Judges and their Freedom of Expression

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Abstract:

Judges posting tweets on Twitter, writing columns in newspapers and pronouncing their views in public lectures - all this is a relatively new phenomenon. Whereas judges have traditionally exercised restraint in public pronouncements, there is an increasing expectation nowadays that they explain their decision-making to the broader public. Moreover, judges, at times, participate in political debate; they express their views on legislative reforms and take a stance on issues related to the judiciary. This increased visibility and public exposure raise new issues about judicial independence. For example, public pronouncement of personal views may give rise to concerns about a judge's impartiality and the authority of the judiciary more generally. Thus, divergent interests are at stake here and need to be weighed against the freedom of expression. How to balance the competing principles is the subject of this article. Before analyzing this issue under the European Convention of Human Rights, I will give a short comparative overview of how national jurisdictions deal with potential conflicts of freedom of speech and judicial independence in order to contextualize the European Court of Human Right's jurisprudence.

Rezumat:

Judecători care postează tweet-uri pe Twitter, scriu articole în ziare și își exprimă opiniile în prelegeri publice - toate acestea reprezintă un fenomen relativ nou. În timp ce, în mod tradițional, judecătorii au dat dovadă de reținere în declarații publice, în prezent, crește tot mai mult așteptarea ca aceștia să își explice decizia în fața marelui public. Mai mult decât atât, uneori, judecătorii participă la dezbaterea politică; aceștia își exprimă opiniile privind reformele legislative și adoptă o poziție privind chestiunile legate de sistemul judiciar. Această creștere a vizibilității și expunerii publice ridică

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noi întrebări legate de independență judiciară. Spre exemplu, exprimarea publică a opiniilor personale poate da naștere unor preocupări legate de imparțialitatea judecătorului și autoritatea sistemului judiciar, în general. Astfel, sunt în joc interese divergente și acestea trebuie cântărite în raport cu libertatea de exprimare. Modul de echilibrare a principiilor concurente este subiectul acestui articol. Înainte de a analiza această chestiune în conformitate cu Convenția Europeană a Drepturilor Omului, voi oferi o scurtă privire de ansamblu comparativă a modului în care jurisdicțiile naționale tratează eventualele conflicte de libertate de exprimare și independență judiciară pentru a contextualiza jurisprudența Curții Europene a Drepturilor Omului.

Keywords: European Convention of Human Rights, judicial independence, freedom of speech

I. Introduction:

Judges posting tweets on Twitter, writing columns in newspapers and pronouncing their views in public lectures - all this is a relatively new phenomenon. Whereas judges have traditionally exercised restraint in public pronouncements, there is an increasing expectation nowadays that they explain their decision-making to the broader public. Moreover, judges, at times, participate in political debate; they express their views on legislative reforms and take a stance on issues related to the judiciary. This increased visibility and public exposure raise new issues about judicial independence. For example, public pronouncement of personal views may give rise to concerns about a judge's impartiality and the authority of the judiciary more generally. Thus, divergent interests are at stake here and need to be weighed against the freedom of expression. How to balance the competing principles is the subject of the following presentation.

Under the European Convention of Human Rights, maintaining the authority and impartiality of the judiciary is one of the reasons for which the freedom of expression may be restricted. This is relevant, when judges express their views in the context of adjudication. Allowing them to speak out on pending cases, would be irreconcilable with the imperatives of their impartiality. Judges are expected not to take sides so that their judgments can be perceived as unbiased and based on law. This is not just a matter of state authority, but a vital precondition for the legitimacy of judicial decision-making. What is more, and I will come back to this later, judicial independence and impartiality are essential for the right to due process.

However, not all cases are as clear-cut as those in which the expression of opinion relates directly to judicial decision-making. While it is appropriate to limit judges' freedom of expression in respect of pending proceedings, it is more difficult to balance judicial independence with the freedom of expression in other cases. For example, how shall freedom of expression be balanced with judicial independence, when speech is related to a judge's political views? Can judges participate in political debate? Moreover, are they allowed to become members of political parties?

Another issue, which came up in the *Baka Case* was the question whether judges may take position with respect to constitutional reform projects. All these issues require a careful balancing exercise, because judges, on the one hand, enjoy the right to freedom of expression just as everyone else in society. On the other hand, their involvement in political affairs may

jeopardize the perceived independence and impartiality of the judiciary. Before analyzing these issues under the European Convention of Human Rights, I will give you a shot comparative overview of how national jurisdictions deal with potential conflicts of freedom of speech and judicial independence.

II. Comparative Overview

Traditionally, judges have been expected to exercise considerable restraint in the exercise of their freedom of expression. This restraint is grounded in the interest of judicial independence and the authority of the judiciary. For example, judges must not disclose confidential information concerning a dispute, which come to their knowledge in the course of the performance of judicial office or comment on the merits of pending proceedings. Some domestic codes of ethics discourage judges from discussing cases that are *sub judice*. Judges are also bound to preserve secrecy with respect to deliberations. As a matter of internal independence, judges should furthermore exercise particular restraint when taking a position in respect of cases pending before or decided by their peers. They should exercise their freedom to talk to the media cautiously and either refrain from answering public criticism of their judicial activities or at least act with moderation and diligence when they reply to public criticism.

Restraint applies not only to their official conduct, but to also when judges act in their private capacity. The German Judiciary Act, for example, incorporates a duty of moderation ("Mäßigungsverbot") which is relevant for conduct outside judicial office. However, the applicable standards of restraint vary amongst the Council of Europe Member States with respect to extra-judicial activities. For example, in several states judges may not become members of a political party. In the United Kingdom, for example, judges should not engage politically and avoid any appearance of political ties, e.g. by attending political gatherings. In Germany, Austria and France, however, judges are allowed to become party members and take a more active stance with respect to political matters. But they may not participate actively in politics while in office and they are expected to draw a line between their personal views and their judicial office. For example, judges should not make use of their judicial position to reinforce the value of their speech when they publicly express their political opinions. Their individual views should be distinguishable from their official function in order not to jeopardize public trust in the independent administration of their judicial office. The case is different with respect to legal issues, which they comment on in law reviews and lectures. In most countries, judges are allowed, in some countries even encouraged, to participate in public discussions on the law, the legal system and the functioning of the justice system more generally.

When judges express their opinions, there are different legal interests at stake, which weigh for or against their restriction. Not only are personal interests involved, but also the interest to protect the authority and legitimacy of the judiciary and the litigant's right to due process.

The short overview demonstrates that, despite variances, there are a number of similarities. All countries seek to balance the freedom of expression with the authority, impartiality and independence of the judiciary. For this matter, they distinguish between different spheres: the

judicial decision-making sphere, the representative sphere (meaning the presentation of the judiciary in general terms) and the judges' individual sphere. The protection of the freedom of speech is strongest when judges express their views related to their individual capacity, whereas, in matters related to judicial decision-making, they are expected to exercise more restraint. For example, in Sweden judges are protected comprehensively from any sanctions unless their speech is directly connected to the administration of justice. Publicly expressed opinions by judges are considered a private matter and thus widely protected by the freedom of expression. Nevertheless, they need to be weighed against public interests if public confidence in the judiciary is at stake.

The measures taken to achieve this balance vary. They are not limited to repressive measures, such as reprimand and removal from office, which represent the most serious interference with the freedom of expression. In practical terms, a balance can often be struck by conflict of interest provisions, which allow judges to express their general views but prevent them from sitting in cases where their perceived impartiality is at stake.

III. The protection of judges' freedom of expression under Article 10 (1) ECHR

When I turn now to the jurisprudence of the European Court of Human Rights, it is important to note at the outset that, according to the Court, judges enjoy the right to freedom of expression irrespective of their official function. This does not only relate to private speech, but also extents to public speech and speech related to judicial office. The Court recognized the broad scope of protection in *Wille v. Liechtenstein*, where a lecture by the President of the Administrative Court was at issue. The applicant had maintained in his lecture that the Constitutional Court of Liechtenstein had the final say over the Prince in constitutional interpretation. When the judge's term expired, the Prince of Liechtenstein refused to reappoint him in reaction to the speech. The Strasbourg Court, when seized with the case by Mr. Wille, held that the applicant was not prevented from commenting on constitutional matters and enjoyed the protection of the freedom of expression despite his position and the political implications of his speech.

There are only few cases, in which the Court has considered a restriction on the freedom of judges as not affecting their freedom of speech. For example, in *Harabin v. Slovakia (2)* it refused to consider the reduction of the President of the Supreme Court's salary as a restriction on Article 10. In this case, the applicant was disciplined after he had refused to allow an audit. The European Court explained that the disciplinary proceedings against the court president did not concern "any statements or views expressed by him in the context of a public debate or in the media", but only his "professional behaviour in the context of administration of justice". The Court distinguished the case from *Wille v. Liechtenstein,* where it had found that the measures complained of "essentially related to freedom of expression" as they had been prompted by a public lecture. In the case of Harabin, however, the *discharge of his duties* as President of the Supreme Court were at issue and not the applicant's freedom of expression.

There is thus a narrow set of cases, which concerns the pure discharge of public office that do not fall within the scope of the freedom of expression. In all other cases, including in *Baka v. Hungary*, the Court has found a restriction on the freedom of expression and engaged in a balancing analysis. In other words, judges

enjoy the freedom of expression also in connection with the performance of their judicial functions.

IV. Duties and responsibilities of judges (Art.10 (2) ECHR)

In the exercise of this freedoms judges are bound by the "duties and responsibilities" of their office which are essential for the rule of law and for public confidence in the functioning of the judiciary. The fundamental premise is that judges, due to their official function, are bound by a duty of loyalty and discretion. Albeit the judiciary is not part of the ordinary civil service, the duty of loyalty and discretion also applies to the third branch of government, given its prominent place among State organs in a democratic society. Thus the scope of their freedom of expression involves a balancing exercise in order to find out whether a fair balance has been struck between the individual right to freedom of expression and the legitimate interest of a democratic state in ensuring that its civil service properly furthers the purposes enumerated in Art. 10, paragraph 2. For this matter the Court needs to determine, whether the independence, impartiality and authority of the judiciary is implicated by a judge's speech. Otherwise, a restriction on free speech is not necessary. If a restriction serves one of these interests, the Court examines whether is proportionate to the aim pursued.

V. Balancing the Freedom of Expression with the independence, impartiality and authority of the judiciary

1. Different spheres of interest

Generally speaking, the more an expression relates to a particular judicial dispute, the less demanding are the requirements for a restriction on the freedom of expression because the independence, impartiality and authority of the judiciary carry particular weight. On the other hand, if the expression is of a more general nature and does not relate to a specific legal dispute, the right to freedom of expression is more likely to prevail.

I will illustrate this by the following three scenarios:

a) Expressions with a nexus to an individual judicial dispute

b) Expressions related to political matters

c) Expressions on behalf of the judiciary

a) Expressions with a nexus to a judicial dispute

The European Court of Human Rights distinguishes between the expression of views in private life and those expressed in the context of judicial office. For the latter category, it allows the Government a certain margin of appreciation to determine whether an interference with a judge's freedom of expression is necessary for maintaining the authority and impartiality of the judiciary. Therefore, it has ultimately denied a violation of Article 10 in several cases. For example, in *Pitkevitch v. Russia*, a judge had prayed publicly during court hearings, had discussed moral and religious issues in court and promised a favourable outcome of their cases to litigants if they joined her church. Since the conduct had called into question her impartiality and had impaired the authority of the judiciary, the Strasbourg Court found that her removal from office was justified as proportionate to a legitimate aim. It thus did not amount to a violation of the applicant's freedom of expression.

This is admittedly an extreme case, where a judge abused her judicial office for private matters. However, there are also cases in which judges have been disciplined for expressing their views on pending judicial proceeding. According to

the European Court, judges are required to exercise maximum discretion in respect of cases with which they deal in order to preserve their image as impartial judges. For example, in *Lavents v. Latvia*, the Court found a violation of a defendant's right to an independent court because in the course of criminal proceedings the presiding judge had criticized the defence strategy of the defence in several press interviews.

The imperative of discretion applies even if a judge seeks to reply in response to criticism voiced in the media. Judges should avoid making use of the press to defend themselves even in case of provocation. The Court has explained the necessary discretion with the "higher demands of justice and the elevated nature of judicial office."

This also applies to expressions, which do not relate to a judge personally. Judges are expected in general to exercise restraint if their speech could be seen to compromise their independence. Nevertheless, disciplinary measures in response to such speech may be in violation of Article 10 ECHR if they are not proportionate. When the Court balances the freedom of expression with the authority of the judiciary, it takes into account the subject matter of the expression. If a matter is of public interest, the protection of the freedom of speech may carry particular weight.

This was recognized in *Kayasu v. Turkey*. In this case, a public prosecutor was removed from office because he had announced to the press that he took steps to indict a former army general who had allegedly been involve in a military coup of 1980. The European Court of Human Rights recognized that the notice concerned a debate of general interest, which enjoys a heightened level of protection under Article 10. When balancing the interest at stake, it recognized that the disputed speech about the amnesty for those involved in the military coup fundamentally served to demonstrate a dysfunction of the democratic regime and thus carried a certain weight. The Court also took note of the chilling effect of his removal from office for the other members of the judiciary and concluded that the interference with the applicant's freedom of expression (removal from the post of the prosecutor and the prohibition to practice as a lawyer) was disproportionate under these circumstances.

Summing up, when judges express views which are related to judicial proceedings or which may compromise their impartiality in respect of pending or future proceedings, they are expected to exercise restraint in order to preserve their authority, independence and impartiality as judges. States have a certain margin of appreciation to determine whether a restriction on the freedom of speech is necessary. However, this does not allow disproportionate measures. In balancing the competing interests at stake, the European Court attributes particular weight to the freedom of speech if it concerns matters of public interest.

b) Expressions regarding political matters

Turning now to the category of cases in which judges have expressed views on political matters, unrelated to a specific legal dispute, it is important to note that, according to the Strasbourg Court, judges are not prevented from making political statement. Nevertheless, they should also show restraint in exercising their freedom of expression when the authority and impartiality of the judiciary are likely to be called in question. Whether this is the case, requires a consideration of all relevant circumstances of a case.

In determining whether a sanction is necessary and proportionate to a legitimate aim, the Court considers the office held by the applicant, the content of the statement, the context in which it is

made and the reaction thereto. In the above mentioned case, *Wille v. Liechtenstein*, the Court noted the high judicial office held by the applicant as President of the Administrative Court and thus exercised "close scrutiny" to determine whether his public lecture justified the refusal to reappoint him as by the President of the Administrative Court. While he denied the Prince's final word in constitutional matters, he had not insulted any high official. Neither had he made any remarks on pending cases nor had his lecture any bearing on his judicial tasks. Therefore, the Court did not consider the interference with the applicant's rights necessary in a democratic society and found a violation of Article 10.

The Court pursued a similar approach in *Albayrak v. Turkey.* The applicant had been transferred to another jurisdiction as a disciplinary measure for reading PKK legal publications and being sympathetic to the PKK. When it assessed the necessity of the disciplinary measure, the Court considered the impact of the judge's conduct on his impartiality and his judicial functions as essential factors. The Government had not referred to any incident, which would have suggested that the applicant's conduct had a bearing on his performance as a judge. He had not overtly associated himself with the PKK or behaved in a way, which could call into question his capacity to deal impartially with related cases coming before him. Therefore, the Court considered that the interference with the applicant's freedom of expression was not based on sufficient reasons to show that the interference complained of was "necessary in a democratic society".

My prediction is that we will see more such cases related to political participation in the future. As mentioned before, judges are increasingly inclined to speak to the media, to partake in social media and to express their views in matters related to society. There is no case yet, in which a judge has challenged the prohibition to become a member of a political party. It is difficult to predict how the Court will decide these matters. Given the absence of a pan-European consensus on party membership of judges, the Court may allow States a certain margin of appreciation when determining the proportionality of such prohibitions.

Both judgements, *Wille v. Liechtenstein* and *Albayrak v. Turkey*, demonstrate, however, that States must argue conclusively that the prohibition of party membership is necessary in a democratic society. In both cases, the Court denied the necessity of an interference with the judges' freedom of expression because the views at issue did not have an impact on their judicial decision-making.

In the context of civil service, the Court held in *Vogt v. Germany* that the dismissal of a teacher on the ground of the mere membership of a communist party was in violation of her freedom of expression. No account had been taken of the context of her breaching the statutory requirements of loyalty. No criticism had been levelled at the way she had actually performed her duties as a teacher. Whether this also applies to the judiciary, remains open. Arguably, the position of the judiciary as the third branch of government is different from ordinary civil service in this respect and requires more distance from political parties.

At least, in some Council of Europe Member States judges' party membership is perceived as irreconcilable with judicial independence given their historical experience with a politicized judiciary. They seek to avoid similar experiences by preventing judges from getting politically involved. Others, like my country of origin, consider it important for the judiciary to be embedded in society.

Judges should be politically mature and diverse in their views in order to prevent political usurpation. Both views have their pros and cons. It remains to be seen whether the Court will consider restrictions on party membership unnecessary in a democratic country or continue to allow States a margin of appreciation in this respect.

c) Expressions on behalf of the judiciary ("whistleblower")

Finally, there is a third category of cases, which has become increasingly relevant over the past years. This is when judges publicly speak out against the government to defend judicial independence. These cases differ from the aforementioned scenarios, because they are close neither to a particular legal dispute nor to a judge's private sphere. They stand out because they relate to judicial matters and at the same time, they are relevant for the judge individually. They are distinguishable from purely political expressions as they relate to judicial office and thus are closer to those cases in which judges express themselves about legal disputes. On the other hand, and this is particularly relevant, judges speak out here in the interest of the judiciary to maintain their independence. This distinguishes these instances from those in which a government restricts free speech *in the interest* of judicial independence.

The main argument advanced by governments for the interference with the freedom of expression in these cases is usually the authority of the judiciary, which they consider at stake when judges criticize the government for insufficient protection of their independence. This argument needs to be balanced in these whistle-blowing scenarios with the freedom of speech, which is reinforced by the public interest in an independent judiciary.

Generally speaking, the Court recognizes that it is in the interest of democracy and pluralism that judges, in their capacity as experts, express reservations or criticism of Government bills. Such criticism does not undermine the fairness of judicial proceedings. In some jurisdictions, high-level judges are even required *ex officio* to comment on legislation affecting the judiciary. This was the case in *Baka v. Hungary*. The applicant served as the President of the Supreme Court of Hungary and headed the National Council of Justice. In this capacity, he was tasked to comment on any legislation affecting the third branch of government. On several occasions, he publicly voiced concerns over governmental reform proposals affecting the judiciary. Subsequently, legal provisions were introduced into parliament, which led to his removal from the office of President of the Supreme Court three and a half years before the end of his term. He remained in office as judge and became president of a civil division of the newly established Kúria, the legal successors of the Supreme Court, but a new president was elected for this court.

The Government argued that the termination of the applicant's mandate as President of the Supreme Court was aimed at increasing the independence of the judiciary. However, the Court found that the premature termination of the applicant's mandate, which had been taken because of the judge's critique, "defeated, rather than served" the aim of maintaining the independence of the judiciary. His removal could hardly be reconciled with the function of the judiciary as an independent branch of State power and to the principle of removability of judges. Therefore, it did not purse a legitimate aim and could not justify the restriction on his freedom of speech.

The Court went on in its legal analysis and found that it was neither necessary in a democratic society. It attached a high level of protection to the applicant's

freedom of speech because it involved a great public interest. The judges emphasized in this respect the legitimate interest that the public had in being informed about the issues related to the separation of powers raised by the applicant. It also stressed that as President of the National Council of Justice he had a duty to express his opinion on legislative reforms affecting the judiciary.

This argument, however, led to a controversy within the Court. Judge Pejchal took issue with the Court's decision, arguing that official speech was unprotected under the Convention. So did Judge Wojtyczek, who distinguished official from private speech, too, arguing that official speech is not a matter of individual freedom. According to him, the plaintiff had spoken out on behalf of a public authority and not as a matter of personal choice. Therefore, his individual freedom of expression was not implicated. Judge Wojtyczek explained this assertion with the nature of the right, arguing that the notion of freedom of expression presupposes free choice. Such choice was incompatible with an official duty to speak out in defense of public interests.

Furthermore, he considered the notion of individual rights at stake if public officials could rely on them in the exercise of their office. This would be particularly problematic if official speech interfered with the rights of private individuals. Any such balancing of public speech against competing private rights would jeopardize the effective protection of individuals against the State.

Judge Wojtyczek *a fortiori* took issue with the idea that judges' speech enjoy stronger protection under the Convention if it is in the interest of judicial independence. The guarantee of judicial independence, according to him, is not a matter of individual rights, but a matter of objective law and thus could not be analyzed as an individual right by a judge. On the contrary, judicial integrity and independence could justify stronger interference with judges' rights than in the case of other citizens. Accordingly, he considered the case a public law dispute between two state organs, which was outside the scope of the European Court's jurisdiction.

The Court, however, took a different approach and found the right to free speech to be applicable not only in purely private matters but also in matters of public concern. Its reference to Mr. Baka's official obligations may not have been particularly persuasive. On the other hand, when the role of the judiciary is discussed, it is difficult to separate a judge's private concerns from public concerns. In many instances, measures, such as early retirement, may not only affect a judge professionally but also individually in their private sphere. In these instances, it makes sense not to exclude speech from Article 10 but to protect it comprehensively even when it relates to judicial office - unless it constitutes judicial decision-making like in *Harabin v. Slovakia*. Arguably, the better option to deal with the competing state interests is when the question about the justification of a restriction is addressed. This is also the approach taken by the German Federal Constitutional Court. According to the Court, the freedom of expression deserves special protection if it serves the disclosure and examination of shortcomings in public affairs. It considers it as an essential precondition for liberal democracy that anyone, including civil servants, who take note of shortcoming in the context of their public office, take action thereon. This also applies to political speech by judges in the public area. The Court therefore considers the freedom of expression to be applicable and deals with the public interests involved on the level of

justification. For example, it requires public officials to exhaust available remedies available before making shortcomings public. Another example is Sweden, where the Parliamentary Ombudsman has developed the notion of reprisal bans, so that judges and civil servants are not sanctioned for sharing information with the public.

It is thus not surprising that the European Court of Human Rights resorts to Article 10 of the European Convention to deal with cases in which judges voice criticism against public authorities. However, though judges enjoy the right to speak out on issues related to the judiciary under Article 10, this does not give them carte blanche. The Court emphasizes that judges are required to exercise maximum discretion in the interest of justice. This is particularly relevant if they make accusations of irregularities by other judges who depend on public confidence to exercise their functions. Therefore, the Court refused to find a violation of the right to freedom of expression in *Di Giovanni v. Italy*. In this case, a judge had be sanctioned with a warning because she had alleged in a press interview that one of the members of a selection committee charged with the recruitment of new judges had influenced the selection procedure on behalf of her daughter. The rumour later turned out to be unfounded. The Strasbourg judges stressed the requirement of discretion in order to preserve public confidence in the judiciary. Taking into account the judicial function of the applicant and the fact that the judge had only received the mildest possible sanction the Court considered the interference with her freedom of expression to be proportionate and necessary in a democratic society.

The careful balancing of the Court demonstrates that this is a matter of nuances. Several factors need to be taken into account in order to determine whether a restriction of a judge's freedom of speech is necessary. For example, in *Kudeshkina v. Russia* the Court took into account not only the subject matter of the speech, but also its mode, context and the gravity of the sanction. The applicant, Ms. Kudeshkina, was a Russian judge at the Moscow City Court who was removed from a high-profile corruption trial. When she subsequently campaigned for a seat in the Russian Duma, she harshly criticized the Russian judicial system and questioned its independence in a number of interviews referring to her experience of pressure from a court's president in the corruption case. When her campaign failed to succeed, she was initially reinstated in her previous office, but later removed from judicial office with the argument that she had disclosed confident information and that she deliberately spread falsehoods.

In this case, a narrow majority of the Court found her removal from office disproportionate for a number of reasons. Though judges owe a duty of loyalty and discretion and are expected to exercise restraint so as not to give rise to doubts regarding the authority and impartiality of the judiciary, the Court found a violation because of the vital public interest in the handling of a high-profile corruption case by judicial officials "which should be open to free debate in a democratic society". The majority concluded that the applicant was entitled to bring the matter at issue to the public's attention. They added that Ms Kudeshkina had not divulged classified information of which she had become aware in the course of her work. She had described merely her experience as a judge when she alleged that courts were under pressure from various officials.

For all these reasons, they concluded that the authorities had failed to strike the right balance between the need to protect the authority of the judiciary and the need

to protect the applicant's right to freedom to expression. For the Court the case was different form *Di Giovanni v. Italy* because Ms. Kudeshkina had voiced general criticism of the functioning of the judicial system more generally by questioning its independence from outside pressure and her accusations had been confirmed by witnesses. Furthermore, she had expressed her views in the context of her electoral campaign for a seat in the Dumaand was later sanction for this expression with the removal from her judicial poste. A narrow minority of the judges could not agree, arguing with the harsh criticism that Ms. Kudeshkina had voiced which was not in line with her duty of loyalty and discretion.

Irrespective of the outcome, both cases, *Kudeshkina v. Russia* and *Di Giovanni v. Italy* demonstrate that there is only a fine line between justified critique and impermissible corrosion of the authority of the judiciary. This requires the consideration of several different aspects and a careful balancing of the competing interests. I will therefore shortly summarize the relevant criteria, which the Court relies on in its jurisprudence.

2. Criteria for balancing the freedom of expression and the authority of the judiciary

The most relevant criteria for balancing the freedom of expression and the authority, independence and impartiality of the judiciary are the subject matter, the manner, the motive and the context of the speech, the rank of judicial office and the gravity of the interference. With respect to the subject matter, the Court takes into account whether the content of the speech is of public interest (i.e. political speech enjoys special protection) and represents a fair comment. In order to determine whether a sanction is proportionate, the Court also considers whether it has the effect of discouraging other judges from making statements critical of public institutions or policies in the future. Such chilling effects on other judges wishing to participate in public debate would work to the detriment of society as a whole.

An expression motivates by personal antagonism or the expectation of personal advantage would not justify a strong level of protection. According to the Court, the proportionality of an interference may depend on whether there exists sufficient factual basis for that statement, since even a value judgment without any factual basis to support it may be excessive. Therefore, speech should not be entirely devoid of any factual grounds. It may be necessary to protect the confidence in the judiciary against destructive attacks, which are essentially unfounded. Furthermore, disclosure of information obtained in the course of their judicial work should be strictly restricted.

The relevant factors of assessing the proportionality of an interference include also the fairness of the proceedings leading to a restriction (e.g. disciplinary proceedings), the procedural guarantees afforded and the nature and severity of the penalties imposed. In the case of Baka, the Court criticized that effective and adequate safeguards against abuse did not accompany the restriction on his speech.

These criteria work like balancing weights. When the freedom of expression is balanced against the standing of the judiciary, the weight of the competing interests needs to be measured. On our judicial scale, we have to weigh the value of the speech and the seriousness of its restriction on the one hand. On the other one, we consider the importance of the interest, which is affected by the speech and the degree to which it is compromised.

The value of the speech is determined by its subject matter, context, manner,

motive, foundation, the function of the author and the interests involved. Thus, the higher the public interest, the more the speech is based on factual grounds, the more objective it is expressed, the heavier the weight of the expression. Also, the more serious the sanction, the higher are the expectations for its justification.

On the other side of the scale, the authority of the judiciary, its impartiality and independence may be at stake. These interests weigh particularly high if litigants' right to due process is implicated, for example, if judges disclose confident information or express views, which are prejudicial to the outcome of legal proceedings. This is why the restriction on views, which relate to a judicial dispute, on balance are more likely to be justified than expressions, which relate to matters that are more general.

VI. Conclusions

Judicial independence and the freedom of expression represent cornerstones of the European legal order. Both are protected under the European Convention of Human Rights. Nevertheless, their relationship is not without tensions. When judges express their views in a way that raises concerns about their independence and impartiality, restrictions may be appropriate to preserve the rule of law and the due process rights of litigants. In other words, judges, who express their views, are expected to exercise self-restraint when their authority and independence is likely to be called into question. They should act with moderation and propriety.

The outcome of a case depends *inter alia,* on whether a dispute is closer related to the private sphere of a judge or to the judicial sphere. In other words, in order to determine whether a restriction is justifies, the nexus to and impact on the expression to judicial authority becomes relevant. In some instances, both spheres overlap. Freedom of expression and judicial independence may even be mutually reinforcing. When judges raise their voice to protect their judicial independence, they do not solely act in their individual interest and in pursuit of their freedom of expression, but also in the interest of the litigants and the rule of law more generally.

All three scenarios demonstrate that the relationship of judicial independence and the freedom of expression is ambivalent. This ambivalence is relevant for the balancing exercise. When judges express their opinions, there are different legal interests at stake, which weigh for or against their restriction. Not only are personal interests involved, but also the interest to protect the authority and legitimacy of the judiciary and the litigant's right to due process.

The European Court of Human Rights leaves Respondent states a certain margin of appreciation when it considers whether a restriction on the freedom of expression is necessary in a democratic society for maintaining the authority and impartiality of the judiciary. This is due to variances amongst the member states of the Council of Europe. There is, for example, no pan-European consensus as to whether judges are allowed to become members of political parties, which could encourage the European Court of Human Rights to recognize a uniform standard. What is more, the question whether the authority, impartiality and independence requires a restriction in a particular case is a matter, which in many instances can be assessed best at the domestic level. After all: "Not only must Justice be done; it must also be seen to be done." In other words, public perception is an important criterion for the authority, impartiality and independence of the judiciary. In some cases, local stakeholders are better situated to assess this perception. Therefore, the Court accords Council of Europe States a *certain* margin of

appreciation to determine the degree to which a restraint on the on judges' freedom of speech is necessary.

However, there are limits to this margin. For example, the European Court of Human Rights applies a narrow margin of appreciation for cases in which freedom of expression and judicial independence come together (e.g. remarks on the functioning of the judiciary). In this case, the rule of law and the rights of litigants to due process, both fundamental principles for the protection of European human rights, narrow the margin of appreciation, and call for strict scrutiny of any interference with the freedom of expression. This is so because Article 10, paragraph 2 of the Convention only allows restrictions, which are "necessary in a democratic society". This clause is an important yardstick for the Court to balance the freedom of expression with judicial independence and will continue to be so in the years to come.