Semi-Final D: Judicial Ethics and professional conduct
The Netherlands

Freedom of speech of the judge.

When does a judge speak on behalf of his office and when as his own private person? (Can such a distinction even be made?)

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1. The Demonstrating Judge

One of the most fundamental rights of any given person is the right to freedom of speech, as is (i.e.) anchored in Article 10 of the European Convention on Human Rights (ECHR). Even if an opinion or conception 'shocks, offends and disturbs'[1]. The extend of – the 'appropriate' use of – this right highly depends on the context in which it is exercised. Freedom of speech can come in many shapes and forms. It can be part of an everyday conversation, a (social) media post but it can also be part of something bigger. One of the most characteristic ways to exercise your right to freedom of speech, is by taking part in a physical[2] demonstration. Judges can – like anybody else – take part in a demonstration. In accordance with established case law of the European Court of Human Rights (ECtHR), judges are in fact characterized as 'civil servants'[3] and 'civil servants are individuals and, as such, qualify for the protection of Article 10 of the Convention'.[4]

The single fact that judges can exercise their right to freedom of speech does not automatically mean that they should. Where should we draw the line, if there is any line to be drawn? And when and under which circumstances should we stand up and speak up? By accepting the office, a judge already accepts the fact that he or she sacrifices a part of it's personal freedom:

> 'As a subject of constant public scrutiny, a judge must accept personal restrictions that might be viewed as burdensome by the ordinary citizen and should do so freely and willingly.'[5]

Because:

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[1] ECtHR, *Handyside v. United Kingdom*, Appl. No. 5493/72, Judgement of 7 December 1976, par 49. All ECtHR decisions are available at https://hudoc.echr.coe.int/.
[2] Demonstrations in a non-physical sense can be observed in several verdicts throughout the history of the Netherlands in which judges stood up for what they believed in (for example, the *Leeuwarder*-case (ECLI:NL:GHLEE:1943:22) in which in 1943 the judges stood up against the German occupier by preventing that the defendant was sent to the infamous camp 'Erika'.
[3] This position will be nuanced in section 2.B.2 of this paper.
[4] ECtHR, *Wille v. Liechtenstein*, Appl. no. 28396/95, Judgment of 28 October 1999, para. 62.
[5] The Bangalore Principles of Judicial Conduct, value 4.2.

> ‘If the judge is to condemn publicly what he or she practices privately, the judge will be seen as a hypocrite. This inevitably leads to a loss of public confidence in the judge, which may rub off on the judiciary more generally.’[6]

Can a judge still make full use of its right to freedom of speech, or is that right highly restricted by accepting office, because the person of the judge and its office become intertwined when wearing the judges toga? These questions will be addressed in this paper. We start by sketching some causes which can move judges to demonstrate (section 1.A). Then we present a discussion between Dutch judges regarding this matter section (1.B, 1.C), followed by the legal framework (section 2). Subsequently we discuss the right – and in some cases obligation – to speak out (section 3) and the use of symbols and the possible confusion on the part of the public (section 4). We conclude with some food for thought (section 5).

A. Which Causes Can Move Judges to Demonstrate?

A decade ago it seemed unrealistic in the Netherlands that a judge would take part in a demonstration. Maybe it is a sign of the times, maybe it is a counterweight to the more media orientated politicians. Or perhaps it is a last resort to try and to be heard. Whichever it is, since 2015 there have been a few days on which the streets turned black, because judges wearing their toga’s demonstrated pending changes to the judiciary or for protection of the rule of law.[7]

Friday 4 September 2015 was the first time in the Netherlands that judges in their toga demonstrated for interest of the judiciary. The Council for the Judiciary, the institute which is responsible for the finance of the judiciary[8] in the Netherlands, meant to implement budget cuts by appointing seven courts which would only handle straightforward cases. This would mean that those courts would only judge criminal law cases in regard to misdemeanors, civil law cases up to a financial interest of € 25.000 and common issues in regard to family law cases. All other cases would be judged in one of the other thirteen courts. In response, the judges of the court of Almelo signed a protest letter and the president of the court of Haarlem

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[6] UNODC, Commentary on the Bangalore Principles of Judicial Conduct, September 2007, no. 103.

[7] ‘The rule of law, I suggest, is an ideal, a goal, something to be strived for. As an ideal, it is never fully achieved. Its presence or absence, therefore, should be judged in relative terms; what is possible in highly developed western democracies may simply not be achievable in a developing country’. Robert A. Stein, ‘What Exactly Is the Rule of Law?’, *57 hours Law Review (*57 *Hours. L. Rev.)* (2019) 185.

[8] With the exception of the Supreme Court.

resigned.[9] The judges of the court of Alkmaar demonstrated in their toga together with a group of lawyers in a calm and dignified march from the court to the city hall.[10] The main issue of the judges against the intended budget cuts was the fact that legal aid seekers would have to travel longer distances to get to court. This would increase the threshold to take a case to the court and therefore influence the accessibility of justice. Before the year was over, the government made more money available for the judiciary and the intended budget cuts were not implemented.[11]

A much larger protest march took place a couple of years later in Poland. At the start of the new year, on 11 January 2020, an extensive group of judges from twenty countries gathered in Poland to protest the derogation of the rule of law.[12] The Netherlands was represented, among others, by a judge from the Supreme Court and representatives of the foundation Judges for Judges. Together with the other judges they were present in their toga. This protest was followed up by a letter from three international judicial organizations[13] to Von der Leyen in her capacity of the president of the European Commission. The presidents from these organizations expressed their concern about the fact that several member states of the European Union (EU) undermine the core values, such as the independence of the judiciary on which the EU is based. The rule of law was under attack. In particular, the presidents expressed their concern about the Polish Law of 20 December 2019 (Muzzle Law). In this letter they 'strongly demanded for the immediate start of an infringement procedure and interim measures as to this law'.[14] In short, in this letter representatives of the judiciary publicly demand action from the executive power of the EU. A second (digital) protest against the Muzzle Law took place on 8 June 2020, because Poland did not seem to be willing to comply with the judgment of the Court of Justice of the EU of 8 April 2020.[15,16] The rule of law in Poland is currently still under pressure. In the meantime, a documentary following

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[9] NOS, *Reorganisatie rechtsbanken zet kwaad bloed bij rechters* (2015), available at Reorganisatie rechtbanken zet kwaad bloed bij rechters | NOS.

[10] NOS, *Protest in toga tegen uitgeklede rechtbank Alkmaar* (2015), available at Protest in toga tegen uitgeklede rechtbank Alkmaar | NOS and BNR Nieuwsradio, *Voor het eerst ook rechters de straat op in protest* (2015), available at Voor het eerst ook rechters de straat op in protest | BNR Nieuwsradio.

[11] NOS, *Bedreigde rechtbanken blijven toch grote zaken doen* (2015), available at Bedreigde rechtbanken blijven toch grote zaken doen | NOS.

[12] NOS, *Poolse rechters betogen tegen regering, veel steun van collega's uit EU* (2020), available at Poolse rechters betogen tegen regering, veel steun van collega's uit EU | NOS.

[13] The European network of presidents of Supreme Courts, the European Association of Judges and the European network of Councils for the judiciary.

[14] J.C. Wiwinius, J.I. Matos & K. Sterk, *Letter to the president of the European Commission* (2020), available at Letter Judicial Networks to President Von der Leyen 21 Feb 2020 .pdf (amazonaws.com).

[15] ECLI:EU:C:2020:277.

[16] Nederlandse Vereniging voor Rechtspraak, *Rechterlijk protest tegen Muilkorfwet Polen* (2020), available at Rechterlijk protest tegen Muilkorfwet Polen | NVvR.

Tuleya, a Polish judge who keeps opposing the measures of the Polish government to limit the independence of the judiciary, has been released.[17] In reaction to the Tuleya situation, several Dutch judges (again) took part in a demonstration in Amsterdam to show their support for Tuleya.[18] The judges involved draped their toga's over their arm.

In short, Dutch judges feel and experience the freedom to demonstrate. Some say this has something to do witch the no-nonsense culture which the Netherlands is famous for. Others say it is because of the very liberal outspoken culture that circulates widely in the Netherlands and reaches the very capillaries of its society. And unlike our colleagues in, for example, Poland, we have the luxury that generally speaking the rule of law is not under attack in the Netherland. Whatever it may be, the question arises to what extend this right to demonstrate reaches for judges. Where do we draw the line?

B. Two Reactions – One Thing in Common: Restraint

The phenomenon of judges partaking in demonstrations has led to a discussion in the Netherlands in *Nederlands Juristenblad* (*NJB*) between two judges: Dijkstra and Heuveling van Beek.

Dijkstra identifies two forms of speech for judges: (personal) expression and formal positions. She qualifies demonstrations as a collective expression of the judiciary and proposes two precarious aspects of this expression, particularly when the judges demonstrate wearing their toga. The first aspect is that judges may give the impression that they appear as a representative of something bigger, such as the judiciary as a whole or even the constitution. The wearing of a toga adds to the confusion, because it implies acts of the office of judge. The second aspect is the toga itself. The toga is a symbol of, among others, the office of judge. It depersonalizes the judge as a person and gives him authority. When wearing a toga at a demonstration the personal expression derives authority and the separation between the person and the office becomes obscure (also see section 4).[19]

Heuveling van Beek felt the urge to respond to Dijkstra's article since she was one of the judges who participated in the demonstration in Poland. She agrees with Dijkstra that the

[17] Judges Under Pressure, which was broadcast in the Netherland by Foundation Dutch Public Broadcast (NPO) on 17 March 2022.

[18] And to demonstrate against – some consequences of the – implementation of the Comprehensive Economic and Trade Agreement (CETA). Mr. Online, *Op de barricaden; vóór Poolse rechter en tégen CETA* (2020), available at [Op de barricaden; vóór Poolse rechter en tégen CETA – Mr. Online (mr-online.nl)](mr-online.nl).

[19] S. Dijkstra, 'De demonstrerende rechter', 34 *Nederlands Juristen Blad (NJB)* (2021) at 2531.

judge as a person should always and everywhere be subservient to the judge as an office. However, she pleas that judges should not be crippled in the exercise of human rights. She refers to the role of the Dutch Supreme Court during the Second World War, which was an ethical inconvenient role as the body remained silent when it should have stood up for what is right. It should be prevented that judges look away or keep silent when a duty to speak up arises (also see section 3). Heuveling van Beek identifies such a duty when the rule of law is threatened. In such a case, the judiciary has, according to her, the duty to draw the line. The practice of freedom of speech is not so much for the benefit of the judge as a person, but mostly for the benefit of society whose interest the judge protects.[20] Judges as guardians of the rule of law. Not just in court, but embedded in the social debate.

C. What Should the Scope of Restraint Be?

Whereas Heuveling van Beek is clear about a justified reason for judges to partake in a demonstration, Dijkstra exercises more cautions. Even with a justified reason, society may get confused about the role of the judge partaking in the demonstration, especially when the judge wears his toga (also see section 4).

The demonstration on 4 September 2015 in Alkmaar, however, was not because the rule of law was threatened. It is beyond dispute that the interest of citizens opposed the intended budget cuts. Nevertheless, a clear interest of the judges as a person can also be distinguished. The contents of their work would be less challenging if they would only judge misdemeanor crimes, civil law cases up to a financial interest of € 25.000 and common family cases.

You can also imagine other reasons for partaking in a demonstration as a judge. For example, the proposed budget cuts did not only appoint seven courts for straightforward cases, but they also contained a hefty reduction of salary for the whole judiciary. Even though the interest of a judge predominates, you can still identify an interest of the legal aid seeker. One of the core principles of the judiciary is impartiality and salary is an aspect which insures the impartiality of a judge in regard to his/her legal position.[21] This raises the question what the scope of restraint should be when exercising freedom of speech as a judge.

2. What Is the Framework For Freedom of Speech of the Judge?

Several codes of conduct as well as the ECHR give norms on the freedom of speech of judges. These norms form the boundaries between which judges can exercise their right of

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[20] L. Heuveling van Beek, 'De demonstrerende rechter', 41 *Nederlands Juristen Blad (NJB)* at 3023.

[21] P.M. van den Eijnden, 'Onafhankelijkheid van de rechter', *Staat en Recht* 3 *(S&R)* (2011).

freedom of speech. Before we can explore the scope of restraint which judges should exercise, we need to know these boundaries.

A. Codes of Conduct

The most important Dutch codes of conduct are: 1) the Council for the Judiciary: Code of Conduct for Judicial Personnel and 2) the NVvR Judges Code. The first Council for the Judiciary: Code of Conduct for Judicial Personnel is (in part) based upon the Bangalore Principles of Judicial Conduct.[22] Because of this, the national code conforms with these international principles of judicial conduct. The guidelines of the European Network of Councils for the Judiciary (ENCJ) form a welcome addition to the Dutch codes of conduct, because it dwells on the struggle of exercising freedom of speech and the impression it might give to third parties.

1. The Council for the Judiciary: Code of Conduct for Judicial Personnel

The most recent version of the Council for the Judiciary: Code of Conduct for Judicial Personnel is applicable since 1 May 2010. The code aims to provide guidelines for the core values of the judiciary, such as impartiality, independence and integrity. Article 7 of this code reads:

> 'Judicial personnel shall understand that private conduct and the public expression of personal opinions may undermine trust in the judicial system.'

The Council for the Judiciary: Code of Conduct for Judicial Personnel offers limited guidelines in regard to the borders of freedom of speech as a judge. It should be sufficient that trust in the judicial system is not undermined by this use of human rights. There is, however, more. Article 3 of this code refers to the intermingling of work and private lives of judicial personnel. This guideline is elaborated in the Guidelines for impartiality and ancillary positions in the judiciary, which is applicable since January 2014. The premise of this guideline is that a judge is entitled to exercise freedom of speech, but must conduct himself in such a way that he does not prejudice his functioning as a judge of the functioning judiciary. This is based upon No. 4.6 of The Bangalore Principles of Judicial Conduct, a part of the propriety a judge should consider, which reads:

[22] No. 8 of the United Nations: Basic Principles on the Independence of the Judiciary is almost identical to this guideline.

'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.'

In other words, the core values of impartiality and independence of the judiciary and the dignity of the judicial office form the borders of the exercise of freedom of speech by a judge. According to the commentary on this code of conduct, restraint in the exercise of freedom of expression is necessary to maintain public confidence in the impartiality and independence of the judiciary. The degree of the involvement of a judge in the public debate is dependent on two fundamental considerations, namely whether the judge's involvement could reasonably undermine confidence in his or her impartiality and whether such involvement may unnecessarily expose the judge to political attacks or be inconsistent with the dignity of the judicial office.[23] The thought behind this is that a judge should not involve him- or herself inappropriately in public controversies. Judges should especially be seen by the public as exhibiting a detached, unbiased, unprejudiced, impartial and open-minded approach. These characteristics of a judge are impaired when a judge presides over a case which touches the subject about which he has expressed himself publicly.[24]
However, there are also matters on which a judge may properly speak out about, even if that matter is politically controversial. These matters are first and foremost those which affect the judiciary, such as the operation of the courts,[25] the independence of the judiciary and the personal integrity of the judge. Salary and other benefits are included as part of the independence of the judiciary. The judge should prevent being seen as lobbying for the government when publicly speaking out about these matters and must remember that his or her public comments may be taken as reflecting the views of the judiciary.[26] Furthermore, a judge may consider it a moral duty to speak out (also see section 3). This also constitutes a matter on which a judge may properly speak out. The examples given are forms of expressions of concern for the local and global community, such as expressing opposition to war or supporting energy conservation. However, these issues can lead to circumstances in

[23] UNODC, Commentary on the Bangalore Principles of Judicial Conduct, September 2007, at 77, No. 134.
[24] UNODC, Commentary on the Bangalore Principles of Judicial Conduct, September 2007, at 78, No. 136.
[25] Over 500 judges signed a petition to protest against the higher workload and pressure.
[26] UNODC, Commentary on the Bangalore Principles of Judicial Conduct, September 2007, at 78 -79, No. 138.

which the judge's impartiality might reasonably be questioned and he will have to disqualify him- or herself from the proceedings.[27,28] The final t matter mentioned is the participation of a judge in the discussion of the law. This discussion can either be held for educational purposes or to point out weaknesses in the law. The judge must avoid offering informal interpretations or controversial opinions on constitutionality and the input should relate to practical implications or drafting deficiencies. This commentary should be made on behalf of a collective or institutionalized effort by the judiciary, not of an individual judge.[29]

2. The NVvR Judges Code

The NVvR is an association of judges and public prosecutors which represent their interests. The NVvR Judges Code is more extensive than the Council for the Judiciary: Code of Conduct for Judicial Personnel, even though their target group is smaller. No. 2.5.4 of this code reads, as far as relevant:

> '(…) Like any other person, a judge is entitled to his own opinion, but he is aware that he is readily regarded by the public as a representative of the legal system and that an appearance in public might damage the authority of himself as judge and of the legal system as a whole. This means that he makes no public statement on matters which are still sub judice. Only exceptionally does a judge act in a public capacity while in office, other than as a judge responsible for briefing the press of in scientific publications. The judge is reticent when using social media and is aware that their use could cause undesirable links to be made.'

Unlike the Council for the Judiciary: Code of Conduct for Judicial Personnel, the NVvR Judges Code explicitly instructs only acting in a public capacity while in office in exceptional cases. However, no directive is given what cases might be exceptional. A connection with the Commentary on the Bangalore Principles of Judicial Conduct may be sought, even though this code does not refer explicitly to the Bangalore Principles of Judicial Conduct like the Council for the Judiciary: Code of Conduct for Judicial Personnel. The question may arise whether there might be more exceptional cases than the matters described in this commentary.

[27] UNODC, Commentary on the Bangalore Principles of Judicial Conduct, September 2007, 79, No. 140.
[28] In the Netherlands, some judges protested against legislation in Turkey and Poland regarding the position of judges as well as legal persons. The question arose whether these judges would and could still be impartial regarding international judicial assistance requests from these countries.
[29] UNODC, Commentary on the Bangalore Principles of Judicial Conduct, September 2007, 79, No. 139.

It is also remarkable that this guideline does not provide directives on how a judge should act in a public capacity after their time in office has ended. Statements from a former judge might still impact the authority of the legal system as a whole.

3. ENJC: Judicial Ethics Report 2009–2010

The ENCJ has reflected on the question of judicial ethics in response to society's expectations of judges. It is therefore that they have also paid attention to the awareness a judge should have on the influence of his professional behavior, private life and conduct in society on the image of justice and public confidence in the judiciary. The ENCJ has approved of the report entitled *Judicial Ethics – Principles, Values and Qualities* as guidelines for the conduct of European judges in order to affirm shared principles and values on a European level and strengthening mutual understanding between judges in Europe.[30] These guidelines are in effect since June 2010.

The report starts with a few core values of the judiciary, such as independence, integrity and impartiality, which also form a part of the aforementioned codes and guidelines. The value of reserve and discretion is discussed thereafter. The interesting part is that the report places the compliance of this value explicitly in the public as well as the private life of the judge, because it comprises the balance between the rights of the judge as a citizen and the constraints linked to his function.

According to these guidelines, a judge should exercise reserve in his dealings in his public life. The obligation of reserve cannot, however, be an excuse for inactivity. A judge is after all ideally placed to explain legal rules and their application. A judge thus has an educational role in his public life. Besides, the obligation of reserve may yield to the duty to speak out when democracy and fundamental freedoms are in peril. Unlike the aforementioned codes and guidelines, the ENCJ: Judicial ethics report prioritizes the judge's educational role when exercising his right to freedom of speech.

As mentioned before, this guideline also gives norms when dealing with third parties in his or her private life. These norms build on those regarding his public life, namely the obligation of reserve. This obligation does not preclude the judge from a normal social life. However, the judge should take common sense precautions in order to avoid undermining the dignity of his office or his ability to exercise it. The most important aspect is the refrain a judge should take from asserting his status in dealing with third parties, because a judge is not entitled, on a

[30] ENCJ Working Group Judicial Ethics Report 2009-2010, Judicial Ethics: Principles, Values and Qualities, June 2010.

personal level, to exercise powers that the law vests in him in the course of his judicial activities. A judge should therefore not give the impression of wanting to put pressure on third parties. In this regard the question arises what exercising the right to freedom of speech looks like to third parties when a judge wears his toga when doing so.

B. Article 10 of the ECHR

The ECHR determines that everybody has the right to freedom of expression.[31] The right to protest can be seen as a form of expression. However, it can also be seen as an expression of the freedom of assembly and association.[32] The ECtHR often assesses arguments submitted by the parties under both human rights together. It has decided that a protest should be assessed under application of Article 10, first paragraph, of the ECHR when the message is central to that protest and under application of Article 11, first paragraph, of the ECHR when the form is central.[33]

We assume that when judges use their right to protest, their message is essential. Therefore, this right would be assessed under Article 10, first paragraph, of the ECHR. This may be different when judges protest while wearing their toga. Because of the symbolic value of the toga, the form of the protest will be closely related to the message. In that case, both articles may be relevant and the line between both human rights will be obscure.[34]

1. The Protest as an Exercise of the Right to Freedom of Expression

Article 10, second paragraph, of the ECHR which contains the right to freedom of expression also contains restrictions in regard to the right to freedom of expression. These restrictions must be prescribed by law, serve a legitimate aim and be necessary in a democratic society.[35] Maintaining the authority and impartiality of the judiciary is, among others, such a legitimate aim.

The ECtHR has decided that professionals vested with public authority should, as a starting point, exercise restraint when using media to give criticism or ventilate their opinion.[36] It goes without saying that judges are professionals vested with public authority (also see section 4).

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[31] Art. 10(1) ECHR.

[32] Art. 11(10) ECHR.

[33] ECtHR, *Taranenko v. Russia*, Appl. No. 19554/05, Judgment of 15 May 2014.

[34] For example ECtHR, *Hashman and Harrup v. United Kingdom*, Appl. No. 25594/94, Judgment of 25 November 1999.

[35] ECtHR, *Sunday Times v. United Kingdom*, Appl. no. 6538/74, Judgment of 26 April 1979 and ECtHR, *Jersild v. Denmark*, Appl. No. 15890/89, Judgment of 23 September 1993.

[36] ECtHR, *Poyraz v. Turkey*, Appl. No. 15966/06, Judgment of 7 December 2010.

The ECtHR has explicitly decided that ‘it can be expected of public officials serving in the judiciary that they show restraint in exercising their freedom of expression in all cases where the authority and impartiality of the judiciary are likely to be called in question’.[37] The separation of powers and the importance of safeguarding the independence of the judiciary call for strict scrutiny in regard to the interference with the freedom of expression, according to the ECtHR.[38] In other words, limitations of the freedom of expression of judges will be assessed strictly. The ECtHR has decided in general terms that it is up to the judge to show restraint in exercising his freedom of expression in all cases where the authority and impartiality of the judiciary are likely to be called in question, because the judge – as a guarantor of justice – is a fundamental value in a democratic society and he must enjoy public confidence in order to successfully carry out his duties. However, even when a public debate in which a judge participates concerning the justice system has political implications, that is not in itself sufficient to prevent a judge from making a statement on the matter.[39]

2. The Protest as an Exercise of the Right to Freedom of Assembly and Association

Just as the freedom of expression can be restricted, the same goes for the freedom of assembly and association. These restrictions must also be prescribed by law, serve a legitimate aim and be necessary in a democratic society.[40] Legitimate aims are the prevention of disorder or crime, the protection of health or morals or the protection of the rights and freedoms of others. A demonstration should therefore not be restricted on the fact that judges are partaking in it, even if they are wearing their toga’s.

However, this paper gives the possibility to prevent lawful restrictions on the exercise of the freedom of assembly and association of, among others, the administration of the state.[41] It is therefore necessary to assess whether judges are part of this administration.

In first instance judges do not seem to form a part of the administration of the state. The judiciary forms one of the three powers of state together with legislative and executive power. It is the executive power which, as a rule, is charged with the administration of the state; a synonym of government. The ECtHR has decided in a case in which candidates for public office had to declare that they were not freemasons that ‘the administration of the state’

[37] ECtHR, *Wille v. Liechtenstein*, Appl. No. 28396/95, Judgment of 28 October 1999.
[38] ECtHR, *Harabin v. Slovakia*, Appl. No. 65284/00, Judgment of 29 June 2004.
[39] ECtHR, *Baka v. Hungary*, Appl. No. 20261/12, Judgment of 23 June 2016.
[40] Art. 11(2), first sentence, ECHR.
[41] Art. 11(2), second sentence, ECHR.

should be interpreted narrowly 'in the light of the post held by the official concerned'.[42] In another case about a labour union of municipal officials it decided that public servants should be interpreted as 'officials directly employed in the administration of the state'.[43] Seeing as the definition of a public servant is, according to Merrim-Webster dictionary, a government official of employee, the ECtHR seems to keep up a narrower interpretation of this notion. A side note must be made. It interpreted the notion of public servant by referring to the interpretation of the ILO Convention No. 98: Right to Organize and Collective Bargaining Convention by the expert committee of the International Labour Organization. It might be likely that the ECtHR takes a different course when interpreting 'the administration of the state' in regard to the right to demonstrate. Besides, in a case about a German teacher the ECtHR left it in the middle whether she was part of the administration of the state.[44]
It is a possibility that the ECtHR decides that judges form part of the administration of state seeing as the border between Articles 10 and 11 of the ECHR is a thin one. Otherwise, judges should exercise restraint in their right to freedom of expression, but loose this restriction when they take part in a demonstration which is part of the freedom of association and assembly. This restriction is necessary because of the unique position a judge has in society. It would be illogical if this unique position should not form a role in their freedom of association and assembly in the sense of the right of demonstration. A demonstration can also detract from the authority or impartiality of the judiciary which would mean that the same goes for this human right as for the freedom of expression. Therefore, it should not matter for the assessment of a case whether it is covered by Article 10 or 11 of the ECHR.

3. Speak out

Aforementioned are – in general – the restraints regarding the right of a person (i.e. a judge) to speak out. On the other side of these restraints we see a duty. A duty to speak out 'when democracy and fundamental freedoms are in peril'.[45] The case *Baka v. Hungary*[46] is about the president of the Hungarian Supreme Court, who is also president of the National Council of Justice. One of the statutory obligation of the National Council of Justice is to comment on reforms to the judiciary. Baka expressed his views on four issues. One of these issues was the

[42] ECtHR, *Grande Oriente d'Italia di Palazzo Giustiniani v. Italy*, Appl. No. 35972/97, Judgment of 2 August 2001.
[43] ECtHR, *Demir & Baykare v. Turkey*, Appl. No. 34503/97, Judgment of 21 November 2006.
[44] ECtHR, *Vogt v. Germany*, Appl. No. 17851/91, Judgment of 26 September 1995.
[45] European Network of Councils from the Judiciary, *Judicial ethics report 2009-2010.*
[46] ECtHR, *Baka v. Hungary*, Appl. No. 20261/12, Judgment of 23 June 2016.

lowering of the retirement age of judges from 70 to 62. Baka and other court presidents addressed their concerns in multiple letters to the President of the Republic, the Prime Minister and the Speaker of Parliament. Baka addressed another letter to the Prime Minister on the day of the vote. After the vote, he also made a public announcement to the Hungarian and EU public about this reform and expressed his concern about the constitution of a new body which was to replace the National Council of Justice in a speech to the Hungarian Parliament. Baka's term as president of the Supreme Court was immediately terminated after this speech and before his term had ended. One of Baka's complaints to the ECtHR was a violation of Article 10 of the ECHR, since his term as president was terminated because he had publicly expressed his views on the reforms. Judge Wojtyczek describes this duty to speak out in his dissenting opinion in this case as follows:

> 'Firstly, speaking out is a duty. Although the nature of this duty is not clearly explained in the reasoning, it may be assumed that it is not only a moral but also a legal duty. Secondly, it serves a specific public interest. Thirdly, it is perceived as a tool which serves to protect the position of the judicial branch in its relations with the other branches of State. (…) The sphere of judges' speech cannot be regarded as a domain of personal choice, but instead as a field subject to precise legal obligations, which have been imposed in the public interest and which restrict the choices available to a judge. In other words, judges' official speech is not a matter of individual freedom, but remains very strictly circumscribed and subordinated to the promotion of specific public interests. Public office in the judiciary is not a rostrum for the exercise of free speech.'

Speaking out is a duty, but only when that specific sound serves a specific public interest (subject to a case-by-case assessment) and meets the conditions as set out in this paper. If these conditions are not met, a judge risks the consequence that their remarks are placed within the sphere of their employment in the civil service.[47] In that case, treaty provisions do not prelude disciplinary measures (in extreme cases). For example, in the case *Simic v. Bosnia Herzegovina*[48] which is about a constitutional judge who wrote a letter to the prime minister of Respublika Srpska in which he wrote that he was at the disposal of the prime minister. And

[47] ECtHR, *Harabin v. Slovakia I & II*, Appl. Nos. 62584/00 and 58688/11, Judgments of 29 June 2004 and 20 November 2012.
[48] ECtHR, *Simic v. Bosnia Herzegovina,* Appl. No. 75255/10, Judgement of 8 December 2016.

more recently the case *Panioglu v. Romania*[49] which is about a judge who published an article about another judge in which she insinuated that the other judge had acted in an unlawful and morally questionable manner in his work as a prosecutor during the communist regime and included his name in the bylines of that article. Even though the article contains a factual account of the career path of the other judge, it casts him in an unfavorable light without supporting evidence. Disciplinary and administrative proceedings were started against Panioglu. The ECtHR decided that in her case there was no violation of Article 10 of the ECHR.

It is easy to speak out when the duty is based upon the law or upon a statutory obligation, such as in *Baka v. Hungary*. The public interest in such cases is almost always a given. But how can the duty to speak out be assessed when a judge feels the (intrinsic) moral obligation to speak out?

Two characteristic examples when judges feel the moral obligation to speak out come from South America.
In 2009, a military coup took place in Honduras. Four justices, of which three judges, from the Association of Judges for Democracy expressed their opposition against the overthrow of the president. They adopted a legal position on behalf of the Association of Judges for Democracy in which they (publicly) criticized the role of the Supreme Court in ousting the president and making way for the military coup. In the year after the coup, the judges were dismissed by the Plenary of the Supreme Court. They submitted their case before the Inter-American Court on Human Rights (IACHR) in which they argued a violation of, among others, Article 13 (freedom of expression) and Article 15 of the American Convention of Human Rights (freedom of assembly). The IACHR decided that judges can feel a moral obligation to speak out. Honduras has violated the freedom of expression and freedom of assembly of the judges by dismissing them after they spoke out.[50]

[49] ECtHR, *Panioglu v. Romania*, Appl. No. 33794/14, Judgment of 19 April 2021.
[50] IACHR, *López Lone y otros v. Honduras*, Judgment of 5 October 2015, available in Spanish at seriec_302_esp.pdf (corteidh.or.cr). The judgment reads: 'declara, por unanimidad, que: El estado es reponsable de la violación de los artículos 13.1, 15 and 23 de la Convención Americana (…) debido a que el procedimiento disciplinario seguido en su contra y su posterior destitución constituyeron una restricción indebida a su libertad de expresión, derecho de reunión y derechos políticos, de conformidad con lo expuesto en los párrafos 160 a 178.'. In English: declares unanimously that the state [Honduros] is responsible for the violation of the freedom of speech and assembly, because of the disciplinary measures which were taken and lead to the dismissal [of the judges] in accordance with paragraph 160 up until 178. The facts and the legal grounds are available in English in the report of the Inter-American Commission on Human Rights of 31 March 2011, which is available at University of Minnesota Human Rights Library (umn.edu).

In the second case, a political rivalry between the judiciary and the provincial executive powers took place in San Luis (Argentina). Three judges signed a note in which they expressed their critical opinions about the institutional crisis – triggered by the provincial executive powers in order to attempt to destroy the independence – which affected the judiciary. This led to the dismissal of these judges, because they were charged with 'the public or concealed intervention in politics or the carrying out of acts in that name'. The three judges signed a petition to the Inter-American Commission on Human Rights, because they felt their dismissal as a consequence of their critical opinions, which constitutes a violation of their freedom of expression. This Commission refers to No. 4.6 of The Bangalore Principles of Judicial Conduct and the case *Kudeshkina v. Russia*[51] in order to assess whether a legitimate objective for the restriction of the right to freedom of expression existed. According to this commission, the dismissal was 'completely disproportionate' because the exercise of the right to freedom of speech took place in order to protect the independence and impartiality of the judiciary.[52]

Speaking out based on a moral obligation is a grey area for judges. Some situations, and therefore the obligation to speak out, are crystal clear. As set out in this paper, these situations have in common that the relevant judges spoke out to defend rights and obligations regarding/protecting the judicial system (as a whole). This distinction becomes more difficult to make if the subject in question is further away from the subject 'judicial system' (as a whole). Can a judge, for instance, criticize the government for not taking enough steps in reducing climate change? And does it make a difference if the judge in question does this through social media or through his verdict? We believe that a judge can indeed speak out in these situations, and in the Netherlands the judges did.[53] The common denominator: protecting a cause that is bigger than the judge in question, i.e.: the public interest.

4. Using Symbols: Confusion on the Part of the Public?

A judge in office exercises state authority. The relation between a judge in office and individual subjects to the law can be characterized as vertical. Typical for this type of exercise of power is that the office-holder is to be seen as a 'temporary holder of the office' and as a 'public trustee'. For the office, the holder is – in principle – interchangeable. Power is not a

[51] ECtHR, *Kudeshkina v. Russia,* Appl. No. 29492/05, Judgment of 14 September 2009.
[52] IACHR, Report No. 43/15, Case 12.623, available at Report No. 43/15 (oas.org).
[53] In the *Urgenda* case. See: Klimaatzaak Urgenda | Rechtspraak.

personal possession, but institutional invested and bound by democratic legitimized rules. 'Government by laws and not by men'.[54] There is a specific distinction in person-office. This relation, more specifically the distinction, between person-office is being manifested with (e.a.) symbols. The symbol that clearly separates person-office when it comes to the position of a judge, is the toga. The toga dehumanizes: the judge as a person dies.[55]

This also works the other way around. If somebody – outside of the courthouse – wears it's toga and uses their right to freedom of speech, they automatically claim authority through their toga (as a symbol of power). The opinion 'rides on the back' of the office.[56] Ethically, this can be problematic because – in the eyes of the public – an opinion from a 'toga' turns in to the opinion of the entire judiciary pretty fast. A distinction can also be made between the expression of the freedom of speech made by only one judge, and that of a united group of judges. In the last situation, the opinion of that grout can hardly *not* been seen as the opinion of the entire judiciary. Especially if that grout is arranged and brought together by their representative organization.

Also on social media, there seems to be a development going on where an opinion is combined with a toga (a *toginion*, if you will). Think of profiles from judges on social network sites like Twitter and LinkedIn where they wear toga's and comment on several topics. In the Netherlands for example, we have 'Judge Joyce'[57] and 'Judge Jos'[58] who frequently post content online which can be classified as *toginions*. Do these *toginions* cause confusion on the part of the public? Here too: "*C'est le ton qui fait la musique*".

5. Conclusion

As the debate is still ongoing and the respect for the rule of law differs per European nation, we may not forget or take for granted that in general the rule of law is well embedded in European society. During the Initial training of justice professionals serving the rule of law event[59] – organized by the European Commission – vivid (and obvious) pleas were held for the importance of respect for the rule of law. As all European nations differ and have their national challenges, a one-size-fits-all guide as suggested by some will simply not work in

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[54] Aristotle, *The Politics* (c. 350 BC), Stephen Everson (trans.), *Cambridge: Cambridge University Press* (1988) at 1287b.

[55] A.M. Hol, 'Rituelen en symbolen in de rechtspraak. Hun functie en betekenis', *Ars Aequi (AA)* 55 (2006) at 811.

[56] C.M. Cobin, 'Mixed Speech: When Speech is Both Private and Governmental', *New York University Law Review* (*N.Y.U. L. Rev.)* (2008), 605, 83, at 638.

[57] Judge Joyce (Joyce Lie) (@JudgeJoyce_) / Twitter.

[58] Rechter Jos (Jos Vink) (@rechterjos) / Twitter.

[59] 22 and 23 February 2022 in Bordeaux, France.

practice. Instead of providing all member states with a practical guide, we would emphasize that respect for the rule of law is an inclined plane. As the rule of law is an abstract concept, the rule of law relies on allies. Judges are the premier allies for respect of the rule of law, and must act in according with this role not only in, but also out of court. But not only for the protection of the rule of law, there are more reasons for a judge to speak out. As stated in this paper, the obligation to speak out can also be found in the fulfillment of a moral obligation. A subjective angle which needs objective boundaries in order to be assessed as a permissible *toginion.* The first question that always should be answered is: which interest is being served?

There are three reasons in particular why judges must and need to speak out actively in public.

First of all, other governmental bodies have different (and in some countries even conflicting) interests. Given the fact that we all understand the importance of the rule of law, we cannot rely on other governmental bodies and their agendas to do the right thing. Doing the right thing must prevail at all costs and cannot be done by the rule of law itself. Therefore, judges are the designated gatekeepers as well as protectors.

Secondly, the mission to divide the judge as a body and as an individual is a fictional one. If having a personality would impair our suitability as a judge, we could easily be replaced by artificial intelligence. As the *Toeslagenaffaire*[60] in the Netherlands revealed, the human dimension (the consequences of a legal decision for the parties involved, especially in administrative law cases) must be kept in mind in court as well. Applying the law does not suffice when taking the human dimension in consideration as a compliment of the rule of law. Adding a personal opinion to the office of judge does not impair the judicial institution and does detract from the core values of the judiciary or readily damages the authority of a judge

[60] A rough translation would be the Allowance affaire. The Dutch Tax Authorities are not only charged with the levying of taxes, but also with the payment of allowances, such as the childcare allowance. Parents of a child who goes to a daycare for one or more days a week can claim this childcare allowance. On request of the Dutch Tax Authorities they have to submit receipts in order to prove that their child went to the daycare for the number of days for which the childcare allowance was claimed. If the parents could not submit these receipts – even if it was only one receipt which was missing – they were forced to repay the whole childcare allowance. This procedure meant that financially weak citizens were forced to repay thousands of euros. The Administrative Law Department of the Council of State (one of the four supreme councils in the Netherlands in regard to administrative law) agreed with this procedure. A large part of these citizens have a migration background. An investigation by a consultancy firm uncovered that the *Combiteam Aanpak Facilitators* had drawn up a work instruction which led to a more intensive investigation of childcare allowance of these citizens in comparison with those without a migration background. This had led, among others, to a reflection of administrative law judges of their role in this affair and how this can be prevented in the future. See: Dutch childcare benefits scandal - Wikipedia.

or the judiciary as a whole. Denying the fact that judges remain human and act in society as humans is based upon a fallacy.

Thirdly, outspoken judges and the urge to be decisive are necessary for the protection of the rule of law. Toginions should be encouraged rather than diminished. Judges should not confuse resignation with neutrality. All judges have the moral obligation to act and rule in the most worthy way. We were selected with due diligence and trained to fulfil this role. Remaining silent to look away from doing the right thing is not serving the rule of law, it is solely serving one's own position. Characteristic for these times is the fact that the public debate regarding several public topics is heated and not always being conducted based on substantiated arguments. Also then, the judge has an obligation to share knowledge in order to enrich the debate objectively and to offer reasoning.

As often the sum is greater than the parts. Demonstrating judges show the utmost respect for the rule of law as designated protectors, as human beings and as the moral compass of the system.