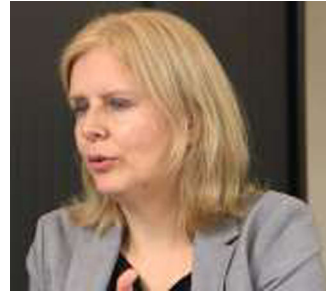


The Freedom of the Judge to Express his Personal Opinions and Convictions under the ECHR

Sietske Dijkstra,*
Judge at the Rechtbank Noord-Nederland,
The Netherlands

Abstract: *In this article the question was asked how the limits to judicial freedom in the case law of the ECtHR are defined and where these limits lie. The answer has been formulated by studying the ECtHR case law from two perspectives. In the first perspective judicial freedom was approached directly by asking the question of what limits there are to judges exercising their rights and freedoms under Articles 9-11 ECHR. In the second perspective it was approached more indirectly, by defining the requirements of Article 6(1) ECHR and the limitation on judicial freedom which these requirements imply. These two perspectives have produced a number of lines with which the territory of the judge to express his personal opinions and convictions under the ECtHR can be marked. Criteria that are dominantly present in this framework are the ‘authority of the judiciary’ and, especially, ‘impartiality’.*



According to settled case law under Article 10 ECHR the judge is required to show restraint when the authority of the judiciary and impartiality come into question. This limitation is a broad one considering the nature of judicial speech. The judge can be regarded as the representative of the judiciary and the embodiment of certain ideas and principles of justice and the rule of law. As a result the expression of personal opinions and convictions by judges is easily understood as the expression of views with a special meaning: they may be regarded as the ‘official’ view of the judicial authorities or as representing what is just and fair. In light of this it is easy to make a connection between the expression of personal opinions and convictions by the judge and the authority of the judiciary or judicial impartiality.

* Judge at the *Rechtbank Noord-Nederland* (the Netherlands). E-mail professional: s.dijkstra@rechtspraak.nl. This article is based on a chapter from a PhD thesis on the judge’s freedom

to express his opinions and convictions: S. Dijkstra, *De rechter als evenwichtskunstenaar. De vrijheid van de rechter om zijn persoonlijke meningen en overtuigingen te uiten* (2016).

Rezumat: În acest articol s-a pus analizat chestiunea definirii și determinării limitelor libertății judiciare în jurisprudența CEDO. Răspunsul a fost formulat urmare a studiului jurisprudenței CEDO din două perspective. Din prima perspectivă, libertatea judiciară a fost abordată direct prin adresarea întrebării „care sunt limitele exercitării de către judecători ale drepturilor și libertăților lor prevăzute de art. 9-11 din Convenție?”. Din a doua perspectivă, libertatea judiciară a fost abordată indirect, prin definirea cerințelor art. 6 par. 1 din Convenție și limitării libertății judiciare urmare a aplicării acestor cerințe. Aceste două perspective au permis delimitarea teritoriului în care judecătorul își poate exprima opiniile personale și convingerile conform jurisprudenței CEDO. Criteriile dominante din această schemă sunt „autoritatea puterii judecătorești” și, în special, „imparțialitatea”.

Conform jurisprudenței constante în materia art. 10 din Convenție, judecătorul trebuie să manifeste reținere arunci când autoritatea judiciară și imparțialitatea sunt puse în discuție. Această limitare este una extinsă, având în vedere natura discursului judiciar. Judecătorul poate fi privit ca reprezentantul autorității judiciare și personificarea anumitor idei și principii privind justiția și statul de drept. Ca rezultat, exprimarea opiniilor și convingerilor personale de către judecători este facil percepută ca o exprimare a unor puncte de vedere cu o semnificație specială: aceste pot fi privite ca fiind punctele de vedere „oficiale” al autorităților judiciare sau ca reprezentând ceea ce este just și echitabil. În lumina acestor aspecte, este ușor a se realiza o conexiune între exprimarea opiniilor și convingerilor personale de judecător și autoritatea sau imparțialitatea puterii judecătorească.

Keywords: judicial speech, judicial freedom, political activities of the judge outside the courthouse, public debate, freedom of expression

1. Introduction

Judicial speech is a complex and important subject. The expression of opinions and convictions by judges stands out from the expression of opinions and convictions by other people. The judge is an official of the State and represents ideas of the rule of law and justice. In addition, judges are generally attributed special characteristics, such as honesty, integrity and wisdom. As a result, expressions by individual judges are easily understood by the public as coming from the judicial authorities and are often

considered as having special weight and meaning. In the Western world there is a strong view that judges are in principle free to write, speak and otherwise express their personal opinions about political, religious, or other matters. The European Court of Human Rights (ECtHR), judges' organisations and several authors have adopted this line of thinking.⁴¹⁶

The freedom of the judge is a topical question in Europe. In the Netherlands, for instance, it has come to light after protests by judges in 2015 against efficiency measures and a further

⁴¹⁶ The ECtHR takes as a starting point in its case law, as will be described in this article, that the judge is entitled to the protection of his freedom of conscience, thought and religion (Article 9 ECHR), his freedom of expression (Article 10 ECHR) and his freedom of assembly and association (Article 11 ECHR). See also Principle 8 of the UN Basic Principles on the Independence of the Judiciary and Application 4.6 of the UN

Bangalore Principles of Judicial Conduct which explicitly recognise the freedom of expression (and association) of the judge. See also M. Kuijer, *The blindfold of Lady Justice. Judicial independence and Impartiality in Light of the Requirements of Article 6 ECHR* (2004), in which the freedom of the judge is approached through Article 6 ECHR. Kuijer writes, p. 315: 'a judge is of course entitled to freedom of expression'.

geographical concentration of the judicial organisation. Judges have protested against these developments in an unprecedented way: they have demonstrated in the streets in their robes, called for a short strike, talked to the press and sent critical messages through Twitter.⁴¹⁷ In recent years the question has also surfaced in Hungary, but in a completely different form, when the President of the Supreme Court found himself derided of his Presidency after he had criticised legislative reforms by the government coalition concerning the judiciary.⁴¹⁸

The question that will be answered in this article is how the limits of judicial freedom are defined in the case law of the most prominent human rights protector in Europe, the ECtHR, and where these limits lie. An understanding of these limits is important not only for the individual judge, since it concerns his human rights, but also for society since restrictions of this freedom have the potential to negatively affect the efficacy of the judiciary and, with that, the rule of law. The freedom that will be studied can be defined more precisely as the freedom of the judge to express his personal opinions and convictions during the exercise of his judicial duties in the courthouse, for instance during court sessions and in court rulings, as well outside the courthouse, for instance by expressing views in a newspaper interview or by being socially active through the exercise of other functions, membership of a political party or by participating in protests and demonstrations. Since religion can be seen as a personal conviction as well, judicial

freedom as discussed here also refers to the possibilities of the judge to give expression to his religious convictions, for instance by wearing religious symbols. The freedom of the judge will be referred to as 'judicial freedom'.

Two categories of cases are studied. In the first, judicial freedom is approached directly by asking the question of what limits there are to judges exercising their rights and freedoms under Articles 9-11 ECHR. These cases are based on complaints from judges about a violation of their freedom of expression (Article 10 ECHR) and, to a lesser degree, the freedom of assembly and association (Article 11 ECHR) and the freedom of conscience, thought and religion (Article 9 ECHR). The case law includes expressions such as delivering a controversial academic lecture, handing out political pamphlets in the streets, criticizing the judicial authorities in the press and criticizing legislative proposals. In the second category of cases judicial freedom is approached more indirectly. The cases are based on complaints from litigants or suspects about a lack of independence or impartiality of the judges in their cases. This case law concerns judges who are politically active, have made statements in the press, are members of an association or have vented their emotions in the performance of their tasks and as a consequence have raised the question of whether the trial meets the requirements of Article 6(1) ECHR. The aim of approaching judicial freedom from both the perspective of the rights of the judge and the rights of the litigants or suspects in the case is to map out the limits in the case law of the ECtHR

⁴¹⁷ See L. Holvast & N. Doornbos, 'Exit, Voice, and Loyalty within the Judiciary: Judges' Responses to New Managerialism in the Netherlands', (2015) 11 *Utrecht Law Review*, no. 2, <<http://doi.org/10.18352/ulr.317>>, pp. 49-63.

⁴¹⁸ Second Section of the ECtHR 27 May 2014, 20261/12 (*Baka v. Hungary*), *EHRC* 2014/177, with a note by J.J.J. Sillen, *NJ* 2015, 66, with a note by B. Meyer, and *NJCM-Bulletin* with a note by S. Dijkstra; Grand Chamber of the ECtHR 23 June 2016, 20261/12 (*Baka v. Hungary*).

as completely as possible. The relevant case law will be discussed in respectively Sections 2 and 3 of this article. In Section 4 an answer to the central question will be formulated, based on the findings of Section 2 and 3.

2. The first perspective: complaints from judges based on Articles 9-11 ECHR

The first perspective from which judicial freedom is studied is the perspective of the rights of the judge. The cases which are here relevant are based on complaints from judges about a violation of Articles 9-11 ECHR. Below, a brief introduction to these articles will first be given, after which various aspects of the case law will be discussed. This article will discuss, in chronological order, the admissibility under Article 34 ECHR and the test of Article 10(1) and (2) ECHR, including the margin of appreciation and the factors that are relevant in the context of the condition that interference is necessary in a democratic society.

Articles 9-11 ECHR have a parallel structure: the first paragraphs define the right to a specific freedom, while the second paragraphs require that restrictions, in order to be legitimate, must be prescribed by law and be necessary in a democratic society to serve certain aims. Article 10 ECHR plays an important role in this perspective of judicial freedom, since most of the cases are based on complaints by judges about a violation of this article. In *Pitkevich v. Russia*⁴¹⁹ the complaint was also based on Article 9 ECHR, but the ECtHR considered it under Article 10 ECHR and concluded that under Article 9 ECHR the complaint was manifestly ill-founded 'for similar reasons'.

Only in *N.F. v. Italy*⁴²⁰ and *Maestri v. Italy*⁴²¹ has the ECtHR considered complaints under Article 11 ECHR. Those cases, however, contribute little to the understanding of the scope of judicial freedom since the ECtHR found a violation on a more formal point and did not enter into the question of the permissibility of the judicial conduct. For these reasons only Article 10 ECHR is discussed here. Article 10 ECHR states:

"1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

2.1. The admissibility of complaints from judges under Article 34 ECHR

Article 34 ECHR entitles a person, a non-governmental organisation or a group of individuals that claim to be the victim of a violation by one of the Member Countries of the Convention to make a

⁴¹⁹ ECtHR 8 February 2001, 47936/99 (*Pitkevich v. Russia*).

⁴²⁰ ECtHR 12 December 2001, 37119/97 (*N.F. v. Italy*), *EHRC* 2001/69, with a note by M.F.J.M.

de Werd, and *NJB* 2001, 943. See also Kuijer *supra* note 1, p. 324.

⁴²¹ ECtHR 17 February 2004, 39748/98 (*Maestri v. Italy*), *EHRC* 2004/31.

complaint before the ECtHR.⁴²² This article deserves special attention in the case of judges who rely on Articles 9-11 ECHR, since it is not self-evident that their complaints meet the requirements of Article 34 ECHR. This is related to the fact that the judge can be seen both as an individual and a representative of the State. Under Article 34 ECHR not only public authorities or governmental organisations are excluded from issuing a complaint, but also the individuals who act on their behalf.⁴²³ Illustrative is the case of *Demirbas and others v. Turkey*,⁴²⁴ which is based on a complaint from public officials, more specifically a mayor and members of a municipal authority. The Minister had disbanded the council and dismissed the mayor because of a decision which the council had made to offer municipal services in various languages, including the Kurdish language. The complaint was considered to be inadmissible under Article 34 ECHR since it concerned the actions performed in the capacity of a mayor and a council member. The complaint was therefore not considered to have been made by 'a person'. This approach leads to a nuanced distinction between the capacities in which the applicant acts: does he act on his own behalf or does he represent his office or part of the public authorities?⁴²⁵

This nuanced approach cannot be recognised in the case law concerning

judges who rely on the protection afforded by Articles 9-11 ECHR. In this case law the ECtHR has not (explicitly) entered into the question of admissibility under Article 34 ECHR. Complaints from judges have so far been considered as complaints from persons, more precisely, as will be discussed later, as complaints from civil servants, and not as complaints issued on behalf of the public office or the public authorities. Especially the most recent case in the category of cases concerning judges who complain about Articles 9-11 ECHR, *Baka v. Hungary*,⁴²⁶ has attracted attention in this respect. This case, which was briefly referred to in the introduction to this article, revolves around Baka, the President of the Hungarian Supreme Court, who complained that the early termination of his mandate by the authorities violated Article 10 ECHR. He claimed that this interference was a consequence of the fact that he had criticised certain parliamentary bills. The critical expressions had been uttered as part of Baka's statutory task of expressing an opinion on parliamentary bills after consulting the courts. Under these circumstances it could be said that, in line with *Demirbas and others v. Turkey*, only the actions of a public office are at stake, so that the applicant is in fact this office.⁴²⁷ From this point of view the complaint would be inadmissible under Article 34 ECHR. As said, however, so far the

⁴²² See about Article 34 also P. Rayney et al., *Jacobs, White & Ovey: The European Convention on Human Rights* (2014), pp. 31-33.

⁴²³ For instance ECtHR 7 June 2001, 52559/99 (*Danderyds Kommun v. Sweden*).

⁴²⁴ ECtHR 9 November 2010, 1093/98 (*Demirbas and others v. Turkey*), EHRC 2011/31 with a note by J.L.W. Broeksteeg, and AB 2012/21 with a note by M.J. van Emmerik.

⁴²⁵ For a case with a different outcome than *Demirbas and others v. Turkey*: ECtHR 10 February 2016, 8895/10 (*Ärzttekammer für Wien and Dornier v. Austria*). The *Ärzttekammer* was qualified by the ECtHR as a governmental organisation and its

complaint was therefore inadmissible; the chairman, who had complained on behalf of the organisation, however, was considered to have an independent right to complain since the interference was directed towards him individually as well.

⁴²⁶ *Baka v. Hungary*, supra note 3.

⁴²⁷ This approach can be recognised in the line of thinking followed in the dissenting opinion of Judge Wojtyczek in the Grand Chamber judgement in *Baka v. Hungary*, supra note 3. He makes the distinction between private and public speech and is of the opinion that the opinions of Baka are to be seen as public speech, which in his opinion is not covered by the Convention.

ECtHR has not taken this approach when the complaint emanates from a judge.

2.2. The test of Article 10(1) ECHR

When a complaint is found to be admissible, the ECtHR ascertains whether it is actually based on the of expression or whether it lies within other spheres. More specifically, the question is addressed whether the matter lies within the sphere of the right of employment within or access to the civil service, a right which is not protected under the Convention.⁴²⁸ This question is answered by determining the scope of the measure by putting it in the context of the facts of the case and the relevant legislation: is it the right of access to or employment in the civil service that is really 'at the heart of the issue' or not?⁴²⁹ Examples of cases that concern a right of employment in or access to the civil service are the cases from 2004 and 2012 that are based on complaints by the Slovakian Supreme Court President Harabin.⁴³⁰ In the first case Harabin complained about the fact that the government had tried to revoke his appointment and in the second case that a disciplinary salary cut had been imposed because he had refused to cooperate with an audit by the Ministry of Finance. In both cases he claimed that the measure was a consequence of his opinions on the law and on judicial

independence, so that it should be regarded as an interference with his freedom of expression. In both cases the ECtHR disagreed. The ECtHR considered that both cases of interference were essentially related to the ability of Harabin to exercise his judicial function, as a matter of the suitability of the office holder for the office, a decision resulting from an appraisal of the professional qualifications and behaviour and of the personal qualities required for the office. In 2004 the complaint was declared inadmissible; in 2012 the ECtHR found a violation of Article 6(1) ECHR and Harabin was granted a small amount of financial compensation.⁴³¹

In *Baka v. Hungary*⁴³² the question whether Article 10 ECHR was at stake needed to be answered explicitly since the authorities had claimed that the early termination of the mandate was not related to Baka's criticism but was the inevitable result of a reorganisation of the judicial authorities. The ECtHR disagreed. It determined that the legislation which led to the reorganisation, including the premature termination of Baka's mandate, had been submitted to Parliament after Baka had expressed his criticism and had been adopted within a strikingly short period of time, and that two politicians belonging to the parliamentary majority had declared that the reforms did not necessitate making changes in the person

⁴²⁸ ECtHR 28 August 1986, 9228/80 (*Glaser v. Germany*), para. 48; ECtHR 28 August 1986, 9704/82 (*Kosiek v. Germany*), para. 36. See also M.W. Janis et al., *European Human Rights Law. Texts and materials* (2008), pp. 306-308 about these cases, and see A. Lawson & H.G. Schermers, *Leading Cases of the European Court of Human Rights* (1997), pp. 195-197 about *Glaser v. Germany*.

⁴²⁹ ECtHR 28 October 1999, 28396/95 (*Wille v. Liechtenstein*), para. 44, and ECtHR 26 February 2009, 29492/05 (*Kudeshkina v. Russia*), para. 79, *EHRC* 2009/59.

⁴³⁰ ECtHR 29 June 2004, 62584/00 (*Harabin v. Slovakia*) and ECtHR 20 November 2012, 58688/11 (*Harabin v. Slovakia*), with a note by E. Mak.

⁴³¹ To the amount of € 3,500. In 2004 Harabin also complained about a violation of Article 14 ECHR (the prohibition of discrimination). This complaint was found inadmissible. Apart from a violation of Articles 6 and 10 ECHR in 2012, Harabin also complained about a violation of Article 6(2) ECHR, Article 1 of Protocol No. 1 (the right to the protection of property), Article 13 ECHR (the right to an effective remedy) and Article 14. These complaints were found inadmissible.

⁴³² *Baka v. Hungary*, supra note 3.

of the President of the Supreme Court. The Second Section concluded on the basis of these facts that Article 10 ECHR was at stake. The Grand Chamber took an extra step to arrive at the same conclusion. It considered that the facts formed prima facie evidence of a causal link between the exercise of the freedom of expression and the termination of the mandate, which it found to have been corroborated by the documents that Baka had submitted, and as a result it shifted the burden of proof of the causal relationship to the authorities.⁴³³ The reasons which the authorities subsequently put forward to defend their point of view did not convince the ECtHR so that it concluded that the freedom of expression lay at the heart of the issue. In the eyes of the ECtHR the interference did not therefore concern an organisational matter that was part of the domain of the public authorities, but an expression of a personal opinion.

2.3. The test of Article 10(2) ECHR: a margin of appreciation

When the ECtHR has ascertained that the complaint is related to the freedom of expression it must be tested whether the

interference meets the three conditions of the second paragraph: it must be prescribed by law, serve a legitimate aim and be necessary in a democratic society.

The ECtHR considers the national authorities to be in a better position than itself to make the initial assessment of whether the requirements of Article 10(2) ECHR have been met. The Member States are therefore allowed a margin of appreciation.⁴³⁴ This margin of appreciation is given both to the domestic legislator and the bodies that interpret and apply the laws in force. This power of appreciation is by its very nature limited; it is always the ECtHR that gives the final ruling on whether an interference is reconcilable with the ECHR, so that the margin of appreciation goes hand in hand with European supervision.⁴³⁵ The extent of the margin depends on the case in question: a 'wide' margin, for instance, is used when consensus is lacking in the Member States on the matter at hand,⁴³⁶ while 'a certain' margin is found in case law concerning the freedom of civil servants,⁴³⁷ and a 'narrow' margin in cases concerning political speech⁴³⁸ or interferences with debates of a social or political nature.⁴³⁹

⁴³³ Grand Chamber judgement in *Baka v. Hungary*, supra note 3, paras. 148-149.

⁴³⁴ See about the margin of appreciation among others E. Brems, 'The Margin of Appreciation Doctrine in the Case-Law of the European Court of Human Rights', (1996) 56 *Zeitschrift für Ausländisches Öffentliches Recht und Völkerrecht*, pp. 240-341; N. Lavender, 'The Problem of the Margin of Appreciation', (1997) *European Human Rights Law Review*, no. 4, pp. 380-390; M.R. Hutchinson, 'The Margin of Appreciation Doctrine in the European Court of Human Rights', (1999) 48 *International and Comparative Law Quarterly*, pp. 638-650; Y. Arai-Takahashi, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECtHR* (2002); Kuijer supra note 1, pp. 48-50; J.A. Sweeney, 'Margins of Appreciation: Cultural Relativity and the European Court of Human Rights in the Post-Cold War Era', (2005) 54 *International and Comparative Law Quarterly*, pp. 459-474; G.

Letsas, 'Two Concepts of the Margin of Appreciation', (2006) 26 *Oxford Journal of Legal Studies*, pp. 705-732; S. Greer, 'The interpretation of the European Convention on Human Rights: universal principle or margin of appreciation?', (2010) *UCL Human Rights Review*, no. 3, pp. 1-14.

⁴³⁵ ECtHR 7 December 1976, 5493/72 (*Handyside v. the United Kingdom*), paras. 48-49.

⁴³⁶ For instance ECtHR 18 April 2006, 44362/04 (*Dickson v. the United Kingdom*), para. 78.

⁴³⁷ For instance ECtHR 26 September 1995, 17851/91, *NJ* 1996, 545, with a note by E.J. Dommering (*Vogt v. Germany*), paras. 52-53, and ECtHR 2 September 1998, 65/1997/849/1056 (*Ahmed v. the United Kingdom*), para. 61.

⁴³⁸ In ECtHR 25 June 2015, 29369/10 (*Morice v. France*), paras. 129-130, *EHRC* 2015/141 with a note by J. Soeharno and J.D.A. den Tonkelaar, the term *particularly narrow margin* is used.

⁴³⁹ ECtHR 14 October 2010, 4260/04 (*Andrushko v. Russia*), para. 57.

The extent of the margin of appreciation in the case of judges who seek the protection afforded by Article 10 ECHR is related to the capacity of the judge as a civil servant. In *Wille v. Liechtenstein* the ECtHR considered for the first time in this case law: 'In carrying out this review, the Court will bear in mind that whenever civil servants' right to freedom of expression is in issue the "duties and responsibilities" referred to in Article 10 § 2 assume a special significance, which justifies leaving to the national authorities a certain margin of appreciation in determining whether the impugned interference is proportionate to the above aim.'⁴⁴⁰

In *Pitkevich v. Russia*⁴⁴¹ the ECtHR tailored the margin of appreciation to take further account of the special position of the judge. This case concerned a complaint from a judge about interference with, among others, articles 6, 9 and 10 ECHR on account of the fact that she had expressed her religious views during the exercise of her official duties. The ECtHR reiterated that the national authorities have a 'certain' margin when determining whether an interference with the freedom of civil servants is proportionate to the aim pursued. It also considered: 'Given the prominent place among State organs which is occupied by the judiciary in a democratic society, the Court considers that this is particularly so in case of a restriction on the freedom of expression

The ECtHR has partly established the limits of judicial freedom, but that there is also still considerable ground to cover for a full understanding of this subject under the ECHR.

of a judge in connection with the performance of his functions, albeit the judiciary is not part of the ordinary civil service.'⁴⁴²

In the case of judges the national authorities therefore expressly have a 'certain' margin of appreciation when assessing whether interferences meet the requirements of Article 10(2) ECHR. This fits with the categorisation of the judge in *Pitkevich v. Russia* as belonging to a group of civil servants whose duties typify the specific activities of the public service, in so far as the latter is acting as the depositary of public authority responsible for protecting the general interests of the State.⁴⁴³ It is a categorisation that implies little or no freedom. The description was given in the context of the test in Article 6 ECHR: according to the settled case law at the time, this group was denied the protection of Article 6(1) ECHR.⁴⁴⁴ The underlying reason for this is the existence of 'a special bond of trust and loyalty'

⁴⁴⁰ *Wille v. Liechtenstein*, supra note 14, para. 62. See also P. van Dijk et al., *Theory and Practice of the European Convention on Human Rights* (2006), pp. 801-803, about the meaning of duties and responsibilities and the special status of the complainant.

⁴⁴¹ *Pitkevich v. Russia*, supra note 4. See also Kuijer supra note 1, p. 323, about this case.

⁴⁴² The quoted passage is reiterated in ECtHR 31 January 2008, 38406/97 (*Albayrak v. Turkey*), para. 42, and in the Grand Chamber judgement in *Baka v. Hungary*, supra note 3, para. 163.

⁴⁴³ ECtHR 8 December 1999, 28541/95 (*Pellegrin v. France*), para. 66, AB 2000/195 with a note by L.F.M. Verhey, and JB 2000, 19, with a note by AWH.

⁴⁴⁴ The Pellegrin criterion has been abandoned by the ECtHR, see ECtHR 19 April 2007, 63235/00 (*Vilho Eskelinen and others v. Finland*), JB 2007, 98; AB 2007/317 with a note by T. Barkhuysen and M.L. van Emmerik. This however does not affect the categorization of the judge as this type of civil servant. See also Janis et al., supra note 13, pp. 755-762 about the developments in this case law.

between these civil servants and the public authorities.⁴⁴⁵

In the Grand Chamber judgement in *Baka v. Hungary* the ECtHR used a different margin. First, the ECtHR referred to the above quoted considerations from *Wille v. Liechtenstein* and *Pitkevich v. Russia* concerning a 'certain' margin of appreciation.⁴⁴⁶ It did not apply this margin, however. After considering that Baka's opinions could not be qualified as a destructive attack on the judiciary and that the questions he commented upon were of public interest, the ECtHR considered: 'Accordingly, the Court considers that the applicant's position and statements, which clearly fell within the context of a debate on matters of great public interest, called for a high degree of protection for his freedom of expression and strict scrutiny of any interference, with a correspondingly narrow margin of appreciation being afforded to the authorities of the respondent State.'⁴⁴⁷ By applying a different margin of appreciation the ECtHR gave itself considerable leeway to overturn the decision of the national authorities: it was the first argumentative step towards the judgement that Article 10 ECHR had been violated.

The conclusion on the margin of appreciation in cases of judges who complain about a violation of Article 10 ECHR is therefore that the authorities in principle have a 'certain' margin of appreciation, but that this margin is apparently narrowed when the expression

can be seen as part of an important public debate. There is tension between this narrow margin and the aforementioned categorisation of the judge in *Pitkevich v. Russia*. Apparently, the ECtHR takes the view that the contribution of the judge to an important public debate prevails over the obligations that flow from the (strong) bond between the judge and the public authorities.

2.4. The test of Article 10(2) ECHR: the three conditions

It is against the background of the margin of appreciation of the national authorities that the ECtHR tests whether the interference meets the three conditions under Article 10(2) ECHR.⁴⁴⁸ The first condition is that the interference must be prescribed by law. In this case law the term 'law' has a broad meaning: it includes various forms of regulation as long as they are sufficiently accessible and the obligations and consequences under the law are sufficiently foreseeable.⁴⁴⁹ The cases of *N.F. v. Italy*⁴⁵⁰ and *Maestri v. Italy*⁴⁵¹ are examples of violations of the first condition in the category of cases concerning judges who complain about a violation of Articles 9-11 ECHR. These two cases concern judges who complained about disciplinary measures that had been imposed on them because of their membership of the Italian freemasonry. The ECtHR concluded that Article 11 ECHR had been violated because the interference was not prescribed by law

⁴⁴⁵ *Pellegrin v. France*, supra note 28, para. 65.

⁴⁴⁶ Grand Chamber judgement in *Baka v. Hungary*, supra note 3, paras. 162-163.

⁴⁴⁷ *Ibid.*, para. 171.

⁴⁴⁸ See about these three conditions also C. Grabenwater, *The European Convention on Human Rights. Commentary* (2014), pp. 243-249 and 262-290; D. Harris et al., *Harris, O'Boyle & Warbrick, Law of the European Convention on Human Rights*

(2014), pp. 505-520; Van Dijk et al., supra note 25, pp. 336-342.

⁴⁴⁹ ECtHR 26 April 1979, 6538/74 (*Sunday Times v. the United Kingdom no. 1*), paras. 47-49. See also Janis et al., supra note 13, pp. 309-313 about this condition.

⁴⁵⁰ *N.F. v. Italy*, supra note 5, see also Kuijjer, supra note 1, about this case, p. 324.

⁴⁵¹ *Maestri v. Italy*, supra note 6

and with that it halted its test under the second paragraph. As a consequence these judgements do not contain an opinion of the ECtHR on the compatibility of the judicial office and membership of the freemasonry under Article 11 ECHR.

The second condition of Article 10(2) ECHR, the requirement that the interference serves a legitimate aim, rarely leads to a violation of Article 10 ECHR, which is not surprising since the aims that are summed up cover a wide range of interests. In most of these cases the legitimate aim on which the interference is based is the maintaining of the authority and the impartiality of the judiciary, sometimes combined with the protection of the rights of others. The ECtHR has explained that the phrase 'the authority and impartiality of the judiciary' includes in particular the notion that the courts are, and are accepted by the public at large, as the proper forum for the settlement of legal disputes and the determination of a person's guilt or innocence in a criminal case. At stake is the confidence which the courts in a democratic society must inspire in the accused, as far as criminal proceedings are concerned, and in the public at large.⁴⁵²

In most cases the third condition, the necessity of the interference in a democratic society, forms the core of the test under Article 10(2) ECHR. According to settled case law an interference is necessary in a democratic society when

there is a 'pressing social need' for it, and it is 'proportionate to the legitimate aim pursued', while the grounds on which it is based are 'relevant and sufficient'.⁴⁵³ 'Necessary' in this meaning is less strict or rigid than 'indispensable', 'absolutely necessary' or 'strictly necessary' but it does not have the flexibility of expressions such as 'admissible', 'ordinary', 'useful', 'reasonable' or 'desirable' either.⁴⁵⁴ It is something in between. When testing whether the interference meets this requirement the ECtHR determines whether the national authorities have struck a fair balance between the fundamental right of the individual to freedom of expression and the legitimate interest of the authorities in ensuring that the civil service furthers the purposes enumerated in Article 10(2) ECHR in a proper fashion.⁴⁵⁵ This requires that the statements concerned are considered in the light of the case as a whole and the circumstances of the case that argue for and against a restriction of freedom are weighed against each other. In this weighing process a large number of facts may play a role.⁴⁵⁶

2.5. Necessity in complaints from judges about Article 10 ECHR

In the case of *Wille v. Liechtenstein*⁴⁵⁷ the ECtHR gave important considerations for the cases in which judges rely on Article 10 ECHR regarding the necessity of the interference. This case finds its origin in the decision of the Liechtenstein

⁴⁵² For instance *Sunday Times v. United Kingdom no. 1*, supra note 34, para. 55, and *Morice v. France*, supra note 23, para. 130. See also Van Dijk et al., supra note 25, pp. 336-342, pp. 813-816 for the meaning of this aim.

⁴⁵³ *Handyside v. the United Kingdom*, supra note 20, para. 48; *Sunday Times v. the United Kingdom no. 1*, supra note 34, paras. 59-62; ECtHR 23 September 1994, 15890/89 (*Jersild v. Denmark*), para. 31. See about *Handyside v. United Kingdom* and *Jersild v. Denmark* also Lawson & Schermers,

supra note 13, respectively pp. 37-42 and pp. 584-588.

⁴⁵⁴ *Handyside v. United Kingdom*, supra note 20, paras. 48-49.

⁴⁵⁵ *Wille v. Liechtenstein*, supra note 14, para. 62, Grand Chamber judgement in *Baka v. Hungary*, supra note 3, para. 162.

⁴⁵⁶ ECtHR 12 July 2001, 29032/95 (*Feldek v. Slovakia*).

⁴⁵⁷ *Wille v. Liechtenstein*, supra note 14.

head of state, Prince Hans-Adam II, not to reappoint Wille, President of the Administrative Court, to public office after Wille had defended a view on a constitutional matter in an academic speech, which the Prince did not share. At the ECtHR, Wille relied on the protection afforded by Article 10 ECHR. After having summed up the basic principles concerning Article 10 ECHR, the ECtHR considered: 'These principles apply also to civil servants. Although it is legitimate for a State to impose on civil servants, on account of their status, a duty of discretion, civil servants are individuals and, as such, qualify for the protection of Article 10 of the Convention.'⁴⁵⁸

After having considered that the national authorities have a 'certain' margin of appreciation as described earlier, the ECtHR formulated the following starting point: '[T]he "duties and responsibilities" referred to in Article 10 § 2 assume a special significance since it can be expected of public officials serving in the judiciary that they should show restraint in exercising their freedom of expression in all cases where the authority and impartiality of the judiciary are likely to be called in question.'⁴⁵⁹

This consideration appeared earlier in an admissibility decision by the European Commission of Human Rights (EComHR), the precursor of the present ECtHR, in the case *E. v. Switzerland* from 1984.⁴⁶⁰ Later it became part of the ECtHR's settled case law in cases involving judges who invoke Article 10 ECHR. The capacity of the judge as a civil servant therefore, as described above, not only in principle justifies, 'especially so', a 'certain' margin of appreciation for the

authorities, but also a starting point of restraint for the judge. It is against the background of the margin of appreciation and this starting point of restraint that the ECtHR weighs the circumstances of the case to establish whether a fair balance has been struck between the right of the individual judge to freedom of expression and the legitimate interest of the State. The following circumstances appear to be relevant from the cases the ECtHR has dealt with:

The consequences of the exercise of the freedom for the judicial office

An important factor is the effect that the exercise of the freedom of expression has on the judicial office. Illustrative is the case of *Pitkevich v. Russia*.⁴⁶¹ The dismissal of Judge Pitkevich on account of the expression of her religious convictions was considered justified in view of the serious consequences of those expressions for judicial impartiality and other aspects concerning the judicial office such as delayed cases. In the cases of *Albayrak v. Turkey*⁴⁶² and *Wille v. Liechtenstein*⁴⁶³ it was, on the contrary, the lack of an effect on the judicial office that came strongly to the fore. Judge Albayrak complained about his transfer to another jurisdiction which the authorities had imposed on him as a disciplinary sanction.⁴⁶⁴ The ECtHR established that there was no indication of any proof for the allegation of the Turkish authorities that Albayrak had displayed PKK sympathies or that such conduct had had a bearing on his performance as a judge or on judicial impartiality. In *Wille v. Liechtenstein* it was considered that Wille's lecture did not

⁴⁵⁸ *Ibid.*, para. 62.

⁴⁵⁹ *Wille v. Liechtenstein*, supra note 14, para. 64.

⁴⁶⁰ EComHR 7 May 1984, 10279/83 (*E. v. Switzerland*), see also Kuijer supra note 1, p. 317, about this case.

⁴⁶¹ *Pitkevich v. Russia*, supra note 4.

⁴⁶² *Albayrak v. Turkey*, supra note 27.

⁴⁶³ *Wille v. Liechtenstein*, supra note 14.

⁴⁶⁴ *Albayrak v. Turkey*, supra note 27, para. 46.

contain any remarks on pending cases and that the authorities did not refer to any incidents that suggested that the lecture had somehow had a bearing on his performance or on any pending or imminent proceedings.⁴⁶⁵ In both cases the interference was not considered necessary in a democratic society.

The consequences of the interference for the judge

The severity of the interference with the freedom of expression is also taken into account. The judge may be confronted with financial consequences and the loss of his office. In *Kudeshkina v. Russia* the ECtHR considered that the dismissal of the judge meant the loss of any possibility of exercising the profession of a judge and that it must have been extremely distressing to have lost access to a profession that had been exercised for eighteen years.⁴⁶⁶ In *Di Giovanni v. Italy*⁴⁶⁷ the weight of the sanction was also explicitly referred to. In this case the President of an Italian criminal tribunal complained about the disciplinary reprimand that had been imposed because she had stated in the press that a judge examiner in a *concours public*, which had been organised to recruit judges, had tried to favour a family member over other candidates, an accusation that was traceable to the judge in question. The authorities took the view that by doing so she had showed insufficient restraint and respect for a respected member of the judiciary. The ECHR found those reasons to be tenable and it took into consideration that the

sanction imposed was the lightest available to the Italian authorities.⁴⁶⁸

The consequences of the interference for society

In several cases the so-called chilling effect of the interference plays a role.⁴⁶⁹ This effect refers to the broader discouraging effect an interference may have on the exercise of the freedom of expression by the judge in question, other judges and society as a whole. In *Kayasu v. Turkey*⁴⁷⁰ the ECtHR explained the significance of the chilling effect. The case was based on a complaint from the public prosecutor Kayasu, who had been dismissed because he had initiated criminal proceedings against statesmen involved in the coup d'état of 1980 and because he had received the press at his home to explain his action. The chilling effect that was considered to be the consequence of his dismissal was an important factor in the decision that it was not proportionate to the aim of maintaining the authority and impartiality of the judiciary. The ECtHR viewed this effect as detrimental to society, since it affected the confidence of the public in the ability of judicial officials to do what is necessary to maintain the rule of law.

The context of a public debate

The fact that the exercise of the freedom of expression can be seen as part of a public debate also influences the outcome of the test. In *Kudeshkina v. Russia*⁴⁷¹ Judge Kudeshkina had expressed fierce criticism of the judiciary in the media. This criticism had been part

⁴⁶⁵ *Wille v. Liechtenstein*, supra note 14, para. 69.

⁴⁶⁶ *Kudeshkina v. Russia*, supra note 14, para. 98.

⁴⁶⁷ ECHR 9 July 2013, 51160/06 (*Di Giovanni v. Italy*), EHRC 2013/196.

⁴⁶⁸ *Ibid.*, para. 83.

⁴⁶⁹ *Wille v. Liechtenstein*, supra note 14, para. 50, *Kudeshkina v. Russia*, supra note 14, para. 99; Grand Chamber judgement in *Baka v. Hungary*, supra note 3, para. 160.

⁴⁷⁰ ECtHR 13 November 2008, 64119/00 and 76292/01 (*Kayasu v. Turkey*), para. 106.

⁴⁷¹ *Kudeshkina v. Russia*, supra note 14.

of an election campaign for the State Duma during which she had – voluntarily – been suspended as a judge. The ECtHR decided by a narrow majority of four against three that the dismissal constituted a violation of Article 10 ECHR. An important factor in this judgement was that the criticism was part of an election debate. According to settled ECtHR case law the unhindered exercise of freedom of speech by election candidates is of particular importance: in the eyes of the ECtHR the right to stand as a candidate in an election is inherent in the concept of a truly democratic regime.⁴⁷² The ECtHR also considered that Kudeshkina had raised a highly sensitive matter of public interest, which should be open to free debate in a democratic society.⁴⁷³ In *Kayasu v. Turkey* the ECtHR placed the exercise of the freedom of expression in a past and present historic, political and legal debate, one that was considered to be of public interest.⁴⁷⁴ These cases differ from the Grand Chamber judgement in *Baka v. Hungary*,⁴⁷⁵ where the public debate was taken into account in the context of the margin of appreciation instead of in the subsequent weighing process. This new approach has resulted in some uncertainty about the exact status of the public debate under Article 10(2) ECHR.

The motive of the judge

The ECtHR also attaches importance to the motive of the judge that appeals to the protection of the ECHR. In *Kudeshkina v. Russia* the ECtHR considered that the severe criticism of the judiciary was not to be regarded as a

gratuitous personal attack by the judge but as a fair comment on a matter of great public importance and in *Kayasu v. Turkey* it was considered that the actions and expressions of the public prosecutor were aimed at displaying a dysfunctional democratic system so that they were more than a personal opinion.⁴⁷⁶ In both cases the judges therefore aimed at exposing an abuse of or a deficit in the system.

The appropriateness of the expressions

Another factor that is weighed is the appropriateness of the expressions. In *Wille v. Liechtenstein* the ECtHR took into account that the lecture did not contain severe criticism of persons or public institutions or insults against high officials or the Prince, and in *Kayasu v. Turkey* it was considered that the public prosecutor's accusations against the army generals could not be qualified as insults against the generals or the army.⁴⁷⁷

The existence of a fair procedure at the national level

The fairness of the national proceedings is also a factor that is taken into consideration when testing whether an interference is necessary in a democratic society. In *Kudeshkina v. Russia* these proceedings did not meet the requirements of Article 6 ECHR since the case had been heard by the Moscow court and part of the criticism that had led to the dismissal had been directed against that court's President. In that light her fear that the proceedings were unfair was

⁴⁷² Ibid., para. 87. See for instance ECtHR 19 October 2004, 17707/02 (*Melnychenko v. Ukraine*), para. 59, EHRC 2004/109, with a note by J.L.W. Broeksteeg.

⁴⁷³ *Kudeshkina v. Russia*, supra note 14, para. 94.

⁴⁷⁴ *Kayasu v. Turkey*, supra note 55, para. 93.

⁴⁷⁵ *Baka v. Hungary*, supra note 3.

⁴⁷⁶ Respectively *Kudeshkina v. Russia*, supra note 14, para. 95, and *Kayasu v. Turkey*, supra note 55, para. 101.

⁴⁷⁷ Respectively, para. 67 of *Wille v. Liechtenstein*, supra note 14, and *Kayasu v. Turkey*, supra note 55, para. 98.

considered justified.⁴⁷⁸ In *Baka v. Hungary* there had been no possibility at all to present the case before a national tribunal because the premature termination of Baka's mandate as President of the Supreme Court was the result of a change to the Constitution and no procedure existed to challenge such a change.⁴⁷⁹

2.6. Conclusions concerning the first perspective of the freedom of the judge

In the category of case law concerning judges who complain about a violation of Articles 9-11 ECHR, Article 10 ECHR plays a dominant role. The ECtHR first ascertains whether it is the freedom of expression that is at stake or whether the complaint falls outside the scope of Article 10 ECHR. If the freedom of expression is not at the heart of the issue the complaint is inadmissible. When the complaint does concern the freedom of expression the ECtHR tests whether the interference meets the three conditions of the second paragraph. The national authorities have a margin of appreciation when assessing whether these conditions are met. From *Wille v. Liechtenstein* and *Pitkevich v. Russia* it follows that the capacity of the judge as a civil servant brings with it that the national authorities have, 'particularly so', a 'certain' margin of appreciation.⁴⁸⁰ In the most recent judgement in this category of case law, the Grand Chamber judgment in *Baka v. Hungary*, the ECtHR, however, assumed a narrow margin of appreciation on account of the fact that the expression was part of an important public debate.⁴⁸¹ By applying a different margin of appreciation the ECtHR took an important step in this case towards the

conclusion that Article 10 ECHR had been violated. This narrow margin is difficult to reconcile with the categorisation of the judge in *Pitkevich v. Russia* as a civil servant belonging to a group of civil servants that are bound by trust and loyalty to the authorities. In the previous case law under Article 6 ECHR this categorisation meant a loss of freedom: a complaint by this type of civil servant was inadmissible under Article 6 ECHR.⁴⁸²

The emphasis in the test of Article 10(2) ECHR is on the condition that the interference is necessary in a democratic society. In this context the ECtHR tests whether the national authorities have struck a fair balance between the right of the individual to freedom of expression and the legitimate interest of the authorities in ensuring that the civil service furthers the purposes enumerated in the Article 10(2) ECHR in a proper manner. In *Wille v. Liechtenstein*⁴⁸³ the ECtHR considered that the judge should show restraint in the exercise of his freedom of expression in all cases where the authority and impartiality of the judiciary are likely to be called into question. The capacity of a civil servant therefore not only justifies in principle a certain margin of appreciation for the authorities but also a starting point of restraint for the judge. Subsequently, the interference is weighed against the legitimate aim on which the authorities base the interference, which in these cases is the aim of the maintenance of the authority of the judiciary and impartiality, sometimes combined with other aims, such as the protection of the rights of others. Important factors that play a role in this weighing process are the consequences of the

⁴⁷⁸ *Kudeshkina v. Russia*, supra note 14, para. 97.

⁴⁷⁹ Second Section *Baka v. Hungary*, para. 89, and the Grand Chamber judgement in *Baka v. Hungary*, para. 121, both supra note 3.

⁴⁸⁰ *Pitkevich v. Russia*, supra note 4.

⁴⁸¹ Grand Chamber judgement in *Baka v. Hungary*, supra note 3, para. 171.

⁴⁸² *Pellegrin v. France*, supra note 28.

⁴⁸³ *Wille v. Liechtenstein*, supra note 14.

exercise of the freedom for the judicial office, the consequences of the interference for the judge and society, the context of a public debate, the motive of the judge, the appropriateness of the expressions, and the existence of a fair procedure at the national level.

The case law shows that judges are entitled to exercise their freedom under Articles 9-11 ECHR but that their special position leaves room for considerable interference, especially on account of the capacity of the judge as a civil servant. Where in a specific case the limits of judicial freedom lie depends, to a high degree, on the outcome of the weighing exercise that takes place as part of the test of Article 10(2) ECHR. Context is of decisive importance in this: what are the contents of the opinions, where and how have they been expressed, and against what background does it all take place?

3. The second perspective: complaints from litigants and suspects concerning Article 6 ECHR

Judicial freedom can also be approached through Article 6(1) ECHR. Relevant are the cases based on complaints from litigants and suspects that the impartial and independent treatment of their cases has been impaired as a consequence of the fact that the judges in their cases have expressed personal opinions or convictions. In this perspective judicial freedom is approached indirectly, in the sense that the ECtHR defines the requirements of a fair trial and these requirements imply a limitation of judicial freedom. Below, the relevant cases will be divided into groups that cover the cases that exist on this subject matter in the ECtHR case law: the

judge and his political activities outside the courthouse, the judge in the press, the judge and his membership of certain associations, and the judge and his emotions during his judicial duties. For a better understanding of this case law, first a brief explanation will be given of the way the ECtHR applies Article 6(1) ECHR.

3.1. Article 6(1) ECHR: the subjective and the objective test

Article 6 ECHR protects the right to a fair trial. Especially relevant for the subject of judicial freedom is the first sentence of Article 6(1) ECHR: 'In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.'

Article 6(1) ECHR requires a tribunal falling within its scope to be independent and impartial. According to settled case law impartiality denotes the absence of prejudice or bias. The existence of impartiality is to be determined according to a subjective and an objective test.⁴⁸⁴ The subjective test refers to the personal convictions of a judge and requires an answer to the question of whether the judge has any personal prejudice or bias in a given case. In applying the subjective test, the ECtHR has consistently held that the personal impartiality of a judge must be presumed until there is evidence of the contrary. The objective test refers to aspects of impartiality other than the personal attitude of the judge: it concerns the question whether the tribunal itself and, among others, its composition, offers sufficient guarantees to exclude any legitimate doubt in respect of its impartiality. In this respect the view of the

⁴⁸⁴ For instance ECtHR 1 October 1982, 8692/79 (*Piersack v. Belgium*); ECtHR 9 January 2013, 21722/11 (*Volkov v. the Ukraine*); and ECtHR 15 December 2005, 73797/01 (*Kyprianou v. Cyprus*),

EHRC 2006/ 26, with a note by A.M.L. Janssen. See about these tests also Kuijer, *supra* note 1, Chapter 7; Grabenwater, *supra* note 33, pp. 120-126; Van Dijk et al., *supra* note 25, pp. 616-623.

litigant or suspect concerned is important but not decisive. Decisive is whether his fear can be held to be objectively justified. In this respect even appearances may be of importance: 'justice must not only be done, it must also be seen to be done', as the ECtHR has often reiterated.⁴⁸⁵ There is no watertight division between subjective and objective impartiality since the conduct of a judge may not only prompt objectively held misgivings as to his impartiality from the point of view of the external observer, but may also extend to the issue of his personal conviction.⁴⁸⁶

3.2. The political activities of the judge outside the courthouse

Complaints concerning the political activities of the judge outside the courthouse do not easily lead to a violation of Article 6(1) ECHR. The judge may in principle be a member of a political party or a national Parliament or otherwise be politically active.

In *Holm v. Sweden*⁴⁸⁷ the ECtHR, however, did find a violation. The case concerned the political activities of jury members. The complaint was made by Holm, the founder of an organisation that was critical of the Swedish Social Democratic Workers' Party (SAP). Holm had initiated a libel case against the author of a book and a publishing house, both related to the SAP, because the book in question described the organisation as right-wing. The case was decided by a jury of nine, five of whom were active SAP members. The ECtHR agreed with Holm that impartiality had been violated from an objective viewpoint: both jurors and the

defendants were associated with the SAP and the subject matter was highly political. The case is of interest to judges since both jury members and judges need to be impartial. It is however conceivable that the differences between them could affect the outcome of a case. It could be said, for instance, that the presumption of impartiality, which is part of the settled case law under Article 6 ECHR, is stronger with regard to judges because of their tenure and special training, than it is with regard to members of a jury, so that more is needed to have legitimate doubts about the impartiality of a judge when compared to a juror.

From *Pabla Ky v. Finland*⁴⁸⁸ it can be concluded that arguments derived from general theories of law are not successful in arguing that Article 6(1) ECHR has been violated by the political activities of a judge. In this case the applicant complained that the theory of the separation of powers brought with it that Article 6(1) ECHR had been violated since a judge in the case was also a member of the national Parliament. The ECtHR considered that neither Article 6(1) ECHR nor any other provision of the ECHR requires Member States to comply with any theoretical constitutional concept and that the question that needs to be answered is whether, in a given case, the requirements of the Convention are met. The ECtHR concluded that Article 6(1) ECHR had not been violated since the judge had not in any way exercised any prior legislative, executive or advisory function in respect of the subject matter so that it could not be said that the proceedings somehow involved 'the same

⁴⁸⁵ For instance recently ECtHR 2 June 2016, 45959/09 (*Mitrov v. the former Yugoslav Republic of Macedonia*).

⁴⁸⁶ For instance *Volkov v. Ukraine*, para. 105, and *Kyprianou v. Cyprus*, para. 119, both supra note 69.

⁴⁸⁷ ECtHR 25 November 1993, 14191/88 (*Holm v. Sweden*). See also Rayney et al., supra note 7, pp. 268-269 about this case.

⁴⁸⁸ ECtHR 22 June 2004, 47221/99 (*Pabla Ky v. Finland*), *EHR*C 2004/78 with a note by A.M.L. Jansen, and *NJ* 2005, 114, with a note by A.E. Alkema, para. 29.

case' or 'the same decision'.⁴⁸⁹ It is therefore, according to the pattern of Article 6(1) ECHR described earlier, only tested whether the facts of the case give rise to doubts about independence and impartiality from a subjective or objective point of view.

3.3. The judge in the press

The ECtHR has dealt with a number of cases concerning judges who express their opinions in the press, in interviews or open letters to the press. In the cases of *Buscemi v. Italy*, *Lavents v. Latvia* and *Olujiæ v. Croatia*⁴⁹⁰ the complaints concerned statements by judges in newspapers about cases they were hearing at the time or which had already been heard by them.⁴⁹¹ In the first case a judge entered into a debate in a newspaper about a youth case with the father of the child concerned. Article 6(1) ECHR had been violated because the judge in question later heard the case on appeal. The expressions in the newspaper had therefore affected the judge's impartiality in future cases. In *Lavent v. Latvia* a judge had stated, among other things, that she had not made up her mind whether a suspect in a prominent criminal case which she was hearing should be partially acquitted or not. In *Olujiæ v. Croatia* three judges in a disciplinary procedure had made negative comments about their colleague against

whom the procedure had been initiated. In all three cases the statements had resulted in a violation of Article 6(1) ECHR. In these cases the ECtHR formulated the following general rule: 'The Court stresses, above all, that the judicial authorities are required to exercise maximum discretion with regard to the cases with which they deal in order to preserve their image as impartial judges. That discretion should dissuade them from making use of the press, even when provoked. It is the higher demands of justice and the elevated nature of judicial office which impose that duty.'⁴⁹² This case law can easily be extrapolated to other media and beyond, in the sense that any public statement about a case which the judge deals with is precarious since it may jeopardise judicial impartiality.

The question is whether the cases in this category are in line with the case law under Article 10 ECHR which in principle entitles the judge to express his opinions, among other things in the press. In both perspectives on judicial freedom impartiality is an important criterion, so that limits that follow from the perspectives should at least partly coincide. The approach under Article 10 ECHR to impartiality, however, seems less strict than under Article 6 ECHR. In *Kudeshkina v. Russia*,⁴⁹³ for instance, Judge Kudeshkina's criticism of the judiciary in a radio interview could be

⁴⁸⁹ ECtHR 6 May 2003, 39343/98; 39651/98; 43147/98; 46664/99 (*Kleyn v. the Netherlands*), AB 2003/211, with a note by L.F.M. Verhey and B.W.N. de Waard, *JB* 2003, 119 with a note by A.W. Heringa, *EHRC* 2003/54 with a note by J. Gerards, *NJCM-Bulletin* 2004, p. 723, with a note by J.H. Reestman and I.C. van der Vlies.

⁴⁹⁰ ECtHR 16 September 1999, 29569/95 (*Buscemi v. Italy*), ECtHR 28 November 2002, 58442/00 (*Lavents v. Latvia*), and ECtHR 5 February 2009, 22330/05 (*Olujiæ v. Croatia*), *EHRC* 2009/57, with a note by M.F.J.M. de Werd. See also Kuijjer supra note 1, p. 333, about this case.

⁴⁹¹ See about the relationship between the

judge and the press in Europe also: S. Dijkstra, 'De ruimte van de rechter in de relatie rechter-media onder het EVRM', *NJB* 2013/198. For research on media reporting on judges and the judiciary in the Netherlands, see J. van Spanje & C. de Vreese, 'De rechtspraak in de media: drie negatieve trends', in: *Speelruimte voor transparantere rechtspraak* (WRR-verkenning 26), pp. 413-449, and P.D. Schulz about media reporting on the judiciary in especially Australia, *Courts and judges on trial: analysing and managing the discourses of disapproval* (2010).

⁴⁹² Respectively para. 67, para. 118 and para. 59.

⁴⁹³ *Kudeshkina v. Russia*, supra note 14.

understood, as the Russian authorities did,⁴⁹⁴ as a serious attack against judicial impartiality. The ECtHR, however, discussed impartiality only in as far as Kudeshkina complained about a violation of Article 6(1) ECHR in the disciplinary procedure which the Russian authorities had initiated against her.⁴⁹⁵ In *Wille v. Liechtenstein* impartiality was not an obstacle either, although it could also be said that Wille's lecture on a controversial constitutional subject affected his impartiality in certain future cases.

3.4. The judge's membership of certain associations

Just as under Article 11 ECHR, those cases that concern judges' membership of associations under Article 6(1) ECHR concern membership of the freemasonry. In *Kiiskinen and Kovalainen v. Finland* and *Salaman v. the United Kingdom*⁴⁹⁶ the question whether Article 6(1) ECHR had been violated by membership of the freemasonry was answered in the negative. In neither case did membership create a bond between the judge and the other party in the procedure or the case matter that could affect impartiality. In the British case the ECtHR considered that it cannot be assumed that the judge's membership of the British freemasonry as such raises doubts about his impartiality if a witness or party in a case is also a freemason, and that there is in particular no reason to doubt that a judge would regard his oath on taking judicial office as taking precedence over other social commitments or obligations. Whether or not a problem arises, for example, due to a judge's personal acquaintance with a fellow freemason, depends on the circumstances of the case.

The general line in these cases can be extended to membership of other associations and societies, depending on their character. That this character may play a role in the test under Article 6(1) ECHR can be illustrated by the joint dissenting opinion of Judges Bonello, Strá•nická, Birsan, Jungwiert and Del Tufo in *Maestri v. Italy*,⁴⁹⁷ a case concerning membership of the freemasonry under Article 11 ECHR. The case does not give much information about the permissibility of such a membership because the ECtHR discontinued its test after having concluded that the interferences were not prescribed by law, but the dissenters did express a clear opinion on the matter. They viewed membership of the Italian freemasonry as being evidently incompatible with the judicial office and Article 6(1) ECHR. This opinion is based on a (supposed) conflict between the loyalty to the organisation that is expected of a member of the freemasonry and judicial independence, and on the specific controversy surrounding the Italian freemasonry which at the time was said to have ties with organised crime, a situation which, as it appears from the British cases, was not present there.⁴⁹⁸

3.5. The judge's emotions during his judicial duties

The ECtHR has also dealt with cases concerning personal opinions that resound in the emotions of the judge when dealing with a case. A violation of Article 6(1) ECHR may be the result of the way the judge handles a case in the courtroom or of the tone and contents of an oral or written verdict.

⁴⁹⁴ Ibid., paras. 34, 73, 74.

⁴⁹⁵ Ibid., paras. 96-97.

⁴⁹⁶ ECtHR 1 June 1999, 26323/95 (*Kiiskinen and Kovalainen v. Finland*) and ECtHR 15 June

2000, 43505/98 (*Salaman v. the United Kingdom*).

⁴⁹⁷ *Maestri v. Italy*, supra note 6.

⁴⁹⁸ Ibid., paras. 10 and 15, of the joint dissenting opinion.

In *Mr. and Mrs. X v. the United Kingdom* and *X v. the United Kingdom*,⁴⁹⁹ two cases from the EComHR from 1973 and 1975, the emotions of the judge displayed during the court session were the subject of the complaint. The (same) judge had showed a great deal of irritation with the defence, especially in the first case, by describing, among other things, the defence as a farce, the jury being reduced to laughter, the case as an absolutely hopeless one, and as a shocking example of an abuse of the Legal Aid System. The EComHR described these statements as such as 'objectionable', but did not find a violation of Article 6(1) ECHR since the trial, taken as a whole, could not be considered unfair. In *Kyprianou v. Cyprus*,⁵⁰⁰ a judgement twenty years later, the verdict in a contempt of court case was found to be too emotional. This verdict stated that the applicant aimed to create a climate of 'intimidation and terror' within the court, that the judges could not conceive of another occasion of such 'a manifest and unacceptable contempt of court by any person, let alone an advocate', that the judges 'as persons' were deeply insulted, that if the court's reaction would not be immediate and drastic, justice was felt to have suffered 'a disastrous blow'. The ECtHR was of the opinion that impartiality was impaired from both the objective and subjective perspective. The judges at whom the contempt of court was aimed were the same as those who took the decision to prosecute, to determine guilt and to impose the sanction, producing a confusion of roles⁵⁰¹ and the language of

the verdict used conveyed an unwanted personal involvement of the judges.⁵⁰² The words and tone of the verdict crossed the line since they ran counter to the approach that is expected of judicial pronouncements, which was described by the ECtHR as 'detached'.⁵⁰³

The cases show a certain shift in the scope of Article 6(1) ECHR. The expressions from the judges in the British cases show more bias than those of the Cypriot judges: the statements of the British judges cannot be considered to be far detached. At the same time the EComHR did not find a violation of Article 6(1) ECHR. These older cases therefore no longer seem representative of the limits drawn in Article 6(1) ECHR. This is confirmed when they are compared with the cases concerning judges that express themselves in the press. In *Lavents v. Latvia*,⁵⁰⁴ for instance, the statements of the judge that she had not made up her mind whether the suspect should be partially acquitted or not were less far-reaching than the statements in the British cases, but did produce a violation of Article 6(1) ECHR. With this it can be said that the requirements of Article 6(1) ECHR seem to have become stricter, thereby leaving less freedom for the judge to express his personal views.

3.6. Conclusion concerning Article 6(1) ECHR and the freedom of the judge

Under Article 6(1) ECHR the exercise of freedom is only limited when there are facts that give rise to doubts about the judge's independence and impartiality

⁴⁹⁹ EComHR 18 July 1973, 4991/71 (*Mr and Mrs X v. the United Kingdom*) and EComHR 21 March 1975, 5574/72 (*X v. the United Kingdom*). See also Kuijer supra note 1, p. 163, about the latter case.

⁵⁰⁰ The case was first decided by the Second Section, ECtHR Second Section 27 January 2004, 73797/01 and later by the Grand Chamber, ECtHR

15 December 2005, 73797/01 (*Kyprianou v. Cyprus*), EHRC 2006/26, with a note by A.M.L. Janssen.

⁵⁰¹ Grand Chamber judgement, para. 127.

⁵⁰² Grand Chamber judgement, para. 129-133.

⁵⁰³ Grand Chamber judgement, para. 123-128.

⁵⁰⁴ *Lavents v. Latvia*, supra note 75.

from the subjective or the objective point of view. The ECtHR refrains from making general statements about the organisation of the State, for instance, with regard to the separation of powers when the activities of the judge have a political character. Only when the opinions and convictions of the judge are present in the form of a noticeable prejudice or bias or when the activities have a specific connection with the parties or the case matter can Article 6(1) ECHR be violated. It is therefore not surprising that especially the expression of personal opinions by judges on cases they are dealing with, as was present in the cases concerning judges who made statements in newspapers or who demonstrated their emotions during a court session or in a verdict, is precarious. In these cases the immediate connection between the expression and the case is given. If prejudice or bias is absent and there is no connection between the facts of the case and the expressions or activities of the judge, Article 6(1) ECHR does not limit judicial freedom. Two more specific rules can be extracted from the case law discussed. The first rule is that judges are required to exercise 'maximum discretion' with regard to the cases which they are hearing. The second one is that it is required that the formulation of judicial decisions and the handling of cases by the judge is 'detached'.

4. Conclusions concerning the scope of judicial freedom under the ECHR

In this article the question was asked how the limits to judicial freedom in the case law of the ECtHR are defined and where these limits lie. The answer has been formulated by studying the ECtHR case law from two perspectives. In the

first perspective judicial freedom was approached directly by asking the question of what limits there are to judges exercising their rights and freedoms under Articles 9-11 ECHR. In the second perspective it was approached more indirectly, by defining the requirements of Article 6(1) ECHR and the limitation on judicial freedom which these requirements imply. These two perspectives have produced a number of lines with which the territory of the judge to express his personal opinions and convictions under the ECtHR can be marked. Criteria that are dominantly present in this framework are the 'authority of the judiciary' and, especially, 'impartiality'.

The starting point under Articles 9-11 ECHR is that the judge is entitled to exercise these rights. The ECtHR approaches the judge as a civil servant. It has emphasised the duties and responsibilities that rest upon the civil servant and has assumed a 'certain' margin of appreciation for the authorities in deciding whether interferences meet the requirements of Article 10(2) ECHR. In *Pitkevich v. Russia*⁵⁰⁵ the ECtHR considered that this margin of appreciation is present, 'particularly so', when the applicant is a judge. Only in the Grand Chamber judgement in *Baka v. Hungary*⁵⁰⁶ was a different margin of appreciation applied: in that case the fact that the expression could be seen as part of an important public debate justified a narrow margin of appreciation. The 'certain' margin of appreciation fits with the categorisation of the judge in *Pitkevich v. Russia* as belonging to a group of civil servants that is tied to the authorities by 'a special bond of trust and loyalty'. The description of this type of civil servant has significance in the previous case law

⁵⁰⁵ *Pitkevich v. Russia*, supra note 4.

⁵⁰⁶ *Baka v. Hungary*, supra note 3.

under Article 6 ECHR where it meant a loss of rights: a complaint about a violation of Article 6 ECHR from a civil servant belonging this group was inadmissible.

According to settled case law under Article 10 ECHR the judge is required to show restraint when the authority of the judiciary and impartiality come into question. This limitation is a broad one considering the nature of judicial speech. The judge can be regarded as the representative of the judiciary and the embodiment of certain ideas and principles of justice and the rule of law. As a result the expression of personal opinions and convictions by judges is easily understood as the expression of views with a special meaning: they may be regarded as the 'official' view of the judicial authorities or as representing what is just and fair. In light of this it is easy to make a connection between the expression of personal opinions and convictions by the judge and the authority of the judiciary or judicial impartiality.

The 'certain' margin of appreciation and the starting point of restraint result in considerable possibilities for the national authorities to restrict the exercise of judicial freedom. Cases that concern the public debate or judicial independence, however, can anticipate a close examination by the ECtHR. In cases where the applicants were high-ranking judges the ECtHR considered that the complaints call for a close scrutiny having regard to the separation of powers and the importance of safeguarding the independence of the judiciary. In the cases of *Kudeshkina v. Russia*⁵⁰⁷ and *Baka v. Hungary*⁵⁰⁸ the ECtHR granted the judges more freedom because the expressions were seen as part of a public debate, which the ECtHR views as essential for democracy. In *Kudeshkina*

v. Russia this was done by giving this factor weight in the weighing of the facts when testing whether the interference is necessary in a democratic society. In the Grand Chamber judgement in *Baka v. Hungary*⁵⁰⁹ it was done, as said, by assuming a narrow margin of appreciation for the national authorities. In this way the ECtHR gave itself considerable latitude in this case to reach the conclusion that the authorities had violated Article 10 ECHR. The net effect in both *Kudeshkina v. Russia* and *Baka v. Hungary* is that counterarguments of considerable importance related to the authority of the judiciary and impartiality had to give way to the exercise of judicial freedom.

At this moment the Grand Chamber judgement in *Baka v. Hungary* is the most recent judgement in the category of cases under Articles 9-11 ECHR. In this case the narrow margin of appreciation was introduced in this category of case law, Article 10 ECHR was considered to be applicable even though the expressions were purely part of the statutory prescribed task of the judge to comment on legislation, and a construction of prima facie evidence was used in order to shift the burden of proof to the national authorities. The case does raise certain questions. For instance, is there a personal right at stake when the judge is statutorily obliged to make statements, and, how must the relationship between the narrow margin of appreciation and the categorisation of the judge in *Pitkevich v. Russia* be understood? The introduction of the narrow margin of appreciation causes uncertainty about the exact status of the public debate under Article 10(2) ECHR. A clarification on these points would be welcome.

Inherent in the system under Articles 9-11 ECHR is a degree of unpredictability.

⁵⁰⁷ *Kudeshkina v. Russia*, supra note 14.

⁵⁰⁸ *Baka v. Hungary*, supra note 3.

⁵⁰⁹ Grand Chamber judgement in *Baka v. Hungary*, supra note 3.

First, the margin of appreciation gives the national authorities, in cases that do not relate to a public debate, certain room to make their own assessments. Decisions that fall within this margin must be respected by the ECtHR. Secondly, the important question whether the interference is necessary in a democratic society requires that all the specific facts of the case are weighed: a fair balance must be struck between the relevant interests. This means that it is the cocktail of facts of the specific case that is decisive for the outcome and that in principle each fact may influence that outcome.⁵¹⁰ This brings with it that it is difficult to draw general conclusions based on a single case. Illustrative of this is *Kudeshkina v. Russia* in which the dismissal of a judge produced a violation of Article 10 ECHR since it could not be considered necessary in a democratic society. In view of the fact that this judgement was reached by a narrow majority of four against three it is likely that even a slightly less severe penalty would have met the requirements of Article 10(2) ECHR. This case does not therefore justify the conclusion that under the ECHR judges are permitted to vent severe criticism of the judiciary. Only more specific conclusions can be drawn, for instance, that the public debate is a factor that argues in favour of the freedom of the judge, or that in this specific case the criticism did not warrant a dismissal.

Under Article 6(1) ECHR the exercise of freedom is only irreconcilable with the judicial office when there are facts that give rise to doubt about the judge's independence and impartiality from the subjective or the objective point of view. This means that only when the opinions and convictions are present in the form

of a noticeable prejudice or bias or when the activities have a specific connection with the parties or the case matter can Article 6(1) ECHR be violated. As a result, especially the expression of personal opinions by judges on specific cases, as was present in the case law discussed about judges who had made statements in newspapers or showed their emotions during court sessions, is precarious. If there is no prejudice or bias and no connection between the facts of the case and the expressions or activities of the judge, Article 6(1) ECHR does not limit judicial freedom.

With its sole focus on independence and impartiality the case law under Article 6(1) ECHR forms a narrow perspective from which to approach judicial freedom. In this perspective only the right of the litigant or suspect to a fair trial is relevant. Contrary to the case law under Articles 9-11 ECHR other interests or the relation between various interests is not relevant for the outcome. This may lead to discrepancies. It is, for instance, conceivable that membership of an extreme right-wing or left-wing organisation or association does not impede the judge's independence or impartiality in a given case but does negatively affect the authority of the judiciary, so that judicial freedom is not limited under Article 6(1) ECHR but is at the same time incompatible with Articles 9-11 ECHR. In view of this it can be concluded that the perspective of Article 6(1) ECHR adds to an understanding of the limits of judicial freedom, but also that, because of its narrow scope, its meaning is limited.

To the above conclusions it can be added that the case law of the ECtHR covers only a limited number of types of

⁵¹⁰ The term cocktail in this context is borrowed from P. Mahoney, 'Free speech of civil servants and other public employees', in J. Casadevall et al.

(eds.), *Freedom of Expression: essays in honour of Nicolas Bratza* (2012), p. 275.

expressions. It does not include complaints that concern, for instance, judges who protest on the streets in their robes, call for a strike, wear religious symbols, express opinions in social media, comment on cases in academic journals, are politically active in town councils or are members of associations other than the freemasonry.

With this observation the final answer to the question that is asked in this article may be that the ECtHR has partly

established the limits of judicial freedom, but that there is also still considerable ground to cover for a full understanding of this subject under the ECHR.

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