

# Communication of the Judiciary\*

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*ABSTRACT The author describes the limitations of the freedom of expression of judges and courts in the context of the fundamental right to freedom of expression, which, due to its prominent position in a democratic constitutional state, is limited in content compared to the general one, also in view of the historical precedents in Hungary. Starting from the relevant constitutional and statutory provisions and in the light of the practice of the Venice Commission and the European Court of Human Rights, the study outlines and analyses the possibilities for individual judges and courts to express their opinions. The paper presents, through a number of pragmatic examples, the prevailing practice in Hungary on the subject under study, which works with undoubtedly one of the most stringent regulatory solutions.*

*KEYWORDS opportunity for the courts to express their views, freedom of expression of judges, the political role of the courts, the independence and impartiality of the courts, the authority of the courts*

## 1. Introduction

According to the practice of the Constitutional Court, the right to freedom of expression is the “mother right” of the fundamental rights of communication,<sup>1</sup> one of the most elementary fundamental rights, the existence of which is a precondition for the exercise of many other fundamental rights.<sup>2</sup> Like most

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<sup>1</sup> See Decision No. 30/1992. (V. 26.) of the Constitutional Court, in Decisions of the Constitutional Court (DCC) 1992, 167, 171.; confirmed by Decision No. 37/1992. (VI. 10.) of the Constitutional Court, in DCC 1992, 227, 229.

<sup>2</sup> Freedom of expression therefore guarantees, on the transactive side, freedom of speech; freedom of the press; freedom to disseminate information; freedom of conscience and religion; freedom of scientific, artistic, literary creation and teaching; and on the interactive side, it promotes freedom of the press (including elements related

fundamental rights, however, freedom of expression is not an absolute right, it can be limited based on a test of necessity, proportionality or real risk, and in some cases this is unavoidable. In Hungary, as in Civil Law systems, it is essentially the constitution itself that provides the framework for the limitations of fundamental rights, so in our case freedom of expression needs to be approached in this context.<sup>3</sup>

The aim of this paper is to present the specific right of Hungarian courts and judges to freedom of expression. In the context of the analysis, it is therefore essential to assess the restrictive provisions applicable to individual judges and the statements recently made by the central administration, which are on the increase.

I hope that this paper will serve as an attention-grabbing work, which can serve as a real reference point for understanding and qualifying individual court statements, press releases and positions.

## 2. The right of judges and courts to express their views

Freedom of expression, one of the most complex fundamental rights, is not without limits, and its exercise can be restricted within certain constitutional limits. The question therefore arises as to the criteria and circumstances under which the restriction of the right to freedom of expression of courts and individual judges can be justified in a given case, in terms of their special public status. Unfortunately, the limitations of this paper do not allow for a thorough description of the discrepancy between the broad exercise of fundamental rights enjoyed by citizens and the specific service status (this has been covered by many authors in the domestic legal literature,<sup>4</sup> and is therefore unnecessary here). As a starting point for this particular case of restriction of fundamental rights, it is therefore worth noting that the service relationship in itself is a restriction of fundamental rights, and that anyone who enters into such a relationship must be aware of the constraints that this entails and cannot enjoy the same fundamental rights in all respects in the same way as a citizen. It is important to underline that the limits of this right are significantly influenced by the development of life circumstances, and therefore the paper – bearing constitutional and statutory regulation in mind, and drawing on the practice of the European Court of Human Rights (hereinafter: ECtHR or the Court) and the

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to the media and the internet); freedom of assembly; freedom of association; the right to strike; and freedom of learning. Cf. Nóra Chronowski, “A szabad véleménynyilvánításhoz való jog,” in *Magyar alkotmányjog III. – Alapvető jogok*, ed. Tímea Drinóczi (Budapest-Pécs: Dialóg Campus, 2006), 295.

<sup>3</sup> It should be noted that in systems based on the US model, constitutions typically do not contain such limits, leaving their “setting” to judicial practice.

<sup>4</sup> See for instance Orsolya Szántai, “A véleménynyilvánítás szabadsága és a bírák számára tilalmazott politikai tevékenység összefüggései,” <https://www.mabie.hu/index.php/1537-dr-szantai-orsolya-a-velemenynyilvanitas-szabadsaga-es-a-birak-szamara-tilalmazott-politikai-tevekenyseg-osszefuggesei>.

Venice Commission – presents the specificities of this fundamental right through some major cases, grouped in the following points.<sup>5</sup>

## 2.1 Expression of opinion by judges sitting in individual cases

As in the constitutions of European countries, the Hungarian Fundamental Law does not contain a specific prohibition on the right of judges to express their opinions<sup>6</sup>, so the starting point for Hungary is Paragraph (1) of Article IX, according to which everyone has the right to freedom of expression.<sup>7</sup> Consequently, the specific limits applicable to courts and judges are detailed in a cardinal law,<sup>8</sup> in our case the relevant parts of Act CLXII of 2011 on the Legal Status and Remuneration of Judges (hereinafter: the Judges Act).

Section 43 of the Judges Act states that judges may not, outside their official capacity, *publicly* express opinions on cases that are or were pending before the court, in particular with regard to cases they have judged, i.e. any other expression of opinion, from expressions of opinion among friends or relatives to publicity in the press, other than professional consultations within the judicial organisation, is prohibited.<sup>9</sup> This is a very strong restriction of the fundamental right in question, but it is nevertheless justified.<sup>10</sup> This rule limits the fundamental right of judges to do so “*in order to uphold the authority and impartiality of the courts*”<sup>11</sup>.

There is no doubt that the value judges place on their own or another court case can have a significant impact on society’s perception of the judiciary.<sup>12</sup> The aim of the legislation is therefore to exclude any factor that could undermine confidence in the professionalism of the courts and in the independence and impartiality of judges. Just think of the unforeseeable consequences of allowing judges to criticise in public the decisions taken in

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<sup>5</sup> Cf. Bernát Török, “A munkavállaló szólásszabadságának alkotmányjogi keretei,” in *A véleménynyilvánítás szabadsága és korlátai a munkajogviszonyban – A Magyar Munkajogi Társaság 2021. június 23-i vitaülésén elhangzott előadások, hozzászólások*, ed. Lajos Pál (Budapest: HVG-ORAC Lap- és Könyvkiadó Kft., 2022), 23.

<sup>6</sup> See Point 12 of Venice Commission Opinion No. 806/2015. European Commission for Democracy Through Law (Venice Commission): Report on the Freedom of Expression of Judges. Adopted by the Venice Commission, at its 103<sup>rd</sup> Plenary Session (Venice, 19-20 June 2015) CDL-AD(2015)018

<sup>7</sup> Accordingly, see Article 10(1) of the European Convention on Human Rights (ECHR).

<sup>8</sup> See Paragraph (8) of Article 25 of the Fundamental Law.

<sup>9</sup> See Point 2 of the detailed reasoning to Section 28 of Act LXVII of 1997 on the Legal Status and Remuneration of Judges (hereinafter: the previous Judges Act).

<sup>10</sup> See European Network of Councils for the Judiciary Working Group, „Judicial Ethics Report 2009-2010 – Judicial Ethics: Principles, Values and Qualities,” June 2010. 6., <https://www.encj.eu/images/stories/pdf/ethics/judicialethicsdeontologiefinal.pdf>.

<sup>11</sup> See Point 2 of Article 10 of the ECHR.

<sup>12</sup> See Point 2 of the detailed reasoning for Section 28 of the previous Judges Act.

particular court proceedings or the management of a particular procedure.<sup>13</sup> Consequently, the provisions of the Act apply to pending and completed cases as well as to cases decided by a judge other than his/her own.<sup>14</sup>

The limitation on the expression of a judge's opinion in an individual case is any assessment or position relating to the correctness and legality of the court's procedure or decision in a specific and identifiable court case, or to anybody involved in the case or connected to the circumstances of the case.<sup>15</sup> Accordingly, judges are not allowed to disclose information about the persons involved in the dispute that they have learned through their judicial activity and must keep secret any information that they have not disclosed during the trial.<sup>16</sup>

According to Paragraph (1) of Section 44 of the Judges Act judges are prohibited from providing information to the press, radio and television on the case before them, i.e. judges are prohibited from publicly expressing their opinion on pending court proceedings, and from commenting on or justifying court decisions in the press, radio and audiovisual programmes.<sup>17</sup> The only acceptable way for the judiciary to publicly criticise court decisions is through the appeal system.<sup>18</sup> As far as non-public criticism is concerned, a judge may, of course, in the context of his or her official capacity, express an opinion on an individual case in a professional context (deliberation, training or collegial meeting), when only judges (and court staff or professional invitees) are present, without any constraints.<sup>19</sup>

Having reviewed the ways in which a judge may give an opinion on a case pending before him or before another judge or on a case that has already been concluded, it is now necessary to analyse the form of information that may be given. There is a natural desire on the part of society to be properly informed about court cases, which are typically "exciting" and of great interest. In such cases, it is particularly important for the courts to inform the public so that they understand the law and inspire respect and confidence in the administration of justice.<sup>20</sup> Pursuant to Paragraph (2) of Section 44 of the Judges Act, the president of the court or a person authorised by him/her (press spokesperson) may provide information to the press, radio and television on cases pending or concluded before the court. In all cases, the information provided must be prompt, objective, credible and accurate in a way that the average person seeking justice can understand. In the context of judicial communication, it is also possible to present the pending case, but the elementary limitation of the

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<sup>13</sup> Cf. Felicitász Szemán, "A bíró jogai és kötelezettségei," in *A bírák nagy kézikönyve*, ed. László Gatter (Budapest: CompLex Kiadó Jogi és Üzleti Társadalomszolgáltató Kft., 2010), 116.

<sup>14</sup> See Point 2 of the detailed reasoning for Section 28 of the previous Judges Act.

<sup>15</sup> See Point 2 of the detailed reasoning for Section 28 of the previous Judges Act.

<sup>16</sup> Cf. Point 17 of Venice Commission Opinion No. 806/2015.

<sup>17</sup> Cf. Point 19 of Venice Commission Opinion No. 806/2015.

<sup>18</sup> See Szemán, "A bíró jogai és kötelezettségei," 117.

<sup>19</sup> See Szemán, "A bíró jogai és kötelezettségei," 117; cf. Point 2 of the detailed reasoning for Section 28 of the previous Judges Act.

<sup>20</sup> Cf. Point 24 of Venice Commission Opinion No. 806/2015.

information is that it cannot go into the merits of the case, i.e. it cannot detail the judge's strategy of conducting the litigation, his plans, his position on the assessment of the evidence, etc., and in general it must avoid the appearance of prejudice.<sup>21</sup> In this context, a major paradigm shift has taken place in Hungary in recent years in terms of court information: the courts are trying to function as primary sources from which the press can effectively start and continue, thus reinforcing each other's impact in the field of information. Accordingly, the central website of the courts ([www.birosag.hu](http://www.birosag.hu)), and also the social media platforms of the individual courts, provide up-to-date information on individual cases and decisions. Getting back to the quality of the information, it is possible to explain closed court cases and decisions, but “commenting” on them must be moderate and factual, so comments can only be made in a way and to the extent that facilitates understanding.

### **2.2 Expression of judges' opinions on organisational and operational matters**

In exploring this topic, one of the most interesting issues is undoubtedly the dimension of the public expression of judges' opinions in relation to the organisation and functioning of the court, given that judges also enjoy the freedom of expression in this respect.

In contrast to making statements, the Judges Act does not impose any obstacles to the provision of information on the organisational and operational issues of the court, nor does it even mention the scope of the persons entitled to receive such information or the content of such information. Therefore, *a contrario*, it follows that any member of the court may provide information on a matter of concern to the courts, in particular

- “[on the] functioning of the judicial organisation in general and on its specific department,
- on the activities of the court apart from a specific case,
- on data of public interest or in the public domain which demonstrate the efficiency of the functioning of the judicial organisation,
- on the situation of the courts and the problems of the organisation,
- on the functioning of the judicial administration, and
- on issues and problems relating to the operation of courts in general or of a specific court”<sup>22</sup>.

The rationale behind this is that the operation of the court, as a tax-funded body exercising public authority, subject to the legal framework, must be transparent and to a certain extent controllable. The Constitutional Court has also taken the view that, when it comes to a general question relating to the

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<sup>21</sup> See Felicitász Szemán, “A sajtó tájékoztatásának rendszere,” in *A bírák nagy kézikönyve*, ed. László Gatter (Budapest: CompLex Kiadó Jogi és Üzleti Társadalomszolgáltató Kft., 2010), 513.

<sup>22</sup> See *ibid.* 514.

functioning of the judicial organisation, the right to freedom of expression takes precedence over the interest in protecting the authority of the court.<sup>23</sup> This is fully in line with the ECtHR's view that it would have a "chilling effect" on freedom of expression if a judge was afraid to participate in public debates of public interest concerning the administration of justice for fear of the consequences of any critical opinion based on generalities.<sup>24</sup>

Of course, this does not mean that all content and forms are permissible, since the development of public discourse cannot be indifferent to the law (either), since "preserving the authority of the courts (in line with this, ensuring order and dignity in the courtroom) and guaranteeing the proper functioning of the judiciary are considered to be fundamental constitutional values of paramount importance"<sup>25</sup>. For this reason, certain principles and rules must be respected.

The first and most important of these principles is the principle of judicial independence, which is the basis of confidence in the entire judicial branch of power.<sup>26</sup> Another standard is provided in Paragraph (2) of Section 37 and Section 107 of the Judges Act. Under the former, judges are required to conduct themselves in a manner befitting their office and to refrain from any conduct that would undermine confidence in the judicial process or the authority of the court. The latter section should be interpreted in conjunction with this, according to which a judge commits a disciplinary offence, and is liable to the court of his/her service, if he/she culpably (i) breaches the obligations of his/her service [see Decision No. 21/2014. (VII. 15.) of the Constitutional Court, in DCC 2014, 582 et seq.], or if (ii) by his/her lifestyle or conduct he/she damages or endangers the prestige of the judicial profession [e.g. addictions (chemical or behavioural addiction)].

The main purpose of the legislation is undoubtedly to preserve the authority of the judiciary and to achieve and maintain confidence in the proper administration of justice (under the rule of law). In this light, legislation offers courts of service a wide range of possibilities for assessing disciplinary offences

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<sup>23</sup> "The weight of a restrictive law to be considered against freedom of opinion is greater if it directly serves to enforce and protect another fundamental right, less if it protects such rights only implicitly, through the intermediary of an 'institution', and least if its object is merely an abstract value (e.g. public peace)." Decision No. 30/1992. (V. 26.) of the Constitutional Court, in DCC 1992, 167, 178.

<sup>24</sup> Cf. Paragraph 100 of the Decision in the case of *Kudeshkina v. Russia*, (29492/05) of 26 February 2009 of the ECHR. The cited decision came after a judge of the Moscow City Court stated in a newspaper and radio interview that the president of the court was putting pressure on him in a specific case. As a result, he was dismissed as a judge for *conduct incompatible with judicial authority*.

<sup>25</sup> See Point [33] in the Reasoning of Decision No. 3001/2022. (I. 13.) of the Constitutional Court

<sup>26</sup> "The institutional guarantee of the independence and autonomy of the judiciary, underpinned by law, is an unquestionable value and an important safeguard of human and civil rights and the rule of law." Decision No. 33/2012. (V. 17.) of the Constitutional Court, in DCC 2012, 99, 110.

## Communication of the Judiciary

and the conduct of judges, which is relevant to this paper. One can also agree that, given the diversity of situations, it was prudent for the legislator to draw a broad framework, which can be filled with case-by-case judgments, as loss of “confidence” and impairment of “authority” are categories that require careful examination, reflection and decision.

The Code of Ethics for Judges, which is similarly brief but contains specific situations that can be subject to substantive scrutiny, should also be mentioned. According to Paragraph (4) of Article 3, a judge shall exercise due diligence when using the World Wide Web. He/she shall only disclose information, audio and video recordings concerning his/her person and his/her relatives that do not undermine judicial dignity. The expression of his/her opinion on the Internet may not undermine the authority of the court, the dignity of the judicial profession or the rules governing the making of statements. The quoted paragraph basically sets out the general guidelines applicable to all situations, whereas Paragraphs (3) to (5) of Article 6 bring the issue under examination closer.

(3) A judge shall not criticise the guidelines of his/her superior court before the parties, nor shall he/she express a different opinion. In his/her decisions, he/she shall refrain from insulting courts of lower instance and from undermining the authority of the judiciary. He/she shall not express any other criticism of the decisions taken by his/her colleagues. He/she may, however, evaluate and comment on these in a constructive manner in the exercise of his/her scientific, teaching or other professional activities.

(4) Judges shall refrain from using language that suggests a distinction between the parties and shall refrain from expressions of sympathy or condescension.

(5) Judges shall refrain from any expression concerning their colleagues which suggests misconduct or judgments serving political or other interests.

Paragraph (4) of Article 3 lays down general requirements similar to those of the statutory provisions. Paragraph (3) of Article 6, however, already precludes criticising courts of higher instance before the parties and expressing a different view. From this, however, it logically follows that if such conduct is prohibited before the parties, the judge may not communicate in the same way to the public. According to the second sentence of Paragraph 3, courts of higher instance shall also exercise “self-restraint” in their decisions in which they lecture courts of lower instance (e.g., by not being condescending, implying that the judge of lower instance is incompetent). These two requirements are supplemented by the third sentence of Paragraph 3, according to which a decision taken by another judge may not be criticised in any other way, for

example outside the proceedings.<sup>27</sup> This can be illustrated by a decision of the ECtHR, in which the former president of the Penitentiary Court of Naples, in the context of a judicial or prosecutorial recruitment application, which was the subject to an internal investigation, stated in response to a journalist's question that a member of the selection board had used his/her influence to favour his/her relative. The Disciplinary Board therefore issued a warning to the former President who made the statement, but who, following an appeal to the Court of Cassation, brought the case before the Court for violation of his/her freedom of expression. The Court concluded, however, that the President who gave the interview had not shown the restraint expected of him in the exercise of his fundamental right in a situation in which the authority and impartiality of the courts were likely to be called into question.<sup>28</sup>

A thought should be given to the freedom of expression of judicial leaders. As already discussed above, the administrative heads of the judiciary (court presidents) have broad powers of declaration and information, which, in my view, do not need further explanation. Apart from that, however, the new ethical approach published on the basis of the revision of the Code of Ethics for Judges contains very interesting and valuable ideas, which, compared to the current one, goes into much more detail about senior judges, or as the new proposal puts it: court leaders.<sup>29</sup> The revised Code of Ethics basically divides the expressions of judicial leaders into two parts: first, there is communication within the organisation, where they shall refrain from any behaviour, statements or actions that offend the dignity of their subordinates;<sup>30</sup> second, there are prohibitions on communication outside the organisation, which is composed of several parts, depending on the manner and content of the communication. Before going into these, however, we must ask a cardinal question: is it possible to separate the opinions of the court leader and the court as that of a part or that of the whole? And so we come to the first category, which seeks to highlight and regulate the dilemma raised by the question in the revised Code, namely by laying down that “*Court leaders shall refrain from presenting their own opinion as the opinion of the judges of the department and shall not otherwise abuse their right of representation.*”<sup>31</sup> An example of this is when the presidents of the regional courts wrote a letter to the outgoing President of the National Office for the Judiciary (hereinafter: NOJ), which was made public, but without consulting the judiciary. The second category is related to the courts of service

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<sup>27</sup> All these requirements are closely linked to the expression of the opinion of the judge in the individual case discussed in the previous point.

<sup>28</sup> See Paragraph 71 of the Decision in the case of *Di Giovanni v. Italy*, (51160/06) of 9 July 2013 of the ECtHR.

<sup>29</sup> See Decision No. 16/2022. (III. 2.) of the National Judicial Council on the Code of Ethics for Judges and its adoption (hereinafter: Code of Ethics), which has been effective since 15 July 2022. It is worth noting that the President of the Curia, in his motion dated 25 May 2022, requested the Constitutional Court to declare this decision to be unconstitutional and to quash it. (Case number: II/01285-0/2022)

<sup>30</sup> See Paragraph (1) of Article 9 of the Code of Ethics.

<sup>31</sup> See Paragraph (4) of Article 9 of the Code of Ethics. *Emphasis added by me.*



and their procedure. According to the Code of Ethics, court leaders shall refrain from expressing any opinion on cases involving the court of service until the end of the proceedings (they must exercise restraint, as a judge in an individual case), taking particular care to protect the privacy of the person concerned.<sup>32</sup> (For an example of this, see the case of László Ravasz, which is perfectly summarised in the application to the ECtHR.<sup>33</sup>) Finally, according to the third category of regulation, court leaders shall refrain from insulting the self-administration and interest representation body of the judiciary, from discriminating against its members and shall respect their legitimacy.<sup>34</sup> This can be the case, for example, if the court union proposes something to the court leader, who then disparages it and the union members (e.g., in the context of a court staff meeting, the organisation of a cultural programme, he/she says that the union only deals with such things of secondary importance, that there is no money for it anyway, etc.).

### 2.3 Judicial opinions on draft legislation

The courts, as one of the three classical and indispensable branches of power, play a crucial role in the life of the state and the rule of law. It is therefore a desirable and natural need for those who administer justice not only to be confronted with finished legislation (typically acts of Parliament), but also to be active participants and shapers in the drafting of the various laws that affect them. This is the only way to ensure that the experience of legal practitioners is properly reflected in legislation, which can pave the way for a more agile judiciary in the future, as it is possible to “prepare” them for reforms already in the legislative process.<sup>35</sup>

This issue is not regulated in detail in the Fundamental Law, so in the present case we have to start from the provisions of Act CXXX of 2010 on Legislation (hereinafter: Legislation Act).<sup>36</sup> According to Paragraph (1) of

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<sup>32</sup> See Paragraph (5) of Article 9 of the Code of Ethics.

<sup>33</sup> See the request of László Ravasz, submitted to the Court, [https://webcache.googleusercontent.com/search?q=cache:AJ8RW4WJ0WwJ:https://tasz.hu/files/tasz/imce/ravasz\\_kontra\\_magyarorszag\\_ejeb\\_kerelem.doc+%&cd=2&hl=hu&ct=clnk&gl=hu](https://webcache.googleusercontent.com/search?q=cache:AJ8RW4WJ0WwJ:https://tasz.hu/files/tasz/imce/ravasz_kontra_magyarorszag_ejeb_kerelem.doc+%&cd=2&hl=hu&ct=clnk&gl=hu).

<sup>34</sup> See Paragraph (6) of Article 9 of the Code of Ethics.

<sup>35</sup> Cf. “A Kúria középtávú intézményi stratégiája, különös tekintettel a joggyakorlat-elemző tevékenység fejlesztésére” (The medium-term institutional strategy of the Curia, with special regard to the development of case-law analysis) (Budapest: Semmelweis Kiadó, 2013), 40.

<sup>36</sup> In this context, Points 12 and 13 of Government Decision No. 1144/2010. (VII. 7.) on the Rules of Procedure of the Government stipulate that, as a general rule, proposals and draft ministerial decrees must be sent for consultation, with a deadline for the submission of comments, to the political director of the Prime Minister, the administrative state secretaries, the government commissioner and the head of the government office concerned, who may comment on the draft, and that drafts concerning the functions of the *courts* and prosecutors’ offices shall be discussed with

Section 19 of the Legislation Act, where an act of Parliament expressly gives a state, local government or other body the right to comment on draft legislation affecting its legal status or functions, the drafter of the legislation must ensure that the body concerned can exercise that right. In this context, the Legislation Act does not define the parties entitled to consultation, nor the formal and substantive conditions and requirements, leaving these to another act of Parliament. Paragraph (2) of Section 19 of the Legislation Act therefore states that the drafter of the legislation shall ensure that the draft legislation and its reasoning are made available for consultation and comment, as provided for in the act on public participation in the preparation of legislation. The Act divides consultation into two named categories: first, the *general consultation*, which is always mandatory and provides for the possibility to submit comments by email via the contact details provided on the website;<sup>37</sup> and second, the optional direct consultation, under which the Minister responsible for preparing the legislation may establish strategic partnership agreements with relevant persons, institutions and organisations, involving them in the direct consultation.<sup>38</sup>

After such an introduction, opinions on draft legislation affecting the courts can be divided into two broad categories: first, the opinion of the court as an organisation, conveyed by the President of the NOJ, which is responsible for the central administration of the courts; and second, the personal opinion of individual judges.

### 2.3.1 Opinion of the “court” as a whole

For the purposes of Point (e) of Paragraph (1) of Section 76 of Act CLXI of 2011 on the Organisation and Administration of Courts (hereinafter: Courts’ Organisation Act), the President of the NOJ, in his/her function of general central administration, obtains and summarises the opinions of the courts through the NOJ, and gives opinions on draft legislation affecting the courts, except for municipal regulations. In this connection, the President of the NOJ may also propose legislation concerning the courts to the initiator of the legislation, and participates as an invited guest in the meetings of parliamentary committees when discussing items on the agenda relating directly to legislation concerning the courts.<sup>39</sup>

It is essential, therefore, that the opinion of some of the actors of the judicial organisation is condensed at the NOJ, and the President of the NOJ, acting in

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the President of the *NOJ* and the Attorney General, and drafts concerning the Constitutional Court, the State Audit Office, the National Bank of Hungary, autonomous state administration bodies and autonomous regulatory bodies must also be discussed with the President of the body concerned.

<sup>37</sup> See Paragraph (1) of Section 7 and Sections 8 to 12 of Act CXXXI of 2010 on public participation in the preparation of legislation.

<sup>38</sup> See Paragraph (2) of Section 7 and Sections 13 to 15 of Act CXXXI of 2010 on public participation in the preparation of legislation.

<sup>39</sup> See Points (d) and (f) of Paragraph (1) of Section 76 of the Courts’ Organisation Act.

his/her discretionary capacity, without any constraints, presents the position and opinion on the draft legislation. In my view, the role of the supreme judicial body<sup>40</sup>, which ensures the unity of the application of the law by the courts, should be significantly greater than it is at present, given that the opinion of the Curia is currently just one of the opinions of the courts, although its role in the administration of justice is much more important.<sup>41</sup>

In connection with all this, it is also necessary to point out that, in my view, the initiation of legislation also constitutes a kind of expression of opinion, especially when, for example, the President of the NOJ puts forward a specific proposal. (Such was the case when the President of the Curia, the President of the NOJ and the Attorney General wrote to the Ministry of Justice requesting that the normal judicial order be restored as soon as possible after the end of the state of emergency imposed by the coronavirus pandemic<sup>42</sup>.)

### 2.3.2 Opinions of individual judges

In my view, the freedom of expression of individual judges in relation to draft legislation is “unlimited”. Individual judges have the opportunity to give their opinion on concepts and proposals that affect them and their organisation. The law does not lay down any specific prohibitions in this area, but they must nevertheless be subject to the strict requirements of their status and other criteria laid down by law when expressing their opinions.

At this point it is inevitable to briefly mention the ECtHR decision adopted in response to the series of opinions on the reforms of the Hungarian court system. In *Baka v. Hungary*, the Court established, in a ratio of 15:2, a violation of Article 10 of the ECHR. The case can be summarised as follows.

András Baka had been a judge at the ECtHR for 17 years when he was elected President of the Supreme Court for a 6-year term by Parliament in 2009. It is important to note that according to the previous legislation, the president of the predecessor of the Curia is also ex officio the president of the National Council of Justice, which before 2012 was responsible for the central administration of the courts, which means that in this capacity he had not only the right but also the duty to express his opinion on concepts, draft laws and reforms affecting the courts. He did so through a spokesperson, in open letters, in statements and in his speeches in Parliament. He challenged several laws,

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<sup>40</sup> See the second sentence of Paragraph (1) and Paragraph (3) of Article 25 of the Fundamental Law.

<sup>41</sup> “The new Legislation Act no longer mentions the Supreme Court or the Curia as a participant in the legislative preparatory process or as an opinion-giver on draft legislation.” See “A Kúria középtávú intézményi stratégiája,” 41.

<sup>42</sup> “A rendes bírósági működés visszaállítását kéri a Kúria elnöke, az OBH elnöke és a legfőbb ügyész”, <https://jogaszvilag.hu/napi/a-rendes-birosagi-mukodes-visszaallitasat-keri-a-kuria-elnoke-az-obh-elnoke-es-a-legfobb-ugyesz/>. It should also be noted that the “opinion” of a body or organisation on draft legislation etc. does not derive from freedom of expression.

including the law implementing the forced retirement of judges, where the mandatory retirement age for judges was reduced from 70 to 62 years, which the Constitutional Court later declared to be incompatible with the Fundamental Law in its Decision No. 33/2012. (VII. 17.).<sup>43</sup> Finally, because of his critical but not at all unprofessional opinions<sup>44</sup>, the new rules of the Fundamental Law and related acts led to the loss of his status of Chief Justice (under the new rules, he did not have the required 5 years of judicial service, as the time spent in international courts could no longer be counted).<sup>45</sup>

The main question was in what capacity András Baka made his statements. In this regard, the Court accepted that he had expressed his public opinion in his official capacity and that his mandate as Chief Justice had been prematurely terminated because of his critical views.<sup>46</sup> The Government's arguments, however, were not well-founded in the sense that such a change was necessary to maintain the authority and impartiality of the courts,<sup>47</sup> as no professional arguments were put forward that András Baka was unfit for his post. This would have been particularly unfortunate because the majority who voted for the change to remove him from office had also contributed significantly to his election as President of the Supreme Court. Consequently, the ECtHR considers that the fact that András Baka, as the highest official in the Hungarian judiciary at the time, lost his position because of his expression of his opinion does not serve to enhance the independence of the judiciary.<sup>48</sup>

Summarising the court's decision, it can be concluded that András Baka's expression of his opinion did not go beyond strictly professional criticism, and that he was clearly involved in a dispute of public interest and concern. The Court also stressed that “[the] premature termination of the applicant’s mandate undoubtedly had a ‘chilling effect’, i.e. it certainly discouraged not only the applicant but also other judges and presidents of courts from participating in future public debates on legislative reforms affecting the judiciary and on issues relating to judicial independence in general.”<sup>49</sup> In short, this intervention “proved unnecessary in a democratic society”.

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<sup>43</sup> See Decision No. 33/2012. (VII. 17.) of the Constitutional Court, in DCC 2012, 99, 99.

<sup>44</sup> See Paragraph 171 of the Decision in the case of *Baka v. Hungary* (20261/12) of 23 June 2016 of the ECtHR.

<sup>45</sup> See Paragraphs 12-26 of the Decision in the case of *Baka v. Hungary* (20261/12) of 23 June 2016 of the ECtHR.

<sup>46</sup> See Paragraph 151 of the Decision in the case of *Baka v. Hungary* (20261/12) of 23 June 2016 of the ECtHR.

<sup>47</sup> See Paragraph 155 of the Decision in the case of *Baka v. Hungary* (20261/12) of 23 June 2016 of the ECtHR.

<sup>48</sup> See Paragraph 157 of the Decision in the case of *Baka v. Hungary* (20261/12) of 23 June 2016 of the ECtHR.

<sup>49</sup> See Paragraph 173 of the Decision in the case of *Baka v. Hungary* (20261/12) of 23 June 2016 of the ECtHR.

## 2.4 Academic, literary and artistic opinions of judges

In line with the role of the judiciary in the rule of law, individual judges are subject to very strict conflict of interest rules. For the purposes of the relevant provisions of the Judges Act, beyond discharging his/her office, a judge may only carry out academic, teaching, artistic, copyright-protected, editorial and proofreading work, in the course of which he/she may also formulate opinions, without compromising his/her independence, impartiality or the appearance thereof, or obstructing the discharge of his/her official duties.<sup>50</sup>

These paid activities, which are enumerated in the Act, can be carried out without infringing the independence of the judiciary, i.e. in a specific case, the theoretical chances of damaging the authority of the court and the trust in its independence and impartiality are extremely low. According to the fourth sentence of Paragraph (3) of Article 6 of the Code of Ethics for Judges, in the exercise of his/her academic, teaching or other professional activities, a judge may give constructive assessments and opinions on the decisions of his/her peers. It is necessary to stop here, because, in my opinion, to emphasise the constructive nature means restricting freedom of expression, since judges are already subject to strict rules that restrict individual opinions. It can also be taken as a basic assumption that judges, in their academic, teaching, etc. activities, do not want to give voice to opinions with destructive or disruptive intentions, but by making constructiveness exclusive, ethical rules unjustifiably exclude a significant group of opinions.<sup>51</sup> According to the concept of the revised Code of Ethics, judges are free to express opinions, publish, lecture, teach and perform other similar activities on law, the legal system, the administration of courts and related matters.<sup>52</sup> They were probably motivated by past tensions between the President of the NOJ and the National Council of the Judiciary (hereinafter: NJC), and are intended to confirm the freedom of action in this direction.

In detailing the content of the activity referred to in this point and certain aspects of the expression of opinions by judges, it can be stated that the topic is far from being simple, nevertheless there are certain rules that are helpful. The principle of political neutrality makes it clear that judges may, for example, participate in the drafting of academic or literary works or professional studies without any restrictions, but political works are an exception.<sup>53</sup> This includes presenting papers at conferences, publishing studies, etc., which should not have any negative consequences, provided that the authority of the court is taken into account.<sup>54</sup> It may be interesting to ask, however, whether this applies

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<sup>50</sup> See Paragraph (1) of Section 40 of the Judges Act.

<sup>51</sup> The revised concept no longer even includes “constructive nature”. See the third sentence of Paragraph (4) of Article 8 of the Code of Ethics.

<sup>52</sup> See Paragraph (2) of Article 4 of the Code of Ethics.

<sup>53</sup> Cf. Point 19 of Venice Commission Opinion No. 806/2015.

<sup>54</sup> See Paragraph 50 of the Decision in the case of *Wille v. Liechtenstein* (28396/95) of 28 October 1999 of the ECtHR.

to current politics, or whether it also extends to political evaluation from a historical perspective: i.e. is the judge's opinion (also) excluded, for example, in relation to political evaluation of much earlier eras?

The maintenance of the *appearance* of independence and impartiality is also a cardinal element of the current legislation, examples of which include “[a] judge may not give a lecture on the application of the law at an event organised by a political party, paint a portrait of his/her client, have his/her book published by a person whose case is pending before the judge, undertake teaching activities for a company whose court proceedings are known to the judge, etc.”<sup>55</sup> It is clear that the scope for this type of expression of opinion is very broad, but the limitations mentioned here are not without reason. Just as each of these categories of expression, forms of expression, etc. is judged one by one, as the following summary of cases illustrates.<sup>56</sup>

In 2012, a judge of the Bucharest Court of Appeals published an article suggesting that the President of the Court of Cassation's former career as a prosecutor could be linked to the repression of the communist regime before the political regime change.<sup>57</sup> The article of the judge was the subject to an investigation, at the end of which the Disciplinary Board found the violation of Paragraph (1) of Article 18 of the Romanian Code of Ethics for Judges, since the judge's article expressed an opinion that violated the moral and professional integrity of his fellow judge. This decision was later upheld by all the forums available as legal remedies, so the infringement was entered in the judge's professional file, which hindered his career as a judge. The Court nevertheless took the view that there had been a breach of the ethical rules, which clearly stated that judges were prohibited from expressing opinions on the moral and professional integrity of their colleagues, and that the judge's action could not therefore be considered to be an expression of an opinion protected by the ECHR. The sanction served as a calculable, statutory and legitimate purpose that is necessary in a democratically functioning society. The Romanian authorities struck the right balance between the right to freedom of expression and the need to preserve the reputation of the judiciary and the judge, and the sanction imposed was not excessive in the circumstances.

## 2.5 Political opinion of the court

According to the third sentence of Paragraph (1) of Article 26 of the Fundamental Law, which Paragraph (1) of Section 39 of the Judges Act sets out in the same way, *judges may not be members of political parties or engage in*

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<sup>55</sup> Szemán, “A bíró jogai és kötelezettségei”, 101. Note that the wording in the quote is not adequate, since a judge has no “client”.

<sup>56</sup> For more detail, see the Decision in the case of *Panioglu v. Romania* (33794/14) of 8 December 2020 of the ECtHR.

<sup>57</sup> The article was literary in nature and language, in which the writer did not use violent or obscene language.

*political activity*.<sup>58</sup> Accordingly, they must refrain from any opinions or conduct that might reveal their political beliefs to the public.<sup>59</sup> They should also take care not to encourage others to draw political or dubious conclusions from their opinions.<sup>60</sup> Given that many have written about the political role of judges from a variety of perspectives, here I will only briefly present and evaluate the court's manifestations and opinions on political issues,<sup>61</sup> justified by the fact that there has been a paradigm shift in the courts: courts want to be authentic and primary sources of justice on issues of justice. In this context, I will present in this section a number of cases of opinions attached to political manifestations.

### 2.5.1 „Treason”

It is well known that the activities and functioning of judges and courts in general, but also in specific cases in recent years, have been surrounded by lively public debates, which have become highly politicised.<sup>62</sup> The first case relates to a specific court case, the gist of which is summarised below.

(a) On 24 September 2020, at first instance, the Budapest Environs Regional Court acquitted Béla Kovács, a former politician of the Hungarian Jobbik (Movement for a Better Hungary) Party, of espionage, but sentenced him to 1 year 6 months' suspended imprisonment and a fine of HUF 600,000 for budget fraud.<sup>63</sup> According to the indictment, Béla Kovács, who was a member of the European Parliament from 2010 to 2019 and a member of Jobbik until the end of 2017, between 2012 and 2014 passed information to Russian intelligence agents on energy issues, European Parliament elections, the domestic political situation in Hungary and the expansion of the Paks nuclear power plant, among other things, for which the prosecution requested a prison sentence. Béla Kovács denied all the accusations and stated that he represented only Hungary's

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<sup>58</sup> „Judges shall not engage in political activities, shall not participate in political meetings and events and shall refrain from political statements in public. A judge may not be a member of an organisation or have relations with an organisation or a permanent or occasional grouping whose purpose or activities are unlawful, discriminatory or offensive to the public trust in the judicial profession.” See Paragraph (1) of Article 2 of the Code of Ethics for Judges.

<sup>59</sup> Cf. Szemán, “A bíró jogai és kötelezettségei,” 95.

<sup>60</sup> See Point II of Position No. 1/2015. (VII. 7.) of the NJC.

<sup>61</sup> For English readers, “politics” is not the same as in English; it covers all aspects of social life. Here the article state that judges should not be involved in the battle of political parties, or they cannot make statements by party line.

<sup>62</sup> Cf. Szántai, “A véleménynyilvánítás szabadsága és a bírák számára tilalmazott politikai tevékenység összefüggései”.

<sup>63</sup> “Regarding the accusation of budgetary fraud, which was related to the violation of the rules on the employment of interns, Béla Kovács admitted that he had made a mistake, but stressed that he had compensated the European Parliament for the damage caused.” “2020 – Tizenkét hónap krónikája,” 59, [http://polhist.hu/wp-content/uploads/2021/01/12\\_honap\\_kronika\\_2020.pdf](http://polhist.hu/wp-content/uploads/2021/01/12_honap_kronika_2020.pdf).

interests and did not help any foreign secret service. The judge acquitted him of the charge of espionage, which he justified with the following: “By expressing his opinion, he was helping Russian interests, but he was not harming the interests of the EU or Hungary.”<sup>64</sup>

b) In the light of the previous point, Tamás Deutsch, the MEP of the incumbent political force, wrote the following about Béla Kovács in his Facebook post the same day, referring to him with a nickname: “According to the ‘independent’ Hungarian court, KGBéla, a former Jobbik politician, was recruited by the Russian secret service, trained as an agent working for the Russian secret service, and KGBéla met regularly and conspiratorially with the case officers of the undercover Russian secret service agent in Budapest, who was in diplomatic status. On this basis, the court acquitted KGBéla of the charge of espionage. Let's be clear: the non-final judgment of the court of first instance in this case is net treason. That's it.”

c) The day after the publication of the post, on 25 September 2020, the President of the NOJ addressed an open letter to Tamás Deutsch. In the open letter, the President of the NOJ informed the public in a factual way, but without detailing the merits of the case, how Béla Kovács was condemned by the non-final judgment and how the proceedings could continue, also in the light of the appeal of the prosecutor. In the letter, the President of the NOJ also stressed that “Hungarian courts are independent, without quotation marks”, adding that “independence does not mean that the judgments of the judiciary cannot be subject to criticism, but *the statement of the Honourable Member goes beyond the limits of expression*”<sup>65</sup>. In view of all this, the President of the NOJ in his closing statement rejected the statement questioning the independence of the court and classifying the judgment of the case as treason.<sup>66</sup>

In connection with this case, the question may well arise: can individual judges and court leaders also speak out in defense of justice, or can only the President of the NOJ, who is responsible for the central administration, speak out? In the light of what has been discussed so far, it can be concluded that individual judges may, in this way, in no way “defend” their profession, and what is more, court leaders (or press spokespersons) may, in principle, only express an opinion up to the point of objective and professionally informed clarification. Nevertheless, the President of the NOJ, as a leader representing

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<sup>64</sup> „The former member of parliament was an undercover agent of the Russian intelligence service and was trained to keep cooperation hidden. For example, the Russians were interested in the EU's case against Gazprom, the South Stream issue, Ukraine's relations with the EU, the Russian visa issue and a range of other current issues. In each case, Kovács gave his opinion on these, but was not given the task of digging up any secrets about these. But he knew that his opinion was important to Russia.” See *ibid.* 59.

<sup>65</sup> Emphasis added by me.

<sup>66</sup> See the open letter of the President of the National Office of the Judiciary to Tamás Deutsch, Member of the European Parliament. [https://birosag.hu/sites/default/files/2020-09/OBH\\_eIn%C3%B6ke\\_lev%C3%A9%202020.09.25..pdf](https://birosag.hu/sites/default/files/2020-09/OBH_eIn%C3%B6ke_lev%C3%A9%202020.09.25..pdf).



the views of the court as an organisation, may defend the judiciary and, where appropriate, there is no obstacle for him/her to speak out, even in public debates with political implications, and to express a strong opinion, as long as he/she does so in order to preserve the authority of the court. In my view, the more liberal nature of opinion-forming is also reinforced by the fact that the President of the NOJ does not have a judicial function, and in this sense he/she is not considered an “ordinary” judge who would pass judgments, and his/her relationship with the Parliament makes his/her reactions to certain political issues and manifestations unavoidable.

### **2.5.2 The question of drawing up a new constitution with simple majority in Parliament**

An interesting addition to this topic is the question of whether it is possible to draw up a new constitution with simple majority in Parliament, which seems to be “purely” political. In the run-up to the 2022 parliamentary elections, it was a recurring question whether, if the united opposition succeeds in replacing the incumbent government, but not with a constitutional majority (two-thirds of all MPs in parliament, in this case), the Fundamental Law could be amended by a simple majority. Naturally, a number of renowned experts took the floor on the subject, but there is a perception that the two divergent views led to parallel positions.

The President of the Constitutional Court was the first to comment on this political discourse, from the point of view of the functioning of the body. The President of the Constitutional Court stressed that the growing political ideas aimed at disrupting the functioning of one of the basic institutions of the rule of law, which has been unquestionable since the political changes in 1989-90, and, *ad absurdum*, at dissolving the Constitutional Court, are unacceptable. The President of the Constitutional Court also stressed that “such manifestations are direct and serious attacks on the rule of law and democracy, and as such are totally unacceptable in a democratic state governed by the rule of law”.<sup>67</sup> Reacting to the open letter of the President of the Constitutional Court, the President of the NOJ stated in a statement that “any change to the Fundamental Law and other norms of the hierarchy of legal sources can only be made in full compliance with the legislation in force”<sup>68</sup>.

All this raises the question: is there any justification for this kind of manifestation, given that it will be in line with the position of a political actor, in this case, the governing powers (regardless of whether the author of this

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<sup>67</sup> Open letter of Tamás Sulyok, President of the Constitutional Court, addressed to President János Áder, Prime Minister Viktor Orbán and Speaker of Parliament László Kövér on 14 December 2021, [https://alkotmanybirosag.hu/uploads/2021/12/nyilt\\_level\\_st.pdf](https://alkotmanybirosag.hu/uploads/2021/12/nyilt_level_st.pdf).

<sup>68</sup> “Az Országos Bírósági Hivatal közleménye,” <https://birosag.hu/hirek/kategoria/birosagokrol/az-orszagos-birosagi-hivatal-kozlemeny>.

paper shares this view), and thus directly or indirectly orienting people in one direction or another. However, based on an extended interpretation of the ECtHR's case-law, these opinions, while responding to "purely" political concerns, are permissible because they relate to constitutional issues, which by their very nature have political implications.<sup>69</sup>

The political element as such does not therefore limit the court's freedom of expression, provided that it fits within the criteria discussed above and, in particular, does not relate to the merits of a specific case and does not in any way undermine the court's authority.

## 2.6 On the conduct of European judges

At this point, it is inevitable to highlight the relevant findings of the European Network of Councils for the Judiciary (hereinafter: ENCJ). Since June 2010, the report *Judicial Ethics – Principles, Values and Qualities* has served as a guideline for European judges to reinforce common principles and values and to align their behavior with them as closely as possible.<sup>70</sup>

The report deals specifically with issues of conduct and expression in the public and private life of judges, taking into account the limits of their office, but also the balance between their rights as citizens (outside their duties).<sup>71</sup> The report states that a judge „[h]e [or she] is entitled to complete freedom of opinion but must be measured in expressing his opinions, even in countries in which a judge is allowed to be a member of a political organization” but at the same time “[t]his freedom of opinion cannot be manifested in the exercise of his [or her] judicial duties”.<sup>72</sup>

The ENCJ working group contrasts the public and private lives of judges, with a separate assessment of the manifestations associated with each. It is quite clear that the benchmark for European judges is the requirement for restraint, but it is also clear that the report emphasises the educational and explanatory function of a judge in the exercise of his or her freedom of expression.<sup>73</sup>

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<sup>69</sup> Cf. Paragraph 67 of the Decision in the case of *Wille v. Liechtenstein* (28396/95) of 28 October 1999 of the ECtHR.

<sup>70</sup> Cf. Jan Jaap Heldens, Claire Houg, and Sebastiaan van de Kant, “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?),” 9. <https://www.ejtn.eu/PageFiles/20509/Themis%20Paper%20Judicial%20Ethics,%20The%20Netherlands.pdf>.

<sup>71</sup> ENCJ Working Group: “Judicial Ethics Report 2009-2010 – Judicial Ethics: Principles, Values and Qualities,” June 2010. 5. <https://www.encj.eu/images/stories/pdf/ethics/judicialethicsdeontologiefinal.pdf>.

<sup>72</sup> In countries where we can talk about the political involvement of judges, national regulations may of course restrict the freedom of expression of judges concerning the requirements of independence and impartiality. See *ibid.* 5., 12.

<sup>73</sup> This is because a judge is ideally placed to interpret and explain the law he or she applies, thereby reinforcing the legal awareness and support for the law. See *ibid.* 6.

In public life, judges, like other citizens, have the right to express political opinions in such a way that the individual can have full confidence in the administration of justice without any concern for the judge's opinion. Equal restraint is required in relation to the media, as a judge must not be seen to be biased by reference to the expression of an opinion. The report also warns judges to be wary of criticism and attacks. The judge's discretion – although it must be restrained – must not, however, be restricted in cases where democracy or certain fundamental elements of a democracy with its values (e.g., the rule of law, legal certainty) or certain fundamental freedoms are at stake, in which case the judge may be allowed to give a kind of "extra opinion" compared with the "usual".<sup>74</sup>

In private life, in the performance of his duties, the judge may not abuse his status or assert it against third parties, nor may he exert pressure on him or give the impression of doing so. The report recognises that „[l]ike any person, a judge has the right to his [or her] private life”, and that the requirement of modesty should not be an obstacle to this, but it goes on to state, in a terse and unspecific manner, that a judge has the right to lead a normal social life, and "[i]t is enough if he takes some common sense precautions to avoid undermining the dignity of his [or her] office or his ability to exercise it."<sup>75</sup>

In addition to the parts described in the report, the Bangalore Principles of Judicial Conduct, the ENCJ London Declaration on Judicial Ethics, the Resolution on Judicial Ethics of the European Court of Human Rights, or the European Convention on Human Rights in general, which also contain many useful ideas on the subject, may also be mentioned.

### 3. Summary

Opinion 3 of the Consultative Council of European Judges states that “[j]udges should not be isolated from the society in which they live, since the judicial system can only function properly if judges are in touch with reality. Moreover, 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). [...] However, such activities may jeopardise their impartiality or sometimes even their independence. 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.”<sup>76</sup>

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<sup>74</sup> It should be noted that the NJC is of particular importance in this area, as it gives its opinion on all major issues affecting the judiciary, such as the state of the rule of law or the President of the Curia, but also evaluates pending cases. For these, see the relevant documents of the NJC, such as the minutes of the meeting 2020.OBT.XI.57/24.

<sup>75</sup> See *ibid.* 6.

<sup>76</sup> See Points 27 and 28 of Opinion 3 of the Consultative Council of European Judges. Accessed on 17 June 2022, <https://rm.coe.int/168070098d>.

As is clear from the text of the opinion, certain fundamental rights, in particular the right to freedom of expression, are an integral part of the judicial system and play a crucial role in the life of the state. The study has therefore reviewed in detail the issue of expression of opinion surrounding Hungarian judges and courts, which has resulted in the following summary findings.

a) In order to preserve the authority and impartiality of the courts, *the judge who adjudicates an individual case* is in fact barred from expressing his or her opinion "outwardly", towards society, but may communicate "inwardly", towards the members of the court organisation, openly and without any constraints. Otherwise, information on a specific case is provided by the persons authorised by law (president of the court, press secretary). The question is whether this is the right solution. If yes, then how should we improve the explanation of case law, because in the age of the internet, "everyone" understands the law and judges immediately on the basis of their subjective sense of justice. But is it possible to do anything about it? Is the communication from the press secretary and the president of the court enough? We must recognise that time and technology have moved beyond this decades-old regulation. So this alone could "destroy" the authority of the whole judiciary without the courts themselves being able to do anything (e.g. explain the judgement on their own website etc.).

b) *In matters of judicial organisation and operation*, there are no very strict restrictions on the expression of opinions, and therefore judges are free to express their opinions on almost all issues and topics related to the third branch of power, in a manner appropriate to their status. The question is whether this is the right practice. Perhaps so, but this may give rise to the following questions. When a judge criticises publicly on administrative issues, how does this resonate with the public? Especially politically. Wouldn't it be better to deal with such criticisms in the internal public sphere? In this case, too, the judge is actually "criticising himself/herself", because he/she is criticising his/her own organisation, its administration and management, and thus can even exert a destructive effect.

c) *Opinions on draft legislation* may be interpreted in two broad categories: first, the opinion of the judicial organisation as a whole, which may consist of several judicial opinions, and which are formulated in their final form by the President of the NOJ; second, the opinion of individual judges, which are formulated by each judge himself/herself and without any special constraints.

d) *In expressing their academic, literary and artistic opinions*, judges shall pay particular attention to the requirements of independence and impartiality and to the authority of the court. In this respect, it may be recalled that there is in principle no framework that precisely sets out the limits to such expressions of opinion, but it can be stated beyond doubt that judges must refrain from any politically motivated activity, as set out above. It is difficult because anything can be political: a professional statement, a work of art, etc., so you cannot predict it, because the political nature of it will depend on political assessments.

e) *Finally, with regard to the court's opinions on political issues*, the courts' determination to shape public debates on judicial matters from a professional

perspective, which I believe can contribute to the high(er) quality of political-social discourse, is to be welcomed.

#### 4. Further questions and conclusions

The paper mixes the right of judges to express their opinions with the public's opinion of the courts. These are two completely different things, not to be confused. Moreover, there is also the issue of political opinions, which must be clearly distinguished from each other here—if the paper is to take the step of examining the issue of expression of opinion in detail—as follows:

- a) the extent to which a judge may invoke his/her basic rights by reason of his/her service relationship,
- b) the basis on which society expresses its opinion on the administration of justice and whether there are limits to this,
- c) how the latter should be handled (what the court should do to explain the judgments in a clear way),
- d) what about political opinions, how to deal with them, etc.

a) The starting point for the exercise of fundamental rights by judges, as in the case of non-judges, is always the provisions of the Fundamental Law. Where applicable, this zero point is the general freedom of expression enshrined in Paragraph (1) of Article IX of the Fundamental Law. Accordingly, any exercise of fundamental rights by a judge that arises from it is subject to a special filter, which is essentially contained in the cardinal rule. This screening mechanism is, however, linked to the provisions of the Fundamental Law, i.e. it must meet the test of necessity, proportionality and real risk. Therefore, it is not possible to give a fully adequate answer to the question posed, since the specific fundamental right(s) must always be weighed against the interests and values to be protected, such as *the authority of the courts, the preservation of judicial independence and impartiality, the maintenance and enhancement of confidence in the judiciary, etc.* In principle, therefore, judges can exercise their fundamental rights in a wide range of ways, but the framework set out above is reflected in both the transactive and interactive sides of judicial expression: nevertheless, the diversity of life situations means that it is not possible to draw up an exhaustive catalogue of the exercise of fundamental rights of judges.<sup>77</sup>

b) The expression of opinions in society can be described as impulsive without exaggeration, especially in the age of the Internet, where there is no need for personal “stand”, but where opinions, in many cases without any

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<sup>77</sup> It happened that a judge expressed his opinion about the judicial procedure, his colleagues and the judiciary in general in his own case, in which he was the plaintiff, as a consequence of which the court of service dismissed him, and later the Constitutional Court annulled the dismissal decisions for violation of Paragraph (1) of Article XXVIII of the Fundamental Law. See Decision No. 21/2014. (VII. 15.) of the Constitutional Court, DCC 2014, 582 et seq.

professionalism, can be expressed without limit and almost without consequences. On social media platforms, however, the filtering mechanisms that ensure factuality and quality in the traditional press are not, or barely, in place. The web plays a crucial role in information and evaluation because of its speed, size, scope and accessibility, so it is not surprising that it is becoming increasingly important, if not the most important, in building, shaping and influencing public opinion. As a result, society often expresses its opinions based on what it hears first or most often, what is most accessible to the masses and, importantly, what they can identify with. It is not surprising that the vast majority of news consumers will not read the often very complicated and lengthy court decisions etc., but that is not even expected. This is where the communication system of the judiciary really plays a key role, as it can provide people with professional information in a lighter form, stressing that a lot depends on the relationship between the courts and the press, and the extent to which they involve and assist the work of the press.

With regard to the limits of opinions on justice, it is necessary to look at the practice of public actors. It goes without saying that the determination of whether a person is a public figure is always a matter of individual discretion,<sup>78</sup> but judges, as public figures exercising public powers (officials<sup>79</sup>), are considered public figures, and sometimes even prominent public figures, in the context of their judicial activity,<sup>80</sup> i.e. they are subject to public criticism, along with the courts, and, moreover, they are subject to an obligation of greater tolerance because of this capacity. But this does not mean that they have to tolerate all opinions. According to the practice of the Constitutional Court, “[the] freedom of expression *no longer provides protection against self-serving communications, outside the scope of public debate, such as those relating to private or family life, which are intended to humiliate, use abusive or insulting language or cause other damage to rights.* Nor does it defend an opinion expressed in a public debate if the views expressed therein *violate the boundless core of human dignity*, and thus amount to a manifest and serious denigration of human status”.<sup>81</sup> As a result, a court or judge is obliged to tolerate criticism of their functioning, which enjoys broader constitutional protection in the case of value judgments and narrower constitutional protection in the case of factual findings.<sup>82</sup>

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<sup>78</sup> See Decision No. 3030/2019. (II. 13.) of the Constitutional Court, ABH 2019, Volume Two, 151, 156.

<sup>79</sup> Cf. Decision No. 36/1994. (VI. 24.) of the Constitutional Court, DCC 1994, 219, 219. et seq.

<sup>80</sup> For example, the judges of the Courts of Appeal and the Curia are considered to be prominent public figures. See Paragraph (1) and Point (d) of Paragraph (2) of Article 4 of Act LIII of 2017 on the Prevention and Combating of Money Laundering and Terrorist Financing.

<sup>81</sup> Decision No. 13/2014. (V. 18.) of the Constitutional Court, DCC 2014, 286, 302.

<sup>82</sup> For example, a judge, as a public figure, has the possibility to defend his/her personality rights in a civil action.

c) Well-functioning democratic societies presuppose well-informed citizens (from reliable sources), reflecting a wide range of interests and equal participation in critical debates. Accordingly, in free and democratic societies, the function of the media is to create a pluralistic public sphere and thereby contribute to the building of citizens' opinions and will. This publicity must take place without influencing the content or creating a lasting field of tension. Opinions and debates, which are often politicised, are voiced, expressed and clash on all kinds of platforms, but especially on the web. Thus, the criticism of a judicial judgment can immediately provoke opposing opinions and very different reactions - anger and hatred, praise and criticism, etc. - and the different opinions reinforce and weaken each other, often in an inappropriate style. There can be many reasons for this, ranging from political orientation to lack of knowledge and prejudice.<sup>83</sup> It is quite obvious that the courts cannot and do not have the task of resolving all the problems raised above, but they can try to fill the knowledge gap. In my opinion, it can greatly contribute to this if the judge does not qualify and explain his own judgement but explains the reasons for his decisions in detail. It would be appropriate to prepare brief court law reports, whether in audiovisual or other forms, as the commentary, evaluation and (mis)interpretation of court judgments on secondary, tertiary, etc. platforms "do not require" the justification, precise and factual knowledge of the judgments. Prompt presentation is extremely important in this context, as the public "judges" before the thorough written reasons are given in some cases (especially more complex ones), i.e. the judicial reasoning may appear to be more of an explanation than the "final product" of a well-founded decision.<sup>84</sup>

d) Political or politically charged opinions evaluating the administration of justice appear on several levels: direct and indirect. Indirectly, there is no constitutional or other legal provision prohibiting Parliament from holding critical debates on the courts and the judiciary. Accordingly, it cannot be directly ruled out that individual members of parliament or party politicians may criticise or disapprove of the functioning of the administration of justice outside the parliamentary framework, e.g. in the form of press statements, announcements, etc. What is more, the public (the masses) are also allowed to express any disapproval of the justice system.

It would be foolish to assume that lawmaking is isolated from politics and therefore not open to criticism, but some forms of expression diminish the legitimacy and authority of these courts. Bearing in mind that, in the context of the judicial service, even if a judge is a public figure, he cannot defend himself in public in the same way as a politician who is a public figure. For the purposes of Paragraph (1) of Section 26 of the Fundamental Law, judges are independent, subject only to the law, and cannot be instructed in their judgement, i.e. any influence on the judiciary, in particular partisan pressure, is prohibited by the Fundamental Law. Consequently, in the absence of legal regulations, it is necessary to exercise restraint and avoid open political debate

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<sup>83</sup> See József Petrétei, *Anyagok a bíráskodásról (Typescript)* (Pécs: 2020), 7.

<sup>84</sup> Cf. the same, 6.

and public political conflict over judicial decisions, as this clearly undermines public confidence in the courts and justice, and through criticism of the functioning of this branch of government, the legitimacy of the entire system of power may be called into question.<sup>85</sup> In this respect, the dissenting opinions and objective clarifications of those who represent the judiciary (typically: the President of the NOJ), who defend the courts, are absolutely appropriate.

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<sup>85</sup> Cf. the same, 9.