Should judicial voices be heard? Judicial interactions between national and European courts reframing freedom of expression as a tool to protect the European rule of law

Should Judicial Voices be Heard? New Directions on Freedom of Expression from European and National Courts

Introduction

Like everybody, judges enjoy freedom of expression, belief, association and assembly.[1] However, legal systems has traditionally imposed starker limitations on these fundamental rights to judges compared to ordinary citizens, the rationale being to safeguard important competing interests: judicial independence, impartiality and public trust in the judiciary.[2] Where exactly the boundary between the two competing values lies, is a complex question. The answer in each case depends on multitude of factors and specific circumstances. The recent rule of law developments in Europe and worldwide have rekindled the dilemma of guaranteeing these fundamental rights to judges. The rule of law crisis has led many judges to speak out and protest against the attacks of autocratic governments targeting judges and courts.[3] Rapid expansion of the digital world has opened up new channels of communication, which led to the decline of traditional media. Social networks emerged as the new digital marketplace of ideas with all if its vices and virtues. The growing role of courts in the society and in particular, judicialisation of politics, have expanded the range of topics brought before the courts and increased the instances where courts deal with much spicier disputes than ever before.[4]

On the one hand, these developments are challenging the prevailing understanding of the role of judiciary and judicial conduct on and off the bench. On the other hand, they have triggered an unprecedented wave of cases concerning freedom of expression of judges before European and national courts, which has resulted in important developments in the caselaw. The European Court of Human Rights has for example refined the nature of judicial function. Judges are now treated as a special category of civil servants, loyal not to their superiors or the state, but to the rule of law.[5] The Court has also recognized the importance of judicial voice for safeguarding judicial independence and the rule of law by confirming that

> "*[T]he general right to freedom of expression of judges to address matters concerning the functioning of the justice system may be transformed into a corresponding duty to speak out in*

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[1] See Article 10 and 11 of the European Convention of Human Rights.

[2] Bangalore principles, p. 5, 4.6.

[3] For examples originating from Hungary, Poland and Romania, see the country reports in: TRIIAL- Trust, Independence, Impartiality and Accountability of Judges and Arbitrators Safeguarding the Rule of Law under the EU Charter', *Robert Schuman Centre for Advanced Studies Research* Paper No. 2022/52 (2022) ('TRIIAL Report').

[4] Ran Hirschl, 'The Judicialization of Politics' in Robert Goodin (ed), *The Oxford Handbook of Political Science* (Oxford University Press 2011) <https://doi.org/10.1093/oxfordhb/9780199604456.013.0013> accessed 11 January 2023; David Kosař, Jiř'i Baro\vs and Pavel Dufek, 'The Twin Challenges to Separation of Powers in Central Europe: Technocratic Governance and Populism' (2019) 3 European Constitutional Law Review 427.'The Global Expansion of Judicial Power' (*NYU Press*) <https://nyupress.org/9780814782279/the-global-expansion-of-judicial-power> accessed 12 January 2023; Scheppele, K.L. 2005. "Democracy by Judiciary (Or Why Courts Can Sometimes Be More Democratic Than Parliaments)." In Adam Czarnota, Martin Krygier, and Wojciech Sadurski, eds. *Rethinking the Rule of Law After Communism* Central European University Press; David Kosař, Jiř'i Baro\vs and Pavel Dufek, 'The Twin Challenges to Separation of Powers in Central Europe: Technocratic Governance and Populism' (2019) 3 European Constitutional Law Review 427.

[5] ECtHR 9 March 2021, No. 1571/07, *Bilgen* v *Turkey*, 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. See also 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.

defence of the rule of law and judicial independence when those fundamental values come under threat".[6]

The Court of Justice of the EU (CJEU) has also been very active in addressing the new threats to independence of judicial power. It has prohibited any interference with the right of judges to request guidance from the CJEU under Article 267 TFEU procedure, even when this would place national courts in conflict with judgements of their national constitutional courts.[7] Strictly speaking, the right to refer preliminary questions to the CJEU is not covered by freedom of expression, but can be used - and indeed was used - many times as a tool for conveying judicial protest against harmful reforms and pressures, undermining judicial independence.[8] Moreover, various soft law instruments are currently sprouting at the national and supranational level. Some, for example Opinion 25 of the Consultative Council of European Judges from December 2022, cover the topic of judicial speech in general, whereas others concentrate on narrower issues such as the use of social media by judges.[9]

Rapidly expanded volume of jurisprudence and soft law instruments has not yet been properly addressed by academia. The approaches adopted in these texts seem far from evident, providing fertile ground for scholarly discussion.[10] Furthermore, as rightly pointed out by Dijsktra,[11] despite this increase of caselaw concerning freedom of expression of judges, the European courts still have to cover many scenarios. To make the matters even more complicated, there seems to be no consensus on the precise margins and limitations of freedom of expression of judges in Europe,[12] let alone worldwide. The differences in Europe alone, are striking. For example, in some states, political activities of judges are deemed entirely inappropriate and are thus strictly forbidden, whereas in some states, judges are allowed to be members of political parties and to even hold political functions and return to the judiciary.[13]

Given a relatively weak academic interest in the topic before the outbreak of the rule of law crisis, there is currently a significant gap in the scholarly literature comparately assessing the limit of the freedom of expression of judges in Europe.[14] Our modest contribution will not

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[6] See ECtHR 16 June 2022, No. 39650/18, *Żurek v Poland*, para. 222. See also ECtHR (GC) 23 June 2016, No. 20261/12, Baka v Hungary, para. 168. The Venice Commission considers that a democratic crisis or a breakdown of the constitutional system is an important element of a particular case and essential in determining the scope of the fundamental rights and freedoms of judges (Venice Commission Report 2015, https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2015)018-e p. 20, para. 84.)

[7] See ECJ 26 March 2020, Joined cases C-558/18 and C-563/18, *Miasto Łowicz (Régime disciplinaire concernant les magistrats)*;and ECJ 23 November 2021, Case C-564/19, *IS (Illégalité de l'ordonnance de renvoi)*; ECJ 21 December 2021, Joined cases C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19, *Euro Box Promotion and Others*.

[8] Cf. ECtHR 13 November 2008, Nos. 64119/00 and 76292/01, *Kayasu* v *Turkey*, where the ECtHR found a violation of the prosecutor's freedom of expression for bringing criminal charges in his own name against individuals who had attempted to carry out a coup d'état in 1980.

[9] See J. Solanes Mullor, Spain, Judicial Independence, and Judges' Freedom of Expression: Missing an Opportunity to Leverage the European Constitutional Shift in EuCons (forthcoming).

[10] Dijsktra, see her article.

[11] Dijsktra, see her article.

[12] Venice Commission, 2015, Seibert-Fohr, A. (2021). Judges' Freedom of Expression and Their Independence: An Ambivalent Relationship. In: Elósegui, M., Miron, A., Motoc, I. (eds) The Rule of Law in Europe. Springer, Cham.

[13] See TRIIAL Report.

[14] Existing scholarly contributions include: Shimon Shetreet and Sophie Turenne, *Judges on Trial: The Independence and Accountability of the English Judiciary* (2nd edn, Cambridge University Press 2013); Anja Seibert-Fohr, 'Judges' Freedom of Expression and Their Independence: An Ambivalent Relationship in The Rule of Law in Europe: Recent Challenges and Judicial Responses in The Rule of Law in Europe: Recent Challenges and Judicial Responses (Elósegui, María; Miron, Alina; Motoc, Iulia Jahn, Jannika Eds.); Wayne MacKay,

entirely fill the extensive gap and settle this hot issue. It is only a first step in a challenging quest to shed more light on this fascinating topic. The strength of our special section is that it is not a purely academic contribution to the debate, as it draws from the project "TRust, Independence, Impartiality and Accountability of judges and arbitrators safeguarding the rule of Law under the EU Charter – TRIIAL"[15]. It elaborates on the findings emerging from the set of 12 cross-border training events that gathered more than 300 legal practitioners to discuss various issues related to the freedom of expression in the countries covered by the Project.[16] They have opened new insights that have inspired the contributions featuring in this special section.

The special section looks at the most recent standards on freedom of expression of judges (and prosecutors), that rely on varied interlinked legal sources, ranging from national constitutions, European Convention of Human Rights and EU law, as interpreted by relevant jurisprudence. This introductory article first gives an overview of the topic, by outlining the evolution of understanding freedom of expression of judges (and prosecutors) in the society. Second, the article dwells upon the new step in this evolution, which is unveiling before our very eyes. It raises yet unresolved questions that have recently emerged as poignant as ever due to the rule of law crisis and the emergence of social media. It analyses the recent jurisprudence of the European courts as well as the impact that the decisions of these courts had on the jurisprudence of national courts. Without envisaging to provide clear-cut answers, the analysis will point to the current standards applied to the fundamental right to free speech as well as to procedural guarantees and avenues for its protection.

Evolution of the role of free speech of judges: from speaking exclusively through judgments to explicit recognition of freedom of expression with important limitations

At first glance, for most of the 20th century in continental Europe, it seems that the prevailing understanding was that once being appointed to a judicial office, judges give up their freedom of expression.[17] In the democratic West, this was predominantly due to high standards of what was deemed decent and appropriate for judges. In the Communist East, judges, who were downgraded to some kind of servile bureaucrats, relied on restraint and discretion mainly as a shield against the omnipresent control of the state.[18] The fall of the Berlin wall and the wind of change it brought, started a process where judicial independence was put at the forefront of

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'Judicial Free Speech and Accountability: Should Judges Be Seen But Not Heard?' (1993) 3 National J. of Constitutional Law 159; Sietske Dijkstra, 'The Freedom of the Judge to Express His Personal Opinions and Convictions under the ECHR' (2017) 13 Utrecht Law Review 1; Jannika Jahn, 'Social Media Communication by Judges: Assessing Guidelines and New Challenges for Free Speech and Judicial Duties in the Light of the Convention', *The Rule of Law in Europe: Recent Challenges and Judicial Responses*, vol 2021 (Springer); HP Lee (ed), *Judiciaries in Comparative Perspective* (Cambridge University Press 2011), especially chapters 8-13, which give an account of freedom of expression of judges in 6 common law countries: Australia, Canada, New Zealand, South Africa, United Kingdom and United States.

[15] TRIIAL project is a DG Justice supported project (G.A. No. 853832), see more at: https://cjc.eui.eu/projects/triial/ .

[16] TRIIAL project addressed nine EU countries, namely Belgium, Hungary, Italy, Poland, Portugal, Romania, Slovenia, Spain, the Netherlands.

[17] Christine Matray, En marge du film « Ni juge ni soumise » : quelques rappels sur la liberté d'expression des magistrats, 27. marec 2019, dostopno na: https://www.justice-en-ligne.be/En-marge-du-film-Ni-juge-ni.)

[18] Aleš Galič, The Aversion to Judicial Discretion in Civil Procedure in Post-Communist Countries: Can the Influence of EU Law Change it? v: Michal Bobek (ur.), Central European Judges Under the European Influence: The Transformative Power of the EU Revisited, Hart Publishing, 2015.

debates on judiciary.[19] In the early 2000s, Bangalore principles already explicitly recognized that judges, as any other individual, enjoy freedom of expression.[20] However, their role in the democratic society directly influences the forms and manners through which such a right can be exercised. As courts have to be regarded as appropriate fora for dispute resolution, judicial free speech has to be limited to safeguard independence, impartiality and authority of the judiciary. [21] This is why the European Court of Human Rights and national courts[22] require judges to exercise their freedom of expression with moderation and restraint. They should in principle avoid communication through the media even in response to provocation.[23] Moreover, they should not address some specific issues, such as, most obviously, the content of the proceedings that the judge is currently deciding, but also sensitive cases, where the judge may express opinions that may not be interpreted as personal but rather as presenting the views of the judicial institution. These conflicting values must be protected not only with specific reference to the concrete exercise of judicial functions, but also as a deontological rule to be observed in all behaviours, in order to avoid that independence and impartiality in the performance of the assigned task can be justifiably doubted by the citizens. Despite these important limitations on judicial freedom of expression, courts call for caution every time this right is at stake. Since *Wille* v *Liechtenstein* from 1998, any limitation to the freedom of expression of judges calls for close scrutiny[24] and should be justified upon the existence of equally important legitimate interest.

Rule of law crisis and digital world: a push towards a new understanding of freedom of expression of judges?

Freedom of expression of judges has acquired a new layer of complexity emerging from the extent to which it may also play a role in addressing the threats to the rule of law, emanating not only from the (populist) governments, but also from within the third branch (the judiciary). In the last decade, several Member States have been witnessing an unprecedented decline in the rule of law, one of the Article 2 TEU values upon which the EU is funded. 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.[25] While other Member States endure for the moment, it is becoming increasingly questionable whether their institutions are robust enough to withstand the present and future attempts to undermine the independence of their justice

[19] Kosař, Baro\vs and Dufek (n 2); Michal Bobek, 'The Fortress of Judicial Independence and the Mental Transitions of the Central European Judiciaries' (2008) 14 European Public Law 99; N. Garoupa and T. Ginsburg, 'Guarding the Guardians: Judicial Councils and Judicial Independence', 57 *AJIL* (2009) p. 103.
[20] Bangalore principles - p. 5, 4.6.
[21] See for instance the decision of the Italian Constitutional Court n. 100, 8 June 1981. In the words of the ECtHR, "[judges] 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 in question" (e.g. *Wille, supra* n. 6, para. 64; *Baka, supra* n. 2, para. 164; ECtHR 5 May 2020, No. 3594/19 *Kövesi v Romania,* para 201). Under Article 10 (2), ECHR recognizes that freedom of expression can be limited to safeguard "the authority and impartiality of the judiciary". Authority is understood in a functional sense as public trust in the independence and impartiality of the judiciary, without which the third branch cannot fulfil its role in a democratic society (see ECtHR (GC) 23 April, No. 29369/12, *Morice v France*, para. 129).
[22] As it emerges from the results of the TRIIAL project national judiciaries addressed this balancing exercise elaborating on the standards that emerge from the European Court of Human Rights. See in particular, TRIIAL Report, available at: https://cadmus.eui.eu/handle/1814/74814.
[23] ECtHR 9 July 2013, No. 51160/06, *Di Giovanni v. Italy*, para. 80; ECtHR 26 February 2009, No. 29492/05, *Kudeshkina v. Russia*, para. 93.
[24] See ECtHR 28 October 1999, No. 28396/95, *Wille v. Liechtenstein*, para. 64 and *Baka, supra* n. 2, para. 165.
[25] ECJ 15 July 2021, Case C-791/19, *Commission v Poland (Régime disciplinaire des juges)*, para. 64.

systems.[26] Traditionally, legal professionals, especially judges and prosecutors, have refrained from voicing their opinion in order to ensure their impartiality and the authority of their institutions. The duty of restraint has been regarded as a prerequisite for public confidence, necessary for successful fulfilment of the role of the judiciary in a democratic society. However, nowadays legal professionals more often than ever find themselves in a difficult position: they have a (moral) duty to speak out in the face of affronts to the rule of law, yet fulfilment of such a duty could expose them to disciplinary and other types of sanctions.[27]

Could the current challenges to independent judicial systems be regarded as a call for a re-examination of the duty of discretion and perhaps for adjustments to the existing norm, especially as the perception that legal professionals should show restraint could be abused as an excuse for disciplining the independent-minded? What are the risks of leaving more freedom (of expression) to legal professionals and what are the advantages of exploring new means to defend this fundamental EU value? What is the role of both European courts in shaping the European standards of freedom of expression of judges and how judicial interaction techniques contribute to safeguarding the rule of law? How the rule of law crisis has influenced developments regarding freedom of expression in both supranational and national courts? This special section raises these questions looking at the recent jurisprudence of the European courts as well as the impact that the decisions of these courts had on the jurisprudence of national courts.

Refinement of the existing caselaw or next major step in the evolution of freedom of expression of judges?

Rule of law crisis in several EU member states has forced European and national courts to refine their caselaw. The Court of Justice of the EU has rediscovered the fundamental importance of rule of law as an EU value and judicial independence as one of its central elements. The starting point of this incremental process was the ASJP judgment from February 2018.[28] The Court carefully construed the narrative around rule of law and judicial independence as cornerstones of organization of the judiciary, guarantees for operation of the preliminary ruling mechanism and consequently for functioning of the EU as a community based on law.[29] The language used by the Court is of the outmost importance here. The Court is consistently underlining the centrality of the rule of law and judicial independence by using words such as essential, cardinal and fundamental.[30] This extraordinary language shows that for the Court, the rule of law and judicial independence are non-negotiable essentials of the EU legal order, forming part of the

[26] For Romania see: ECJ 18 May 2021, Joined Cases C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19, Asociaţia 'Forumul Judecătorilor din România; Euro Box Promotion and Others, supra n. 2; ECJ 22 February 2022, Case C-430/21, RS; ECJ, Request for a preliminary ruling from the Curtea de Apel București (Romania) lodged on 21 December 2021, Case C-817/21, R.I. v Inspecția Judiciară, N.L (pending). On the rule of law issues in Spain, Italy, Portugal, Slovenia, the Netherlands and Belgium, see TRIIAL national reports, supra n. 5.

[27] ECJ 18 May 2021, Joined Cases C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19, A*sociaţia 'Forumul Judecătorilor din România* (indirect criminal sanctions); *Miasto Łowicz*, supra n. 2 and IS (Illégalité de l'ordonnance de renvoi), supra n. 2 (disciplinary proceedings); ECtHR 5 May 2020, No. 3594/19, *Kövesi, supra* n. 7 *v Baka*, *supra* n. 2 (premature termination of mandate); *Żurek*, supra n. 1 (audit of judge's financial declaration, inspection of his work and premature termination of mandate as member of the National Council of the Judiciary (NCJ) and its spokesperson); ECtHR 19 October 2021, No. 40072/13, *Miroslava Todorova v Bulgaria* (disciplinary sanctions and administrative controls of judicial work).

[28] Lenaerts - one of the key judgments of the Court of all time.

[29] See for example Loïc Azoulai, '"Integration through Law" and Us' (2016) 14 International Journal of Constitutional Law 449.

[30] See the country report on Poland in TRIIAL Report.

overlapping consensus[31] on the old continent. The European Court of Human Rights has also been underlining the utmost importance of these values. In Astrađsson and its progeny,[32] the Court subjected national judicial selection procedures under its scrutiny. In Bilgen and Grzęda,[33] it has refined the status of judges, who are now considered loyal to the rule of law and not their superiors or to the holders of state power. It has even adopted new rules for prioritisation of caselaw. The rule of law challenges are the key topic of the Strasbourg court in the last few years.[34]

This entrenchment of the rule of law and judicial independence as fundamentals of modern democratic states has had a tremendous impact on the judicial free speech standards. As explained by Dijkstra with regards to the ECtHR, it seems there is very little room for limitations of freedom of expression of judges (and prosecutors) when they speak in defence of the rule of law and judicial independence.[35] Starting from Baka v Hungary, the Court has consistently adopted a very judge-friendly approach. It has been willing to treat official speech, even one stemming from legal duty to give opinion on judicial reforms, as exercise of the right to freedom of expression. It has shifted the burden of proof regarding the causal link between public expression and sanction, suffered by a judge, from the applicant to the state. It has found that governmental measures served no legitimate aim (Kövesi, Baka), a finding the Court makes extremely rarely and even relied on Article 18 of the Convention to come to the conclusion, that the state abused the limitation clause for furthering an illegitimate aim (Miroslava Todorova). Moreover, in cases, where the judges raises their voice to defend the rule of law, only a narrow margin of appreciation is afforded to the national authorities (Baka, Kovesi, Zurek etc.). In Żurek v Poland, the Court even ruled that judges have a duty to speak out when the rule of law is at stake. As shown by Dijkstra, such duty is most probably a moral one. Nevertheless, it is a strong sign of support for judges in the backsliding states to know that their freedom of expression will be safeguarded in Strasbourg.[36]
Like the ECtHR, the CJEU has been an important ally of national judges in hardship.[37] It has taken a strict stance on the right of national judges to refer preliminary questions,[38] namely that

> "[I]t is an inherent guarantee of the independence of national judges that they will not be subject to disciplinary proceedings or sanctions because they have exercised the option to apply to the Court under Article 267 TFEU"[39] and that "the mere prospect of being the subject of disciplinary

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[31] See Poland: TRIIAL Report, which explains idea of overlapping consensus boils down to the claim that under certain conditions the supporters of the different comprehensive doctrines can agree on basic principles that subjects require others to respect as the condition of their deference to decisions taken by others.
[32] *Guðmundur Andri Ástráðsson proti Islandiji*, prit. št. 26374/18 [veliki senat] 1. december 2020; *Xero Flor w POLSCE sp. z o.o. proti Poljski,* prit. št. 4907/18, 7. maj 2021; *Reczkowicz proti Poljski*, prit. št. 43447/19, 22. julij 2021; *Dolińska-Ficek in Ozimek proti Poljski*, prit. št. 49868/19 in 57511/19, 8. november 2021; Advance Pharma v. Poland, App. No. 1469/20, 3.12.2021.
[33] In ECtHR 9 March 2021, No. 1571/07, *Bilgen* v *Turkey*, 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.
[34] Robert Spano, 'The Rule of Law as the Lodestar of the European Convention on Human Rights: The Strasbourg Court and the Independence of the Judiciary' (2021) 27 European Law Journal 211.
[35] See article Dijkstra.
[36] See Solanes Mullor article.
[37] See Opinion of Advocate General Pikamäe, 15 April 2021. Criminal proceedings against IS, C-564/19, para 1, where AG that in some cases, preliminary questions »are appeals for assistance from national judges concerned by or even subject to disciplinary proceedings«.
[38] Opinion of Advocate General Pikamäe, 15 April 2021. Criminal proceedings against IS, C-564/19, paras. 44 and 48.
[39] ECJ 21 December 2021, Joined cases C-357/19, *Euro Box Promotion and others*, C-379/19, *DNA- Serviciul; Teritorial Oradea*, C-547/19 *Asociaţia « Forumul Judecătorilor din România »*, C-811/19 *FQ and others* and C-

> proceedings as a result of making such a request (or deciding to maintain that request after it was made) is likely to undermine the effective exercise by the national judges concerned of the discretion and the functions of national courts in the framework of Article 267 TFEU."[40]

As affirmed also by AG Bobek, such right should not be interpreted as being absolute.[41] Nevertheless, in the context of rule of law crisis, national judges are able seek support from the ECJ by smartly channelling their opposition to harmful reforms or other phenomena, detrimental for judicial independence, through preliminary questions.[42] This is a much wiser approach compared to open public criticism of the government, since judges express themselves solely through legal mechanisms, whose legitimacy is beyond doubt.[43] Judges can rely on Article 6 ECHR to defend their right to refer preliminary questions, since at least in some cases, unduly reasoned rejection of party's request for a preliminary ruling violates the right to fair trial.[44] Relying on Article 10 ECHR could possibly be an option, since the ECtHR has been interpreting "formal" speech as coming within the ambit of Article 10.[45]

For now it remains uncertain, whether these developments, broadening the scope of judicial free speech have to be limited to the context of rule of law crisis, or whether they might apply in other contexts. In any case, their prospect for further development of the standards towards greater protection of freedom of expression is beyond doubt.

In addition to the rule of law crisis, the other phenomena are challenging the prevailing understanding of where the limits of judicial free speech lie. The first one is the role of authority of the judiciary in the modern society. According to the Strasbourg court, it should not be understood in the sense that the judicial actors should not be criticized. The Court understands this limitation clause essentially as a synonym to public trust in the judiciary, meaning that the courts are recognized by the public as an appropriate fora for resolution of disputes. Constructive criticism is not harmful but beneficial to the authority of the judiciary,[46] even when it comes from the mouth of a fellow judge. Social legitimacy of the judiciary is crucial for everyday functioning of the judiciary as well as for resilience of the third branch against "hostile takeover" by the government, since courts and formal institutions cannot resist authoritarian attacks without public support.[47] If people would feel that it is not only some court but *their*

840/19 *NC and others*. ECLI:EU:C:2021:1034, para. 227. See also Judgment of 26 March 2020, Miasto Łowicz and Prokurator Generalny (C-558/18 and C-563/18, EU:C:2020:234, paragraph 59).

[40] Miasto Łowicz and Prokurator Generalny (C-558/18 and C-563/18, EU:C:2020:234, paragraph 57).

[41] See *Opinion of AG* Bobek, in ECJ 21 December 2021, Joined cases C-357/19, *Euro Box Promotion and others*, C-379/19, *DNA- Serviciul; Teritorial Oradea*, C-547/19 *Asociația « Forumul Judecătorilor din România »*, C-811/19 *FQ and others* and C-840/19 *NC and others, paras. 238-245; Opinion of AG Bobek in* C-379/19 - DNA-Serviciul Teritorial Oradea*, paras. 93-95.*

[42] Of course, judges have to make sure, that the preliminary question they are raising is relevant for determination of the concrete case, they are handling. If they fail to do so, the Court finds that the question is inadmissible. This happened in Miasto Łowicz and Prokurator Generalny (C-558/18 and C-563/18, EU:C:2020:234 2021).

[43] B. Zalar, TRIIAL crossborder workshop, 21-22 October 2021.

[44] See ECtHR, 8 April 2014, No. 17120/09, *Dhahbi v. Italy*; ECtHR, 21 October 2015, No. 38369/09, *Schipani and others v.* Italy; ECtHR, 16 April 2019, No. 55092/16, *Baltic Master Ltd v Lithuania*; ECtHR, 13 February 2020, No. 25137/16, *Sanofi Pasteur v. France*; ECtHR, 28 August 2018, No. 60934/13, *Somorjal v. Hungary*; ECtHR, 11 April, No. 50053/16, *Harisch v. Germany.*

[45] Another option would be to rely to this provision under the right to receive information from the Luxembourg court. However, in such cases, invoking Article 10 ECHR could turn out to be far-fetched and unconvincing, as there nevertheless seems to be a stark difference between speech originating in a professional legal duty, as in Baka, and expression of opinion in legal act, as in the case of referrals under Article 267.

[46] Morice v. France, paras. 129, 167, 170.

[47] A. Arato: Populism and the Courts, VerfBlog, 2017/4/25, https://verfassungsblog.de/populism-and-the-courts/, DOI: 10.17176/20170425-082356; D. Kosar, Freedom of Speech and Permissible Degree of Criticism of Judges,

court which is under pressure, we would not have such large scale meddling with the judiciary by the political actors.[48] The question is what makes people feel that these are *their* courts and what kind of negative statements towards the judiciary make weaken their trust. As shown by Solanes Mullor, also the lack of autonomy and independence of the General Council of the Judiciary may reduce the esteem that the citizens have on the independence and impartiality of the judiciary as a whole.

If authority of the judiciary is in fact the level of public trust in judges, this should mean that the higher trust one has in judges (and prosecutors) as individual components of the judiciary, more eagerly he/she will support the freedom of expression of judges. If we trust judges judging, why should we not trust them when they are using their free speech? There is some logic behind this rationale. However, judges have not been trained for public communication of their opinion outside the courtroom. Training is crucial in this respect, as was recently recognized by the CCJE in its Opinion No. 25 of Freedom of expression of judges.

This is even truer now than it was ten or fifteen years ago. With the advent of social media, the means of communication, the tone of expressing one's opinion as well as the reach and availability of channels for public communication have changed dramatically. What does this mean for judicial free speech? It is hard to draw general conclusions, but it seems that boundaries of what is deemed appropriate communication for judges are being pushed by these developments. Some general principles, such as discretion and restraint, requirement to avoid communication through the media, even when provoked or the prohibition to comment the case the judge is handling, have not been seriously questioned yet, but could come under stress in the coming years.[49] Such general prohibitions are hardly consistent with the logic of human rights, which is allergic to sweeping rules that take little account of the different circumstances in which such rules are applied.[50] During one of the TRIIAL workshops, a participant was contemplating whether it would nevertheless be better to inform the media about inadequacies in the judiciary, especially after exhausting other internal remedies. At the end of the day, only this might help to bring positive change in the functioning of the judiciary, which is a topic of great public concern. Besides, judges know the judicial system best and fully understand its functioning in practice, which is often different than on paper.[51] Their opinion could hence turn out to be priceless for strengthening our judiciaries or defending them against outside (or inside) pressures. Another participant gave a more general comment, which was revealing: "Judges are smart people. If smart people remain silent, there will be more media space for foolish people."[52] Indeed, without the (self-)critical opinion of judges, there is more room for political criticism of the judiciary, which is opposed by high-ranking judicial officials, who cannot be more convincing than "ordinary" judges in defending the judiciary, because their very position gives people the feeling that they have their own interests in the debate. It seems that excessive

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CEU, 2007, p. 7; B. Bugarič, Can Law Protect Democracy? Legal institutions as Speed Bumps, Hague Journal on the Rule of Law (2019) 11:447–450.

[48] *Understanding Social Legitimacy of the Judicial Power - Tomasz Koncewicz, TRIIAL Transnational training,* Accountability and Freedom of Expression of Magistrates and Attorneys in Europe, *EUI, 16-17 June 2021.* <https://www.youtube.com/watch?v=1Vu-0lLImZk> accessed 18 January 2023.

[49] See Article Dijsktra.

[50] In the US, such rules are regularly found overbroad and thus unconstitutional.

[51] David Kosař, The Heterogeneous Systems of Accountability of Magistrates in Europe, TRIIAL Transnational workshop "Accountability and Freedom of Expression of Magistrates and Attorneys in Europe" EUI, 17 and 18 June, https://www.youtube.com/watch?v=1V0g0xrzE3E. See also: J. Gutmann & S. Voigt, Judicial Independence in the EU: a Puzzle, European Journal of Law and Economics, 49(1), 83-100.

[52] TRIIAL Cross-border workshop "Freedom of Expression of Legal Professionals: Facing the Rule of Law Challenges in Europe", University of Ljubljana, 20-21 October 2021.

restrictions on the freedom of expression of judges, in effect, conceal from the public upright, independent and professional judges, and thus the judiciary as a whole loses its reputation, which is not built on the "immaculateness" of the institution, but on the excellence of the individuals who make it up. If we want judges to be truly public intellectuals who contribute to debates in the public interest, we must also encourage them to responsibly use social networks responsibly, as also required by the recently adopted Principles by the Spanish Judicial Ethics Committee.[53] Without this, we risk their voices being drowned in the flood of information and opinions.

Our moderate scepticism towards general rules, outlined above, however should not be understood as call for their abandonment at the normative level. They should be taken into account when balancing the competing interests, but alongside with other factors, which could sway the decision into the other direction. If these rules are taken too seriously, they can become useful tools for disciplining the independent-minded judges, who fell obliged to speak out in the face of affronts to the rule of law. When these judges are systematically penalized, a powerful 'chilling effect' for freedom of expression of other judges and the judiciary as a whole is created. If such atmosphere is established and maintained, the judiciary becomes an easy target for (aspiring) autocrats. This is one of the reasons why the concept of 'chilling effect' is so important. Further, as argued by Fajdiga and Zagorc,[54] it helps to understand freedom of expression (of judges) better. Even though some doubt its real impact, we have experienced ourselves during the TRIIAL project, through discussion with legal practitioners, that it is very real. Hungarian judges, for example seemed very hesitant in expressing their views. Their Polish colleagues were far more vocal, which could come as a surprise given that in both countries, populist governments do not hesitate to penalize judges, who dare to speak out. The difference testifies that there are many different factors contributing to the overall 'chilling effect' on judicial speech in a given society, from the strength of judicial associations, to (perceived) support of the civil society.

[53] *Understanding Social Legitimacy of the Judicial Power - Tomasz Koncewicz* (n 46). See Solanes Mullor.
[54] See article Zagorc and Fadjga, …