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Interpretation of the Right to an Effective Remedy in Freedom of Expression Cases in the Light of the Rule of Law Principle[2]

1. Introduction

The paper focuses on the protection of freedom of expression of judges and prosecutors who exercise this freedom in their professional capacity, to promote the rule of law, but suffer negative consequences as a result. The starting point is the European Court of Human Rights (ECtHR) judgment in the case of *Kövesi v. Romania*.[3] The case law of the ECtHR is examined in the light of the conception of the rule of law as developed by the ECtHR.

The focus is on the question of what legal remedy should be afforded to judges and prosecutors when their freedom of expression in this context is protected as a human right. In particular, the issues of whether this remedy should necessarily be judicial and what quality requirements it should meet are analysed in this paper.

Examination of the question indicated above raises two further questions. Firstly, does the fact that a person is exercising his/her freedom of expression in order to promote the rule of law heighten the level of protection of this freedom under the European Convention on Human Rights (ECHR)[4] given that observance of the principle of the rule of law is a necessary precondition for safeguarding human rights enshrined in the ECHR? Secondly, how important for the level of protection of the freedom of expression in this context is the fact that a state in question is also bound by the European Union law and, notably, its provisions that are aimed at safeguarding the rule of law?

Arguments derived from legal theory and philosophy are used to inform the analysis outlined above.

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[3] *Kövesi v. Romania*, ECtHR, judgment of 5 May 2020 (no. 3594/19).

[4] European Convention on Human Rights of 4 November 1950.

2. Case of *Kövesi v. Romania*

In a recent case *Kövesi v. Romania,* the Court found a violation of the freedom of expression (Article 10 ECHR) where an anti-corruption prosecutor (chief of the national anticorruption prosecutor's office) had been dismissed for criticising a legislative reform in the area of corruption, which could have an impact on the judiciary and its independence. There was no way for her to bring a claim in court against her dismissal as only the formal aspects of the presidential decree for her removal and not her substantive argument that she had been incorrectly removed for criticising the legislative changes in corruption law would have been admitted for examination in such proceedings. The ECtHR rejected an interpretation offered by the government to the effect that freedom of expression of prosecutors had to be limited in order to protect the rule of law and held the opposite.

Under Article 6 the ECtHR applied its well-established case law which links the rule of law with the requirement of access to courts and assessed whether the limitation of the right of access to court did impair the very essence of the right of access to court. As the possibility of judicial review was limited to the formal review of the removal decree, while any examination of the appropriateness of the reasons, the relevance of the alleged facts on which the removal had been based or the fulfilment of the legal conditions for its validity was specifically excluded, the ECtHR found that the essence of the right was impaired. It therefore held that Article 6 was violated.

3. Rule of law under the ECHR

It is worth having a closer look at the conception of rule of law as developed by the ECtHR and its elements that are relevant in this particular context.

The rule of law is an underlying value of the rights enshrined in the European Convention of Human Rights. The ECHR is established within the auspices and operates on the basis of values of the Council of Europe as reflected in various Council of Europe instruments. Under the Statute of the Council of Europe[5], 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 (Article 3). There is thus a strong link between the commitment to the rule of law and the protection of human rights.

The conception of the rule of law relied on by the ECtHR has both a formal and a substantive aspect. The rule of law enables protection of human rights in a formal manner[6] by prohibiting arbitrariness in the application of law. In the ECHR context it is evident that arbitrariness would amount to a negation of the rule of law.[7] The ECHR requires that the State abides by its domestic law or otherwise its actions would be arbitrary. This requirement also includes the requirement to abide by international obligations assumed by the State in question. For an EU Member State this would include a requirement to abide by the EU law. Any outcome of actions taken in accordance with the domestic law and in line with international obligations must necessarily be substantively in line with the ECHR. The seeming contradictions stemming from different

[5] Statute of the Council of Europe, 5 May 1949 (European Treaty Series no. 1).
[6] B. Tamanaha, *On the Rule of Law: History, Politics, Theory*, Cambridge 2004, pp. 91–101.
[7] *Al-Dulimi and Montana Management Inc. v. Switzerland*, ECtHR, judgment [GC] of 21 June 2016 (no. 5809/08), § 145.

sources of applicable law have to be reconciled with the objective to reach a result compatible with the ECHR. It is also worth recalling that, in interpreting the ECHR, the ECtHR displays openness to external sources of law in determining the existence (or absence) of a European consensus on a certain matter.[8] Such external sources can include acts of international, regional, or national law. The formal requirement to act according to the law may consequently require a substantive interpretation of a variety of legal sources with a view to reconcile their requirements. There is thus a link between the formal and the substantive nature of rule of law obligations.

As is well known, the rule of law may also contain, if a thick conception is adopted, certain substantive elements that create conditions for preventing human rights violations or rectifying them.[9]

The rule of law conception relied on by the ECtHR does indeed contain those substantive elements.[10] Even those researchers who hold that the core elements of the rule of law under the ECHR are formal, admit that the ECtHR does refer to the rule of law in relation to substantive values and rule of law safeguards are instrumental to achieving the substantive aims of the ECHR.[11] The ECtHR relies on the rule of law in interpreting the ECHR rights and identifying new aspects of the ECHR rights. As early as in 1975, in its first case where rule of law was discussed as an element of the ECHR, *Golder v. the United Kingdom*, the ECtHR held that in civil matters one can scarcely conceive of the rule of law without there being a possibility of having access to the courts.[12] A new element of a right to fair trial was thus identified and thereafter developed in the ECtHR case law. The ECtHR holds that the rule of law is inherent in all the Articles of the ECHR.[13] Among substantive elements covered by the rule of law, as interpreted by the ECtHR, experts identify the themes of: 1) the separation of powers, 2) the role of the judiciary, 3) impunity, 4) a tribunal established by law, 5) sufficiently accessible and foreseeable law, 6) judicial control of the executive, 7) the right of access to a court, 8) the right to an effective remedy, 9) the right to a fair trial.[14] In its 2008 overview, the secretariat of the Council of Europe grouped the relevant themes under three broader headings, namely: 1) the institutional framework and organisation of the state, 2) the principle of legality: principles of lawfulness, legal certainty and equality before the law, and 3) due process: judicial review, access to courts and remedies, fair trial.[15] The interdependence between the rule of law, democracy and human rights is widely accepted, also in the Council of Europe context.[16]

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[8] This is the so-called holistic, open, or integrated approach to human rights. See: I. Ziemele, *European Consensus and International Law*, in: A. Van Aaken, I. Motoc (eds.), *The European Convention on Human Rights and General International Law*, Oxford 2018, p. 26; E. Brems, *Introduction: Rewriting Decisions from a Perspective of Human Rights Integration*, in: E. Brems, E. Desmet (eds.), *Integrated Human Rights in Practice: Rewriting Human Rights Decisions*, Cheltenham 2017, p. 10.

[9] B. Tamanaha, *On the Rule of Law*…, p. 8 and pp. 102–113.

[10] R. Spano, *The Rule of Law as the Lodestar of the European Convention on Human Rights: The Strasbourg Court and the Independence of the Judiciary*, "European Law Journal" 2021, pp. 1–17, https://doi.org/10.1111/eulj.12377, accessed on: 23 May 2022.

[11] G. Lautenbach, *The Concept of the Rule of Law and the European Court of Human Rights*, Oxford 2013, pp. 214–215.

[12] *Golder v. the United Kingdom*, ECtHR, judgment of 21 February 1975 (no. 4451/70), § 34.

[13] *Amuur v. France*, ECtHR, judgment [GC] of 25 June 1996 (no. 19776/92), § 50.

[14] J. Polakiewicz, J.K. Kirchmayr, *Sounding the Alarm: The Council of Europe As the Guardian of the Rule of Law in Contemporary Europe*, in: A. von Bogdandy, P. Bogdanowicz, I. Canor, C. Grabenwarter, M. Taborowski, M. Schmidt (eds.), *Defending Checks and Balances in EU Member States. Beiträge zum ausländischen öffentlichen Recht und Völkerrecht, vol. (Bd.) 298*, Berlin 2021, p. 367.

[15] Council of Europe, *The Council of Europe and the Rule of Law – An overview*, CM(2008)170, § 36–58.

[16] Venice Commission, *Rule of Law Checklist*, 18 March 2016, CDL-AD(2016)007-e, § 33.

In relation to the subject-matter of this paper, it is worth noting that the rule of law themes outlined above embrace requirements related to the functioning of a democratic society and the quality of law, with the functioning of the judicial branch of power featuring very prominently. Notably, the ECtHR has produced rich case law on the independence of judges.[17] One substantive requirement of the rule of law is to resist (i.e. prevent and sanction) corruption. Within the Council of Europe, corruption has been identified as a threat for the rule of law by the Venice Commission in its Rule of Law Checklist.[18] Corruption leads to arbitrariness and abuse of powers, because decisions will not be made in line with the law, which will lead to their being arbitrary in nature. Moreover, corruption may offend equal application of the law: it therefore undermines the very foundations of the rule of law.[19] Access to justice is central to the conception of the rule of law and any scrutiny of the effectiveness of legal remedies, notably those available to the members of judiciary whose independence was threatened by the restrictions of their rights suffered while fighting against corruption, has to embrace the analysis of human rights, but also of the needs of a democratic society and ensuring the rule of law.

It follows from this brief overview of the of rule of law conception developed under the ECHR that freedom of expression of members of judiciary is a rule of law issue and, as such, it is of fundamental importance for the functioning of a democratic society. It seems to be a plausible assumption that when judges or prosecutors exercise their freedom of expression specifically to promote the rule of law (identify corrupt practices, dangerous legislative initiatives, etc.), their freedom of expression is even more important and should be accorded an even higher level of protection. For the next stage of our research, this suggests that rule of law aims of expression may also affect the requirements to a legal remedy against breaches of the freedom of expression exercised in this way, i.e. such requirements may be higher than in the case where expression did not specifically serve any rule of law aims.

4. Issues arising in relation to the legal remedy in *Kövesi* type of cases

The case reviewed above has the following features as it addresses the freedom of expression by judges or prosecutors exercised in a professional context and specifically aimed at promoting the rule of law. The question of a legal remedy becomes relevant when the professional in question suffers negative consequences in connection with their professional career as a result of expressing their professional opinion. *Kövesi* shows that even a judicial remedy may not necessarily be sufficiently effective. A question that arises in such context is, consequently, what criteria should a legal remedy meet in order to be effective? Another question is whether a legal remedy can be improved by replacing a judicial remedy with a non-judicial one, such as applying to a professional body of self-governance or having the circumstances of the case examined by a political body. Having first considered the implications of the specific rule

[17] A. Nuβberger, *Rule of Law in Europe Demands and Challenges for the European Judiciary*, in: P. Craig *et al.*, *Rule of Law in Europe Perspectives from Practitioners and Academics*, European Judicial Training Network 2019, pp. 81–82, https://www.ejtn.eu/News/Rule-of-Law-in-Europe--Perspectives-from-Practitioners-and-Academics1/, accessed on: 11 May 2022.

[18] Venice Commission, *Rule of Law Checklist*…, § 114.

[19] Venice Commission, *Rule of Law Checklist*…, § 115.

of law-promoting aims of expression for the requirement of a legal remedy, the two questions will be addressed one by one.

4.1. Implications of specific rule of law-promoting aims of expression

In *Kövesi* the Court found a violation of the freedom of expression with regard to criticisms the applicant had made in the exercise of her duties as a prosecutor.[20] The same approach had been taken in an earlier Grand Chamber judgment in *Baka v. Hungary*[21] where a violation of Article 10 was found in a situation where a person was dismissed from the position of the President of the Supreme Court after expressing his opinion, which was his statutory task, on parliamentary bills. The ECtHR held that "the applicant's position and statements, which clearly fell within the context of a debate on matters of great public interest, called for a high degree of protection for his freedom of expression and strict scrutiny of any interference".[22] It seems to be an established view that judges are entitled to speak out in a proportionate way in relation to reforms impacting the judiciary[23] even though other views exist.[24] Judges, like all other citizens, are entitled to take part in public debate, provided that it is consistent with maintaining their independence or impartiality.[25]

The general criterion of the debate being in the public interest applies when determining how far the protection of the freedom of expression should go. This would be so also when civil servants (including judges and prosecutors) speak on matters of legal reform. The *Baka* judgment shows that contribution to debate on legal reform is considered to be worth strong protection. Cases where civil servants used their freedom of expression to highlight corruption also show that such rule of law-related contribution to public debate enjoys strong protection. Notably, in *Guja v. Moldova* the ECtHR dealt with a case where a civil servant (the Head of the Press Department of the Prosecutor General's Office) publicly disclosed internal information (letters alleging corruption of prosecutors) following a call by the President of the Republic to fight corruption and trading in influence. The ECtHR considered that "the signalling by a civil servant or an employee in the public sector of illegal conduct or wrongdoing in the workplace should, in certain circumstances, enjoy protection."[26] The first relevant factor in assessing the proportionality of an interference with the civil servant's freedom of expression is

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[20] *Kövesi v. Romania*…, § 204: "[…] the applicant expressed her views on the legislative reforms at issue in her professional capacity as chief prosecutor of the national anticorruption prosecutor's office. The applicant also used her legal power to start investigations into suspicions of corruption crimes committed by members of the Government in connection with highly disputed pieces of legislation and to inform the public about these investigations She also availed herself of the possibility to express her opinion directly in the media or during professional gatherings."

[21] *Baka v. Hungary*, ECtHR, judgment [GC] of 23 June 2016 (no. 20261/12).

[22] *Baka v. Hungary*…, § 171.

[23] ECtHR Judicial Seminar 2018, *The Authority of the Judiciary*. Background document prepared by the Registry, p. 16, https://www.echr.coe.int/Documents/Seminar_background_paper_2018_ENG.pdf, accessed on: 23 May 2022; K. Aquilina, *The Independence of the Judiciary in Strasbourg Judicial Disciplinary Case Law: Judges as Applicants and National Judicial Councils as Factotums of Respondent States*, in: P. Pinto de Albuquerque, K. Wojtyczek (eds.), *Judicial Power in a Globalized World*, Cham 2019, p. 28: "judge's right to express views in a professional capacity on the administration of justice and the judiciary".

[24] S. Shetreet, *Reflections on Contemporary Issues of Judicial Independence*, in: P. Pinto de Albuquerque, K. Wojtyczek, *Judicial Power*…, p. 513: "carefully shaped restrictions should be put on the ability of judges to take part in external activities (including in preparing legislation and academic writings and debates) while in office".

[25] Consultative Council of European Judges. Opinion no. 18(2015), "The position of the judiciary and its relation with the other powers of state in a modern democracy", 16 October 2015 (CCJE 2015/4), § 42.

[26] *Guja v. Moldova*, ECtHR, judgment [GC] of 12 February 2008 (no. 14277/04), § 72.

the public interest involved in the disclosed information. In a democratic system, the acts or omissions of government must be subject to the close scrutiny not only of the legislative or judicial authorities, but also of the media and public opinion. The interest which the public may have in a particular information can sometimes be so strong as to override even a legally imposed duty of confidence.[27] The ECtHR case law shows that promoting the necessary legal reform while identifying deficient, corrupt practices enjoys strong protection. This also seems to imply that, in the context of such rule of law-promoting expression, strong legal remedies are required. They would at the very least have to fully meet the requirement of effectiveness as defined under Article 13 ECHR.

4.2. What criteria should a legal remedy meet to be effective?

Kövesi v. Romania shows that a mere possibility of challenging at court a formal decree which formed the basis for restricting the applicant's rights (i.e. removing her from office for the reason of expressing her opinions) is not seen as a sufficient remedy. In *Kövesi,* a violation of Article 6 ECHR was found because the report of the Minister of Justice, which contained reasons for the suggested removal of the applicant from her chief prosecutor's position, could not be challenged at court. Since under the Romanian law this report could not produce any effects by itself and was just a preliminary instrument leading to the adoption of the presidential decree, it was not established that a complaint to the administrative courts against the Report of the Minister of Justice would have been an effective domestic remedy for the applicant (§ 149). Moreover, the administrative courts had limited powers to review the presidential decree for the applicant's removal and the Constitutional Court considered that such a review was limited to the lawfulness *sensu stricto* of the decree (§ 153). Any scrutiny into the appropriateness of the reasons, the relevance of the alleged facts on which the removal had been based or the fulfilment of the legal conditions for its validity was specifically excluded and for this reason the extent of the judicial review available to the applicant in the circumstances of the current case cannot be considered "sufficient" (§ 154).

It follows from this case and is also generally recognised in the ECtHR case law that judicial remedy cannot be limited to examining merely the formal compliance with required procedures and should necessarily allow for examining the substance of the matter, i.e. the reasons based on which the decision that negatively affects a judge or a prosecutor was taken. The Guide on Article 13 of the European Convention on Human Rights, prepared by the registry of the ECtHR,[28] expediently summarises the relevant case law.

The scope of judicial scrutiny by a domestic court must be sufficient to guarantee protection under Article 13 (§ 52). It is important to recall that, in principle, all acts of the (government) administration or the executive fall within the scope of Article 13 (§ 66). Generally, the domestic authorities ruling on the case must examine the merits of the Convention complaint (§ 34). Admittedly, Article 13 does not go so far as to guarantee a remedy allowing a Contracting State's laws as such to be challenged before a national authority on the ground of being contrary to the Convention. Similarly,

[27] *Guja v. Moldova*…, § 74.

[28] ECtHR, *Guide on Article 13 of the European Convention on Human Rights*, updated on: 31 December 2021, https://www.echr.coe.int/Documents/Guide_Art_13_ENG.pdf, accessed on: 23 May 2022.

Article 13 does not allow challenging the general policy as such (§ 67).[29] There is thus a sphere of political choices which is impenetrable to individual legal remedies, but this sphere seems to be limited to the choices by the legislature.

4.3. Is there a role for non-judicial remedies?

In the *Kövesi v. Romania* type of cases, one can consider a possibility of a non-judicial remedy as an alternative to judicial examination. Such a measure could be attractive to the State as it could provide a forum more shielded from public attention than judicial proceedings, yet allowing for a merit-based discussion regarding the choices by actors involved in the management of judicial careers. Thus, we will now analyse whether and on what conditions such non-judicial remedy could meet the relevant European rule of law standards.

4.3.1. ECHR argument

A right to a legal remedy under Article 13 ECHR is guaranteed where an applicant has an arguable claim under another substantive article of the ECHR.[30] An applicant member of judiciary would not, under current conditions, have an arguable claim under Article 6 regarding her independence. Linos-Alexander Sicilianos shows[31] that as of now the ECtHR has not recognised a judge's subjective right to independence, but a movement towards such a right in the ECHR system can be discerned. The letter of Article 6 § 1 has led the ECtHR to analyse the issue of judicial independence from the perspective of the rights of persons involved in court proceedings and not from that of a judges' subjective right to have their own independence guaranteed and respected by the State. Where judges raise issues related to their independence, other provisions of the ECHR are relied on. Such was the case of *Baka v. Hungary*,[32] in which the ECtHR was confronted with the question of judicial independence as a result of negative consequences suffered by a judge for his professional expression. As the applicant relied only on the access to court aspect under Article 6, the ECtHR also limited its analysis of Article 6 issues to this aspect. It has also examined the case under Article 10.

For this reason, the question of whether a remedy for a breach of a judge's or a prosecutor's right to judicial independence under the ECHR should necessarily be judicial does not even arise. This question would, however, arise as regards the freedom of expression claim under Article 10 ECHR.

Under Article 13 ECHR, the required legal remedy is not necessarily a judicial one. We shall again turn to the Guide on Article 13 of the European Convention on Human Rights prepared by the registry of the ECtHR[33] for a summary of the relevant case law.

An individual should have a remedy before a national "authority" in order to both to have his claim decided and, if appropriate, to obtain redress (§ 24). According to the *travaux préparatoires* in respect of the ECHR, the national authority before which

[29] For a precise quotation see *Hatton and Others v. the United Kingdom*, ECtHR, judgment [GC] of 8 July 2003 (no. 36022/97), § 138.

[30] ECtHR, *Guide on Article 13 of the European Convention on Human Rights*…, § 10–11.

[31] L.A. Sicilianos, *The Subjective Right of Judges to Independence: Some Reflexions on the Interpretation of Article 6, Para. 1 of the ECHR*, in: P. Pinto de Albuquerque, K. Wojtyczek, *Judicial Power*….

[32] *Baka v. Hungary*….

[33] ECtHR, *Guide on Article 13 of the European Convention on Human Rights*….

a remedy will be effective may be a judicial or non-judicial body (§ 25). The ECtHR case law confirms that the "authority" referred to in Article 13 need not, in all the cases, be a judicial institution in the strict sense or a tribunal within the meaning of Articles 6 § 1 and 5 § 4 of the ECHR. The national authority may be a quasi-judicial body such as an ombudsman, an administrative authority such as a government minister, or a political authority such as a parliamentary commission (§ 28).

A non-judicial remedy is, however, effective only if it meets certain requirements. The authority's powers and the procedural safeguards that it affords are taken into account in order to determine whether the remedy is effective. The ECtHR will verify whether non-judicial "authorities" are independent and whether procedural safeguards are afforded to the applicant (§ 29).

A non-judicial body must normally have the power to hand down a legally binding decision (§ 30). The reviewing authority cannot be a political organ which has issued the impugned instructions, otherwise it would be a judge in its own cause (§ 31). The domestic authorities ruling on the case must examine the merits of the ECHR complaint (§ 34).

The requirements of Article 6 may be relevant for the assessment of the effectiveness of a remedy for the purposes of Article 13 of the ECHR. As a general rule, the fundamental criterion of fairness, which encompasses the equality of arms, is a constitutive element of an effective remedy. A remedy cannot be considered effective unless the minimum conditions enabling an applicant to challenge a decision that restricts his or her rights under the ECHR are provided (§ 36).

4.3.2. Theoretical argument

The rule of law implies that access to justice needs to be ensured. William Lucy, relying on Lon Fuller, shows that access to justice includes access to legal fora only if three conditions are met. First, the society in question is "complex and numerous", that complexity also being reflected in its legal system; second, the members of that society have something sufficient at stake, alongside the psychological wherewithal, to push disputes toward a legal resolution; and third, no better alternative form of dispute resolution exists.[34] If a particular conception of the rule of law is seen as comprising the requirement of respect for human dignity, then it also requires treating law subjects as responsible beings, which includes allowing them space to interrogate and contest the rules by which their conduct is governed.[35] Lucy, relying on Fuller, stresses that the requirement of access to legal fora does not necessarily mean a requirement of access to courts. The existence of the conditions that require access to legal fora "makes courts a salient, but not the only, means of resolving legal disputes."[36] The essential requirement stemming from the rule of law with regard to access to justice is to have a possibility to offer a competing interpretation of the rules and to have it examined. It can be understood as a guarantee of a right to adjudication, i.e. the right to a hearing.

Alon Harel and Adam Shinar convincingly argue that courts are the institutional embodiment of the right to a hearing, as they are designed to provide the right to a hearing. First, the judicial process gives voice to the citizens' grievances. Second, it imposes

[34] W. Lucy, *Access to Justice and the Rule of Law*, "Oxford Journal of Legal Studies" 2020/2, p. 393.
[35] W. Lucy, *Access to Justice*…, p. 397.
[36] W. Lucy, *Access to Justice*…, p. 401.

a duty on the state or other entities to provide a justification for the decision that eventually gave rise to the grievance. Third, it also requires examination of the decision that may lead to its reconsideration. What characterizes an adjudicative body is its attentiveness, willingness to hear, provide arguments and reasons, and to reconsider the grievances. It seems therefore that the body that performs the hearing (irrespective of whether it is a legislature or a new body that is neither the court nor the legislature) ought to conduct procedures that are identical to those applicable in courts. There is no reason to believe that courts are the only institution that can hold a hearing. However, the body that performs the hearing (irrespective of whether it is a legislature or a new body that is neither the court nor the legislature) ought to conduct procedures that are identical to those characterizing courts. "Non-judicial bodies" such as executive administrative tribunals that provide for a hearing therefore mimic the procedures of courts. The more these bodies are effective in performing a hearing, the more they resemble a court. They resemble a court so much that one can simply say that the right to a hearing requires the establishment of courts. The argument is not an instrumental one, i.e. they argue not that courts are good instruments in promoting and protecting rights, but that the adjudicative process is necessary for protecting and honouring the right to a hearing.[37] Importantly, this is an argument in favour of a strong judicial review.

Political context of certain human rights cases, notably concerning careers of high-profile members of the judiciary, could be used as an argument in favour of political rather than legal procedures to review the findings by the government or the procedures it applies. However, even in a political context, the judiciary has a vital role to play in defending rights. Paul Craig shows that arguments against the role of courts in this context can be refuted. If the premise against judicial review is that courts should not be involved in cases where there are contentious value assumptions or difficult balancing exercises, then the premise is unsustainable since it would destroy adjudication across private as well as public law. Argument against legal adjudication of certain human rights by national courts cannot be conceptually reconciled with an acceptance of adjudicatory competence by the ECtHR of the same issues. If the objection to judicial intervention is premised on the undesirability of courts balancing different values, it is not apparent why this should be acceptable when the same exercise is done by an alternative actor such as an ombudsman. According to Paul Craig, those who advocate limitation of the judicial role must, by parity of reasoning, explicate how, if at all, diminution of judicial protection is to be compensated for by an increase in "non-legal protection". In this connection it is important that in, e.g., the United Kingdom over the last century, the executive has dominated the legislature notwithstanding the role played by the Parliament. This does not mean that judicial review should be unlimited. Traditional judicial review does acknowledge the relationship between the political and the legal and courts show deference to decisions adopted by other branches of power. This can be the basis for an argument that judicial review should be limited, but any further limits cannot be introduced without adducing reasons why they are necessary, and which alternative measures shall ensure the required level of protection of rights at issue.[38]

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[37] A. Harel, A. Shinar, *Between Judicial and Legislative Supremacy: A Cautious Defense of Constrained Judicial Review*, "International Journal of Constitutional Law" 2012/4, pp. 950–975.

[38] P. Craig, *Political Constitutionalism and the Judicial Role: A Response*, "International Journal of Constitutional Law" 2011/1, pp. 112–131.

If we apply the above arguments to the ECHR context, admittedly, this legal system relies on a thick version of the rule of law, notably one that embraces dignity as a value underlying human rights whose protection is enabled by the rule of law. Its legal complexity, the importance of what is at stake in human rights cases, the requirement of an effective legal remedy at a domestic level (Article 13 ECHR) and the existence of the ECtHR as the adjudicator of human rights claims points to the conclusion that access to legal fora is a necessary element stemming from the rule of law on which the ECHR is based. Notably, the protection of human dignity is an important element in the value system of the ECHR, which supports this conclusion even more. The ECtHR under Article 13 considers that judicial remedy is the one which normally meets the requirement of effectiveness. Non-judicial remedies are not ruled out, but more arguments would be required to convince the ECtHR of their effectiveness. Non-judicial remedies should essentially provide the same guarantees as a judicial remedy. In practice, the requirement of an independent adjudicatory body would be a difficult condition to meet in the case of administrative bodies. In the case of legislature, the absence of necessary procedures to ensure the necessary level of examination of individual circumstances of a case could be an issue.

4.3.3. EU law argument

EU law requires judicial remedy. Article 19(1) of the Treaty on European Union (TEU)[39] requires judicial remedy in the fields covered by the EU law, including at a national level. Where fundamental rights are at issue, Article 47 of the Charter of Fundamental Rights[40] requires a judicial remedy, but this is only binding on Member States when they implement EU law (Article 51). Based on Article 19 TEU, the scope of situations in which complaints related to judicial independence can be filed is broader than under Article 47 and 51 of the Charter.[41] Where a member of judiciary exercises her freedom of expression with a view to promoting the rule of law, this, arguably, is a field covered by the EU law within the meaning of Article 19(1) TEU. Indeed, the situation is comparable to *Juízes Portugueses* case[42] in a sense that a connection with the rule of law provides the necessary connection with the EU law.

In *Juízes Portugueses*, the Court of Justice found it was competent to assess whether organisational measures regarding the judiciary (in that particular case, general salary – reduction measures) were in line with EU law because Article 19 TEU, which gives tangible expression to the value of the rule of law stated in Article 2 TEU, entrusts the responsibility for ensuring judicial review in the EU legal order not only to the Court of Justice, but also to national courts and tribunals (§ 32). In that regard, as provided for by the second subparagraph of Article 19(1) TEU, Member States are to provide remedies sufficient to ensure effective judicial protection for individual parties in the fields covered by EU law. It is, therefore, for the Member States to establish a system of legal remedies and procedures ensuring effective judicial review in those fields (§ 34). Every Member State must ensure that the bodies which, as "courts or tribunals" within

[39] Treaty on European Union (OJ 2016 C 202, p. 13).

[40] Charter of Fundamental Rights of the European Union (OJ 2016 C 202, p. 389).

[41] Judicial remedy is required in the fields covered by EU law irrespective of whether the Member States are implementing Union law within the meaning of Article 51(1) of the Charter. Court of Justice of the European Union (CJEU), *Associação Sindical dos Juízes Portugueses*, 27 February 2018, C-64/16, ECLI:EU:C:2018:117, § 29.

[42] *Associação Sindical dos Juízes Portugueses*….

the meaning of EU law, come within its judicial system in the fields covered by that law, meet the requirements of effective judicial protection (§ 37). In order for judicial protection to be ensured, maintaining such a court or tribunal's independence is essential, as confirmed by the second subparagraph of Article 47 of the Charter, which refers to the access to an "independent" tribunal as one of the requirements linked to the fundamental right to an effective remedy (§ 41). The guarantee of independence, which is inherent in the task of adjudication is required not only at EU level as regards the Judges of the Union and the Advocates-General of the Court of Justice, as provided for in the third subparagraph of Article 19(2) TEU, but also at the level of the Member States as regards national courts (§ 42). Thus, the value of the rule of law enshrined in Article 2 TEU finds a concrete expression in Article 19 TEU and results in a requirement of independence of national courts responsible for judicial review in the EU legal order. The standards of judicial independence are a matter of EU law based on Article 19 TEU and its standards are further specified in Article 47 of the Charter.

Similarly, freedom of expression of members of the judiciary can be seen as an element of the independence of courts and, thus, a matter of EU law. This is clearly visible especially where judges exercise their individual freedom of expression in a professional context, providing their expert opinions on matters related to rule of law issues, such as on the legal reform that may affect the system of the protection of the rule of law, as was the case in ECtHR, *Kövesi v. Romania*.

Where a judge or a prosecutor exercises her freedom of expression to promote the rule of law and suffers negative consequences as a result, both the freedom of expression and the independence of judicial authorities seem to be violated. The question is then whether both these claims can be filed under EU law. The standards of the freedom of expression are provided in Article 11 of the Charter. The standards of judicial independence are enshrined in Article 47 of the Charter. The Charter does not provide for any specific procedural avenues under EU law. Moreover, Member States are not required to implement any EU legal acts providing for standards of the freedom of expression or judicial independence and the Charter in this context imposes no direct obligations on them. As we have seen, Article 47 of the Charter becomes relevant via Article 19(1) TEU, which encompasses a requirement for national courts to be independent. Article 19(1) TEU has a broader scope of application than the Charter and is applicable in fields covered by EU law. As national judges and prosecutors have a role in applying EU legal acts (notably, in the area of judicial cooperation, i.e. the preliminary ruling mechanism under Article 267 Treaty on the Functioning of the European Union[43]), their independence has to meet the EU standard and the question of compliance with that standard can be examined by the CJEU. Freedom of expression issues can potentially be examined as an element of judicial independence. The question nevertheless remains who under EU law has a legal standing to initiate such a case.

As independence of the judiciary is an element of an EU Charter right (Article 47), judicial remedy against a violation of this right should be available. A person whose case was examined by a tribunal which was not independent, must have a right to complain before a court. A person who is a member of a tribunal which is not independent, however, does not have a right to be independent under Charter 47 (as there is no analogous right under a corresponding provision in Article 6 ECHR) and thus cannot complain.

[43] *Associação Sindical dos Juízes Portugueses*…, § 43.

Article 19(1) TEU does not necessarily change the picture in this respect. It expresses the value of the rule of law, which requires that individual parties have the right to challenge before the courts the legality of any decision or other national measure relating to the application of an EU act to them.[44] It does so by entrusting the responsibility for ensuring judicial review in the EU legal order not only to the Court of Justice but also to the national courts and tribunals.[45] It does not mention that only a holder of a right should be able to complain about a violation of that right. A complaint should be related to the results of the application of an EU act to them. It does not, however, say that any individual who considers that she suffered from a measure which is in violation of EU law has a right to judicial review. A situation where a judge or a prosecutor of an EU Member State suffered negative consequences (e.g. was dismissed) after expressing their views in order to protect the rule of law value protected by the EU law, would not be a situation of the application of an EU act to them. They would thus not be able to rely on any EU law-based right to challenge at an EU court a violation of the EU standard of judicial independence.

However, if, as in *Kövesi v. Romania*, the state relies on the value of the rule of law to show that dismissal of the prosecutor was necessary, it becomes possible to argue that the independence of the prosecutor was violated as a result of incorrect application to them of an EU act expressing the value of the rule of law. The prosecutor would then have a right to a judicial remedy based on EU law and the remedy would have to meet the standards of Article 47 of the Charter.[46]

A complication can arise from the multi-faceted nature of the rule of law and a possible claim by a Member State that by restricting the freedom of expression of a member of judiciary (judge or a prosecutor) it was protecting, rather than infringing, the rule of law. It would be possible for a Member State to argue that, in order to protect the independence of the judiciary as required by the EU law, it may be necessary to protect its authority as an institution and thus there may be a reason to remove the examination of disputes related to the judiciary from the public arena and to design a disciplinary setting for internal disputes or a political procedure (such as an inquiry commission) for the purpose of examining relations between the executive and the judicial branches of power. Such procedures would not be open to the public and, in their course, discussions on what is necessary for the protection of the rule of law could take place without threatening the authority of the rule of law.

In this context, arguably, an EU law-based claim of constitutional identity could also be raised. Even though the principle of effective judicial protection of individuals' rights under EU law, referred to in the second subparagraph of Article 19(1) TEU, is a general principle of EU law stemming from the constitutional traditions common to the Member States, which has been enshrined in Articles 6 and 13 of the ECHR and reaffirmed by Article 47 of the Charter,[47] there is some room for raising a constitutional identity issue. Where a Member State has an established practice of active involvement of the parliament in settling disputes between the government and the judiciary, a use of a political procedure for issues in which a person cannot claim a human right, could be

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[44] The European Union is a union based on the rule of law in which individual parties have the right to challenge before the courts the legality of any decision or other national measure relating to the application of an EU act to them. See: *Associação Sindical dos Juízes Portugueses*…, § 29, 31.

[45] *Associação Sindical dos Juízes Portugueses*…, § 29, 31–32.

[46] The second subparagraph of Article 19(1) TEU requires Member States to provide remedies that are sufficient to ensure effective legal protection, in particular within the meaning of Article 47 of the Charter, in the fields covered by EU law. See: CJEU, *Online Games and Others*, 14 June 2017, C-685/15, ECLI:EU:C:2017:452, § 54 and the case law cited.

[47] *Associação Sindical dos Juízes Portugueses*…, § 35 and the case law cited.

seen as a constitutional tradition. As long as a judge cannot complain about a violation of her human right to be an independent judge (there being no such right for her under Article 6 ECHR or Article 47 of the Charter), there are no legal obstacles for such conceptions of a constitutional identity.

A possible way out of the constitutional identity dilemma is to look more closely at the notion of the rule of law and its relation to the constitutional consciousness. If it is shown that freedom of expression and the resulting exchange of information and ideas, including critical ones, furthers the ideals of the domestic, EU and international rule of law, it should then be accepted that effective remedy against breaches of the freedom of expression is required irrespective of the framework (domestic, EU, international) within which this remedy is sought. In a way, strengthening the remedy as uniformly required by the EU law reinforces the protection of the constitutional identity with its inherent lack-of-uniformity element because the freedom of expression can also be used to argue for the domestic constitutional identity. How the court would then reconcile the various requirements stemming from different normative frameworks is by no means an easy question. However, if the court believes that the interests of domestic constitutional identity are actually served rather than destroyed by due consideration of the requirements derived from the EU and international rule of law, its task becomes easier. The constitutional consciousness relying on which a judge decides a case could then comprise both the rule of law consciousness stemming from the rule of law as understood in the EU legal order and from the rule of law which finds its expression in international law and, notably, global and regional law of human rights. The court would then be able to define the domestic standard in the light of the external standards exactly because those standards had been accepted domestically, on the basis of the national Constitution, by becoming party to the relevant instruments of international law, as a source of influence and inspiration for fleshing out the domestic constitutional requirements. Constitutional consciousness makes it possible to define the constitutional identity of the State. This identity can be a factor which limits the protection of any right such as a right to a judicial remedy, but it can also be a factor in favour of expanding it in line with the domestic constitutional traditions.

4.3.4. Connecting the dots: how rule of law affects requirements for a legal remedy

We shall now examine how the rule of law arguments derived from the ECHR, EU law as well as theory or philosophy of law affect requirements for a legal remedy in *Kövesi* type situations.

As we have seen, the right to a legal remedy under the ECHR is the right to have a question of a violation of an ECHR right examined in a substantive manner. The fact that this right is not limited to the requirement of a formal analysis can be interpreted as one expression or an influence of a thick, substantive conception of the rule of law to which the ECtHR subscribes.

Given the openness of the ECtHR to external influences, notably stemming from EU law, it is possible to assume that the rule of law conception, as applied by the ECtHR, can be influenced by an even thicker-seeming conception of the rule of law developed by the Court of Justice of the European Union. If this becomes a reality, then a right to a legal remedy under the ECHR is likely to move towards explicitly embracing the requirement of a judicial remedy. As we have seen, theoretical arguments show that a right to a legal remedy requires a right to a hearing, to adjudication and this right can be ensured by providing

a remedy which has all features of a judicial remedy. The requirement of a judicial remedy under the ECHR could thus be supported also by theoretical arguments.

In the present-day situation, when the right to a legal remedy under the ECHR can still be ensured by providing a non-judicial remedy, the requirement of a judicial remedy can nevertheless become applicable based on the rule of law requirement to abide by the law binding the State in question. If this State is a Member State of the EU, then the requirement to provide a judicial remedy would be a requirement stemming from a domestic law rule demanding application of EU rules where facts of the case arise in the fields covered by the EU law. The failure of the EU Member State to have such a remedy would then be against its own law, against the rule of law in the most general formal sense, and thus arbitrary, and the ECtHR would find a violation of the ECHR.

In a *Kövesi* type of a situation, the prosecutor could still not claim to be a victim of a violation of Article 6 ECHR and require a remedy under Article 13 ECHR for a violation of judicial independence as a result of her dismissal. The ECtHR case would still be a freedom of expression (Article 10) case. However, in such freedom of expression case examined at the ECtHR, the applicant could then have a valid argument that her right to have a remedy for an alleged violation under Article 10 should have comprised an element of a possibility to complain to a national court about a violation of judicial independence required by EU law provisions regarding the rule of law. The absence of such remedy could also lead to a finding a violation of Article 13 ECHR.

Where the EU law does not provide the guidance and the ECtHR, be it for this or other reasons, considers the situation as the one in which there is no European consensus, arguments derived from the domestic law can be decisive.

Constitutional traditions of granting a broad scope of judicial review would then make it a requirement of a domestic conception of the rule of law which, based on the rule of law conception applied by the ECtHR, should be observed. Constitutional traditions preferring non-judicial remedies in the context of politically sensitive issues would equally make it a requirement of a domestic conception of the rule of law which, based on the rule of law conception applied by the ECtHR, cannot be disregarded. In either of these cases the ECHR-based requirement of ensuring a right to a substantive examination of the complaint would nevertheless have to be guaranteed. This element necessarily has to be an element of the rule of law conception, regardless of whether it is a domestic, ECHR or an EU law-based rule of law. Constitutional consciousness helps to reconcile the competing elements of different conceptions by relying on the underlying concept of the rule of law.

5. Conclusion

The answer to the question whether the legal remedy for alleged violations of the freedom of expression by members of the judiciary, when it was exercised with a view to promoting the protection of the rule of law, should necessarily be a judicial one is then as follows below. The ECtHR case law shows that using the freedom of expression to promote rule of law enjoys strong protection. This may imply that, in this context, particularly strong remedies are required. There is no ECtHR case law, however, which would clearly exclude a possibility of non-judicial remedies in this context. Article 13 ECHR leaves a possibility of a non-judicial remedy, provided that it is effective.

For Member States of the EU, their rule of law-related obligations under EU law may have repercussions also for their obligations under the ECHR. EU law broadens

the scope of judicial protection, so that only arguments related to constitutional identity can legitimately result in exceptions to the requirement of judicial review where EU matters are concerned. Since there is an overlap of EU and ECHR subject-matter, notably as regards judicial independence, Article 19(1) TEU demands a judicial remedy that could be used to raise a matter of a violation also of a freedom of expression where this violation threatens judicial independence. We may then say that, to meet their obligations under the ECHR, EU Member States have to provide a judicial remedy for violations of professional expression by members of judiciary unless there are very limited EU law-based reasons (notably, constitutional identity arguments) that justify a possibility of a non-judicial remedy.

The main requirement for a non-judicial remedy in this context is that of effectiveness, just as in the case of a judicial remedy. Essentially, a legal remedy has to provide a right to a substantive examination of an ECHR complaint by an independent institution. Formal review would not suffice. This is so regardless of a political nature of the context in which issues examined in this paper arise. There are good reasons to assert that any limitations of a right to adjudication of ECHR claims (e.g., those related to the need of deference to be shown by the judiciary to other branches of power) need to be compensated by alternative guarantees. Absence of a substantive right to adjudication is never an option under Article 13 ECHR. These findings are a result of an analysis of the ECHR law and theoretical arguments which broadly fall into the category of substantive conceptions of the rule of law.

The ECtHR is reticent on whether it takes any theoretical stance on the rule of law or on the right to a legal remedy. Theoretical arguments that support the need for a judicial remedy, however, seem to be in line with the general philosophy of the ECHR. The way the ECtHR interprets ECHR rights (notably, by identifying additional elements of rights relying on the notion of the rule of law) shows that application of rule of law requirements affects substantive outcomes of interpretation of ECHR rights. A substantive, or thick, conception of the rule of law is therefore relevant in the ECHR context. Substantive understanding of the rule of law strengthens the protection of a right to a legal remedy in the context examined in this paper.

Interpretation of the Right to an Effective Remedy in Freedom of Expression Cases in the Light of the Rule of Law Principle

Abstract: The paper focuses on the protection of freedom of expression of judges and prosecutors who exercise this freedom in their professional capacity to promote the rule of law, but suffer negative consequences as a result. Starting with the ECtHR *Kövesi v. Romania* judgment, the issues of whether legal remedy, in this context, should necessarily be judicial and what quality requirements it should meet are analysed. The paper finds that the ECtHR requires effective remedies in this field, but does not clearly exclude a possibility of non-judicial remedies. The EU law, on the other hand, requires judicial remedies unless there are very limited EU law-based reasons (notably, constitutional identity arguments) that justify a possibility of a non-judicial remedy. Theoretical arguments based on substantive conception of the rule of law support the need for a judicial remedy. The study is an addition to the research into judicial independence in the light of the rule of law. It connects the ECtHR, EU law and theoretical perspectives.

Keywords: judicial independence, prosecutors, freedom of expression, rule of law, remedy

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