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The right to freedom of expression and the irremovability and appointment of judges – democratic standards of the Council of Europe

Council of Europe standards

Democratic standards of the Council of Europe are established by binding legal acts, as well as by those of a soft law type, i.a. resolutions and recommendations of the Parliamentary Assembly and the Committee of Ministers¹. The first to be mentioned are the provisions of the Statute of the Council of Europe of May 5, 1949, signed in London², which has been in force in Poland since November 26, 1991. The provision of Article 3 of this Statute stipulates that: „Every member of the Council of Europe must accept the principles of the rule of law and of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms (...)”. It can be concluded from the provisions of the preamble to the Convention for the Protection of Human Rights and Fundamental Freedoms, adopted in Rome on 4 November 1950³, that the essential objectives of the Council of Europe can be achieved through

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¹ On the subject of *soft law* acts regulating the public behaviour of a judge, including the right to freedom of expression – see: J. Barcik *Standards of participation of judges in the public sphere according to international documents*, National Council of the Judiciary Quarterly 2017, No 1, pp. 36-38.

² Journal of Laws of 1994/118, item 565.

³ Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950), Journal of Laws of 1994/61, item 284, further referred to as Convention.

the protection and development of human rights and fundamental freedoms providing the foundation of justice. The preservation of these freedoms requires a truly democratic political system and a commonly shared respect for human rights. This “commonly shared” adherence to European standards constitutes a pillar of the Council of Europe⁴.

As far as this discussion is concerned, the crucial provisions are stipulated in Article 10, paragraphs 1 and 2 of the Convention, according to which: „Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers (...). The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary”.

The right to freedom of speech and public debate

All the citizens of the states signatory to the Convention are entitled to the right of the freedom of expression. It is emphasized in the relevant literature that this freedom is granted to everyone and means the right to holding opinions as well as to receiving and imparting information and ideas⁵. It should be taken into account that this information often exerts significant influence on public opinion⁶. The right expressed in Article 10 of the Convention stresses the importance of the freedom of expression and the freedom of information as the cornerstones of a democratic and pluralistic society. As recognized by the ECHR in the case of *Manole and Others v. Moldova*, democracy develops when the freedom of speech is exercised⁷. The Strasbourg jurisprudence stresses that freedom of speech should be performed “without interference by a public

⁴ P.A. Świtalski, *The role of the Council of Europe in the system of international organizations*, in: *Council of Europe and democratic changes in Central and Eastern Europe states in 1989-2009*, J. Jaskiernia (ed.), Toruń 2010, pp. 13-14.

⁵ W. Sakulin, *Trademark Protection and Freedom of Expression: An Inquiry Into the Conflict Between Trademark Rights and Freedom of Expression Under European Law*, The Netherlands 2011, p. 112.

⁶ E. Guild, G. Lesieur, *The European Court of Justice on The European Convention on Human Rights: Who Said What, When?*, London-The Hague-Boston 1998, p. 283.

⁷ The judgment of the ECHR in the case of *Manole and Others v. Moldova* of 17.09.2009, application No. 13936/02, Legalis.

authority⁹, in particular without interference by the state, public bodies or servants⁸. Moreover, it is essentially democratic to enable a discussion even if it might question the manner in which the state is presently organized, provided that the debate does not harm the democracy itself⁹.

It cannot raise doubts that the right to freedom of expression is also granted to judges. Relating this right to a public debate is of a paramount importance. Judges who do not want to keep silent on the issues regarding the judiciary are often involved in the debate¹⁰. Importantly, the public debate is one of the basic elements of democracy. A public debate conducted in a state with democratic standards requires providing a diversification of views, the possibility of expressing them and the opportunity to argue with opposing views and subject them to public criticism. It is assumed that those participating in the public debate are also able to articulate and defend their views and to effectively compile opponents' stands and opinions. The definitely critical attitude towards the fact that the debate participants express conflicting views can generate tensions and frictions in the society. Nevertheless, as emphasized in the literature, the state is not to eliminate the pluralism that provides the basis for differences in views. The state can neither decide which views are to be presented in the public debate nor promote or discredit any of them. The elimination of views opposing the idea of democracy and a democratic society is the only authoritarian form of state interference in the course of the debate, regardless of the status of the entities involved in its course¹¹.

Therefore, it is important to distinguish two issues, such as the participation of judges in the public debate and judicial freedom of expression in matters of public interest. L. Garlicki was right to emphasize certain dangers of imposing restrictions on the judges' freedom of expression, especially when the expressed opinions regard a broadly understood judicial system, the rule of law and the protection of individual rights¹². Therefore, judges' statements in the ongoing debate on the protection of the values upon which the functioning of the Council of Europe is axiologically based need to be particularly strictly protected.

⁸ *Ibidem*.

⁹ The judgment of the ECHR in the case of *Centro Europa 7 S.R.L. and di Stefano v. Italy* of 7.01.2012, application No. 38433/09, <https://hudoc.echr.coe.int> [access: 28.11.2017].

¹⁰ K.R. Kozłowski, *Judges' Cooperation Forum*, „Iustitia” 2017, No 2, p. 87.

¹¹ M. Florczak-Wątor, *The duty to protect the pluralistic character of a democratic society by a State being a Party in the European Convention for the Protection of Human Rights and Fundamental Freedoms in: Twenty years of the RP Constitution's operation. Polish constitutional thought and international democratic standards*, J. Jaskiernia, K. Spryszak (ed.), Toruń 2017, p. 433.

¹² L. Garlicki, *Democratic Standards of the Council of Europe and the Constitution of the Republic of Poland (political practices) in: Twenty years of the RP Constitution's operation. Polish constitutional thought and international democratic standards* [in Polish], J. Jaskiernia, K. Spryszak (ed.), Toruń 2017, p. 433.

Referring to the Strasbourg jurisprudence the author distinguished two areas requiring a separate assessment in terms of the implementation of the so-called presumed freedom of expression, i.e. form and content. As far as the content of expression is concerned, it is not appropriate to introduce stricter rules with regard to the implementation of this freedom, whereas the form of expression may be subject to restrictions in order to maintain the dignity of judicial office¹³. Undoubtedly, judges' participation in the public debate requires a restrained form of expression to preserve public trust and respect for judicial system. Critical remarks expressed by judges exercising the "right of reply" need more reticent form and a sound factual foundation¹⁴. Apparently the above-mentioned standards are common to judges and other public authorities acting in an official capacity, such as the president or members of the government and parliament.

Restrictions on the right to freedom of expression

It is primarily assumed for the sake of further discussion that freedom of expression is of fundamental importance for the proper functioning of democracy¹⁵. The assumptions derived from art. 10 of the Convention are of special significance, being relevant with respect to other rights granted in the Convention. Respecting the general principle of "freedom of expression" is important for maintaining the public order. In view of the above, it is advisable to point out the restrictions in implementing the right to freedom of expression exercised by judges¹⁶. It should be agreed that the scope of freedom of expression is not the same for every entity being subject to the provision of Article 10 of the Convention. Entities operating in an official capacity do not enjoy the same degree of freedom of expression as is granted to those entities which do not perform any public function¹⁷. The scope of freedom of expression given to judges thus appears to be narrower than in the case of individuals who do not hold judicial office. This issue will be analyzed in further discussion.

Certainly one of the most important aspects limiting the judge's right to freedom of expression is the necessity to provide the protection of the reputation of others and the closely related protection of the rights of others, such as the right to privacy, which is particularly important in public statements¹⁸. According

¹³ L. Garlicki, *Democratic Standards...*, p. 433.

¹⁴ *Ibidem*, p. 432.

¹⁵ P. van Dijk, F. van Hoof, A. van Rijn, L. Zwaak (ed.), *Theory and Practice of the European Convention of Human Right*, Antwerpen-Oxford 2006, p. 774.

¹⁶ The same comments apply in principle to retired judges – see: M. Wróblewski, *Limits of judge's expression and speech – problem outline*, National Council of the Judiciary Quarterly 2017, No 1, p. 29. This view (with some remarks) is also represented by: L. Garlicki - *Idem*, *Democratic Standards...*, p. 432.

¹⁷ L. Garlicki, *Democratic Standards...*, p. 433.

¹⁸ T. Marauhn, in: *European Fundamental Rights and Freedoms*, D. Ehlers (ed.), Berlin 2007, p. 108.

to the doctrine it is believed that the right to effective democracy¹⁹ is included in the category of the rights of others in the Convention. This thesis is of great importance for the scope of the right to freedom of expression exercised by judges who are the holders of judicial authority, one of the three independent authorities in a democratic society. Furthermore, freedoms and restrictions of political speech in the context of Article 10 of the Convention require respecting what is in the interest of national security, territorial integrity and public security.

One of the most difficult limitations in the exercise of the right to public expression concerns the protection of morals required in a democratic society. The protection of morals, which sets the limits of freedom of expression, is not absolute and requires the principle of proportionality to be taken into account²⁰. The judge, exercising the right to free expression, should take into consideration the necessity to prevent the disclosure of information received in confidence or secret. This obligation rests with the judge not only during public statements, but also during pending proceedings which require absolute appearance of impartiality as perceived both by individuals and society. Primarily, the judge should not express his opinions in public on the proceedings that are currently pending or are to take place in court²¹. The ability not to express any related comments and the prohibition to reveal them is connected with a wider issue of judicial culture. Every word uttered by a judge is important and may affect the sphere of rights and obligations of the subjects of the proceedings²². The judge should avoid expressions exceeding the actual need to justify his view that could violate the dignity or honour of other subjects²³. Therefore, the implementation of the requirement of maintaining the prestige and impartiality of the judiciary²⁴ deserves to be emphasized.

A similar position was adopted by the ECHR, recognizing that in certain circumstances the Convention may impose a positive obligation to prevent, regulate or limit the freedom of expression exercised, i.a. by private individuals. The exercise of the freedoms guaranteed by the Convention may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for

¹⁹ *Ibidem*.

²⁰ See more: W. van Gerven, in: *The Principle of Proportionality in the Laws of Europe*, E. Ellis (ed.), Oxford-Portland Oregon 1999, p. 43.

²¹ The Code of Professional Ethics for Judges and Judicial Assessors - attachment to Resolution No. 25/2017 of the National Council of the Judiciary of 13/01/2017 on the publication of the consolidated text of the Code of Professional Ethics for Judges and Judicial Assessors (paragraph 13), further referred to as CPEJJA.

²² J. Derlatka, *Exclusion of a judge in civil proceedings*, Warsaw 2016, p. 37.

²³ See: paragraph 11, items 1 and 2 CPEJJA.

²⁴ T. Marauhn, in: *European Fundamental Rights...*, p. 110.

the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.²⁵ According to the ECHR, the freedoms guaranteed by Article 10 of the Convention cannot, however, deprive state authorities of the right to protection of state institutions²⁶.

The apolitical nature of judges and its consequences

Undoubtedly, all the above-mentioned directives, which set the limits as to the content of an individual's statements, also apply to judges²⁷. Limits on the scope or extent of public expression of judges' opinions are dictated primarily by normative requirements imposed on judges²⁸, but also by specific moral or axiological values providing the foundations of the prestige of the judiciary. The special position of the judge, deeply founded on impartiality and independence, has been broadly discussed in relevant literature²⁹. It should be especially emphasized that a judge must be apolitical and this obligation determines the scope of judicial freedom of expression. The apolitical character of the judge provides both constitutional (Article 178 (3) of the Constitution of RP³⁰) and political³¹ guarantee of impartial judicial decisions.

²⁵ The judgment of the ECHR in the case of *Manole and Others v. Moldova* of 17.09.2009, application no. 13936/02, Legalis; the decision of the ECHR in the case of *Belkacem v. Belgium* of 27.06.2017, application no. 34367/14, Legalis.

²⁶ The judgment of the ECHR in the case of *Socialist Party and others v. Turkey* of 28.05.1998, application No. 21237/93, <https://hudoc.echr.coe.int> [access: 28.11.2017].

²⁷ The judgment of the ECHR in the case of *Poyraz v. Turkey* of 7.12.2010, application No. 15966/06, Legalis.

²⁸ See: Articles 82-82a, Article 86, Article 105 paragraph 1 of the Act of 27 July The Law on the System of Common Courts, Journal of Laws of 2016, item 2062 as amended, further referred to as: p.u.s.p.

²⁹ See: W. Brzozowski, *Ideological impartiality of public authorities in the Constitution of the Republic of Poland*, Warsaw 2011, p. 34; Z. Tobor, T. Pietrzykowski, *Impartiality as a legal concept*, in: *Law and values. Jubilee book of Prof. Józef Nowacki*, I. Bogucka, Z. Tobor (ed.), Krakow 2003, p. 273; Z. Łyda, *The arbitrator's impartiality and the prohibition of "interest in the case"*, „Państwo i Prawo” 1996, v. 2, p. 45; F. Longchamps de Bérier, *Problems of subordination to law*, in: *Ethics of legal professions. Legal ethics*, H. Izdebski, P. Skuczyński (ed.), Warsaw 2006, p. 164; K. Piasecki, *Organization of Justice in Poland*, Krakow 2005, p. 41; G. Ławnikowicz, *Idea of judicial independence in the legal order and legal thought of the Second Polish Republic*, Toruń 2009, p. 387; S. Paweła, *The principle of judicial independence in the views of the Constitutional Tribunal*, in: *Constitution and guarantees of its observance. A memorial book in honour of prof. J. Zakrzewska*, Warsaw 1996, p. 152; M. Jabłoński, *Comments on the Evolution of the Guarantee of Independence and Impartiality of Judges and Common Courts*, in: *Acta Universitatis Wratislaviensis*, Wrocław 1997, p. 123 ff.; J. Derlatka, *Exclusion of a judge...*, p. 23 ff.

³⁰ Act of 2 April 1997 Constitution of the Republic of Poland, Journal of Laws No. 78, item 483 as amended, hereinafter referred to as the Constitution of the Republic of Poland.

³¹ See: Article 86 2 and Article 106j paragraph 2 p.u.s.p.

It is now important to note that the Council of Europe standards, also included in the opinions of the Venice Commission, do not stand in opposition to the legally regulated prohibition on the membership of judges in political parties, creating institutional or constitutional restrictions within passive electoral law, political activity of judges or the principle of *incompatibilitas* (regarding the incompatibility of holding the judicial office with performing functions within the executive power)³². The very fact that judges are obliged to stay apolitical prevents them from getting directly and personally involved in political matters. It is vital, however, that the obligation to be apolitical does not mean the prohibition to articulate expressions on topics concerning a broadly understood political situation of the country. Therefore there emerges, primarily, the question of the scope of the judge's freedom of expression on political issues. The opinions of the Venice Commission, which contribute to the canon of democratic standards of the Council of Europe and the Strasbourg Court's jurisprudence should be regarded as crucial for the explanation of this matter. Secondly, it should be analyzed whether the judge may be held liable in any way for exceeding the limits of freedom of expression in this category of issues³³. The Strasbourg jurisprudence, with the prominent case of *Baka v. Hungary*³⁴ will provide the basis for resolving this problem.

The assessment of the Venice Commission's position allows to accept – as has already been stated – that the guarantees of freedom of expression are also applicable to judges. However, due to the particular role of their tasks, accountability and the need to ensure impartiality and neutrality of the judiciary, it is considered justified to impose certain restrictions on the judges' freedom of expression and political activities. The Venice Commission stressed that in the light of ECHR's position, any interference with the judge's freedom of expression requires careful consideration, taking into account the importance of the principle of separation of powers and the independence of the judiciary³⁵. Interference with the judge's freedom of expression should take into account the principle of proportionality. With respect to the participation of judges in a political debate, the internal political situation of the country, e.g. the election campaign, is also important in defining their freedom of expression. It may

³² L. *Democratic standards...*, p. 430.

³³ It should be noted that a public expression of a judge's exceeding the framework provided for in the constitutional provisions constitutes a misconduct which, pursuant to Art. 107 § 1 p.u.s.p. creates disciplinary responsibility.

³⁴ The judgment of the Grand Chamber of the ECHR in the case of *Baka v. Hungary* of 23.06.2016, application No. 20261/12, Legalis. See: A. Rutkowska, *Unacceptable interference of the executive the powers with the rights of the judiciary. Gloss to the judgment of the European Court of Human Rights of 27/05/2014, case of Baka v. Hungary, application no. 20261/12*, „Przegląd Sądowy” 2015, No. 7-8, p. 203.

³⁵ European Commission For Democracy Through Law. *Rapport sur la liberte d'expression des juges* (23.06.2015), CDL-AD(2015)018, <http://www.venice.coe.int> [access: 28.11.2017].

also become necessary to determine the scope of judges' freedom specified in Article 10 of the Convention in case of a democratic crisis or overthrowing the constitutional order³⁶.

In the case of public persons (judges) the limits of acceptable criticism of their expressions are definitely wider than in the case of private persons³⁷. Due to the apolitical nature of judges, however, the limits of their freedom of expression are not as wide as those of politicians³⁸. Due to the prominent place of the judiciary in a democratic society, certain restrictions on the freedom of the judges' expression in relation to the function they perform are justifiable³⁹. The Court reminded that freedom of expression is subject to a number of exceptions, which, however, should be interpreted narrowly. The freedom of expression is not absolute, but the restrictions imposed on it by the national authorities must fulfill three conditions (the so-called three-element test). Firstly, the restriction on that freedom must be provided for by already existing and known national law. Secondly, interference in protected law can only be performed to protect the values explicitly indicated in Article 10 paragraph 2 of the Convention. Thirdly, the above action of national authorities must be necessary in a democratic society⁴⁰. Any restrictions on the freedom of expression must be convincingly established. The adjective "necessary" in the sense of Article 10 paragraph 2 of the Convention implies the existence of an "pressing social need" in this context. Contracting States have a certain margin of discretion in the interpretation and establishment of this circumstance⁴¹. The right to judicial freedom of opinion cannot, however, lead to using insults instead of real arguments in a political debate⁴².

Exceeding the limits of freedom of expression by a judge can undoubtedly entail certain liability. Assessment of whether the judge violated Article 10 of the Convention requires examining such reference points as: formulating statements

³⁶ *Ibidem*.

³⁷ The judgment of the ECHR in the case of *Unabhängige Initiative Informationsvielfalt v. Austria* of 26.02.2002, application No. 28525/95, Legalis; the judgment of the ECHR in the case of *Nikula v. Finland* of 21.03.2002, application No. 31611/96, Legalis.

³⁸ The situation of a judge cannot be reconstructed as the one of a politician – see: I.C. Kamiński, *Freedom of expression and the issue of maintaining the authority and impartiality of the judiciary – remarks on the case law of the European Court of Human Rights*, „National Council of the Judiciary Quarterly” 2017, No 1, p. 6.

³⁹ The judgment of the ECHR in the case of *Albayrak v. Turkey* of 31.01.2008, application No. 38406/97, Legalis.

⁴⁰ The judgment of the ECHR in the case of *Nikula v. Finland* of 21.03.2002, application No. 31611/96, <https://hudoc.echr.coe.int> [access: 28.11.2017].

⁴¹ The decision of the ECHR in the case of *Pitkevich v. Russia* of 8.02.2001, application No. 47936/99, Legalis.

⁴² The judgment of the ECHR in the case of *Oberschlick v. Austria (no 2)* of 1.07.1997, application No. 20834/92, <https://hudoc.echr.coe.int> [access: 28.11.2017].

when executing the office (situational context of the statement), the subject scope of the statement (whether they concern the functioning of the judiciary), form of expression (form adequate to the authority of the office) and its content (evaluation of statements in terms of unacceptable elements of personal attack or insult)⁴³.

Irremovability and appointment of judges and violation of Article 10 of the Convention

The institution of irremovability of judges regulated in Article 180 Paragraph 1 of the Constitution of the RP has particularly important constitutional significance, making it impossible for any authority to interfere in the rules of performing the official duties by the judges. Irremovability is treated as one of the constitutional and political guarantees of impartial justice⁴⁴. The principle of irremovability of judges and the prohibition of transferring a judge to another position, together with values such as impartiality and autonomy, independence from authorities and other judicial bodies, judicial immunity or general acceptance of the judge's prestige, are recognized in the jurisprudence of the Polish Constitutional Court as elements contributing to judges' independence⁴⁵. The rule of irremovability of judges from the position they hold, along with the rules of appointing judges and abandoning the term of office limits, is regarded as further constitutional guarantee of judicial independence⁴⁶. The idea of appointing judges for an indefinite period is closely connected with the concept of irremovability (Article 179 of the Constitution of the RP). In principle, it is unacceptable to remove a judge from office on a temporary or permanent basis⁴⁷.

It is absolutely unacceptable to remove a judge from office in an arbitrary and discretionary manner. The doctrine emphasizes that the irremovability of judges plays a special role in actually preserving the judge's impartiality⁴⁸. The judges' irremovability provides the affirmation of their office, affecting also the judges' working conditions⁴⁹. Certainly, irremovability reduces the element

⁴³ L. Garlicki, *European standards...*, p. 431.

⁴⁴ J. Bodio, in: *The system of legal protection authorities, a detailed part*, J. Bodio, G. Borkowski, T. Demendecki (ed.) Krakow 2005, p. 28 ff.

⁴⁵ Judgment of the Constitutional Tribunal of June 24, 1998, K 3/98, OTK 1998, No. 4, item 52.

⁴⁶ D. Górecki, *Polish Constitutional Law*, Warsaw 2012, pp. 212-213.

⁴⁷ The guarantee of appointing a judge for an indefinite period does not exclude the possibility of depriving him of office under a court judgment and in the cases specified in the Act - see also: T. Erciński, J. Gudowski, J. Iwulski, in: *The Law on the System of Common Courts. The Act on the National Council of the Judiciary. Commentary*, J. Gudowski (ed.), Warsaw 2009, p. 184.

⁴⁸ A. Żurawik, *The system of the judiciary in Poland*, Warsaw 2013, p. 56.

⁴⁹ P. Winczorek, *Commentary to the Constitution of the Republic of Poland of April 2, 1997*, Warsaw 2000, p. 354.

of subordination, allowing the judge to perform justice tasks in an impartial manner in accordance with his own conscience, and at the same time free from threats and pressures regardless of their origin⁵⁰. Recall of a judge from office, suspension from office, transfer to another bench or position against his will, may only occur by virtue of a court judgment and only in those instances prescribed in statute. (Article 180 paragraph 2 of the Constitution of the RP). Irremovability of judges by the executive power during their term of office was distinguished by the ECHR as one of the testers of the independence of courts and other bodies appointed under the Act to exercise jurisdictional functions⁵¹.

The Strasbourg standard for the irremovability of judges is also determined by the documents of the Venice Commission⁵². The Venice Commission emphasizes primarily that the removal of a judge from office should be apolitical. Any action to remove incompetent or corrupt judges must fulfill the principle of irremovability of judges whose independence is protected. The removal of a judge from office may be delegated to a small expert body composed entirely of judges⁵³. The Venice Commission has also accepted the advisability of recalling a judge who does not comply with the rules regarding professional standards of integrity, reliability and correctness. This refers to “performing activities that undermine the prestige of the judiciary”⁵⁴.

It is crucial for this discussion that the exercise of freedom of expression must not lead to the violation of the principle of irremovability of judges and the rules for their appointment. In the case of *Wille v. Lichtenstein* with the president of the Liechtenstein Administrative Court as the applicant, ECHR decided that what had occurred was an example of an unacceptable repression related to the exercise of the right to free expression by judges. In a lecture given at a scientific institute, the president of the court said that in the case of a difference of opinion between the executive power (the prince) and the parliament, it is the Constitutional Tribunal that is competent to interpret the constitution. The

⁵⁰ E. Waśkowski, *Civil process system. Volume I. Theoretical introduction: principles of the rational system of courts and civil proceedings*, Vilnius 1932, p. 49 ff.

⁵¹ The judgment of the ECHR in the case of *H. Urban and R. Urban v. Poland* of 30.11.2010, application No. 23614/08; the judgment of the ECHR in the case of *Kingsley v. The United Kingdom* of 7.11.2000, application No. 35605/97; the judgment of the ECHR in the case of *Findlay v. The United Kingdom* of 25.02.1997, application No. 22107/93; the judgment of the ECHR in the case of *Campbell and Fell v. Findlay v. The United Kingdom* of 28.06.1984, application No. 7819/77 - <https://hudoc.echr.coe.int> [access: 28.11.2017].

⁵² J. Barcik, *The position of the judge in the draft constitution of PiS (Law and Justice Party) in the perspective of Strasbourg*, „Iustitia” 2016, No 2, p. 65.

⁵³ European Commission For Democracy Through Law. *Memorandum. Reform of the judicial system in Bulgaria* (20.01.2003), CDL-AD (2003)12, <http://www.venice.coe.int> [access: 28.11.2017].

⁵⁴ European Commission For Democracy Through Law. *Opinion on the Constitutional Amendments reforming the Judicial System in Bulgaria* (24.09.2003), CDL-AD(2003)016, <http://www.venice.coe.int> [access: 28.11.2017].

prince disagreed with this view, to which the applicant replied that the prince's statement interfered with the freedom of expression and communication of scientific views. Then, when the parliament proposed that the applicant should be the president of the Administrative Court for another term, the prince did not agree, just as he had announced beforehand in his correspondence with the applicant⁵⁵.

Conflicts of a political nature in which judges get involved exercising their right to freedom of expression must not lead to the threat of their irremovability. A case of great importance is that of Hungarian judge András Baka, who repeatedly appeared in public commenting on and presenting the position of the Supreme Court, of which he was the president, regarding draft laws regulating issues related to the administration of justice, as well as his own position on proposals for changes in the judiciary formulated by the parliamentary majority. As a part of constitutional changes, the Curia was formed in Hungary (the new Supreme Court). In the opinion of the national authorities, amendments to the Act on the Organization of Courts prevented the judge from applying for the position of the President of the Curia. As it was, he did not fulfill the criterion of holding the judicial office for a five-year-long term preceding the selection procedure⁵⁶. According to the judge, depriving him of his position violated Article 10 of the Convention and was a repression for his critical public statements against governmental plans to reform the judiciary, which the judge defined as harmful to the rule of law and incompatible with the independence of the judiciary. In that decision, the Tribunal stressed that the sequence of events needs to be analyzed to determine whether to qualify the unpleasant outcome imposed by the national authorities as the deprivation of a public office or as the repression against Article 10 of the Convention. The ECHR accepted the argument that the imposition by the national authorities of specific repressions against the judge in the circumstances where no complaints about the professional competence of the judge were formulated at any stage of the domestic proceedings is an interference with the rights stipulated in Article 10 of the Convention⁵⁷.

Therefore, the Court's finding that the disciplinary offence the applicant was charged with and found guilty of was neither connected with any of his statements

⁵⁵ The judgment of the ECHR in the case of *Wille v. Lichtenstein* of 28.10.1999, application No. 28396/95, Legalis.

⁵⁶ M. Krzyżanowska-Mierzevska, *Procedural protection accorded to judges in disputes with the state. Commentary on the judgment of the Grand Chamber of the European Court of Human Rights in the case of Baka v. Hungary of 23 June 2016, application no. 20261/12*, „National Council of the Judiciary Quarterly” 2016, No 3, p. 26.

⁵⁷ The judgment of the Grand Chamber of the ECHR in the case of *Baka v. Hungary* of 23.06.2016, application No. 20261/12, Legalis; the judgment of the ECHR in the case of *Kudeshkina v. Russia* of 26.02.2009, application No. 29492/05, Legalis.

or views expressed in the public debate, nor with the opinions communicated in the media, results in the acknowledgement of the lack of interference in the applicant's exercise of his right to freedom of expression⁵⁸. This freedom is not violated if the government's proposal to recall the applicant from the post of the President of the Supreme Court is related to his capacity to perform his duties, and thus to the evaluation of professional qualifications and personal qualities of the judge in the context of his activities and attitudes, as well as his management of the Supreme Court on behalf of the state⁵⁹. There are no grounds to acknowledge the violation of Article 10 of the Convention, when the sanction imposed on a judge refers only to the performance of public function related to the administration of justice, not protected by the Convention.

ECHR pointed out that deciding the case of *Baka v. Hungary* and thus deciding whether the violation of Article 10 of the Convention took place, was possible given the determination of facts on the basis of co-existing strong, clear and concordant inferences or unrebutted factual presumptions. The examination of the sequence of events, i.e. the removal of the judge from office, his public statements and the subsequent reaction of the executive and legislative authorities, led to the conclusion about a causal link between the publicly expressed criticism of the planned legislative solutions and the subsequent removal of the judge from office⁶⁰.

Restricting the rights of judges in relation to public statements on political subjects provides the foundation of other Strasbourg verdicts as well. As the ECHR points out, the interference of public authorities with the exercise of freedom of expression by judges is subject to verification from the point of view of a three-element test of proportionality. Thus the following factors are taken into consideration: legality, i.e. whether the interference with conventional freedoms is laid down by law (fr. „*prévüe par laloi*”), whether it serves legitimate and justified purpose or purposes defined in Article 10 paragraph 2 of the Convention (fr. „*inspirée par unouplusieurs des butslégitimes*”) and whether it is indispensable in a democratic society (fr. „*nécessaire, dansune société démocratique*”) ⁶¹. The test of „necessity in a democratic society” requires the Court to determine whether the „interference” corresponded to a „pressing social need”, whether it

⁵⁸ The judgment of the ECHR in the case of *Harabin v. Slovakia* of 20.11.2012, application No. 58688/11, <https://hudoc.echr.coe.int> [access: 28 November 2017].

⁵⁹ The decision of the ECHR in the case of *Harabin v. Slovakia* of 29.06.2004, application No. 62584/00, <https://hudoc.echr.coe.int> [access: 28.11.2017]; M.A. Nowicki, *European Court of Human Rights - Review of Jurisprudence (July-December 2012)*, „Palestra” 2013, No. 1-2, p. 193.

⁶⁰ M. Krzyżanowska-Mierzevska, *Procedural protection...*, p. 28.

⁶¹ The judgment of the ECHR in the case of *Kayasu v. Turkey* of 13.11.2008, application No. 64119/00, Legalis.

was proportionate to the legitimate aim pursued, and whether the reasons given by the national authorities to justify it are relevant and sufficient⁶².

Conclusions

The main issue in this discussion is defining the limits of the freedom of expression enjoyed by judges in those circumstances when they are the authors of critical statements, not only when the critical opinions are addressed at judges and courts⁶³. Importantly, the rules of exercising the right specified in Article 10 of the Convention remain largely common to judges and other entities that do not perform official functions related to the administration of justice. Judges, however, should exercise special restraint and caution in the implementation of this freedom⁶⁴, especially with respect to the form of the expression, also regulated by the provision of paragraph 23 of CPEJJA. The apolitical nature of judges means that their participation in a public debate on current political issues should be definitely different than that of politicians.

However, that does not change the fact that judges have the right to comment on the current political situation of the country, and the public communications of views on the current problems of the judicial system can often be perceived as their duty⁶⁵. Judicial freedom of expression cannot be limited by a sanction threat violating the principles of the irremovability and appointment of judges. It should be stressed with the utmost emphasis that, as expressed by the Venice Commission, the removal of a judge from office and appointing him to office should not be subject to political decisions, but should be preceded by a thorough assessment of the judge's competence to perform professional duties or his guilt of an inappropriate behaviour⁶⁶. Accepting the views expressed in the Strasbourg jurisprudence, it is worth noting that, as a general rule, imposing a sanction of a particular type on the judge can be considered as a violation of Article 10 of the Convention only if the national authorities have not communicated objections regarding the judge's professional competences.

⁶² The judgment of the ECHR in the case of *Błaja News sp. z o.o. v. Poland* of 26.11.2013, application No. 59545/10, Legalis.

⁶³ On the violation of Art. 10 of the Convention through critical remarks about the judges - I.C. Kamiński, *Freedom of expression...*, p. 8 ff.

⁶⁴ The judgment of the ECHR in the case of *Morice v. France* of 23.04.2015, application No. 29369/10, <https://hudoc.echr.coe.int> [access: 28.11.2017].

⁶⁵ M. Wróblewski, *Limits of judge's expression...*, s. 32.

⁶⁶ European Commission For Democracy Through Law. *Opinion on the Draft Laws on Judges and the Organisation of Courts of the Republic of Serbia* (19.03.2008), CDL-AD(2008)007, <http://www.venice.coe.int> [access: 28.11.2017].

„Individual freedom of judges is the subject of constant discussion”⁶⁷, which does not change the fact that the scope of judges’ use of the rights and freedoms granted to them should be assessed in relation to the Kantian foundation of morality⁶⁸. What deserves support is a proposal communicated in the doctrine that a kind of prevential mechanism should be developed as a part of the National Council of the Judiciary, consisting in providing an opportunity for judges to inquire beforehand about the admissibility of the public activity they are planning. It seems, however, that this mechanism should be not only of a preventive, but primarily of a subsidiary nature. It is important that there should be no institutional restrictions on judicial freedom of expression, and the assistance of the National Council of the Judiciary of Poland should be used to make a decision on the judge’s participation in a public debate on a particularly controversial topic, in the conditions of an uncertain political situation of the country.

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⁶⁷ J. Barcik, *Standards of participation...*, pp. 41, 44.

⁶⁸ I. Kant, *The metaphysics of morals*, Warsaw 1971, p. 50.

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Prawo do swobody wypowiedzi a nieusuwalność i powoływanie sędziów – standardy demokratyczne Rady Europy

Streszczenie

Przepis art. 10 Konwencji o Ochronie Praw Człowieka i Podstawowych Wolności podkreśla znaczenie wolności ekspresji wypowiedzi oraz wolności informacji jako kamieni węgielnych demokratycznego i pluralistycznego społeczeństwa.

Celem niniejszego artykułu jest wskazanie granic korzystania przez sędziów ze swobody wypowiedzi w tej sytuacji, gdy to oni są autorami wypowiedzi krytycznych dotyczących aktualnych problemów demokratycznego ustroju państwowego, nie zaś tylko wówczas, gdy wypowiedzi krytyczne kierowane są pod adresem sędziów i sądów.

Apolityczność sędziów powoduje, iż ich udział w debacie publicznej poświęconej aktualnym problemom politycznym powinien zostać poddany szczególnym zasadom. Wartością nadrzędną nadającą ramy udziału sędziów w debacie publicznej jest powściągliwość. Nie zmienia to faktu, iż sędziowie powinni zabierać głos w sytuacji, gdy publiczna debata dotyczy funkcjonowania wymiaru sprawiedliwości czy ustroju sądów powszechnych. Wolność wypowiedzi sędziiego nie może być jednak ograniczana przez groźbę sankcji przyjmującą postać naruszenia zasad nieusuwalności oraz powoływania sędziów.

Słowa kluczowe: Prawo swobody wypowiedzi, nieusuwalność sędziów, powoływanie sędziów, debata publiczna, standardy demokratyczne.

Summary

The right to freedom of expression and the irremovability and appointment of judges - democratic standards of the Council of Europe
The right expressed in Article 10 of the Convention stresses the importance of the freedom of expression and the freedom of information as the cornerstones of a democratic and pluralistic society. The main issue in this article is defining the limits of the freedom of expression enjoyed by judges in those circumstances when they are the authors of critical statements, not only when the critical opinions are addressed at judges and courts. The apolitical nature of judges means that their participation in a public debate on current political issues should be subject to special rules. The parent value of participation in a public debate is the special restraint. However, that does not change the fact that judges should comment on the current problems of the judicial system and the system of common courts. Judicial freedom of expression cannot be limited by a sanction threat violating the principles of the irremovability and appointment of judges.

Keywords: The right to freedom of expression, the irremovability of judges, appointment of judges, public debate, democratic standards.
