

Balancing judicial apoliticism and the right to freedom of speech – a critical analysis of ECHR Judgement no. 16915/21

Magdalena Marynowska, *University of Warsaw (Warsaw, Poland)*

E-mail: m.marynowska@student.uw.edu.pl

<https://orcid.org/0009-0001-5735-5510>

Abstract

In recent years, the issue of judges' freedom of expression in the context of their independence and role in a democratic state has attracted increasing interest from scholars and legal practitioners. Referring to the ongoing discussion in the literature, this article analyses the boundaries of this freedom, drawing on the jurisprudence of the European Court of Human Rights, with particular emphasis on the case of *Danileț v. Romania*. The aim of this article is to examine the boundaries of judges' freedom of expression within the framework of a democratic state governed by the rule of law. The study combines literature review, analysis of legal frameworks as well as critical doctrinal analysis to comprehensively analyse the ECHR's position in relation to legal norms and relevant literature. A critical assessment of the impact of these rulings on the redefinition of the relationship between judicial independence and judges' right to participate in public debate is conducted.

Keywords: judicial freedom of expression, European Court of Human Rights, proportionality principle, judicial independence

Równowaga pomiędzy apolitycznością sędziów a prawem do wolności słowa – krytyczna analiza wyroku ETPCz nr 16915/21

Streszczenie

W ostatnich latach kwestia wolności wypowiedzi sędziów w kontekście ich niezależności oraz roli w państwie demokratycznym wzbudziła duże zainteresowanie badaczy i praktyków prawa. W nawiązaniu do dyskusji obecnej w literaturze, niniejszy artykuł analizuje granice tej wolności, odwołując się do orzecznictwa Europejskiego Trybunału Praw Człowieka, ze szczególnym uwzględnieniem sprawy *Danileț przeciwko Rumunii*. Celem tego artykułu jest zbadanie granic wolności wypowiedzi

sędziów w ramach demokratycznego państwa prawa. Badanie łączy przegląd literatury, analizę ram prawnych, a także krytyczną analizę doktrynalną, aby kompleksowo przeanalizować stanowisko ETPCz w odniesieniu do norm prawnych i odpowiedniej literatury. Przeprowadzono krytyczną ocenę wpływu tych wyroków na redefinicję relacji między niezależnością sądownictwa a prawem sędziów do uczestnictwa w debacie publicznej.

Słowa kluczowe: wolność wypowiedzi sędziów, Europejski Trybunał Praw Człowieka, zasada proporcjonalności, niezależność sądownictwa

The aim of the article, theses, and research methods

The primary aim of this article is to explore the intricate boundaries of judges' freedom of expression within the context of a democratic state governed by the rule of law. Drawing upon an extensive review of the literature and a critical doctrinal analysis, the study seeks to offer a comprehensive assessment of the European Court of Human Rights' jurisprudence on the matter, contextualised within relevant legal norms and scholarly discourse.

The analysis is centred around two pivotal theses. The first is that freedom of expression, as a fundamental right protected under Article 10 of the *European Convention on Human Rights*, also applies to judges, allowing them to participate in public debate concerning the functioning of state institutions. The second is that the obligation of judicial apoliticism does not exclude judges' right to freely express opinions on public matters, provided that these statements fall within the scope of Convention-protected freedom of speech.

Through these perspectives, the article aims to critically assess how these principles are interpreted in the context of European Court of Human Rights jurisprudence and to evaluate their implications for judicial independence and the rule of law.

Introduction – factual background

In January 2019, Romanian judge Vasilică-Cristi Danileț published two messages posted on social media, criticising the judiciary and public institutions in Romania.¹ At the

¹ One of these statements, dated 9 January 2019, was the following: "You might have noticed the string of efforts to attack, disrupt and discredit institutions such as the Directorate General of Information and Internal Protection, the Romanian Intelligence Service, the police, the National Anti-Corruption Directorate, the gendarmerie, the High Court of Cassation and Justice's Public Prosecutor's Office, the High Court of Cassation and Justice and the army. [The attacks in question] didn't just happen randomly after 'the abuses committed by the powers that be'. Do people realise what it would mean to weaken [these] institutions or, worse, to bring services, the police, the courts and the army back under political control? And speaking of the army, have you ever given much thought to Article 118 § 1 of the Constitution, which provides that 'the army shall solely serve the will of the people in order to ensure... constitutional democracy'? What would happen if one day you happened to see the army on the streets defending... democracy, because support appears to be waning these days? Would you be surprised to know that this solution would be... constitutional?! I think we can't see the wood for the trees..." (European Court of Human Rights 2024b: p. 2).

On 10 January 2019, in the second Facebook post, the judge shared a hyperlink to a controversial article entitled *A prosecutor sounds the alarm. Living in Romania today represents a huge risk. The red line*

moment, his Facebook profile had around 50.000 followers, which elevated his status to that of a public figure.

The Superior Council of Magistracy, which is the highest judicial authority in Romania, alleged that his first message undermined public institutions' credibility, suggested „that they were controlled by the political class", and proposed military intervention to ensure constitutional democracy, thereby breaching his duty of restraint and tarnishing the judiciary's reputation. The disciplinary board alleged that the language used by the judge in the posted message „had overstepped the limits of decency and had been unworthy of a judge" (European Court of Human Rights 2024a: p. 1–2).

The applicant clarified that his first posted message was intended to engage readers in a public debate on a critical societal issue. He emphasised that the message was not a call to disregard the law but a reminder of existing legal provisions. He also noted that the content was unrelated to his judicial duties and reflected his personal concerns as a citizen. Regarding the second message, the applicant affirmed his support for judicial independence and any related initiatives. He argued that freedom of expression allowed him to post on his Facebook page as long as he did not make any statements strictly criticising the judiciary, such as insulting other judges (Gioroceanu 2024).

The position of the European Court of Human Rights

In its judgement, the European Court of Human Rights indicated that the Romanian authorities failed to recognise that a balance needed to be struck between the conflicting Convention rights at play. Judges are indeed obliged to exercise restraint due to the requirement of political neutrality, however, they also possess fundamental Convention rights that apply to every individual (Warecka 2024).

The European Court of Human Rights found that the first posted message did indeed criticise the political influences affecting certain state institutions, including the army and judiciary. However, the applicant referred to Romanian constitutional provisions, according to which the army was subject to the will of the people. As clarified by the Court: „Through the use of rhetorical questions, he invited his readers to imagine the army acting against the will of the people, someday, under the pretext of protecting democracy; in his view, this was a mere detail behind which lay a more serious problem" (European Court of Human Rights 2024a: p. 2).

The applicant's position, therefore, amounted to an assessment that constitutional democracy would be at risk if public authorities were to come back under political control. The posted message was closely related to a matter of public interest – main-

has been crossed when it comes to the judiciary, and in comment he praised a prosecutor for speaking out on political issues: "Now here's a prosecutor with some blood in his veins, speaking his mind about dangerous prisoners being freed, our leaders' bad ideas on legislative reform, and judges and prosecutors being lynched!" (European Court of Human Rights 2024b: p. 2).

taining the independence of public institutions. The second comment addressed not only a public interest issue but also a matter of personal concern for the applicant, as it directly related to legislative reforms that were expected to bring changes to the judiciary system.

The Court, after analysing the judge's social media posts, ruled that any interference with freedom of expression must be assessed with the narrowest margin of appreciation. It found that the Romanian courts failed to adhere to the principle of proportionality, noting that judges are expected to exercise restraint in their speech to uphold judicial authority and impartiality. However, in this case, the statements were neither unlawful, hateful, nor inciting violence. The European Court of Human Rights also criticised the Romanian courts for imposing a disproportionate sanction, such as dismissal, instead of a milder option (e.g. a reprimand), which likely discouraged public debate on important reforms (European Court of Human Rights 2024a: p. 3).

The disciplinary commission's decision, which was upheld by the highest judicial body in Romania, lacked sufficient justification to demonstrate that the questioned social media posts violated the dignity and honour of the judiciary. Furthermore, in its judgement, the Court found that the national courts did not adequately consider the broader context of the applicant's statements, which were made as part of a public debate on a matter of public interest. In their ruling, the national courts failed to assign proper importance to the freedom of expression (European Court of Human Rights 2024a: p. 1).

Freedom of speech and its limits – an analysis of the legal framework concerning possible restrictions

Protecting human rights, particularly freedom of expression, is a cornerstone of both international law and the national legal systems of democratic states. Recognised in international legal instruments and enshrined in many domestic legal frameworks, any restriction on fundamental rights must be clearly defined by statutory law and meet the principles of proportionality, legality and necessity. As Richard Moon wrote, "Freedom of expression, like other important rights, is supported by a number of overlapping justifications" (Moon 2000: p. 8) highlighting its role in the pursuit of truth, the promotion of individual autonomy, the functioning of democracy, and the fostering of social progress.

Article 10 of the *European Convention on Human Rights* undeniably serves as a fundamental safeguard of freedom of expression, ensuring that individuals can freely receive and disseminate information and ideas. In the context of international law, Article 10 plays a pivotal role in balancing individual freedoms and state interests, particularly in democratic societies where open discourse and access to information are essential for accountability and the protection of other human rights (see: *European Convention on Human Rights* 1950). However, it is important to highlight that in international law the issue of limiting freedom of expression is addressed not only by the *European Convention on Human Rights*. For instance, article 19 (3) of *International Covenant on*

Civil and Political Rights states that the freedom of expression shall only be limited due to necessary reasons provided by statutory law and establishes a closed catalogue of permissible limitations, confirming the mentioned observation (United Nations 1966: art. 19(3)). Similar stance may be observed in article 29(2), in conjunction with article 19 of the *Universal Declaration of Human Rights*. While article 19 regulates the right to freedom of expression, article 29(2) outlines that the limitations on human rights „are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society" (United Nations 1948: art. 29 (2)). Such legislations confirm the valid role of applying the proportionality rule in interpretation of each limitation on human rights in order to prevent excessive interference with democratic discourse.

Moreover, while signatories of the *European Convention on Human Rights* are required to meet a minimum standard of protecting fundamental rights, they are free to adjust these protections in national legal systems and expand them. For instance, when it comes to European Union, article 52 (3) of *Charter of Fundamental Rights of the European Union* states that the guaranteed rights align with those safeguarded by the *Convention for the Protection of Human Rights and Fundamental Freedoms*, however, Union law is not precluded from granting broader protection (*Charter of Fundamental Rights of the European Union* 2007). The norms are also not directly applied, meaning it may take a different form or be expressed in an alternative manner. As a result, constitutional law provisions may vary between countries.

In order to illustrate how law provisions concerning this issue have been implemented in different legal systems, a comparative analysis of national law in Poland, Hungary and Romania has been conducted. The selection of states was based not only on their shared legal obligations under the *European Convention on Human Rights* and EU law, but also on the necessity of examining relevant jurisprudence. In particular, the cases of *Žurek v. Poland*, *Baka v. Hungary*, and *Danileț v. Romania* constitute essential reference points for the doctrinal and case-law analysis developed in this article.

Against this background, the constitutional framework of Poland provides a clear example. According to article 54 (1) of *The Constitution of the Republic of Poland*, each person has the right to freedom of conveying one's opinions and obtaining and sharing information. General regulation of limitations are presented in article 31(3) of the act, incorporating the principle of proportionality into the legal system: „Any limitation upon the exercise of constitutional freedoms and rights may be imposed only by statute, and only when necessary in a democratic state for the protection of its security or public order, or to protect the natural environment, health or public morals, or the freedoms and rights of other persons. Such limitations shall not violate the essence of freedoms and rights" (*The Constitution of the Republic of Poland* 1997: art. 31(3)).

Concerning Hungary, article I (1) of *Fundamental Law of Hungary* acknowledges that „fundamental rights of man must be respected", and the state bears the primary responsibility for their protection. The next paragraphs of the specified article illustrate

the protection of human rights by proclaiming that „the rules for fundamental rights and obligations shall be laid down in an Act”, whereas restrictions are permissible solely „to allow the effective use of another fundamental right or to protect a constitutional value, to the extent absolutely necessary, proportionate to the objective pursued and with full respect for the essential content of that fundamental right.” (*The Fundamental Law of Hungary* 2011: art. I (3)).

In both of the aforementioned cases, the national law indicates that the limitations must be established in statutory law.

In reference to Romanian law, according to article 20 (1) of *The Constitution of Romania*: „Constitutional provisions concerning the citizens' rights and liberties shall be interpreted and enforced in conformity with the *Universal Declaration of Human Rights*, with the covenants and the other treaties Romania is a party to.” Moreover, according to article 30 of the act quoted above, the freedom of expression shall be inviolable and the only limitation may take place if it violates „the dignity, honour, privacy of a person, and to the right to one's own image” (*The Constitution of Romania* 1991: art. 30(6)). Therefore, applying both the linguistic and systemic interpretation, it becomes evident that the Romanian courts were obligated, not only by international law, but also by national law, to apply the principle of proportionality in Danileț's case.

The primacy of judge's freedom of expression in the context of public debate – a critical analysis of European jurisprudence

Judges, as integral members of society, hold a unique position that makes their participation in public debate both desirable and significant. Their authority in matters of legal knowledge, as well as the dignity of their office, places them at the meeting point of public discourse and professional ethics. As Michał Laskowski states: „The issue of the limits of a judge's freedom of expression is of interest both in the context of international regulations, the creators of professional ethics codes for judges, and Polish legislation [...]. Generally, it is accepted that a judge, as a citizen, has the right to freedom of speech just like any other individual, but due to their office, they are subject to certain restrictions when publicly expressing their views” (Laskowski 2023). This statement captures the delicate balance that democratic societies must navigate in determining how judges can participate in public debate – balancing their duty to remain impartial with their rights and responsibilities as citizens engaged in the life of the law and society.

As a general principle, freedom of expression must be assessed in light of the core principles that define the judicial role, including independence, impartiality, dignity and diligence (Sessa 2022). In this regard, impartiality is widely regarded as the essential foundation of ethical judicial conduct (Wendel 2008). In order to safeguard the credibility and independence of the judiciary, judges are traditionally expected to refrain from public or political commentary, particularly where it might compromise the perception

of their neutrality. This expectation of self-restraint is deeply embedded in judicial ethics codes across jurisdictions and plays a central role in maintaining public confidence in the judiciary's apolitical character.

However, the *rationale* for such restraint presumes the existence of a stable democratic order, in which institutional checks and balances are respected and upheld. In contexts marked by democratic regression or systemic threats to judicial independence, the paradigm shifts. Under such conditions, judicial silence may inadvertently facilitate authoritarian consolidation by masking institutional deterioration. In these situations the freedom of expression of judges assumes a qualitatively different function: it becomes not merely a residual civil liberty, but a mechanism of constitutional resistance and a form of institutional accountability.

Moreover, as Dominika Bychawska-Siniarska states: „Freedom to hold opinions is a prior condition of the other freedoms guaranteed by Article 10, and it enjoys an almost absolute protection in the sense that the possible restrictions set forth in paragraph 2 are inapplicable” (Bychawska-Siniarska 2017: p. 13).

In the context of the ECHR judgement in case of *Danileț v. Romania*, the European Court of Human Rights stated that freedom of expression is a fundamental principle of a democratic society and any restrictions on it must be exceptionally justified. The principle of proportionality requires that any measures taken must align appropriately with their intended purpose (Michalska 2019). Additionally, the disciplinary sanctions imposed on the judge for publicly criticising state institutions violated Article 10 of the Convention, as they were not necessary in a democratic society and did not meet the proportionality requirement established in the ECHR' 1976 judgement in case of *Handyside v. the United Kingdom* (European Court of Human Rights 1976).

Furthermore, the court adapted a similar stance in case *Baka v. Hungary*. ECHR ruled that Article 10 guarantees strong protection for statements on matters of public interest, allowing minimal discretion for national authorities. As it emphasised, especially in the context of comments regarding the functioning of the judiciary (European Court of Human Rights 2016). According to attorney Marek Nowicki: „Even if one were to accept that the reasons cited by the government were significant, they could not be considered sufficient to demonstrate that the alleged interference was necessary in a democratic society...” (Nowicki 2017). Given the above, it is crucial to acknowledge that matters of significant public concern should be addressed by individuals with the appropriate expertise and authority.

The case of *Żurek v. Poland* further illustrates the application of Article 10 to judicial freedom of expression, as the removal of a judge from his role as spokesperson for the Cracow Regional Court, seemingly neutral, raised concerns of interference due to his criticism of judicial reforms. The ECHR highlighted that „the general right to freedom of expression of judges to address matters concerning the functioning of the justice system may be transformed into a corresponding duty to speak out in defence of the rule of law and judicial independence when those fundamental values come under threat” (European Court of Human Rights 2022: p. 1, 55).

Regarding the European Union, all Member States are also signatories to the *European Convention on Human Rights*. Furthermore, according to article 6 (3) of the Treaty on European Union: „Fundamental rights, as guaranteed by the *European Convention for the Protection of Human Rights and Fundamental Freedoms* and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law” (TEU: art. 6(3)). Therefore, the values upheld by the Convention must be respected and safeguarded by all parties involved.

While the ECHR focuses directly on judges' freedom of expression, the jurisprudence of the CJEU, particularly in case of the Polish Disciplinary Chamber, highlights how disciplinary measures may undermine judicial independence and indirectly restrict judges' ability to express their opinions freely. For instance, in case of *European Commission v. Poland* (C-791/19), the CJEU examined Poland's disciplinary regime for judges (see: Judgment of the Court 2021).

In 2017, the Polish parliament, dominated by one political party, introduced a Disciplinary Chamber in the Supreme Court. One of the allegations raised by the Commission at the time was the issue of holding judges accountable based on the content of their rulings. The CJEU ruled that provisions allowing the content of judicial decisions to serve as grounds for disciplinary liability violate the principle of judicial independence. Even though the CJEU did not specifically mention the right to freedom of speech, it is evident that a clear connection exists between freedom of speech and the freedom to adjudicate. (CJEU 2021) In the context of judges' freedom of expression, this indicates that the disciplinary system cannot be used to restrict the freedom to adjudicate or to exert pressure on judges through the threat of sanctions for the content of their rulings.

Judicial impartiality and the rule of law crisis

The issue of judges' freedom of expression is a persistent point of tension in liberal democracies, and its significance grows depending on the context in which it is framed (Jabłoński et al. 2023). Current debates consider whether, during a rule of law crisis, such as the erosion of the separation of powers, restrictions on judges' freedom of expression should be adjusted.

Political power often positions itself as the authority responsible for identifying issues within the judiciary and proposing solutions, which extends to influencing judges' freedom of expression (Jabłoński et al. 2023). It is argued that the limits of judicial expression should include the possibility that judges may have both the right and the duty to speak out publicly in defence of the rule of law, when circumstances demand it (Laskowski 2023). As Anna Machnikowska stated: „The passivity of judges within the framework defined by evaluation mechanisms, procedures for filling vacant positions, and the appellate review system does not contribute to the public's recognition of the values that genuinely shape the quality of contemporary justice” (Machnikowska 2018). Given this, one must question whether judicial passivity is not only undesirable but potentially socially harmful in a democratic society.

Moreover, as the ECHR stated in several cases, such actions by national courts undoubtedly have a chilling effect on judges, discouraging them from participating in public debate or speaking out on important matters concerning the judicial system (Pech 2021). While democracies aim to protect freedom of speech, the reality often diverges, with fear undermining open dialogue. Judges, essential to upholding the rule of law, should be able to engage in debates without fear of sanctions (Fajdiga, Zagorc 2023).

Conclusions

In debate concerning the limits of one's freedom of expression, the dilemma of defining the boundaries of this freedom regarding judges, still lies at the crossroads of balancing conflicting legal norms. However, it is important to emphasise the role of ethical principles that underpin their professional conduct. On the one hand, the law imposes on judges a duty of restraint and neutrality, aimed at maintaining public trust in the impartiality and objectivity of the judiciary. On the other hand, a judge's freedom of expression, as a citizen of a democratic state, should not be unjustifiably restricted, particularly when their statements address issues critical to the functioning of state institutions and the defence of the rule of law.

While judge Danileț's statements were critical of state institutions, they remained within the bounds of permissible public debate and did not breach any legal or ethical standards. The measures taken were neither necessary nor proportional, as clearly demonstrated by the fact that the sanction was excessively severe and disproportionate. Given the above, it is possible to confidently determine that the Romanian courts did not apply the proportionality test, failing to uphold fundamental principles.

The thorough examination of international law compared with European Court of Human Rights' jurisprudence and relevant doctrinal literature, highlights the importance of proportionality rule in applying any restriction of human rights. Judges, as integral part of civil society, should be able to freely express opinions on public matters, provided that these statements fall within the scope of Convention-protected freedom of speech. The restrictions are justified only when there is a genuine threat to the dignity of the judiciary or public order, and the measures taken are proportional to achieving this aim. Otherwise, there is a risk of violating Article 10 of the *European Convention on Human Rights* and curtailing the space for constructive public debate, which forms the foundation of a democratic society.

Furthermore, the judge's expertise in legal matters not only grants them the right to freedom of expression but, when fundamental values such as the rule of law and judicial independence are under threat, transforms this right into a duty to speak out in their defence. Safeguarding democratic values requires ensuring that judges are not silenced through disproportionate sanctions, as such actions diminish the judiciary's capacity to engage in public debates on critical societal issues. The analysis emphatically shows that freedom of expression does apply to judges, allowing them to participate in public

debate concerning the functioning of state institutions. Moreover, the analysis successfully verifies its two key theses.

This article has achieved its objective by critically examining the boundaries of judges' freedom of expression through the lens of European Court of Human Rights jurisprudence, demonstrating how legal principles and doctrinal analysis support a balanced approach that upholds both judicial independence and democratic public debate.

Magdalena Marynowska – Law and International Relations student at the University of Warsaw, planning to pursue a doctoral degree. Her academic interests are focused on European law, contract law, and international commercial law. Beyond her studies, she is passionate about promoting legal literacy and fostering international dialogue on contemporary legal challenges.

Magdalena Marynowska – studentka prawa i stosunków międzynarodowych na Uniwersytecie Warszawskim, planująca podjęcie studiów doktoranckich. Jej zainteresowania naukowe koncentrują się na prawie europejskim, prawie umów i prawie handlu międzynarodowego. Poza studiami pasjonuje się promowaniem znajomości prawa i wspieraniem międzynarodowego dialogu na temat współczesnych wyzwań prawnych.

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