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**THE ROLE OF JUDGES
IN DEFENDING LIBERAL DEMOCRACY**



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Introduction

A number of EU member states are currently facing a **crisis of liberal democracy**. Countries such as Hungary and Poland have witnessed a rise of populist parties and some systemic changes to legislation and composition of public institutions, including courts. These threats do not come from the enemies of democracy, but from the democratic majority itself. It is submitted, however, that there are certain essential values that should be defended even against the democratic majority.

As has been famously argued by Fareed Zakaria, **it is not just democracy itself but rather *liberal democracy that is worth fighting for***.¹ Interestingly, past experience has shown that members of legally-trained occupations have usually played a significant role in the advances of political liberalism, but also in the retreats therefrom.² In this essay, we examine **the role of judges in defending liberal democracy**; we deal with examples from European countries where members of the judicial profession have stood up against developments threatening liberal democracy and the rule of law and we examine these examples in light of the European Convention of Human Rights (“Convention”) and the case law of the European Court of Human Rights (“ECtHR”).

The opening chapter of this essay offers a definition of liberal democracy and introduces two examples where judges have openly criticised reforms threatening the fundamental principles of liberal democracy in Hungary and in Poland respectively. The second chapter presents the very foundations of the freedom of expression as guaranteed by the Convention; the third chapter delves into the most relevant cases of the ECtHR; and the fourth chapter assesses the various perspectives that are (or should be) taken into account in the assessment of the judges’ exercise of their freedom of expression. These perspectives are then applied to the studied examples; and the essay concludes with a final chapter on the so-called ‘paradox of liberal democracy’.

Overall, the ambition of this essay is to critically assess the role of judges in defending liberal democracy, without endangering the authority and independence of the judiciary as a whole.

¹ ZAKARIA, Fareed. The Rise of Illiberal Democracy. *Foreign Affairs*, 1997, p. 22-43.

² HALLIDAY, Ference. KARPIK, Lucien. FEELEY, Malcom. *Fighting for Political Freedom: Comparative Studies of the Legal Complex and Political Liberalism*. Oxford: Hart Publishing, 2007, p. 3.

1/ Liberal Democracy and Judges Who Defend It

Most European countries are nowadays established on liberal democracy as one of the forms of socio-political system. Liberal democracy is typically based on attributes such as multi-party politics formed in democratic elections, recognition of individual rights, freedom of expression, maintaining political opposition, as well as a balanced division of state powers into the legislative, executive, and judicial branches. The judicial branch as one of the three powers of any democratic state shall guarantee the very existence of the rule of law by proper application of legal norms in an impartial, just, fair and efficient manner; judicial independence and impartiality are therefore essential prerequisites for the operation of justice.³

For the purposes of this essay, we can essentially define **liberal democracy as a democratic system of government in which individual rights and freedoms are recognized and protected by the state, and the exercise of political power is limited by the rule of law.**⁴

Liberal democracy is inherently fragile since it has a tendency, frequently triggered by the democratic majority itself, to slide towards either illiberal democracy or undemocratic liberalism.⁵ Both situations can seriously hamper the principles established and valued by liberal democratic society. In illiberal democracy, democratically elected governments are systematically undermining liberal principles, depriving citizens of their fundamental rights and freedoms, and violating the rule of law by their lack of respect for constitutional norms; the problem often goes hand in hand with the rise of populism. On the other side of the scale, undemocratic liberalism shows respect to individual rights and freedoms; yet, this happens at the expense of democratic principles, including citizens' engagement in politics and politicians' accountability; and the rule of the elite is usually emblematic to this situation. Depending on the extent of a slide and the seriousness of a situation we can even refer to **a crisis of liberal democracy.**

Recent developments in some EU countries have clearly shown that the endurance of liberal democracy cannot be taken for granted. Hungary and Poland have recently faced a steady rise of populism accompanied by attempts to change the composition of several key institutions. In **Hungary** in 2011, the second Orbán government initiated a complex set of reforms fostering the legislative and executive power while weakening the judiciary and the Constitutional Court. Accompanied by changes

³ The Magna Carta of Judges (Fundamental Principles), CCJE, November 2010.

⁴ The definition available at Oxforddictionaries.com [online].

⁵ See GALSTON, William A. *The Populist Challenge to Liberal Democracy*. Yale: Yale University Press, 2018.

such as lowering the age for mandatory retirement of judges, the reform was specifically designed to lead to an early termination of the mandate of Judge András Baka, former President of the Hungarian Supreme Court and President of the National Council of Justice. Similarly, the **Polish** government announced last year a series of reforms interfering with the balance of state powers at the expense of the judiciary. The proposed law intended to give the executive and legislative branches the opportunity to deprive the judiciary of its independence, to dismiss inconvenient judges and to subordinate judicial power to political management.

Situations in Hungary and Poland have raised **controversies and different public opinions** which provided both voices of criticisms and voices of support. However, these complex and radical reforms undermining the independence of the judiciary could hardly be deemed compatible with liberal democratic principles and the rule of law. Steps of the governments have been clearly condemned by the Venice Commission, the European Commission, the Court of Justice of the European Union, as well as the European Court of Human Rights.⁶ Threats to the very foundations of liberal democracy have not gone unheeded even by judicial functionaries who spoke up in defense of liberal democratic values.

In Hungary, Judge Baka publicly criticised several aspects of the proposed reform in his role as President of the National Council of Justice; he also successfully challenged some government decisions and laws before the Constitutional Court. He strongly opposed to the establishment of the new body replacing the National Council of Justice that would be granted new powers, in his view “excessive”, “unconstitutional” and “uncontrollable”. He also expressed criticism of the new retirement age of judges claiming that it would have an adverse effect on the Supreme Court.⁷

Legislative initiatives **in Poland** also stirred emotions among judges, even abroad. On 21 July 2017, the presidents of three Czech apex courts issued a public proclamation condemning the proposed Polish legislation.⁸ The Czech judicial functionaries have conveyed a very clear message:

"Following the paralysis of the Constitutional Tribunal and the subordination of public-service media to the current state party politics last year, an unprecedented attack on the independence of the Polish judiciary is now being seen. The laws passed on the National Council of the Judiciary and on the

⁶ E.g. Position of the Government of Hungary on the Opinion on the Fundamental Law of Hungary adopted by the Venice Commission at its 87th Plenary Session (Venice, 17-18 June 2011, CDL-AD(2011)016); on 17 January 2012, the Commission decided to open “accelerated” infringement proceedings against Hungary followed by the judgement of the Court of Justice of 6 November 2012 in case C-286/12, *Commission v. Hungary*, ECLI:EU:C:2012:687.

⁷ ECtHR, judgment in case *Baka v. Hungary* [GC], no. 20261/12, 23 June 2016 (see Ch 3 below for more details).

⁸ The proclamation was signed also by the Supreme Public Prosecutor and the Ombudsperson.

ordinary courts and the proposed law on the Supreme Court, which make it possible for the executive and legislative powers to relieve the judiciary entirely of its independence, to relieve inconvenient judges of their mandate and to subordinate the judiciary to the political system, represent an attack on the very foundations of the operation of democratic rule of law. While we are aware of and respect the sovereignty of the Polish state, we cannot remain silent about steps that threaten its very source, which are the inviolable values of European civilization, humanism and fundamental rights and freedoms.”⁹

The illustrated examples demonstrate that judges have been relatively active in exercising their freedom of expression, especially in cases where legislative changes have directly affected the judiciary and its independence. Some authors even suggest that acknowledgment of judges as social and political actors is required by a deeper understanding of judicial autonomy.¹⁰

In this context, it needs to be examined **whether judges, and particularly judicial functionaries, have a right (or even an obligation) to intervene and stand up for the values of liberal democracy and the rule of law in the exercise of their political rights and freedoms?** More specifically, have the Czech judges or the Hungarian judicial functionary overstepped any boundaries when publicly expressed their views? And would their public criticism be legally and ethically acceptable even if they commented on issues not directly affecting the judiciary?

The role of judges as protectors of their own independence and, in a broader sense, the rule of law and liberal democratic values is undoubtedly one of the most unexplored areas.

2/ Freedom of Expression and Its Limits: Legal and Ethical Perspectives

At the outset, it is crucial to examine the freedom of expression, as guaranteed by international and national conventions on human rights. According to Opinion No. 3 of the Consultative Council of European Judges, “[t]he judicial system can only function properly if judges are not isolated from the society in which they live [...]. **As citizens, judges enjoy the fundamental rights and freedoms protected, in particular, by the European Convention on Human Rights (freedom of opinion, religious freedom, etc).**”¹¹ Besides, showing respect for these rights belongs to the most fundamental attributes of a liberal democratic society. Of all political rights, this essay will focus on freedom of expression,

⁹ Available online at <https://www.usoud.cz/en/current-affairs/declaration-of-representatives-of-czech-judiciary-on-situation-in-poland/>.

¹⁰ TROCHEV, Alexei. ELLETT, Rachel. Judges and Their Allies: Rethinking Judicial Autonomy Through the Prism of Off-Bench Resistance. *Journal of Law and Courts*, 2014, p. 68.

¹¹ 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 (November 2002).

which – according to the ECtHR – “*in the content of effective political democracy not only is important in itself, but also plays a central role in the protection of the other rights under the Convention.*”¹²

At the international level, **Art. 10 of the European Convention on Human Rights is the cornerstone of freedom of expression.**¹³ As the ECtHR held in *Handyside v. UK*, Art. 10 “*constitutes one of the essential foundations of the democratic society, one of the basic conditions for its progress and for the development of every man*”.¹⁴ Art. 10(1) provides a range of rights including freedom to hold opinions and impart information and ideas, which are guaranteed to citizens in general, and therefore also to judges. Judges can therefore exercise this right in all its forms through any medium like articles, papers, books, radio interviews, information pamphlets, internet, films, cartoons or even paintings.

On the other hand, **Art. 10(2) aims to ensure a fair balance between the freedom of expression and its potential restrictions**, on condition that these 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.

In line with Art. 10(2), it seems that the **authority and impartiality of the judiciary** may lead to considerable limitations imposed on judges exercising their freedom of expression. According to the opinion of CCJE cited above, “[a] *reasonable balance therefore needs to be struck between the degree to which judges may be involved in society and the need for them to be and to be seen as independent and impartial in the discharge of their duties.*”¹⁵ As a rule of thumb, judges should generally refrain from **commenting on purely political issues** such as pension reforms, imposition of regulation fees in health care system or any other issues of a socio-economic nature that form the subject-matter of ongoing political discussions. This is because a judge can ultimately decide even in political cases which often stir strong emotions and controversies. Political activities of judges should not create an impression that they are in any way biased or that they show disrespect to the legal order. Thus, restrictions on the freedom of

¹² RAINEY, Bernadette, WICKS Elizabeth and OVEY Clare. *The European Convention on Human Rights: Commentary*. Oxford: Oxford University Press, 2014, p. 438.

¹³ The freedom of expression is usually enshrined also in national constitutions, and/or national catalogues of fundamental rights. In the Czech Republic, for example, this right is embedded in Article 17 of the Charter.

¹⁴ ECtHR, judgment in case *Handyside v. United Kingdom* [GC], no. 5493/72, 7 December 1976, para 48.

¹⁵ Opinion No. 3 of the CCJE (n 11).

expression of judges are typically justified by the objective of ensuring impartiality, neutrality and dignity as key attributes of the judiciary.

In addition to legal norms, **rules of professional ethics** represent a powerful tool that may significantly impact judges' freedom of expression. Professional ethics can be understood as one of the components of applied ethics that reflects the ethical aspects of the issues and problems arising within certain professions.¹⁶ Two key issues must usually be addressed: 1) the identification of a standard to which members of the judiciary must be held, and 2) a mechanism, formal or informal, to ensure that these standards are adhered to.¹⁷ The standards and core principles to which members of the judiciary must be held, have been already identified and codified in **judicial ethical codes**, which can be understood as sets of norms aiming to provide a guideline for responsible, professional and high-quality performance of the judicial profession.

In practice, the list of the most important **ethical codes** would include, inter alia, *The Universal Charter of the Judges*¹⁸ adopted by The International Association of Judges, the *European Charter on the Statute for Judges*¹⁹ adopted by the Council of Europe, *The Bangalore Principles of Judicial Conduct*²⁰ approved by the United Nations, and others.²¹ Also, for its members, the ECtHR has a *Resolution on Judicial Ethics*,²² while the members of the Court of Justice of the European Union are bound by the *Code of Conduct for Members and former Members of the Court of Justice of the European Union*.²³

In general, all of the above-mentioned codes emphasize similar fundamental principle concerning the exercise of freedom of speech of judges, namely that **judges have an indisputable right to exercise freedom of expression, but it is limited to the need to preserve the independence and other**

¹⁶ More generally, the basic task for professional ethics is to explain how the actions, commitments, and traits of character typical of the profession in question may be integrated into a life well-lived. Further see MARKOVITS, Daniel. *A Modern Legal Ethics: Adversary Advocacy in a Democratic Age*. Princeton University Press, 2008, p. 1.

¹⁷ LAHOTI, R. C. *Canons to judicial ethics*, Universal Law Publishing Co. Pvt. Ltd, 2005, p. 12.

¹⁸ *The Universal Charter of the Judges*, available online at: <https://www.iaj-uim.org/universal-charter-of-the-judges/>.

¹⁹ *European Charter on the Statute for Judges*, available online at: <https://rm.coe.int/16807473ef>.

²⁰ *The Bangalore Principles of Judicial Conduct*, available online at:

https://www.unodc.org/pdf/crime/corruption/judicial_group/Bangalore_principles.pdf.

²¹ For example IBA Minimum Standards (available at: http://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx), Recommendation on the Independence, Efficiency and Role of the Judge From the Committee of Ministers to the Member States, (13 October 1994) No. R (94)12 (available online at: <https://wcd.coe.int/ViewDoc.jsp?id=1707137>), Report on Judicial Ethics approved by the London Declaration on Judicial Ethics, July 2nd–4th 2010 (available at: <https://www.ency.eu/index.php/node/258>) and many others.

²² Resolution on Judicial Ethics, available online at:

https://www.echr.coe.int/Documents/Resolution_Judicial_Ethics_ENG.pdf.

²³ Code of Conduct for Members and former Members of the Court of Justice of the European Union, available online at: https://curia.europa.eu/jcms/jcms/p1_743290/en/

elemental principles of the judiciary. For example, Section 4.6. of The Bangalore Principles of Judicial Conduct states 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.*”²⁴

This key principle is so strong that the Commentary on the Bangalore Principles of Judicial Conduct (created by the United Nations) specifies that **a judge should not be involved in public controversies** such as participating in public debates, either by expressing opinions on controversial subjects, entering into disputes with public figures in the community, or publicly criticizing the government.²⁵ On the other hand, judges may speak out on matters that affect the judiciary, they may participate in discussion of the law and there may even be situations where a moral duty to speak out will be considered acceptable.²⁶

Regarding the binding character of these codes (and formal or informal mechanisms), they should be primarily respected by judges voluntarily and inwardly. The main sanction for their violation should therefore be condemnation by colleagues; a disciplinary (or other) sanction should play a subsidiary role and should be applied only if the ethical code ceases to act by its own convincing force. Secondly, their binding character depends on 1/ whether the ethical code is part of formal law (the code was adopted under the same legislative procedure as other laws, another law refers to the code as legally binding etc.), 2/ whether the code has a character of an internal regulation at the concrete court and its members, 3/ whether it is just a document adopted by a professional organization for its members, i.e. the judges, or 4/ whether the document represents only a recommendation or a comment made by an international institution/organization.

To conclude this part, there is evident tension between the judges’ right to exercise their freedom of expression on the one hand, and the requirement for the judiciary to remain independent in the eyes of the public, on the other hand. **These two values**, written both in legal and professional ethics norms, **should be weighed against each other** based on the specific circumstances of each case.

²⁴ The Bangalore Principles of Judicial Conduct, Section 4.6.

²⁵ See the Commentary on the Bangalore Principles of Judicial Conduct.

²⁶ *Ibid.*

3/ Freedom of Expression in the Case Law of the ECtHR

The provision of Art. 10 of the Convention has been given clearer contours in the case law of the **European Court of Human Rights** (“ECtHR”) throughout the past decades.

In relation to public officials, interesting developments have taken place near the end of the past century, essentially changing the understanding of the freedom of expression of public officials from an original conception applied by the European Commission on Human Rights that was rather restrictive²⁷ to a much broader understanding of the freedom in the case law of the ECtHR, starting with the judgment in *Vogt v. Germany*.²⁸

Mrs. Dorothea Vogt was a secondary school teacher in Germany who faced disciplinary proceedings for her previous membership in the German communist party. This was presented as a breach of her duty of loyalty to the constitution. In its assessment of the case, the ECtHR first summarised the key principles relating to the freedom of expression as guaranteed by Art. 10, and subsequently added a crucial novelty:

*“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. It therefore falls to the Court, having regard to the circumstances of each case, to determine whether a fair balance has been struck between the fundamental right of the individual to freedom of expression and the legitimate interest of a democratic State in ensuring that its civil service properly furthers the purposes enumerated in Art. 10 para. 2...”*²⁹

It can therefore be concluded without exaggeration that *Vogt v. Germany* was an important milestone leading to a broader understanding of the freedom of expression of public officials.

Four years after *Vogt*, the ECtHR delivered another landmark judgment, this time explicitly in relation to the freedom of expression of judges, in the case of *Wille v. Liechtenstein*.³⁰ Mr. Herbert Wille served as President of the Liechtenstein Administrative Court and was sanctioned by the Prince of Liechtenstein for expressing his opinions on the powers of the Constitutional Court in a public lecture.

²⁷ See for example two decisions of the European Commission of Human Rights which severely limited the freedom of expression of public officials: decision in case *Van der Heijden v. The Netherlands*, no. 11002/84, 8 March 1985, concerning a Dutch public servant dismissed for his opinions on issues of migration; and decision in case *Morissens v. Belgium*, no. 11389/85, 3 May 1988, concerning a Belgian teacher dismissed for voicing her criticism of state schools' approach to discrimination on grounds of sexual orientation which had personally affected her.

²⁸ ECtHR, judgment in case *Vogt v. Germany* [GC], no. 17851/91, 26 September 1995.

²⁹ ECtHR, *Vogt v. Germany* (n 28), para 53.

³⁰ ECtHR, judgment in case *Wille v. Liechtenstein* [GC], no. 28396/95, 28 October 1999.

Following this lecture, the Prince sent a letter to Judge Wille, informing him that he would not reappoint him in his office at the Liechtenstein Administrative Court. This, according to the ECtHR, constituted a breach of Judge Wille's freedom of expression guaranteed by Art. 10 of the Convention.³¹

The ECtHR subsequently delivered a number of judgments that confirmed this understanding of the scope of judges' freedom of establishment, most notably the judgment in the case of *Kudeshkina v. Russia*,³² as well as in other cases. One of the most recent and also most relevant ECtHR cases in this area was the judgment in *Baka v. Hungary*, delivered in June 2016. The situation leading to this case has already been briefly described above; the dispute stemmed from the criticism voiced by Judge Baka in relation to the systemic changes to the judiciary in Hungary.

It is crucial to note that Judge Baka did not only serve as President of the Supreme Court, but also as President of the National Council of Justice; and in this latter capacity, he was “*under an explicit statutory obligation to express an opinion on parliamentary bills that affected the judiciary, after having gathered and summarised the opinions of different courts via the Office of the National Council of Justice.*”³³

In the exercise of his statutory obligations, Judge Baka therefore repeatedly and publicly commented (in oral and in written) on a number of controversial legislative proposals affecting the judiciary.³⁴

This was criticised fiercely by political actors, including a Member of the Hungarian Parliament who stated: “*The adopted legal solution was said to be unfortunate. Now, I myself find it unfortunate if a member of the judiciary, in any position whatsoever, tries to exert influence over the legislative process in such a way.*”³⁵

As a consequence of the critical remarks voiced by Judge Baka, the Hungarian Parliament terminated his mandate as President of the Supreme Court through systemic legislative changes. This happened despite the fact that his term of office should have lasted until 22 June 2015 and despite the original declaration of the Parliament that the position of the President of the Supreme Court would not be altered.³⁶ As a consequence of the legislative and constitutional changes, Judge

³¹ ECtHR, *Wille v. Liechtenstein* (n 30), paras 63-70.

³² ECtHR, judgment in case *Kudeshkina v. Russia*, no. 29492/05, 26 February 2009, para 79.

³³ ECtHR, judgment in case *Baka v. Hungary* [GC], no. 20261/12, 23 June 2016, para 13.

³⁴ ECtHR, *Baka v. Hungary* (n 33), paras 15-23 and 145.

³⁵ ECtHR, *Baka v. Hungary* (n 33), para 17.

³⁶ ECtHR, *Baka v. Hungary* (n 33), paras 12 and 25 respectively; see also para 146.

Baka's term of office was terminated prematurely on 1 January 2012, more than three years before the expected date.³⁷

As for whether the termination of Judge Baka's mandate was in any way linked to his critical statements, the ECtHR concluded in its judgment that "*having regard to the sequence of events in their entirety, rather than as separate and distinct incidents, there is prima facie evidence of a causal link between the applicant's exercise of his freedom of expression and the termination of his mandate.*"³⁸ This was confirmed, according to the ECtHR, by indirect confirmations, such as media articles or texts adopted by international institutions. The burden of proof was therefore shifted to the Government to establish that no such causal link existed; the Government however failed to prove this, and the ECtHR therefore concluded that the premature termination of Judge Baka's office **constituted an interference** with the exercise of his right to freedom of expression.³⁹

Having established the existence of an interference, the ECtHR examined whether this interference was **justified**, i.e. whether it followed a legitimate aim foreseen by the Convention and whether it was necessary in a democratic society.

As for the **legitimate aim**, the Government submitted that the interference aimed to maintain the authority and impartiality of the judiciary within the meaning of Art. 10(2). Yet, according to the ECtHR, "*the premature termination of the applicant's mandate [rather] appeared to be incompatible with that aim.*"⁴⁰

Last but not least, in its examination of the **necessity of the measure in a democratic society**, the ECtHR concluded that Judge Baka's statements "*did not go beyond mere criticism from a strictly professional perspective*" and therefore "*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 [Hungarian authorities].*"⁴¹

³⁷ ECtHR, *Baka v. Hungary* (n 33), para 33.

³⁸ ECtHR, *Baka v. Hungary* (n 33), para 148.

³⁹ ECtHR, *Baka v. Hungary* (n 33), paras 149-152.

⁴⁰ ECtHR, *Baka v. Hungary* (n 33), para 156.

⁴¹ ECtHR, *Baka v. Hungary* (n 33), para 171.

4/ Perspectives Taken into Account in the Assessment of the Boundaries of Judges Freedom of Expression (“The Test”)

In the assessment of a potential breach of the freedom of expression of judges and judicial functionaries, the ECtHR usually stresses *the content of the impugned statement, the context in which the statement was made and the nature and severity of the penalties imposed* by the state upon a judge.⁴² This paper, however, does not focus on the application of Art. 10 in itself, but rather on the identification of the boundaries limiting the freedom of expression of judges, and even more specifically, the concrete question whether the Czech judicial functionaries overstepped the limits of their freedom of expression when they commented on the political situation in Poland. This question could arise already at the national level before national disciplinary commissions and eventually before the courts considering the behaviour of a judge who publicly expressed his or her opinion. For the purposes of our research, the last criterion applied by the ECtHR, namely *the nature and severity of the penalties*, can thus be set aside.

Generally, the legal assessment of whether a judge exceeded the boundaries of his or her freedom of expression will always depend on the specific facts of the case. The above-mentioned national institutions may find valuable inspiration in the decision-making practice of the ECtHR, namely as far as *the content of the impugned statement and the context in which the statement was made* is concerned. Both categories might be assessed from various angles; additional aspects that should be taken into account are further suggested.

- *1/ the judge’s position*

The first question will be whether the impugned statement of a judge was made in his or her capacity of **a citizen, a judge, or a judicial functionary.**

When considering a hypothetical case of a judge participating in a demonstration, it certainly makes a difference whether we are looking at a judge of a lower judicial instance who perfectly merges with the crowd without anyone recognizing him, as opposed to a well-known judge of an apex court who is easily recognised by the public. The former situation is not in itself problematic because concerns

⁴² European Commission for Democracy through Law (Venice Commission), “Report on the freedom of expression of judges”, adopted by the Venice Commission at its 103rd Plenary Session (19-20 June 2015), pp. 19-20.

about the independence of the judiciary are out of the play if the crowd perceives the participant of the demonstration merely as a citizen exercising his or her political rights.

The situation changes if someone from the crowd recognises a judge, typically if the judge is a well-known public person such as the president of the Supreme Court who appears in the press on a regular basis. The conduct of a judge as a mere citizen on the one hand, and in his or her judicial position (including judicial administrative functions) on the other, can influence the extent to which the independence of the judiciary might be threatened by the judge's appearance in demonstrations or other politically flavoured gatherings. The more famous a judge is, the more they should be cautious about their public behaviour since the public will more likely perceive them as a representative of the judiciary and thus, make a closer link between their statements and the judiciary and its independence as such.

Not to omit anyone who might fall into this category, even judges in charge of national (autonomous) judicial councils should be mentioned; they form in fact, at least seemingly, a specific group. In *Baka v. Hungary*, the ECtHR put an emphasis on the fact Judge Baka was under specific obligation to comment on the situation from his position of the President of the National Judicial Council; yet, the assessment of the court suggests that even without a specific national provision imposing on Judge Baka a legal obligation to express his views, the outcome of the case would most probably have been the same.⁴³ In fact it seems (from a legal perspective) that the ECtHR does not make any difference between a judicial functionary and the president of a national judicial council who officially represents not just one specific court but the judiciary as a whole.⁴⁴

- *2/ the subject-matter of the statement*

Secondly, the subject-matter of a statement is important – the ECtHR distinguishes between situations when the judiciary and its independence is affected and when it is not. In this respect, issues of *pure politics*, *the administration of the judiciary* and even of *liberal democracy in a broader sense* (going beyond the administration of the judiciary) might be distinguished.

⁴³ See also the decision in *Harabin v. Slovakia; Baka v. Hungary*, (n 33).

⁴⁴ The exception will be unconstitutionality of law. In such case, controversial law, or its specific provisions, shall be submitted by a lower court judge to the Constitutional Court with a proposal on quashing down the problematic act or some provisions thereof.

In general, judges should refrain from commenting on *purely political* issues such as pension reforms, imposition of regulation fees in health care system, or any other regulatory issues, mostly those of socio-economic characters. This is because they can ultimately decide even political cases while applying (and respecting) new legislation adopted by the Parliament; wider restrictions on freedom of expression in these cases are typically reasoned by the objective of ensuring impartiality and neutrality of the judiciary.

The ECtHR has further dealt with *the administration of the judiciary* as a specific subject matter of a statement, namely with legislative and constitutional changes affecting the judiciary. On the one hand, one might still remember that the administration of justice is by its very nature political; judges shall not by their actions jeopardize the independence and, thus, **political discussion always needs to take place only to the extent necessary**.⁴⁵ On the other hand, the ECtHR seems to be relatively benevolent (depending also on other criteria) towards public criticism of judges concerning legislative and constitutional changes to the judiciary. Interestingly, here we can notice a paradox because judges are in fact opposing to the threats to the judiciary and actively defending their own independence.⁴⁶ The independence is more likely to be hampered by external factors rather than by judges themselves who defend it.⁴⁷ Therefore, the more the external interference affects the judiciary and its independence, the less restriction should be imposed on the freedom of expression of judges who defend it. This criterion closely relates to **reactiveness**, rather than proactiveness of a judge and his or her position of a defender of the judiciary and its independency as one of the key cornerstones of liberal democratic society.

In *Wille v. Liechtenstein*, the ECtHR further dealt with the freedom of expression of a judge who expressed his views (during a series of lectures at a research institute) on **questions of constitutional law**.⁴⁸ It is thus obvious that the statement does not have to be directed only at regular political issues and the administration of the judiciary. The criticism or other public views of a judge can even respond to **issues of liberal democracy and the rule of law** in a broader sense that goes beyond the judiciary. For example, the subject matter can relate to systemic changes to checks and balances between the executive and legislative powers, the level of protection of human rights, or even to the standard of

⁴⁵ ECtHR, *Wille v. Liechtenstein* (n 30), para 64; *Baka v. Hungary* (n 33), para 168.

⁴⁶ TROCHEV, Alexei. ELLETT, Rachel. Judges and Their Allies: Rethinking Judicial Autonomy Through the Prism of Off-Bench Resistance. *Journal of Law and Courts*, 2014, p. 68.

⁴⁷ ECtHR, judgment in case *Kudeshkina v. Russia*, no. 29492/05, 26 February 2009, para 34 and ongoing.

⁴⁸ ECtHR, *Wille v. Liechtenstein* (n 30).

keeping international treaties. Besides, systemic changes to the Constitution may be part of a broader plan affecting the judiciary merely indirectly or posing a threat such changes will harm the judicial system sometime in the future.

Although it is not obvious from the case law of the ECtHR how the last mentioned situations pertaining to liberal democracy affect the final assessment of the case, we suggest that the freedom of speech in situations undermining liberal democracy and/or the rule of law (going beyond the administration of the judiciary) should not be limited more than those concerning merely the judiciary; quite the opposite. We base our argument on the following criteria.

- ***3/ the seriousness of a situation and the public interest criterion***

Situation of systemic constitutional or legislative changes not directly affecting the judiciary but undermining liberal democracy and the rule of law relates to **the seriousness of a situation**. From the judges point of view, the more a situation affects or may affect the judiciary of which they are part, the more severe a situation is. Similarly, a decision of the Parliament concerning the division of powers, systemically changing checks and balances in favour of one of them, will be undoubtedly more severe than a decision of local government imposing new road toll levy on trucks. In this respect also the *local, national* and *international* dimensions of a situation can be distinguished. A crisis of liberal democracy will usually occur at a national dimension but can evolve into an international problem due to the *ever closer Union* of states within the EU, as well as increasing globalisation.

Criteria such as *a geographic dimension* and *a seriousness of a situation* have not been (at least directly) addressed by the ECtHR yet. However, the seriousness of a situation and its dimension closely relate to **the extent of public interest** that might be harmed. In *Wille v. Lichtenstein* a judge commented on *a controversial provision of the Constitution* and interpreted it contrary to the views of the Prince and the Government. In this case, the ECtHR pointed out the relevance of public interest criterion and granted him the protection of his freedom of expression.⁴⁹ Similarly, in *Baka v. Hungary* the ECtHR further mentioned that judges should not be discouraged from making critical remarks about *public institutions or policies*.⁵⁰ The ECtHR's approach suggests accepting the fact that judges may publicly express their views not only as far as constitutional issues (not directly affecting the judiciary) are concerned, but also in matters such as the interpretation of the Constitution by the executive and

⁴⁹ ECtHR, *Wille v. Lichtenstein* (n 30), see above.

⁵⁰ ECtHR, *Baka v. Hungary* (n 33), para 125.

legislative branches, the level of protection of human rights, the fact that the Parliament is going to withdraw from an international treaty on human rights, etc.

Naturally, **not only situations directly affecting the judiciary might be of paramount importance to the public** and, thus, of great public interest. The public interest criterion (along with the seriousness of the situation) should be perceived as in fact as supporting judges in their public actions and, therefore, widening the scope of their freedom of expression rather than limiting it; yet, even in these cases, judges should mind preserving the independence of the judiciary.

- *4/ the scope and the nature of the statement*

Furthermore, **the scope and nature of the examined statement** should be of great significance. The ECtHR in *Baka* stressed that Judge Baka's statements did not go beyond *mere criticism from a strictly professional perspective*.⁵¹ In *Wille*, the court observed that "*there was no evidence to conclude that the applicant's lecture contained any remarks on pending cases, severe criticism of persons or public institutions or insults to high officials or the Prince.*"⁵² It depends on whether judges present constructive remarks in a moderate and appropriate way, or whether they publicly use inappropriate strong words including vulgarisms. In the latter scenario it is highly likely that the restrictions on the freedom of expression will be much tougher compared to the first situation, since in such case, it is an issue relating not only to the independence of the judiciary but also to its dignity. The depth of a statement and the level of its detail can also be of relevance in the assessment.

- *5/ the necessity of a restriction*

According to Art. 10(2) of the Convention, the interference within the freedom of expression can be justified if it can be shown that it is "**prescribed by law**", pursued one or more legitimate aim or aims defined Art. 10(2) **and**, at the same time, "**necessary in a democratic society**" to attain them.⁵³ However, the ECtHR have not acknowledged arguments submitted by the states that the restriction of freedom of expression of judges was required by the necessity in a democratic society.

⁵¹ ECtHR, *Baka v. Hungary* (n 33), para 171.

⁵² ECHR. *Press release issued by the Registrar: Judgment in the case of Wille v. Liechtenstein*, 28. 10. 1999, p. 4.

⁵³ *Ibid.*

Some of the above-mentioned aspects have already been addressed by the ECtHR (because the circumstances of the cases required so), whilst others have not. Some of them might be subsumed either under *the content of a statement* or *its context*, the categories used by the ECtHR, others are proposed as novelties to complement the existing criteria. The scope and the nature of a statement as well as the relevance of the position of a judge have been discussed in this chapter. *The necessity of a restriction* in a democratic society should also be considered. In searching for the boundaries of freedom of expression of judges, we further suggested taking into consideration other criteria such as *the proactiveness and reactiveness of judges*, *seriousness of a situation*, including *its geographical dimension*, and *the nature and the extent of public interest affected*. If all these categories are combined in various ways, the legal assessment of the situation changes. It is crucial to be aware of them and to understand how they influence this assessment because the freedom of expression of judges may vary accordingly.

5/ Application of the Test to the ‘Czech Judges’ Declaration’

Based on the criteria of our test outlined in the previous chapter, we can now proceed to evaluate the Declaration of the judicial functionaries of the Czech Republic against the developments in Poland (“the Declaration”). In fact, shortly after the publication of the Declaration signed by the Czech highest judicial functionaries, numerous actors have evaluated this statement and criticised it as going beyond the acceptable limits of the freedom of expression of judges and judicial functionaries. One of the fiercest critics of the Declaration was Kamil Kydalka, a Czech judge who himself had been previously condemned in disciplinary proceedings for exceeding the limits of his freedom of expression. On his Facebook profile, Kydalka wrote:

“I have read the declaration of representatives of the Czech judiciary [...]. I’ll try to suggest what I don’t like about the fact that Mr Šámal, Mr Baxa and Mr Rychetský have signed this, including all their functions. Some of you have certainly noticed the disciplinary proceedings against my person [...] for an article about the possible coalitions at the townhouse of one small town with about 3.000 inhabitants. And I have signed that article in the role of a cottage-owner. Despite that, there was a disciplinary proceeding, I was condemned, but not punished. [...] If I was chased in disciplinary proceedings for an article in a local newspaper, what will happen in the case of the above-mentioned gentlemen, who have interfered with international political affairs and who have moreover signed their declaration, including all their functions? Well, I would personally expect that they would also be chased in disciplinary proceedings! However, I do not expect this; because, as said in a proverb, ‘Quod licet Iovi, non licet bovi’. Any other result would only be a pleasant surprise for me! [...]”⁵⁴

⁵⁴ See the Facebook status of Judge Kamil Kydalka posted on 22 July 2017, available at: <https://www.facebook.com/kamil.kydalka/posts/340263476414652>.

We hereby submit that the reason for the different treatment of Judge Kydalka's case, as opposed to the case of the three judicial functionaries who have signed the Declaration, does not stem from the quoted Latin proverb. Rather, these two situations are fundamentally different; they diverge in various aspects of the test formulated in the previous chapter. Let us therefore apply the criteria of the test to the Declaration, in order to show why we do not perceive it as a blatant overstepping of the limits of freedom of expression.

First, as regards "**the judge's position**" criterion, the Declaration was signed by the presidents of the Constitutional Court, the Supreme Court and the Supreme Administrative Court. These three signatories are publicly known persons whose statement raised the interest of the media and feedback of many professionals and amateurs. Even more importantly, in light of the ECtHR's case law analysed above, it is very appropriate for high judicial functionaries to comment on issues of judicial reforms and other related questions. Any critical statements in this area should therefore be justified by a higher rate of necessity and by the nature of their position.

The main aspect of whether the Declaration exceeded the limits of freedom of expression will be the **subject-matter of the statement**. It contained not only the matter of judicial reforms but, given their nature (major structural changes in judiciary and in the division of power were going to happen), we can say that the changes would affect the basic principle of liberal democracy. Although still political, these issues significantly differ from matters of *pure politics* that should remain outside the scope of criticism voiced by judges and/or judicial functionaries.

The **seriousness of the situation** can also be considered to be very high. The systemic changes introduced by the Polish government have a potential impact on all Polish citizens who put their trust in the national judicial system. Moreover, given that the EU relies on national judicial systems in various cross-border mechanisms, most notably the European Arrest Warrant mechanism, any systemic changes to the national judiciary in fact affect not just Polish citizens, but potentially also citizens of all the remaining member states of the Union. Therefore, although the Czech judicial functionaries do not form a direct part of the Polish judiciary, we can argue that their concern for the worrisome systemic tendencies in Poland was not unfounded. Furthermore, the EU endeavours to guarantee a certain standard of rule of law on its territory as a whole, which means that a crisis of liberal democracy in one of its member states can certainly be of interest to the remaining member states as well. All EU countries belong to the European society; they share a certain mentality and

identity. Furthermore, the Visegrad countries are tightly bound in many ways and the Czech judges could have a justified fear of undesired changes of attitudes within the V4 group. **One country with liberal democracy on retreat can be a trigger for other countries.**

Last but not least, we should address the **content of the Declaration** which clearly and comprehensibly expresses the opinion of the representatives of the Czech judiciary. It politely mentions the fear of inapt changes and shows specific examples which the judges consider to be problematic. With this in mind, even the criterion of **appropriateness** of the document is fulfilled.

Based on the reasoning above, we conclude that the statement, despite being composed by the presidents of the three most important courts in the Czech Republic, did not cross the symbolic boundaries of the concept of freedom of speech. We therefore respectfully disagree with the criticism voiced by Judge Kamil Kydalka, quoted above.

6/ The Paradox of Liberal Democracy

National statutory provisions and professional codes of conduct concerning judges and their public behaviour are mainly written in the form of a negative obligation: they include prohibitions, rather than prescriptions. However, we submit that just like legal obligations, **ethical obligations should also be divided into negative and positive.**

Some documents such as the Commentary on the Bangalore Principles of Judicial Conduct cited in the Chapter 2 suggest so. The commentary speaks about a moral duty to stand out in defence of the independence of the judiciary; it specifically suggests that there might be the situation when “*judge may feel it a moral duty to speak.*”⁵⁵ In this context, “a moral duty” is deemed rather as **an option of a judge to use his or her freedom of expression.** Neither do the oaths of the judges support the view that judges should be active in exercising their freedom of expression since they are concerned mainly with their decision-making rather than external (political) activities.

Concerning judicial functionaries, and especially presidents of judicial councils, i. e. national autonomous bodies representing the judiciary as a whole, the situation seems different – a moral duty on their part or, in other words, “the compulsion to speak” might be even stronger. Some EU countries even impose a legal obligation on a specific category of judges to use their freedom of

⁵⁵ Commentary on Bangalore Principles, para 140.

expression. This aspect could be clearly observed in *Baka v. Hungary* where Judge Baka was under a specific (national) legal obligation to comment on legislative (and constitutional) changes directly affecting the judiciary.

However, not all judicial systems within the EU benefit from having a representative of the judiciary who would be legally obliged to defend the independence thereof. Thus, we put forward that such provision should be introduced also in other EU countries, not only towards the representatives of the judiciary as whole, but towards all judicial functionaries and even presidents of national apex courts in the EU member states. Otherwise, the defence of the judiciary against external attacks will likely depend merely on voluntary initiatives of the representatives of the courts or alternatively regular judges.

The positive obligation of judges in defence of liberal democracy in a broader sense is completely omitted. Although we find it extremely worrisome, the answer to the question of whether judicial ethics could include a positive obligation to defend liberal democracy will likely be in the negative: there is no such positive obligation, neither legally, or ethically.

On the other hand, **if judges want to speak up, they should be able to; and the impossibility to impose any positive obligation in fact makes this negative obligation even stronger.** Judges, and in particular judicial functionaries, will naturally have an interest in keeping and supporting the established principles governing the judiciary as well as the principles of liberal democracy and the rule of law. Some authors even speak about the new political roles of judges ranging from *peacemakers* to *state builders* to *election monitors*.⁵⁶ Judges are also perceived as creators of the current legal system and the principles of liberal democracy and moral authorities, so their voice certainly carries a significant weight. Coming back to where we started from, there are indeed some good reasons for judges, as well as for other legally trained professionals, to embrace the role of defenders of liberal democracy, while respecting the limits imposed on the exercise of their political rights by the aim of maintaining the authority and independence of the judiciary.

⁵⁶ TROCHEV, Alexei. ELLETT, Rachel. Judges and Their Allies: Rethinking Judicial Autonomy Through the Prism of Off-Bench Resistance. *Journal of Law and Courts*, 2014, p. 68

Conclusion

In this essay, we have examined the role of judges in defending liberal democracy, paying particular attention to concrete statements of Judge Baka who commented on the developments in Hungary and whose case has already been heard and decided by the ECtHR, and on the Declaration by representatives of the Czech judiciary who have condemned the developments in Poland. On the basis of a set of criteria, developed in the case law of the ECtHR and enriched by some modest suggestions from our side, we have critically assessed the said Declaration and concluded that it does not transgress the boundaries imposed on the freedom of expression exercised by judges and judicial functionaries. We therefore conclude with a statement, admittedly rather strong, that both the statement by Judge Baka and the Declaration of the Czech judicial functionaries, are prime example of the role that should be embraced by judges and judicial functionaries in the fight for liberal democracy and the rule of law.

Bibliography

Books and articles

GALSTON, William A. *The Populist Challenge to Liberal Democracy*. Yale: Yale University Press, 2018

HALLIDAY, Ference. KARPIK, Lucien. FEELEY, Malcom. *Fighting for Political Freedom: Comparative Studies of the Legal Complex and Political Liberalism*. Oxford: Hart Publishing, 2007

LAHOTI, R. C. *Canons to judicial ethics*, Universal Law Publishing Co. Pvt. Ltd, 2005

MARKOVITS, Daniel. *A Modern Legal Ethics: Adversary Advocacy in a Democratic Age*. Princeton University Press, 2008

RAINEY, Bernadette, WICKS Elizabeth and OVEY Clare. *The European Convention on Human Rights: Commentary*. Oxford University Press, sixth edition, 2014

TROCHEV, Alexei. ELLETT, Rachel. *Judges and Their Allies: Rethinking Judicial Autonomy Through the Prism of Off-Bench Resistance*. *Journal of Law and Courts*, 2014

ZAKARIA, Fareed. *The Rise of Illiberal Democracy*. *Foreign Affairs*, 1997

Case law of the ECtHR

Baka v. Hungary [GC], no. 20261/12, 23 June 2016

Handyside v. UK, no. 5493/72, 7 December 1976

Kudshbkina v. Russia, no. 29492/05, 26 February 2009

Morissens v. Belgium, no. 11389/85, 3 May 1988

Wille v. Liechtenstein [GC], no. 28396/95, 28 Oct 1999

Van der Heijden v. NL, no. 11002/84, 8 March 1985

Vogt v. Germany [GC], no. 17851/91, 26 September 1995

Soft law

Code of Conduct for Members and former Members of the Court of Justice of the European Union, Commentary on the Bangalore Principles of Judicial Conduct,

European Commission for Democracy through Law (Venice Commission), “Report on the freedom of expression of judges”

ECHR. *Press release issued by the Registrar: Judgment in the case of Wille v. Liechtenstein*, 28. 10. 1999

European Charter on the Statute for Judges

IBA Minimum Standards

The Magna Carta of Judges (Fundamental Principles), CCJE, November 2010.

Opinion no. 3 of the Consultative Council of European Judges (CCJE)

Recommendation on the Independence, Efficiency and Role of the Judge From the Committee of Ministers to the Member States,

Report on Judicial Ethics approved by the London Declaration on Judicial Ethics

Resolution on Judicial Ethics

The Universal Charter of the Judges

The Bangalore Principles of Judicial Conduct