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[Media and Freedom of Expression](#)

The Public Opinion of Judges

Between Freedom of Expression and the
Judicial Duty of Independence

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In recent years, judicial independence has increasingly been the subject of court decisions. The European Court of Human Rights (ECtHR) recently sought to draw a line regarding the freedom of expression of judges. In Southeast Europe, numerous disciplinary actions have been initiated against judges as a result of expressions of opinion on social media. Have the dignitaries in these cases really failed to fulfil their judicial duty of independence, or is this increasingly becoming an instrumentalised political issue?

The Council of Europe stressed in late autumn 2010 that “the independence of the judiciary secures for every person the right to a fair trial and is therefore not a privilege for judges, but a guarantee of respect for human rights and fundamental freedoms, allowing every person to have confidence in the justice system”.¹ However, judges, like all citizens, have a right to freedom of expression, as emphasised by the International Association of Judges,² and the principle is similarly determined by the United Nations in Point 4.6 of the Bangalore Principles of Judicial Conduct.³ However, this right is limited to the extent that the dignity of the judicial office and the impartiality and independence of the judiciary must always be respected when it is being exercised. Accordingly, judges are obliged to orientate their conduct towards this and to exercise restraint if the aforementioned principles are endangered.⁴ Thus, a judge is required to refrain from any conduct, actions, or statements that might affect confidence in his/her impartiality and independence.⁵

The theoretical principles form a manageable guide for judges and a good orientation aid, but they have already been the subject of judicial proceedings several times in the past. We will initially examine where the limits of dignitaries’ freedom of expression should be drawn in legal practice so as to ensure adequate protection of the judicial duty of independence by studying the case law of the European Court of Human Rights in Strasbourg. Subsequently, a closer look at the current regulations and jurisprudence

in selected countries of Southeast Europe will shine some light on the state of freedom of expression of judges in the region. For example, some countries in Southeast Europe already have codes of conduct for judges. In recent years, there has been an increase in disciplinary proceedings in the eastern part of Europe as a result of public statements, especially on social media. One country even felt compelled to enact separate regulations for the behaviour of judges on social media. Did the judges in these cases actually cross the line of freedom of expression or did judicial independence serve as a smokescreen for the suppression of undesirable expressions of opinion?

The Limit of Freedom of Expression According to the ECtHR

In its jurisdiction as presented in the Report on Human Rights of the European Commission for Democracy through Law (Venice Commission), the European Court of Human Rights concludes that judges have the right to express themselves publicly, but that each statement must be analysed in terms of content and in the context of an evaluation of society as a whole.

The case “Baka vs. Hungary”⁶ was about the president of the Supreme Court of Hungary, András Baka. In 2011, he criticised to the press the constitutional reform planned under the leadership of the Hungarian Fidesz party. The reform included lowering the retirement age for Supreme Court judges from 70 to 62 and

an amnesty for convicted right-wing protesters. Baka addressed the press and condemned the reform efforts. Above all, he expressed the criticism that this would violate basic principles of independence of the judiciary – first and foremost the irremovability of judges through lowering the retirement age. The Hungarian parliament passed the law to amend the constitution, despite widespread public opposition. Baka was also directly affected by the law. When, in 2009, he was elected President of the Supreme Court, his term was originally supposed to be six years. However, the law amending the constitution stipulated that the President of the Supreme Court’s term of office ended on 1 January 2012, three years and six months earlier than foreseen when Baka was elected.⁷

Judges have not only a right but also a duty to talk about reform in the judiciary.

In the 2016 proceedings, the ECtHR found that there was a causal link between Baka’s public statements and the termination of his mandate.⁸ Moreover, the Court judges stated on record that public discourse on reforms in the judiciary and administration of justice is of fundamental importance to a democratic society and enjoys special protection. Representatives of the judiciary are accorded a special role as guarantors of the rule of law. The Court stated that the judge not only had the right but also a duty to speak out about reforms affecting the judiciary.

Judge Olga Borisovna Kudeshkina suffered a similar fate, which was heard in the ECtHR in the case “Kudeshkina vs. Russia”.⁹ Kudeshkina was removed from office after she publicly criticised the behaviour of public officials. She also accused politicians, among others, saying that it is not unusual in Russian courts for them to exert pressure on the judiciary during their decision-making. The ECtHR concluded that such criticism was covered by the judge’s freedom of expression, as it was a matter of particular

public interest. In principle, due to their special position vis-à-vis the state, all civil servants – and thus also the judge – are bound by a duty of loyalty and confidentiality. However, the duty of political loyalty cannot be given general precedence over freedom of expression, provided that the statements have been made on issues of public interest.¹⁰

The court in Strasbourg does not make freedom of expression absolute in its jurisprudence, but it is increasingly making it clear that in certain cases, parts of the judiciary are able to assess that there is a special public interest in a given issue.

Freedom of Expression in Southeast Europe and the Influence of Social Media

With the tremendously rapid growth in importance and the increasing presence of new media, especially social media such as Facebook and Twitter, the tension with self-imposed judicial restraint is becoming particularly clear. Thus, certain recent judicial decisions relating to this tension have shaped jurisdiction or become part of regulatory processes in Southeast Europe. In Romania, special regulations have been issued for judges regarding their use of, and conduct on, social media. In other countries of the region, however, the general principles of freedom of expression and its restrictions apply.

We will now look at the existing limitations on freedom of expression by considering selected countries in Southeast Europe and presenting case studies. In some cases, the threshold for abuse of judicial independence used to restrict expression may already have been crossed.

Bosnia and Herzegovina

In Bosnia and Herzegovina (BaH), judges are generally permitted to publicly express and defend their own opinions and convictions. Freedom of expression is also an important element of judicial activity in BaH.

Yet, there too, judges are not granted this right without limitation. Rather, the freedom of

expression of judicial dignitaries is subject to certain restrictions in relation to their judicial position. Thus, they are free to express their opinions on all issues without compromising their independence or impartiality. At the same time, however, they cannot make any statements that, in the estimation of an objective

observer, could cast doubt on their judicial impartiality and independence.

This limit is also formally defined in the form of a disciplinary offence under Article 56, Point 23 of the High Council of Judges and Prosecutors Act of BaH. This specifies what conduct and



New media, new questions: With the rapid increase in the importance of social networks such as Facebook and Twitter, the tension between judicial restraint and freedom of expression is becoming increasingly clear.
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which actions constitute a disciplinary offence. As per the article, this includes “any other conduct constituting a serious breach of official duty or calling into question public confidence in the impartiality and credibility of the judiciary”. Exceeding these limits of freedom of expression – in social media or elsewhere – automatically leads to impairment of the principle of judicial independence, so not even the judiciary is immune to misconduct on social media in BaH. In this situation, the trade-off between the right to freedom of expression and the safeguarding of judicial independence works at the expense of freedom of expression.

Issues relating to the functioning and independence of the judiciary constitute an exception to the ban on participation in discussions.

The general question of the admissibility of appearances and expressions of opinion by judges in public and on social media is the subject matter of various disciplinary proceedings in BaH. The Code of Ethics for Judges and Prosecutors (EC) is decisive for the scope of public appearances by judges. For example, Article 2.4a of the EC stipulates that “a judge may publicly express his or her views and opinions in order to optimise existing legal regulations and the legal system and to comment on social discourse, always taking into account the principles of impartiality and independence of the judiciary”.

Further restrictions also arise from Article 2.2.3e of the EC, which prohibits judges from publicly “participating in controversial political discussions”. Exceptions to this are “matters directly related to the functioning of the courts, the independence of the judiciary, and fundamental aspects of the administration of justice”. The EC also contains a “ban on judicial comment”. The confidentiality regulation states: “A judge

shall not comment, either publicly or privately, on any proceedings over which he is himself presiding, or on any proceedings over which he might yet preside. Nor shall he comment on another judge’s proceedings in such a way as to cast doubt on his impartiality or give the impression of undue influence.”

The disciplinary proceedings against judges were triggered by direct statements of personal opinion or indirect expressions of opinion on social media. In all these proceedings, the persons concerned were accused of violating the principles of impartiality and independence of their judicial function. In one case, for example, the judge presiding over a pending civil case uploaded a selfie on Facebook accompanied by a comment in which she expressed how happy she felt while sitting in a restaurant. However, this was not just any restaurant but the restaurant of a party involved in the case, the plaintiff in the civil proceedings. At the end of the proceedings, the presiding judge upheld the claim and ruled in favour of the plaintiff, the restaurant operator. Disciplinary proceedings were initiated against the judge. As a result, the judge received a warning, which was made public.¹¹

Another case that is still ongoing is not directed against a judge, but this time against a public prosecutor. In BaH, however, prosecutors enjoy the same status as judges. In a post on Facebook, someone discredited the Bosnian judiciary and made negative comments about conditions in the judiciary. The prosecutor liked the post. However, this case once again illustrates the restrictions imposed on the freedom of expression of certain members of the judiciary. The proceedings against the prosecutor were initiated due to the “statement” (insofar as a ‘like’ can be considered as such), and this despite the exception in Article 2.2.3e of the EC, allowing expression on “fundamental aspects of the administration of justice”. In view of the media attention now directed at these proceedings, it remains to be seen whether the disciplinary proceedings will result in a sanction for the public prosecutor, or whether they will be discontinued.

Moldova

In the Republic of Moldova (Moldova), judicial dignitaries are similarly, in principle, allowed to express their opinions. Unlike the situation in BaH, no explicit rules of conduct or special requirements in regard to the permissible behaviour of judges on social media have been enacted or established in Moldova. Rather, general ethical principles and the jurisprudence of the Moldovan Constitutional Court (MCC) apply when evaluating comments on social media or placing them in context.

In cases relating to judicial freedom of expression, the interpretation of national regulations is subject to the case law of the ECtHR. In addition, the Code of Ethics for Judges adopted by the Supreme Magistrates' Council provides for several practical restrictions on judicial freedom of expression.¹² Accordingly, judges are prohibited from disclosing or commenting on confidential information or information entrusted to them professionally (least of all on social media). The confidentiality clause is similar to the rule in BaH. However, judges in Moldova are allowed to publicly contest defamatory remarks directed against them in sub judice cases. Accordingly, a public statement by a judge on remarks directed at him or her is only permissible to the extent that it does not infringe the rights of the person affected by the judicial statement. The Code does not provide for any restrictions within the framework of judicial freedom of expression on the content of statements that can be classified as sensitive with regard to (legal) policy. In this context, no distinction is made between traditional and social media.

The law relating to the status of judges provides for more extensive requirements and restrictions. As per the law, judges are obliged to refrain from actions that could discredit the judiciary and the dignity of a judge or raise doubts about their impartiality. Thus, the exercise of a political activity may also constitute sufficient reason to initiate disciplinary proceedings against the judge in question.¹³ However, the possibilities for restricting freedom of expression must

be interpreted and applied restrictively where the provisions conflict with judicial freedom of expression. In principle, judges should be granted the opportunity to participate in political discourse.

Negative assessments of some judges have led to them being banned from performing their duties.

This approach is also reflected in legal reality. In recent times, judges have almost exclusively not been disciplined or sanctioned for statements made in public. Statements criticising the system have not been used directly to remove judges from their posts and hence from their systemically important positions. Rather, subliminally perceptible sanctioning mechanisms have become apparent over time. For example, in some cases the working conditions of judges perceived to be too critical of the constitution have deteriorated. This method was used in Moldova as an attempt to bring the actors to their senses. In some cases, an attempt has been made to question the competence of the judge or the quality of his judicial work by means of poor work assessments. As a result, the negative evaluations of some judges have led to them being banned from performing their duties.

A different standard is applied to judges working at the Constitutional Court when evaluating and classifying their statements – regardless of whether or not their statements are supplementary explanations of the reasons for the judgement. The dignitaries employed at the highest court are exposed to a different level of media attention, and a heightened public presence is expected of them.

In a 2015 interview, for example, the former chairman of the MCC commented on several constitutional issues, including on the conditions for the dissolution of the Moldovan parliament, a possible constitutional reform, and the

form of government existing in Moldova at the time. Some members of the Moldovan parliament took these statements as an opportunity to have the judicial independence of the then constitutional judge examined by the MCC within the framework of a complaint.

The complainants took the view that, due to their political effect, public statements by constitutional judges on constitutional reform efforts were not covered by their freedom of expression. The MCC did not follow this line of argument and stated in its reasoning that ECtHR case law shows that the mere fact that a constitutionally relevant statement could also have political implications does not prevent or exclude freedom of expression. Indeed, it was considered to be the duty of the constitutional judges not only to explain the judgements of the MCC to the public but also to give assessments of the constitutional and legal protection system. Dismissal from judicial office as a result of such statements would therefore be inadmissible and would seriously jeopardise judicial independence.¹⁴ In this case and in contrast to the standards applied in BaH, the liberal approach to the possibility of expression clearly bears the hallmark of the Strasbourg judges. Whether or not this approach by the MCC is due to Moldova's aspirations to join the European Union will probably not be fully answered, but in any case no ostentatious attempts to use judicial independence as an instrument to limit judicial expression are being made in Moldova.

Romania

The situation is different in Romania, where judicial independence requires judges to refrain from making critical or defamatory comments about organs of the legislative and executive branches, according to new provisions in the law passed by the government of social democrat Viorica Dăncilă (2018 to 2019). Nor are judges in Romania allowed to explain the reasons for their judgements in greater detail in the media. The law as it stands provides for detailed regulations with regard to freedom and demarcation of judicial expression. Thus, according to

Romanian law on judicial status,¹⁵ judges are prohibited from being members of a political party. In addition, they are explicitly excluded from participation in political activities.

These restrictions offer little room for exercising the right to free expression and, given the significant restrictions on freedom of expression, are likely to be abolished in the foreseeable future (also due to increasing international pressure). Further restrictions, already adopted in 2012, also reinforce the impression that judges in Romania are now barely allowed any freedom of expression. They are prohibited from carrying out public (especially politically motivated) activities of any kind. Any statements that conflict with their professional ethos, or which could jeopardise the reputation of the judiciary, are banned. Derogatory comments to other members of the judiciary, or to representatives of other institutions, during the performance of official duties are similarly not tolerated. The broad wording of the provision and the lack of clearly definable rules of conduct leave plenty of scope to enact restrictions and to impose arbitrary sanctions on how judges express themselves.

The Romanian inspectorate's approaches rarely meet international standards.

Romanian law sets very precise rules regarding how judges use, and conduct themselves upon, social media and networks. In a catalogue of regulations, a distinction is made in two parts between the courts and judicial bodies on the one hand, and the judges, on the other. The first part describes the general communication strategy of the Romanian courts. The second part of the catalogue specifies and defines the scope of judges to exercise freedom of expression. Accordingly, judges are not allowed to comment negatively in any way on the professional and moral probity and integrity of their colleagues. Ideas or orientations that might suggest a connection to a party, or to partisan structures, must not be expressed on



What are judges allowed to do? In Moldova, no explicit rules of conduct have been established with regard to expressions of opinion on social media. Source: © Gleb Garanich, Reuters.

social media. Judges are also prohibited from supporting, promoting, or evaluating in any manner campaigns, pages, or posts by activists or groups if this could damage the reputation of the judiciary. In this law, with all its concrete guidelines and requirements, there are also broad and vague formulations that are unlikely to ensure that statements are evaluated in a non-arbitrary manner.

Attempts are made to partially compensate for the above limitations on freedom of expression by allowing judges to promote and protect universally recognised human rights and the rule of law. The extent to which this is actually allowed is, however, not made clear. Such promotional behaviour is only permitted and accepted if the judicial opinion is expressed in a duly scientific manner that is justified in accordance with the

academic degree. In the same breath, it also suggests that judges express this criticism primarily within the framework of an institutional dialogue. Socio-political polarisation of views is to be avoided at all times.

It is the task of the Romanian judicial inspectorate to balance the restrictions with the freedoms granted by law in a proportionate manner. However, the inspectorate's approaches to finding solutions rarely meet international standards. This is also made clear by the fact that several cases brought against judges critical of the system are currently pending before the European Court of Justice.¹⁶

Only last year in the case of "Kövesi vs. Romania", the ECtHR confirmed that the dismissal of

the head of the anti-corruption department of the public prosecutor's office (DNA) was based on her public statements against systemic corruption. The ECtHR deemed this action to be a violation of freedom of expression (Article 10 of the European Convention on Human Rights).¹⁷ Recently, the Romanian judicial inspectorate initiated disciplinary proceedings against eight judges for certain critical comments made in discussions about the state of the Romanian judiciary in a non-public Facebook group. It reasoned that this compromised the integrity of the judiciary. Three of the judges are now facing suspension. The extent to which judicial independence in Romania is being used to restrict judges' freedom of speech should be clear. Subliminal sanctions, which are common practice in Moldova, are the exception in Romania.

Conclusion

A look at the different developments and jurisprudence in Central and Southeast Europe shows that the level of protection judicial freedom of expression is accorded currently varies considerably (regardless of its worthiness of protection). The ECtHR increasingly takes into account the role of judges and – in accordance with their professional ethics – grants them more extensive powers of expression in the overall context. However, the situation in certain countries in Southeast Europe clearly shows the attacks that judicial freedom of expression still faces, despite adequate demarcations, for example through the Bangalore Principles of Judicial Conduct. In some of these countries, for example, the freedom of expression of judges is determined by legal professional codes and is limited to the point of explicitly regulated bans on commentary. Judicial independence is sometimes used as a tool to suppress certain opinions. Occasionally, governments use this to restrict critical public opinion still further.

It remains to be seen how jurisdictions will develop in the light of the increasing importance and use of social media, including by members of the judiciary. The next few years will show whether the rapid spread and wide reach

of the spoken word in the media will be given separate consideration, or whether increasing disciplinary constraints on judges with regard to their ability to express their opinions will be seen. It will not be possible to deprive judges per se of the right to speak out in public. This is also undesirable in view of the supreme value of freedom of expression, which undoubtedly conflicts with judicial duty as a public servant and its incorporated impartiality and independence. In the modern digitised world, sufficient ways and means can be found to express one's opinions. Checks and evaluations of statements will only ever be possible retrospectively. In any case, each assessment requires individual consideration of the individual case, along with careful balancing of the particularly protection-worthy concept of freedom of opinion, as well as sufficient safeguarding of judicial impartiality, all the while ensuring the functionality of the judiciary. However, it is noticeable that some countries are particularly tough and resolute in cases where the statements are critical of the existing system. It remains to be seen whether restrictions that are compatible with the case law of the ECtHR will be applied by codifying a professional ethos, or whether the principles developed in the case law are able to create sufficient legal certainty and legal protection for judges.

– translated from German –

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