications, since Mr Wille argued for a specific interpretation of the constitution that would benefit the powers of constitutional court to the detriment of the powers of the executive. Nevertheless, the Court found that he was entitled to expressing such opinion and found that a declaration of the Prince of Liechtenstein, that he will not reappoint the judge after the expiry of the term of office violated Article 10 of the Convention.[[46]](#footnote-46)

#### Opinions regarding other topics in the public interest

Whenever judges engage in public interest expression regarding topics other than those covered by the previous two sub-categories, they must ensure that their expression is not damaging the independent and impartial image of the judiciary. According to the CCJE Opinion No. 25, in such situations, “a reasonable balance needs to be struck between the degree to which judges may be involved in public debates and the need for them to be and to be seen to be independent and impartial in the discharge of their duties.” The CCJE underlines the importance the content and context of a given statement.[[47]](#footnote-47)

To illustrate how these abstract and vague standards apply in practice, and to illustrate the difficulties in distinguishing between the different categories, this section continues with outlining how this was done in two concrete cases.

#### Illustrating the difficulties in distinguishing different types of public interest expression with political implications

*Eminağaoğlu* v *Turkey:* The applicant, Mr *Eminağaoğlu* expressed opinions of allegedly political nature in his role of President a judicial association. He was transferred as a disciplinary measure, which he successfully challenged before the national courts that eventually imposed a reprimand.[[48]](#footnote-48) The Court distinguished statements concerning the justice system from other statements. The former could be regarded as falling into the most protected category (2.1.), whereas the later most probably fall into the least protected category of among the different types of expressions with political implications (2.3). Regarding the later, the ECtHR referred to the judge’s criticism of the attitude of the President of Turkey towards international institutions and his position on the wearing of the Islamic headscarf by the wife of the President of Turkey.[[49]](#footnote-49) It ruled that “although participation [of judges] in public debate on major societal issues cannot be ruled out, members of the judiciary should at least refrain from making political statements of such nature as to compromise their independence and undermine their image of impartiality.” As to the former, the ECtHR seems to have adopted a broad understanding of the expressions concerning the justice system. In addition to the opinion regarding the constitutional reform affecting the judiciary, the Court also considered the applicant’s criticism of statements of politicians concerning judicial decisions or the judiciary in general as falling in the first category. A failure of the Turkish authorities to distinguish between different types of expressions and to provide sufficient procedural guarantees, seems to have been the primary reasons leading the Court to find a violation of freedom of expression. The Court recognised that the Government was right to underline the duty of restraint and discretion concerning statements falling in into the less protected category. It seems that if the Government decided to impose disciplinary sanctions only for these statements, the Court would have found no violation, but most probably only if a milder penalty would have been imposed.[[50]](#footnote-50)

*Danileţ v Romania:* The most recent ECtHR’s case concerning freedom of expression of judges, *Danileţ v Romania*, illustrates the complexity of distinguishing between the first two subcategories of expressions with political implications.[[51]](#footnote-51) For posting two messages on his Facebook account with about 50.000 followers, the National Judicial and Legal Service Commission (the CSM) imposed a disciplinary penalty of two-month 5% salary cut. “As to the first message, the Court found that it contained criticism of the political influences to which certain institutions were allegedly subject, namely the police, the judiciary and the army. The applicant had referred to the constitutional provisions under which the army was subject to the will of the people and contemplated the risk of any form of political control over that institution. Through the use of rhetorical questions, he invited his readers to imagine the army acting against the will of the people, someday, under the pretext of protecting democracy; in his view, this was a mere detail behind which lay a more serious problem. […] Regarding the second message, the Court observed that the applicant had posted on his Facebook page a hyperlink to a press article published on a news website, containing an interview with Prosecutor C.S. on the management of criminal cases by the public prosecutor's office and the difficulties encountered by prosecutors in dealing with the cases assigned to them. The posting of this hyperlink was accompanied by a comment written by the applicant, who praised the prosecutor's courage in daring to speak openly about the release of dangerous prisoners, the initiatives, which he considered to be wrong, to amend the laws on the organisation of the judicial system and the lynchings of magistrates.”[[52]](#footnote-52) The Court was unanimous in finding that the expression had political implications and that this itself did not prevent the judge from expressing his opinion.[[53]](#footnote-53) The majority of the ECtHR justices seems to have put the applicant’s messages in the first category and accorded only a narrow margin of appreciation to the national authorities. The dissenting judges disagreed and argued that a certain margin of appreciation should have been accorded. They warned that the applicant’s remarks, especially the first, concerned not only the judiciary but also the army,[[54]](#footnote-54) that he was not in any visible judicial position and that his criticism was not made from a strictly professional perspective, but he used coloured language.

# National case law regarding freedom of expression and association of judges

## Casesheet No. 1 – Human Rights Law v Judicial Ethics: On Existence of Interference with Freedom of Expression of Judges in the Context of Code-of-conduct Proceedings

***Reference case***

Slovenia, Ethics and Integrity Commission of the Judicial Council of the Republic of Slovenia, Reasoned opinion no. Su Ek 10/2022-10 of 25 August 2022 – the case currently pending before the Administrative Court

*Core issues*

Does finding a violation of judicial ethics constitute an interference with freedom of expression of judges in the absence of any other tangible consequences for the judge in question? Does it create a legally relevant chilling effect?

Is the Ethical Commission of the Slovenian Judicial Council a consultative forum for helping judges to resolve ethical dilemmas or a quasi-disciplinary body?

Do prominent judges enjoy greater protection of freedom of expression compared to their colleagues?

**At a glance**

**Case description**

1. *Facts*

In early December 2021, the government friendly media started to question whether one of the Supreme Court judges, a former president of the Supreme Court of the Republic of Slovenia, has actually obtained a law degree, as his name was not found in a publication of the University of Sarajevo. The media called on the judge to show his graduation diploma, which he refused to do. Instead, the Supreme Court published an official statement, explaining that this is a condition for becoming a judge and that any such demands are clearly unjustified. The Supreme Court added that the judge will sue the media and give the compensation for charity. This added fuel to the fire, since the government media now started to claim that the Supreme court has prejudged any eventual defamation proceedings in this case. The pressures on the judge intensified. The media now started questioning whether his bar exam, which he obtained in Bosnia and Hercegovina, was valid under the Slovenian legislation.

In early February 2022, another Supreme court judge, who was known to be in bad relations with the judge in question, gave an interview, in which he argued that according to the case law of the Supreme Court, the judge in question would not even be entitled to represent clients before the Supreme Court, as the Supreme Court found, in two cases concerning a lawyer, that bar exams obtained in other Yugoslav republics were not comparable to the one obtained in Slovenia, and that the lawyers in question did not have the required qualifications to represent clients before the Supreme Court. He claimed that if the judge does not have the required qualifications for representing clients before the Supreme court, it is hard to argue that he can adjudicate as a judge of the Supreme court. The judge explained that the problem of Slovenian legislation is that it does not regulate a situation, in which judge’s status of a judge would be questioned. In such a case, there are two conflicting constitutional values: on the one hand, the contentiously appointed judge and on the other hand the guarantee of irremovability and independence of the judge. He added that the judge in question eventually explained to the media, that claiming that his bar exam from Bosnia is not valid in Slovenia was the pinnacle of distortion. According to the interviewed judge, this was a sign of authoritarian understanding of law, since it is based on the argument of power rather than on the power of argument.

Judge’s remarks even intensified the discreditation campaign, launched against the judge in question. President and Vice President of the Supreme court decided to initiate a procedure before the Ethics and Integrity Commission of the Council of Judiciary (the Ethical Commission). The Ethical Commission found that his remarks constituted a violation of ethical principles no. IX and X, since they were not compliant with the requirement of restraint, consideration, loyalty and respect for judicial colleagues.

The judge in question continued to express his opinion on the matter. He published an article in the most read weekly law journal in Slovenia, in which he further elaborated his views and “warned” (in what seems to be a manner which shows lack of respect for the decision of the Ethical Commission) the readers that his article includes parts that are unethical according to the leadership structures of the Slovenian judiciary.

He challenged the decision of the Ethical Commission before the Administrative court in an administrative dispute that is currently pending.

1. *Legal issues*

The case offers a wealth of legal issues relevant for the current discussions on freedom of expression of judges, their independence, the rule of law, the delimitation between law and judicial ethics etc. This is the reason why this case is included in this booklet despite being currently pending before the Administrative court.

1. Existence of interference with freedom of expression of the judge

Perhaps the most intriguing legal issue of the case is whether finding of violation of judicial ethics constitutes an interference (not necessarily a violation) with freedom of expression of the judge at hand. The case is similar to *Panioglu v Romania*, in which the ECtHR found an interference with freedom of expression but no violation of Article 10. The case concerned a judge attached to the Bucharest Court of Appeal, who “wrote an article, in which she drew parallels between communist oppression and the rise of the President of the Supreme Court of Romania, who had served as a state prosecutor in the era of communism. Despite the targeted Supreme Court President had undergone a vetting procedure, Mrs Panioglu suggested that “Comrade Prosecutor”, as she called the President in her article, was a part of the ruling structure and questioned the President's belief in democratic values, albeit without pointing to concrete facts proving inadequate behaviour. In response, the judges’ section of the High Council of the Magistracy opened a code-of-conduct procedure, in which the applicant was found to have overstepped the limits of freedom of expression in breach of her duty to respect the moral and professional integrity of her colleagues. The decision was permanently included in the applicant’s professional file and can thus be taken into consideration if she applies for promotion.”[[55]](#footnote-55) The Court found that “the *[the code-of-conduct proceedings] did not entail any concrete and imminent loss of judicial office or any pecuniary penalty for her*.” However it noted that “the impugned penalty was relevant and affected the assessment of the applicant’s applications for promotions.”[[56]](#footnote-56) The Court concluded that “*the decision in the code-of-conduct proceedings may have had a certain ‘chilling effect’ on the exercise of the applicant’ freedom of expression,*” but nevertheless found no violation as it ruled that “the decision was not excessive in the circumstances of the present case.”[[57]](#footnote-57)

In October 2020, the Judicial Council of the Republic of Slovenia (the Judicial Council) adopted an order, according to which, all decisions (officially referred to as “principled opinions”), in which the Ethical Commission found a violation of judicial ethics, were to be included in the personal file of the judge concerned. At one of the TRIIAL workshops, this issue was problematised in the light of the above-described case of *Panioglu v Romania*.[[58]](#footnote-58) It seems that this has prompted the Ethical Commission and the Judicial Council to reconsider of the issue. After discussing the issue at several sessions, in a rarely seen split (6 to 5 vote) decision, the Judicial Council adopted a new order (dated 10 March 2022)[[59]](#footnote-59) annulling its order from October 2020. As a result, the decisions of the Ethical Commission were no longer included in the personal files of judges.

In the case at hand, the decision of the Ethical Commission was therefore not included in the personal file of the judge concerned. It will be thus much more difficult for the judge to convince the court that there was an interference with his freedom of expression or another right.

1. Can a decision of the Ethical Commission be challenged in court?

The question of existence of interference with judge’s rights is crucial, because of Article 23 of the Constitution of the Republic of Slovenia, which guarantees a right to judicial review, whenever rights are at stake. If the finding of a violation of judicial ethics constitutes an interference, then this decision can be challenged in court. If so, another question arises, namely, whether we are still in the realm of judicial ethics or does the involvement of courts bring the case into the realm of (human rights) law. This opens an interrelated question: whether the Ethical Commission is a quasi-disciplinary body or a forum for discussing ethical dilemmas of judges.

1. Does a decision finding a violation of judicial ethics create a legally relevant chilling effect?

As we have seen, in *Panioglu*, the Court answered the above question in the affirmative. However, in the case at hand, in contrast with *Panioglu v Romania*, the decision of the Ethical Commission was not included in the personal file and could not, at least formally, be relied on in evaluation of judicial service or promotion procedures.[[60]](#footnote-60) It seems that the key question for the court will be whether such a decision nevertheless creates a legally relevant chilling effect. If it does, it interferes with freedom of expression and vice versa.[[61]](#footnote-61) The ECtHR has not yet resolved this legal issue.

1. Do prominent judges enjoy greater protection of freedom of expression?

The jurisprudence of the ECtHR sometimes accords higher protection to judges in prominent positions,[[62]](#footnote-62) but there are also cases, in which the Court seems to impose a more restrained and cautious approach on prominent judges.[[63]](#footnote-63) In this case, the Ethical Commission decided for the later (see part c. of this case).

1. *Reasoning of the Ethical Commission (whether the action of the judge was in breach of the requirements of judicial ethics*

Preliminary remarks and central question(s):

The Ethical Commission first underlined that the President and the Vice-President of the Supreme Court do not oppose or criticise the legal opinion expressed by the judge at hand and do not claim that such an opinion is unethical. What they see as problematic is the manner how and in what circumstances the judge expressed his opinion. The Ethical commission therefore focused on the following question(s): whether the manner in which the judge expressed himself publicly in an online interview about a fellow judge is in line with the ethical principles and whether it was appropriate in the case at hand to address the media directly when discussing the above-mentioned legal position.

To answer the question(s), the Ethical Commission first referred to the *guidelines for communication among judges and public expression on the functioning of the judiciary and judicial self-government*.[[64]](#footnote-64) It then invoked the guiding principles from the case law of the ECtHR stemming from *Simić v. Bosnia and Herzegovina* App no 75255/10 of 15 November 2016, paras 49, 51 and 52; *Wille v. Lichenstein* App no 28396/95 of 28 October 1999, para. 64; and *Baka v Hungary* App no 20261/12, 23 June 2016, para 125. It also noted the difference between the legal principles of the ECtHR and the judicial ethics. Despite an action being in line with what is legally permissible, it may not be compliant with the requirements of judicial ethics. The Ethical Commission underlined that its primarily task is to raise awareness about mutual respect among judges. It also referred to the Bangalore principles of judicial conduct, Value 4 - Propriety, 4.6: „A judge, like any other citizen, is entitled to freedom of expression, belief, association and assembly, but, in exercising such rights, a judge shall always conduct himself or herself in such a manner as to preserve the dignity of the judicial office and the impartiality and independence of the judiciary.“ It invoked the ECtHR's Resolution on Judicial Ethics, Adopted by the Plenary Court on 21 June 2021, point VI. Expression and contacts,[[65]](#footnote-65) and ENCJ Working group, Judicial Ethics Report 2009-2010, Respect and the ability to listen, p. 8.[[66]](#footnote-66)

Application of the principles to the present case:

Turning to the present case, the Ethical Commission found several lapses in the communication of the judge in question.

First, the Ethical Commission found that the judge has not availed himself of any internal route for warning about the problem of the alleged lack of qualifications of a fellow judge. Instead, the judge, argued that he has done so many times and that his warnings were ignored. The Ethical Commission found that he had done so on various occasions concerning other controversies, but not regarding the one at hand. It invoked the above-mentioned guidelines, providing “*that judges must show appropriate loyalty, restraint and discretion towards fellow judges and their work in critical dialogue on issues relating to the functioning of the judiciary, and that direct media coverage of problems of judicial (self-)administration cannot be ruled out. However, from the point of view of judicial ethics, it is normally appropriate to do so when other (foreseen and possible) mechanisms are exhausted or unavailable. Only in exceptional cases (e.g. where the protection of the fundamental principles of the rule of law, in particular the independence and impartiality of the judiciary, so requires) may public discourse be appropriate as a first option*.”

Second, the Ethical Commission found that some statements were not merely a legal position, taken by the judge at hand, but constituted *ad personam* remarks which are as such ethically inappropriate.[[67]](#footnote-67)

Third, the Ethical Commission explained that if the judge only presented his legal opinion in the light of the latest jurisprudence of the ECtHR concerning the requirement of “tribunal established by law”, this would “suggest a bona fide intention on the part of the judge, but the summarised statements and the context of the interview do not support such an intention.”[[68]](#footnote-68) The Ethical Commission continued that it was immaterial for the ethical assessment, whether the judge had the required formal qualifications, as there are other available avenues to verify this. It ruled that “[b]y making the statements described above, the Judge acted contrary to the duty of discretion, moderation, loyalty, restraint and respect in the presentation of his position and cast doubt on the moral and professional integrity of his fellow judge. In so doing, he has not only tarnished the reputation of a fellow judge but has also damaged the reputation of the judiciary. By relying on Panioglu v Romania, paras 36 and 119, the Ethical Commission continued that the judge “should have been aware of the risks that his statements in the interview may have for the professional integrity of his fellow judge and for the authority and reputation of the judiciary. He should also have been aware that it is not only the judiciary that loses authority in this way, but also its decisions. Judge at hand occupies the highest position in the judicial system, and the Commission therefore agrees with the petitioners’ contention that his words in public carry particular weight and significance, and that he should therefore exercise even greater caution and restraint in his public utterances.” The Ethical Commission therefore found that judge’s interview violated ethical principles no. IX and X, he did not comply with the duty of restraint, consideration, loyalty and respect for judicial colleagues.

1. *Outcome at the national level*

The case is currently pending before the Administrative court.

1. *Judicial dialogue*

The Ethical Commission interpreted ethical guidelines in the light of the ECtHR’s case law and judicial soft-law and assessed the case against these bolstered standards. It showed that it was familiar with the requirements of the ECHR. However, it highlighted that ethical rules sometimes go beyond the ECHR standards.

1. *Additional relevant jurisprudence*
* *Simić v. Bosnia and Herzegovina* App no 75255/10 of 15 November 2016,
* *Wille v. Lichenstein* App no 28396/95 of 28 October 1999
* *Baka v Hungary* App no 20261/12, 23 June 2016
* *Panioglu v Romania* App no 33794/14, 8 December 2020
* Olujić v the Republic of Croatia, app. no. 22330/05, 5 February 2009
* *Marcolino de Jesus v Portugal* App no 2388/15, 1 June 2021

## Casesheet No. 2 – Balance between the duty of discretion and the right to react publicly to restore the truth and the credibility and honour of a magistrate[[69]](#footnote-69)

***Reference case***

Italy, Disciplinary chamber of the Supreme Judicial Council, n 65/2013, 10 May 2013

*Core issues*

Limitations to the freedom of expression of magistrates; balance between the duty of discretion that binds magistrates and the right to react publicly in order to restore the truth and the credibility and honour of a magistrate.

**At a glance**

**Case(s) description**

1. *Facts*

In 2010 the Italian police apprehended a minor girl of Moroccan origin who was suspected of theft. The girl did not have any identification documents with her. The police contacted Ms Fiorillo, the deputy public prosecutor at the Juvenile Court of Milan, who required her fingerprints to be taken and asked for finding a centre where the girl could stay. During the evening, a politician who was member of the regional council of the Lombardy region, Ms Minetti, reached the police office and claimed to know the girl and asked for her custody. The police, after having contacted Ms Fiorillo, gave the girl in custody to Ms Minetti. However, Ms Fiorillo claimed that she never agreed to give the girl to the custody of Ms Minetti as she was not a family member. In the following days, the case became a political scandal in the media and the Minister of Interior reported the matter to the Parliament. Ms Fiorillo, feeling the need to clarify her conduct in the case, made a series of statements to the press where she opposed the version of the Minister of Interior. Then, she participated to a television program where she was interviewed on the matter, and later made further statements to the press. The Prosecutor General accused Ms Fiorillo of a series of disciplinary offences for breaching the duty of discretion that binds magistrates.

1. *Legal issues*

The main legal issue in this case revolves around the question, how to balance between the duty of discretion that binds magistrates and the right to react publicly in order to restore the truth and the credibility and honour of a magistrate. According to the jurisprudence of the ECtHR, magistrates (judges and public prosecutors) should avoid the media, even to respond to provocations.[[70]](#footnote-70) The duty of discretion and restraint prevents them from replying to destructive attacks that are essentially unfounded.[[71]](#footnote-71) However, in Di Giovanni v Italy, dissenting judges Sajo and Pinto de Albuquerque argued that such an absolute restriction does not take into account the fact that various situations may justify public intervention by the judge.” They added that “[w]hile the higher imperatives of justice require judges to exercise discretion and reserve, they certainly do not require them to remain silent when they are publicly attacked. Like any other professional, the judge has the right to defend himself when his honour and professional reputation are attacked and, if the attack is made in the public sphere, the defence can certainly also take place in the public sphere.”[[72]](#footnote-72)

1. *Reasoning of the Disciplinary chamber of the Supreme Judicial Council*

The disciplinary chamber of the Italian Judicial Council (Consiglio Superiore della Magistratura – CSM) found Ms Fiorillo guilty of the disciplinary offenses set forth in Article 2(1)(aa) and (n) of Legislative Decree No. 109 of 2006, which sanction, respectively, the soliciting of the publication of news pertaining to official activities and the failing to comply with the provisions on judicial service adopted by the competent bodies. Ms Fiorillo was thus sentenced to the sanction of censure, that is, a formal statement of reprimand contained in the operative part of the disciplinary decision. The censure also entails some inconvenient consequences, such as the loss of the right to vote and to stand as a candidate at the elections of the CSM for ten years. It may also be accompanied with the ancillary sanction of the transfer of the judge concerned to another office or division.

The disciplinary chamber considered that was no doubt that Ms Fiorillo had violated the aforementioned provisions since she had made direct contact with the press and participated in a well-known television broadcast. The central issue in the case was rather whether such conduct could be justified by reason of the public dissemination, by, among others, the Minister of the Interior, of a version of the judicial affair different from how Ms Fiorillo had known and perceived it. In short, the question was whether there is a right for the magistrate to react publicly in order to restore the truth, as well as her own credibility and honour, and whether, in the case at hand, this right was properly exercised.

In this respect, the disciplinary chamber referred to the right to freedom of expression enshrined in Article 10 ECHR, which may be subject to limitations provided by law. Indeed, Article 10(2) ECHR itself imposes a general duty of discretion on the magistrate to ensure the authority and impartiality of the justice system. The disciplinary chamber referred to the interpretation provided by the ECtHR in *Buscemi v. Italy*, where the latter ruled that judicial authorities must observe utmost discretion with respect to the case with which they deal in order to preserve their image as impartial judges and must avoid using the press even once provoked. The disciplinary chamber also referred to the judgment 100/81 of the Italian Constitutional Court where the latter held that the freedom of expression of magistrate must be balanced with their role and authority. It considered that both decisions express the need to avoid that statements made by an individual magistrate endanger the appearance of independence of the judiciary.

In the case at hand, the disciplinary chamber found that Ms Fiorillo had not properly exercised her right to provide clarifications to dispel misinterpretations and distortions of her actions, and therefore this right could not be balanced against the principles of the ECtHR case law. Had she asked for protection from the CSM and her office, and such protection had been denied, it would have been reasonable to grant her the possibility to make clear her versions of the facts and restore her honour. Instead, Ms Fiorillo had made her initial statements the day after she sought protection from the CSM, an insufficient amount of time to allow the CSM or her office manager to intervene. In addition, she had not considered that the actual course of events covered by her statements could be ascertained in criminal court with the consequent recognition of the correctness of her actions. In such a scenario, the disciplinary chamber found that there was no need, urgency, or indispensability for a media disclosure of the truth by Ms Fiorillo realised before the outcomes of the criminal trial, the action of the CSM, the intervention of the Public Prosecutor at the Juvenile Court of Milan, and in violation of the provisions of the law and the directives of the head of her office.

1. *Outcome at the national level*

The judgment was appealed before the Court of Cassation which set it aside and referred the case back to the disciplinary chamber in a different composition. The Court of Cassation balanced then interest protected by the disciplinary rules – that is the independence and impartiality of the magistrates – with the justification provided by Ms Fiorillo. It found that the disciplinary chamber of the CSM erred in considering that that the legal interest behind the conduct of Ms Fiorillo was the protection of the freedom of expression. Instead, the Court of Cassation considered that her action was meant to protect her right to professional honour by restoring the truth of the facts. The question was thus whether the action of Ms Fiorillo to restore her honour – and, thus, the breach of the value of judicial independence – was proportionate and there were no less restrictive means available. Such a balance must be struck by the disciplinary chamber not in abstract but rather considering the actual results that the magistrate could have obtained in restoring her honour by using different means than the ones at issue. Accordingly, the disciplinary chamber of the CSM must hear again the case and adhere to the following principle of law: “the conduct of the magistrate defending herself from the attribution of a measure different in content from that adopted and irreconcilable with her duties of the magistrate is not, in itself, in contrast with the value of impartiality but it can be because of the means used. It follows that, in the case in which the magistrate resorts to interviews and press releases to defend herself, the legitimacy of the conduct at the disciplinary level must be assessed with an *ex ante* judgment that, having regard to the specific circumstances that have connoted the injury to the magistrate’s honour, cannot be limited to identifying abstract viable alternatives, without foreseeing what actual results the magistrate could have achieved with them to protect his professional honour”.

The Disciplinary Chamber of the Supreme Judicial Council, hearing the case for the second time, applied the exemption of the right to professional honour suggested by the Court of Cassation, and held that the magistrate did not commit the disciplinary offence. In operative part of the decision, the Disciplinary Chamber ruled:
“The conduct of a prosecutor defending herself from against the attribution, based on statements released on the media, of a measure not only different in content from the one adopted but also irreconcilable with her duties and with the image that the magistrate must give of herself for her credibility and that of the judiciary, does not constitute a disciplinary offence in the performance of her duties for repeated or serious non-compliance with the regulations or the provisions on the judicial service adopted by the competent organs if the means used for this purpose, on the basis of an ex-ante judgment that considers the specific circumstances of the concrete case, are the sole usefully practicable.”

1. *Judicial dialogue*

The disciplinary chamber of the CSM referred to the case law of superior Italian courts. In particular, it quoted the judgment n. 100/81 of the Italian Constitutional Court where the latter affirmed that, even though magistrates enjoy the right of freedom of expression as any other citizen, the constitutional values of impartiality and independence of the judiciary must be protected as a deontological rule. As a result, the freedom of expression of magistrates must be balanced with the need to protect the consideration that the magistrates enjoy in public opinion, to ensure the prestige of the entire order and the trust of citizens towards the judicial function. The disciplinary chamber also referred to the case law of the Italian Court of Cassation – as well as its own case law – affirming the magistrate’s right to provide the clarifications necessary to dispel misunderstandings and prevent distortions about his or her work when the informational activity of the bodies in charge was not sufficient (Court of Cassation, sez. un., 5/2001; CSM disciplinary chamber 20/2000).

Furthermore, the Disciplinary Chamber quoted the ECtHR judgment in *Buscemi v Italy* after mentioning the limitations to the freedom of expression of magistrates in Article 10(2) ECHR. In that judgment the ECtHR had stressed that judicial authorities shall exercise maximum discretion with regard to the cases with which they deal in order to preserve their image as impartial judges and, moreover, that discretion should dissuade them from making use of the press, even when provoked. The Disciplinary Chamber considered that the meaning of the ECtHR judgment is to bind the magistrate to the special duty that characterize his or her entire activity, even outside the performance of duties, and even when he or she is not accountable through media and information organs.

1. *Additional relevant jurisprudence*
* Buscemi v Italy
* Di Giovanni v Italy
* *Marcolino de Jesus v Portugal* App no 2388/15, 1 June 2021
* Prager and Oberschlick v Austria App no 15974/90, 26 April 1995

## Casesheet No. 3 – The right of a judge to criticise individual decisions of an apex court in the context of rule of law backsliding[[73]](#footnote-73)

***Reference case***

Romania, High Court of Cassation and Justice, Judgement no 128/2019 of 27 May 2019 (case currently pending before the ECtHR – Coadă v Romania App no 616/20, communicated 5 April 2023)

*Core issues*

Under what conditions and in which circumstances judges are entitled to criticise the decisions of apex courts?

In the determination of limits to judges’ free speech, what is the role of the context of rule of law backsliding and the fact that the judge is not criticising the reform itself, but the decision of an apex court concerning such reform?

**At a glance**

**Timeline representation**

**Case(s) description**

1. *Facts*

The Superior Council of Magistracy (SCM) admitted on 18 February 2018 the Judiciary Inspection’s (JI) accusation concerning C. C., judge of a criminal division of the Constanţa Court of Appeal. The accusation claimed that he affected the honour / professional probity or the prestige of justice with his article published on an legal online portal (www.juridice.ro) on 14 March 2017, entitled “Agenda: in search of lost prestige” criticizing the Romanian Constitutional Court (the RCC) Decision no 68 of 27 February 2017 as a ”conspiracy against the rule of law”.

The RCC Decision 68/2017 followed the President of the Romanian Senate’s (2nd chamber of the Parliament) request to solve a presumed legal conflict of a constitutional nature between the Romanian Government and the National Anti-Corruption Directorate. The presumed conflict concerned a criminal investigation carried out regarding the adoption of an emergency ordinance (EO) no. 13/2017 for the amendment of the Criminal Code and the Criminal Procedure Code - in order to sanction a potential practice that would harm the principle of separation and balance of powers in the state.

The information that the Romanian Government adopted the EO no 13/2017 was published late in the evening of 31 January 2017, after a government meeting which did not have this point on the agenda. The main provision of the EO no 13/2017 was the decriminalisation of some forms of “abuse in office”, which caused a damage of less than 200.000 Romanian lei. Some other forms of abuse in office received lighter punishments. In the next days, the public protest rally against EO no 13/2017 took place in Bucharest and in other Romanian cities.

In his article, judge C. C. warned that the decision of the RCC upheld the constitutionality of national legislation, according to which a minister or a parliamentarian may not be criminally liable for potential corruption acts the same way any other person.

The SCM sanctioned judge C. C. with a 2 months reduction of salary for damaging the honour / professional probity or the prestige of justice, but rejected the JI’s accusation of unworthy attitudes during the exercise of duties by the same act. The HCCJ definitively admitted, on 17 May 2019, judge CC’s appeal (recurs devolutiv) and changed the sanction to “warning”. On 7 October 2019, the HCCJ rejected the judge CC’s annulment appeal (contestație în anulare).

1. *Legal issues*

The central issue of the case is whether judges are allowed to publicly criticize individual decisions of an apex court. In this case, the judge wrote an article, evaluating a decision of the Romanian Constitutional Court (the RCC) as “a conspiracy against the rule of law.” The case thus focuses on the question of balance between the right of a judge to criticise individual decisions and the authority of the judiciary (public trust). The case ultimately revolves around the correct interpretation of the duty of restraint and discretion imposed on judges. It is interesting since the judge is criticising the judicial decision in the context of rule of law crisis.

1. *Reasoning of the High Court of Cassation and Justice*

Both the SCM’s decision and the HCCJ’s judgement used the following criteria to identify and sanction the misbehaviour: the existence of the *actus reus* (required action), *mens rea* (guilt), consequences for the image of the judiciary and the personalisation of sanction.

The HCCJ ruled that the legal standard should be that of the “diligent magistrate”, namely a magistrate who acts with care towards the public interest of the administration of justice and the defence of the general interests of society and subordinates his behaviour to the demands arising from professional duties and ethical norms. The HCCJ then acknowledged that the defendant “was entitled to present his own opinion in relation to a series of events which could have influenced the activity of the judicial system, but the concrete manner, in which the statements were made, was likely to break the fair balance between the need to protect the right to free expression (including of magistrates) on the one hand, and the need to protect the authority of the judiciary and the rights of other persons on the other hand. Furthermore, nothing suggests that that, in the given circumstances, this way of expression was for the judge the only way to express the information he intended to present”.

Judge C. C. claimed that: “the obligation of reserve has been misinterpreted in recent years, giving effect to some older standards of judicial ethics, adapted to different historical periods. In the current social context, the obligation of reserve must be disregarded when the rule of law, democracy and citizens’ rights are in danger. The necessity of this type of response must be understood in the context of concerted and deliberate attacks against the Public Ministry (the public prosecutors) and against other bodies with attributions in the field of national security. The judiciary should counter these attacks.” Judge C. C. continued that his intention was not to defame anybody or to dishonour the justice, but to alert the public opinion on lapses in the rule of law. He wanted to defend not individual, but general interests, to protest and to ask for transparency and integrity of the public office. Judge CC did not use personal names, but expressed an “obligation of indignation” due to the risks generated by the way in which the Romanian Constitutional Court (RCC) solved the constitutional conflict: a minister or a parliamentarian may not criminally answer for potential corruption acts the same way as others.

The HCCJ disagreed considering that JI was right when stating that the insidious expressions judge C. C. used do not comply with the dignity of the judges’ office. Judge C. C. accused the RCC judges without providing any proof. The SCM did not deny C. C.’s right to freedom of expression but ruled that the way he chose to exercise it, broke the balance between the free speech and the legitimate interest from Article 10 (2) ECHR. Judge CC was aware of the detrimental effect his article would have on the justice system and accepted it. The article was spread by the media and generated reactions in the general public and among the Constanta Court of Appeal personnel, as witnesses confirmed.

Judge CC also claimed that time management of both the JI’s enquiry and the procedure before the SCM was unfair: the enquiry took only one day, even though he asked for more days, he had to wait hours while in front of the SCM, while he only had been granted a few minutes to defend himself. The case before the SCM took unreasonably long to be decided and then additional time was needed for the decision to be motivated and communicated. The HCCJ considered however that the trial was fair and equitable and the right to defence was observed.

1. *Judicial dialogue*

The HCCJ extensively referred to the caselaw of the ECtHR. The purpose pursued was, presumably, to solve a conflict between judge C. C.’s and SCM’s interpretation involving fundamental rights enshrined in the ECHR and to convince the reader on the conformity of its reasoning with the European standards.

1. *Jurisprudence to which the case makes reference*
* principle of equality of arms
	+ Dombo Beheer B.V. v. Netherlands (judgement from 27.10.1993);
	+ Georgiadis v. Greece (judgement from 29.05.1997);
* principle of adversial proceedings
	+ Barbera, Messegue and Jabardo v Spain (judgement from 06.12.1988),
	+ Feldbrugge v. Nethrlands (judgement from 29.05.1986),
	+ Sanchez-Reisse v. Spain (judgement from 21.10.1986),
	+ Ruiz-Mateos v. Spain (judgement from 23.06.1993),
	+ Niederost v. Switzerland (23.06.1997);
* predictability of law
	+ Dragatoniu and Militaru-Pidhorni v. Romania (applications no 77193/01 and 77196/01)
	+ Groppera radio AG and others v. Switzerland (judgement from 28.03.1990)
	+ Tolstoy Miloslavsky v. UK (judgement from 13.07.1995)
	+ Cantoni v. France (judgement from 15.11.1996)
	+ Kokkinakis v. Greece (judgement from 25.05.1993)
	+ S.W. v. UK (judgement from 22.11.1995)
* disciplinary responsibility of magistrates
	+ Morissens v. Belgium, judgement from 03.05.1988
	+ Tato Marinho Dos Santos Costa Alves Dos Santos and Figueiredo v. Portugal (applications no 9023/13 and no 78077/13),
	+ Ramos Nunes de Carvalho e Sa’ v. Portugal (applications no. 55391/13, no 57728/13 and no 74041/13)
* freedom of speech
	+ *Kudeshkina* *v.* *Russia*, App no 29492/05, 26 February 2009

## Casesheet No. 4 – Freedom to criticise the current state of judiciary in times of looming major judicial reform and freedom to comment court cases, to which a judge is a party[[74]](#footnote-74)

***Reference case***

Hungary, First Instance Service Court attached to the Budapest-Capital Regional Court of Appeal, SZF1/46/2011, 23 January 2012

*Core issues*

What legal principles apply when a judge critically assess an individual case in which he or she is involved as a party? Should a judge conform to the requirements otherwise applicable when judges comment on other cases, cases which they decided or different standards should apply?

To what extent may states limit freedom of expression based on the prohibition of political activities? How to define political activities?

What are the limits of freedom of expression of judges, who comment the current state of the judiciary in times of looming extensive judicial reform, in particular, when such statements can be viewed as a justification of such reform?

**At a glance**

**Timeline representation**

**Case description**

1. *Facts*

In 2011, Mr. László Ravasz, being a judge for 24 years, published several articles and gave more interviews in the media. He stated that the judiciary was in a crisis that undermined the rule of law, and the organization was under political influence. Judicial independence was not ensured, and the judiciary was exposed to unlawful pressure also on how particular cases were decided. According to him, the problems were rooted primarily in the 1997 system of court administration. He criticized the judges at high courts, stating that they lacked professional competence and represented an attitude shaped by the pre-1989 socialist regime. According to him, the hierarchy put pressure on lower instance courts and junior judges.

In this context, he analysed the alleged judicial errors of two cases involving him as a plaintiff.

In a post, he expressed his criticism about an open letter signed by court executives, including the President of the Supreme Court, protesting against the forced early retirement of a large number of judges. In support of the planned measure, he argued that it targeted the top tier of the judiciary and was unfavourable only to judges appointed during the previous regime.

He called for the removal of the "old", "socialist" judges from administrative offices and some from the judiciary too. Besides the above, he lodged complaints with court executives about similar concerns, which were dismissed without an examination.

In the following months, the judge was subject to disciplinary proceedings because of his publications and media appearances.

1. *Legal issues*

The decision addressed different aspects of judges' freedom of expression. It was based on the differentiation between views on concrete judicial cases and those on general issues related to the judiciary. First Instance Service Court interpreted whether the ban on publicly commenting and releasing information to the press about specific court cases covers making comments on a case in which the judge was involved as one of the parties. It also addressed the problem of whether the judges' statements in the media that harshly criticized the judiciary could undermine trust in judicial proceedings and the authority of courts and violate the prohibition on political activities.

1. *Reasoning of the First Instance Service Court*

i) Statements on court cases in which the judge is involved as a party

The relevant law on making statements by judges says that judges shall not express their opinion on pending or already resolved cases in public outside their judicial capacity, particularly on cases heard by them. Furthermore, it states that information to the press on pending and resolved cases can be given by court presidents or the persons authorized by them. The service court set out that even though there is a special emphasis on those cases that are heard by the judge herself, the above rules also apply to cases in which a judge was a party to the case. It argued that the judge published his opinion on individual cases in which he was the plaintiff, and his comments were one-sided and critical about the judgments, finding them unreasonable. As a result, his conduct was a manifest and clear breach of the statutory limitations on making public statements by judges. The service court added that the prohibition on public statements applies only to specific cases and organizational issues, so judges are not per se prevented from expressing their opinion on the judiciary in general, judicial reforms or laws in force. So, the problems of his further publications lie not in their topic but in their content.

ii) Refraining from undermining confidence in judicial proceedings and the authority of courts

The service court argued that the judge made grossly biased and generalizing, manifestly unfounded statements regarding the judicial organization, which were also undeserving in their tone. The publications were made in front of a large public and lacked a minimum of solidarity for the organization. They provided a picture of the judiciary as it does not seek to carry out its constitutional mandate, most of the administrative officials are politically biased, and career advancement depends on fulfilling the expectations of senior court officials who exert undue influence on judges. So, the harsh criticism targeted a clearly identifiable group of judges. Furthermore, the negative statements, repeated multiple times by the judge in his writings, gave the impression that a large number of judges failed to act in accordance with the law; moreover, they committed criminal offences.

At the disciplinary hearing, the judge argued that (a) he exercised only his constitutional right to freedom of expression, and (b) he just sought to draw attention to some unlawful, corruption-like phenomena in the judiciary which he himself experienced. He also referred to a case when a senior court official was detained and prosecuted. However, the service court rejected these arguments on the following grounds: (a) judges indeed have the right to freedom of expression, but this right is subjected to limitations determined by the constitution and statutory laws, which the judge was obviously aware of. According to the relevant laws, in case of experiencing undue influence, he should have made steps to prevent them and inform the court president, or reported the police. But he should not have turned to the public. Also, (b) his statements did not refer to some isolated, one-off anomalies in the judicial organization but rather suggested that the problems were general and large-scale at higher courts, among senior court officials being of a certain age. The criminal proceedings that were commenced against a judge did not substantiate the judge's claims.

iii) Prohibition of political activity

The service court held that both the Hungarian Constitution and the Act on the Status of Judges prohibit judges from party membership and engaging in political activity. The service court then defined the term political activity, covering not only conducts in relation to party politics but also "publicly expressing an opinion on national and local state of affairs", "participating in political events and demonstrations", and "making public statements on political matters". Judges cannot make their political opinions available to the outside world. The aim is to protect the independence and impartiality of the judge and to maintain the neutrality of the judicial branch. The service court stressed that expressing a political opinion is prohibited for judges, irrespective of the value, the soundness and the acceptance of a given opinion. Then, it held that the impugned publications connected all negative developments, persons and laws to a particular political system and ideology. This was reinforced by the repeated reference to the Kádár era, to post-1989 socialist governments (the Horn and Gyurcsány governments) and by the regular reference to the adjectives "Kádárist", neo-Kádárist, communist and socialist regarding judges and certain behaviours. The publications revealed the judge's political ideology and how he characterized his colleagues in political terms. After all, he suggested the need for a political cleansing within the judiciary. Therefore, the judge's conduct violated the prohibition of political activity.

iv) Sanction

Finally, the court had to decide on the sanction for the breach of several duties. The court assessed the severity and the consequences of the misconduct and the degree of culpability. It stressed that the judge violated several standards of judicial conduct; the infringements consisted of a large number of actions which were carried out before a large audience, and they were capable of undermining the confidence in the judiciary as a whole and in high courts in particular. Consequently, the service court inflicted the most severe sanction on the judge and initiated his dismissal from judicial office.

v) Decision of the second-instance service court

The judge challenged the decision before the second-instance service court on the grounds that his writings did not qualify as political activity. As a result, he did not contest the findings of the first-instance court regarding the violation of the rules on making statements and refraining from undermining public confidence in the judiciary. The appeal court noted the importance of the neutrality of the judicial branch, which is reflected in many provisions of the Act on the Status of Judges. It argued that judges expressing professional criticism of their peers are not allowed to characterize their colleagues in political terms. However, the impugned statements could have prompted others to draw political consequences from them. Furthermore, the statements were made at the time when the government's decision to force judges into retirement at the age of 62 sparked a heated debate, so the judge's writings could be seen as a justification for these measures. Consequently, the appeal court upheld the decision.

vi) Judge Ravasz before the Hungarian Constitutional Court and the ECtHR

The judge challenged the disciplinary decision before the Constitutional Court and the ECtHR. In these cases, the judge was represented by a Hungarian Human Rights NGO, whose strategic litigation objective was to challenge the regulation and jurisprudence on judges' freedom of expression. After the Constitutional Court, based on procedural reasons, quashed the disciplinary decision and remitted the case to the service court [Decision 21/2014 (VII. 15.) AB], the ECtHR rejected the complaint, finding it premature and therefore inadmissible under Article 10 (Ravasz v. Hungary, Application no. 64239/12).

According to the submissions, commenting on the cases in which the judge participated as a plaintiff does not fall under the prohibition of making public statements on court cases. Extending the prohibition to such situations would deprive the judges as a party of a case of possibility of publicly disclosing infringements in court proceedings, that other parties can use.

The applicant argued that the service court restricted his freedom of expression based on the content of the statements only because they were critical of the judiciary.

The applicant also stated that the prohibition on political activity relates only to disclosing party politics preferences but cannot be extended to include making public statements on public affairs. The complainant notes that a public letter protesting against the forced early retirement of the judges did not raise the question of the responsibility of the court executives who had signed it. Consequently, his statements on the same issue cannot serve as grounds for disciplinary proceedings. The purpose of initiating disciplinary proceedings was to silence a judge who expressed an opinion contrary to those of the court executives. Furthermore, court executives as public figures must also bear harsh criticism.

The applicant argued that his negative opinion of the judiciary was based on facts that could be proved, so it should have been protected. Also, he had to turn to the public because his initiatives to have court executives deal with the problems were rejected. Finally, he also argued that his removal was not a proportionate sanction, and it could deter other judges from expressing any criticism about the judiciary.

## Casesheet No. 5 – Judge as a “journalistic” commentator of political processes[[75]](#footnote-75)

***Reference case***

Czech Republic, Constitutional Court, Decision I. ÚS 2617/15 5 September 2016

*Core issues*

Whether and if so, to what extent can a judge comment on political processes in manner of a journalistic commentator?

**At a glance**

**Case(s) description**

1. *Facts*

The judge was accused of undermining the dignity of the judicial office and abusing the judicial office to promote private interests while exercising his political rights. Shortly before the local elections, the judge wrote and distributed a leaflet in a village where he had a hut, evaluating the electoral programmes of political parties. Subsequently, after the election, he published an article in the local newspaper thanking people for voting, analysing possible coalitions, supporting the election's winner and warning of disaster if the leader of that party did not govern the village as a mayor. The disciplinary chamber found the judge guilty of disrespect for his office but refrained from imposing any penalty, as it deemed the hearing of the case in the disciplinary proceedings itself as sufficient.

1. *Legal issues*

The case concerns the question of involvement of a judge in political processes. The Czech constitutional court had to determine how much a judge can be involved in election process as a “journalistic” commentator.

1. *Reasoning of the Constitutional Court of the Czech Republic*
2. Preliminary remarks

The Constitutional Court began with general principles governing the freedom of expression of judges in political competition. Based on the jurisprudence of the ECtHR, the Constitutional Court stated that judges also have freedom of expression, but this is subject to specific limitations. The duty of loyalty and restraint binds them. On the one hand, according to a similar interpretation of the Czech Charter, judges should not question the fundamental values of the state, as the duty of loyalty binds them. On the other hand, the duty of restraint is broader. According to the case law of the ECtHR, judges must be impartial and independent. Their appearance in this sense is essential; therefore, the judge’s statements must be restrained so as not to undermine confidence in the impartiality and independence of the judiciary. The separation of powers is also important, all the more so given the Czech experience with the communist regime. Therefore, there is a particular interest in preventing judges from being linked to political parties and being excessively involved in political competition. Given the recent past, it is necessary to strengthen public confidence in the independence of the judiciary from political interests.

1. General principles regarding freedom of expression of judges

The Constitutional Court then analysed the criteria for assessing the judge's speech. On the basis of the ECtHR’s jurisprudence and its own case law, it distinguished between factual assertions, value judgements or hybrid statements. The judge’s statement must not flagrantly contradict the fundamental values of the democratic rule of law, must not undermine public confidence in the independence and impartiality of the judiciary, and must not excessively involve the judge in political competition. Moreover, speeches in which an individual explicitly refers to his or her position as a judge should be assessed more strictly. On the other hand, judges are more protected when criticising the judiciary. Last but not least, the sanction imposed must be evaluated.

1. Application of the general principles to the case at hand

In this case, the judge made hybrid statements. Although the statements do not contradict the fundamental values of the state, the judge, through his speech, on his own initiative, actively, openly and with excessive intensity engaged in political competition. In addition, the Constitutional Court found it contrary to the Constitution that the judge, through his public speeches, attempted to influence the shape of the coalitions in the council or who would serve as mayor. As a result, the judge infringed the duty of discretion. The sentence imposed was considered appropriate. In the end, the judge's constitutional complaint was rejected.

1. *Judicial dialogue*

The case shows an example of how the ECtHR shapes national standards regarding freedom of expression of judges. The Constitutional Court extensively referred to the ECtHR case law to build up the basic assumptions about freedom of expression of judges, against which it later assessed the specific circumstances of the given case, and to interpret Czech Charter of Fundamental Rights and Freedoms - an integral component of the constitutional system of the Czech Republic (Article 3 of the Constitution of the Czech Republic)

1. *Jurisprudence referred to by the Constitutional Court*
* Decision of the ECtHR from 26. 9. 1995, Vogt v Germany, application no. 17851/91
* Decision of the ECtHR from 12. 2. 2008, Guja v Moldavia, application no. 14277/04
* Decision of the ECtHR from 28. 10. 1999, Wille v Lichtenstein, application no. 28396/95
* Decision of the ECtHR from 26. 2. 2009, Kudeshkina v Russia, application no. 29492/05
* Decision of the ECtHR from 20. 11. 2012, Harabin v Slovakia, application no. 58688/11
* Decision of the ECtHR from 23. 6. 2016, Baka v Hungary, application no. 20261/12
* Decision of the ECtHR from 2. 9. 1998, Ahmed and others v United Kingdom, application no. 22954/93
* Decision of the ECtHR from 14. 3. 2002, De Diego Nafria v Spain, application no.46833/99
* Decision of the ECtHR from 26. 10. 1984, De Cubber v Belgium, application no. 9186/80
* Decision of the ECtHR from 15. 12. 2005, Kyprianou v Cyprus, application no. 73797/01
* Decision of the ECtHR from 15. 9. 2009, Micallef v Malta, application no. 17056/06
* Decision of the ECtHR from 23. 4. 2015, Morice v Frane, application no. 29369/10
* Decision of the ECtHR from 1. 10. 1982, Piersack v Belgium, application no. 8692/79
* Decision of the ECtHR from 28. 6. 1984, Campbell and Fell v United Kingdom, applications no. 7819/77 and 7878/77
* Decision of the ECtHR from 22. 10. 1984, Sramek v Austria, application no. 8790/79
* Decision of the ECtHR from 9. 6. 1998, Incal v Turkey, application no. 22678/93
* Decision of the ECtHR from 6. 5. 2003, Kleyn and others v Netherlands, application no. 39343/98
* Decision of the ECtHR from 17. 12. 2004, Pedersen and Baadsgaard v Denmark, application no. 49017/99
* Decision of the ECtHR from 1. 12. 2009, Karsai v Hungary, application no. 5380/07
* Decision of the ECtHR from 22. 10. 2007, Lindon, Otchakovsky-Laurens and July v France, applications no. 21279/02 and 36448/02
* Decision of the ECtHR from 6. 10. 2009, Kuliś and Różycki v Poland, application no. 27209/03
* Decision of the ECtHR from 27. 2. 2001, Jerusalem v Austria, application no. 26958/95
* Decision of the ECtHR from 11. 4. 2006, Brasilier v France, application no. 71343/01
* Decision of the ECtHR from 17. 12. 2004, Cumpănă and Mazăre v Romania, application no. 33348/96

## Casesheet No. 6 – Freedom of expression of a judge as a member of a social movement advocating the right to self-determination[[76]](#footnote-76)

***Reference case***

Spain, Supreme Court (Contentious-Administrative Chamber), Judgment no. 2614/2016 of 14 December 2016[[77]](#footnote-77)

*Core issues*

Whether the judge was entitled to exercise his freedom of expression as part of the Catalan secessionist movement, without violating the duty of discretion and restraint, which is imposed on the judge to safeguard independence and impartiality and public trust in the judiciary?

**Case(s) description**

1. *Facts*

In the context of the Catalan political crisis, which reached its peak between the years 2012-2017, Judge Vidal drafted a Catalan constitution and distributed it for debate. In addition, Judge Vidal participated as a speaker in over a hundred events organized by pro-independence civil society organizations such as Omnium Cultural and the National Assembly of Catalonia. In these events, he presented himself as a judge of the Provincial Court of Barcelona and encouraged attendees to engage in political participation.

Through a decision from 16 February 2015, the General Council of the Judiciary suspended Judge Vidal from the practice of his profession for a period of three years. The decision, adopted with 8 dissenting votes, found the judge committed a serious offense: firstly, for violating his judicial duties (Article 417.14 of the Organic Law of the Judiciary) and secondly, for breaching his duty of loyalty to the Constitution (Article 417.1 of the Organic Law of the Judiciary). The Council deemed that the judge had participated in acts of a political nature, meaning that he had taken a political stance, and thereby had lost the appearance of independence and impartiality. The judge challenged the decision of the General Council of the Judiciary before the Contentious Chamber of the Supreme Court.

1. *Legal issues*

The key legal issue was whether the judge was entitled to exercise his freedom of expression as part of the Catalan secessionist movement, without violating the duty of discretion and restraint, which is imposed on the judge to safeguard independence and impartiality and public trust in the judiciary. The case also raises other important issues such as the required precision of disciplinary offences and whether the judges involvement in such political activities is problematic per se or only when the judge fails to expresses himself or herself in a measured and imprudent manner.

1. *Reasoning of the Spanish Supreme Court*

Before the Supreme Court, judge Vidal argued that drafting a constitution and participating in events organized by civil society had a scientific, rather than political intention. He claimed that the obligation to uphold and enforce the constitution does not require ideological adherence to it. He criticized the fact that the sanction was based on the interpretation of a disciplinary provision with an essentially indeterminate content, namely “ignorance of judicial duties”. Finally, he denounced the indeterminate content of the concept of “constitutional loyalty” (Article 417.1 Organic Law of the Judiciary), reproaching the Council for attributing to him the violation of two offenses whose content overlaps. Thus, the judge understood that he was accused of violating judicial duties (Article 417.14 Organic Law of the Judiciary) and failing to fulfill the duty of loyalty (Article 417.1 Organic Law of the Judiciary), when in reality, the former is a manifestation of the latter.

The Court rejected all allegations and upheld the sanction imposed by the Council. To do so, it relied on various reasons. Firstly, it established that when taking office, the judge promises to uphold the constitution (Article 318 Organic Law of the Judiciary) and is bound by the compliance of the constitution (Articles 9.1 and 9.3 of the constitution), and the rule of law (Article 117 Organic Law of the Judiciary). In this sense, the Supreme Court understood that participating in a process advocating for Catalonia's independence through a constituent process outside the constitutional reform procedures is contrary to the judge's statutory mandate to uphold the constitution. This mandate is not limited solely to actions taken in the exercise of judicial functions but extends to actions outside the judges’ work.

Secondly, the Court emphasized the distinction between violating judicial duties (Article 417.14 Organic Law of the Judiciary) and being disloyal to the constitution (Article 417.1 Organic Law of the Judiciary). The Supreme Court argued that the scope of application of both types of offenses is different. The former can occur when the judge acts in the exercise of judicial functions, but also when acting outside of it. Meanwhile, the latter occurs only when the judge acts in the exercise of judicial functions. However, the Court asserted that this did not preclude actions taken outside the scope of judicial functions from affecting the appearance of independence and impartiality that the judge must maintain when exercising judicial functions. Otherwise, it would erode public trust in the justice system. Hence, it considered the judge to have committed two different disciplinary offences.

The Supreme Court wanted to make it very clear that Mr. Vidal is not suspended for his ideas but for collaborating with citizen groups that promote a political process in Catalonia outside or directly against what is established in the constitution and its reform clauses. Alongside the majority vote, the judgment included a series of concurring and dissenting opinions. For example, the concurring vote of Justice *Sieira Míguez* emphasizes that any act of political nature in which judges participate, presenting themselves in their capacity as judges, constitutes a violation of their judicial duties (Article 417.14 Organic Law of the Judiciary) that may jeopardize the appearance of independence and impartiality, thereby undermining the principle of public trust in the justice system.

On the contrary, Justice Garzón Herrero expressed disagreement with the majority. According to the dissenting judge, the majority demanded a positive adherence to the constitution from the judge, as if Spain were a model of militant democracy, which is not the case. In this regard, the judge referred to the jurisprudence of the European Court of Human Rights (ECtHR) to point out that judges, despite the duty of prudence, are also entitled to the right to freedom of expression. Justice Menéndez Pérez also dissented from the majority. In his view, the facts do not prove Judge Vidal's lack of loyalty to the constitution, as there is no evidence that he advocated for its violation. Despite being a borderline case, he does not consider that judge Vidal has violated statutory obligations that would cast doubts on his impartiality and independence since he always remained prudent and measured in his statements.

1. *Judicial dialogue*

Interestingly, there is no reference to European jurisprudence in the majority opinion of the Supreme Court. Only the appellant and one of the dissenting judges relied on the jurisprudence of the European Court of Human Rights (ECtHR).

## Casesheet No. 7 – Heightened level of protection of freedom of expression of a president of a judicial association[[78]](#footnote-78)

***Reference case***

Portugal, Supreme Court of Justice, Decision 24/20.1YFLSBof 25 March 2021

*Core issues*

Whether a judge, who is simultaneously the president of the Portuguese Judges’ Union Association, can write an opinion article in a newspaper about the ethical legitimacy of judges publicly assuming social, political, ideological, religious or other militancy, without thereby violating the duty of reserve?

How the position of the judge, in this case the president of a judicial association, impact the assessment of limits of freedom of expression?

How to strike the correct balance between the judge’s right to freedom of expression and reputation of another judge?

**At a glance**

**Case(s) description**

1. *Facts*

A. was a judge at the Portuguese Constitutional Court, who resigned from that role after a disagreement over the drafting of a ruling. A. publicly recognises herself as a "feminist judge", and the main issue that led to this disagreement was that A., as a Constitutional Court judge, equated the crime of domestic violence with the crime of terrorism in a draft decision, prompting a vehement protest from her colleagues. Sometime after this episode, and also citing other arguments, A. ended up resigning as a Constitutional Court Judge.

The case (and its information) made it into the newspapers. B., who was a judge and president of the Portuguese Judges’ Union Association, wrote an opinion article in a newspaper, regarding A's resignation, criticizing some of the positions that A. had taken. In particular, B. questioned whether it was permissible for judges, in their decisions, to express personal convictions that are lateral to the reasoning of those decisions, citing, for this purpose, the Ethical Commitment of Portuguese Judges, which states, precisely, that judges should not use their decisions to express personal opinions or considerations of a political, ideological or religious nature, which are not strictly necessary for the respective reasoning and are manifestly far removed from the subject of the case.

A., in turn, understood that the judge could not have written that same article, since, by doing so, he violated his duty of reserve, at the same time offending the honour of A. Based on this consideration, she requested the Superior Council of the Judiciary to initiate disciplinary proceedings against B. However, the Superior Council of the Judiciary disagreed with A. Unsatisfied, A. appealed to the Supreme Court of Justice, asking the court to reverse the decision of the Superior Council of the Judiciary and sentence B. to disciplinary action.

1. *Reasoning of the Portuguese Supreme Court of Justice*

The Court did not agree with A. After an extensive reference to the ECHR and the jurisprudence of the ECtHR, the court understood that B's actions did not call into question the duty of reserve arising from the provisions of article 7-B of the Statute for Judicial Magistrates, since B: i) acted as president and representative of a union association, and not as a judge, in the performance of his duties as a judge; ii) commented on matters relevant to the exercise of the judicial function and included in the respective Union’s Statutory purpose, Article 2 of which states that one of the missions of the Portuguese Judges’ Union Association is to *promote the dignity of the judiciary* and *defend the cohesion of judges*.; and, above all, iii) he did not comment on a specific legal process, but only on news that was published by several newspapers (of a public nature).

Thus, the Supreme Court of Justice concluded that the statements in question were not made in gratuitous terms, aimed at defaming or offending A., nor did they have any defamatory intent, there being no gratuitous slanderous criticism aimed at affecting the plaintiff's personal qualities. For this very reason, and in line with ECtHR case law, the Supreme Court gave precedence to B's freedom of expression over an alleged offence against A's honour.

1. *Judicial dialogue*

The Supreme Court took care, as a preliminary question, to understand how freedom of expression of judges from Article 10 ECHR is interpreted by the ECtHR, with the aim to ensure its decision is in line with the jurisprudence of this court.

1. *Additional relevant jurisprudence and jurisprudence referred to by the national court*
* *Miroslava Todorova v* *Bulgaria* App no 40072/13, 19 October 2021
* *Eminağaoğlu* *v* *Turkey*, App no 76521/12, 9 March 2021
* *Żurek v Poland* App no 39650/18, 16 June 2022
* *Baka v Hungary* [GC] App no 20261/12, 23 June 2016
* Eon v. France (2611/10);
* Margulev v. Russia (155449/09);
* Sylka v. Poland (19219/07);
* Lopes Gomes da Silva v. Portugal (37698/97);
* Lombardo and others v. Malta (733/06);
* Dyuldin and Kislov v. Russia (25968/02);
* Lingens v. Austria (9851/82);
* Oberschlick v. Austria (20834/92);
* Pakdemirli v. Turkey (35839/97);
* Turhan v. Turkey (48176/99);
* Brasilier v. France (71343/01);
* Kuliś v. Poland (15601/02);
* Brunet Lecomte and Lyon Mag v. France (17265/05);
* Tuþalp c. Turkey (32131/08 and 41617/08);
* Mladina DD Ljubljana v. Slovenia (20981/10);
* Axel Springer AG v. Germany, (48311/10);
* Morar v. Romania (25217/08);
* Nadtoka v. Russia, (38010/05).
1. Bangalore principles of judicial conduct, UN Judicial Group on Strengthening Judicial Integrity, November 2002, p. 5, para. 4.6. [↑](#footnote-ref-1)
2. E.g. UNODOC Non-binding guidelines on the use of social media by judges <<https://www.unodc.org/res/ji/import/international_standards/social_media_guidelines/social_media_guidelines_final.pdf>>; CEELI Institute, Practical guidelines on use of social media by judges: Central and Eastern European context, November 2019<<https://ceeliinstitute.org/wp-content/uploads/2022/01/CEELI_SoMe_Guidelines_ENG_Upd2021.pdf>>.

 [↑](#footnote-ref-2)
3. Judge Sicilianos argued for a subjective right to independence in his concurring opinion in *Baka v Hungary* [GC] App no 20261/12, 23 June 2016. Leloup and Ducoulombier support the idea, whereas Fajdiga proposes an alternative, according to which the Court would rely on the concept of chilling effect (Peggy Ducoulombier, ‘Le Droit Subjectif Du Juge à La Protection de Son Indépendance : Chaînon Manquant de La Protection de l’Etat de Droit En Europe ?’, Procès équitables : perspectives régionales et internationales, Liber Amicorum Linos-Alexandre Sicilianos, L. Branko, I. Motoc, P. Pinto de Albuquerque, R. Spano, M. Tsirli (eds.) (Anthemis, 2020); Mathieu Leloup, ‘Who Safeguards the Guardians? A Subjective Right of Judges to Their Independence under Article 6(1) ECHR’ (2021) 17 European Constitutional Law Review 394; Mohor Fajdiga, ‘Chilling effect: Turning the Poison into an Antidote for Fundamental Rights in Europe’ forthcoming in Maastricht Journal of European and Comparative Law. [↑](#footnote-ref-3)
4. This works in some cases, but not in all, and it misses the central issue: a violation of judicial independence. See for example: David Kosař and Katarína Šipulová, ‘The Strasbourg Court Meets Abusive Constitutionalism: Baka v. Hungary and the Rule of Law’ (2018) 10 Hague Journal on the Rule of Law 83. [↑](#footnote-ref-4)
5. See Sietske Dijkstra, ‘The Freedom of the Judge to Express His Personal Opinions and Convictions under the ECHR’ (2017) 13 Utrecht Law Review 1. [↑](#footnote-ref-5)
6. *Wille* *v* *Liechtenstein* [GC] App no 28396/95, 28 October 1999, para 64; *Baka v Hungary* [GC] App no 20261/12, 23 June 2016, para 165; *Harabin* v *Slovakia* App no 62584/00, 29 June 2004; *Żurek v Poland*, App no 39650/18, 16 June 2022, para. 224; *Danileţ v Romania* App no 16915/21, 20 February 2024, para. 54. [↑](#footnote-ref-6)
7. Gábor Halmai and Ágnes Kovács, ‘All Quiet in the Judiciary: Low Voice of Hungarian Judges and the Role of European Courts’, forthcoming in Freedom of Expression of Judges: European and National Perspectives, Federica Casarosa, Mohor Fajdiga and Madalina Moraru (eds) (Routledge 2024). [↑](#footnote-ref-7)
8. Concurring Opinion of judges Pinto de Albuquerque and Dedov in [GC] App no 20261/12, 23 June 2016, para 21. [↑](#footnote-ref-8)
9. Venice Commission, Opinion no. 610/2011, Draft opinion on the Law on Judges and Prosecutors of Turkey, 8 March 2011, CDL(2011)003, <https://www.venice.coe.int/webforms/documents/?pdf=CDL(2011)003-e>, para 60. [↑](#footnote-ref-9)
10. Tom Ginsburg, Aziz Z Huq and Mila Versteeg, ‘The Coming Demise of Liberal Constitutionalism?’ (2018) 85 The University of Chicago Law Review 239, p. 258. [↑](#footnote-ref-10)
11. Gábor Halmai and Ágnes Kovács, ‘All Quiet in the Judiciary: Low Voice of Hungarian Judges and the Role of European Courts’, forthcoming in Freedom of Expression of Judges: European and National Perspectives, Federica Casarosa, Mohor Fajdiga and Madalina Moraru (eds) (Routledge 2024). [↑](#footnote-ref-11)
12. This approach was reiterated in *Kövesi v Romania*, App no 3594/19, 5 August 2020 and in *Żurek v Poland*, App no 39650/18, 16 June 2022. [↑](#footnote-ref-12)
13. See dissenting opinion of judge Wojtyczek in *Baka v Hungary* [GC] App no 20261/12, 23 June 2016. In *Brisc v Romania* App no 26238/10, 11 December 2018, the applicant argued that, as head of the district prosecutor’s office, he was merely exercising his duty to inform the public when he issued a press release and gave an interview. The ECtHR found a violation of Article 10 ECHR, which was strongly criticised by Judge Kūris, who pointed out that it was not an exercise of freedom but an exercise of duty and that the applicant had not expressed himself at all, but had merely given the bare facts. [↑](#footnote-ref-13)
14. *Baka v Hungary* [GC] App no 20261/12, 23 June 2016, paras. 149–151; *Kövesi v Romania*, App no 3594/19, 5 August 2020, para 189; Żurek v Poland, App no 39650/18, 16 June 2022, paras 204, 211–213. The Court seems to have gone a step further in the case of *Miroslava Todorova v* *Bulgaria* App no 40072/13, 19 October 2021, where it was undisputed that Mrs Todorova, the President of the Bulgarian Judges' Association, was often late on deadlines to issue judicial decisions. The government claimed that this was the reason for the termination of her judicial service, while the applicant defended herself by saying that the covert reason was that she had publicly criticised the Bulgarian authorities. In the absence of any evidence to the contrary by the Government, the ECtHR upheld the appellant's claim and even found that Bulgaria had violated Article 18, which prohibits the restriction of rights on grounds not provided for by the ECHR. [↑](#footnote-ref-14)
15. Under Article 2 of the Whistleblower Directive, Member states can extend the Directive’s scope of application. In such cases, arguably, the Charter is applicable. [↑](#footnote-ref-15)
16. CJEU, Case C‑64/16, *Associação Sindical dos Juízes Portugueses*, EU:C:2018:117. [↑](#footnote-ref-16)
17. Joined Cases C-558/18 and C-563/18 *Miasto Łowicz and Prokurator Generalny*, EU:C:2020:234, para. 58–59; Case C‑791/19 *Commission v. Poland (Disciplinary regime for judges)*, EU:C:2021:596, para. 227; Case C‑564/19 *IS*, EU:C:2021:949, para. 90. [↑](#footnote-ref-17)
18. Raluca Bercea, ‘Speech is Silver. Is Silence Golden?’, forthcoming in Freedom of Expression of Judges: European and National Perspectives, Federica Casarosa, Mohor Fajdiga and Madalina Moraru (eds) (Routledge 2024). [↑](#footnote-ref-18)
19. Laurent Pech, Alberto Alemanno, Vlad Perju, Joelle Grogan, The Good Lobby Profs statement in support of Romanian judges, accessible at: <http://www.forumuljudecatorilor.ro/index.php/archives/4409>. The authors argue that the disciplinary proceedings against judges who criticised judicial reforms in Romania in a closed Facebook group are contrary to Article 19(1) TEU. [↑](#footnote-ref-19)
20. *Kudeshkina* *v.* *Russia*, App no 29492/05, 26 February 2009, para. 95. [↑](#footnote-ref-20)
21. *Morice v France* App no 29369, 23 April 2015, para 129. [↑](#footnote-ref-21)
22. *Rekvényi v Hungary* App no 25390/94, 20 May 1999, paras 41, 46; *Karapetyan and Others v Armenia* App no 59001/08, 17 November 2016, para 49. [↑](#footnote-ref-22)
23. *Żurek v Poland* App no 39650/18, 16 June 2022, para 222; *Sarisu Pehlivan v Turkey* App no 63029/19, paras 41–42. See also *Eminağaoğlu* *v* *Turkey*, App no 76521/12, 9 March 2021, para. 133–134. [↑](#footnote-ref-23)
24. Even though the Ethical Commission of the Slovenian Council of Judiciary found a violation of judicial ethics in a case of two judges who attended a political party rally (Reasoned Opinion no Su Ek … of 17 June 2019, available at: <http://www.sodni-svet.si/doc/kei/NM_2019_07.pdf>) and at a post-election celebration of a political candidate (Reasoned opinion no Su Ek … of 21 January 2019, available at: <http://www.sodni-svet.si/doc/NM_KEI_2019_01_22.pdf>). [↑](#footnote-ref-24)
25. Article 40 of the Judicial Service Act – English text available at: pisrs.si/Pis.web/npbDocPdf?idPredpisa=ZAKO7156&idPredpisaChng=ZAKO334&type=doc&lang=EN. [↑](#footnote-ref-25)
26. Compare *Briķe v Latvia* App no 47135/99, 29 June 2000, where the Court declared inadmissible an application of a judge, who was struck from the list of candidates since she had not resigned from her office even though judges could not run for the political office according to the Latvian legislation. The Court recognised that such legislation was common in Europe and that it pursued the aim neutral judiciary with the goal indispensable for democratic societies: to guarantee impartiality. [↑](#footnote-ref-26)
27. Article 178 (3) of the Polish Constitution: “A judge shall not belong to a political party, a trade union, or perform public activities incompatible with the principles of independence of the courts and judges.” (available at: <https://www.sejm.gov.pl/prawo/konst/angielski/kon1.htm>); Article 26 of the 2011 Hungarian Constitution: “Judges shall not be affiliated to any political party or engage in any political activity.” (available at: <https://www.constituteproject.org/constitution/Hungary_2011>) and Article 50 (3) of the 1949 Hungarian Constitution, amended in 1989 (available at: <https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&ved=2ahUKEwjvnOPDpcuEAxWSRPEDHYAjBosQFnoECBgQAQ&url=https%3A%2F%2Fwww2.ohchr.org%2Fenglish%2Fbodies%2Fcescr%2Fdocs%2Fe.c.12.hun.3-annex2.pdf&usg=AOvVaw04sO71RPcgeXZTOU3eeOmv&opi=89978449>). [↑](#footnote-ref-27)
28. Ahmed and Others v the United Kingdom App no 22954/93, paras. 41–48; Rekvényi v Hungary App no 25390/94, 20 May 1999, paras 34–38; *Karapetyan and Others v Armenia* App no, 17 November 2016, para 40–41; Zhechev v Bulgaria App no 57045/00, paras 39–41; *Ecodefence and Others v Russia* App no 9988/13, 14 June 2022, paras 95, 96, 100. See also two cases concerning judges, in which other terms of national legislation, not “political activities” were allegedly vague and unclear. The Court adopted the same approach: *Panioglu* v *Romania* App no 33794/14, 8 December 2020, para 106; *Kozan v Turkey* App no 16695/19, 1 March 2022, paras 53–57. [↑](#footnote-ref-28)
29. The case of *Tuleya v Poland* App nos 21181/19 and 51751/20, 6 July 2023 could be regarded as the step in the right direction, since the Court ruled that the Polish legislation allowing the disciplinary prosecutor to open disciplinary inquiries in an arbitrary manner, did not attain the required quality of the law (see paras 534–537). [↑](#footnote-ref-29)
30. *Otegi Mondragon and Others v Spain*, App nos 4184/15, 4317/15, 4323/15 et al., 3 November 2015. [↑](#footnote-ref-30)
31. *M.D.U. v Italy* App no 58540/00, 28 January 2003 [↑](#footnote-ref-31)
32. CJEU, C-132/20, *Getin Noble Bank,* 29 March 2022, para 108. [↑](#footnote-ref-32)
33. CJEU, case C-204/21 *Commission v Poland*, 5 June 2023, paras 331–384. [↑](#footnote-ref-33)
34. Ibid., paras 365, 382–383. [↑](#footnote-ref-34)
35. *E v Switzerland* App no 10279/83, 7 May 1984. The case must be seen in the context of the Swiss law and societal reality at the time of the events, which allowed various kinds of political engagement of judges, who were mostly members of political parties. The European Commission for Human Rights seems to have declared the application inadmissible not because of the political nature of the expression, but since the judge advocated for particular measures that directly concerned pending criminal proceedings, he could adjudicate in the future. [↑](#footnote-ref-35)
36. *Altin v Turkey* App no 39822/98, 6 April 2000. [↑](#footnote-ref-36)
37. *Jhangiryan Gagik v Armenia* App no 8696/09, 5 February 2013, paras 4–5, 40–41, 43. [↑](#footnote-ref-37)
38. *Karapetyan and Others v Armenia* App no, 17 November 2016, paras 54–55. [↑](#footnote-ref-38)
39. *Wille* *v* *Liechtenstein* [GC] App no 28396/95, 28 October 1999, para. 67. ECtHR, *Baka v Hungary* [GC] App no 20261/12, 23 June 2016, para. 167; ECtHR, *Kövesi* *v.* *Romania,* Application no. 3594/19, 5 August 2020, para. 201; ECtHR, *Eminağaoğlu* *v* *Turkey*, App no 76521/12, 9 March 2021, paras. 123 and 134; ECtHR, *Kudeshkina* *v.* *Russia*, App no 29492/05, 26 February 2009, para. 95; ECtHR, *Żurek v Poland* App no 39650/18, 16 June 2022, para. 219; *Miroslava Todorova v* *Bulgaria* App no 40072/13, 19 October 2021, para. 172; *Sarisu Pehlivan v Turkey* App no 63029/19, para. 47; *Danileţ v Romania* App no 16915/21, 20 February 2024, para. 54. [↑](#footnote-ref-39)
40. *Karapetyan and Others v Armenia* App no, 17 November 2016, para 58. [↑](#footnote-ref-40)
41. ECtHR 9 March 2021, *Bilgen* v *Turkey* App No 1571/07, 9 March 2021, para. 79. The Court emphasised that judges are loyal to the rule of law and democracy and not to the holders of state power. This was reiterated in ECtHR (GC) 15 March 2022, No. 43572/18, *Grzęda* v *Poland*, para. 264. Compare to cases concerning other civil servants, such as *Karapetyan and Others v Armenia* App no, 17 November 2016, para 49. [↑](#footnote-ref-41)
42. CCJE Opinion 25 on freedom of expression of judges, December 2022, paras. 45–50, available at: <https://rm.coe.int/opinion-no-25-2022-final/1680a973ef%0A%0A>. [↑](#footnote-ref-42)
43. *Żurek v Poland* App no 39650/18, 16 June 2022, para 222; *Sarisu Pehlivan v Turkey* App no 63029/19, paras 41–42. CCJE Opinion no. 25, para. 58 and the references contained in footnote 58 of this opinion. See also the European Network of Councils for the Judiciary 2013 Sofia Declaration on Judicial Independence and Accountability: “The prudent convention that judges should remain silent on matters of political controversy should not apply when the integrity and independence of the judiciary is threatened. There is now a collective duty on the European judiciary to state clearly and cogently its opposition to proposals from government which tend to undermine the independence of individual judges or Councils for the Judiciary.” (<https://www.encj.eu/images/stories/pdf/GA/Sofia/encj_sofia_declaration_7_june_2013.pdf>) [↑](#footnote-ref-43)
44. CCJE Opinion no 25, para. 46 [↑](#footnote-ref-44)
45. *Wille* *v* *Liechtenstein* [GC] App no 28396/95, 28 October 1999. [↑](#footnote-ref-45)
46. See *mutatis mutandis* Ayuso Torres v Spain. [↑](#footnote-ref-46)
47. CCJE Opinion no 25, para 45. [↑](#footnote-ref-47)
48. *Eminağaoğlu* *v* *Turkey*, App no 76521/12, 9 March 2021, paras. 19–24, 145–148, 151–152. See also: Mohor Fajdiga, ‘Freedom of Expression of Judges on Social Media: A Case Note on the Order Ds-Ss 1/2021 of the Disciplinary Court of the Judicial Council of the Republic of Slovenia’ (2023) LXXXIII Ljubljana Law Review (Zbornik znanstvenih razprav) 221. [↑](#footnote-ref-48)
49. *Eminağaoğlu* *v* *Turkey*, App no 76521/12, 9 March 2021, para. 145. [↑](#footnote-ref-49)
50. *Eminağaoğlu* *v* *Turkey*, App no 76521/12, 9 March 2021, para. 147. [↑](#footnote-ref-50)
51. The most important issue of the case seems to be the weight that should be accorded to the requirement that judges express themselves in a retained and dignified manner, with restraint and decency. This issue seems to have divided the Court, which ultimately found a violation of freedom of expression with 4 votes against 3. [↑](#footnote-ref-51)
52. *Danileţ v Romania* App no 16915/21, 20 February 2024, paras 68, 72. [↑](#footnote-ref-52)
53. *Danileţ v Romania* App no 16915/21, 20 February 2024, para 54. See also Dissenting opinion of judges Kucsko-Stadlmayer, Eicke and Bormann, para 1. [↑](#footnote-ref-53)
54. Dissenting opinion of judges Kucsko-Stadlmayer, Eicke and Bormann, para 5. [↑](#footnote-ref-54)
55. Fajdiga, Zagorc, p. 261. [↑](#footnote-ref-55)
56. Para. 120. [↑](#footnote-ref-56)
57. *Panioglu, supra* n. 29, paras. 123. [↑](#footnote-ref-57)
58. See the presentation that most likely triggered the discussions in the Ethical Commission and in the Judicial Council: Freedom of Expression of Judges: National case law – T. F. Freitas, F. Casarosa and M. Fajdiga, available at: <https://www.youtube.com/watch?v=KVZDarPVD-8&t=12s> (from 32:17 onwards) [↑](#footnote-ref-58)
59. <http://www.sodni-svet.si/doc/Zapisnik_14_seja_2022.pdf>). [↑](#footnote-ref-59)
60. In the case at hand, the judge already had the highest possible rank in the judiciary. [↑](#footnote-ref-60)
61. For a thorough analysis of the chilling effect argument in relation to freedom of expression of judges, see: Mohor Fajdiga and Saša Zagorc, ‘Freedom or Feardom of Expression of Judges? Exploring the “Chilling Effect” on Judicial Speech’ (2023) 19 European Constitutional Law Review 249. See also: Mohor Fajdiga, ‘Chilling Effect or no Chilling Effect: To Be or Not to Be for Freedom of Expression of Judges before the European Court of Human Rights’, forthcoming in Freedom of Expression of Judges: European and National Perspectives, Federica Casarosa, Mohor Fajdiga and Madalina Moraru (eds) (Routledge 2024). [↑](#footnote-ref-61)
62. In *Żurek v Poland* App no 39650/18, 16 June 2022, para. 222, the Court ruled: “When a judge makes such statements not only in his or her personal capacity, but also on behalf of a judicial council, judicial association or other representative body of the judiciary, the protection afforded to that judge will be heightened.” See also Kovesi, para. 207; *Wille* *v* *Liechtenstein* [GC] App no 28396/95, 28 October 1999, para. 64, *Miroslava Todorova v* *Bulgaria* App no 40072/13, 19 October 2021*,* para 175; *Marcolino de Jesus v Portugal* App no 2388/15, 1 June 2021. See also *Żurek v Poland* App no 39650/18, 16 June 2022, dissenting opinion of judge Wojtyczek, who questions the Court’s approach from as incompliant with the principle of equality. [↑](#footnote-ref-62)
63. See for example *Eminağaoğlu* *v* *Turkey*, App no 76521/12, 9 March 2021, para*. 139:* “Having regard to his high-ranking status in the judicial professions, the Court must bear in mind that, whenever the right to freedom of expression of persons in such a position is at issue, the “duties and responsibilities” referred to in Article 10 § 2 assume a special significance since it can be expected of public officials serving in the judiciary that they should show restraint in exercising their freedom of expression in all cases where the authority and impartiality of the judiciary are likely to be called into question.” [↑](#footnote-ref-63)
64. Available at: <http://www.sodni-svet.si/doc/kei/KEI_SMR_19_10_odnos_SU_sodniki.pdf>. [↑](#footnote-ref-64)
65. ECtHR's Resolution on Judicial Ethics, Adopted by the Plenary Court on 21 June 2021, available at: <https://www.echr.coe.int/Documents/Resolution_Judicial_Ethics_ENG.pdf>. [↑](#footnote-ref-65)
66. Available at: <https://www.encj.eu/images/stories/pdf/ethics/judicialethicsdeontologiefinal.pdf>. [↑](#footnote-ref-66)
67. “B.B. does not even have the postulation capacity to appear before the Supreme Court. Even as a party in his own case, the door to the Supreme Court is closed to him. He, who could not even file a writ petition in his own name in the Supreme Court, is at the same time the Chief Justice who decides on those writ petitions. It must be clear to everyone, even a layman, that this is a glaring discrepancy." "... The doubts continue to linger, as he has not shown one paper, namely the certificate of passing the state legal exam under the Law on the State legal exam of the Republic of Slovenia."; "... Unfortunately, this complication has arisen because of what I consider to be an unnecessary or even incomprehensible delay on the part of this judge to remove all doubts within an hour or two."; "... Apparently, in Bosnia, the case was even investigated by an inspectorate, and with each passing day and each new copy, the doubts about the authenticity of these documents and his qualifications only grew stronger, with a devastating impact on the reputation of the judiciary."; "... We must not forget that this man is a Supreme Court judge, the head of the criminal division, a former president of the Supreme Court and the Judicial Council, an examiner or even a vice-president or chairman of the examination board for the state examination for lawyers.". He further stated that the judge's response in allowing the possibility of filing lawsuits against journalists showed an authoritarian conception of law and that the man's response did not include legal arguments but only disqualifications and half-baked threats.” [↑](#footnote-ref-67)
68. The Ethical Commission referred to judge’s claim that the understanding of law of the judge in question was authoritarian. [↑](#footnote-ref-68)
69. This casesheet heavily relies on the casenote written by Martina Coli, UNIFI. The casenote was shortened and included in this booklet. Part b Legal issues was added. [↑](#footnote-ref-69)
70. *Buscemi v Italy* App no 29569/95, 16 September 1999, para. 67; *Di Giovanni* *v* *Italy* App no 51160/06, 9 July 2013, para 71, 80. [↑](#footnote-ref-70)
71. Prager and Oberschlick v Austria App no 15974/90, 26 April 1995, para 34. [↑](#footnote-ref-71)
72. For a more detailed discussion of this issue, see Sietske Dijkstra, ‘The freedom of expression of judges in Europe: an analysis of the case law under Article 10 of the European Convention of Human Rights - the rule of law in the leading role’ forthcoming in Freedom of Expression of Judges: European and National Perspectives, Federica Casarosa, Mohor Fajdiga and Madalina Moraru (eds) (Routledge 2024). [↑](#footnote-ref-72)
73. This casesheet heavily relies on the casenote written by Roxana Prisacariu, UNBR. The casenote was shortened and included in this booklet. Part *b. legal issues* was added. [↑](#footnote-ref-73)
74. This casesheet heavily relies on the casenote written by Ágnes Kovácz, ELTE. The casenote was shortened and included in this booklet. [↑](#footnote-ref-74)
75. This casesheet heavily relies on the casenote written by Ondřej Kadlec, Šimon Chvojka, Masaryk University. The casenote was shortened and included in this booklet. [↑](#footnote-ref-75)
76. This casesheet heavily relies on the casenote written by David Mier Galera, UPF. The casenote was shortened and included in this booklet. [↑](#footnote-ref-76)
77. For a commentary of this case and its aftermath, see: Joan Solanes Mullor, ‘Spain, Judicial Independence, and Judges’ Freedom of Expression: Missing an Opportunity to Leverage the European Constitutional Shift?’ (2023) 19 European Constitutional Law Review 271. [↑](#footnote-ref-77)
78. This casesheet heavily relies on the casenote written by Afonso Brás, Lisbon Public Law Research Centre (CIDP). The casenote was shortened and included in this booklet. [↑](#footnote-ref-78)