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Case Note

LIMITS OF A JUDGE'S FREEDOM OF EXPRESSING HIS/HER OWN OPINION: THE UKRAINIAN CONTEXT AND ECtHR PRACTICE

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LIMITS OF A JUDGE'S FREEDOM OF EXPRESSING HIS/HER OWN OPINION: THE UKRAINIAN CONTEXT AND ECtHR PRACTICE

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Abstract This paper examines the degree of permissible interference with a judge's freedom of expressing his/her own opinion and convictions. A question is raised about the limits of a judge's freedom of expression and discretion of the state in establishing his/her communicative behaviour, taking into account the established practice of the European Court of Human Rights (hereinafter ECtHR, the Court). Understanding these limits is important not only for individual judges but also for society as a whole, as restrictions on freedom of expression may affect the state's perception of the rule of law.

Systematic analysis of the key documents that regulate the issue of freedom of expression of a judge in Ukraine allows us to identify several spheres of imperative regulation of a judge's behaviour in the context of communicative activity: during the administration of justice (in court procedure); in public speeches, particularly in the media; during the implementation of other activities not prohibited for the judge – literary, scientific, educational; during Internet communication; in everyday life.

ECtHR case-law in the context of assessing the limits of a judge's freedom of expressing one's opinion develops in two directions. In the first, the judge's freedom is considered in the context of Art. 10 (freedom of thought, conscience, and religion, freedom of expression, and freedom of assembly and association) of the European Convention on Human Rights (hereinafter ECHR, the Convention). In the second, the right to freedom of expression is limited to the right to a fair trial of others (in the context of impartiality and independence of a court within the meaning of Art. 6 of the ECHR). In general, the matter of judicial evaluation was the statements of judges concerning cases that were in their proceedings; those criticising judicial reform measures and other administrative actions; those which criticised their colleagues.

The results of the analysis allow us to conclude that, despite the different preconditions, different circumstances, and varying implementation reflections, the freedom of a judge to express his/her opinion is limited by his/her special status as a state servant (in a broad sense). Where the boundary is in a particular case should be determined by considering the specific circumstances. However, national law enforcement authorities must develop their own criteria for assessing the balance of public and private interests in a judge's communicative behaviour.

Keywords: judiciary, authority of a judiciary, status of a judge, ethics of a judge, freedom of speech, freedom of expression, European Court of Human Rights.

1 INTRODUCTION

In any legal state, the judiciary has a special place as a guarantor of justice and the fundamental values of democracy. The effective functioning of the judiciary is a necessary condition for implementing the rule of law doctrine in any democratic state. The judge, who represents the judiciary in society as a person who administers justice, will always be in the focus of the public, experts, and all those involved in the creation of judicial reform in Ukraine.

Through the prism of assessing the judge's behaviour and his/her statements, both in court and outside it, a public image of a fair trial and trust in the judiciary is formed.¹ That is why it is important that a judge's motives and reflections correspond to the existing values and norms of morality in society. This situation determines the existence of certain restrictions, additional requirements, and responsibilities of the judge regarding his/her communicative behaviour.²

Thus, in his/her professional and daily activities, a judge must adhere to the rules of professional ethics, which are aimed at establishing respect for the high status of judges and the credibility of the judiciary in society. Domestic legal regulation of this issue is reduced to an ethical requirement for a judge – a judge's public speech should be characterised by restraint, caution, and neutrality. A judge's freedom of expression is also a matter of special attention for the ECtHR, which has formulated and developed a number of positions in its decisions that are valuable for the development of society, the status of a judge, and the judiciary of any country. In particular, the ECtHR is gradually developing a model for distinguishing between the civil rights of a judge as a person and the duties of a public figure in the context of freedom of expression. The Court continues to develop new concepts and approaches that could broaden the usual understanding of what is covered by the guarantees of Art. 10 of the ECHR, and it may narrow them too. Particular attention is paid to cases that form positive obligations of the state under Art. 10 of the ECHR – cases on freedom of expression in political discussion, the protection of confidential sources of information, the responsibility of news Internet portals for disseminating comments about judges, 'hate speech' between public institutions, etc.

Developing a system of reasonable and fair criteria for determining the permissible communicative behaviour of a judge is important not only for the individual judge but also for society as a whole, as restricting freedom of expression could negatively affect the perception of the rule of law.³ The approaches the ECtHR has developed in the context of the limits of freedom of expression of judges should be gradually implemented in national law enforcement and regulatory practice and developed with consideration for the national context.

1 Canadian Judicial Council Ottawa, Ontario, Ethical Principles For Judges. <https://cjc-ccm.ca/cmslib/general/news_pub_judicialconduct_Principles_en.pdf> (accessed 03 June 2021).

2 C Gray, Ethical Standards for Judges American Judicature Society. <https://www.ncsc.org/__data/assets/pdf_file/0026/17594/ethical-standards-for-judges.pdf> (accessed 03 June 2021).

3 European Commission for Democracy through Law (Venice Commission), Report on the Freedom of Expression of Judges, Venice, 19-20 June 2015. <[https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2015\)018-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2015)018-e)> (accessed 03 June 2021).

2 THE NATIONAL CONCEPTION OF A JUDGE'S COMMUNICATIVE BEHAVIOUR

The right to freedom of expression, according to researchers, is one of the most recognised human rights – it is enshrined in the constitutions of more than 87% of countries and appeared in constitutions as early as the eighth century.⁴ A judge, like anyone else, has the right to freely express his/her views, which is, among other things, a reflection of his/her independence. Art. 10 of the Convention provides that everyone has the right to freedom of expression and the Constitution of Ukraine in Art. 34 guarantees everyone the right to freedom of thought and speech, to freely express one's views and beliefs. At the same time, the professional status and role assigned to a judge in society impose certain ethical constraints related to his/her responsibilities to exercise and maintain the authority of a court and judiciary.⁵

The Bangalore Principles of Judicial Conduct state that

A judge, like any other citizen, is entitled to freedom of expression, belief, association and assembly, but, in exercising such rights, a judge shall always conduct himself or herself in such a manner as to preserve the dignity of the judicial office and the impartiality and independence of the judiciary.⁶

As we can see, a judge's right to freedom of speech and its exercise is bordered, limited, and assessed in the context of threats and risks to its independence and impartiality, as well as in the context of damage to the authority of professional status, the judiciary, and public confidence in it.

In the modern conditions of the state formation and development of Ukrainian society, which is still in the whirlpool of judicial reforms, the judge has become an active participant in communication processes that encourage active positioning of the judiciary in the information space, defending their own views on the problems of its functioning, protecting the corporate interests of the judiciary community, and, sometimes, the personal interests of a judge. That is why the issue of a normative communicative model of judicial behaviour is being actualised.⁷

The provisions of the Bangalore Principles of Judicial Conduct formulate the basics of the judge's communication model: before considering a case, a judge must refrain from any comments that could in any way affect the case or call into question the fairness of the trial (para. 2.4). The norms of the Code of Judicial Ethics that are in force in Ukraine correspond to this provision. In particular, with regard to the conduct of a judge in the administration of justice, it is provided that

a judge must perform the duties of a judge impartially and neutrally and refrain from... statements that may cause doubt on the equality of professional judges) (Art. 10);

a judge could not make public statements, comment in the media on cases pending before the court, and question court decisions that have entered into force. A judge has no right to disclose information that became known to him/her in connection with the hearing of a case (Art. 12);

4 M Janice, R Kay, E Bradley, *European human rights law (Practice and comments)* (Publishing House 'Human Rights', 1997) 179.

5 Constitution of Ukraine of 28 June 1996 <<http://zakon2.rada.gov.ua/laws/show/254%D0%BA/96-%D0%B2%D1%80/page3>> accessed 03 June 2021.

6 Bangalore Principles on Judicial Conduct of 19 May 2006: Approved by UN Economic and Social Council Resolution of 27 July 2006 No 2006/23. <https://zakon.rada.gov.ua/laws/show/995_j67#Text> (accessed 03 June 2021).

7 Ethical Principles for Judges (n 1); Code of Judicial Ethics International Criminal Court. <https://www.icc-cpi.int/NR/rdonlyres/A62EBC0F-D534-438F-A128-D3AC4CFDD644/140141/ICCBD020105_En.pdf> (accessed 03 June 2021).

a judge holding an administrative position in a court must refrain from statements that may cause doubt on the uniform status of judges and on the fact that judges collectively decide on the organisation of the work of a court (Art. 13).

Outside the court, a judge's participation in social networks, Internet forums, and other forms of communication on the Internet are permissible, but a judge may only post and comment on information that does not harm the authority of the judge and judiciary (Art. 20).⁸

These days, normative and law enforcement practice has developed several areas of regulation of a judge's communicative behaviour:

- (a) during the administration of justice (in a trial);
- (b) in public speeches, in particular in the media;
- (c) during Internet communication;
- (d) in everyday life.⁹

For the first one, the communicative behaviour of a judge in the trial is directly related to the requirements of independence, impartiality, and objectivity of the trial, non-discrimination of participants of the trial, and the constitutional principle of justice: respect for the honour and dignity of all participants.¹⁰

In the scholarly literature, it is noted that the interaction of the court with other participants of the trial on the basis of mutual respect provides a regime of a court hearing, including communication, the exercising during the trial of their rights, duties, any procedural actions performed in the context of their awareness of the importance of each other's responsibilities, and the social role of each of them.

...Manifestations of mutual respect... during the proceedings could be varied and consist of: polite treatment of each other; respectful and calm manner of communication in court; tactful and sustained manner of behavior; ... avoidance of disputes between each other and incorrect statements addressed to each other, etc.¹¹

That is, both the form and content of statements by the judge during the proceedings should serve as an expression of respect for the participants of the trial. A judge may not use offensive words or words that may humiliate or discriminate against others. At the same time, his/her words and expressions must be neutral and unbiased so that there is no doubt about his/her independence and impartiality. Any verbal expression of sympathy or antipathy to the participants of the trial could be regarded as a violation of the right to justice by an independent and impartial tribunal.

Regarding the requirements for public speeches of judges, particularly in the media, there is an important balance between the right to self-expression of members of the judicial community and not harming the authority of the judiciary. Restrictions due to a direct ban on judges from speaking publicly about cases pending are fair enough.¹²

8 Code of Judicial Ethics: Approved by the decision of the XI Regular Congress of Judges of Ukraine of 22 February 2013. <<https://zakon.rada.gov.ua/rada/show/n0001415-13#Text>> (accessed 03 June 2021).

9 O Khotynska-Nor, 'Judge's ethics and freedom of expression in the context of European Court of Human Rights judgments' (2020) 12 *Entrepreneurship, Economy, and Law* 284-289. <<https://doi.org/10.32849/2663-5313/2020.12.49>>

10 K Trykhlid, 'Law-making activity in the case law of the Constitutional Court of Ukraine (2019) 19 (2) *International and Comparative Law Review* 27-75. DOI: 10.2478/iclr-2019-0014.

11 C.H. (Remco) van Rhee, 'Towards harmonised European rules of civil procedure: Obligations of the judge, the parties and their lawyers' (2020) 1 (6) *Access to Justice in Eastern Europe*. <http://ajee-journal.com/upload/attaches/att_1587629785.pdf>

12 Judges' freedom of expression: Seeking a balance between constitutional right and reputation of the judiciary. <<https://pirc-musar.si/en/freedom-of-expression-of-judges/>> (accessed 03 June 2021).

As to the consequences of the public discussion by a judge of the course or the participants of the proceedings of a case hearing by him/her, the case of *Lavents v. Latvia* is illustrative, in which the judge

criticized the defense's position in the press, suggested possible results of the trial before its conclusion and expressed surprise that the applicant had insisted on his innocence.

In the Court's view, these statements meant that the judge had decided on the outcome of the case and was ready to reach a guilty verdict before the case was concluded on the merits. Such statements contradicted para. 1 of Art. 6 of the Convention and forced the applicant to fear that the judge was biased. Consequently, the Court concluded that there had been a violation of para. 1 Art. 6 of the Convention regarding the lack of impartiality of the court, and there was no need to consider whether the 'court was independent', as required by the Convention.¹³

Public discussions of judicial reform with the participation of judges are of particular interest since many reform measures, particularly in Ukraine, are aimed directly at changes in legal status, which does not always find support and provoke a barrage of criticism.¹⁴ In some cases, the rhetoric of judges may be marked by sarcasm or excessive sharpness in statements, which is incompatible with the neutrality required of the judiciary. In this regard, the Consultative Council of European Judges noted the need to uphold a balance between the right of judges to freedom of opinion, expression, and the requirement of neutrality

Judges must (even if their participation in a political party or public discussions on the main problems of society could be prohibited) refrain from any political activity that undermines their independence or threatens their impartiality. However, judges should be allowed to participate in discussions concerning national judicial policy.¹⁵

Perhaps one of the most well-known current decisions is *Baka v. Hungary*, in which the ECtHR has formulated a position on the right of a judge to publicly criticise measures aimed at reforming the judiciary. In general, the ECtHR considers that since a judge is a civil servant, the administrative power has discretion in imposing restrictions on a judge's freedom of expression, but it cannot restrict a judge from expressing his/her opinion on issues that have been a matter of public debate. Still, it is empowered to assess whether a judge's statements are unacceptable public speeches that violate the honour, dignity, and professional reputation of their colleagues. For example, in *Di Giovanni v. Italy*, the ECtHR found no violations of Art. 10 of the Convention, stating that 'the serious rumors which the applicant made public in her interview concerning her fellow judge who could be identified without giving him a chance to interpret doubts in his favor were completely unfounded'.¹⁶ In another case, *Kudeshkina v. The Russian Federation*, the applicant, who was a judge and ran for the State Duma, criticised the level of independence of judges in various interviews and accused the head of the court of pressuring the court. As a result of disciplinary proceedings, her powers were terminated. In its decision, the ECtHR recalled that

- 13 Judgment of the European Court of Human Rights of 28 November 2002 in *Lavents v Latvia*. <https://zakon.rada.gov.ua/laws/show/980_175#top> (accessed 03 June 2021).
- 14 G Borkowski, O Sovgyria, 'Current judicial reform in Ukraine and in Poland: Constitutional and European legal aspects in the context of independent judiciary (2019) 2 (3) Access to Justice in Eastern Europe. <http://ajee-journal.com/upload/attaches/att_1560677669.pdf> (accessed 03 June 2021).
- 15 Opinion No 3 of the Consultative Council of European Judges (CCJE) to the attention of the Committee of Ministers of the Council of Europe on the principles and rules governing judges' professional conduct, in particular ethics, incompatible behaviour and impartiality. <<https://court.gov.ua/inshe/mss/>> (accessed 03 June 2021).
- 16 Judgment of the European Court of Human Rights of 9 July 2013 in case *Di Giovanni v Italy*. <<https://hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=003-4595177-5556407&filena me=003-4595177-5556407.pdf>> (accessed 03 June 2021).

In saying that the restriction of the right to freedom of expression 'must be provided by law', the ECtHR understands the term 'law' in the broadest sense of the word, which includes any form of legal regulation. The key point is that legal requirements must be accessible, understood, and determine the consequences of their violation.

The assessment of the legitimate aim of restricting a judge's freedom of speech is interpreted by the Court through the principle of respect for the authority of the court and guarantees of impartiality of justice, sometimes in combination with the protection of the rights of other persons.²⁰

Most of the violations of the right to freedom of expression found by the Court in relation to a judge concerned the controversial justification of the need to restrict him/her in a democratic society. According to the case-law settled by the Court, a restriction of a right is necessary if there is a pressing social need and if it is proportionate to the legitimate aim pursued and its grounds are 'relevant and sufficient'. Applying these criteria, the ECtHR determines whether the national authorities have reached a balance between a judge's right to freedom of expression and the legitimate interest of the state to ensure the proper functioning of the judiciary.

In the case of *Wille v. Liechtenstein*, concerning the President's decision not to reappoint the President of the Administrative Court after he had spoken on a constitutional issue and his point of view did not coincide with the President's, the ECtHR stated that liabilities referred to in para. 2 of Art. 10 are of particular importance because officials belonging to the judiciary could be expected to restrict their freedom in cases where the authority and impartiality of the judiciary may be threatened. Based on this starting point, the ECtHR assesses the various circumstances of the case, including the consequences of a public opinion: for the judiciary, for society, and for the judge. Furthermore, the following are added to the system of the facts assessed:

1. the context of the public discussion;
2. the judge's motives to express himself in a certain way;
3. appropriateness of expression of opinion;
4. the quality of the national procedure for assessing the consequences of a judge's communicative behaviour and the procedure for prosecuting for violating the established restrictions on a judge's freedom of expression.

4 THE JUDGE'S RIGHT TO EXPRESS AN OPINION VS RIGHT TO A FAIR TRIAL

Public speeches by a judge and the expression of his/her opinion could be considered a violation of Art. 6 of the ECHR in the context of failure to ensure an impartial and independent court. In its practice, the ECtHR has also developed two criteria for assessing a complaint made for these reasons, using a test of subjectivity and objectivity. The test of subjectivity concerns the personal beliefs of the judge and answers the question of whether the judge has a prejudice against the case.

The ECtHR has repeatedly stated that it should be assumed that the judge is impartial until proven otherwise (presumption of impartiality (neutrality) of the judge). For example, in *Kyprianou v. Cyprus*, the ECtHR concluded that there had been a violation of para. 1 of Art.6 of the Convention (on the impartiality of the court). Among the reasons, the ECtHR noted that the judges had acknowledged in their judgment to the applicant that 'as human

20 S Dijkstra, 'The freedom of the judge to express his personal opinions and convictions under the ECHR' (2017) 13 (1) Utrecht Law Review 7.

beings' they had been 'deeply offended' by the applicant. According to the ECtHR, such a statement demonstrated that the judges had been personally offended by the applicant's words and actions. In addition, the expressive language used by the judges in sentencing conveyed a sense of indignation and shock, contradicting the impartial approach expected of the court in proclaiming its acts. In addition, the judges had expressed their views earlier in their debate with the applicant, stating that they found him guilty of a criminal offence – contempt of court.²¹

The test of objectivity concerns other characteristics of the court, including the existence of guarantees that exclude doubts about impartiality, for example, cases of doubts about a judge's impartiality due to his/her political activity.

Thus, in *Pabla Ky v. Finland*, the applicant argued that on the basis of the theory of separation of powers, his right under Art. 6 of the ECHR was violated because the judge was also a member of parliament. The ECtHR ruled that Art. 6 of the ECHR was not violated because the judge was not involved in legislative, executive, or advisory activities on the matter which was the subject of the applicant's proceedings, so there is no evidence that he participated in 'the same' or in 'the same decision'. However, the ECtHR assumes that there is no clear line between objective and subjective impartiality, as the judge's conduct may affect both of them. Therefore, the circumstances of each case are analysed according to both criteria.

With regard to a judge's opinion expressed in the media, interviews, or open letters, the ECtHR has formulated the following general rule

...among other things, the judiciary should exercise the utmost discretion in the cases before them in order to save the image of impartial courts. Common sense should lead them to self-limit the use of the press, even in the case of provocations. This commitment is imposed on them by the high interests of justice (*Olujić v. Croatia*).

There are also cases concerning a judge's membership in certain organisations. In particular, the ECtHR considered cases concerning the membership of judges in the Masonic lodge. Thus, in *Kiiskinen and Kovalainen v. Finland* and *Salaman v. The United Kingdom*, the ECtHR ruled that the judges' membership of that organisation did not infringe the applicant's right to a fair trial because it did not establish a link between the judge and the other party to the proceedings. Such an approach could, without a doubt, be extended to a judge's membership in other organisations and societies. However, the nature of these organisations plays an important role, as demonstrated in the dissenting opinion of the five judges in *Maestri v. Italy*, considered under Art. 11 of the ECHR (freedom of assembly and association), in which the judges considered membership in an Italian Masonic lodge to be incompatible with the status of a judge because of its specific image and links to organised crime.

The ECtHR has also paid attention to the assessment of the expression of emotions by a judge. The court found that the way the judge conducted the case, as well as the tone and content of his/her oral or written decision, may violate Art. 6 of the ECHR. An analysis of the case-law of the ECtHR reveals a gradual strengthening of the ECtHR's requirements for judges in such cases.

We can conclude that the violation of Art. 6 of the ECHR will be stated in decisions where the circumstances of the case indicate that the judge's opinions and beliefs are expressed in the form of obvious bias or when his/her activities are associated with a party or a particular case.

21 Judgment of the European Court of Human Rights of 15 December 2005 in the case *Kyprianou v. Cyprus*. <<https://hudoc.echr.coe.int/eng#%7B%22appno%22:%5B%2273797/01%22%2C%22itemid%22:%5B%22001-71671%22%5D%7D>> (accessed 03 June 2021).

5 CONCLUSIONS

The right of a judge to freedom of thought and expression is his/her inalienable right as a person and a citizen. The ECtHR, in interpreting Art. 10 of the European Convention, which guarantees everyone 'freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers', highlights the crucial importance of this right for the development of democracy, emphasising that freedom of expression is one of the basic foundations of a democratic society, a fundamental condition for its development, and an important condition for the realisation of the abilities and capabilities of each person.

However, the special status of a judge and his/her role in society allows the state to restrict his/her civil right to freedom of expression and normatively determine the model of his/her communicative behaviour. In this sense, it is important to find a reasonable balance between the principle of equality of rights and the principle of proportionality and reasonableness of restricting the rights of some people, in particular, judges, that is acceptable in a democratic society.

A judge's exercise of the right to freedom of expression is a necessary condition for the development of a democratic state in which the judiciary communicates with society and influences state-building processes. At the same time, in expressing his/her opinion, a judge must adhere to ethical standards and not jeopardise the basic values of the rule of law, including the authority of the judiciary. None of his/her words should call into question the independence and impartiality of the court or violate the right of another person to a fair trial in the context of Art. 6 of the ECHR.

The abovementioned points highlight the issue of balancing private and public interests in a democratic state. The formulation of the limits of a judge's freedom of expression that is acceptable in a democratic society must be based on clear, understandable, and reasonable criteria that consistently uphold the fundamental values of a democratic state governed by the rule of law – the independence and authority of the judiciary and human rights.

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